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# CRIMINAL LAW

## THE CRIMINALIZATION OF POVERTY

KAARYN GUSTAFSON\*

*The welfare system and the criminal justice system in the United States are becoming ever more tightly interwoven. Scholars, however, have not yet examined the processes involved in these developments and what these developments mean for both the welfare system and for criminal jurisprudence. Many people, including welfare recipients, treat the welfare and criminal justice systems as analytically distinct. As a practical matter, however, the systems now work in tandem.*

*This Article maps the criminalization of welfare. First, this Article describes the social construction of welfare fraud, tracing how “welfare queens” and welfare cheating came to be the targets of much governmental attention and resources. The Article then describes the various ways that criminal justice goals and strategies have become embedded in the welfare system, as well as the ways that the welfare system has become a tool of law enforcement. Next, the Article examines the treatment of welfare recipients in the courts, where the poor have been relegated to an inferior status of rights-bearing citizenship, a status on par with parolees and probationers. In the end, the Article encourages more careful policy analysis of these criminalizing practices, proposes a de-coupling of the economic security and crime control functions of the state, and offers recommendations for ensuring the constitutional rights of welfare recipients. Specifically, administrative and criminal procedures must adapt to the transformations*

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*in welfare law to ensure that welfare recipients enjoy basic constitutional protections. More research is suggested to measure the unmeasured and the externalized costs associated with the criminalization of welfare.*

## I. INTRODUCTION

The word *welfare* is now commonly used pejoratively—as in “welfare mother” or “welfare queen.” We often hear the word *welfare* used to describe a bureaucratic mess or to describe economically and socially marginalized populations. Lost in these contemporary understandings of welfare is the association of *welfare* with wellbeing, particularly collective, economic wellbeing. Many of the current welfare policies and practices are far removed from promoting the actual welfare of low-income parents and their children. The public desire to deter and punish welfare cheating has overwhelmed the will to provide economic security to vulnerable members of society. While welfare use has always borne the stigma of poverty, it now also bears the stigma of criminality. This change in perspective has under-examined implications for both welfare law and criminal law. This Article examines those implications.

Over the last several decades, criminal law enforcement goals, strategies, and perspectives have grown entangled with the welfare system, a putatively benevolent arm of the state. Government welfare policies increasingly treat the poor as a criminal class, and the treatment of low-income women as criminals has occurred at all levels of government—federal, state, and local. The 1996 federal welfare reform legislation required states to implement measures to control welfare fraud.<sup>1</sup> While states have approached the policing of welfare fraud with varying levels of zeal, there is a clear trend toward toughness on welfare recipients who run afoul of regulations or who fail to comply with welfare rules.<sup>2</sup>

Perhaps no state has been tougher on welfare fraud than California. California is one of the most aggressive states not only in investigating and prosecuting welfare fraud cases, but also in welcoming law enforcement into the welfare system.<sup>3</sup> Even before receipt of a first issuance of a grant,

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<sup>1</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, Title IX, § 911, 110 Stat. 2105, 2353 (codified as amended at 42 U.S.C. § 608(a) (2006)); *see also* H. COMM. ON WAYS & MEANS, 1996 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS, WMCP 104-14, app. L (104th Cong., 2d Sess. 1996) (summarizing, *inter alia*, the fraud control requirements for states).

<sup>2</sup> *See infra* notes 89-105 and accompanying text (discussing state sanction rules for welfare recipients in California and other states).

<sup>3</sup> *See infra* notes 242-276 and accompanying text (discussing history of home searches of welfare recipients in California); note 201 and accompanying text (discussing the preference for criminal penalties over civil penalties for welfare cheating in California).

an applicant for welfare is reminded of the welfare system's punitive rules and undergoes state scrutiny otherwise limited to criminal offenders. A welfare recipient has likely signed documents informing her that her welfare grant will be reduced or terminated if she has a boyfriend move in without informing the state, if she fails to vaccinate her children, or if she is convicted of a drug charge. She has probably signed a document stating that any child she conceives and gives birth to while on welfare will be excluded from calculations of household financial need. Her Social Security number has been matched against state and national criminal records to make sure that she is not someone who should be incarcerated, that she does not have an outstanding arrest warrant, and that she has not been convicted of a drug-related crime. The financial information she has provided has been matched against various employment databases, IRS records, and Franchise Tax Board records to see that her lack of income is verifiable. Her personal information has been entered into the welfare system's database, which may be accessed by law enforcement officers without any basis for suspicion that she has engaged in any wrongdoing. She has been photographed and fingerprinted. And all of this has occurred before she has received a single welfare check.

Particular California counties are especially zealous in policing welfare fraud. San Diego, for example, takes a more proactive approach to welfare cheating than other California counties. In 1997 the County established a program known as Project 100%.<sup>4</sup> Under the program, all individuals who apply for California's welfare program, known as CalWORKs, are subject to an unannounced home visit by a plain-clothed welfare fraud investigator, who is deputized and employed by the local prosecutor's office.<sup>5</sup> Home visits occur before benefits are issued, and consist of an interview and a walk-through of the home. Investigators may, and do, look inside closets, bathroom cabinets, laundry baskets, and trash cans during the walk-through.<sup>6</sup> Welfare applicants are informed that the home visits are designed to verify their eligibility.<sup>7</sup> Anyone who refuses consent for the interview or walk-through will automatically have her welfare application denied.<sup>8</sup> If the home visit and walk-through reveals any evidence of criminal activity, the county investigator may make a referral for criminal investigation.<sup>9</sup>

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<sup>4</sup> *Sanchez v. County of San Diego*, No. 00 CV 1467 JM(JFS), 2003 U.S. Dist. LEXIS 27538, \*2 (S.D. Cal. Mar. 7, 2003).

<sup>5</sup> *Id.* at \*5-6.

<sup>6</sup> *Sanchez v. County of San Diego*, 464 F.3d 916, 919 (9th Cir. 2006).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 919 n.3.

San Diego County's practices, some of the most aggressive in the country, are emblematic of the broader trends in both welfare provision and the intermingling of the welfare and criminal justice systems. Nationwide, welfare applicants are treated as presumptive liars, cheaters, and thieves. Low-income families find their lives heavily surveilled and regulated—not only by welfare officials, but also by the criminal justice system. And low-income individuals may not be aware of the complex rules and regulations that take effect when applying for government benefits or of the many ways the government surveilles their actions. Policing the poor and protecting taxpayer dollars from misuse have taken priority over providing for the poor. Regulating the behavior of the poor and deterring fraud are now the objects of political attention and government resources, even when the goals of such regulation are unclear and the methods of deterrence are unevaluated and costly.

More than forty-five years ago, Professor Charles Reich wrote that it would undermine the fundamental purposes of welfare provision to “violate the sanctity of the home and degrade and humiliate recipients.”<sup>10</sup> Yet today, some of the key purposes of welfare policies are to regulate the home and to degrade welfare recipients to such a degree that they are deterred from using welfare.<sup>11</sup>

The term *criminalization* is used in this Article to describe a web of state policies and practices related to welfare.<sup>12</sup> There are several different kinds of criminalizing policies and practices. First, there are a number of

<sup>10</sup> Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347, 1360 (1963).

<sup>11</sup> Norma M. Riccucci, *Street-Level Bureaucrats and Intrastate Variation in the Implementation of Temporary Assistance for Needy Families Policies*, 15 J. PUB. ADMIN. RES. & THEORY 89, 102-03 (2005) (finding that frontline welfare administrators in Michigan view reducing the number of people on welfare to be a state policy priority).

<sup>12</sup> The term *criminalization of poverty* is frequently used by advocates for the homeless to describe ordinances, such as panhandling statutes and anti-loitering statutes, and selective enforcement targeting homeless individuals. See, e.g., METRO ATLANTA TASK FORCE FOR THE HOMELESS, *THE CRIMINALIZATION OF POVERTY* (1993); David M. Smith, *A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy*, 12 YALE L. & POL'Y REV. 487 (1994). I use the term more broadly, however, to include all of the poor who use, or even apply for, means-tested public benefits.

A number of sociologists use the term *criminalization of poverty* to describe an element of neoliberalism that involves the mass incarceration of poor people of color. See, e.g., ZYGMUNT BAUMAN, *COMMUNITY: SEEKING SAFETY IN AN INSECURE WORLD* 120 (2001) (describing the criminalization of the poor as the “ongoing exchange of population between the ghettos and the penitentiaries, each serving as a huge and growing input source for the other”); Loïc Wacquant, *The Penalization of Poverty and the Rise of Neo-Liberalism*, 31 CAPITULO CRIMINOLÓGICO 7, 16 (2003) (describing the criminalization of poverty in the United States as “a sharp and brutal substitution of the social-welfare treatment of poverty by penal treatment backed by all-out ‘carceralization’”).

practices involving the stigmatization, surveillance, and regulation of the poor.<sup>13</sup> These practices are historically embedded in aid programs to the poor. As Part II of this Article describes, the welfare reforms implemented near the end of the twentieth century raised these practices to a new level.

Second, many of the policies written into the federal and state welfare reform laws assumed a latent criminality among the poor. The welfare reform measures were aimed at excluding welfare recipients who had engaged in illicit behavior (such as drug use or possession) in the past, and were aimed at imposing harsh penalties on welfare recipients who engaged in illicit behavior while receiving government benefits.<sup>14</sup> These policies engaged the get-tough-on-crime approach used by the criminal justice system.

The third type of criminalizing practices involved the growing intersection between the welfare system and the criminal justice system. This intersection includes not only overlapping goals and attitudes toward the poor, but also collaborative practices and shared information systems between welfare offices and various branches of the criminal justice system. Both these systems are now preoccupied not with addressing social ills, but rather with reducing the risks associated with social ills. Very concrete examples of this criminalization exist in the welfare system—most notably, aggressive investigations into and increasing prosecutions for welfare fraud.<sup>15</sup> These government practices, which involve both the welfare offices and the criminal justice system, are leaving a large and growing number of parents with criminal records and paying criminal penalties. More troubling, the policing of welfare fraud typically occurs at the local level, so that dramatically disparate rates of investigation and prosecution appear to exist among counties, even those in a single state.<sup>16</sup>

The following Part of this Article describes the historical and political progression through which welfare fraud and welfare cheats became such a concern in the United States. Part III then details some of the federal programs and state and local practices that have in recent years contributed to the criminalizing trends. That Part also examines the movement away from civil penalties for welfare cheating and the increasingly aggressive

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<sup>13</sup> See *infra* notes 147-153 and accompanying text (discussing fingerprint imaging); notes 163-176 and accompanying text (discussing drug testing); notes 89-99 and accompanying text (discussing administrative sanctions).

<sup>14</sup> See *infra* notes 130-138 and accompanying text (discussing the felony drug exclusion); notes 109-113 and accompanying text (discussing the fugitive felon provision).

<sup>15</sup> See *infra* note 228 (discussing a trend among the states to punish welfare cheating through criminal prosecution rather than through civil administrative remedies).

<sup>16</sup> See *infra* notes 199-200 and accompanying text (discussing prosecutorial discretion and localized practices of punishing welfare cheating).

pursuit and punishment of welfare cheating as a felony crime. Part IV examines the tenuous and troubling state of constitutional protections for the poor under recent case law. Finally, Part V proposes some policy changes to address the problematic convergence of the welfare and criminal justice systems. It also considers why legal scholars should become more attentive to the intermingling of government programs and strategies and, more specifically, attentive to the poor.

## II. THE HISTORY OF THE CRIMINALIZATION OF POVERTY

### A. FROM 1935 THROUGH THE 1960S: CHANGES IN WELFARE DEMOGRAPHICS AND THE RISE OF MIDNIGHT SEARCHES

The criminalization of welfare recipients entails a long historical process of public discourse and welfare policies infused with race, class, and gender bias.<sup>17</sup> State and federal government aid programs developed in the first half of the twentieth century supported white, male workers and the white women and children dependent upon their wages while they excluded a huge segment of poor women of color and their children.<sup>18</sup> The Social Security Act created Aid to Dependent Children (ADC), a program specifically designed for poor mothers and their children and originally intended to support the widows of working men.<sup>19</sup> After World War II, the ADC rolls grew—from about 900,000 individuals in 1945 to approximately three million in 1960.<sup>20</sup> The proportion of families headed by divorced or

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<sup>17</sup> See generally KENNETH J. NEUBECK & NOEL A. CAZENAVE, *WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA'S POOR* 35 (2001) (using the term *welfare racism* to describe “the various forms and manifestations of racism associated with means-tested programs of public assistance for poor families”). Neubeck and Cazenave describe “the abolition of [Aid to Families with Dependent Children (AFDC)] and the substitution of punitive welfare reform policies for the safety net needed by impoverished families” as the “ultimate expression of welfare racism.” *Id.* at 37. See also JILL QUADAGNO, *THE COLOR OF WELFARE* 15 (1994) (arguing that “the motor of American history has been the continual reconfiguration of racial inequality in the nation’s social, political, and economic institutions”).

<sup>18</sup> Barbara J. Nelson, *The Origins of the Two-Channel Welfare State: Workmen’s Compensation and Mothers’ Aid*, in *WOMEN, THE STATE, AND WELFARE* 124 (Linda Gordon ed., 1990) (arguing that we should view “the welfare state as fundamentally divided into two channels, one originally designed for white industrial workers and the other designed for impoverished, white, working-class widows with young children”).

<sup>19</sup> See generally Nelson, *supra* note 18.

<sup>20</sup> The Aid to Dependent Children (ADC) caseload in 1942 was 901,560. WINIFRED BELL, *AID TO DEPENDENT CHILDREN* 208 n.24 (1965). By the beginning of 1960, the number of individuals receiving ADC had grown to 2,964,135 children and their adult caretakers. Jules H. Berman, *Public Assistance Under the Social Security Act*, 14 *INDUS. & LAB. REL. REV.* 83, 88 (1960).

unmarried mothers grew, while the proportion of families headed by widows declined.<sup>21</sup> In addition, the number of African-American families receiving welfare rose, especially as poor African-American families, seeking economic opportunity, migrated from southern agricultural areas to the industrial hubs of the North.<sup>22</sup>

Welfare offices in many states and locales adopted “suitable home” and “substitute parent” rules, which were essentially morality standards, and which were arbitrarily and discriminatorily applied, and commonly excluded women of color from the welfare rolls, especially in the South.<sup>23</sup> Notwithstanding a 1961 rule issued by the Secretary of Health, Education and Welfare barring the arbitrary application of suitable home requirements, many welfare offices continued to engage in midnight raids on the homes of ADC recipients in order to police “man in the house” rules.<sup>24</sup> The stated reason for surprise visits was to catch men sleeping in the homes of women receiving welfare. Unmarried women with men in their beds were deemed morally unfit and their households therefore unsuitable for assistance.<sup>25</sup> In addition, the men discovered in the homes were considered household breadwinners who had hidden their income support from the aid office.<sup>26</sup> The unstated but underlying goals of the rules were to police and punish the sexuality of single mothers, to close off the indirect access to government support of able-bodied men, to winnow the welfare rolls, and to reinforce the idea that families receiving aid were entitled to no more than near-desperate living standards.

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<sup>21</sup> *Id.* at 106.

<sup>22</sup> FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 184-89* (updated ed. 1993).

<sup>23</sup> BELL, *supra* note 20, at 76 (explaining that the rules “had no standing in the general state statutes” and tended most heavily to affect African Americans). These morality standards were indeed generally intended as tools of racial oppression. In response to a school desegregation order by a federal court, the Louisiana state legislature passed a “segregation package” that included welfare legislation designed to economically disempower African Americans in the state. NEUBECK & CAZENAVE, *supra* note 17, at 70, 74. The legislation included welfare reforms excluding from public benefits women who had, in the last five years, lived in a common-law marriage or who had given birth outside of marriage. *Id.* at 71. The legislation rendered ineligible “6,000 families with 22,500 children—95 percent of whom were African American.” *Id.*

<sup>24</sup> Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *YALE L.J.* 1245, 1248 (1965).

<sup>25</sup> BELL, *supra* note 20, at 41-46 (describing the suitable home requirements); *id.* at 87-92 (describing surveillance of welfare mothers by welfare caseworkers).

<sup>26</sup> *Id.* at 77-78.



Midnight raids on welfare recipients continued for most of the 1960s.<sup>27</sup> During that time, a number of publicized cases of welfare fraud charges resulted from the raids.<sup>28</sup> In many of those cases, though, the men, not the women, were charged with fraud. Men found residing with women receiving welfare aid were treated as the welfare cheats.<sup>29</sup> The prosecutions of men, rather than women, suggest that the welfare and law enforcement officials considered women to be easily manipulated by the men, but ultimately blameless in the cheating. This view of the innocence of women, however, changed over time.

By the mid-1960s, low-income women of color were being blamed for all sorts of social problems. An oft-cited 1965 report by Daniel Patrick Moynihan promoted the idea that the problems of inner cities—poverty, joblessness, and crime—could be traced to a “tangle of pathology” perpetuated by unmarried black mothers.<sup>30</sup> The Moynihan Report identified family disorganization and disintegration among poor African Americans as a source of social, moral, and economic instability in the United States.<sup>31</sup> The report stated that “[a]s a direct result of this high rate of divorce, separation, and desertion, a very large percent of Negro families are headed by females. While the percentage of such families among whites has been

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<sup>27</sup> See generally *Parrish v. Civil Serv. Comm'n*, 425 P.2d 223, 232-33 (Cal. 1967) (holding unannounced early morning searches invalid under the California Constitution). These surprise searches, done without warrants, were conducted in the early morning by teams of both fraud investigators and social workers. *Id.* at 225. Surprise home visits in California stopped after an Alameda County social worker, Benny Max Parrish, refused to continue participating in Sunday morning raids of welfare recipients' homes. *Id.* at 226, 234. Parrish, after being fired for insubordination, challenged his dismissal, claiming he had been asked to participate in illegal activity. *Id.* at 226. The California Supreme Court held that the raids violated welfare recipients' rights to privacy and were unreasonable, and that Parrish was justified in refusing to participate. *Id.* at 234.

<sup>28</sup> NEUBECK & CAZENAVE, *supra* note 17, at 96-97. In 1962, the Senate Appropriations Committee held hearings on welfare fraud in the District of Columbia. *Id.* According to Kenneth Neubeck and Noel Cazenave, the hearings were sparked by segregationist U.S. Senator Robert Byrd, who was preoccupied not only by the rising welfare caseloads in the District, but also by both the rising population of African Americans in the District and the recent passage of the Twenty-Third Amendment giving D.C. residents the right to vote. *Id.* at 92-104.

<sup>29</sup> *Id.* at 102. Neubeck and Cazenave note that in congressional discussions of welfare cheating in this era, unmarried men in intimate relationships with women receiving welfare “were portrayed as being, on the one hand, men who exploited welfare-reliant mothers and their children, and on the other hand, as men who provided for them. Both actions violated ADC policy, and, taken separately, each depiction presented a very negative view of these men, their motives, and their actions.” *Id.*

<sup>30</sup> DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 30 (1965).

<sup>31</sup> *Id.* at 5-6, 14.

dropping since 1940, it has been rising among Negroes.”<sup>32</sup> Even worse, according to the report, many of the children in female-headed households received Aid to Families with Dependent Children (AFDC, formerly ADC), a program originally designed for widows and orphans.<sup>33</sup> In Moynihan’s popular portrayal, low-income African-American mothers were a social threat because they gave birth to and raised sons who became the criminal, urban underclass.

In 1968, the Supreme Court handed down a decision that halted the “substitute father” rule, which had stipulated that any man cohabiting with a mother should be considered a substitute father and should be held responsible for supporting the entire family.<sup>34</sup> While the decision lifted the stigma of welfare cheating from fathers and boyfriends, it also intensified the stigma on mothers. The Supreme Court held in *King v. Smith* that the substitute-father presumption was inconsistent with the intent of the Social Security Act to provide for needy children.<sup>35</sup> The plaintiff, Sylvester Smith, was an African-American widow and mother of four whose welfare case had been closed when the welfare department found that a man (who was married with nine children of his own) sometimes spent the night in her house.<sup>36</sup> As a result of *King v. Smith*, welfare offices devoted markedly less attention to the men involved in the lives of women receiving welfare. Policymakers instead turned their full attention to welfare mothers.

#### B. THE 1970S: GROWING CONCERNS ABOUT GOVERNMENT WASTE AND ABOUT CRIME

Beginning in the 1970s, it became more difficult for welfare recipients to live on their welfare grants. Throughout the 1970s, ‘80s, and ‘90s, the value of the welfare grant, adjusted for inflation, declined dramatically. The weighted average maximum benefit per three-person family was \$854 in 1969 (in 2001 dollars), but plummeted to \$456 by 2001.<sup>37</sup> It became increasingly hard for welfare recipients to cover their most basic expenses—food, clothing, and rent—with their welfare grants. Unable to survive on welfare checks and facing barriers to employment, many welfare recipients turned to other sources of income, whether help from kin or participation in underground labor markets, and attempted to hide those

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<sup>32</sup> *Id.* at 9.

<sup>33</sup> *Id.* at 12.

<sup>34</sup> *King v. Smith*, 392 U.S. 309 (1968).

<sup>35</sup> *Id.* at 329.

<sup>36</sup> *Id.* at 315.

<sup>37</sup> U.S. DEP’T OF HEALTH & HUMAN SERV., INDICATORS OF WELFARE DEPENDENCE: ANNUAL REPORT TO CONGRESS tbl.TANF 6 (2003), available at <http://aspe.hhs.gov/hsp/indicators03/apa.htm#ttanf6> (last visited May 15, 2009).

sources from the welfare office for fear of losing the small checks they received.<sup>38</sup>

Also in the 1970s, as a part of welfare reforms under President Richard Nixon, the AFDC system became more bureaucratic.<sup>39</sup> The practice of social workers visiting the homes of welfare recipients and verifying financial need ended.<sup>40</sup> Office caseworkers, hired to replace the social workers, processed the routine paperwork that welfare recipients regularly submitted to the office to document their continuing financial need. In a process known as “churning,” the federal government increased the amount of information and paperwork required to determine welfare eligibility, and denied benefits to low-income families who failed to keep up with the paperwork.<sup>41</sup> Income-eligible families were removed from the aid rolls for their failures to provide verification documents in a timely manner.<sup>42</sup> Home visits by welfare caseworkers, particularly unannounced visits, virtually

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<sup>38</sup> See generally KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 147-84 (1997); SUDHIR ALLADI VENKATESH, AMERICAN PROJECT 46 (2000) (discussing how families often reported men as absent from the household so that they could qualify for cash aid under AFDC).

<sup>39</sup> For a detailed description of this administrative “churning,” see PIVEN & CLOWARD, *supra* note 22, at 373-81.

<sup>40</sup> *Id.* at 375-76 (“Forms written in legalese were mailed out (as often as monthly) asking poorly-educated recipients with erratic mail delivery to fill in the blanks and provide documentation justifying the continuation of checks.”).

<sup>41</sup> Timothy J. Casey & Mary R. Mannix, Ctr. on Soc. Welfare Policy & Law, *Quality Control in Public Assistance: Victimizing the Poor Through One-Sided Accountability*, 22 CLEARINGHOUSE REV. 1381, 1385 (1989) (“Extreme verification requirements create a cycle, known as ‘churning.’ Eligible families have their applications rejected or their cases closed for failure to verify, and then they reapply to gain or regain benefits.”).

<sup>42</sup> See Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3, 13 (1984) (“[E]xclusive concern with quality control errors resulted in diminished attention to helping recipients or concern about whether they fully received all to which they were entitled.”). The Reagan Administration began penalizing states that overpaid benefits to the poor. Under an “error rate reduction system” implemented by the Reagan Administration, a state that could be shown to have an error rate of more than 5% on food stamp cases lost out on a portion of the funds it would otherwise have received from Washington. Michael J. Puma & David C. Hoaglin, *Food Stamp Payment Error Rates: Can State-Specific Performance Standards Be Developed?*, 85 J. AM. STAT. ASS’N. 891, 891 (1990) (noting that between 1981 and 1985, the Food and Nutrition Service of the U.S. Department of Agriculture assessed “423.5 million in liabilities against 49 states” for their food stamp error rates). Only overpayment was penalized; from 1973 to 1977, underpayment to an eligible recipient, or the failure to serve an eligible person altogether, did not count as an error for the purpose of that calculation. Casey & Mannix, *supra* note 41, at 1381, 1382. This system created a strong incentive for welfare administrators to err on the side of caution in determining eligibility for aid. In fact, hunger rose in the United States during the early 1980s. See Joseph Lelyveld, *Hunger in America: The Safety Net Has Shrunken but It’s Still in Place*, N.Y. TIMES, June 16, 1985, at 20.

stopped during the 1970s.<sup>43</sup> During that period, welfare recipients gained greater expectations of privacy in their own homes.

Governmental scrutiny of administrative records, however, increased. Particularly during the Carter Administration, the news media brought greater attention to fraud in government spending, a concern that first arose in the context of military contracts after glaring examples of waste and abuse were exposed.<sup>44</sup> Congress passed, and President Carter signed, the Inspector General Act of 1978, which authorized the President to appoint Inspector Generals to twelve federal administrative agencies.<sup>45</sup> Data collection and analysis were increased throughout government programs.<sup>46</sup>

In the 1970s, the image of low-income mothers took a particularly negative turn. As discussed below, California Governor (later President) Ronald Reagan used the symbol of the “welfare queen” to propel his ideas on limited government and increased crime control.<sup>47</sup> Reagan used references to the welfare queen to portray an image of widespread depravity and criminality among low-income women of color.<sup>48</sup> Despite the factual inaccuracies of Reagan’s descriptions, the symbol of the welfare queen resonated with the public.

Welfare cheating had always been an issue in poverty politics. Senator Robert Byrd made a highly publicized investigation of welfare fraud in

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<sup>43</sup> Casey & Mannix, *supra* note 41, at 1386 (noting that home visits declined in the 1970s, though also noting that the Department and Health and Human Services instructed states in 1984 that they might return to home visits to reduce overpayments to welfare recipients).

<sup>44</sup> David Burnham, *U.S. Agencies Starting to Bolster Meager Defenses Against Fraud*, N.Y. TIMES, Apr. 17, 1978, at A1.

<sup>45</sup> Inspector General Act of 1978, Pub. L. No. 95-452, § 3, 92 Stat. 1101, 1101-02. The Inspector General’s duties were to root out waste and fraud in government programs, and report instances of abuse directly to the U.S. Attorney General.

<sup>46</sup> A 1978 Department of Health, Education, and Welfare Inspector General’s report revealed costly fraud and abuse in the programs the department oversaw. OFFICE OF THE INSPECTOR GEN., DEP’T OF HEALTH, EDUC. & WELFARE, ANNUAL REPORT: JANUARY 1, 1978-DECEMBER 31, 1978 (1979). The Inspector’s report criticized, in particular, defaulted loans in the student aid program and abuses by medical providers, particularly pharmacies and physicians, in the Medicaid and Medicare programs. *Id.* at 58-68, 122. (The report gives the impression that overpayments to AFDC recipients and fraud by government officials in both the cash aid and food stamp programs, though occurring, were problems secondary to the student aid and medical aid abuses.) The Inspector General’s recommendations for attacking fraud, abuse, and error in income maintenance programs, such as AFDC, targeted improvements in information systems and better data exchange between government agencies.

<sup>47</sup> ‘Welfare Queen’ Becomes Issue in Reagan Campaign, N.Y. TIMES, Feb. 15, 1976, at 51.

<sup>48</sup> *Id.*

Washington, D.C. in 1962.<sup>49</sup> In 1972, when President Richard Nixon was considering an overhaul of the welfare system, Senator Russell Long of Louisiana declared that “the welfare system, as we know it today, is being manipulated and abused by malingerers, cheats and outright frauds.”<sup>50</sup> While distrust of those low-income adults unattached to the wage labor market had always existed in the United States, it appeared to grow throughout the 1970s. Concerns about welfare cheats, in particular, began to rise. Beginning in 1977, those who applied for food stamps had to disclose their Social Security numbers to receive benefits.<sup>51</sup> This marked the first use of an extensive data exchange using Social Security numbers among government agencies, and the beginning of computer data tracking of the poor.

That is not to say that there were not individuals who defrauded the welfare system. In the late 1970s and early 1980s, there were a few particularly notable cases of welfare fraud in large U.S. cities.<sup>52</sup> It was not

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<sup>49</sup> MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 115 (1999).

<sup>50</sup> RUSSELL B. LONG, S. COMM. ON FINANCE, 92D CONG., 2D SESS., WELFARE CHEATING (Comm. Print 1972).

<sup>51</sup> Food Stamp Act of 1977, Pub. L. No. 106-171, 114 Stat. 3 (codified as amended at 7 U.S.C. §§ 2011-2036 (1977)).

<sup>52</sup> The first nationally publicized case made news in 1974 when police began investigating forty-seven-year-old Chicago mother Linda Taylor for welfare fraud. Taylor herself triggered the investigation by reporting to police that fourteen thousand dollars in cash, jewelry, and furs had been stolen from her home. *Welfare and Pension Swindle Laid to Woman of Many Aliases*, N.Y. TIMES, Dec. 15, 1974, at 58. Early newspaper coverage of the case reported that Taylor was being investigated for using as many as fourteen different aliases over twenty-eight years to collect perhaps hundreds of thousands of dollars in welfare and social security payments. *Id.* The early estimates of her fraud were perhaps overestimates. In March, Taylor—who investigators and the press called the “welfare queen”—was found guilty of welfare fraud and perjury for using two aliases to collect eight thousand dollars in wrongful payments over the course of twenty-three months. *Chicago Relief ‘Queen’ Guilty*, N.Y. TIMES, Mar. 19, 1977, at 8.

Then, in 1978, Barbara Jean Williams, a thirty-three-year-old African-American mother from Compton, California, was convicted of ten counts of welfare fraud and twelve counts of perjury. *Woman Guilty of \$240,000 Welfare Fraud*, WASH. POST, Dec. 2, 1978, at A4. According to a newspaper account of the investigation:

Officials were alerted by an anonymous telephone tip to feed the name of Barbara Jean Thompson, one of Williams’ alleged aliases, into the computer. The computer printout showed a pattern of identical or similar names for the recipients’ alleged needy children. Williams was later accused of filing for aid in 10 welfare offices and collecting a total of \$239,587 from September 1971 to February 1978.

*Id.* At the time she applied for aid, the welfare system had not yet been computerized, making it easy for a willful criminal to apply for aid by opening multiple cases under different names. Williams was ultimately sentenced to eight years in jail for cheating the system. *‘Queen of Welfare’ Ordered Jailed in \$239,500 Fraud*, N.Y. TIMES, Dec. 29, 1978,

happstance that a number of welfare fraud cases involving double-dipping crooks were uncovered in the late 1970s, as it was then that the AFDC system was computerized and that identifying and documenting cases of fraud became much easier for welfare officials.<sup>53</sup> What may have appeared to the public and to policymakers to be a spike in cases of welfare fraud was actually a sudden improvement in the ability of officials to root out fraud effectively. And while this transformation—the computerization of the system—might have been heralded as a means of both providing aid more efficiently and policing fraud more effectively, the transformation marked instead a period of zealous attacks on welfare recipients and a public perception that welfare cheating was on the rise.

### C. THE 1980S: THE RISE OF THE WELFARE QUEEN

The election of Ronald Reagan as President in 1980 marked a significant transition in public opinions towards the poor and in government services for the poor. From the first moment of his bid for presidential election, Ronald Reagan used anecdotes about welfare queens to exemplify everything he believed was wrong with government programs—excessive spending on domestic programs and misuse of government money.<sup>54</sup> Reagan apparently merged the identities of two well-known women convicted of welfare fraud—Linda Taylor, the Chicago “welfare queen,” and Barbara Jean Williams, the Cadillac-driving “Queen of Welfare” from Compton—into a single persona who starred in an often-used anecdote. Reagan regularly exaggerated the number of aliases used by these women so that his welfare queen had 100 of them.<sup>55</sup> The welfare queen played a prominent role in Reagan’s presidential campaign.

Programs providing assistance to the poor changed after Reagan took office. Whereas Nixon, during his 1973 State of the Union Address, proudly stated that federal spending on food assistance programs had tripled

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at A10. The *New York Times* reported that Williams was known as the “Queen of Welfare.” *Id.* In coverage of her court case, the *New York Times* and the *Washington Post* repeatedly noted that Williams drove a Cadillac. *Id.*

<sup>53</sup> *Text of White House Message to Congress on Proposal to Overhaul Welfare System*, N.Y. TIMES, Aug. 7, 1977, at 40.

<sup>54</sup> See ‘Welfare Queen’ Becomes Issue in Reagan Campaign, *supra* note 47. The article noted that while campaigning for the Republican presidential primaries in New Hampshire, Reagan mentioned Linda Taylor “at nearly every stop.” *Id.* Reagan reported greatly exaggerated facts, telling voters that Taylor had used eighty names, when, in fact, the indictment brought against her charged her with using four aliases. *Id.* The article noted that “[t]he ‘welfare queen’ item in Mr. Reagan’s repertoire is one of several that seem to be at odds with the facts.” *Id.*

<sup>55</sup> David S. Broder, *Still Learning to Be the Opposition*, WASH. POST, Feb. 15, 1981, at C7.

during his presidency, Reagan regarded those same programs as government waste.<sup>56</sup> Under Reagan's direction, the federal government cut funding for food stamps in 1981.<sup>57</sup> The federal government also tightened the eligibility requirements for the federal school lunch program, eliminating 2.6 million children from the program.<sup>58</sup>

Reagan also began a government crackdown on "waste, fraud and abuse"—a phrase that became a dominant theme in his second campaign. The crackdown, however, was targeted rather than universal. Upon taking office, Reagan abruptly fired all of the Inspectors General.<sup>59</sup> Rather than focusing on waste and fraud throughout federal government, President Reagan focused instead on welfare fraud, particularly on fraud committed by welfare recipients. In Reagan's view, the poor, and not the welfare bureaucracies, were the sources of fraud and waste. In the 1980s, some Democrats began accusing Republicans of using "[w]aste, fraud and abuse" as code words for "a budget-cutting program that would take more money away from poor blacks and Hispanics, and relatively less from middle-class whites."<sup>60</sup> Republicans replied that the disparate racial effects of the policies were not intentional.<sup>61</sup> Despite the congressional concern about welfare fraud by recipients, the Washington Post reported that an audit of the Department of Health and Human Services (formerly Health, Education and Welfare) released shortly before Reagan fired its Inspector General found that "[t]he greatest cheaters . . . are not individual welfare or health care recipients, but doctors and pharmacists and other providers of services who overbill the government."<sup>62</sup>

Again, that is not to say that cheating welfare recipients did not exist.<sup>63</sup> But rather than treat a few exceptional instances of criminal activity as the

<sup>56</sup> Robert Pear, *Reagan's Social Impact*, N.Y. TIMES, Aug. 25, 1982, at A1.

<sup>57</sup> Steven V. Roberts, *Food Stamp Trims Sought by Reagan*, N.Y. TIMES, Sept. 23, 1981, at A23.

<sup>58</sup> Pear, *supra* note 56.

<sup>59</sup> Charles R. Babcock & Patrick Tyler, *Fired U.S. Waste-Fighters Bare Government Foulups*, WASH. POST, Feb. 2, 1981, at A1.

<sup>60</sup> Steven V. Roberts, *'82 Election Preview: Making Money, Making Law*, N.Y. TIMES, Sept. 22, 1981, at A28 (summarizing comments by California Democratic Representative Tony Coelho).

<sup>61</sup> House Representative Guy Vander Jagt, a Michigan Republican, said, "I suspect that a disproportionate share of blacks are on welfare, and that a disproportionate share of welfare fraud is committed by blacks . . . . But people are not mad at black welfare chiselers, they're mad at welfare chiselers, period." *Id.*

<sup>62</sup> Babcock & Tyler, *supra* note 59; see OFFICE OF THE INSPECTOR GEN., *supra* note 46.

<sup>63</sup> In December of 1980, after Reagan's successful presidential campaign, another prominent welfare fraud case surfaced in California. Dorothy Woods, a thirty-eight-year-old African-American mother of six living in Pasadena, was charged with welfare fraud for, like Barbara Jean Williams, creating multiple (twelve) aliases for herself and using the names of

exceptions they were, politicians—and the media and public, as well—adopted these cases as typifying poor, African-American women on welfare. These “welfare queens” were treated not merely as stereotypes of poor black mothers on aid, but as archetypes—perfect examples of what welfare recipients become over the course of years on the dole.<sup>64</sup> And

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fictitious children to receive large payments from the AFDC program. *Coast Woman Admits \$377,458 Welfare Fraud*, N.Y. TIMES, Mar. 17, 1983, at A16; *Woman's Aid Claims for 38 Children Are Examined*, N.Y. TIMES, Dec. 21, 1980, at 31. Again, the news coverage highlighted the welfare cheat's automobiles of choice, in this case a Rolls Royce, a Mercedes Benz, and a Cadillac. *Woman's Aid Claims for 38 Children Are Examined, supra*. Woods was jailed in November of 1981 and, in March of 1983, pleaded guilty to forty-one criminal counts, including forgery, perjury, and welfare fraud. *Coast Woman Admits \$377,458 Welfare Fraud, supra*. According to prosecutors, Woods had fraudulently collected \$377,458 in welfare between 1974 and 1980. *Id.* The media dubbed Woods the “Welfare Queen,” not only because of her luxury cars, but also because she lived in a large house with a swimming pool. *Requiem for the Welfare Queen*, WASH. POST, June 29, 1983, at A18.

Woods's criminal activities were not limited to welfare fraud and did not end with her fraud conviction. In 1987, Woods had her parole rescinded after the welfare office discovered she had collected a welfare check for a son who was not living with her. Lois Timnick, *'Welfare Queen' Arrested on New Fraud Charges*, L.A. TIMES, May 22, 1987, at 3. An administrative hearing, however, later determined that the welfare office had not provided fair notice before terminating her benefits and that Woods had left her son with her brother for a few weeks while searching for housing. *The Region*, L.A. TIMES, Aug. 9, 1987, at 2. In 1993, after her release from prison, Woods became head of a Pasadena church homeless shelter. Nicholas Riccardi, *'Welfare Queen' Held on Tax Fraud Charges*, L.A. TIMES, Apr. 11, 1997, at B3. Her life of freedom did not last long. In 1997, Woods was again charged with fraud and pleaded guilty, this time for using the Social Security numbers of clients at the homeless shelter, forging their signatures, and fraudulently filing and collecting claims for earned-income tax credits. *Official Business: Woman Pleads Guilty to New Tax Fraud Charge*, L.A. TIMES, July 8, 1997, at B4.

<sup>64</sup> See WAHNEEMA LUBIANO, *Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 323, 332-33 (Toni Morrison ed., 1992) (“[T]he welfare queen is omnipresent in discussions about ‘America’s’ present or future even when unnamed. All of those things are constantly in the news (not that welfare queens were ever much out of the news)—urban crime, the public schools, the crack trade, teenage pregnancy are all narratives in which ‘welfare queen’ is writ large.”). See generally ANGE-MARIE HANCOCK, *THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN* (2004) (discussing negative views of welfare recipients in political debates and in public opinion).

The figure of the welfare queen offered (and continues to offer) contradictory stereotypes about the rationality of poor women. On the one hand, the welfare queen stereotype embodied a woman who was hyper-rational and enterprising, someone who was working the system and milking taxpayer money from the government. This welfare queen was someone who had decided to maximize her income by bearing more children and increasing her government benefits rather than working. She also represented a mother who refused to enter into marriage, which would jeopardize her benefits.

At the same time, the welfare queen stereotype portrayed welfare recipients as uneducated, lazy, and irrational. A welfare queen was someone who did not, or perhaps



Ronald Reagan's re-election campaign was spearheaded by an attack on waste, fraud and abuse in welfare programs.<sup>65</sup> Just as in President Reagan's first bid for the White House, the welfare queen became a powerful symbol in the 1984 presidential campaign.<sup>66</sup>

Where the welfare queen stereotype was accurate was in its characterization of poverty and welfare as women's issues. Indeed, in 1984, two-thirds of the adults living below the poverty line were women, and households headed by single mothers were five times more likely to live in poverty than two-parent families.<sup>67</sup> Moreover, with rising divorce rates and an increasing number of non-marital births in the United States, the disproportionate representation of women and their children would become a growing trend.

#### D. THE 1990S: WELFARE REFORM AND THE CONVERGENCE OF THE WELFARE SYSTEM AND THE CRIMINAL JUSTICE SYSTEM

Vilifying the low-income mothers receiving welfare became a bi-partisan project in the 1990s. Survey research revealed that Americans associated welfare with African Americans and viewed the welfare system as a program that rewarded laziness among African Americans.<sup>68</sup> "Welfare dependency" became a keyword associated not only with economic risk and social disorder, but also with crime.<sup>69</sup>

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could not, pursue the long-term well-being of her family. She was someone unmotivated to seek an education to improve her station, someone who refused to take the economic risk of joining the paid labor force and leaving the welfare system. Worst of all, she had children without regard for her inability to raise them in middle-class comfort. She neither participated in the paid labor market nor took on the caretaking responsibilities for a working husband. She simply drew upon taxpayer dollars with neither gratitude nor remorse.

While poverty is not exclusive to women of color who have children, black mothers have come to bear much of the stigma associated with welfare. Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 J. GENDER & L. 1, 25 (1993) ("Ideologically, in America, single motherhood is Black.").

<sup>65</sup> *Choking Food Stamps*, N.Y. TIMES, Nov. 14, 1983, at A18 (noting that the Reagan Administration's focus on "fraud, waste and abuse," described in the article as "Reagan bugaboos," was making it difficult for destitute families to access public benefits).

<sup>66</sup> Editorial, *Reagan, Women and Poverty*, BOSTON GLOBE, Apr. 13, 1984 (noting that Reagan's re-election efforts were aimed at middle-class women, while many of the budget cuts he implemented during his first term most affected the poor women he labeled "welfare queens").

<sup>67</sup> WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 370-71 (5th ed. 1994).

<sup>68</sup> GILENS, *supra* note 49, at 3.

<sup>69</sup> HANCOCK, *supra* note 64, at 93-94 (conducting a content analysis of the Congressional Record of the 104th Congress and finding the following terms arising frequently in debates about welfare recipients: *Culture of Poverty*, *Don't Work*, *Single-Parent Family*, *Illegitimacy*, *Cross-Generational Dependency*, *Teen Mothers*, *Crime*, and *Overly Fertile*);

In the 1990s, states began to attack welfare recipients through aggressive welfare fraud investigations and criminal prosecutions.<sup>70</sup> California again became a leader in these new punitive approaches to welfare reform.<sup>71</sup> By 1993, twenty-six other states had joined California in establishing pre-eligibility fraud investigation units, which conducted investigations of individuals applying for cash aid.<sup>72</sup> The pre-eligibility fraud investigation units checked on welfare applicants' assets, sources of property, household composition, and address.<sup>73</sup> Investigators conducted their investigations by interviewing relatives, friends, neighbors, employers, and landlords of welfare applicants; visiting and conducting surveillance of applicants' homes; investigating financial resources through database searches; and interviewing the welfare applicants themselves.<sup>74</sup> In 1995, all of the states that had established welfare fraud investigation units housed them separately from the eligibility workers in order to avoid conflicts of interest between government employees trying to provide for the poor and those focused on deterring and capturing welfare fraud.<sup>75</sup>

California continued its leadership on "get-tough-on-welfare" reforms. California's Republican governor, Pete Wilson, reduced the welfare grants to needy families and increased the number of welfare fraud investigators in

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see also Martha L. Fineman, *Images of Mothers in Poverty Discourse*, 1991 DUKE L.J. 274, 283 ("[I]n poverty discourses emanating from a broad spectrum of groups, these single mothers have been lumped together with drug addicts, criminals, and other socially-defined 'degenerates' in the newly-coined category of 'underclass.'").

<sup>70</sup> Susan D. Bennett describes welfare office application procedures as "discouragement practices" leading to "bureaucratic disorientation." Susan D. Bennett, "No Relief but upon the Terms of Coming into the House"—*Controlled Spaces, Invisible Disorientations, and Homelessness in an Urban Shelter System*, 104 YALE L.J. 2157, 2159 (1995). She explains that discouragement practices tend to take four forms: "the demand for the applicant's physical presence as a precondition to application, the physical isolation of the applicant in the waiting room, the withholding of information from the applicant, and verification extremism." *Id.* at 2161.

<sup>71</sup> California began investigating applicants, not just welfare recipients, for fraud in the 1980s. A report by the 1996 U.S. Office of Inspector General notes:

California was the original pioneer to use pre-eligibility fraud investigative units, and their program is one of the largest in the United States. It is also generally more aggressive than other States in detecting fraud. For example, many California counties used trained peace officers rather than social workers for investigators.

OFFICE OF THE INSPECTOR GEN., DEP'T OF HEALTH & HUMAN SERV., REP. NO. OEI-04-91-00101, AFDC PRE-ELIGIBILITY FRAUD INVESTIGATIVE UNITS 3 (1995).

<sup>72</sup> *Id.* at 2.

<sup>73</sup> *Id.* at 6.

<sup>74</sup> *Id.* at 8.

<sup>75</sup> *Id.* at 11-12.

the state.<sup>76</sup> In 1994 Governor Wilson authorized the electronic fingerprinting of welfare recipients, even though legislative analysts, state budget officials, and welfare officials said doing so was both costly and unnecessary to address welfare fraud.<sup>77</sup>

In 1996, California legislators stiffened the penalties for welfare fraud. Legislators passed bills that would permanently disqualify individuals convicted of welfare fraud from ever receiving welfare again.<sup>78</sup> At the same time, they voted to reduce welfare benefits.<sup>79</sup> California also began shifting the investigation and punishment of welfare cheating from the welfare office to district attorneys. Beginning in July 1996, district attorneys rather than staff from public social services agencies assumed the role of conducting welfare overpayment investigations.<sup>80</sup> Functionally, California—like many other states—made it increasingly difficult for welfare recipients to survive on their welfare grants alone, and shifted state money from aiding low-income women to policing and punishing them through the criminal justice system when they sought unreported income.

Then came an overhaul of the welfare system at the federal level. In the debates leading up to the votes on the welfare legislation, federal lawmakers employed dehumanizing rhetoric to describe welfare recipients.<sup>81</sup> In a particularly vivid example of the dehumanization of welfare recipients, John Mica, a Republican Congressional Representative from Florida, held up a sign during a congressional debate that read, “Don’t feed the alligators.”<sup>82</sup> On the House floor, Mica argued that providing aid

<sup>76</sup> Wilson cut AFDC benefits by 5.8% in 1992. Jane Gross, *U.S. Court Delays Welfare Cutback*, N.Y. TIMES, Dec. 24, 1992, at A10. Wilson also sought to provide reduced benefits to welfare recipients who moved from other states, though a federal court prohibited that restriction, citing *Shapiro v. Thompson*, 394 U.S. 618 (1969), a Supreme Court case holding that residency restrictions on AFDC violate a constitutional right to travel. *Id.*

<sup>77</sup> Carla Rivera, *Experimental Fingerprint Program Targets Aid Fraud*, L.A. TIMES, Apr. 7, 1994, at B4. A consultant to the Senate’s Budget Committee noted that finger imaging would raise the \$72 million a year the state already spent on welfare fraud programs another 13% without significant increases in efficiency. *Id.*

<sup>78</sup> Max Vanzi, *Assembly OKs GOP-Backed Welfare Cuts*, L.A. TIMES, May 21, 1996, at A3.

<sup>79</sup> *Id.*

<sup>80</sup> Scott Steepleton, *Countywide; Investigators Arrest 22 Welfare Recipients*, L.A. TIMES, Mar. 7, 1997, at 3.

<sup>81</sup> Beverly Horsburgh, *Schrödinger’s Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color*, 17 CARDOZO L. REV. 531, 565-66 (1996) (quoting lawmakers who associated women on welfare with caged animals such as wolves and alligators).

<sup>82</sup> Vanessa Gallman, *‘Sit Down and Shut Up’: Welfare Debate Turns Testy*, MIAMI HERALD, Mar. 25, 1995, at 8A.

to poor women would do nothing but spur them to reproduce, entice them to return for more free handouts, and threaten the general public safety.<sup>83</sup>

Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act in 1996.<sup>84</sup> The legislation eliminated the broad, federally-governed AFDC program and ended cash aid as a federal entitlement to all income-qualified families.<sup>85</sup> Replacing AFDC entitlements, the federal government distributed state block grants through a federal program known as Temporary Assistance for Needy Families (TANF).<sup>86</sup> The new welfare policies threatened that those who failed to play by the rules—by meeting mandatory work requirements, by abiding by behavior reforms, and by reporting all details of income and household composition—would be harshly punished with new penalties.<sup>87</sup> In addition, states were allowed to place their own conditions upon receipt of welfare and could establish time limits even shorter than the federal ones.<sup>88</sup> Those welfare recipients who failed to meet their obligations under the new system would be excluded from benefits and have the safety net pulled out from under them—in some cases permanently.

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<sup>83</sup> [I] represent Florida where we have many lakes and natural reserves. If you visit these areas, you may see a sign like this that reads, “do not feed the alligators.” We post these signs for several reasons. First, because if left in a natural state, alligators can fend for themselves. They work, gather food and care for their young.

Second, we post these warnings because unnatural feeding and artificial care creates dependency. When dependency sets in, these otherwise able-bodied alligators can no longer survive on their own.

141 CONG. REC. 9194 (1995) (statement of Representative Mica).

<sup>84</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7, 8, 21, 25, 42 U.S.C. (2006)).

<sup>85</sup> *Id.* at Title I, § 401, 110 Stat. at 2261 (codified as amended at 42 U.S.C. § 601 (2006)) (specifying that the federal funds provided to states “shall not be interpreted to entitle any individual or family to assistance . . .”).

<sup>86</sup> *Id.* at Title I, § 402, 110 Stat. at 2113-15 (codified as amended at 42 U.S.C. § 602 (2006)).

<sup>87</sup> *Id.* at Title I, § 407, 110 Stat. at 2129-34 (codified as amended at 42 U.S.C. § 607 (2006)) (describing mandatory work requirements); *id.* at Title I, § 404, 110 Stat. at 2124-28 (codified as amended at 42 U.S.C. § 604 (2006)) (allowing states to sanction a family’s welfare benefits if an adult fails to ensure that children attend school); *id.* at Title IX, § 902, 110 Stat. at 2347 (codified as amended at 21 U.S.C. § 862(b) (2006)) (allowing states to sanction welfare recipients who test positive for controlled substances).

<sup>88</sup> *Id.* at Title I, § 408, 110 Stat. at 2140-42 (codified as amended at 42 U.S.C. § 609 (2006)) (allowing states discretion in determining the obligations of individual aid recipients and granting the states discretionary authority to determine penalties for noncompliance among individuals).

## E. ESCALATING ADMINISTRATIVE SANCTIONS

During the welfare reform debates of the mid-1990s, politicians and the public repeatedly championed the “carrot and stick” approach to welfare.<sup>89</sup> The new welfare system would not only include incentives, but would also create a new system of disincentives and punishments. The approach was designed to coax welfare recipients who were not participating in the formal wage-labor market to seek steady employment and leave the welfare system.<sup>90</sup> There were a few incentives: increased earnings disregards, increased availability of child care subsidies, and an increased Earned Income Tax Credit for the working poor. The true underpinning of reform, however, came in the form of sanctions.

A welfare recipient’s failure to comply with welfare rules and regulations can result in a reduction or termination of the family’s welfare benefits; this is known as a sanction. Failing to comply can mean violating welfare-to-work requirements, failing to fulfill the number of work hours required, or merely missing a scheduled meeting at the welfare office.<sup>91</sup> One study of the sanctions imposed in three major cities found that such missed appointments were the most common triggers for sanctions.<sup>92</sup> In California, the result of a sanction is a reduction of the adult’s portion of aid from the grant check; in 2008, this reduction amounted to \$139 for a family of three—a significant sum for a family living in poverty.<sup>93</sup>

While many people assume that transitions from welfare to work account for dramatic decreases in welfare caseloads, a number of studies

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<sup>89</sup> The many people who used this phrase seemed uncritical of the beast-of-burden imagery that the phrase “carrot and stick” creates with relation to the poor individuals who stand between the carrot and the stick. The phrase itself conjures up images of coerced, unpaid labor and resonates with images of black servitude under slavery. Martin Gilens notes that the public’s negative attitudes towards the welfare system are inextricably tied to racism and an aversion to providing African Americans with aid. GILENS, *supra* note 49, at 3 (noting that “welfare has become a ‘code word’ for race”).

<sup>90</sup> Carolyn Skorneck, *Negotiators OK Welfare Bill: Carrot-and-Stick Reform Offers Some Concessions to Clinton*, TIMES-PICAYUNE, July 31, 1996, at 2 (explaining that the welfare reform bill had “a tough edge that would force people off public rolls and into jobs”).

<sup>91</sup> Regulations set forth by the Department of Health and Human Services determine general rules for all of the states, but the states determine what the work requirements will be under their programs, and eligibility workers at local offices determine what counts as work hours for individual welfare recipients.

<sup>92</sup> Andrew J. Cherlin et al., *Operating Within the Rules: Welfare Recipients’ Experiences with Sanctions and Case Closings*, 76 SOC. SERV. REV. 387, 395 (2002).

<sup>93</sup> JACOB ALEX KLERMAN & JANE MCCLURE BURSTAIN, RAND, SANCTIONS IN THE CALWORKS PROGRAM xv (2008).

indicate that sanctions actually account for much of the decline.<sup>94</sup> Research by Sanford Schram found evidence that “get-tough policies, especially strict sanctions, have contributed to the roll declines and may have done so in ways that forced people off even while they still needed assistance.”<sup>95</sup>

Like most policies under welfare reform, the policies regarding sanctions vary dramatically from state to state. While some states, like California, only reduce the adult’s portion of aid under a sanction (known as a “partial sanction”), thirty-six states implemented “full family sanctions,” meaning that if a parent fails to meet his or her work requirement, cash aid to the entire family is cut off.<sup>96</sup> In seventeen of these states, full-family sanctions are immediate upon noncompliance with the welfare rules; in the remaining nineteen states, full-family sanctions are only instituted after multiple instances of non-compliance (referred to as a “gradual full-family sanction”).<sup>97</sup> Wisconsin determines sanctions based on the number of hours a welfare recipient has failed to perform.<sup>98</sup> In addition, nineteen states eliminate food stamp benefits if an adult is non-compliant, and twelve states eliminate Medicaid benefits to non-compliant adults.<sup>99</sup>

Sanctions are a routine occurrence. Researchers estimate that between 33% and 52% of TANF recipients have been sanctioned.<sup>100</sup> More than half

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<sup>94</sup> See, e.g., Jacob Alex Klerman & Caroline Danielson, *Why Did the Welfare Caseload Decline?* 2 (RAND, Working Paper No. WR-167, 2004) (“[O]ur simulations suggest only a moderate role for any specific reforms in explaining the large observed drop in the welfare caseload. We attribute about a fifth of the caseload decline to time limits and sanctions, about a quarter to the economy, and about a third to a residual policy bundle; the remainder of the decline is absorbed by unexplained time effects.”).

<sup>95</sup> Sanford F. Schram, *Race and State Welfare Reform Choices: A Cause for Concern*, in FROM POVERTY TO PUNISHMENT: HOW WELFARE REFORM PUNISHES THE POOR 97 (Gary Delgado ed., 2002).

<sup>96</sup> LADONNA PAVETTI ET AL., MATHEMATICA POLICY RESEARCH, INC., THE USE OF TANF WORK-ORIENTED SANCTIONS IN ILLINOIS, NEW JERSEY, AND SOUTH CAROLINA 2 (2004).

<sup>97</sup> *Id.*; see also State Policy Documentation Project, TANF Categorical Eligibility, [http://www.spdp.org/tanf/sanctions/sanctions\\_findings.htm](http://www.spdp.org/tanf/sanctions/sanctions_findings.htm) (last visited May 15, 2009). States may determine standards of “good cause” that will spare a household a sanction if an adult was not in compliance with the work requirements or other state requirements of the state welfare rules. *Id.* Good cause usually includes illness of the head of household, illness of a child in the family, or lack of transportation. *Id.* The Center for Law and Social Policy (CLASP) notes, however, that three states “do not have any type of process to resolve sanction disputes before they are imposed.” *Id.* This lack of procedural protection for welfare recipients appears to be a violation of *Goldberg v. Kelly*, 397 U.S. 254 (1970), which holds that individuals are entitled to notice and a right to a fair hearing before denial of governmental benefits.

<sup>98</sup> PAVETTI ET AL., *supra* note 96, at 2.

<sup>99</sup> LaDonna Pavetti, *Welfare Policy in Transition: Redefining the Social Contract for Poor Citizen Families with Children*, 21 FOCUS, Fall 2000, at 44.

<sup>100</sup> LADONNA PAVETTI ET AL., MATHEMATICA POLICY RESEARCH, INC., REVIEW OF SANCTION POLICIES AND RESEARCH STUDIES: FINAL LITERATURE REVIEW 3 (2003); JANICE

of a million families were subject to full-family sanctions from 1997 through 1999.<sup>101</sup> Schram has shown that those states that have instituted the punitive full-family sanctions are those with the largest populations of African Americans.<sup>102</sup> Other researchers examining TANF sanctions found that “limited education and being African American predict sanctioning when [one] control[s] for a wide range of other personal and demographic characteristics.”<sup>103</sup> In short, it appears the “carrot and stick” approach is overwhelmingly being used as a stick against some of the most marginalized and vulnerable populations—women of color and their children.

As troubling as the effects of sanctioning practices are, the sanctions raise other concerns. For example, a study conducted by Yeheskel Hasenfeld found that approximately half of the sanctioned adults surveyed did not know they had been sanctioned.<sup>104</sup> For these families, the welfare system may seem so complex, arbitrary, and mystifying that they cannot determine why their benefits are fluctuating. This suggests that rather than creating a set of incentives that will “make work pay,” the current welfare system is simply punishing people who cannot figure out how the system works.<sup>105</sup>

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PETERSON, INST. FOR WOMEN’S POLICY RESEARCH, REP. NO. IWPR-E511, FEMINIST PERSPECTIVES ON TANF REAUTHORIZATION: AN INTRODUCTION TO KEY ISSUES FOR THE FUTURE OF WELFARE REFORM 4 (2002); ISABEL V. SAWHILL ET AL., BROOKINGS INST., WELFARE REFORM: AN OVERVIEW OF EFFECTS TO DATE (2001), *available at* [http://www.brookings.edu/papers/2001/01poverty\\_haskins.aspx](http://www.brookings.edu/papers/2001/01poverty_haskins.aspx); Pamela Holcomb & Caroline Ratcliffe, *When Welfare Recipients Fail to Comply with Work Requirements: Indiana’s Experience with Partial Benefit Sanctions*, 24 J. APPLIED SOC. SCIENCES 1, 4 (2000).

A recent study of California’s TANF system found one-fifth of the adults were being sanctioned, and that the sanction rates doubled between 2000 and 2005. KLERMAN & BURSTAIN, *supra* note 93, at xvii-xviii.

<sup>101</sup> HEIDI GOLDBERG & LIZ SCHOTT, CTR. ON BUDGET & POLICY PRIORITIES, A COMPLIANCE-ORIENTED APPROACH TO SANCTIONS IN STATE AND COUNTY TANF PROGRAMS (2000).

<sup>102</sup> Schram, *supra* note 95, at 99 (finding that among various factors analyzed, “only race and ethnic composition [of a state] affect the probability of adopting a family cap policy”); see also Joe Soss et al., *The Hard Line and the Color Line: Race, Welfare, and the Roots of Get-Tough Reform*, in RACE AND THE POLITICS OF WELFARE REFORM 245 (Sanford F. Schram et al. eds., 2003) (finding that “adoption of family caps and strict time limits was unrelated to any factor other than the racial composition of the [welfare] rolls”).

<sup>103</sup> Ariel Kalil et al., *Sanctions and Material Hardship Under TANF*, 76 SOC. SERV. REV. 642, 655 (2002); see also PAVETTI ET AL., *supra* note 96, at 33-34 (finding African Americans are sanctioned at higher rates than other racial and ethnic groups).

<sup>104</sup> Yeheskel Hasenfeld et al., *The Logic of Sanctioning Welfare Recipients: An Empirical Assessment*, 78 SOC. SERV. REV. 304, 314 (2004).

<sup>105</sup> Sanctions are not only imposed for noncompliance with work requirements. States can establish other grounds for sanctioning as well. For example, women receiving welfare

## III. THE CRIMINALIZATION OF POVERTY TODAY

Welfare reform not only produced punitive policies, but also established a system that blurred the boundaries between the welfare system and the criminal justice system. Until the 1990s, the welfare system was relatively simple and self-contained. The rules of AFDC and Food Stamps were handed down by the federal government, and eligibility rules and violations of welfare rules were consistent from state to state. If families were found ineligible for aid, they were given notice and their benefits ended. If they were found cheating—for example, underreporting their income or failing to report a change of household composition—but were still income-eligible for aid, then the penalties were civil: their welfare benefits would typically be reduced by a certain percentage each month until any overpayments were recouped by the state.<sup>106</sup>

As a result of the reforms, the federal government and the states instituted policies and practices that burdened welfare receipt with criminality; policed the everyday lives of poor families; and wove the criminal justice system into the welfare system, often entangling poor families in the process. David Garland notes that the “themes that dominate crime policy—rational choice and the structures of control, deterrents, and disincentives, the normality of crime, the responsabilization of individuals, the threatening underclass, the failing, overly lenient system—have come to organize the politics of poverty as well.”<sup>107</sup> The welfare reform policies were designed to punish the poor; to stigmatize poverty, particularly

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in California may be sanctioned for failing to cooperate in the State’s efforts to establish a child’s paternity and to assign child support benefits to the State. CAL. WELF. & INST. CODE § 11477(b) (West 2001 & Supp. 2009). Exceptions to this requirement apply when establishing paternity poses risks of abuse to mother or child, or where a child was conceived through rape or incest. This exception, however, may not come to light until a mother has already refused to provide information and has been sanctioned.

Little to no qualitative research on the effects of sanctions on the daily lives of families who are sanctioned has been conducted. One might suppose, though, that these get-tough policies, intended to spur low-income women into the workforce, are making life more difficult for families who are already struggling.

<sup>106</sup> 42 U.S.C. § 602(a)(22) (1994) (repealed by Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7, 8, 21, 25, 42 U.S.C. (2006))) (requiring states to recoup welfare overpayments, whether or not the overpayment was the fault of the state or the individual welfare recipient).

<sup>107</sup> DAVID GARLAND, *THE CULTURE OF CONTROL* 196 (2001). Other scholars have begun tracing the ways that crime-control strategies have seeped into various realms of social life. John Gilliom, for example, traced the emergence of drug testing in the workplace and how it involved a process of “reclassifying largely criminal policies as administrative and colonizing the workplace as a site of surveillance and control.” JOHN GILLIOM, *SURVEILLANCE, PRIVACY, AND THE LAW: EMPLOYEE DRUG TESTING AND THE POLITICS OF SOCIAL CONTROL* 119 (1996).



poverty that leads to welfare receipt; and to create a system of deterrence aimed at the middle class.

A vast regulatory and punitive system developed under welfare reform. The welfare policies the states instituted after welfare devolution included a broad range of punitive approaches to the poor designed not only to punish poor adults who failed to transition from welfare to work, but also to punish entire families where the head of the household failed to live up to governing standards of morality.<sup>108</sup> The reforms not only ended aid to families as a federal entitlement, they allowed states to develop their own rules about who was entitled to aid and their own regulations and practices around removing families from the aid rolls. More importantly and less well-known, however, the reforms of 1996 produced a system that blurred the boundaries between the welfare system and the criminal justice system.

The welfare system is increasingly used by the government to police crimes, both those involving welfare and those unrelated to welfare. As the next Part illustrates, the welfare system is now being used to catch criminals, and restrictions on aid are being used to punish individuals who have been convicted of crimes.

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<sup>108</sup> The “family cap” policies—welfare rules prohibiting an increase in a poor family’s cash assistance when a new child is born into the family—highlight the ways welfare regulations affect issues of personal and family autonomy. The family cap rules were intended by lawmakers to influence women’s, especially poor women-of-color’s, decisions about birth control, abortion, childbearing, and family formation. The policies punish not only women who decide to bear children while on welfare, but also their entire families.

Federal welfare reform legislation gave states the option of instituting family cap policies that prohibit welfare offices from offering cash assistance to children born to families receiving welfare. JODIE LEVIN EPSTEIN, CTR. FOR LAW & SOC. POLICY, CHILDBEARING & REPRODUCTIVE HEALTH SERIES BRIEF NO. 1, LIFTING THE LID OFF THE FAMILY CAP: STATES REVISIT PROBLEMATIC POLICY FOR WELFARE MOTHERS 1 (2003) (describing the federal and state policies). Twenty-one states have adopted the family cap; two others—Idaho and Wisconsin—have instituted flat grants for families of any size. Schram, *supra* note 95, at 95. The effects of the family cap are significant. According to the U.S. General Accounting Office, in an average month in the year 2000, approximately 108,000 families were receiving less cash assistance than they would have received without the punitive family cap policies. U.S. GEN. ACCOUNTING OFFICE, GAO-01-924, WELFARE REFORM: MORE RESEARCH NEEDED ON TANF FAMILY CAPS AND OTHER POLICIES FOR REDUCING OUT-OF-WEDLOCK BIRTHS 2 (2001). The family cap rules may also be increasing the number of abortions among low-income women of color. A study of women affected by New Jersey’s family cap found that the abortion rate rose among welfare recipients subject to the rule—but only among African-American welfare recipients. Radha Jagannathan & Michael J. Camasso, *Family Cap and Nonmarital Fertility: The Racial Conditioning of Policy Effects*, 65 J. MARRIAGE & FAM. 52, 62 (2003).

## A. THE WELFARE SYSTEM AS A TOOL OF LAW ENFORCEMENT

The fugitive felon prohibitions, Operation Talon, and the drug felony lifetime ban have little to do with aid to the poor. These rules and programs are essentially new ways for the criminal justice system to make use of welfare administrative data to capture poor individuals who are also wanted by the criminal justice system. Through changes in statutes and practices, then, the welfare system has become an extension of the criminal justice system.

### *1. Fugitive Felon Prohibitions*

The federal welfare legislation of 1996 included a provision that prohibited any individual who is wanted by law enforcement officials for a felony warrant or for violating the terms of parole or probation from receiving government benefits, including not only TANF benefits, but also food stamps, SSI, and housing assistance.<sup>109</sup> The fugitive felon provisions allow the criminal justice system to side-step privacy protections that apply to government and financial information belonging to citizens who are not receiving welfare.

According to a 2002 report by the then-General Accounting Office (GAO) (now the Government Accountability Office), “about 110,000 beneficiaries [were] identified as fugitive felons and dropped from the SSI, Food Stamp, and TANF rolls.”<sup>110</sup> While government officials claim that fugitive felon rules remove dangerous criminals from the streets,<sup>111</sup> it is not clear that dangerous criminals are those who are ensnared by the effort. According to the GAO report, more than one quarter of the SSI recipients excluded from aid under the rule were dropped because of parole or probation violations; in more than 37.4% of the cases, the offense on the warrant was not indicated in the data.<sup>112</sup> Not all parole or probation violations, however, are direct threats to public safety. An individual may have a warrant issued for arrest for parole or probation offenses that, while

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<sup>109</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, Title II, § 202, 110 Stat. 2105, 2185-86 (codified as amended at 42 U.S.C. § 1382 (2006)) (relating to SSI benefits); *id.* at Title VIII, § 821, 110 Stat. at 2321 (codified as amended at 7 U.S.C. § 2015 (2006)) (relating to food stamps); *id.* at Title IX, § 903, 110 Stat. at 2348-49 (codified as amended at 42 U.S.C. § 1437 (2006)) (relating to public housing).

<sup>110</sup> U.S. GEN. ACCOUNTING OFFICE, GAO-02-716, WELFARE REFORM: IMPLEMENTATION OF FUGITIVE FELON PROVISIONS SHOULD BE STRENGTHENED 3 (2002).

<sup>111</sup> Press Release, Nancy Bartel, U.S. Dep’t of Agric., Operation Talon Sting Nabs Hundreds of Fugitive Felons in Portland Area (Feb. 9, 2000), *available at* <http://www.usda.gov/oig/webdocs/oig45.htm>.

<sup>112</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 110, at 39.

they may be violations of parole, are not criminal acts. For example, an individual may have a warrant issued for missing a meeting with a parole or probation officer, missing a substance abuse meeting, or being determined to be psychologically unstable.

Thus, it is not clear whether this rule is reining in threatening criminals and keeping public housing safe, or instead merely reducing the government's costs for providing aid to individuals with outstanding warrants. Excluding felons—even those who have served their sentences—from the full benefits available to citizens without felony convictions certainly draws upon precedents under some state laws. A number of states exclude convicted felons, including those who have completed their sentences, from voting.<sup>113</sup> However, the drug felony exclusion and the fugitive felon rules extend beyond political disfranchisement to encompass deprivations of economic citizenship. While withdrawing the right to vote may have little impact on an individual's daily life, economic disfranchisement can substantially and detrimentally affect not only daily life, but also physical well-being.

In short, the fugitive felon provisions raise several concerns: first, the denial of benefits to needy adults and their children; second, the suspension of procedural rights within the welfare system for individuals who have been involved in the criminal justice system; and third, the denial of economic citizenship.

## 2. Operation Talon

The federal welfare legislation also loosened the confidentiality that once protected poor families' personal and financial information.<sup>114</sup> Before 1996, law enforcement officers could only access welfare records through

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<sup>113</sup> JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISFRANCHISEMENT AND AMERICAN DEMOCRACY* 74 (2006).

<sup>114</sup> The use of Social Security numbers and privacy concerns over their use were a big concern during the 1970s. See, e.g., Marjorie Hunter, *Social Security Number at Birth Urged to Curb Welfare Abuses*, N.Y. TIMES, Mar. 21, 1972, at 24 (discussing heated debates over use of Social Security numbers in the welfare system). Many civil libertarians opposed the requirement of Social Security numbers for welfare benefits and opposed exchanges of information between government agencies. *Id.* In 1974 Congress passed the Privacy Act, which stated that states and localities could not withhold benefits from individuals who refused to provide Social Security numbers. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (2006)). The following year, Congress passed an amendment to the Act requiring disclosure of a Social Security number as a condition of AFDC eligibility. Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (codified as amended in scattered sections of 42 U.S.C. (2006)). The next year, Congress authorized states to use Social Security numbers as a requirement of eligibility in any public assistance program. Tax Reform Act of 1976, Pub. L. No. 94-455, Title XII, § 1211, 90 Stat. 1520 (codified as amended at 42 U.S.C § 405 (2006)).

legal process, but now welfare records are available to law enforcement officers simply upon request—without probable cause, suspicion, or judicial process of any kind.<sup>115</sup> The scope of an individual's rights to financial privacy under the U.S. Constitution is narrow,<sup>116</sup> but California protects individuals who are affluent enough to have bank accounts from state actors conducting fishing expeditions in their financial records.<sup>117</sup> Under the federal regulations, both welfare offices and public housing agencies are required to "furnish any Federal, State, or local law enforcement officer, upon the request of the officer, with the current address, Social Security number, and photograph of any recipient of assistance."<sup>118</sup> This exchange of information is not merely available to law enforcement officials when the welfare recipient herself is suspected of violating the law, but rather more generally when an officer believes the aid recipient, or anyone in her household, "has information that is necessary for the officer to conduct an official duty."<sup>119</sup>

The information exchange between welfare offices and law enforcement, however, has expanded beyond mere investigatory use. Under a program titled "Operation Talon," food stamp offices are used as

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<sup>115</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, Title I, § 408(9)(B), 110 Stat. 2105, 2140 (codified as amended at 42 U.S.C. § 608 (2006)) (legislating that prior state safeguards on disclosure of personal information "shall not prevent the State agency administering the program from furnishing a Federal, State, or local law enforcement officer, upon the request of the officer, with the current address of any recipient if the officer furnishes the agency with the name of the recipient").

<sup>116</sup> The U.S. Supreme Court has held that individuals have no legitimate expectation of privacy to financial information they disclose to banks through the regular course of business and therefore no Fourth Amendment claims when a bank is subpoenaed. *United States v. Miller*, 425 U.S. 435, 442-44 (1976). A recent federal district court case, however, noted that while searches conducted under legal process are protected, individuals have standing to challenge searches of financial records as unlawful where the searches are conducted either without legal process or outside the scope of a subpoena that has been issued. *Walker v. S.W.I.F.T. SCRL*, 491 F. Supp. 2d 781, 790 (N.D. Ill. 2007).

<sup>117</sup> *Burrows v. Superior Court*, 529 P.2d 590, 595-95 (Cal. 1974) (holding that "bank statements or copies thereof obtained by [investigators] without the benefit of legal process were acquired as the result of an illegal search and seizure"). Congress has offered some privacy protections to customers of banking institutions through the Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, Title XI, 92 Stat. 3641, 3693 (codified as amended at 12 U.S.C. §§ 3401-22 (2006)).

<sup>118</sup> 7 U.S.C. § 2020(e)(8)(D) (2006); 42 U.S.C. § 1437z (2006).

<sup>119</sup> 7 U.S.C. § 2020(e)(8)(D)(i)(II). Individuals who receive Social Security benefits possess greater privacy rights over their information. Under the Omnibus Budget Reconciliation Act of 1990, an individual receiving Social Security benefits cannot be subject to any adverse action as a result of data matching without both verification of the information and prior notice to the individual. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, Title VII, § 7201, 104 Stat. 1388 (codified as amended at 5 U.S.C. § 552a (2006)).

the sites of sting operations for arresting individuals with outstanding warrants.<sup>120</sup> People with warrants who receive food stamps typically receive a call telling them to report to a welfare office at a designated time to resolve a problem with their benefits or receive some kind of bonus.<sup>121</sup> When they show up, an officer from the sheriff's department is waiting to do the arrest. Thousands of low-income citizens have been rounded up under the program.

Operation Talon was a program developed under the Office of Inspector General to expedite enforcement of the fugitive felon rule.<sup>122</sup> Then-Vice President Al Gore served as spokesperson for the program.<sup>123</sup> As a result of the 1996 federal rule changes, law enforcement officers now actively use the food stamp records of local social service agencies to locate and apprehend individuals with outstanding arrest warrants.<sup>124</sup> Operation Talon transformed food stamp offices into the sites of sting operations for arresting aid recipients with outstanding arrest warrants and facilitated use of welfare administrative data to capture low-income individuals who are wanted by the criminal justice system. Through this program the welfare system has become an extension of the criminal justice system, transforming the welfare system into a trap for hungry lawbreakers.

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<sup>120</sup> OFFICE OF INSPECTOR GEN., DEP'T OF AGRIC., OPERATION TALON: OCTOBER 2000 UPDATE 6 (2000); OFFICE OF INSPECTOR GEN., DEP'T OF AGRIC., OPERATION TALON (1998).

<sup>121</sup> *Food Stamp Bust Nets 205 Suspects*, COLUMBIAN, Feb. 12, 2000, at B6 (describing a sting where individuals were "[I]ured by promises of cash bonuses and transportation reimbursement"); Kristan Trugman, *Fake Gambling Trip Helps Cops Snare Maryland, D.C. Fugitives*, WASH. TIMES, Feb. 9, 2000, at C1 (describing how, after food stamp recipients with outstanding warrants were identified through computer checks, they "were encouraged to sign up early for a free bus junket to Atlantic City for a day of gambling, offers of a \$50 stake and a free gym bag").

<sup>122</sup> The Inspector General for the Department of Agriculture stated Operation Talon was initiated "to locate and apprehend fugitives who were illegally receiving food stamp benefits, thereby ensuring that program benefits go to those who are truly in need." *Review the Operations of the Food Stamp Program: Hearing Before the Subcomm. on Department Operations, Oversight, Nutrition, and Forestry of the H. Comm. on Agriculture*, 108th Cong. 20 (2003) (statement of Phyllis K. Kong, Inspector General, United States Department of Agriculture).

<sup>123</sup> Press Release, U.S. Dep't of Agric., Gore Announces Arrest of 2,199 Fugitives in Nationwide Sting (Dec. 18, 1997), available at <http://www.usda.gov/news/releases/1997/12/0447>.

<sup>124</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, Title I, § 408(9)(B), 110 Stat. 2105, 2140 (codified as amended at 42 U.S.C. § 608 (2006)) (legislating that prior state safeguards on disclosure of personal information "shall not prevent the State agency administering the program from furnishing a Federal, State, or local law enforcement officer, upon the request of the officer, with the current address of any recipient if the officer furnishes the agency with the name of the recipient").

Between early 1997 and September 2006, Operation Talon led to the arrest of 10,980 individuals across the country.<sup>125</sup> While the Inspector General's Year 2000 Update on Operation Talon indicates that some individuals arrested under the program faced charges for violent or serious crimes, many others did not. For example, 31% were for offenses known as "Group B offenses," such as writing bad checks, which are considered less serious. Many of the Group A arrests were for non-violent offenses: 11% were for fraud charges and 10% were for larceny/theft offenses, categories which may include welfare fraud; 23% were for drug-related crimes.<sup>126</sup>

Various states seem to have targeted different types of felony offenders under the program. For example, while two-thirds of the individuals caught in the Illinois program instituted under Operation Talon had outstanding warrants on drug-related charges, more than three-fourths of the California offenders had fraud warrants (which include but are not limited to welfare fraud charges).<sup>127</sup> Thus, it is not clear whether this program is protecting public safety by reining in violent criminals or simply providing law enforcement officers a new tool in carrying out arrests.

Government costs—and any cost savings—associated with administering the program are unclear. In testimony before the U.S. House of Representatives Committee on the Budget, Inspector General Phyllis Fong stated that: "It is difficult . . . for most States to determine costs savings because even though fugitives are removed from the food stamp eligibility roles, they may be only one member in an entire household that continues to be eligible."<sup>128</sup> Researchers have yet to explore the effects of this program on the families who receive food stamps and other benefits. The big value for the federal government and for localities seems to rest in the numerous press releases celebrating the number of arrests made through use of Operation Talon.

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<sup>125</sup> *A Closer Look: Inspectors General Address Waste, Fraud, and Abuse in Federal Mandatory Programs: Hearing Before the H. Comm. on the Budget*, 108th Cong. 66, 1st Session (2003) [hereinafter *Hearing on Waste, Fraud, and Abuse*] (statement of Phyllis K. Fong, Inspector General., U.S. Department of Agriculture); OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., REPORT NO. 56, OFFICE OF INSPECTOR GENERAL SEMIANNUAL REPORT TO CONGRESS: FY 2006—2ND HALF 22 (2006).

<sup>126</sup> *Formulation of the 2002 Farm Bill: Hearings Before the H. Comm. of Agriculture and Its Subcomm.*, 107th Cong. 643-57 (2001) (statement of Roger C. Viadero, Inspector General, U.S. Department of Agriculture); OFFICE OF THE INSPECTOR GEN., OPERATION TALON: OCTOBER 2000 UPDATE, *supra* note 120, at 6.

<sup>127</sup> OFFICE OF THE INSPECTOR GEN., OPERATION TALON: OCTOBER 2000 UPDATE, *supra* note 120, at 6.

<sup>128</sup> *Hearing on Waste, Fraud, and Abuse*, *supra* note 125, at 66 (statement of Phyllis K. Fong, Inspector Gen., U.S. Department of Agriculture).

### 3. The Drug Felony Lifetime Ban

The federal welfare legislation encourages states to adopt rules excluding adults with drug felony convictions from receiving aid. As of December 2001, forty-two states had adopted the drug felony ban either in part or in full.<sup>129</sup> By 2005, the number of states that adopted the drug felony ban had dropped to thirty-two.<sup>130</sup> The states themselves chose the criteria they use to determine whether an individual is ineligible for government aid based on a past drug conviction. These criteria vary dramatically.

In fifteen states, all drug related charges—from possession of small quantities to major trafficking—disqualify an individual from welfare receipt for life.<sup>131</sup> Poor adults in these states may receive neither cash aid nor food stamps. The other states that exclude convicted drug felons from public assistance have modified their exclusions in various ways. For example, some of the states disqualify individuals convicted of manufacturing or distributing drugs, but allow those who have been convicted of using drugs to remain on aid.<sup>132</sup> Some states allow parents who are participating in or who have completed drug treatment programs to re-qualify for aid.<sup>133</sup> In some states adults are ineligible for aid for the first twelve months after incarceration, but are eligible thereafter.<sup>134</sup> Only fifteen states bar those convicted of drug offenses from receiving food stamps for life.<sup>135</sup>

As well as anyone has been able to measure, approximately 92,000 adults had been removed from the welfare rolls because of their felony drug convictions between 1997 and 2002.<sup>136</sup> According to data analysis by

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<sup>129</sup> PATRICIA ALLARD, THE SENTENCING PROJECT, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 1 (2002).

<sup>130</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-238, DRUG OFFENDERS: VARIOUS FACTORS MAY LIMIT THE IMPACTS OF FEDERAL LAWS THAT PROVIDE FOR DENIAL OF SELECTED BENEFITS 17 (2005).

<sup>131</sup> *Id.* at 33-34 tbl.5.

<sup>132</sup> ALLARD, *supra* note 129, at 2.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 130, at 20. Fourteen states exempt all individuals convicted of drug felonies from food stamp bans, while twenty-one states allow only some individuals with drug convictions to receive food stamps. *Id.* Food stamps are federally funded, and the benefits flow not only to low-income individuals, but also to the businesses that accept them and to local food producers. Food stamps are also viewed as a benefit that cannot be easily used for illicit purposes, unlike cash benefits.

<sup>136</sup> ALLARD, *supra* note 129, at 4. The Government Accountability Office points out that measuring the full effect of the drug felony exclusion is virtually impossible, since states do not report the number of parents they find ineligible for welfare due to drug convictions because there is no way to accurately determine the number of individuals who might be low-income heads of households and because there is no way to determine how this rule

Patricia Allard at the Sentencing Project, California disqualified 37,825 adults from welfare receipt under the felony drug exclusion between 1996 and 1999.<sup>137</sup> (Thus, as the numbers above show, California accounted for more than one-third of the families excluded under the felony drug exclusion nationwide.) California modified its food stamp ban in 2004,<sup>138</sup> but maintained its ban on TANF benefits.

While California's TANF program was supposed to make substance abuse treatment available to individuals who needed it in order to become work-ready, it is unlikely that mothers with substance abuse problems who know about the felony drug exclusion would reveal this to their caseworkers given the penalties. Rather than deterring welfare recipients from drug use, these rules—assuming they are known and understood by welfare recipients—may have the counter-effect of discouraging mothers with drug problems from inquiring about or seeking out help with their problems.

It could be argued persuasively that the drug felony ban is unfair—that it punishes not only parents, but also their children.<sup>139</sup> It is also a harsh punishment for first-time petty drug offenders.<sup>140</sup> Furthermore, as others have noted, it is arbitrary to target drug offenders when individuals convicted of other crimes, such as homicide and rape, can receive benefits after serving their sentences.<sup>141</sup>

Given the limited knowledge of the elements of welfare reform among welfare recipients,<sup>142</sup> most recipients are likely unaware of the felony drug exclusion. This lack of knowledge and the diversity of rules nationwide make it difficult for the felony drug exclusion to serve as a clear, unwavering deterrent to drug use. In some states the rules are so complex that it is unlikely any welfare recipient knows or fully understands them unless or until she finds herself subject to them.

The drug felony lifetime ban again makes the welfare system an instrument of the criminal justice system. Here, again, the policies push

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affects household composition. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 130, app.II.

<sup>137</sup> ALLARD, *supra* note 129, at 5.

<sup>138</sup> CAL. WELF. & INST. CODE § 18901.3 (West Supp. 2009).

<sup>139</sup> Peter Schrag, Op-Ed., *Food Stamps Become a Weapon in the War on Drugs*, CONTRA COSTA TIMES, June 3, 2001, at 03.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See generally Kaaryn Solveig Gustafson, *The Morality and Rationality of Welfare* (Spring 2004) (unpublished Ph.D. dissertation, University of California–Berkeley) (on file with Proquest).



those who are already economically marginalized to the periphery of society.

## B. CONFLATING POVERTY AND CRIME

### *1. Biometric Imaging and Data Sharing Between the Welfare and Criminal Justice Systems*

To prevent fraud, welfare administrators collect vast amounts of information about welfare recipients and their families.<sup>143</sup> Those who want to receive welfare have to fill out extensive paperwork at the time of their initial application and again every twelve months for their annual renewal of aid. In addition, they have to submit monthly and quarterly forms describing any changes in their income or household circumstances. Problems with paperwork routinely tie up assistance payments for recipients.<sup>144</sup>

In the late 1990s some federal studies began to examine welfare cheating and welfare overpayments. Studies found that there were some individuals receiving food stamp benefits in more than one state and that it was possible some individuals might be collecting cash aid in multiple states.<sup>145</sup> There were also reports that government benefits were flowing to men and women who were incarcerated.<sup>146</sup>

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<sup>143</sup> 45 C.F.R. § 205.51 (2008) (recording federal regulation requiring states to collect particular types of personal information and to establish an electronic Income Eligibility and Verification System).

<sup>144</sup> Of the 24,970 welfare grants discontinued in December 2008 to one- and two-parent households, 10,898 (or 45%) were discontinued because the recipients failed to complete or return paperwork (known as CW7 and QR 7 forms). CAL. DEP'T OF SOC. SERV., CALIFORNIA WORK OPPORTUNITY AND RESPONSIBILITY TO KIDS (CALWORKS) REPORT ON REASONS FOR DISCONTINUANCES OF CASH GRANT 1 (2009), available at <http://www.dss.cahwnet.gov/research/res/pdf/CA%20253/2008/CA253Dec08.pdf> (calculations drawn from columns A and C).

<sup>145</sup> See U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-98-228, FOOD STAMP OVERPAYMENTS: HOUSEHOLDS IN DIFFERENT STATES COLLECT BENEFITS FOR THE SAME INDIVIDUALS (1998) (studying duplicate food stamp participation data across states and finding potentially 20,000 duplicate Social Security numbers); OFFICE OF STATE SYSTEMS, DEP'T OF HEALTH & HUMAN SERV., REPORT TO CONGRESS ON DATA PROCESSING AND CASE TRACKING IN THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) PROGRAM (1997) (reporting that no federal agency tracks duplicate TANF cases across state lines).

<sup>146</sup> See U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-97-54, FOOD STAMPS: SUBSTANTIAL OVERPAYMENTS RESULT FROM PRISONERS COUNTED AS HOUSEHOLD MEMBERS (1997) (finding that government agencies, inadequately verifying household composition, were issuing benefits to incarcerated individuals, and recommending computer cross-checks between welfare agencies and the criminal justice system); see also Josh Meyer, *Prisoners Get Food Stamps*, U.S. Study Finds, L.A. TIMES, Mar. 11, 1997, at B1.

The 1996 federal welfare reform legislation required states to institute fraud prevention programs.<sup>147</sup> The legislation did not, however, specify what the fraud prevention programs should look like. The three most populous states—California, New York, and Texas—as well as some other states instituted biometric imaging, in most cases fingerprint imaging programs, as part of their welfare fraud control measures. These biometric data collection requirements have been applied, depending on the state, to recipients of food stamps, TANF grants, and General Assistance grants (available to indigent adults without children). Individuals who apply for cash aid or food stamps in these states are required to submit fingerprints—and sometimes photographs—through an electronic imaging system. New fingerprints are cross-checked with those on record to identify cases where a person might have tried to apply for aid in two different welfare offices. The stated goals of these programs are to deter and catch individuals who might attempt to “double-dip” by using aliases to open welfare cases.

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**Table 1**

*State welfare programs that require the collection of biometric data from welfare recipients<sup>1</sup>*

	TANF	Food Stamps
Arizona	X	X
California	X	X
Connecticut	X	-
Illinois	X	-
Massachusetts	-	X
New York	X	X
Pennsylvania	X	X
Texas	X	X

Notes:

1. Information gathered from WILLIAM S. BORDEN & ROBBIE L. RUBEN-URM, U.S. DEP'T OF AGRIC., REPORT NO. FSP-02-CM, AN ASSESSMENT OF COMPUTER MATCHING IN THE FOOD STAMP PROGRAM: VOLUME 1—SUMMARY OF SURVEY RESULTS (2002). University of Connecticut Law Professor Todd Fernow pointed out to me the irony of Connecticut's finger printing program for welfare recipients, where state statute recognizes criminal mugshots and fingerprinting to be invasions of privacy and provides individuals a right to have records erased from criminal justice system databases when individuals are found not guilty or where the cases are dismissed, whether outright or through nolle prosequi. CONN. GEN. STAT. § 29-15(a) (West 2003 & Supp. 2008).

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<sup>147</sup> 42 U.S.C. § 602(a)(6) (2006).

While there were several well-publicized California and Illinois cases of double-dipping welfare fraud between 1975 and 1983, discussed in Part II, *infra*, in all of those cases the welfare recipients had first signed up for aid before applicants were required to submit Social Security numbers and before extensive computer verification systems existed. With computerization in place, individuals would have great difficulty opening multiple cases: even if they used fake Social Security numbers, computer checks on the numbers would be likely to reveal earnings or assets associated with those numbers. The fingerprint imaging systems, then, are largely superfluous to existing efforts to reduce fraud.<sup>148</sup> But fingerprint imaging serves another purpose: the collection of biometric data scrutinizes and stigmatizes low-income adults in a way that equates poverty with criminality.

In states with biometric imaging, applying for welfare mirrors the experience of being booked for a crime: after being interrogated about family and finances, individuals are photographed and fingerprinted. The fingerprint images are entered into statewide computer systems and then used to check for duplicate applications. Few duplicates—indicating one person submitting more than one welfare application—are found. In California, for example, the state identifies only three matches per month and typically refers only one of these cases per month for more extensive fraud investigation or prosecution.<sup>149</sup> A report by the California State Auditor in 2003 berated the Legislature for the fingerprint imaging system, stating it was impossible “to determine whether SFIS [State Fingerprint Imaging System] generates enough savings to cover the estimated \$31 million the State has paid for SFIS or the estimated \$11.4 million the State will pay each year to operate it.”<sup>150</sup>

Policymakers claim that the real motive behind fingerprint imaging is deterring, not merely catching, acts of fraud. There is, however, evidence that procedures deter not only fraudulent applications, but also legitimate

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<sup>148</sup> Even before California instituted the first fingerprint imaging program, legislative analysts and state consultants noted that adequate fraud control measures were in place and that fingerprint imaging would be unlikely to identify a significant number of fraud cases. Rivera, *supra* note 77.

<sup>149</sup> CAL. STATE AUDITOR, BUREAU OF STATE AUDITS, REPORT NO. 2001-015, STATEWIDE FINGERPRINT IMAGING SYSTEM (2003).

<sup>150</sup> *Id.* at iii. The report added:

The Legislature should consider the pros and cons of repealing state law requiring fingerprint imaging, including whether SFIS is consistent with the State’s community outreach and education campaign efforts for the Food Stamp program. To assist the Legislature in its consideration of the pros and cons of repealing state law requiring fingerprint imaging, Social Services and the data center should report on the full costs associated with discontinuing SFIS.

*Id.* at 8.

applications by needy families, particularly eligible immigrant families.<sup>151</sup> The fingerprint imaging requirements create another hurdle that poor adults must clear in what is an otherwise demanding application process. In some counties in California, fingerprint imaging is done only on certain days, sometimes requiring aid applicants to make an additional trip to the welfare department and delaying the time between initial application and first day of aid receipt.<sup>152</sup> Individuals who apply for welfare but who choose not to follow through with the applications by providing their finger images may do so as an act of resistance to government authority, but may unwittingly be opening themselves up to additional government scrutiny.<sup>153</sup>

While lawmakers and the public seem unwilling to devote tax dollars to providing cash benefits to the poor, there seems to be great willingness to spend money to police the poor—even when doing so appears economically inefficient or ineffective. Separate audits of the fingerprint imaging systems in New York,<sup>154</sup> Texas,<sup>155</sup> and California<sup>156</sup> determined that the

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<sup>151</sup> SERVS., IMMIGRANT RIGHTS & EDUC. NETWORK, IMMIGRANT FAMILY ACCESS TO FOOD STAMPS IN SANTA CLARA COUNTY (2000). The Asian Pacific American Legal Center (APALC) conducted a survey of community-based organizations to determine why, despite such high poverty rates among Asian and Pacific Islander communities, food stamps were being underutilized by eligible members of those communities. The report listed fear of the state fingerprint imaging system as one of the top four barriers to food stamp use among the eligible poor. ASIAN PACIFIC AM. LEGAL CTR., BARRIERS TO FOOD STAMPS (2000).

<sup>152</sup> Several years ago, while recruiting interviewees outside a Northern California welfare office for a research project, I routinely met welfare applicants who were showing up for their second or third fingerprint imaging appointments because the machine had been broken on previous visits to the welfare office.

<sup>153</sup> A California welfare applicant challenged the state's fingerprinting requirement after she refused to be fingerprinted and her entire household was subsequently denied welfare benefits. *Sheyko v. Saenz*, 5 Cal. Rptr. 3d 350 (Cal. Ct. App. 2003). The plaintiff argued that being fingerprinted and photographed was "an invasion of privacy and personal dignity" and that fingerprinting was a violation of her religious freedom because the imaging left "a mark of the devil and stains the soul with sin." *Id.* at 688. The claimant also argued that fingerprinting deterred needy families from aid and resulted in a net loss of tax dollars. The California appellate court that heard the case, however, noted that the U.S. Department of Agriculture produced a document stating that fingerprint imaging might prevent fraud and that the judiciary was "not in the best position to craft efficient relief laws." *Id.* at 688. The appellate court upheld the lower court's decision that welfare applicants could be deemed ineligible for aid for failure to be fingerprinted and photographed. *Id.* at 701.

<sup>154</sup> *Hearing on SB 1, General Appropriations Act for 2008-09 Before the H. Appropriations Subcomm. on Health and Human Serv.*, 80th Leg. (Tex. 2007) [hereinafter *Tex. Hearing*] (statement of Celia Hagert, Senior Policy Analyst, Center for Public Policy Priorities).

<sup>155</sup> *Id.*; DEANNA T. SCHEXNAYDER ET AL., CTR. FOR THE STUDY OF HUMAN RES., LONE STAR IMAGE SYSTEM EVALUATION: FINAL REPORT (1997). Texas began fingerprint imaging on a pilot basis in 1996 and implemented statewide in August 1999. *Tex. Hearing, supra* note 154 (statement of Celia Hagert, Senior Policy Analyst, Center for Public Policy Priorities). By the end of 2000, fingerprint imaging had cost the state \$15.9 million dollars.

systems were costly, caught few (if any) cheats, and served as both a hurdle and a deterrent to poor families in need of aid. In each case, less than one-half of 1% of the new and recertified cases triggered a match—0.44% in Texas.<sup>157</sup> By instituting these programs, states signaled that crime control—specifically preventing the receipt of excess government benefits—takes priority over relieving poverty, relieving food insecurity, and containing state administrative costs.

The fingerprinting programs, which contribute to the stigma of receiving government aid, may also deter needy families from applying.<sup>158</sup> It is generally true that only a fraction of those families eligible for food stamps receive them.<sup>159</sup> Still, most of the states with fingerprint imaging requirements in 2006 had fewer eligible families receiving food stamps than the national average.<sup>160</sup> Nationwide, in 2006, 67% of those individuals eligible for food stamps participated in the food stamp program.<sup>161</sup> The only states that employed fingerprint imaging and had a higher-than-average food stamp participation rate were Illinois, with a participation rate of 79%, and Pennsylvania, with a participation rate of 75%. The other five states that that required fingerprinting for food stamp participation had participation rates between 50% (in California) and 65% (Connecticut).<sup>162</sup>

As the following Part illustrates, fingerprinting is by no means the most invasive proposal for regulating welfare recipients.

## 2. Drug Testing

The welfare system is moving beyond efforts to punish drug use when it comes to the attention of law enforcement officers. Some states are becoming invasive in their search for drug-use among the welfare poor, and

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*Id.* While the Texas Department of Human Services claimed that fingerprint imaging was cost-effective, that claim was based on the decline in food stamp cases. *Id.* Between 1996 and the end of 2000, fingerprint imaging had “resulted in only nine charges filed by the DA, 10 administrative penalty cases, and 12 determinations of no fraud.” *Id.*

<sup>156</sup> CAL. STATE AUDITOR, *supra* note 149.

<sup>157</sup> *Tex. Hearing, supra* note 154 (statement of Celia Hagert, Senior Policy Analyst, Center for Public Policy Priorities).

<sup>158</sup> SUSAN BARTLETT ET AL., FOOD ASSISTANCE & NUTRITION RESEARCH PROGRAM, REPORT NO. E-FAN-03-013-3, FOOD STAMP PROGRAM ACCESS STUDY: FINAL REPORT 8-10 (2004) (finding applicants who applied for benefits in offices that required fingerprinting were 23% less likely to complete the application process than those who went to offices that did not require fingerprinting).

<sup>159</sup> KAREN E. CUNNYNGHAM ET AL., MATHEMATICA POLICY RESEARCH, INC., REACHING THOSE IN NEED: STATE FOOD STAMP PARTICIPATION RATES IN 2006, 5 (2008).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

penalties against drug-users do not apply only to those actually convicted of drug-related offenses. Michigan, for example, instituted “a pilot program of substance abuse testing as a condition for family independence assistance eligibility in at least [three] counties, including random substance abuse testing.”<sup>163</sup> Under the plan, all adults who applied for welfare were to be tested as part of the application process. In addition, every six months 20% of the recipients would be randomly tested. According to the Family Independence Program’s Eligibility Manual:

[A]pplicants who refuse to take the drug test without good cause and applicants who fail to complete the assessment process or do not comply with a required treatment plan within two months will be refused benefits. Aid recipients who refuse to submit to the random drug testing will lose a percentage of their benefits each month; after four months of failure to cooperate in the testing, such recipients will have all benefits withheld.<sup>164</sup>

The drug testing pilot program was challenged even before it was implemented. A federal district court in Michigan preliminarily enjoined implementation of the pilot program in 1999 as constituting an illegal search, a violation of Fourth Amendment rights, because the testing was done even where there was no “particularized suspicion” of illicit behavior.<sup>165</sup> Between 1999 and 2002, however, the Supreme Court issued a ruling allowing suspicionless drug testing in public schools and broadening the category of “special needs” that might justify suspicionless searches.<sup>166</sup>

In 2002, the Sixth Circuit lifted the district court’s injunction, allowing Michigan to proceed with its drug testing program.<sup>167</sup> The Sixth Circuit extended the definition of a “special need” justifying suspicionless searches by grouping a number of social concerns into a special need among welfare recipients.<sup>168</sup> These concerns included “the safety of the children of families” receiving aid, “the risk to the public from the crime associated with illicit drug use and trafficking,” and the need to insure that cash is “used by the recipients for their intended purposes and not for procuring controlled substances.”<sup>169</sup> The Sixth Circuit decision declared that the drug testing did not intrude into welfare recipients’ privacy interests because “it is clear that the plaintiffs have a somewhat diminished expectation of

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<sup>163</sup> MICH. COMP. LAWS ANN. § 400.571(2) (West 2008).

<sup>164</sup> *Id.*

<sup>165</sup> *Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000).

<sup>166</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (allowing suspicionless drug testing of high school students who participate in competitive extracurricular activities).

<sup>167</sup> *Marchwinski v. Howard*, 309 F.3d 330 (6th Cir. 2002).

<sup>168</sup> *Id.* at 335-36.

<sup>169</sup> *Id.* at 336.

privacy . . . . [W]elfare assistance is a very heavily regulated area of public life with a correspondingly diminished expectation of privacy.”<sup>170</sup>

Indeed, welfare recipients have had very little privacy under U.S. welfare policies. Still, using these past government refusals to recognize the privacy rights of welfare recipients as justifications for further invasions placed the argument on a shaky legal foundation. The Sixth Circuit opinion stood in stark contrast to the welfare rights cases from the early 1970s, which suggested that the poor do not lose their fundamental rights even when their “brutal need” leads them to seek government aid.<sup>171</sup> Judge Batchelder’s majority opinion in *Marchwinski* made clear that the government’s desire to “get tough on drugs” outweighs both the needs of the poor, who will be dissuaded from seeking aid merely by the humiliation of the experience, and their privacy rights, as they lack the full rights-protections of other citizens.

When the *Marchwinski* case was reheard en banc, the panel of the Sixth Circuit Court judges evenly split on the decision.<sup>172</sup> By default, the original injunction granted by the federal district court was reinstated. Michigan’s drug testing program was enjoined.<sup>173</sup> The possibility exists, however, that other states may attempt to develop such programs.

The drug testing of welfare recipients particularly highlights the conflation of poverty and crime and the widespread assumption that poor women of color are the causes of crime. There is some dispute as to whether welfare recipients have higher drug use and dependence than the population at large.<sup>174</sup> Drug use among welfare recipients appears to be higher than drug use in the general population, but drug dependence, which

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<sup>170</sup> *Id.* at 337.

<sup>171</sup> *E.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970) (upholding procedural due process rights for welfare recipients); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (upholding the right of welfare recipients to travel).

<sup>172</sup> *Marchwinski v. Howard*, 60 Fed. App’x. 601 (6th Cir. 2003). While no state currently has a program of random testing for all welfare recipients, in the years since the welfare reforms of 1996, eleven states other than Michigan—Florida, Illinois, Indiana, Louisiana, Maryland, Nevada, New Jersey, New York, North Carolina, Oklahoma, and Oregon—have at some point proposed legislation or instituted drug testing programs for some welfare recipients who have been identified as being at risk for drug abuse. ACLU, WELFARE DRUG TESTING (2003), available at <http://www.aclu.org/drugpolicy/testing/10757res20030415.html>. Since the *Marchwinski* case was decided, there have been intermittent discussions of attempting to try a modified version of the drug testing program in Michigan. *Drugs Redux*, LANSING STATE J., Sept. 20, 2006, at 6A (describing drug-testing bills unsuccessfully introduced in the Michigan legislature in 2004 and 2006).

<sup>173</sup> *Marchwinski*, 60 Fed. App’x at 601.

<sup>174</sup> Harold A. Pollack et al., *Substance Use Among Welfare Recipients: Trends and Policy Responses*, 76 SOC. SERV. REV. 256, 259 (2002).

interferes with relationships and work, may not be higher.<sup>175</sup> Further, even if some welfare recipients use drugs, statistics indicate that the vast majority of those who might be subjected to drug testing do not.<sup>176</sup>

### C. WELFARE FRAUD INVESTIGATIONS AND PROSECUTIONS

Unlike sanctions and family cap rules, which are policed by welfare administrators, welfare fraud prosecutions rest mainly within the domain of the criminal justice system. For this reason, welfare fraud policies stand apart.

Poor families usually turn to the welfare system only when they are in desperate need and cannot find employment to provide their most basic needs. However, the cash benefits available under TANF are too low to sustain a family. The gap between resources and need often leads welfare recipients to seek income to supplement their welfare benefits and to hide that income from the welfare office. In all states, a family who receives TANF and food stamps as its only source of income will find itself living well below the poverty threshold. In California, the maximum aid payment available to a family of three living in a high-cost county is \$723 in TANF cash assistance and \$361 in food stamps, for a total of \$1,084.<sup>177</sup> These amounts would place the family at only 73% of the poverty threshold.<sup>178</sup> Because welfare recipients are required to work, many combine earnings and welfare benefits. In November 2007, the average TANF cash aid grant to California families was \$528 and the average food stamp amount \$126.<sup>179</sup> When it comes to violating the welfare rules, most welfare recipients are damned if they do and doomed if they don't. In short, the U.S. system both produces and punishes lawbreakers.

As several studies have found, families relying on the welfare system cannot live on their cash aid alone. Because welfare benefits are so low, most welfare recipients have to rely on other sources of income to make

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<sup>175</sup> *Id.* at 268-69.

<sup>176</sup> RUKMALIE JAYAKODY ET AL., NAT'L POVERTY CTR., POLICY BRIEF NO. 2, SUBSTANCE ABUSE AND WELFARE REFORM 3 (2004) ("[F]indings suggest that policymakers and advocates have likely overstated the extent to which substance abuse contributes to continuing dependence on cash aid.").

<sup>177</sup> This is for fiscal year 2007-2008. For low-cost counties the figures are \$689 in TANF cash assistance and \$377 in food stamps, for a total of \$1,066. LEGISLATIVE ANALYST'S OFFICE, ANALYSIS OF THE 2008-09 BUDGET BILL: HEALTH AND SOCIAL SERVICES 1 fig.1 (2009), available at [http://www.lao.ca.gov/analysis\\_2008/health\\_ss/hss\\_anl08009.aspx](http://www.lao.ca.gov/analysis_2008/health_ss/hss_anl08009.aspx).

<sup>178</sup> *Id.*

<sup>179</sup> CAL. DEP'T OF SOC. SERV., PUBLIC ASSISTANCE FACTS AND FIGURES: FOR THE MONTH OF JANUARY 2009 (2009), available at <http://www.dss.cahwnet.gov/research/res/pdf/Paff/2009/PAFFJan09.pdf>.



ends meet.<sup>180</sup> As a result, almost all recipients engage in some kind of income-generating activity that they hide from the welfare office, and that could therefore be deemed fraud. This difficulty—perhaps impossibility—of living on welfare grants alone means that for many families receiving government assistance, their everyday activities of making ends meet amount to crime.

California county welfare agencies are given the duties of identifying and reclaiming overpayments from recipients, whether those overpayments are due to recipient error or office error. The federal regulations require welfare offices to notify clients within forty-five days of becoming aware of a likely overpayment,<sup>181</sup> though this notice rule has regularly been violated by the counties. An overpayment to a family still on aid results in a 10% reduction of the family's future grants until the overpayment is reclaimed by the county.<sup>182</sup> The counties pursue cash repayments from individuals who are no longer receiving aid. When those repayments are not forthcoming, the counties may pursue a collections process, sometimes leading to wage garnishment for newly-employed former welfare recipients.

Welfare cheating typically takes one of several forms.<sup>183</sup> The first involves working at a legitimate job, but failing to report all of the earnings to the welfare office. The second type involves "side jobs": under-the-table employment for cash that is not reported either to the welfare office or to tax authorities. A third type of fraud occurs when welfare recipients fail to report to welfare officials the presence of wage-earners in their household. Other fraudulent activities may include receiving aid for a child no longer in the household or, in rare cases, establishing false identities to collect aid for non-existent persons.

### 1. Welfare Fraud Investigations

Welfare agencies aggressively investigate fraud before and after applicants receive benefits. Alameda County, like other California counties, conducts what is known as Early Fraud Prevention (EFP) by

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<sup>180</sup> EDIN & LEIN, *supra* note 38, at 7 ("Because of their constant budget shortfall, mothers . . . had to generate additional revenue to make ends meet. Welfare-reliant mothers had to keep these activities hidden from their welfare caseworkers and other government bureaucrats."); KAREN SECCOMBE, "SO YOU THINK I DRIVE A CADILLAC?": WELFARE RECIPIENTS' PERSPECTIVES ON THE WELFARE SYSTEM AND ITS REFORM 146 (1999) (reporting that welfare recipients, unable to survive on welfare benefits, often turn to the help of friends, neighbors, relatives, charities, and social service agencies).

<sup>181</sup> 45 C.F.R. § 205.56(a)(1)(iv) (2008).

<sup>182</sup> CAL. WELF. & INST. CODE § 11004 (West 2001 & Supp. 2009).

<sup>183</sup> Welfare fraud prosecutions are typically brought under a state's general fraud statute. Thus, statistics on felony arrests and prosecutions cannot disaggregate welfare fraud charges from other types of fraud charges.

screening welfare applicants for possible fraud before a case is even opened and a check issued. Alameda County, however, engages in fewer EFP measures than some other California Counties. Orange County California, for example, has aggressively investigated applicants through EFP policies since the early 1980s. The county's fraud prevention efforts set the standard for the rest of the country. In fiscal year 1992-1993, 21% of the applicants for AFDC and food stamps in Orange County were referred for fraud investigation.<sup>184</sup>

Welfare fraud investigations occurring after a case is open can be triggered in one of several ways. First, an investigation may be triggered when a data exchange based on a recipient's Social Security number identifies an inconsistency in information. Second, an investigation may be initiated by a welfare caseworker who suspects a problem. Third, an investigation may be triggered by an anonymous call to one of the state or county welfare fraud hotline numbers, or by any other form of tip provided to the welfare office. Most investigations in California are triggered by either a flag in the quarterly income verification done through the income eligibility database or by tips to the state or local welfare fraud hotlines.

Welfare fraud investigations are commonplace. California investigated 2.44% of its TANF aid caseload each month between October and December 2007, though in some counties the rates of investigation were much higher.<sup>185</sup> Investigations may delve deeply into the lives of welfare recipients. While overstepping the welfare rules is a common practice among welfare recipients, welfare fraud investigators cast their nets broadly, routinely investigating welfare recipients who are not determined to be engaged in fraud. A 1999 Los Angeles Grand Jury Report found that "the statewide rate for the number of completed investigations with allegations unfounded or insufficient evidence was 52.3[%.]"<sup>186</sup> A 2003 Los Angeles audit found only 34% of statewide fraud investigations and 30% of Los Angeles fraud investigations produced evidence of fraud.<sup>187</sup>

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<sup>184</sup> C.A. MACDONALD & ASSOC., EARLY DETECTION AND PREVENTION PROGRAMS: STATE DIRECTORY 9 (1995), available at <http://www.camacdonald.com/edpstate.htm>.

<sup>185</sup> CAL. DEP'T OF SOC. SERV., FRAUD INVESTIGATION REPORT: OCTOBER-DECEMBER 2007 (2007), available at <http://www.dss.cahwnet.gov/research/res/pdf/fraud/2007/Oct-Dec07.pdf>. Madera County, for example, had a caseload of 2,708 families and referred 1,060 cases (or 39% of its caseload) for fraud investigations. *Id.* at 5 tbl.1.

<sup>186</sup> L.A. GRAND JURY, WELFARE FRAUD PREVENTION AND INVESTIGATIVE FUNCTIONS OF THE DEPARTMENT OF PUBLIC SOCIAL SERVICES 4 (1999), available at <http://grandjury.co.la.ca.us/gjury99/REPORTgj-15.htm>.

<sup>187</sup> COUNTY OF L.A. DEP'T OF AUDITOR-CONTROLLER, DEPARTMENT OF PUBLIC SOCIAL SERVICES: WELFARE FRAUD PREVENTION PROGRAM REVIEW 4 (2003), available at [http://auditor.lacounty.gov/Public%20Social%20Services/cms1\\_009318.pdf](http://auditor.lacounty.gov/Public%20Social%20Services/cms1_009318.pdf).

California averaged just under 464,000 families receiving aid in the last quarter of 2007 and had a severe backlog of pending welfare fraud investigations—more than 52,000 as of the same quarter.<sup>188</sup> The delay in investigating cases means that overpayments to welfare recipients may continue and accumulate during the interim period between the county or state's first identification of problems with the case and the point at which the client is notified of a problem.<sup>189</sup> As a result, most of the overpayments

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<sup>188</sup> CAL. DEP'T OF SOC. SERV., *supra* note 185, at 2, 5.

<sup>189</sup> An example of the injustice of these delays can be found in a recent unpublished case, *People v. Pahoua Lo*, 2008 Cal. App. Unpub. LEXIS 9428. In 1992, eighteen-year-old Pahoua Lo, whose primary language was Hmong, applied for cash welfare benefits and food stamps when she became pregnant. *Id.* at \*3-4. In August of 1998, Lo informed both her social services case worker and her Welfare to Work case worker that she would begin working part-time as an interpreter for the local school district. She began work in September and received her first paycheck on October 1, 1998. *Id.* at \*4. She received her pay for a given month on the first day of the following month and reported her earnings, submitting her first-of-the-month earnings as pay for the earlier month, an error under the California reporting rules. *Id.* at \*5. Lo failed to report her income in November and December and, when contacted by a case worker, explained that she was unaware she needed to submit documentation each month since her pay was consistent from month to month. *Id.* at \*6. Though numerous database alerts between November 1998 and December 2001 signaled income reporting discrepancies to case workers, no case workers notified Lo of problems with her case record, and her cash benefits and food stamps continued. *Id.* Lo continued to receive cash payments through October 2001 and food stamps through July 2002. *Id.* at \*2. Not until August 2002 did the welfare department inform Lo that she had been overpaid benefits. *Id.* An administrative hearing determined that the overpayment was caused not by intentional misrepresentations by Lo, but rather by the County Welfare Department's administrative error. *Id.* at \*8. At the same time, the hearing officer rejected an argument of equitable estoppel and ordered Lo to repay approximately \$30,000 in benefits, finding that Lo had "unclean hands" because she had failed to accurately report income (despite language barriers and explanations to case workers) and because "public policy strongly demands repayment." *Id.* at \*7-8.

In May 2004, the State brought criminal charges of welfare fraud and perjury against Lo. *Id.* at \*8. In November 2004, Lo pleaded no contest to felony welfare fraud; the perjury charge was dismissed. *Id.* She was given probation, but found obligated to pay restitution for the welfare overpayment of \$30,000. *Id.* In 2006 the Superior Court issued a writ of administrative mandamus related to the overpayment of cash aid and overissuance of food stamps, wherein it attacked the County Welfare Department (CWD), declaring that "in violation of its obligations to assist [defendant] and act humanely, if not in bad faith, the CWD chose to pursue fraud instead of explaining to [defendant] how to report [her income properly]." *Id.* at \*9.

Granting equitable estoppel on the overpayment of cash benefits, the Superior Court reduced the restitution amount to just over \$15,000 in food stamp overissuances. *Id.* at \*12. The Appellate Court affirmed that the food stamp overissuance was an administrative error, which allows the State and the defendant to compromise on a settlement amount and, if Lo returns to the food stamp program, limit collection efforts to thirty-six months. *Id.* at \*15 (citing Settlement Agreement and Stipulation for Entry of Judgment After Remand from the Court of Appeal, *Lomeli v. Saenz*, No. 98CS01747 (Cal. Sup. Ct. July 2000)).

attributable to client failure to report income easily trigger felony fraud charges since the accumulated overpayments usually surpass the dollar threshold for a felony, versus misdemeanor, charge.

The line between administrative and criminal penalties for welfare cheating has become increasingly blurry. Federal welfare legislation (the Personal Responsibility and Work Opportunity and Reconciliation Act of 1996, hereinafter PRWORA) greatly increased administrative penalties. PRWORA states that if an individual loses benefits in any federally funded, means-tested program due to fraud, she or he will not only lose benefits under that program, but also become ineligible for increased benefits under any other program.<sup>190</sup> In other words, if a welfare recipient is found to be engaged in cash aid fraud by virtue of failing to report all of her income, she will lose cash aid, and her household will see no increase in food stamps or housing assistance to offset the decrease in aid.

As states implemented rules under federal welfare reform, many stiffened their own civil and criminal penalties for government aid recipients who cheat. California, for example, adopted a “three strikes and you’re out” rule for intentional program violations determined by the administrative agency.<sup>191</sup> In addition to civil penalties, California imposes stiff criminal penalties for welfare fraud, including permanent exclusion from aid. This comes on top of any penalties that the criminal justice system might impose for a conviction of fraud or perjury. Welfare fraud

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Pahoua Lo’s case is not an isolated one. In 2002, a non-profit organization, People United for a Better Oakland (PUEBLO) filed suit on behalf of low-income families, claiming that the County Welfare Department was failing to notify individuals of overpayments in a timely manner and was instead allowing overpayments to accrue, sometimes for many years, and then seeking repayment from poor families who lacked the memory and paperwork to defend restitution claims. Complaint, PUEBLO v. Saenz, (Cal. Sup. Ct. Jan. 18, 2002) (on file with author). The action was dismissed for lack of standing.

<sup>190</sup> 42 U.S.C. § 608a(a) (2006).

<sup>191</sup> The penalties for failing to report required information—even where the reporting failures would not affect aid calculations—are tough. A finding of one offense, in an administrative hearing or by a court, disqualifies an individual from aid for six months. CAL. WELF. & INST. CODE § 11486(c)(1)(A), (c)(2)(A) (West 2001 & Supp. 2009). A second occasion results in a twelve-month disqualification from aid, and a finding of a third occasion results in permanent—meaning life-long—disqualification from aid. *Id.* There are other civil violations that can lead to permanent disqualification from welfare. Under California law, an individual can be excluded from receiving welfare benefits for life for any of the following violations: (1) “double dipping,” or in other words, making false statements or representations about one’s place of residence in order to make simultaneous claims for aid in more than one county or state; (2) submitting documents to receive aid for non-existent children or for children ineligible for aid; or (3) receiving more than \$10,000 in aid as a result of intentionally and willfully making false statements or misrepresenting, concealing, or withholding pertinent facts from welfare administrators. *Id.* § 11486(c)(1)(B)-(c)(2)(B).

charges are available to prosecutors when welfare recipients receive undeserved benefits as a result of making any kind of intentional misstatement.<sup>192</sup>

The legislative drive to punish welfare cheaters has created some problems. In many California counties the physical boundaries between welfare administration and criminal fraud control efforts have disappeared. Of California's fifty-eight counties, only twenty-eight have the county welfare departments conduct welfare fraud investigations.<sup>193</sup> The remaining counties have moved their fraud investigators to law enforcement, with twenty-one counties housing their fraud investigation units in the offices of the District Attorney (DA), nine situating satellite DA's offices in the welfare office, and two placing fraud investigations in the hands of local sheriff's offices.<sup>194</sup>

The close relationship between officials who administer aid and those who police cheating raises some troubling issues. Welfare recipients identified as having received overpayments as a result of their failing to report earnings are notified by letter that they must attend a meeting with an official, and many of these officials share office space with case workers. Although these officials are criminal fraud investigators or members of the County DA's office, many welfare recipients do not realize that these officials are part of the criminal justice system rather than the welfare system.<sup>195</sup> As a result, they attend the meetings without consulting or bringing legal counsel.

California welfare recipients suspected of fraud and called into meetings with fraud investigators are asked to sign disqualification consent agreements. These agreements are basically admissions that the recipients

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<sup>192</sup> Anyone convicted in state or federal court of felony welfare fraud is ineligible for aid for two years if the amount of money in dispute is less than \$2,000. *Id.* § 11486(b)(1). A person convicted of fraudulently receiving between \$2,000 and \$10,000 is barred from receiving aid for five years; a person convicted of fraudulently receiving more than \$10,000 is prohibited from receiving aid for life. *Id.* § 11486(b)(2)-(b)(3).

<sup>193</sup> CAL. DEP'T OF SOC. SERV., *supra* note 185, at 4.

<sup>194</sup> *Id.* Los Angeles turned its investigations over to the DA's office in January 1997. Greg Krikorian, *8 Arrested in Probe of Welfare Fraud*, L.A. TIMES, July 26, 1997, at B1.

<sup>195</sup> My interviews with welfare recipients as part of my dissertation research indicated that a number of welfare recipients who had been called in by the fraud investigation unit did not know that these were criminal investigations. One interviewee, Yvonne, said that when she received a letter stating that officials wanted to ask her some questions, she did not understand the officials with whom she met were criminal investigators rather than welfare officials. Gustafson, *supra* note 142, at 290. Even after a year of repayment through a diversion program, she did not understand that she had been criminally sanctioned, that she was no longer eligible for cash payments (although her children were), and that her ineligibility was due to her failure to report income and not because she quit a job. *Id.* at 291.

did not state all necessary facts in their monthly reporting forms or in their (re)applications for aid. By signing one of these agreements, a welfare recipient waives any available administrative remedies.<sup>196</sup> Before asking an individual to sign a disqualification consent agreement, counties are required to give the individual a notice including the following statements:

- (1) [T]he accused understands the consequences of signing the consent agreement; (2) consenting to the disqualification will result in a reduction in benefits for the disqualification period; (3) the actual disqualification penalty to be imposed; and (4) any remaining members of the [family] may be held liable for any overpayments that the accused has not already repaid.<sup>197</sup>

The procedures do not specify how far in advance the recipient must be given this notice, so it is conceivable that the individual receives notice only minutes before signing what amounts to an admission of criminally culpable behavior.

Other research suggests that welfare fraud suspects sign these agreements believing that they will be asked to repay money to the welfare office, but are unaware that the consent agreements may be, and often are, used as the basis for felony criminal charges brought against them later.<sup>198</sup> In other words, they sign the agreements with far less than complete knowledge of the consequences of doing so. Welfare recipients continue to treat the welfare and criminal justice systems as distinct, unaware that the two are merging.

The welfare reforms expressed a popular notion, namely, that individuals who fail in the free market economy and turn to government assistance programs lose the full benefits of citizenship. They become the objects of unrelenting social control. At the same time, their everyday activities and omissions—taking “side jobs” to supplement their income, allowing boyfriends to move into the household, and failing to report all of their earnings to the welfare office in writing—become subject to punishment under criminal law.

## 2. Criminal Prosecutions

Failing to report all sources of income and support to the welfare office can result in criminal charges. District Attorneys may bring charges of welfare fraud and even perjury against welfare recipients who earn

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<sup>196</sup> CALIF. DEP'T OF SOC. SERV., MANUAL OF POLICIES AND PROCEDURES § 20-352.2 (1999).

<sup>197</sup> *Id.* § 20-352-21.

<sup>198</sup> Gustafson, *supra* note 142, at 291.

income through work but do not accurately report all of their income or their household composition on their monthly reporting forms.<sup>199</sup>

There is a demographic arbitrariness to welfare fraud prosecutions, with some locales (and states) investigating more rigorously than others, and with some locales prosecuting at higher rates than others.<sup>200</sup> Five of the six largest counties in California have welfare caseloads of comparable size and are presented for comparison in Table 2, *infra*. (Los Angeles County, which is much larger, is excluded from the table.) The table demonstrates that investigation and prosecution rates vary dramatically. Prosecutions generally require the collaboration of welfare officials and local prosecutors, meaning that much of the politics around welfare fraud is local. Moreover, some states have made efforts to create general policies or centralize control over welfare fraud investigations and prosecutions, while others have left the decisions to localities. As a result, an individual welfare recipient's chances of being investigated and prosecuted for welfare fraud depend largely on where she lives.

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**Table 2**

*Comparison of Selected California Counties—Welfare Caseloads, Fraud Investigations, Evidence of Fraud, Prosecutions Filed, Overpayments Collected*<sup>1</sup>

County	CalWORKs caseload	Number of fraud investigations	Evidence to support fraud	Prosecutions filed	Overpayments collected
Riverside	22,005	4,743	507	51	\$303,061
San Diego	24,070	3,854	1222	11	\$104,425
Fresno	24,988	195	107	8	\$96,299
Sacramento	28,960	610	449	20	\$220,510
San Bernardino	34,184	1,550	718	5	\$117,238
Riverside	22,005	4,743	507	51	\$303,061

Notes:

1. Information gathered from CAL. DEP'T OF SOC. SERV., *supra* note 185, at 5 tbl.1, 7 tbl.3, 10 tbl.6.

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<sup>199</sup> CAL. PENAL CODE § 118 (West 1999).

<sup>200</sup> Frederick Melo, *Stopping Welfare Cheats: Differing Approaches in Washington County and Dakota County*, ST. PAUL PIONEER PRESS, Aug. 17, 2008 (discussing differing penalties for welfare fraud among Minnesota counties).

There is a push to bring criminal rather than administrative penalties against welfare cheats in California. In the fourth quarter of 2007, 417 cases were referred for criminal prosecution in California while only 43 cases were referred to Administrative Disqualification Hearings.<sup>201</sup> The disparities among counties in practices and outcomes may reflect differences in the county welfare populations or differences in prosecutorial enthusiasm on the part of county authorities. Research and evaluation are clearly needed on the dramatic disparities among counties, and states, in rates of welfare fraud prosecution

### 3. *The Unmeasured Costs (and the Fuzzy Math) of Pursuing Welfare Fraud*

The drive to punish welfare cheats and to increase the administrative and criminal penalties for those who are caught cheating seems to prevent policymakers from analyzing the goals, effects, and costs of punishing welfare cheats. Many prosecutors' offices across the county have pursued individuals (mostly women) for welfare fraud with a zealotry that belies the actual public threat or criminal intent associated with this problem.

In 1997, Erik Luna, then a Deputy District Attorney in San Diego and now a law professor, wrote a law review article declaring, "Welfare fraud is an epidemic."<sup>202</sup> That view, however, assumes that the problem of individuals making misrepresentations to the welfare office and receiving some level of benefits to which they are not entitled outweighs the problem of poverty in the United States. While a public conversation about the relative weights of these problems has not occurred, the policies being proposed, and often implemented, commonly reflect assessments like Luna's. With 9.8% of U.S. families falling below the poverty level in 2006,<sup>203</sup> many might argue that poverty itself remains a chronic condition and a concern of government.

One of the difficulties in evaluating the success of punitive and criminalizing approaches to welfare is that the goals of these strategies are often unstated, multiple, and even contradictory. According to welfare officials, welfare fraud measures are designed to achieve several goals: to catch welfare cheats, to deter would-be and actual welfare cheats, and to reduce governmental costs. The first goal, catching cheats, is one that the system is certainly achieving. The problem, however, is that the vast

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<sup>201</sup> CAL. DEP'T OF SOC. SERV., *supra* note 185, at 2.

<sup>202</sup> Erik G. Luna, *Welfare Fraud and the Fourth Amendment*, 24 PEPP. L. REV. 1235, 1235 (1997).

<sup>203</sup> U.S. Census Bureau, Historical Poverty Tables tbl.13, <http://www.census.gov/hhes/www/poverty/histpov/hstpov13.html> (last visited May 15, 2009).



majority of welfare recipients are technically welfare cheats. If they were not, they would be unable to survive.

Whether fraud is actually deterred cannot be easily measured. As Professor Dan Kahan writes, "Empirically, deterrence claims are speculative."<sup>204</sup> Deterrence theory assumes that individuals can foresee the penalties of rule-breaking. But research has revealed that the harsh penalties for welfare cheating are largely unknown by welfare recipients.<sup>205</sup> Unless welfare recipients are aware of the severe consequences for rule-breaking, those can have no deterrent effects on welfare recipients' actions. Cesare Beccaria, who wrote *On Crimes and Punishment* in the mid-eighteenth century, called for a rational system of criminal punishment.<sup>206</sup> Under this system, individuals must be informed of both the rules and the consequences of violating the rules.<sup>207</sup> With this knowledge, Beccaria theorized, individuals would be able to weigh the costs of rule-breaking and opt to follow the rules rather than risk the long-term consequences of pursuing short-term gain. This cost-benefit system of deterrence, however, cannot function where neither the rules nor the consequences of rule-breaking are known by individuals.<sup>208</sup> The system also cannot function where immediate needs actually do outweigh the risks of long-term suffering.

When I interviewed an Assistant District Attorney (ADA) who headed the welfare fraud investigation unit in a Northern California county, even he questioned the deterrent and retributive aspects of the push to punish welfare cheats in the criminal system. When interviewed by phone in March of 1999, the ADA said that his office at that time filed about 100 to 110 felony welfare fraud cases a month.<sup>209</sup> He criticized the state standard for fraud, saying that "it targets the wrong people," adding that the system

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<sup>204</sup> Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 416 (1999).

<sup>205</sup> Gustafson, *supra* note 142, at 214 (finding that most of the welfare recipients interviewed were unaware that "underreporting of income could result not only in a civil claim demanding repayment, but also criminal fraud charges and lifelong exclusion from the welfare system").

<sup>206</sup> See generally CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (Henry Paolucci trans., Bobbs-Merrill Co. 1963) (1764).

<sup>207</sup> *Id.* at 17-18 (discussing the importance of making rules known).

<sup>208</sup> *Id.* at 94 ("Do you want to prevent crimes? See to it that the laws are clear and simple and that the entire force of a nation is united in their defense, and that no part of it is employed to destroy them. See to it that the laws favor not so much classes of men as men themselves.").

<sup>209</sup> Telephone Interview with Jim Stevens, Assistant District Attorney, Welfare Fraud Division, in Bayview County, Cal. (May 30, 1999) (note on file with author). Name and location have been changed to protect the identity of the interviewee.

“traps and punishes the least culpable culprits.”<sup>210</sup> He recognized that it was hard-working and financially-strapped mothers who were hardest hit by these policies and practices.

The ADA explained that while his office pursued cases identified through computerized income matching, the office also pursued a lot of cases that were reported anonymously through the welfare fraud hotline. The hotline paved an arbitrary track to welfare investigations for many people. The ADA said that the hotline was used by individuals in personal disputes: “No one can snitch you off like your ex or your ex’s girlfriend or your neighbor or your landlord.”<sup>211</sup> At the time of our interview, the ADA said the investigators had 300 to 500 hotline tips backlogged for investigation; hundreds of poor individuals were awaiting an unpleasant surprise.

The effects of deterrent criminal policies are generally elusive. How does one measure what is *not* happening? Many state officials calculate the costs and savings of fraud deterrent measures by employing models that involve questionable speculations. Estimations of any state savings in aggressive fraud control policies are usually based on either: (1) assumptions that anyone removed from the welfare rolls would have been receiving full benefits indefinitely, or (2) assumptions that declines in welfare caseloads are attributable only to fraud deterrence measures and that the caseload would otherwise have remained constant. Welfare officials and local prosecutors often request increased funding for welfare fraud prosecution, arguing that by ending payments to those convicted and making claims for overpayments, the state makes money. Most of the overpayments (80% statewide according to the ADA) are reclaimed from the payments that continue to children, not through actual payment by the welfare recipient.<sup>212</sup> In other words, dollars recouped generally come out of the government benefits flowing to children. Actual recoupment of dollars through direct payments from cheating welfare recipients is quite low.<sup>213</sup>

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<sup>210</sup> *Id.* A 2003 Los Angeles County audit similarly found that fraud investigations were not prioritized, meaning that cases with high dollar values were not necessarily given priority over cases involving small amounts of overpayments. COUNTY OF L.A. DEP’T OF AUDITOR-CONTROLLER, *supra* note 187, at 8.

<sup>211</sup> Telephone Interview with Stevens, *supra* note 209.

<sup>212</sup> *Id.*

<sup>213</sup> California data for the fourth quarter of 2008 show that while more than \$30 million in overpayments to CalWORKs payments were identified, only \$12.9 million dollars were recovered by the state. CAL. DEP’T OF SOC. SERV., QUARTERLY REPORT OF OVERPAYMENTS AND COLLECTIONS-CALWORKS 1 (2009), available at <http://www.cdss.ca.gov/research/res/pdf/CA%20812/2008/CA812Oct-Dec08.pdf>. Of the money recouped, only \$2.8 million was collected as cash payments; another \$9.8 million was recovered by reducing cash grants to families who continued to receive aid. *Id.*

Many assume that disqualifying a parent or family from TANF aid ultimately reduces government costs, but this is not necessarily true. For example, California Governor Arnold Schwarzenegger's 2007-2008 Budget proposed changes to state administrative rules of welfare receipt so that: (1) where a parent was found to be in noncompliance with program rules for more than 90 days, the family would lose their entire cash grant, not just the parent's portion of the grant; and (2) aid would be limited to sixty months for TANF child-only cases—cases where children qualify for cash aid, but where parents are disqualified either because they are immigrants (legal or undocumented) or because they have been convicted of drug offenses.<sup>214</sup> These families would receive no cash benefits, though most would be entitled to some amount of food stamps. The budget itself estimated that the full-family sanctions would *increase* state costs by \$11.4 million during the fiscal year.<sup>215</sup> And while the Governor's budget estimated that the exclusion of child-only cases would save the state \$160 million,<sup>216</sup> analysis by administrators for Los Angeles County concluded that if even half of the excluded children in Los Angeles subsequently applied for county-provided General Relief, for which they would qualify, welfare cost in that county alone would rise between \$74.2 to \$103.2 million.<sup>217</sup> In short, the proposal would have raised government costs throughout the state, though shifting costs from federal and state funding streams to county coffers. The legislature voted down the proposal, but the very same proposal appeared again in the Governor's 2008-2009 Budget.<sup>218</sup>

The government costs associated with policing and prosecuting welfare fraud are high and are often underestimated.<sup>219</sup> In addition to the costs of overpayments, costs of investigations, and costs of prosecutions, there are a number of other unmeasured costs of aggressively prosecuting

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<sup>214</sup> CAL. DEP'T OF SOC. SERV., HIGHLIGHTS OF THE 2007-08 GOVERNOR'S BUDGET 7, 9 (2007).

<sup>215</sup> *Id.* at 7.

<sup>216</sup> *Id.*

<sup>217</sup> DAVID E. JANSSEN & BRYCE YOKOMIZO, COUNTY OF L.A. CHIEF ADMIN. OFFICE, ADDENDUM TO THE JANUARY 18, 2007 REPORT ASSESSING THE IMPACT OF THE GOVERNOR'S WELFARE PROPOSAL 3 (2007).

<sup>218</sup> LEGISLATIVE ANALYST'S OFFICE, *supra* note 177.

<sup>219</sup> A 2003 report noted that Los Angeles County alone spent \$32 million per year on welfare fraud investigations (prevention and detection). COUNTY OF L.A. DEP'T OF AUDITOR-CONTROLLER, *supra* note 187, at 1. By comparison, the California Franchise Tax Board spent less than a third as much (\$10.5 million) in 2005-2006 investigating tax fraud throughout the entire state. STATE OF CAL. FRANCHISE TAX BD., OPERATIONS REPORT: FISCAL YEAR ENDING JUNE 30, 2006, 17 (2008), available at [http://www.ftb.ca.gov/aboutftb/OpRpt/OpRpt\\_0506.pdf](http://www.ftb.ca.gov/aboutftb/OpRpt/OpRpt_0506.pdf).

welfare fraud. One of those costs is the cost to families.<sup>220</sup> Low-income families that include an adult charged with welfare fraud not only lose access to government benefits, they also gain an adult with decreased earning capacity as a result of the criminal prosecution.

There are still other unmeasured costs to welfare fraud prosecution. When a welfare recipient is charged with fraud, she adds costs to the criminal justice system. In addition to the costs of investigation, the county has to pay for the time of both a prosecutor and public defender. If the recipient goes through a welfare fraud diversion program (discussed more in the following Part), the county bears continuing administrative costs for collecting payments and monitoring her progress in the diversion program. If the welfare recipient is convicted and sent to jail or prison, then government costs soar. The California Department of Corrections estimates the annual cost of housing an inmate at \$35,587,<sup>221</sup> much more than an entire family receives per year through the welfare system.<sup>222</sup> If the head of a household does end up serving time in jail or prison, her children may be placed in the foster care system, where much more money will be spent on the children than under the welfare system. Finally, if the welfare recipient receives probation, the county must cover the wages of the probation officer. All of these costs are ignored in calculations of the costs of investigating and prosecuting welfare fraud.

In sum, the government cost savings that policymakers associate with punitive and criminalizing welfare policies may actually only be cost-

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<sup>220</sup> A poignant example of the unmeasured family costs of welfare fraud prosecutions occurred in the case of Jerome (a pseudonym), a father I interviewed as part of a study on welfare rule knowledge and rule compliance. Jerome was single-handedly caring for his toddler child. The toddler's mother ended up spending a year in jail after her sister called the welfare hotline and reported that Jerome was living in the household. The sister had hoped that officials would kick Jerome out of the house. Instead, they arrested and convicted the mother of welfare fraud. Jerome, who had been employed while staying with his son and girlfriend, could not find employment after she went to jail. While he received a sanctioned aid check for his son, he was ineligible for child care assistance because of his earlier admission to the welfare office that he had been living in his girlfriend's home. Jerome and his son were renting a small room (a converted garage) from Jerome's ex-wife, and the boy had spent a year without his mother.

<sup>221</sup> CAL. DEP'T OF CORR. & REHAB., FOURTH QUARTER 2008 FACTS AND FIGURES, available at [http://www.cdcr.ca.gov/Divisions\\_Boards/Adult\\_Operations/docs/Fourth\\_Quarter\\_2008\\_Facts\\_and\\_Figures.pdf](http://www.cdcr.ca.gov/Divisions_Boards/Adult_Operations/docs/Fourth_Quarter_2008_Facts_and_Figures.pdf) (last visited May 15, 2009).

<sup>222</sup> The average cash welfare payment to a family receiving CalWORKs in January 2008 was \$528.80. A year on aid at that rate would total \$6,344.60. CAL. DEP'T OF SOC. SERVS., *supra* note 179, at 4. CalWORKs recipients generally qualify for other forms of public assistance, including food stamps, which max out at \$463 per month for a family of three, and Medicaid. Still, the overall state cost to provide for a family on welfare is lower than the cost of housing one inmate.

shifting—either between federal, state, and local coffers; or from the welfare system to the criminal justice and foster care systems.

#### 4. Recent Trends

Criminal prosecutions in California have become less vigorous in the last few years. In 1998, the State of California incentivized welfare prosecutions by the counties by rewarding them (at 25% of any overpayment determined) for prosecutions.<sup>223</sup> The 2002-2003 California Budget, however, eliminated the \$5.1 million welfare fraud incentive payments that had been provided to counties.<sup>224</sup> Since then, fraud prosecutions have dropped significantly. In the third quarter of 2001, prosecutions were filed in 19% of all the investigations referred to prosecutors; by the same period in 2005, 15% were filed; in the same period in 2007, 8% were filed.<sup>225</sup>

Over the last four years, while California counties have become more aggressive in investigating welfare recipients for fraud—particularly at the time of application for aid—the State appears to be scaling back on criminal prosecutions.<sup>226</sup> This decline cannot be attributed solely to the declining welfare caseload and increased investigations at the time families apply for benefits. The reduced state incentives to counties for identifying and recovering overpayments,<sup>227</sup> and the county-borne costs of aggressive investigation and prosecution, are also likely contributors to the decline. At the same time that prosecutions appear to be declining in California, other states are apparently becoming more willing to bring criminal rather than civil sanctions, though few cases nationwide seem to go to trial.<sup>228</sup>

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<sup>223</sup> California Assembly Bill 1542 added CAL. WELF. & INST. CODE § 11486(j) (West 2001). The bill provided each county “25 percent of the State’s share of the client-caused Cal-WORKs overpayment collections.” Memorandum from Bruce Wagstaff, Dep’t of Soc. Serv., All-County Information Notice I-58-98, 1 (Oct. 14, 1998). Congress later passed the Improper Payments Information Act of 2002, which provided a 12.5% incentive to the states for welfare fraud prosecutions and which required states to compile information on overpayments and underpayments of benefits. Pub. L. No. 107-300, 116 Stat. 2350 (codified as amended at 31 U.S.C. § 3321 (2006)).

<sup>224</sup> GRAY DAVIS, STATE OF CAL. GOVERNOR’S OFFICE, CALIFORNIA GOVERNOR’S BUDGET HIGHLIGHTS 48 (2002). The federal incentives remain, providing counties with 12.5% of the aid repaid or recovered by a county. CAL. WELF. & INST. CODE § 11486(j) (West Supp. 2009).

<sup>225</sup> See Cal. Dep’t of Soc. Serv., Fraud Investigation Report, <http://www.dss.cahwnet.gov/research/PG363.htm> (last visited May 15, 2009) (prosecution activity).

<sup>226</sup> *Id.*

<sup>227</sup> See *supra* notes 223-224 and accompanying text.

<sup>228</sup> I have gathered information about the welfare fraud prosecution practices in a number of states. A full analysis of the trends is too extensive to summarize here and creates a rich

The amount of tax dollars devoted to policing welfare fraud is also on the rise.<sup>229</sup> In large part, the costs are rising because the number of welfare fraud investigators is rising. Two reasons appear to account for the rising number of welfare fraud investigators in a period in which welfare caseloads are declining. First, much of the welfare money that flows to states and

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opportunity for future research. There are notable divergences among states. In a few states—Arkansas, Massachusetts, and Wisconsin—prosecutors typically avoid criminal charges for welfare fraud. In a large and seemingly growing number of states, however, the move is to punish welfare cheats through criminal charges rather than civil penalties. Also notable is that a growing number of states and localities are creating welfare fraud diversion programs, allowing welfare recipients to avoid criminal conviction and jail time if they pay restitution to the state.

In the model of drug diversion programs, these fraud diversion programs usually allow welfare recipients who have violated the rules to engage in some sort of restitution—usually repayment, but in some cases home monitoring—to have their sentences suspended or removed from their records. These programs, however, are quite different from drug diversion programs. First, the welfare fraud diversion programs are often being promoted by prosecutors rather than by advocates for the poor. The reasons are clear: fraud diversion is a quick way to process the cases through the criminal justice system. Second, the goal of rehabilitation is absent since the underlying cause of the crime, poverty, goes unaddressed. Third, in some locales the purpose of the fraud diversion programs appears to be to stigmatize those who engage in welfare fraud rather than redeem them. (One welfare fraud diversion program in California required participants to show up in person at a window labeled “welfare fraud payments” periodically to pay a nominal sum; another required participants to wear ankle monitoring bracelets.)

The welfare fraud diversion programs share some of the same problems as the drug diversion programs. First, the effects of the fraud diversion programs have been the subject of even less research than the drug diversion programs. Second, there is anecdotal evidence that many participants in the welfare fraud diversion programs do not or cannot comply with the conditions of participation, specifically the repayment requirement. Third, it may be that, as in the case of the drug courts, more individuals are finding themselves under the control of the criminal justice system than they would were the diversion programs not available. This is because weak cases do not get dropped by prosecutors, and those who fail to meet the administrative requirements of the diversion programs find themselves either under the control of the criminal justice system for a longer time than they would have been if they had been charged, or they find themselves ultimately facing felony charges. See Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1558-60 (2004) (explaining that rather than reducing state incapacitation of offenders, diversion programs may instead be widening the net and simply changing types of state-imposed incapacitation of offenders).

<sup>229</sup> Dorothy Brown, dismissing the idea that wage-earning taxpayers escape the heavy policing of welfare recipients, suggests that the criminalization of welfare is now seeping into tax policy. She explains that recipients of the Earned Income Tax Credit, a credit for low-wage earners, are now targets for IRS audits. Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 795 (2007) (“Welfare stereotypes . . . do apply to low-income taxpayers because even though the low-income taxpayer credit was created as an *alternative* to welfare, low-income taxpayers are viewed as lazy former welfare recipients who work because they have to and will lie and cheat in order to line their pockets with government money.”).

counties is federal money. If that money is not spent, the states and counties lose it; rather than laying off government employees and losing the stream of federal funding, many counties are transferring former welfare caseworkers and civil fraud investigators into positions as deputized welfare fraud investigators.<sup>230</sup>

Second, the welfare fraud investigators are gaining political leverage. Welfare fraud investigators are unionizing.<sup>231</sup> In many states they have formed associations and even hired lobbyists.<sup>232</sup> These associations urge legislators to step-up efforts to investigate and prosecute welfare fraud and to move investigations from the civil to the criminal arena.<sup>233</sup> Whether these efforts to criminalize welfare fraud investigations are in the real interests of the public or merely an example of the power of self-interested bureaucrats remains an open question.

#### IV. CONSTITUTIONAL RIGHTS AND THE CRIMINALIZATION OF POVERTY

Substantively, the government is treating welfare recipients as criminals. Procedurally, welfare recipients are treated as individuals who have already been convicted rather than individuals who are presumed innocent. Over the last four decades, the welfare system has been a place

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<sup>230</sup> In 2002, the Santa Clara County (California) Board of Supervisors approved a proposal to re-assign thirty-seven employees from positions in the welfare office to positions as criminal investigators. Bd. of Supervisors, Santa Clara County, Agenda, Item No. 27 (June 25, 2002) (on file with author).

<sup>231</sup> See WELFARE FRAUD INVESTIGATORS ASS'N, MEMORANDUM OF UNDERSTANDING BETWEEN THE ALAMEDA COUNTY WELFARE FRAUD INVESTIGATORS ASSOCIATION AND THE COUNTY OF ALAMEDA, JULY 16, 2006-JUNE 27, 2011, 1 (2007) (describing the agreement signed by the "Alameda County Welfare Fraud Investigators Association, affiliated with Operating Engineers Local Union No. 3").

<sup>232</sup> For example, consider the California Welfare Fraud Investigators Association, "a nonprofit organization dedicated to developing the professionalism of Welfare Fraud and Medi-Cal Investigators throughout the state by sponsoring annual training conferences, identifying and supporting regional training sessions, and through legislative interaction." The California Welfare Fraud Investigators Association Home Page, <http://www.cwfia.org> (last visited May 15, 2009). Other associations include: The Alabama Council on Welfare Fraud; The Colorado Welfare Fraud Council; Iowa Council on Welfare Fraud; the Minnesota Fraud Investigators Association; the Ohio Council on Welfare Fraud; the New York Welfare Fraud Investigators Association; the Welfare Investigators of California Arizona Nevada (WICAN); and the United Council on Welfare, an umbrella organization for welfare fraud associations in both the United States and Canada.

<sup>233</sup> The California Welfare Fraud Investigators Association introduced a bill requiring all welfare fraud investigators to complete a special course approved by the Commission on Peace Officer Standards and Training. A.B. 2059, 1999-2000 Reg. Sess. (Cal. 2000). They also introduced a bill extending leaves of absence in lieu of temporary disability benefits from public safety investigators to welfare fraud investigators. S.B. 125, 2003-2004 Reg. Sess. (Cal. 2003) (enacted).

where rights are denied. Throughout the 1960s, welfare recipients and advocates fashioned a litigation strategy aimed at having the Supreme Court recognize a right to subsistence rooted in the U.S. Constitution.<sup>234</sup> The Supreme Court, however, refused to recognize a fundamental right to subsistence. The Court held that public assistance to the poor was merely a statutory entitlement, to be given and withheld as legislators pleased, so long as terminations of individual benefits are preceded by notice and an opportunity for hearing.<sup>235</sup> While the Court did articulate minimal due process rights, even those rights have proved elusive.

#### A. THE EROSION OF FOURTH AMENDMENT RIGHTS

Welfare recipients are denied basic rights of citizenship, including rights to privacy and to adequate due process. The Fourth Amendment of the U.S. Constitution protects the right of people “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .”<sup>236</sup> The Fourteenth Amendment has been found to guarantee individuals a right to privacy.<sup>237</sup> The scope of Fourth Amendment freedoms and privacy rights has been a recurrent issue in the federal courts for the last four decades, and Fourth Amendment claims that would seem reasonable among members of the general populous have been evaluated differently for welfare recipients.

Intrusions into the daily lives of welfare recipients have always been a part of the welfare system. Even after the Department of Health, Education, and Welfare prohibited welfare offices from implementing the “substitute father” rule and the U.S. Supreme Court found the “substitute father” presumption inconsistent with the statutory aims of the Social Security Act to provide assistance to needy children,<sup>238</sup> warrantless searches—and even midnight raids—continued to be conducted on welfare recipients. From the 1970s until the late 1990s, however, welfare recipients were generally not subject to routine home visits by welfare officials. The personal intrusions involved demand that the details of personal life be recorded on paper, not that the details of daily home life be viewed by the government.

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<sup>234</sup> See generally MARTHA DAVIS, *BRUTAL NEED* (1993) (offering a history of the lawyer’s movement for welfare rights in the 1960s and 1970s).

<sup>235</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970) (finding the loss of welfare benefits a deprivation sufficient to trigger due process rights, but inadequate to trigger substantive constitutional rights).

<sup>236</sup> U.S. CONST. amend. IV.

<sup>237</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (discussing the “zone of privacy created by several fundamental constitutional guarantees”).

<sup>238</sup> *King v. Smith*, 392 U.S. 309, 329 (1968).



It is important to note that since the federal welfare reforms of 1996, many welfare advocates have actually encouraged more home visits (though not home searches) of welfare recipients.<sup>239</sup> These advocates argue that caseworkers are failing to identify and serve welfare recipients who have disabilities, particularly in the form of mental illnesses,<sup>240</sup> as well as those who are the victims of domestic violence. Both categories of recipients are usually entitled to both additional services and exemptions from certain welfare rules, including work requirements and time limits. These advocates are pushing for visits by community organizations or social workers trained to identify signs of disability and domestic violence, not visits by law enforcement officers.<sup>241</sup> Social workers are mandatory reporters of child abuse and neglect, but are not mandatory reporters of welfare fraud. Moreover, the advocates are seeking consensual, not mandatory, visits.

The level of privacy that welfare recipients enjoy in their homes has been an issue of controversy for years, particularly in California. During the 1960s, California welfare offices conducted mass morning raids on the homes of AFDC recipients to determine program eligibility.<sup>242</sup> The California Supreme Court, in *Parrish v. Civil Service Commission*, ruled that unannounced, early-morning visits of welfare caseworkers to the

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<sup>239</sup> Cary LaCheen, *New Provisions of the Temporary Assistance for Needy Families Program: Implications for Clients with Disabilities and Advocacy Opportunities*, 40 CLEARINGHOUSE REV. 490, 500-01 (2007) (touting state programs that “use home visits and other outreach ways to determine the reason for noncompliance, to assist in attending appointments, and to deal with barriers to compliance”); see also ANDREA WILKINS, NAT’L CONFERENCE OF STATE LEGISLATURES, ITEM NO. 6900-0005, STRATEGIES FOR HARD-TO-SERVE TANF RECIPIENTS 13 (2002) (suggesting that welfare departments “[i]mplement home visits for time-limited or sanctioned families to ensure the well-being of children in these families”).

<sup>240</sup> CARY LACHEEN, WELFARE LAW CTR., HOME ALONE: THE URGENT NEED FOR HOME VISITS FOR PEOPLE WITH DISABILITIES IN NEW YORK CITY’S WELFARE SYSTEM 27 (2004) (demanding that New York’s welfare agency “[p]rovide home visits to all applicants and recipients with physical or mental health problems that severely limit their ability to travel to appointment or wait in waiting rooms for extended periods of time”).

<sup>241</sup> GREGORY ACS & PAMELA LOPREST, THE URBAN INST., A STUDY OF THE DISTRICT OF COLUMBIA’S TANF CASELOAD 54 (2003) (describing the District of Columbia’s policy of having community organizations conduct home visits with families who are being sanctioned for noncompliance with welfare rules).

<sup>242</sup> *Parrish v. Civil Serv. Comm’n*, 425 P.2d 233, 224 (Cal. 1967). The raids were intended to find men who might be cohabiting with the female welfare recipients. The case was brought by Benny Parrish, the caseworker who, citing *King*, 392 U.S. at 309, refused to participate in midnight raids to enforce the substitute parent rule. Parrish was subsequently fired and challenged his dismissal. The Supreme Court had to determine whether he was being asked to engage in unlawful conduct on the job, which is how the Court reached the issue of the lawfulness of early morning raids. As a result, many law students read this case in Employment Law courses rather than Poverty Law courses.

homes of welfare recipients “transgressed constitutional limitations.”<sup>243</sup> The searches involved “thorough searches of the entire dwelling.”<sup>244</sup> The court found that the majority of the searches were conducted when there was no suspicion at all of wrongdoing, much less probable cause.<sup>245</sup> The County argued that the searches were intended to determine welfare eligibility and not to search for evidence of crimes, and that the searches therefore did not have Fourth Amendment implications. The California Supreme Court rejected this argument, stating that evidence of welfare cheating could be used in criminal prosecutions and that the loss of benefits amounted to a forfeiture of property.<sup>246</sup>

The California Supreme Court in *Parrish* also ruled that unannounced searches could not be considered consent-based. The ruling states:

The persons subjected to the instant operation confronted far more than the amorphous threat of official displeasure which necessarily attends any such request. The request for entry by persons whom the beneficiaries knew to possess virtually unlimited power over their very livelihood posed a threat which was far more certain, immediate, and substantial. These circumstances nullify the legal effectiveness of the apparent consent secured . . . .<sup>247</sup>

In short, there could be no valid waiver of constitutional rights under such coercive circumstances.

In *Wyman v. James*, the U.S. Supreme Court considered the issue of home visits to welfare recipients.<sup>248</sup> A majority of Justices ruled that mandatory home visits by social workers from the welfare department did not violate the Fourth Amendment freedom from unreasonable searches or the Fourteenth Amendment right to privacy.<sup>249</sup> In that case, however, the visits: (1) were announced, (2) did not involve full searches of the home, (3) were conducted by social workers, not law enforcement officers, and (4) resulted in civil rather than criminal penalties where welfare recipients were found to be violating the rules.

Justice Blackmun, writing for majority in *Wyman*, distinguished the New York home visits at issue from the searches described in *Parrish*. Justice Blackmun wrote:

The State, working through its qualified welfare agency, has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it

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<sup>243</sup> *Parrish*, 425 P.2d at 225.

<sup>244</sup> *Id.* at 226.

<sup>245</sup> *Id.* at 225.

<sup>246</sup> *Id.* at 227.

<sup>247</sup> *Id.* at 229-30.

<sup>248</sup> *Wyman v. James*, 400 U.S. 309 (1971).

<sup>249</sup> *Id.* at 326.

dispenses. Sure it is not unreasonable, in the *Fourth Amendment* sense or in any other sense of that term, that the State have at its command a *gentle means, of limited extent and of practical and considerate application*, of achieving that assurance.<sup>250</sup>

The home visits, of which the welfare recipient was given written notice for the specific date of the visit and which were conducted by welfare social workers,<sup>251</sup> were gentle and limited. No law enforcement officers were involved.<sup>252</sup> Blackmun pointed out that the plaintiff offered “nothing that supports an inference that the desired home visit had as its purpose the obtaining of information as to criminal activity.”<sup>253</sup> Blackmun clearly stated that the home visit in *Wyman*, unlike the home search in *Parrish*, was a reasonable one because it was “not a criminal investigation, d[id] not equate with a criminal investigation, and despite the announced fears of Mrs. James and those who would join her, [wa]s not in aid of any criminal proceeding.”<sup>254</sup> Justice Douglas’s dissent in *Wyman*—joined by Justice Marshall—expressed concern that the home visits, whether targeting criminal activity or not, infringed on fundamental constitutional rights, particularly the right to privacy.<sup>255</sup> Douglas suggested that government officials should only enter a home with either valid consent of the resident or with a warrant; to do otherwise runs counter to Fourth Amendment protections.<sup>256</sup> Justice Marshall, in a separate dissenting opinion, wrote that

<sup>250</sup> *Id.* at 318-19 (emphasis added).

<sup>251</sup> *Id.* at 320-21 (specifically stating that under the procedures “[p]rivacy is emphasized”).

<sup>252</sup> “The visit is not one by police or uniformed authority. It is made by a caseworker of some training whose primary objective is, or should be, the welfare, not the prosecution, of the aid recipient for whom the worker has profound responsibility.” *Id.* at 322-23.

<sup>253</sup> *Id.* at 321. The plaintiff Barbara James, it appears, may have feared not a fraud charge, but rather an abuse or neglect charge. The Supreme Court noted that her welfare case file contained comments from a caseworker that “all was not always well with the infant Maurice (skull fracture, a dent in the head, a possible rat bite). The picture is a sad and unhappy one.” *Id.* at 322 n.9.

<sup>254</sup> *Id.* at 323.

<sup>255</sup> Douglas, acknowledging both the stigmatized status of the poor and the ease with which their rights are disregarded, wrote:

If the welfare recipient was not Barbara James but a prominent, affluent cotton or wheat farmer receiving benefit payments for not growing crops, would not the approach be different? Welfare in aid of dependent children, like social security and unemployment benefits, has an aura of suspicion. There doubtless are frauds in every sector of public welfare whether the recipient be a Barbara James or someone who is prominent or influential. But constitutional rights—here the privacy of the *home*—are obviously not dependent on the poverty or on the affluence of the beneficiary. It is the precincts of the *home* that the *Fourth Amendment* protects; and their privacy is as important to the lowly as to the mighty.

*Id.* at 332-33 (Douglas, J., dissenting) (internal citations omitted).

<sup>256</sup> *Id.* at 334 (Douglas, J., dissenting) (“[I]f inspectors want to enter the precincts of the home against the wishes of the lady of the house, they must get a warrant.”).

it was disingenuous to describe home visits as something other than criminal investigations when visits were partially motivated by a desire to find evidence of fraud and child abuse (both felonies) and to eliminate benefits, which he viewed as a civil forfeiture.<sup>257</sup>

Although *Wyman v. James* upheld home visits, home visits ended in most locales following federal policy changes requiring welfare offices to devote more resources to gathering paper records that verified eligibility. The San Diego home searches of welfare recipients, begun in 1997, marked a dramatic return to old practices. Los Angeles County soon followed, implementing home visits in 1999 after a television broadcast raised concerns about welfare fraud in the county.<sup>258</sup> Los Angeles County officials claimed that the purpose of the home visits was twofold: to eliminate fraud and to identify individual needs for supportive services.<sup>259</sup> Under that home visit program, soon after a new welfare case was opened, an Eligibility Worker, specially trained in the details of supportive services and identifying potential fraud, made an announced visit to the home of the applicant.<sup>260</sup> Welfare recipients were notified that the visits would occur between 8:00 a.m. and 5:00 p.m. during the ten days following notice.<sup>261</sup> The home visits lasted from around thirty to forty-five minutes and included a one- to two-minute walk-through of the home.<sup>262</sup> Where the Eligibility Workers found the applications to be fraudulent, they denied benefits, but did not refer individuals for criminal prosecution.<sup>263</sup>

A group of welfare applicants filed a petition for a writ of mandamus challenging the home visits, but the California Court of Appeals, in *Smith v. Los Angeles Board of Supervisors*, dismissed the action.<sup>264</sup> The court ruled that the home visits did not contradict the purpose of the state welfare

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<sup>257</sup> *Id.* at 339-40 (Marshall, J., dissenting).

<sup>258</sup> *Smith v. Bd. of Supervisors*, 128 Cal. Rptr. 2d 700, 703 (Ct. App. 2002) (noting the broadcast as the trigger for the home visit program).

<sup>259</sup> *Id.* at 703. According to county officials, the purpose was:

[T]o explain the CalWORKs program to the participant and to discuss the availability of supportive services. Supportive services include educational, child care, transportation, domestic violence, substance abuse, and mental health services. During the interview, the HIP Eligibility Worker (EW) also notes any indications of circumstances that are inconsistent with the case information. For example, if children will be aided on the case, the HIP EW will look for evidence that children live in the home. If the participant claims that the father is an absent parent, the HIP EW will look for indications that the father lives in the home.

COUNTY OF L.A. DEP'T OF AUDITOR-CONTROLLER, *supra* note 187, at 3.

<sup>260</sup> *Smith*, 128 Cal. Rptr. 2d at 704.

<sup>261</sup> *Id.* at 712.

<sup>262</sup> *Id.* at 705.

<sup>263</sup> *Id.* at 704.

<sup>264</sup> *Id.* at 702 (affirming the Superior Court's dismissal of the claims).

statute because the purpose of the searches was to determine eligibility.<sup>265</sup> The judges also pointed to evidence that welfare home visits had occurred in the past in California, though they failed to note that such visits had generally not occurred for close to thirty years.<sup>266</sup> The decision noted that the petitioners had not offered evidence that there was a method other than a home search to verify a welfare applicant's address or to determine the presence of an undisclosed adult in the household.<sup>267</sup> The judges did not address the fact that neither of these determinations required *actual entry into the home*.<sup>268</sup>

The judges also concluded both that searches of welfare recipients' homes do not substantially intrude on their privacy<sup>269</sup> and that home visits, if they are searches at all, fall within the "special needs" exception to the Fourth Amendment.<sup>270</sup> During the 1980s, the U.S. Supreme Court handed down a series of decisions allowing the government to conduct suspicionless searches of individuals where particular safety concerns were at issue.<sup>271</sup> Most special needs cases have arisen in the contexts of drug and weapons smuggling—both of which pose serious safety concerns—in settings such as jails, prisons, and schools. Additionally, the cases have generally involved individuals who are under state control because of their vulnerability—for example, minor students<sup>272</sup>—or individuals who are either suspected or convicted of criminal activity. At the time *Smith* was decided, all of the home searches that the U.S. Supreme Court had approved

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<sup>265</sup> *Id.* at 709.

<sup>266</sup> The decision states that "in the past, when caseloads were not so high and budgets not so tight, home visits were the norm in the eligibility determination process." *Id.*

<sup>267</sup> *Id.* at 705.

<sup>268</sup> For example, a knock on the door without entry into the home would generally suffice to verify an applicant's address and determine the presence of additional adults living in the home. Moreover, the computer database cross-checks that are now conducted can already identify additional taxpayers, benefit recipients, or vehicle owners reporting a given address as a residence.

<sup>269</sup> *Smith*, 128 Cal. Rptr. 2d at 703.

<sup>270</sup> *Id.* at 711-12.

<sup>271</sup> *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (allowing search of probationer's home without probable cause); *New Jersey v. T.L.O.*, 469 U.S. 325, 337-42 (1985) (allowing searches of high school students by school authorities based on reasonable suspicion rather than probable cause); *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979) (allowing visual inspection body cavity searches of pre-trial detainees following detainees' contact with visitors).

<sup>272</sup> *See, e.g., Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (allowing random drug testing of student athletes based on "special needs" of public schools); *T.L.O.*, 469 U.S. at 337-42.

under the special needs exception involved parolees and probationers<sup>273</sup>—individuals convicted of criminal wrongdoing.<sup>274</sup>

San Diego's home searches *are* more intrusive than any other program challenged in the courts. The searches are unannounced full searches of private dwellings; they are conducted by deputized law enforcement officers, and they occur before a welfare applicant ever receives a check. The American Civil Liberties Union, representing a number of welfare recipients in San Diego, brought claims in federal district court challenging San Diego's practices.<sup>275</sup> The case was appealed to the Ninth Circuit Court of Appeals where, in 2006, two of the three sitting judges agreed that the home searches were lawful.<sup>276</sup>

Judge Tashima, writing for himself and Judge Kleinfeld, concluded that the home searches were not searches under the Fourth Amendment because "the home visits are conducted with the applicant's consent" and because "there is no penalty for refusing to consent to the home visit, other than denial of benefits."<sup>277</sup> Acknowledging that recent Supreme Court case law had recognized consensual administrative searches as covered by the Fourth Amendment,<sup>278</sup> he then reasoned that even if the San Diego home visits were searches, they were reasonable ones. He further argued that any intrusions into a welfare applicant's privacy were outweighed by important government interests, namely the public's "strong interest in ensuring that aid provided from tax dollars reaches its proper and intended recipients."<sup>279</sup>

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<sup>273</sup> *United States v. Knights*, 534 U.S. 112, 113 (2001) (upholding warrantless investigative search of probationer's dwelling where there was reasonable suspicion for search and where unconditional searches were included in terms of probation). The decision in *Knights* states that "probationers do not enjoy the absolute liberty to which every citizen is entitled. Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Id.* at 119 (citations omitted). The analogy of special needs searches of probationers to searches of welfare recipients suggests that welfare recipients also do not enjoy the freedoms of law-abiding citizens.

<sup>274</sup> See, e.g., *Griffin*, 483 U.S. at 873 (allowing search of probationer's home without probable cause).

<sup>275</sup> *Sanchez v. County of San Diego*, 2003 U.S. Dist. LEXIS 27538 (S.D. Cal. Mar. 7, 2003). The district court later enjoined fraud investigators' collateral contacts—for example, interviews with neighbors or landlords—conducted without the consent of the welfare applicants. *Sanchez v. County of San Diego*, 2003 U.S. Dist. LEXIS 27351, \*22 (S.D. Cal., May 9, 2003).

<sup>276</sup> *Sanchez v. County of San Diego*, 464 F.3d 916 (9th Cir. 2006), *reh'g denied, reh'g en banc denied*, 483 F.3d 965 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 649 (2007).

<sup>277</sup> *Sanchez*, 464 F.3d at 921.

<sup>278</sup> *Id.* at 922 n.8.

<sup>279</sup> *Id.* at 923.

Judge Tashima went on to argue that the San Diego home visits properly fell under the “special needs” exception to the warrant requirement.<sup>280</sup> Tashima concluded that verifying welfare eligibility was a special need akin to that of supervising probationers and minor student athletes, without explaining why those groups of individuals were analogous.<sup>281</sup> Tashima also wrote that while information gathered by welfare fraud investigators might be used for general law enforcement purposes,<sup>282</sup> the primary use was for verification of eligibility and prevention of fraud. While he acknowledged that welfare recipients have a right to privacy, he wrote that a welfare recipient’s “relationship with the state can reduce that person’s expectation of privacy *even within the sanctity of the home*,”<sup>283</sup> and that the state need not use less intrusive measures, even when they are available.<sup>284</sup>

Judge Fisher’s dissenting opinion in *Sanchez* focused on *Wyman v. James* and distinguished the unannounced, full home searches by deputized officers from the brief, pre-announced visits by social workers in *Wyman*. Fisher wrote: “Neither *Wyman* nor the special needs doctrine renders constitutional the entry and inspection of homes . . . by agents of the district attorney without warrants, probable cause or individualized suspicion of ineligibility or fraud.”<sup>285</sup> Fisher expressed particular dissatisfaction with the arguments that welfare recipients have lower expectations of privacy in the home than anyone else and that the special needs exception to the warrant requirement should apply in this case.<sup>286</sup>

Though the welfare applicants sought to have the issue re-heard by the full panel of Ninth Circuit judges, less than a majority of the judges thought

<sup>280</sup> *Id.* at 925.

<sup>281</sup> *Id.* at 925 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (upholding warrantless searches of the homes of probationers as a special need); *Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002) (upholding suspicionless drug testing of student high school athletes as a special need)).

<sup>282</sup> Warrantless and suspicionless searches for the purposes of general law enforcement purposes were found to violate the Fourth Amendment in *Ferguson v. City of Charleston*, 532 U.S. 67, 83 (2001) (putting a halt to suspicionless drug testing of pregnant women in a public hospital).

<sup>283</sup> *Sanchez*, 464 F.3d at 927 (emphasis added).

<sup>284</sup> *Id.* at 928. The Supreme Court in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 n.2 (1989), upheld drug testing of public employees by explaining that, like the *pre-announced* welfare home visits in *Wyman*, it was the least intrusive means available, suggesting that, at least at one point in time, the notion of least intrusive means was important to the special needs doctrine.

<sup>285</sup> *Sanchez*, 464 F.3d at 938 (Fisher, J., dissenting).

<sup>286</sup> *Id.* at 940 (Fisher, J., dissenting) (“[U]nlike convicted felons, welfare applicants have no lesser expectation of privacy in their homes than the rest of us.”).

the issue merited a rehearing.<sup>287</sup> Eight of the judges who favored a rehearing joined their voices in a dissent authored by Judge Harry Pregerson. The dissenting opinion stated in part: “The government’s general interest in preventing fraud cannot justify such highly intrusive searches of homes where no grounds for suspicion exist. Welfare applicants are ordinary people who, due to lack of adequate funds, find themselves applying for life-sustaining government benefits.”<sup>288</sup> Increasingly, however, judges, policymakers, and everyday individuals do not view welfare recipients as ordinary people.

Pregerson’s dissenting opinion appropriately labeled Judge Tashima’s majority opinion as “an [a]ssault on the [p]oor,”<sup>289</sup> for an assault it surely was. There is no legitimate consent in the case of San Diego welfare recipients;<sup>290</sup> rather, the recipients are placed in coercive situations where they must make choices based on “brutal need.”<sup>291</sup> Nonetheless, the majority in *Sanchez* rejected the argument that San Diego’s welfare office placed unconstitutional conditions upon receipt of welfare by forcing welfare applicants to give up their Fourth and Fourteenth Amendment rights.<sup>292</sup> While individuals regularly endure government intrusion into their lives, such as when they receive driver’s licenses or student loans,<sup>293</sup>

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<sup>287</sup> *Sanchez v. County of San Diego*, 483 F.3d 965 (9th Cir. 2007).

<sup>288</sup> *Id.* at 968 (Pregerson, J., dissenting).

<sup>289</sup> *Id.* (Pregerson, J., dissenting).

<sup>290</sup> Consent is determined by the “totality of all the circumstances,” and elements suggesting that the search was non-voluntary and that the individual searched did not perceive a right to refuse render a consent-based search unlawful. *Schnecko v. Bustamonte*, 412 U.S. 218, 227, 230 (1972). A federal judge in Minnesota, applying the totality of the circumstances standard, ruled that a search was rendered nonconsensual by the mere fact that a welfare recipient’s refusal to allow caseworkers to search her home would result in the termination of benefits. *Reyes v. Edmunds*, 472 F. Supp. 1218, 1223, 1225 (D. Minn. 1979). The opinion states, “The right to be free from unreasonable search and seizure is an absolute right. It in no way is qualified by whether or not evidence of an illegal activity is actually possessed or being concealed. A violation of this right is per se damaging.” *Id.* at 1229. This case arose before the U.S. Supreme Court articulated the ever-expanding “special needs” exception. *See supra* notes 271-274.

<sup>291</sup> This term was used by the district court in *Kelly v. Wyman*, 294 F. Supp. 893, 900 (S.D.N.Y. 1968), and quoted in the majority opinion of *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970). The term was used to describe situations where—even absent the life, liberty, or property claims usually required to anchor a due process claim—a right to procedural due process might exist.

<sup>292</sup> *Sanchez v. County of San Diego*, 464 F.3d 916, 931 (9th Cir. 2006).

<sup>293</sup> More than forty years ago Charles Reich noted, “When government—national, state, or local—hands out something of value, whether a relief check or a television license, government’s power grows forthwith; it automatically gains such power as is necessary and proper to supervise its largess. It obtains new rights to investigate, to regulate, and to punish.” Charles Reich, *The New Property*, 73 *YALE L.J.* 733, 746 (1964). Reich specifically warned of such intrusions:



those who are not suspected or convicted of criminal activity are understood to enjoy protections from government intrusion into their dwellings. The reality that individuals forfeit these protections once their incomes drop below a certain floor is deeply troubling.

Recent California case law involving searches of welfare recipients' homes have described the intrusions as "minimal."<sup>294</sup> The conclusion that these intrusions are minimal stands in contrast to much of Fourth Amendment case law, which treats the home as a special place where government authorities may not intrude without either consent or a warrant supported by probable cause. For citizens other than welfare recipients, the Supreme Court has been particularly protective of the home, handing down a series of recent decisions holding that search of a home must be either clearly consensual or based on probable cause.<sup>295</sup> For welfare recipients, however, the privacy protections of the home are dismissed or diminished by the courts.<sup>296</sup>

While some judges have argued that home searches by welfare fraud investigators should not be viewed as searches under the Fourth Amendment, these searches are properly viewed as searches under established Fourth Amendment case law. Since the 1970s, welfare

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Administering largess carries with it not only the power to conduct trials, but also the power to inflict many sorts of sanctions not classified as criminal punishments. The most obvious penalty is simply denial or deprivation of some form of wealth or privilege that the agency dispenses. How badly this punishment hurts depends upon how essential the benefit is to the individual or business affected.

*Id.* at 755.

<sup>294</sup> *Smith v. Bd. of Supervisors*, 128 Cal. Rptr. 2d 700, 712 (Ct. App. 2002) ("Eligibility workers are prohibited from opening drawers or closets during their walk-through of the home. We conclude that whatever intrusion is involved is minimal, and is outweighed by the government's interest in preventing fraud."). Minnesota appears to provide more protections to welfare recipients. *See Reyes*, 472 F. Supp. 1218 (finding that both the Fourth Amendment and the Minnesota Constitution prohibit suspicionless, unannounced home searches of welfare recipients by welfare caseworkers).

<sup>295</sup> *See, e.g., Kyllo v. United States*, in which Justice Scalia writes that "[a]t the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." 533 U.S. 27, 31 (2001) (internal quotation mark and citations omitted); *see also Georgia v. Randolph*, 547 U.S. 103, 123 (2006) (Stevens, J., concurring) ("At least since 1604 it has been settled that in the absence of exigent circumstances, a government agent has no right to enter a 'house' or 'castle' unless authorized to do so by a valid warrant.").

<sup>296</sup> Steven Schwinn writes that these are not only violations of the Fourth and Fourteenth Amendments, but also violations of the Fifth Amendment's limitation on unconstitutional conditions. *See Steven D. Schwinn, Reconstructing the Constitutional Case Against Mandatory Welfare Home Visits*, 42 CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y 42 (2008).

recipients have typically had very little interaction with government officials in their homes. While information gathering about the recipient increased in the form of written and electronic information, welfare recipients began to expect freedom from government intrusion into their homes. Under the two-pronged *Katz* standard, welfare recipients certainly had a subjective expectation of privacy from government intrusion in their own homes. Supreme Court cases handed down over the last decade would suggest that welfare recipients, like everyone other than parolees and probationers,<sup>297</sup> enjoy a reasonable expectation of privacy within the home.

In addition, the Supreme Court has also handed down cases making it clear that law enforcement officers may not go fishing for criminal activity among ordinary citizens going about their everyday lives.<sup>298</sup> Searching the homes of welfare applicants, and drug testing welfare recipients, is nothing but fishing for wrongdoing. Welfare recipients are not treated as ordinary citizens, but rather as presumptive criminals. For instance, Judge Tashima's opinion for the majority in *Sanchez* cites *Samson v. California*, where a Supreme Court majority of five upheld suspicionless home searches of parolees based on the history of criminal activity and the assumption that because of their status, parolees are more likely than ordinary citizens to break the law.<sup>299</sup>

The special needs analysis applied in *Sanchez* seems particularly wobbly. There is nothing "inherently dangerous" about welfare receipt as there is in some of the other cases justifying special needs searches.<sup>300</sup> If the weighty governmental need underlying suspicionless searches is "program integrity," then suspicionless searches of any recipients of government benefits amounts to a special need.<sup>301</sup> The *Sanchez* decision,

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<sup>297</sup> *Samson v. California*, 547 U.S. 843 (2006) (validating warrantless searches of probationers' homes).

<sup>298</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000) (finding that where "the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment" and suggesting that the Fourth Amendment is meant to "prevent such intrusions from becoming a routine part of American life"); see also *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (holding warrantless, non-consensual drug testing of pregnant patients—even patients at risk of drug abuse—to be a violation of the Fourth Amendment).

<sup>299</sup> See *Sanchez v. County of San Diego*, 464 F.3d 916, 928 (9th Cir. 2006) (citing *Samson*, 547 U.S. at 853-54).

<sup>300</sup> See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 671-72 (1989) (finding a special need for suspicionless searches where employees are involved in interdicting illegal drugs and carry firearms).

<sup>301</sup> Amy Mulzer writes that welfare verification procedures play a more complex role in welfare policy than many people realize. First, they are a way to informally change eligibility rules and ration benefits. Second, verification procedures serve "a symbolic

though, cites no basis for assuming that applicants for welfare are more likely to violate the law and cheat the government out of money than other ordinary citizens. Moreover, welfare recipients are not “wards” of state institutions like prisoners or minor students, two populations who have been found subject to special needs searches.<sup>302</sup> And outside of parolees and probationers, the special needs exception had never, until *Sanchez*, been extended so far as to allow government searches of individuals’ homes.

The lack of privacy rights afforded welfare recipients mirrors the limited freedoms of parolees and probationers. In written opinions, judges have been uncritical about how analogizing the status of welfare recipients to parolees and probationers stigmatizes the poor and equates poverty with criminality. The balancing of government interests in this context is essentially a weighing of the interests of the taxpaying “haves” over the privacy interests of the “have nots.”

In the end, the Fourth Amendment’s protection from search and guarantee of privacy in the home do not appear to apply to welfare recipients. Christopher Slobogin has written that there is a “poverty exception” to the Fourth Amendment.<sup>303</sup> Welfare recipients hold a special, and inferior, status under the law—a status that positions them much closer to probationers and parolees than to law-abiding citizens. But the decision in *Sanchez* goes further: one need not be an actual recipient of welfare to suffer these constitutional impairments. Simply applying for TANF benefits and food stamps, before ever receiving them, curtails an individual’s Fourth Amendment rights.<sup>304</sup>

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function, expressing and reaffirming public ideas about welfare and welfare claimants.” Amy Mulzer, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means-Tested Welfare Programs*, 36 COLUM. HUM. RTS. L. REV. 663, 710 (2005).

<sup>302</sup> See *supra* notes 166, 271-272.

<sup>303</sup> Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 406 (2003) (“[T]he Court’s caselaw affords the poorer people in our country much less protection of their privacy and autonomy than those who are better off.”).

<sup>304</sup> In 2007, Republican Member of the State Senate Tom McClintock introduced a bill, S.B. 269, 2006-2007 Reg. Sess. (2007), that would mandate unscheduled home visits throughout the State of California. At the time it was considered by committee, the *Sanchez* case was on appeal, and the bill failed passage in committee. Given that the Supreme Court has denied certiorari, thereby validating home searches of welfare applicants, it would not be a surprise to see this bill re-introduced in California—or to see similar bills introduced in other states.

## B. THE EROSION OF PROCEDURAL RIGHTS

Rules of procedural fairness have been denied to welfare recipients.<sup>305</sup> The crackdown on welfare cheats has raised concerns about a lack of notice that criminal proceedings have begun, and a lack of clarity as to when the investigative process ends and the adversarial process begins. Because the line between the welfare system and criminal justice system has blurred, many questions arise about when a criminal investigation has begun, when a criminal interrogation has begun, and perhaps even when charges are being brought.<sup>306</sup>

Several concerns arise about the recent criminalization of welfare offices. First, merging the physical space between welfare administrators and fraud investigators, as well as the movement of personnel between the two roles, creates confusion for welfare recipients, who cannot separate the welfare system from the criminal justice system in their interactions with the state. It also creates conflicts of interests where government employees may not be clear whether their primary mandate is to provide for or to punish the poor.

Second, it is no longer clear when criminal proceedings have begun and, therefore, when a welfare recipient should have access to legal counsel to ensure fairness. In *Goldberg v. Kelly*, one of Justice Black's bases for dissent was that a right to a fair hearing would ultimately require a right to

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<sup>305</sup> California advocates for welfare recipients have lodged a number of complaints: that welfare offices contact recipients' employers and disclose their welfare status, causing recipients to be fired; that fraud investigators threaten children that their families will be cut off aid if they refuse to answer investigators' questions; that fraud investigators stop benefits without notice to recipients; that recipients who have been charged with fraud and who have obtained counsel are questioned without counsel present; that fraud investigators secretly tape interviews and offer them as evidence against recipients; and that eligibility workers frivolously refer self-assertive welfare recipients for fraud investigations. *Advocate Meeting with CDSS Welfare Fraud Bureau – 4/18/06*, CCWRO NEW WELFARE NEWS (Coal. Of Cal. Welfare Rights Org., S.F., Cal.) July 3, 2006, at 5, available at <http://www.benchmarkinstitute.org/ccwro/CCWRO-06-08.pdf>.

<sup>306</sup> A number of years ago, I attended an administrative hearing in Alameda County, California, requested by a welfare recipient to challenge her termination of benefits, which had occurred without notice. In addition to a couple of officials from the welfare office, two ADAs hoping to charge the woman with welfare fraud were in attendance. Also in attendance was a welfare fraud investigator, though it was unclear whether she was employed by the welfare office or was a deputized investigator working for criminal prosecutors. The welfare recipient had no idea that statements she made could be used against her in criminal proceedings, and had no idea that she could exercise her Fifth Amendment right to remain silent in this setting. At the hearing, the welfare recipient had representation, but not representation by a lawyer. (Anyone with adequate knowledge of the regulations may represent a client in an administrative appeal in California. An individual with knowledge of the welfare regulations, though, may not have knowledge of the evidentiary issues or criminal issues involved.)

government-paid counsel.<sup>307</sup> Currently, however, welfare recipients are not provided counsel in administrative hearings, even when those hearings have direct criminal consequences.<sup>308</sup>

Finally, states often prefer criminal remedies even where both civil and criminal remedies are available. In California, collateral estoppel precludes the State from prosecuting welfare recipients who have been exonerated of welfare fraud in an administrative hearing.<sup>309</sup> In many instances, the State avoids collateral estoppel by going straight for criminal prosecution unless the welfare recipient herself files for an administrative hearing. In other instances, the State apparently ignores stated law and attempts to take a second bite at the apple even after losing an administrative hearing.<sup>310</sup> In a recent, lengthy California Supreme Court dissent, Justice Ming Chin argued that clear and strong legislative preferences for criminal resolution of welfare fraud cases should serve as an exception to the rules of collateral estoppel.<sup>311</sup> He also noted that informal administrative hearings merely create additional risks for welfare recipients whose testimony may be used against them in later criminal proceedings.<sup>312</sup>

Clearly, the criminalization of the welfare system is raising complicated issues of procedural justice that are being inadequately addressed. Charles Reich wrote in 1964 that “higher standards of procedural fairness should apply when government action has all the effects of a penal sanction.”<sup>313</sup> Welfare hearings not only hold the potential for penal sanctions, but increasingly lead straight to penal sanctions. Welfare

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<sup>307</sup> 397 U.S. 254, 278 (Black, J., dissenting) (citing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)).

<sup>308</sup> Today, lawyers are rarely available to low-income individuals who are engaged in administrative interactions with welfare officials. Legal aid attorneys give administrative welfare appeals low priority among the many legal issues that arise among the poor. During the late 1990s, when welfare prosecution rates soared in northern California, none of the legal aid offices provided representation to welfare recipients during administrative appeals because they had to prioritize resources and welfare hearings were subordinate to other legal issues. Lack of legal representation is particularly serious for welfare recipients who have misreported or underreported their income because statements they make at administrative hearings, particularly admissions, may be used against them in criminal proceedings. Collateral estoppel prevents welfare recipients from challenging any findings of fact in an administrative hearing during later criminal proceedings.

<sup>309</sup> *People v. Sims*, 651 P.2d 321, 334 (Cal. 1982) (expressing concern that multiple, and possibly inconsistent, judgments undermine procedural integrity).

<sup>310</sup> *People v. Garcia*, 141 P.3d 197, 210 (Cal. 2006) (remanded on the collateral estoppel issue for “determination of whether the issues litigated at the administrative hearing and the criminal prosecution for welfare fraud and perjury were identical”).

<sup>311</sup> *Id.* at 213-15 (Chin, J., dissenting).

<sup>312</sup> *Id.* at 222-23.

<sup>313</sup> Reich, *supra* note 293, at 784.

recipients should therefore be given clear notice, both written and verbal, that statements they make during administrative appeals may have criminal implications. They should also have access to government-paid legal counsel in all proceedings that have the potential to lead to serious criminal action.

## V. POLICY RECOMMENDATIONS AND CONCLUSIONS

The scope of this Article does not extend to recommendations for systemic reform of the welfare and criminal justice system. But the problems explained in the preceding Parts suggest some modest approaches to reform.

### A. DE-COUPLE WELFARE FRAUD INVESTIGATIONS FROM WELFARE PROVISION

Federal, state, and local governments should maintain a welfare administration that is separate from welfare fraud investigation and prosecution agencies. The combination of the two functions—providing and investigating—creates conflicts of interests, with welfare administrators focused on withholding benefits and catching cheats rather than providing for the poor.

Welfare caseworkers should be housed in facilities separate from fraud investigators and prosecutors. This physical separation will give notice to welfare recipients when they become the subjects of criminal investigations. Low-income families may be confused by the deputizing of welfare fraud investigators; they may encounter the same individual as a benefits caseworker one month and as a deputized fraud investigator the next. As a result, welfare recipients may often be unaware when criminal investigations are underway.

### B. AFFIRM THE PRIVACY RIGHTS OF WELFARE RECIPIENTS IN INVESTIGATIONS

Judges and legislators should recognize that being poor does not relegate an individual to second class citizenship. Fourth Amendment protections should apply to all citizens, whether rich or poor. Professor Christopher Slobogin wrote that if there is a “poverty exception” to the Fourth Amendment, it exists not because the Supreme Court Justices hold animus toward the poor, but because they are blind to the interests of the poor, and are instead concerned—perhaps overly so—with issues of crime control. Slobogin argues that if “the Court thought more about the interests

of the poorer segments of society when deciding its cases, it would have structured a Fourth Amendment that is more protective of us all.”<sup>314</sup>

Protecting welfare recipients’ privacy in the home from unreasonable searches is an issue of concern to more than just the judiciary. Legislators could move closer to guaranteeing basic privacy rights by repealing the federal welfare provisions that allow law enforcement officials to access welfare records and states to drug test welfare applicants.

As the boundary between public and private life is blurred, and as issues of consent lose clarity, the probable cause doctrine is the only tool that can protect the poor from being treated like criminal convicts and becoming subject to state control.

#### C. ENSURE PROCEDURAL FAIRNESS IN THE HEARING PROCESS

As the welfare system becomes more and more like the criminal justice system, procedural protections for welfare recipients should be adjusted to keep pace. In particular, when welfare recipients are notified that they have overpayments due to their own errors or misrepresentations, they should also be notified that overpayments based on knowing misrepresentation may result in criminal charges. Welfare recipients should be informed that written *and* oral statements they make in response to administrative notices may be used against them in criminal proceedings. Likewise, they should be informed that any facts established in administrative proceedings can be used as settled facts for any subsequent criminal proceedings.

Welfare recipients suspected of cheating should also be clearly informed of their right to counsel during administrative proceedings. Moreover, given that negative findings in an administrative hearing may carry the possibility of criminal charges and collateral lifelong exclusion from welfare programs, welfare recipients facing overpayment claims should have a right to government-appointed counsel.

#### D. CLARIFY FRAUD STATUTES AND ESTABLISH STANDARDS FOR PROSECUTIONS

The criminal statutes used to prosecute individuals of welfare fraud, and the standards used to determine which cases deserve criminal treatment, differ drastically between states. Many states do not have statutes specific to the crime of welfare fraud.<sup>315</sup> Model welfare fraud codes should be

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<sup>314</sup> Slobogin, *supra* note 303, at 406-07.

<sup>315</sup> Ohio, for example, has no statute specific to welfare fraud. Individuals accused of welfare cheating can be charged with falsification, OHIO REV. CODE ANN. §2921.13 (West 2006 & Supp. 2009); theft by deception, OHIO REV. CODE ANN. § 2913.02(A)(3) (West 2006

developed to encourage consistency among states and to make it easier for the Bureau of Justice Statistics to track welfare fraud as a specific category.<sup>316</sup> Likewise, when reviewing fraud statutes, state legislatures should take care to clarify that welfare fraud requires specific intent to receive benefits to which one is not entitled, thereby distinguishing welfare fraud from perjury. Zealous prosecutors are currently using this statutory ambiguity to the disadvantage of welfare recipients who might have unwittingly overstepped the complex rules and who might legitimately argue mistake of fact as a defense.

Some states have created guidelines for pursuing cases in the criminal rather than the administrative realm, while others have not. As a result, the system has become arbitrary. Where prosecution decisions are left to the discretion of local prosecutors, and where limited benefits prompt widespread cheating throughout the welfare system, local discretion can lead to both selective enforcement and racial discrimination.

Wisconsin, a state with some of the harshest welfare policies, has virtually de-criminalized welfare fraud. For the last decade, the Wisconsin Department of Health and Family Services has encouraged counties to pursue administrative remedies or sanctions rather than refer cases to county District Attorneys for prosecution. Since the early 1980s, Wisconsin prosecutors have been reluctant to take welfare fraud cases and, when they do, almost always resolve them through pre-charge or pre-trial diversion programs. This reluctance is particularly interesting given that Wisconsin district attorneys are locally elected and therefore vulnerable to the influence of public opinion. Officials there have apparently decided that welfare benefits are so limited and that prosecutions and restitution efforts are so costly that criminal prosecutions are neither cost-effective nor effective in deterring fraud. More extensive data collection and analysis within and across states may help policymakers to evaluate the effects of criminalization and de-criminalization of welfare fraud.

#### E. EVALUATE COSTS

Policymakers, agency officials, and academics need to consider how to measure those welfare system costs that are externalized to the criminal justice system. Numerous studies have questioned the community and fiscal benefits of fingerprint imaging, welfare sanctions, lifelong welfare

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& Supp. 2009); securing writings by deception, OHIO REV. CODE ANN. § 2913.43 (West 2006); or unauthorized use of property, OHIO REV. CODE ANN. § 2921.04 (West 2006).

<sup>316</sup> Georgia is a state that specifically defines welfare fraud and that seems to encourage prosecutors to enter into consent agreements, under which individuals who pay the state restitution and meet other specified conditions will go without criminal convictions. GA. CODE ANN. § 49-4-15 (West 2003).



exclusions, and criminal welfare prosecutions.<sup>317</sup> Local studies of the savings associated with reducing the number of welfare recipients fail to assess the costs that are externalized to other government programs. Moreover, many fiscal studies fail to measure costs such as the effect of punitive policies on families and communities, costs associated with increasing the number of parents in the criminal justice system, the cost to state and local governments of policing the poor, and the long-term costs of stigmatizing government assistance and allowing poverty to go unalleviated. Evaluators should develop a holistic accounting method that examines both cost-shifting and the human costs of criminalization.

#### F. RECOGNIZE THE STRUCTURAL AND SYMBOLIC SIGNIFICANCE OF CRIMINALIZING POVERTY

While the intermingling of the welfare system and the criminal justice system has largely gone unnoticed by the public, it has been applauded by policymakers and approved by the courts. Nonetheless, this Article seeks to highlight some of the practical, economic, policy, and constitutional problems associated with the criminalization of poverty.

The recommendations above may give the impression that if the government simply provides more procedural and constitutional safeguards for welfare recipients, then all will be well. While the government should employ appropriate procedural safeguards, this discussion of rules, regulations, and procedures may distract governments and policymakers from larger issues of power, ideology, and the individual's relationship with the state.<sup>318</sup> Though it may be impossible to pay heed to the "pull of the policy audience"<sup>319</sup> and at the same time remain a critical outsider to that audience, there is something about the criminalization of poverty that demands both policy reforms and a larger analysis of the flow of state power.

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<sup>317</sup> See notes 109-201 and accompanying text.

<sup>318</sup> Critical scholars have long expressed their anxieties that engaging with policy discussions simply reinforces law's hegemonic power over the oppressed, and fails to further either social theory or social transformation. See generally Kitty Calavita, *Engaged Research, "Goose Bumps," and the Role of the Public Intellectual*, 36 LAW & SOC'Y REV. 5, 7 (2002) (arguing that truly engaged law and society research is not myopically concerned with discrete policy issues, but rather engages with macrostructural analyses and social theory); Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 LAW & POL'Y 97, 102 (1988) (arguing that "[b]y addressing a policy audience, scholars speak directly to power," but may ultimately serve to silence political and moral challenges to the power relationships foundational to the policies).

<sup>319</sup> Sarat & Silbey, *supra* note 318, at 99 (arguing that those who avoid the policy audience are scholars who are "politically engaged without adopting the agenda of those who currently make or administer policy").

The criminalization of poverty highlights economically and legally institutionalized ideologies of neo-liberalism, racism, sexism, and the dehumanization of the poor. The growth of punitive welfare policies and the policing of welfare fraud add up to something more than the policing of crime. These policies and practices are rooted in the notion that the poor are latent criminals and that anyone who is not part of the paid labor force is looking for a free handout. In many ways, the policy goals of punishing non-working welfare recipients, welfare cheats, and aid recipients who engage in unrelated crimes has overwhelmed the goal of protecting poor families, adults, and children from economic instability.

But adults as well as children are being harmed. More than forty years ago, Charles Reich expressed concerns that the individual's dependence upon the state was leading to the erosion of constitutional rights and protections.<sup>320</sup> Time has brought the realization of those fears.

Social factors and problems, and the ways in which we understand them, change over time.<sup>321</sup> The language of pathology and crime has become central to discussions of welfare policy, while the word "poverty" has fallen out of use in the literature. The use of the term "welfare dependency," now commonplace in public and policy discussions of aid programs,<sup>322</sup> has assumed a thoroughly negative connotation<sup>323</sup> and is more often used than the more neutral term "welfare use." In addition, the federal and state governments and an expanding group of social scientists and policymakers now use the term "recidivism" to describe a family's departure from and return to the welfare system.<sup>324</sup> Once a term generally

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<sup>320</sup> Reich, *supra* note 293, at 779 ("The most clearly defined problem posed by government largesse is the way it can be used to apply pressure against the exercise of constitutional rights. A first principle should be that government must have no power to 'buy up' rights guaranteed by the Constitution.").

<sup>321</sup> See generally Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995) (describing the social and legal construction of understandings and outlining techniques of transforming social meanings). While my Article is an attempt to map the social construction of poverty, welfare, and welfare cheating, it is also an attempt to transform our understandings of welfare in the process.

<sup>322</sup> See, e.g., Shao-Hsun Keng et al., *Welfare Dependence, Recidivism, and the Future for Recipients of Temporary Assistance for Needy Families (TANF)* 9 (Iowa State Univ. Ctr. for Agric. & Rural Dev., Working Paper No. 00-WP 242, 2000) (using the term "welfare dependency" frequently).

<sup>323</sup> See generally Nancy Fraser & Linda Gordon, *A Genealogy of 'Dependency': Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309 (1994) (exploring the term "welfare dependency" and its negative connotations). See also Sanford F. Schram, *Words of Welfare: The Poverty of Social Science and the Social Science of Poverty* 31-32 (1995) (explaining that Liberals' adoption of neo-liberalism has led to their use of the term *dependency*).

<sup>324</sup> See R. MARK GRITZ ET AL., THE SPHERE INST., GRANT NO. 99ASPE-338A, WELFARE RECIDIVISM AND USE OF NON-CASH AID BY WELFARE LEAVERS IN CALIFORNIA (2001), available at <http://www.sphereinstitute.org/publications/AspePARecidivism.pdf>; Shiferwa

limited in use to describe an individual's repeated involvement in crime, recidivism is now the word that has displaced the neutral term "welfare cycling," which most social scientists used before welfare reform.<sup>325</sup>

There is something fundamentally and morally different between imposing criminal penalties versus other types of penalties. Criminalizing behavior serves an expressive social function.<sup>326</sup> Given recent case law, it seems there is little to prevent the expansion of the criminalizing of behaviors and practices beyond the welfare poor. For example, what is to prevent the same types of invasive and punitive reform associated with TANF "program integrity" from being employed by the Social Security Administration or by state departments of motor vehicles? Perhaps the irrational animus now targeted at welfare recipients will not spread and economically and racially privileged individuals will escape the creep of criminalization. Today, when the U.S. economy is in decline, a growing number of Americans are in peril of becoming not just economically poor, but rights-poor as well. Indeed, the Fourth Amendment itself is being compromised by the criminalization of poverty. Universal protections—whether economic or constitutional—are meant to benefit us all. To ensure those protections, we must disentangle the welfare and criminal justice systems from root to tip.

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Gurmu & William J. Smith, *Recidivism Among Welfare Recipients: The Role of Neighborhood and Access to Employment*, 34 ATLANTIC ECON. J. 405 (2006).

<sup>325</sup> See, e.g., MARY JO. BANE & DAVID T. ELLWOOD, *WELFARE REALITIES: FROM RHETORIC TO REFORM* 40-41, 64-65 (1994) (discussing "welfare cyclers").

<sup>326</sup> Kahan, *supra* note 204, at 415 (arguing that deterrence-based arguments for criminal policies secretly mask "illiberal conflict between contending cultural styles and moral outlooks").