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# Degradation Ceremonies and the Criminalization of Low-Income Women

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*This Article, a call for both empirical social scientists and critical race theorists to engage with each other in careful interpretive analysis, applies sociologist Harold Garfinkel's concept of ceremonial degradation to policies, practices, and proposals targeting low-income women of color in the United States. This Article offers several examples of degradation ceremonies, including: excessive penalties and extrajudicial public shaming for women convicted of welfare fraud; mandatory drug testing of welfare recipients; high-publicity criminal prosecutions of mothers who violate school district residency requirements to enroll their children in more affluent schools; and tough criminal penalties for those who possess stolen infant formula or other necessities low-income Americans have difficulty obtaining. This Article also describes some of the functions served by degradation ceremonies, including the legitimation of material inequality, the perpetuation of social and economic myths, the policing of status quo distributions of property, and the satisfaction of the public's emotional desire for sadomasochistic ritual. The Article's final Part calls upon policy makers and scholars to acknowledge the degradation of low-income women that now occurs through policy and practice and offers broader suggestions for subverting the ceremonial degradation of the poor.*

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## INTRODUCTION

In recent discussions with fellow scholars, there has emerged a divide between those who believe that empirical social science research and critical race theory (CRT) are approaches to inquiry that are in conflict and those who believe that the two approaches may be complementary. I side with the scholars who consider the approaches complementary. The important overlap between the two approaches is found in interpretive work and the contextualizing of empirical facts within systems of social meaning—particularly within systems of racial, economic, and political meaning.

Over the last few years, I have written about public policy and low-income women. In some of my work, I have drawn upon empirical research in an effort to examine some empirical truths at root in policy conversations that are often heavily clouded by stereotypes.<sup>1</sup> In many ways, the new efforts to bridge empirical research and critical race theory are efforts to address competing truths: stark empirical facts about inequality in the United States and the emotional aspects of lived experiences of inequality in the United States, particularly among the have-nots.

It is the interpretive work among social scientists and critical theorists that is fundamentally important to scholarship in general. The interpretive scholarship

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1. KAARYN S. GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* (2011).

that was central to political scientists and sociologists during the 1960s seems to have given way to academic norms favoring narrowly interpreted presentation of quantitative or qualitative data divorced from thick description.<sup>2</sup> CRT—in part a reaction to the social scientific, decontextualized presentation of data and perceptions that social scientists were contributors to existing hierarchies—has favored interpretive work, particularly narrative approaches, and has also tended to eschew reliance on empirical data or social scientific methodology.<sup>3</sup> CRT scholars have also continually critiqued abstract legal doctrines and liberal principles detached from lived experiences of racial and material inequality and have called attention to the many ways that law maintains racism and economic subordination.<sup>4</sup>

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2. The term “thick description” is most closely associated with anthropologist Clifford Geertz to describe ethnography. CLIFFORD GEERTZ, *INTERPRETATION OF CULTURES* (1973). Analysis of culture, he wrote, “is sorting out the structures of signification . . . and determining their social ground and import.” *Id.* at 9. Geertz wrote that culture might be thought of as the “webs of significance [man] himself has spun,” adding that an analysis of culture should be “not an experimental science in search of law but an interpretive one in search of meaning.” *Id.* at 5.

For sharp critiques of the role of social scientists in narrowly framing poverty as a problem of individual behavior while ignoring structuralist interpretations of poverty, see generally ALICE O’CONNOR, *POVERTY KNOWLEDGE: SOCIAL SCIENCE, SOCIAL POLICY, AND THE POOR IN TWENTIETH-CENTURY U.S. HISTORY* (2001). See also SANFORD F. SCHRAM, *PRAXIS FOR THE POOR: PIVEN AND CLOWARD AND THE FUTURE OF SOCIAL SCIENCE IN SOCIAL WELFARE* 5–6 (2002) (arguing that social science is not depoliticized but rather situated in social context and that social scientists should acknowledge the political nature of their efforts and embed their analyses in politics).

3. See Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 *UCLA L. REV.* 143, 147 (1996) (arguing that “discussion of numbers is irrelevant to the morality” of reforms proposed by critical race theorists). For an example of the power of narrative to critique doctrinal practices even more effectively than dispassionate doctrinal analysis, see Devon W. Carbado, (*E*)*Racing the Fourth Amendment*, 100 *MICH. L. REV.* 946, 947–59 (2002) (describing his efforts to maintain his dignity during what was an apparent suspicionless search of his car and his person soon after arriving in the United States from the United Kingdom and identifying it as the moment he became a black American). For discussions of the importance of narrative in challenging structures of power, see Kathryn Abrams, *Hearing the Call of Stories*, 79 *CALIF. L. REV.* 971 (1991); Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 *LAW & SOC’Y REV.* 197 (1995).

I am certainly not saying that all scholars drawing upon critical race theory are resistant to empirical methods. Indeed, there are a growing number of scholars engaged in empirical work aimed at developing deeper knowledge of the cultural and political meanings of race and ethnicity. *E.g.*, ANGE-MARIE HANCOCK, *THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN* 65–116 (2004) (employing content analysis of newspapers and the *Congressional Record* to examine the role of disgust in shaping welfare reform debates); Ann Morning, *Reconstructing Race in Science and Society: Biology Textbooks, 1952–2002*, 114 *AM. J. SOC.* S106 (2008) (conducting content analysis of high school biology textbooks published over fifty years to examine the books’ constructions of race and science); Osagie K. Obasogie, *Do Blind People See Race? Social, Legal, and Theoretical Considerations*, 55 *LAW & SOC’Y REV.* 585 (2010) (using empirical research with people who are blind to examine how they learn and understand race and racial difference).

4. See Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 *CALIF. L. REV.* 741, 749 (1994), (citing DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 12 (1992)); Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and*

This Article highlights the importance of interpretive analysis in social science and critical race theory. Drawing upon the lens of critical race theory and upon the interpretive frameworks developed by an earlier generation of sociologists and political scientists, this work examines some recent policy trends affecting low-income women of color. The Article seeks to understand how and why the economic deprivations disproportionately affecting women of color and their children are being framed as issues of criminality rather than issues of poverty. The Article also examines the role of emotion (particularly disgust and shame) in shaping policies affecting the poor, and scrutinizes the role of law and policy in perpetuating social and economic inequality.

Economic policies regulating the poor are fraught with stereotypes about low-income people, particularly low-income mothers of color.<sup>5</sup> Stereotypes about the poor have crystallized in American law, leading to the implementation of policies and practices that I have described elsewhere as the “criminalization of poverty.”<sup>6</sup> Criminalization includes state policies and practices that involve the stigmatization, surveillance, and regulation of the poor; that assume a latent criminality among the poor; and that reflect the creep of criminal law and the logics of crime control into other areas of law, including the welfare and immigration systems.<sup>7</sup> In previous work I have described the irrationality of these policies—at least where the goal was cost-savings or behavioral modifications.<sup>8</sup>

Recent practices and proposals targeting the poor, many of which violate notions of rationality and promote neither economic goals nor the general welfare have prompted me to think that the way we treat the poor primarily serves symbolic functions. The public handling of the poor—both by the state and by the media, sometimes in concert—serves deep symbolic functions and sadomasochistic emotional pleasures that we as observers and political participants are reluctant to acknowledge.

This Article focuses on the symbolic aspects—and the symbolic power—of social, economic, and criminal policies involving the poor. Part I of this Article examines the notions of *ceremonial degradation* and *deniable degradation*. Part II then offers examples of degradation ceremonies, those policies and law-centered media spectacles that make examples of low-income women and that communicate to the public that low-income mothers of color are inferior and crime-prone.<sup>9</sup> In Part

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*Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378–81 (1988); Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721, 740 (1994).

5. Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 650–51 (2009).

6. *Id.* at 646–47 & n.12.

7. *Id.* at 646–47.

8. GUSTAFSON, *supra* note 1, at 184–85; Gustafson, *supra* note 5, at 689–94.

9. Dorothy Roberts has explained that not only is motherhood a social construction, but that it is also a raced and classed social construction. Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 3–4 (1993); *see also* LUANA ROSS, *INVENTING THE*

III, I sketch various functions that degradation ceremonies appear to serve in the United States. Finally, Part IV and the concluding Part consider the problems that degradation ceremonies promote, and it offers suggestions for subverting the proliferation and power of degradation ceremonies.

## I. CEREMONIAL DEGRADATION AND PUBLIC POLICY

### *A. Ceremonial Degradation Defined*

Numerous sociologists have written about the concepts of *social solidarity* or *social cohesion*.<sup>10</sup> To create and maintain solidarity, dominant members of the group must engage in practices that help define the collective, define the boundaries of membership, and set norms on behavior within the collective.<sup>11</sup> An important part of building social solidarity is labeling deviant those behaviors considered unacceptable threats to cohesion.<sup>12</sup>

Sociologist Harold Garfinkel is noted for his notion of degradation ceremonies.<sup>13</sup> Garfinkel described a degradation ceremony as communicative work “whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types.”<sup>14</sup> He also wrote that while shame itself does not bind communities, “moral indignation may reinforce group solidarity” and at the same time “bring[] about the ritual destruction of the person being denounced.”<sup>15</sup> In short, marginalizing a few promotes solidarity among the majority.

Harry Murray has expanded on Garfinkel’s basic notion of degradation ceremonies, articulating a notion of deniable degradation.<sup>16</sup> In ceremonies of deniable degradation, actors do not deny that an action was done, but claim that the action “did not have a certain meaning or that the meaning was unintended.”<sup>17</sup> Murray writes that “[d]eniable degradation can most easily be shown . . . where elite policymakers plan and knowingly implement a degrading policy.”<sup>18</sup> Murray offers the finger imaging of welfare recipients, a condition of receipt for some

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SAVAGE: THE SOCIAL CONSTRUCTION OF NATIVE AMERICAN CRIMINALITY 178–79 (1998) (addressing the impact of lifestyle, race, and ethnicity on society’s view of imprisoned mothers).

10. *E.g.*, EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 63 (W.D. Halls trans., 1984) (“The real function [of criminal punishment] is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour.”).

11. *See id.*

12. *See id.*

13. Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 *AM. J. SOC.* 420 (1956).

14. *Id.* at 420.

15. *Id.* at 421.

16. Harry Murray, *Deniable Degradation: The Finger-Imaging of Welfare Recipients*, 15 *SOC. F.* 39, 40–42 (2000).

17. *Id.* at 42.

18. *Id.* at 45.

public benefits, as an example of deniable degradation.<sup>19</sup> Lawmakers claimed that finger imaging was not intended to degrade welfare recipients but, rather, intended to catch double-dipping welfare cheats.<sup>20</sup> “The problem with that claim,” Murray writes, “is that human action is symbolic, not merely instrumental, and symbols are subject to multiple interpretations.”<sup>21</sup>

What makes the degradation of the poor in the United States ceremonious is the formal and public nature of the degradation, a formality lent to the degradation through the involvement of, or association with, the criminal justice system.

### B. Mapping the Raced and Gendered Rituals of Degradation

Degradation ceremonies help us learn what we know as social facts. Our notions of acceptable conduct and acceptable persons are shaped by these rituals. In the United States, degradation ceremonies tend to differ for different groups, with the degradation ceremonies often specific for marginalized groups based on their gender, age, race, and ethnicity.<sup>22</sup> For young African American and Latino men, police stops, frisks, and automobile searches are common degradation

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19. For background on finger imaging, see Gustafson, *supra* note 5, at 660, 675–78. The Department of Agriculture has urged states not to finger image SNAP recipients based on indications that it deters eligible families from using the benefits. *Hearing to Review Federal Nutrition Programs: Hearing Before the Subcomm. on Dep't Operations, Oversight, Nutrition and Forestry of the H. Comm. on Agric.*, 111th Cong. 10, 13 (2010) (statement of Lisa J. Pino, Deputy Administrator, Supplemental Nutrition Assistance Program, Food and Nutrition Service, U.S. Department of Agriculture). At the time of this writing, only the state of Arizona was finger imaging SNAP recipients, though a bill to end finger imaging (SB 1356) was introduced in the Texas Senate on February 4, 2013. In the last two years, three states—California, New York, and Texas—have stopped finger imaging, citing the high costs of the practice. California Bill AB6, ending finger imaging for SNAP benefits in California, was signed by Governor Jerry Brown on October 6, 2011. Patrick McGreevy, *Gov. Jerry Brown Ends Fingerprinting for Food Stamp Recipients*, POLITICAL (Oct. 6, 2011, 12:15 PM), available at <http://latimesblogs.latimes.com/california-politics/2011/10/gov-jerry-brown-ends-fingerprinting-for-food-stamp-recipients.html>. New York ended finger imaging for SNAP in 2012. See N.Y. COMP. CODES R. & REGS tit.18, § 387.9(c)(ii) (West 2012) (“No social services district may require any applicant or recipient household member to be finger imaged for purposes of the Supplemental Nutrition Assistance program.”) Texas ended finger imaging in 2011. See TEX. HUM. RES. CODE ANN. §§ 31.0326, 33.0231 (West 2012).

20. Murray, *supra* note 16, at 47.

21. *Id.*

22. Frances Fox Piven and Richard Cloward famously wrote, Some of the aged, the disabled, the insane, and others who are of no use as workers are left on the relief rolls, and their treatment is so degrading and punitive as to instill in the laboring masses a fear of the fate that awaits them should they relax into beggary and pauperism.

FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 3 (updated ed. 1993). Avi Brisman argues that undocumented immigrants are another population subject to ritualized degradation by legal actors and through legal policies. Avi Brisman, *Ritualized Degradation in the Twenty-First Century: A Revisitation of Piven and Cloward's Regulating the Poor*, 10 SEATTLE J. SOC. JUST. 793, 801–08 (2012).

ceremonies.<sup>23</sup> Numerous studies have shown that black and brown men are subject to pedestrian stops and automobile stops at much higher rates than white men.<sup>24</sup> Police stops of young African American and Latino men are more likely to involve pat-downs of the body and full searches of persons or vehicles than stops of white pedestrians and drivers.<sup>25</sup> In addition, the vast majority of these stops do not lead to citations or arrests.<sup>26</sup> That young men of color who are the objects of these police actions find the experiences oppressive makes no difference in the practices; these men are not the political referent.<sup>27</sup>

These ceremonies involving men of color are largely symbolic. They give the public the impression that law enforcement officers are engaged in managing crime. At the same time, they reinforce stereotypes. Prevalent understandings of young African American and Latino men as criminal, as violent, and as needing to be regulated by the police are shaped by our routine experiences seeing these men spread-eagled in public spaces, and being searched and questioned by the police.

These images reflect and reinforce both our conscious and unconscious understandings of young men of color as marginalized, our understandings of police as protectors of the public (even when what they are doing may be infringing upon Fourth Amendment rights to freedom from government search and seizure), and our understandings of street crime as a major social problem. Devon Carbado describes residents of the United States as having a collective “police state of mind.”<sup>28</sup> He writes, “This racial dis-ease is inflicted on black people ostensibly to cure the problem of crime. Its social effect, however, is to make white people feel good about, and comfortable with, their own racial identity and to make black people feel bad about, and uncomfortable with, being black.”<sup>29</sup>

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23. Carbado, *supra* note 3, at 1030; *see also* VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 110–11 (2011) (describing routine police brutality towards young African American and Latino men in an urban California neighborhood).

24. *E.g.*, Andrew Gelman, et al., *An Analysis of the New York City Police Department’s “Stop-and-Frisk” Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS’N 813, 820 (2007); David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 LAW & CONTEMP. PROBS. 71 (2003); Ian Ayres & Jonathan Borowsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department*, AM. C.L. UNION (2008), <http://www.aclu-sc.org/issues/police-practices/racially-disparate-outcomes-in-the-los-angeles-police-department>.

25. Gelman et al., *supra* note 24, at 814–17, 821; Ayres & Borowsky, *supra* note 24, at 6.

26. Gelman et al., *supra* note 24, at 820–21; Ayres & Borowsky, *supra* note 24, at 17–18.

27. Delores D. Jones-Brown, *Debunking the Myth of Officer Friendly: How African American Males Experience Community Policing*, 16 J. CONTEMP. CRIM. JUST. 209, 220–24 (2000) (analyzing a survey of 125 African American teenaged men and finding that 101 had been stopped by the police in the last twelve months, that most of the respondents did not agree that police make stops with good reason, and that respondents found police interactions “repressive”). For a first-person account of police stops, *see* Carbado, *supra* note 3.

28. Carbado, *supra* note 3, at 952.

29. *Id.*



As the next Part highlights, degradation ceremonies involving women of color are quite different from the stop-and-frisk ceremonies involving young men of color.<sup>30</sup>

## II. DEGRADATION CEREMONIES INVOLVING LOW-INCOME WOMEN

Both low-income men of color and low-income women of color are treated as marginal and are subject to degradation ceremonies. For women, however, the ceremonies are somewhat different, in part because the negative stereotypes and the behaviors labeled deviant are different for women and often revolve around motherhood.<sup>31</sup> The sections below offer examples of both recent and ongoing degradation ceremonies.

### *A. Maintaining the Routine Degradation of Poverty*

Individuals who fall into poverty, who receive government benefits, or who cheat the welfare rules are treated as irresponsible individuals.<sup>32</sup> But material need is not an individual experience. It is an experience shared by a great number of Americans. Poverty has remained steadfast in the United States, with more families now living in poverty (almost 9.5 million) than at any other time since the U.S. Census Bureau began recording poverty rates in 1959.<sup>33</sup> The child poverty rate in the United States has risen over the last forty years.<sup>34</sup>

Some studies distinguish between *shallow poverty*, defined as household income between fifty and one hundred percent of the poverty threshold, and *deep poverty*, defined as household income below fifty percent of the poverty line. The welfare reforms of 1996 targeted government benefits to households with low-wage workers, helping those in shallow poverty.<sup>35</sup> The number and percentage of households living in deep poverty, however, has risen. In 2011, nearly 20.4 million people (6.6% of the population) lived in deep poverty.<sup>36</sup> Moreover, poverty

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30. See *infra* note 31 and accompanying text.

31. Dorothy Roberts has traced a number of these degradation ceremonies. See DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 66–67 (2002) (discussing the child welfare system’s devaluation of black motherhood); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1454–56 (1991) (discussing criminal punishments imposed on low-income pregnant women of color).

32. Christopher Jencks & Kathryn Edin, *Do Poor Women Have the Right to Bear Children?*, AM. PROSPECT, Nov. 19, 2001, at 43 (arguing that the welfare reforms of 1996 were driven by beliefs that the irresponsibility of young women was the cause of poverty and welfare use).

33. U.S. CENSUS BUREAU, HISTORICAL POVERTY TABLES—FAMILIES, TABLE 13; NUMBER OF FAMILIES BELOW THE POVERTY LEVEL AND POVERTY RATE (2012), available at <http://www.census.gov/hhes/www/poverty/data/historical/families.html>.

34. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR, & JESSICA C. SMITH, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-243, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011, at 15–16 (2012), available at <http://www.census.gov/prod/2012pubs/p60-243.pdf>.

35. Paul Tough, *The Birthplace of Obama the Politician*, N.Y. TIMES MAG., Aug. 19, 2012, at 24.

36. U.S. CENSUS BUREAU, HISTORICAL POVERTY TABLES—FAMILIES, TABLE 22; NUMBER

remains gendered. While only 19.5% of the families in the United States are female-headed, women head 51.5% of families falling below the poverty line.<sup>37</sup>

There are public benefits available to low-income adults and their dependent children, including Temporary Assistance to Needy Families (TANF) cash assistance benefits, Supplemental Nutritional Assistance Program (SNAP) benefits (formerly called the Food Stamp Program), and Medicaid health insurance.<sup>38</sup> Direct cash assistance to the poor has declined over the last two decades, with a shrinking number of poor families receiving aid and a declining percentage of federal dollars reaching families through cash benefits.<sup>39</sup> Congress passed welfare reform legislation in 1996 that restricted eligibility in various ways, such as imposing work requirements on recipients and capping the amount of money the federal government provided to the states to \$16.5 billion a year.<sup>40</sup>

Benefits for TANF cash assistance are not generous, in most locales providing too little for families to survive. In 2010, the maximum TANF and SNAP benefits available to families did not raise any of those families to the poverty line; in forty-five of the fifty states, the combined benefits left families below seventy-five percent of the poverty line.<sup>41</sup> Numerous studies have found that welfare recipients cannot survive on so little and are then stuck, often turning to under-the-table earnings or hiding resources and cohabitants from government officials.<sup>42</sup>

In addition, cash assistance to low-income families is no longer a needs-

AND PERCENT OF PEOPLE BELOW 50 PERCENT OF THE POVERTY LEVEL (2012), available at <http://www.census.gov/hhes/www/poverty/data/historical/people.html>.

37. U.S. CENSUS BUREAU, HISTORICAL POVERTY TABLES—FAMILIES, TABLE 13, *supra* note 33.

38. *Medicaid & CHIP Information*, MEDICAID.GOV, <http://www.medicaid.gov/medicaid-chip-program-information/medicaid-and-chip-program-information.html> (last visited May 13, 2013); *Supplemental Nutrition Assistance Program*, U.S. DEP'T OF AGRIC. (Feb. 16, 2012), <http://www.fns.usda.gov/snap/> (last visited May 13, 2013); *Temporary Assistance for Needy Families (TANF)*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.acf.hhs.gov/programs/ofa/programs/tanf> (last visited May 13, 2013).

39. *Chart Book: TANF at 16*, CENTER ON BUDGET & POL'Y PRIORITIES (2012), <http://www.cbpp.org/files/8-22-12tanf.pdf> (“Federal and state TANF spending on basic assistance declined from \$13.9 billion in 1997 to \$9.6 billion (in nominal dollars) in 2011, the most recent year available.”); see also Tami Luhby, *Welfare Spending Cut in Half Since Reform*, CNN MONEY (Aug. 9, 2012, 10:47 AM), <http://money.cnn.com/2012/08/09/news/economy/welfare-reform/index.htm> (stating that the number of people receiving cash assistance and the funding given to such programs has decreased since the 1996 welfare reforms).

40. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2134–42 (codified as amended at 42 U.S.C. § 608 (2006 & Supp. IV 2010)); *id.* at 110 Stat. at 2115–24 (codified as amended at 42 U.S.C. § 603 (2006 & Supp. IV 2010)). For a summary of reforms instituted under the Act, see Gustafson, *supra* note 5, at 661–64.

41. Ife Finch & Liz Schott, *TANF Benefits Fell Further in 2011 and Are Worth Much Less Than in 1996 in Most States*, CENTER ON BUDGET & POL'Y PRIORITIES 8 fig.5 (2011), <http://www.cbpp.org/files/11-21-11pov.pdf>.

42. KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 38–45 (1997); GUSTAFSON, *supra* note 1, at 101–06, 109–10.

based entitlement and excludes many of those who are most economically vulnerable.<sup>43</sup> Many states have instituted punitive welfare policies, including economic sanctions for those who do not follow all of the rules.<sup>44</sup> Numerous studies have found that the higher the proportion of the state population is non-white, the more punitive the policies.<sup>45</sup> One study found that family caps (restrictions on additional cash benefits to children born to families already on welfare) and strict time limits (limiting benefits for even shorter duration than the sixty-month lifetime limit established under federal law) were significantly more likely in states with higher percentages of African Americans and/or Latinos on their welfare caseloads.<sup>46</sup> The study also found that states with proportionately more African Americans on their welfare caseloads were “significantly more likely to adopt stricter sanctions,” meaning benefit reductions or eliminations in instances when the adults failed to satisfy work requirements or other requirements in a timely manner.<sup>47</sup> In addition, even within states, Latina and African American welfare recipients are more likely to be sanctioned than white welfare recipients.<sup>48</sup>

Over the last fifteen years, there have been changes to welfare policies that reflect not legislative desires to protect those who are economically vulnerable, but rather a presumption that those who are poor are criminal; these changes also reflect an effort to extend get-tough-on-crime approaches from the criminal justice system to the welfare system.<sup>49</sup> For example, the San Diego Department of Social Services has deputized welfare fraud investigators and allowed them to conduct unannounced, suspicionless searches of welfare applicants’ homes before their requests for aid can be approved.<sup>50</sup> This practice was challenged as a Fourth Amendment infringement of welfare recipients’ rights to be free from unreasonable search and seizure.<sup>51</sup> While the Fourth Amendment generally requires individualized suspicion and probable cause to conduct a search,

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43. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2113 (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”).

44. Gustafson, *supra* note 5, at 663–64.

45. See *infra* notes 46–48.

46. 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 225, 233 (Sanford F. Schram et al. eds., 2003).

47. *Id.* at 235.

48. Sanford F. Schram et al., *Deciding to Discipline: Race, Choice, and Punishment at the Frontlines of Welfare Reform*, 74 AM. SOC. REV. 398, 406–08 (2009) (finding that black welfare recipients were more likely to be sanctioned than white welfare recipients in a survey experiment involving Florida welfare case managers).

49. See Gustafson, *supra* note 5, at 658–61.

50. Sanchez v. Cnty. of San Diego, 464 F.3d 916, 918–19 (9th Cir. 2006).

51. *Id.* at 920.

particularly of a home, the three-judge panel of the Ninth Circuit upheld these searches.<sup>52</sup>

The routine practices of state surveillance now mean that welfare recipients do not enjoy the privacy or autonomy that others in society, outside of individuals who have been convicted of crimes, enjoy.

### *B. Welfare Cheating and the Public Pillory*

In November 2011, the *Clarion-Ledger*, a newspaper in Jackson, Mississippi, reported that Anita McLemore, a forty-seven-year-old mother with two teenaged children, had been sentenced to three years in prison.<sup>53</sup> McLemore's crime: failing to note on the food stamp applications she filed in 2006, 2007, 2009, and 2010 that she had been convicted of one or more drug felonies after August 22, 1996.<sup>54</sup> After being charged by federal prosecutors, McLemore pleaded guilty to submitting a false claim for federal benefits, made an agreement with federal prosecutors to spend less than a year in jail, and repaid the \$4,345 in benefits she had received in the four years that she failed to note her drug convictions on her applications for benefits.<sup>55</sup>

Judge Henry Wingate, who sentenced McLemore, disregarded the agreement between McLemore and federal prosecutors and stepped far outside the sentencing guidelines recommendations of two to eight months in prison, sentencing McLemore to three years of incarceration, three years of supervised release after that, and a fine of \$250.<sup>56</sup> The article in the *Clarion-Ledger* noted that there is no federal prison in Mississippi that houses female inmates, making it certain that she would be incarcerated outside of the state and making it unlikely that her teenaged children would be able to visit her regularly or with ease.<sup>57</sup>

In December 2011, McLemore requested that her sentence begin in March rather than January 2012, allowing her time to make arrangements for her teenaged children and providing her the opportunity to work extra hours to save money to take care of them and to allow her children to make the six-hour trip to visit her in prison.<sup>58</sup> The judge denied her request.<sup>59</sup>

McLemore's sentence was excessive, particularly given that her misdeed looks more like a crime of omission (failing to include full information) rather than a complex scheme to steal government dollars. In addition, there is no

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52. *Id.* at 931.

53. Jimmie E. Gates, *Woman Given 3-Year Prison Term for Lie*, CLARION-LEDGER (Jackson, Miss.), Nov. 12, 2011, at 1A.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Miss. Mom's Bid to Delay Prison Term Fails*, DELTA DEMOCRAT TIMES (Greenville, Miss.), Dec. 26, 2011, available at 2011 WLNR 26659514.

59. *Id.*

evidence that McLemore and her children were not financially needy and would not have been eligible for benefits had she not had earlier drug convictions. Nor did McLemore's crimes involve violence.<sup>60</sup> McLemore appears to be someone acting out of need rather than greed.

The judge's sentence in this case appears to be a reaction of moral outrage. The sentence imposed retribution not only for McLemore's making false statements but also for her fulfilling the description of the welfare queen: a non-working, substance-abusing, single mother relying on the state for her benefits and lying to receive more than she deserves.<sup>61</sup>

However, McLemore's punishment need not have been through the criminal justice system. There are provisions for punishing intentional program violators and collecting benefit overpayments through the system of civil administrative law.<sup>62</sup> Those hearings, however, do not result in incarceration and do not come with the formality or the rituals of criminal proceedings.

In addition, there was never any discussion of the financial need of McLemore and her children. She was deemed criminal because she failed to declare herself a criminal on welfare documents.<sup>63</sup> Apparently, over the years in question, McLemore and her children had a household income so low that, but for the mother's drug convictions, they all would have qualified for benefits.<sup>64</sup>

The public pillory for those who are convicted of cheating welfare rules extends well beyond McLemore's case. The *Riverside Press-Enterprise*, a newspaper in Southern California, regularly runs ads listing the names of individuals who have been convicted of welfare fraud in Riverside County.<sup>65</sup> The ad is paid for by the County Department of Social Services. The four-inch-by-five-inch ads list—in large, bold print—the names and aliases of the individuals convicted, as well as the dates of conviction.<sup>66</sup> The list serves as a shaming device for those convicted, a penalty above and beyond those generally imposed by the criminal justice system

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60. McLemore was convicted of possession of crystal methamphetamine. *Mississippi Woman Pleads Guilty to Making False Claim for USDA SNAP Benefits*, U.S. DEP'T OF JUSTICE (July 8, 2011), <http://www.justice.gov/usao/mss/press/July2011/mclemore%20plea.pdf> [hereinafter *Mississippi Woman Pleads Guilty*]. Appellate records from McLemore's divorce suggest that she had battled drug addiction for years. *McLemore v. McLemore*, 762 So. 2d 316, 321–22 (Miss. 2000).

61. Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 282 (1991) (describing the stereotype of poor, unmarried mothers of color as “bad mothers”); Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 105–06 (1993) (noting that non-ideal mothers tend to receive harsher criminal punishments than other women).

62. Gustafson, *supra* note 5, at 685.

63. See Gates, *supra* note 53.

64. The Department of Justice cites only her failure to acknowledge her drug convictions as the basis for the false claim charge. *Mississippi Woman Pleads Guilty*, *supra* note 60.

65. For an example, see the newspaper ad run on September 30, 2012, Advertisement, \$100 Reward Offered by Riverside County Dept. of Public Social Services, RIVERSIDE PRESS-ENTERPRISE (Cal.) (Sept. 30, 2012), <http://ads.pe.com/riverside-ca/communication/newspaper/dpss-welfare-fraud/2012-09-30-3935-100-dollars-reward-offered-by-riverside>.

66. *Id.*

and a penalty unusual for nonviolent property crimes. The publication of names also serves as a deterrent to those who might be considering actions that would constitute welfare fraud—and perhaps as a deterrent to those considering applying for public benefits for which they are eligible.

A statement at the very top of the advertisement appears to be intended as a wanted poster.<sup>67</sup> It states: “\$100 Reward Offered by Riverside County Dept. of Public Social Services.”<sup>68</sup> A footnote offers more detail:

\$100 Reward offered by the Riverside County Department of Public Social Services for information leading to the conviction on welfare fraud charges. To report suspected fraud, call (951) 358-3278. Eligibility for reward is determined by a review committee. (Department of Social Services and District Attorney—employees and family members are not eligible). Fraud amount must be \$1000 or more.<sup>69</sup>

Philip H. Robb, a retired California prosecutor and a licensed clinical social worker, has repeatedly requested that Riverside County discontinue running the ads in the *Press-Enterprise*, arguing that the ads humiliate the low-income children of those convicted and that they are ineffective in deterring welfare fraud, which is often a crime of need.<sup>70</sup> Despite Robb’s efforts, Susan Loew, Director of the Riverside County Department of Public Services, has refused to stop printing the ads and continues to pay to run the ads.<sup>71</sup> Loew claims that the advertisements are intended to deter fraud.<sup>72</sup> If deterrence were the main goal, however, then it could be effectively achieved by reporting the *number* of welfare fraud convictions local prosecutors had secured. That information would be sufficient to let readers know that the county actively investigates and prosecutes for welfare fraud. Including the names of those convicted goes beyond general deterrence.

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67. *Id.*

68. *Id.*

69. *Id.* In 2011, Riverside County had a typical monthly welfare caseload of slightly more than 48,000 individuals. See *CalWORKS Cash Grant Caseload Movement Reports*, CAL. DEP’T OF SOC. SERVS., <http://www.cdss.ca.gov/research/PG281.htm> (last visited May 13, 2012). Of the 174 convicted of welfare fraud in the county that year, forty-one came to the attention of fraud investigators through community tips or from referrals from suspicious caseworkers. No one was paid the \$100 reward offered in the newspaper, raising the question of whether county administrators may be engaging in false advertising. Letter from Susan Loew, Dir., Riverside Cnty. Dep’t of Pub. Soc. Servs., to Philip Robb (May 14, 2012) (on file with author).

70. E-mail from Philip Robb to author (Nov. 21, 2011) (on file with author); Letter from Philip Robb to Elizabeth Ayala, Inland Congregations United for Change (Dec. 20, 2011) (on file with author).

71. E-mail from Philip Robb to author, *supra* note 70; Letter from Philip Robb to Elizabeth Ayala, Inland Congregations United for Change, *supra* note 70.

72. Letter from Susan Loew, *supra* note 69 (“We believe that it is important for the public and our customers to know that we have an active anti-fraud program and that as circumstances warrant it, individuals are held criminally liable for their actions. We believe it is an effective deterrent in preventing fraud and also helps inform the public of the opportunity to report suspected fraud. On a related note, a majority of our convictions stem from tips we receive from concerned citizens.”).

Moreover, offering a bounty to those who call the fraud hotline effectively seeks to engage the entire community in policing the poor, shifting responsibility for policing welfare recipients from agents of the state alone to the general public and calling upon citizens to surveil and report upon their neighbors. The advertisements call upon average citizens to become agents of the state and to treat the poor as suspects.

Listing the names of the individuals convicted of welfare employs old-fashioned shaming. Indeed, there are many local newspapers that include police blotters that list the arrests or charges recently brought in a community.<sup>73</sup> In addition, there are a growing number of websites that post mug shots of arrestees.<sup>74</sup> While many media outlets regularly report on outrageous crimes, particularly crimes of violence, it is highly unusual for newspapers to serve as media for government-initiated public shaming of individual offenders. The names of convicted sex offenders, as a result of the federal Sex Offender Registration and Notification Act,<sup>75</sup> are available for members of the public to locate through online sex offender registries, for the explicit reasons of warning the public and for the implicit reason of expressing disgust toward and humiliating those convicted.<sup>76</sup> Those convicted of welfare fraud in Riverside are subject to more direct publicity than sex offenders, suggesting that they are the objects of just as much disgust, if not more.

Indeed, shaming played a prominent role in criminal law during America's colonial period.<sup>77</sup> Still, the use of shaming has largely disappeared.<sup>78</sup> There are,

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73. *E.g.*, *Police Blotter*, BROOKLYN PAPER (Nov. 5, 2012), <http://www.brooklynpaper.com/sections/news/crime/>; *Police Blotter*, SILICON VALLEY MERCURY NEWS (Oct. 31, 2012, 4:13 PM), [http://www.mercurynews.com/bay-area-news/ci\\_21896828/police-blotter](http://www.mercurynews.com/bay-area-news/ci_21896828/police-blotter).

74. *See*, for example, ARRESTS.ORG (Nov. 20, 2012), <http://www.arrests.org>, and MUGSHOTSUSA.COM (Nov. 20, 2012), <http://mugshotsusa.com>, though I have found nearly forty similar sites. One concern these websites raise is that they may undermine the presumption of innocence with regard to individuals who are arrested; cases that are dismissed by prosecutors or where arrestees are found innocent are not recorded on the sites. A new service industry has developed, offering paid services to remove mug shots from these sites. *E.g.*, REMOVE ARREST, <http://removearrest.com> (last visited May 13, 2013) and INTERNETREPUTATION, <http://www.internetreputation.com/remove-mugshot> (last visited May 13, 2013). It is unlikely that low-income arrestees have the ability to pay to have their mug shots removed from the Internet. Because Internet searches are now a common screening practice among employers who are hiring, low-income arrestees—whether convicted of the arrest charges or not—face reputational barriers to mainstream employment because of past arrests. A case recently filed in Ohio claims that the websites violate the state's right to publicity statutes, which regulate the commercial use of an individual's name or image. *Debra Lashaway v. JustMugshots.com*, No. CI0201206547 (Ohio Court of Common Pleas, Lucas County) filed Dec. 3, 2012).

75. 42 U.S.C. §§ 16901–16991 (2006).

76. *Id.* 42 U.S.C. § 16901. The Supreme Court has disavowed the shaming function of the sex offender registries. *See The Supreme Court, 2002 Term: Leading Cases: I. Constitutional Law: D. Due Process: 5. Sex Offender Registration*, 177 HARV. L. REV. 327, 328 (2003) (citing *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003), and *Smith v. Doe*, 538 U.S. 84 (2003)).

77. Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2167–70 (2001) (describing the use of

however, scholars who have argued that certain types of shaming might be more effective, more just, and less costly than incarceration.<sup>79</sup> What these scholars do not seem to take into account is how the shaming of an individual can have the ripple effect of shaming individuals' non-offending family members. In this context, the practice might indirectly shame all of those receiving welfare in the community, inviting scrutiny and surveillance by all who are aware they are receiving government benefits. Most of the individuals convicted of welfare fraud are parents, meaning that the prominent publication of the names not only humiliates the parents but also inflicts shame—the shame of poverty and criminality, both of which despoil reputation in American society—upon the children as well.

Moreover, those who have advocated shaming of convicted criminals have advocated it as an alternative to current methods of punishment, not as an additional method.<sup>80</sup> Perhaps most importantly, they advocate shaming that would be overseen by judges rather than meted out through the extrajudicial actions by bureaucrats and the popular press.<sup>81</sup> James Whitman warns that the “chief evil in public humiliation sanctions is that they involve an ugly, and politically dangerous, complicity between the state and the crowd.”<sup>82</sup> Indeed, Whitman's concern manifests itself in Riverside County, California.

Riverside County has over the last few years tended to file more prosecutions for welfare fraud than other California counties with similar welfare caseloads,<sup>83</sup> raising the question of whether the county has more welfare recipients

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temporary shaming techniques, such as the pillories and the stocks, and permanent shaming techniques, including branding and maiming).

78. *Id.* at 2170.

79. See, e.g., Richard J. Arneson, *Shame, Stigma, and Disgust in the Decent Society*, 11 J. ETHICS 31, 62 (2007) (“If such [shaming] penalties bring about morally better outcomes by fundamental justice standards of assessment than alternative social policies, we should opt for the shaming penalties.”); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631–37 (1996) [hereinafter Kahan, *What Do Alternative Sanctions Mean?*] (extolling the functions of shaming in expressing community disapproval for behavior and arguing that this function makes it both effective and just); Markel, *supra* note 77, at 2229–32 (advocating the use of guilt punishments). *But see* MARTHA NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 238 (2004) (“[T]hough shame penalties are powerfully expressive, what they express is deeply problematic in a society based on ideas of dignity and equal worth.”); Dan M. Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2088 (2006) (rethinking earlier writings on shaming and rejecting shaming punishments because they “seem inescapably to conjure up the specter of hierarchy and coerced conformity”).

80. James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1062 (1998).

81. See *id.* at 1088–89.

82. *Id.* at 1059.

83. Gustafson, *supra* note 5, at 688 tbl.2 (2009) (providing a comparison of California counties with comparable welfare caseloads and showing that Riverside County filed two to ten times more prosecutions in 2007 than other counties). The most recent report, documenting welfare fraud prosecutions filed in California counties during the last quarter of 2012 shows that the trend continues, with Riverside County filing twenty-nine welfare fraud prosecutions, Sacramento filing ten,



committing fraud, is receiving more tips than other counties, is devoting more resources to investigations and prosecuting fraud, or is more zealously—or perhaps overzealously—seeking criminal convictions. Counties have the option of seeking civil penalties or criminal charges against those who knowingly receive benefits to which they are not entitled.<sup>84</sup> Civil penalties result in restitution (repayment of benefits) and a period of exclusion from welfare receipt, which may last from two years to life depending on the amount of benefits fraudulently received and on any previous civil or criminal findings of prior fraud.<sup>85</sup> Conviction of criminal penalties, however, is harsher, resulting in fines, state supervision (probation or parole) or incarceration, and the lifelong stigma and economic disability of a criminal conviction.<sup>86</sup>

### *C. Drug Testing and Ceremonies of Dignitary Harm*

Since 2010, bills requiring individuals to submit to drug testing through urinalysis as a condition of receiving public benefits have been introduced in more than half the state legislatures.<sup>87</sup> But such proposals are not new. Proposals to drug test welfare recipients date back to the 1980s, with one of the earliest bills introduced in the Louisiana House of Representatives by state representative and former Klansman David Duke.<sup>88</sup>

San Bernardino County filing seven, Fresno filing sixteen, and San Diego filing nine. Cal. Dep't of Soc. Servs., *Fraud Investigation Activity Report: December 2012*, CDSS 27 (Apr. 10, 2013), <http://www.cdss.ca.gov/research/res/pdf/DPA266/2012/DPA266Dec12.pdf>.

84. See CAL. WELF. & INST. CODE § 11486 (West 2012).

85. *Id.*

86. Prosecutors may choose from criminal charges to bring against welfare cheats, including fraud (CAL. WEL. & INST. CODE § 10980 (West 2012)) and perjury (CAL. PEN. CODE § 118 (West 2013)). DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 36 (2007) (finding that a criminal conviction impairs future ability to find employment, noting, “[i]n addition to formal barriers . . . the negative credential of a criminal record conveys generalized information about the disposition of its bearer in ways that further limit access to opportunities”).

87. U.S. DEP'T OF HEALTH & HUMAN SERVS., DRUG TESTING WELFARE RECIPIENTS: RECENT PROPOSALS AND CONTINUING CONTROVERSIES app. A (2011), available at <http://aspe.hhs.gov/hsp/11/DrugTesting/ib.shtml>. In 2010 and 2011, bills related to drug testing welfare recipients were proposed in 31 state legislatures as well as in Congress. *Id.*

It is possible that the flurry of state welfare drug testing bills sponsored by Republican lawmakers reflected efforts to bring the touchy topics of welfare and drugs into the realm of political rhetoric at a time when Republicans were hoping to destabilize support for Democrat Barack Obama during his first term in office. Republicans' efforts to label Obama the “Food Stamp President”—a title reminiscent of the “Welfare Queen”—gained some traction in the year leading up to the 2012 Presidential election. See Sandhya Somashekhar, *Some See Racial Tinge to Gingrich Remarks*, WASH. POST, Jan. 18, 2012, at A4.

88. Philippa M. Guthrie, *Drug Testing and Welfare: Taking the Drug War to Unconstitutional Limits?*, 66 IND. L.J. 579, 581 n.22 (1991) (referring to H.R. 1303, Reg. Sess., La. (1989)). For a more detailed history of legislators in southern states using welfare policies to control low-income African Americans, see KENNETH J. NEUBECK & NOEL A. CAZENAVE, *WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA'S POOR* 69–78 (2001).

The federal welfare reform legislation of 1996 included multiple provisions related to drug use. For example, it gave states options to exclude from benefits anyone who had been convicted of drug-related charges.<sup>89</sup> In addition, it gave states permission to impose drug testing as a condition of receipt of benefits.<sup>90</sup>

At the time the federal welfare legislation was being debated, the Supreme Court had ruled on only a few cases involving suspicionless searches or suspicionless drug testing, all of them involving very specific contexts.<sup>91</sup> In *Vernonia School District 47J v. Acton*, a case decided a year before passage of the federal welfare reforms, the Court upheld a school district's requirement that student athletes submit to drug testing.<sup>92</sup> The majority opinion reasoned that students had a diminished expectation of privacy, that urine testing was relatively unobtrusive, and that the government needs being served—detering drug use among school children—were severe.<sup>93</sup> In *Vernonia*, the majority of the Supreme Court justices, while acknowledging that drug testing through urinalysis amounted to a search under the Fourth Amendment, seemed to be doing away not only with the probable cause and warrant requirements, but also the individualized suspicion requirements that the Court had articulated years before in *Terry v. Ohio*.<sup>94</sup> Although the *Vernonia* opinion cautioned that the ruling should not be read as a wholesale approval of drug testing,<sup>95</sup> the opinion suggested that a simple balancing of individual privacy interests and government interests was all that was necessary, and that the government interests need not even reach the degree to be described

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89. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, Title I, § 115, 110 Stat. 2105, 2180–81 (codified as amended at 21 U.S.C. § 862a (2006 & Supp. IV 2010)).

90. *Id.* § 115, 110 Stat. at 2347 (codified at 21 U.S.C. § 862b (2006)); Pub. L. No. 104–193, Title IX, § 902, 110 Stat. 2105, 2347 (codified at 21 U.S.C. § 862b (1996)) (“Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances.”).

91. The Supreme Court had approved drug testing in narrow circumstances in a few earlier cases. For example, in *Bell v. Wolfish*, 441 U.S. 520, 560 (1979), the Court upheld suspicionless invasive searches of prisoners and pretrial detainees, reasoning that loss of privacy expectations is inherent in such settings and that the potential for smuggled contraband raises government interests that outweigh those privacy interests. In *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 633–34 (1989), the Court ruled that railroad employees could be tested for drug and alcohol use immediately following a train accident because government interests in determining the causes of accidents outweighed employees' privacy interests. In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 664–65 (1989), the Court, weighing heightened government interests against employee privacy interests, ruled that U.S. Customs Service employees involved in drug interceptions could be subject to suspicionless drug testing.

92. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665–66 (1995).

93. *Id.* at 661, 664–65.

94. See *Terry v. Ohio*, 392 U.S. 1, 29–31 (1968).

95. *Vernonia Sch. Dist. 47J*, 515 U.S. at 665 (“We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts.”).

as compelling.<sup>96</sup> To some, it appeared that the door to broad, government drug testing through urinalysis might have been opened.

However, the Supreme Court signaled in 1997 that suspicionless drug testing by the government was not allowed in all contexts.<sup>97</sup> In *Chandler v. Miller*, the Court struck down a Georgia statute mandating drug tests for anyone seeking state office.<sup>98</sup> Justice Ruth Bader Ginsburg, writing for the eight-justice majority, stated that the drug testing served no special state need and, instead, served only symbolic needs.<sup>99</sup> Symbolic needs, then, are insufficient to overcome fundamental rights to privacy.

Several state legislatures have passed statutes either allowing or mandating drug testing of welfare recipients where caseworkers had reasonable suspicion that welfare recipients were using drugs or where they had actually been convicted of drug-related felonies.<sup>100</sup> None of those statutes have been challenged in the courts. In 1999, despite the Supreme Court's *Chandler* ruling, Michigan instituted a suspicionless drug testing pilot program that required all welfare applicants in identified pilot counties to submit urine samples for drug testing; administrators of the program conducted randomized testing of twenty percent of all welfare recipients every six months.<sup>101</sup> In *Marchwinski v. Howard*, a federal district court preliminarily enjoined the testing program.<sup>102</sup> A three-member panel of the Sixth Circuit lifted the injunction in a two-to-one vote, ruling that the drug-testing program was allowable under the consent doctrine or passed constitutional muster under the special needs doctrine of the Fourth Amendment.<sup>103</sup> When the case was heard *en banc* by the Sixth Circuit Court of Appeals, the judges split evenly on whether drug testing infringed upon welfare recipients' legitimate expectations of privacy and therefore violated the Fourth Amendment.<sup>104</sup> By default, the injunction granted by the lower district court was reinstated, ending Michigan's drug-testing program.<sup>105</sup> Despite the outcome in *Marchwinski*, calls to drug test

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96. *Id.* at 661.

97. *Chandler v. Miller*, 520 U.S. 305 (1997).

98. *Id.* at 319–23.

99. *Id.* at 318 (“Our precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion. Georgia has failed to show, in justification of § 21-2-140, a special need of that kind.” (citation omitted)).

100. Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, 19 WM. & MARY BILL RTS. J. 751, 781 (2011) (citing 2009 Ariz. Sess. Laws 3rd S.S., ch. 10, § 27, LA. REV. STAT. ANN. § 46:460.10 (2009), MINN. STAT. § 609B.435 (2009), N.C. GEN. STAT. § 108A–29.1 (2009), VA. CODE ANN. § 63.2–605 (West 2009), and WIS. STAT. §§ 49.79(5), 49.148(4) (2009)).

101. *Marchwinski v. Howard*, 113 F. Supp. 2d 1134, 1136 (E.D. Mich. 2000).

102. *Id.* at 1135.

103. *Marchwinski v. Howard*, 309 F.3d 330, 331–32, 337–38 (6th Cir. 2002).

104. *Marchwinski v. Howard*, 60 Fed. App’x 601 (6th Cir. 2003).

105. *Id.*

welfare recipients have continued—almost exclusively among Republican lawmakers and candidates for office.<sup>106</sup>

In 2001, the Supreme Court struck down a hospital policy allowing medical staff to identify pregnant patients they suspected of drug use, to conduct drug screenings on those women without their consent, and to report positive test results to law enforcement officers.<sup>107</sup> The previous drug-testing cases decided by the Supreme Court had not involved sharing of drug test results with law enforcement officials.<sup>108</sup> The majority opinion struck down the policy as a violation of the Fourth Amendment, finding that the hospital practices were a substantial invasion of privacy.<sup>109</sup> The justices found that the intent of the statute was “to coerce the patients into substance abuse treatment.”<sup>110</sup> The justices expressed concern that the purpose of the practice was general law enforcement, indicating that that goal provided insufficient government interest to outweigh the privacy interests of the women involved.<sup>111</sup> Earlier that year, the Supreme Court had invalidated the Indianapolis Police Department’s practice of conducting random car stops and dog sniffs, stating that suspicionless fishing expeditions for criminal activity by law enforcement officials were clearly unlawful under the Fourth Amendment, even if the intrusions to individual liberties were brief and minor.<sup>112</sup> Both cases signaled that government interests in deterring and punishing drug use did not give government officials license to conduct widespread suspicionless searches of individuals, at least for purposes of law enforcement.

In March 2011, Florida Governor Rick Scott signed a bill passed by the state legislature that implemented mandatory drug testing for the state’s recipients of cash TANF benefits.<sup>113</sup> The statute required all adult applicants for TANF benefits to be tested and required the applicants to bear the costs of testing.<sup>114</sup> For applicants with clean drug tests, the welfare office would reimburse each for the cost of the drug test by increasing the amount of the initial welfare payment.<sup>115</sup>

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106. See *infra* note 113 and accompanying text.

107. *Ferguson v. City of Charleston*, 532 U.S. 67, 70–76 (2001).

108. *Id.* at 77.

109. *Id.* at 78.

110. *Id.* at 80.

111. *Id.* at 84 (“Because law enforcement involvement always serves some broader social purpose or objective, under respondents’ view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment.” (footnote omitted)).

112. *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (“We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.”).

113. FLA. STAT. § 414.0652 (2012).

114. FLA. STAT. § 414.0652(1).

115. FLA. STAT. § 414.0652(2)(a).

Under the Florida statute, any welfare recipient testing positive for drugs would be ineligible for benefits for one year.<sup>116</sup> If she returned to the welfare system and tested positive for a second time, then she would be ineligible for benefits for three years.<sup>117</sup> While a parent or guardian who tested positive could no longer receive benefits, the children could continue to receive benefits, though the benefits had to go through a designated protective payee (who was also subject to drug testing).<sup>118</sup> Still, the household benefits as a whole were reduced. A parent or guardian testing positive for drugs also lost access to TANF job supports such as transportation, job training, and childcare assistance. In addition, all positive test results were shared with the Florida Abuse Hotline.<sup>119</sup> Any information provided to that hotline might be shared with law enforcement officials.<sup>120</sup>

An individual who is found ineligible for welfare benefits may reapply for benefits after six months if she or he can prove successful completion of a licensed substance abuse program.<sup>121</sup> And while welfare offices are instructed to provide a list of substance abuse treatment providers to applicants who test positive for drugs, the Florida statute specifically provides that neither the welfare department nor the state will pay for substance abuse treatment for anyone who tests positive.<sup>122</sup> The legislators who drafted the statute provided no explanation for how a parent or guardian financially desperate enough to apply for welfare would be able to pay the substantial costs of substance abuse treatment.<sup>123</sup>

The Florida statute requires that the welfare department “[a]ssure each individual being tested a reasonable degree of dignity while producing and submitting a sample for drug testing, consistent with the state’s need to ensure the reliability of the sample.”<sup>124</sup> A “reasonable degree of dignity” is a rather vague and ironic statement in a statute requiring low-income individuals to urinate on demand as a condition of receiving government assistance and to foot the bill.

Drug screening tests are different from urinalysis done for medical screenings. The Supreme Court’s *Vernonia* decision, which stated that urine testing was “relatively unobtrusive,” did not acknowledge that difference. To ensure urine specimens are not being falsified or contaminated, drug testing facilities usually require that an individual produce the specimen on-site and require that some

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116. FLA. STAT. § 414.0652(1)(b).

117. FLA. STAT. § 414.0652(2)(h).

118. FLA. STAT. § 414.0652(3).

119. *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1280 (M.D. Fla. 2011).

120. *Id.*

121. FLA. STAT. § 414.0652(2)(j).

122. *Id.*

123. A 2008 study of drug treatment programs found that per-episode costs of non-methadone outpatient treatment programs ranged from \$1,266 to \$11,378. Pierre K. Alexandre et al., *The Economic Cost of Substance Abuse Treatment in the State of Florida*, 36 EVALUATION REV. 167, 177 tbl.3 (2012).

124. FLA. STAT. § 414.0652(2)(f).

degree of monitoring (auditory or visual) occur.<sup>125</sup> In addition, the person being screened for drugs usually must hand the specimen cup directly to the observer so that the observer can document within a matter of minutes that the specimen produced is at body temperature.<sup>126</sup> Medical testing is designed to ensure the dignity and privacy of patients by allowing them to produce the specimens in private and leave them discreetly for medical staff to retrieve. Drug testing is much more intimate, invasive, and humiliating.

Aside from sex, there is probably no activity that most Americans consider more personal and private than the elimination of bodily waste. This is especially true for women, who even in public restrooms enjoy the privacy of enclosed stalls. Welfare recipients are asked to share the most intimate details of their lives in welfare applications.<sup>127</sup> Florida has demanded that they also reveal to agents of the state private activities associated with shame and disgust.<sup>128</sup>

Governor Scott claimed that drug testing welfare recipients would save the state money, apparently based on the requirement that welfare applicants pay for their own drug tests and the assumption that testing would deter new welfare applicants.<sup>129</sup> His claim went unfulfilled. “Because the Florida law requires that applicants who pass the test be reimbursed for the cost, an average of \$30, the cost to the state was \$118,140. This is more than would have been paid out in benefits to the people who failed the test . . . .”<sup>130</sup> And that was before a legal challenge to the law began accruing legal fees.<sup>131</sup>

Soon after signing the legislation mandating drug testing for welfare recipients, Governor Scott issued an executive order mandating random drug

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125. U.S. DEP'T OF HEALTH & HUMAN SERVS., SUBSTANCE ABUSE: CLINICAL ISSUES IN INTENSIVE OUTPATIENT TREATMENT 238 app. B (2006), available at <http://www.ncbi.nlm.nih.gov/books/NBK64093> (“Some programs insist that a staff member of the same sex accompany a client into the bathroom to observe urine collection. Others find that monitoring through an open door and having clients leave packages and coats outside are sufficient.”).

126. *Id.*

127. Gustafson, *supra* note 5, at 645.

128. COLIN MCGINN, *THE MEANING OF DISGUST* 26–27 (2011) (noting that urine elicits the emotion of disgust in modern society). Daniel Solove notes that contemporary society associates privacy with control over the body and concealment of bodily functions such as urination. Daniel Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1135–36 (2002).

129. Michael C. Bender, *Drug Test Law Faces Challenge*, ST. PETERSBURG TIMES (Fla.), Sept. 8, 2011, at 1A. It should be noted that several years earlier, Florida had conducted a pilot study of drug testing welfare recipients. A study of that program found that because estimated rates of drug use were low and that those welfare recipients who tested positive had similar earning and employment outcomes as those who tested negative, drug testing was not a demonstrated need. Robert E. Crew, Jr. & Belinda Creel Davis, *Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits*, 17 J. HEALTH & SOC. POL'Y, 39, 39, 52 (2003).

130. Lizette Alvarez, *No Savings Are Found from Welfare Drug Tests*, N.Y. TIMES, Apr. 18, 2012, at A14.

131. In civil rights cases, federal law allows judges to award prevailing plaintiffs attorneys' fees and costs. 42 U.S.C. § 1988(b) (2006).

testing for 85,000 state employees.<sup>132</sup> Scott has been challenged on the authenticity of his belief that drug testing of state employees would withstand legal challenge.<sup>133</sup> The executive order was challenged in court;<sup>134</sup> the legislature then passed a bill instituting random drug testing for state employees, signed by the Governor on March 19, 2012.<sup>135</sup> That law mandating drug testing for state employees was declared unconstitutional by a federal district judge on April 26, 2012, who ruled that the State failed to identify any public interests for the program, much less any extraordinary interests sufficient to overcome employees' fundamental rights to privacy.<sup>136</sup>

Florida's drug testing mandate for welfare recipients came before a federal court soon after it was implemented. Luis Lebron, a single father caring for a disabled mother while working and attending college, challenged Florida's welfare drug-testing mandate. A district court preliminarily enjoined the drug-testing program.<sup>137</sup> The district court opinion not only described the urine testing itself as an invasion of privacy, but also noted Florida's failure to keep positive test results confidential from third parties.<sup>138</sup> The court decision dismissed the state's claims of various "special needs" for drug testing that would provide an exception to the usual Fourth Amendment protections.<sup>139</sup>

Florida appealed the district court ruling to the Eleventh Circuit Court of Appeals. The motion for summary judgment filed by the American Civil Liberties Union, the legal organization representing the welfare applicants, documented some disturbing occurrences in Florida's drug testing efforts.<sup>140</sup> For example, a welfare applicant who was suffering from kidney failure could not produce a urine sample; because there is no "good cause exemption" under the state statute, she had to provide a urine sample through a urinary catheter.<sup>141</sup> Another applicant found that the drug-testing lab representative showed up unannounced at her

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132. Fla. Exec. Order 11-58 (March 22, 2011).

133. Daily Show comedian Aasif Mandvi, posing as a news reporter, held up a specimen cup and asked Governor Scott, "Would you be willing to pee into this cup to prove to Floridian taxpayers that you're not on drugs?" The Governor, startled and embarrassed, declined. *The Daily Show: Poor People*, (Comedy Central television broadcast Feb. 2, 2012), available at <http://www.thedailyshow.com/watch/thu-february-2-2012/poor-pee-ple>.

134. Am. Fed'n. of State, Cnty. & Mun. Emps. Council 79 v. Scott, 278 F.R.D. 664, 667 (S.D. Fla. 2011).

135. FLA. STAT. § 112.0455 (2012).

136. Am. Fed'n of State Cnty. & Mun. Emps. Council 79 v. Scott, 857 F. Supp. 2d 1322, 1342-43 (S.D. Fla. 2012).

137. Lebron v. Wilkins, 820 F. Supp. 2d 1273, 1293 (M.D. Fla. 2011).

138. *Id.* at 1283.

139. *Id.* at 1284-92.

140. Plaintiff's Motion for Summary Judgment and Supporting Memorandum of Law at 18, Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011) (No. 6:11-cv-01473-MSS-DAB).

141. *Id.*

home and insisted that she leave her children alone with him while she collected the sample in her bathroom.<sup>142</sup>

The Eleventh Circuit reviewed and upheld the district court's preliminary injunction.<sup>143</sup> Judge Rosemary Barkett, who authored the main opinion, wrote that only in limited and exceptional cases had the United States Supreme Court upheld as reasonable searches that were without individualized suspicion. Citing *Chandler v. Miller*, Judge Barkett wrote that for the government to justify suspicionless drug testing, it would first have to identify a special need that would make the Fourth Amendment's probable cause and warrant requirements impractical and then demonstrate that the special need was substantial enough to overcome the individual privacy interests at stake.<sup>144</sup> Barkett's opinion stated that Florida could not support its argument that there is a special need for suspicionless drug testing

when there is no immediate or direct threat to public safety, when those being searched are not directly involved in the frontlines of drug interdiction, when there is no public school setting where the government has a responsibility for the care and tutelage of its young students, or when there are no dire consequences or grave risk of imminent physical harm as a result of waiting to obtain a warrant if a TANF recipient, or anyone else for that matter, is suspected of violating the law.<sup>145</sup>

The analysis of Florida's claim that it had a special need to conduct drug testing of applicants reached a straightforward conclusion: "The simple fact of seeking public assistance does not deprive a TANF applicant of the same constitutional protection from unreasonable searches that all other citizens enjoy."<sup>146</sup>

The Eleventh Circuit judges also found unconvincing Florida's argument that because adults applying for benefits were informed that receipt of aid would be contingent upon a clean drug test, they effectively gave consent to be drug tested.<sup>147</sup> The court's opinion stated that consent to a government search is invalid where it is impliedly "granted in submission to authority":<sup>148</sup>

The State cannot mandate "consent" to drug testing, which essentially requires a TANF applicant to choose between exercising his Fourth Amendment right against unreasonable searches at the expense of life-sustaining financial assistance for his family or, on the other hand, abandoning his right against unreasonable government searches in order to access desperately needed financial assistance, without

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142. *Id.*

143. *Lebron v. Sec'y, Fla. Dep't of Children & Families*, No. 11-15258, 2013 WL 672321, at \*12 (11th Cir. Feb. 26, 2013).

144. *Id.* at \*3.

145. *Id.* at \*6.

146. *Id.* at \*8.

147. *Id.* at \*9.

148. *Id.* at \*9 (quoting *Johnson v. United States*, 333 U.S. 10, 13 (1948)).



unconstitutionally burdening a TANF applicant's Fourth Amendment right to be free from unreasonable searches.<sup>149</sup>

Countering the recent trends in state legislatures, the Eleventh Circuit's decision in *Lebron* maintained the principle that individuals—rich and poor alike—bear rights to dignity and privacy that should not and cannot be casually transgressed to serve popular or symbolic public interests.

Georgia passed a bill in 2012 to drug test welfare recipients, though the state, awaiting the outcome of the Florida case in the federal courts, has yet to implement the program.<sup>150</sup> At the time of this writing, the program was in limbo. Other states have bills pending.<sup>151</sup> The continuing popularity of drug-testing schemes among state lawmakers is striking, particularly given the negative responses to such measure in the federal courts and the costs associated with implementing and running (not to mention legally defending) these proposals. Even in the drafts of bills, lawmakers appear to find it difficult to identify public needs that would be served by the drug-testing schemes, other than speculative claims that the efforts would deter drug use or vague statements that drug testing would promote fiscal integrity.

In debates over drug testing, it is common to hear the argument that many private companies require their employees to submit to drug testing, so that it should not be much of an imposition for someone receiving money from the government to have to experience the same indignity.<sup>152</sup> This logic raises the question of why private companies are engaged in drug testing. Employers are generally free to fire employees who show up for work intoxicated.<sup>153</sup> Although pre-employment testing of job applicants is widespread, few employees are engaged in activities where use of drugs in the prior two to fourteen days would pose a hazard in the workplace.<sup>154</sup> For the most part, workplace drug testing appears to have little to do with workplace safety and more to do with screening

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149. *Id.* at \*11.

150. Kate Brumback, *Appeals Court Hears Challenge to FL Drug Test Law*, AUGUSTA CHRON. (Nov. 1, 2012), <http://chronicle.augusta.com/news/crime-courts/2012-11-01/federal-appeals-court-hears-arguments-challenge-welfare-drug-testing>.

151. *Id.*

152. Many employers have instituted drug testing as a screening tool for job applicants, while a smaller number engage in continuing drug screening tests for existing employees. KENNETH D. TUNNELL, *PISSING ON DEMAND: WORKPLACE DRUG TESTING AND THE RISE OF THE DETOX INDUSTRY* 3–5 (2004). In some states, employers may fire employees for refusing to submit to drug tests and employee refusals are treated as willful misconduct, rendering a fired employee ineligible for unemployment insurance payments. *See generally* Brianna Rae Davidson, *Architectural Testing, Inc. v. Unemployment Comp. Bd. of Review*, 19 WIDENER L.J. 611 (2010) (providing an overview of the Pennsylvania statute and case law on employee drug testing).

153. Rafael Gely & Leonard Bierman, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 HARV. J.L. & TECH. 287, 290–91 (2007) (“Although it is not widely recognized, most employees in the United States are ‘employees-at-will’—that is, they can be fired by their employers at any time for essentially any reason, or for no reason at all.”).

154. TUNNELL, *supra* note 152, at 6, 28, 118.

for workers who will obey rules and submit to authority, even in circumstances compromising an employee's dignity.<sup>155</sup> In short, drug testing is a show of dominance.

Efforts to drug test welfare recipients are also a display of dominance. Some have described drug testing welfare recipients, who are mostly women, as part of a continuing pattern of the state exerting authority over and punishing economically marginalized minority women.<sup>156</sup> Supporters of welfare drug testing proposals work under the assumption (or the stereotype) that welfare recipients engage in criminal activities such as drug use at higher rates than those who are financially better off. They also assume that individual choices, such as drug use, prevent low-income women from attaining financial security and cause families to live in poverty. They do not acknowledge that many low-wage workers—whether they use drugs or not—fall far below the poverty line and turn to the state when they face desperate need.

The emotion of disgust associated with mothers receiving welfare is being transformed into state practices that ask these mothers to engage in acts, such as urine testing, that we associate with disgust. Lawmakers have used debates over drug testing as an opportunity to engage in the dramaturgy of poverty, producing stories, meanings, and symbols that then shape the lives of poor parents and their children.

#### *D. School Enrollment and Education Theft*

In the fall of 2010, Connecticut mother Tanya McDowell enrolled her son in kindergarten in Brookside Elementary School located in the town of Norwalk, Connecticut. McDowell and her son were homeless; their last residence had been in Bridgeport, Connecticut—a town with one of the highest poverty rates in the state.<sup>157</sup> McDowell enrolled her son using the Norwalk address of the babysitter

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155. TUNNELL, *supra* note 152, at 124–25 (describing employee drug testing as a method of social control); Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1392 (2012) (low-wage workers, more often than white-collar workers, are “subject to visible—sometimes humiliating—surveillance tactics such as psychological testing, regular drug screening, and overt videotape monitoring”).

156. SUSAN C. BOYD, FROM WITCHES TO CRACK MOMS: WOMEN, DRUG LAW, AND POLICY, at xix (2004) (analyzing how “race, class and gender inequalities inform drug law and policy” and how widespread beliefs about motherhood, sobriety, and morality lead to drug policies that are even more punitive toward women than they are toward men).

157. In 2011, an estimated twenty-six percent of Bridgeport residents were living in poverty while only eight percent of Norwalk residents were living in poverty. U.S. Census Bureau, *Population and Housing Narrative Profile: 2011, 2011 American Community Survey 1-Year Estimates*, AM. FACT-FINDER, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_11\\_1YR\\_NP01&prodType=narrative\\_profile](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_NP01&prodType=narrative_profile) (last visited May 13, 2013).

who took care of him after school.<sup>158</sup> The babysitter lived in public housing, and officials at the Housing Authority, apparently through routine data exchanges with other government offices, found discrepancies between the names of residents listed on the lease agreement and the names of residents listed in school enrollment records.

In January 2011, school officials discovered that McDowell and her son did not actually reside at the address reported on the school enrollment forms and contacted her.<sup>159</sup> McDowell withdrew her son and transferred him to a school in Bridgeport.<sup>160</sup> Despite removing her child from the Norwalk school in the middle of the school year, McDowell was charged with first-degree larceny.<sup>161</sup> McDowell eventually pled guilty to the larceny charge, as well as to drug possession and sales charges filed subsequent to her larceny charge.<sup>162</sup> For the combined charges, she was sentenced to five years in prison and five years of probation.<sup>163</sup> McDowell's babysitter was evicted from her subsidized housing because listing McDowell and her son as residents of her unit violated her lease agreement.<sup>164</sup> McDowell, who claimed to be living in a van in Norwalk, apparently did not know that if she had reported being homeless to Norwalk School officials, then federal law would have required the school district to enroll her son for the entire school year.<sup>165</sup>

Connecticut schools and neighborhoods, like many in the United States, remain racially and economically segregated.<sup>166</sup> A 2011 U.S. Census Bureau report studying income inequality in metropolitan areas in the United States determined that the metropolitan area in the United States with the highest Gini coefficient or, in other words, the starkest income inequality, was the Stamford-Bridgeport-Norwalk area of Connecticut—the same place where Tanya McDowell was

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158. Peter Applebome, *In a Mother's Case, Reminders of Educational Inequalities*, N.Y. TIMES, Apr. 28, 2011, at A18. McDowell's babysitter was later evicted from her subsidized housing because listing McDowell and her son as residents of her unit violated her lease agreement. *Id.*

159. Stacy Teicher Khadaroo, *Homeless Child Enrolled in Wrong School: What Should Happen to Him?*, CHRISTIAN SCI. MONITOR, Apr. 28, 2011, at 17.

160. *Id.*

161. Grace E. Merritt, *Sharpton Weighs In: Activist Defends Mother's Enrollment Decision; Court Case Continued; Norwalk*, HARTFORD COURANT (Conn.), June 8, 2011, at B1.

162. *Id.*

163. Samaia Hernandez, *Homeless Mom Sentenced in Drug, Larceny Cases*, HARTFORD COURANT (Conn.), Mar. 28, 2012, at B4.

164. Applebome, *supra* note 158.

165. 42 U.S.C. § 11432(g)(3) (2006).

166. In 1989 parents in Hartford, Connecticut brought legal claims that extreme segregation in Connecticut's urban schools deprived students of equal opportunities. In 1996, the claims reached the Connecticut Supreme Court, which concluded that Connecticut's schools were segregated, concluded that the conditions deprived students of equal opportunities, and ruled that the state constitution and state legislation required the state to provide equal educational opportunities to all children. *Sheff v. O'Neill*, 678 A.2d 1267, 1281 (Conn. 1996) (“[W]e conclude that the existence of extreme racial and ethnic isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity and requires the state to take further remedial measures.”).

charged with criminal larceny for sending her son to a Norwalk school.<sup>167</sup> The heavy-handed policing of the school district residency rules through the criminal justice system seemed to be an effort to send a warning to other parents from low-income, low-performing school districts that they, too, would face tough penalties if they tried to violate district boundaries.<sup>168</sup>

McDowell's defense attorney, Darnell Crosland, complained that twenty-six other families had also had their children removed from Norwalk schools that year based on their residency, but that McDowell was the only one arrested and prosecuted on larceny charges.<sup>169</sup> McDowell and her son are African American, and members of the National Association for the Advancement of Colored People (NAACP) came to her defense, suggesting that race played a factor in the state's decision to bring criminal charges against her.<sup>170</sup>

McDowell's is not the only case of a mother facing criminal charges after enrolling her child in a school district with abundant resources. After a jury trial in 2011, Akron, Ohio mother Kelley Williams-Bolar, also African American, was convicted of felonious tampering with records in her efforts to enroll her two daughters in the Copley-Fairlawn City Schools, which were higher-performing schools than their neighborhood schools in Akron.<sup>171</sup> Williams-Bolar's father lived in the Copley-Fairlawn district and paid property taxes there.<sup>172</sup> Williams-Bolar used her father's address to register the girls in the school district.<sup>173</sup> Williams-Bolar claimed that fear for the girls' physical safety is what prompted her to enroll the girls in the district.<sup>174</sup> She said that her home in a public housing project in Akron had been burglarized and she feared the girls returning to an empty home by themselves after school.<sup>175</sup> While attending the Copley-Fairlawn Schools, the girls were able to go to their grandfather's house every day after school.<sup>176</sup>

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167. DANIEL H. WEINBERG, U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY REPORT 16: U.S. NEIGHBORHOOD INCOME INEQUALITY IN THE 2005–2009 PERIOD 5 (2011), available at <http://www.census.gov/prod/2011pubs/acs-16.pdf>.

168. Connecticut Department of Education spokesperson Thomas Murphy admitted that in most school district residency cases, the children are allowed to finish the school year at the schools they are attending and that in rare cases the parents are billed by the district for the cost of educating their children. Bill Leukhardt, *Illegal Student Crackdown: 33 Non-Resident Students Removed from Public Schools*, HARTFORD COURANT (Conn.), June 19, 2011, at B1.

169. Merritt, *supra* note 161.

170. See Khadaroo, *supra* note 159.

171. Stacy Teicher Khadaroo, *'Stealing' a Good Education?*, CHRISTIAN SCI. MONITOR, Feb. 28, 2011, at 19. While the jury found her guilty of two counts of tampering, they did not reach a unanimous decision on the grand theft charge prosecutors brought against her. Minutes of the Special Meeting of the State of Ohio Adult Parole Authority at 3 (July 20, 2011), available at <http://www.drc.ohio.gov/Public/WilliamsBolarKellyClemency.pdf> [hereinafter Minutes].

172. Khadaroo, *supra* note 159.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

Ohio has an open enrollment law, allowing parents to enroll their children in districts other than the ones where they reside.<sup>177</sup> Many affluent school districts, however, opt out of this law; Copley-Fairlawn is one of those districts.<sup>178</sup>

The county prosecutor noted that there had been forty-eight other incidents of parents improperly enrolling children in the affluent school district (twenty-nine of them African American), but that only Kelley Williams-Bolar had been prosecuted—because unlike the other parents she was uncooperative in resolving the matter.<sup>179</sup> An African American mother living in a housing project and sneaking her kids into a more affluent school district was hardly a sympathetic figure before a jury.

Like the babysitter who took care of Tanya McDowell's son, Kelley Williams-Bolar received government-subsidized housing.<sup>180</sup> In both cases, it appears that close scrutiny by housing authorities led to the discovery that addresses listed on school registration documents did not match documents overseen by public housing authorities.<sup>181</sup> Both cases highlight the close government scrutiny under which low-income women receiving public benefits live. Those parents who do not receive housing benefits or public assistance, who have tax-paying friends or neighbors living in appealing school districts, and who are willing to allow their addresses to be used for school registration probably merit no attention from school officials.

Williams-Bolar served nine days in jail and was also sentenced to two years of probation.<sup>182</sup> At the time of her conviction, Williams-Bolar was working as a

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177. OHIO REV. CODE ANN. § 3313.98(B)(1)(b)–(c) (LexisNexis 2012) (concerning enrollment of students from adjacent or other districts).

178. *Open Enrollment Listing*, OHIO DEP'T EDUC. (Jan. 18, 2013, 11:50 AM), <http://www.ode.state.oh.us/gd/templates/pages/ode/odedetail.aspx?page=3&topicrelationid=704&content=138906>.

179. *See Mother Jailed for School Fraud, Flares Controversy*, NAT'L PUB. RADIO (Jan. 28, 2011), <http://www.npr.org/2011/01/28/133306180/Mother-Jailed-For-School-Fraud-Flares-Controversy> (transcribing National Public Radio host Michel Martin's interview with Copley-Fairlawn Superintendent Brian Poe).

It should be noted that Akron and Copley Townships have significantly different demographics. In Akron in 2010, the median value of owner-occupied housing units was \$89,800, and 62.2% of the residents were white. *Akron, Ohio QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/39/3901000.html> (last revised Jan. 10, 2013). In Copley Township, the median home value was \$151,700, and 86.4% of the residents were white. *Copley Township Demographics*, COPLEY TOWNSHIP, <http://www.copley.oh.us/about-copley/about-copley/demographics.html> (last visited May 13, 2013).

180. Khadaroo, *supra* note 171 (“The felony charges arose from conflicting paperwork that Williams-Bolar filed—with public agencies and the school—about her daughters’ residence and her income, according to the prosecutor.”).

181. To identify fraud, the U.S. Department of Housing and Urban Development uses the Enterprise Income Verification (EIV) system to match information provided by recipients of housing assistance benefits against information in other government databases. *See* U.S. DEP'T OF HOUSING & URBAN DEV., WHAT YOU SHOULD KNOW ABOUT EIV (2010), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=10-19pihn1.pdf>.

182. Minutes, *supra* note 171, at 3.

teacher's aide and was taking college courses with the hope of earning her teaching credential.<sup>183</sup> Her felony conviction almost assured that she would not be able to be hired as a teacher in a public school system.<sup>184</sup> Williams-Bolar's father, Edward Williams, was charged as a codefendant with fourth-degree felony grand theft, though those charges were dismissed after jurors could not agree on the theft charge brought against his daughter.<sup>185</sup>

Williams-Bolar sought clemency from the Ohio Parole Board; the eight members unanimously denied her appeal.<sup>186</sup> The Board report noted that Williams-Bolar could have avoided the entire problem if she and her daughters had moved into her father's house<sup>187</sup> (which would have caused her to lose her public housing benefits).<sup>188</sup> In September 2011, Ohio's governor granted Williams-Bolar clemency, reducing her two conviction charges from felonies to misdemeanors.<sup>189</sup>

The prosecutors and the Parole Board in Williams-Bolar's case seemed to be less than sympathetic to her arguments because of her applications for or receipt of other public benefits. The Board report denying her appeal noted that she had received or applied for several programs—including subsidized housing, Medicaid, Federal Heating Assistance benefits, reduced school lunches, and student loans and grants—using inconsistent information.<sup>190</sup> According to the Bureau of Labor Statistics, the mean annual income nationwide for a teacher's assistant in 2011 was \$25,270.<sup>191</sup> If Williams-Bolar was supporting her family of three on a comparable income, then her household income was above the poverty

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183. *Id.* at 2.

184. *Id.* at 2, 13.

185. Kymberli Hagelberg, *Copley Grandfather Found Guilty*, FAIRLAWN-BATH PATCH, (June 3, 2011), <http://fairlawn-bath.patch.com/articles/copley-grandfather-found-guilty>. Apparently, detectives investigating Edward Williams discovered misstatements he had made on other applications for public benefits. Prosecutors charged and convicted him of felony counts of tampering with documents and grand theft; he was sentenced to one year in prison. *Id.*

186. Minutes, *supra* note 171, at 14.

187. *Id.* at 13.

188. Federal regulations prohibit recipients of public housing benefits from renting from relatives. 24 C.F.R. § 982.306(d) (2012) (“The [Public Housing Authority (PHA)] must not approve a unit if the owner is the parent, child, grandparent, grandchild, sister, or brother of any member of the family, unless the PHA determines that approving the unit would provide reasonable accommodation for a family member who is a person with disabilities.”) If Williams-Bolar moved into her father's home rent-free, then she would lose her housing benefits. If her income remained low and she needed to reapply for housing assistance to obtain affordable housing, she would likely have to wait for years. Cornelius Frolik, *Demand for Rental Property Raises Rates Report: Many Local Families Unable to Afford Modest Apartments. Continuing Coverage Housing Crisis*, DAYTON DAILY NEWS (Ohio), Apr. 2, 2012, at B1.

189. Alan Johnson, *Kasich Cuts Convictions in Mother's School Case*, COLUMBUS DISPATCH (Ohio), Sept. 8, 2011, at A1.

190. Minutes, *supra* note 171, at 12.

191. *Occupational Employment and Wages, May 2011, 25-9041 Teacher Assistants*, BUREAU LAB. STAT., <http://www.bls.gov/oes/2011/may/oes259041.htm> (last modified Mar. 27, 2012).

line (\$18,530), but not far above it. The Parole Board report noted a couple things about her educational history: first, that over the years she had received approximately \$70,000 in loans and grants to attend college; second, that her grade point average was not high enough to be admitted to a program that would actually grant her a degree in early childhood education. These facts were, it seems, included to suggest that she had a history of lazing about on taxpayer money. These facts not only contributed to her image as a liar, but also suggested that she had wasted taxpayer money—just like the stereotypical welfare queen.

A more sympathetic reading of the facts, however, suggests another interpretation. One might view Kelley Williams-Bolar as a single mother trying to balance—perhaps not so successfully—care for two daughters, her own efforts to earn a college degree, and the demands of a full-time, low-paying job. One could see how a mother faced with time constraints, concerns about her children's welfare, limited income, and mounting student loan debt might see her options as limited. One might also see how her hopes for a brighter economic future might be dwindling and how it might push her to take risks to ensure both the physical safety of her daughters and better educational opportunities for them by stating on forms that they lived with their grandfather in a good school district.

There are numerous other cases:

- In 2011, Charles Lauron was charged with felony theft by deception for sending his son to Oldham County Schools, known for their high test scores, rather than schools in Louisville, Kentucky.<sup>192</sup> Criminal charges were also brought against the family friend whose address was used for the school registration forms.<sup>193</sup> A grand jury dropped the charges against the family friend, who claimed that her signature had been forged on the residency affidavit.<sup>194</sup> Lauron's friend then sued the Oldham County School Board for slander.<sup>195</sup> Criminal charges were also brought against four other parents whose children attended the Oldham County Schools.<sup>196</sup>
- Mother Myrna Winslow was arrested in 2011 and charged with a misdemeanor for allegedly enrolling her son in Belleville, Missouri rather than East St. Louis.<sup>197</sup>
- In 2010, grandmother Marie Menard was charged with first-degree

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192. Sara Cunningham, *District Says Address Faked*, COURIER-JOURNAL (Louisville, Ky.), Aug. 27, 2011, at A1.

193. *Id.*

194. Emily Hagedorn, *Oldham Schools Sued*, COURIER-JOURNAL (Louisville, Ky.), Apr. 8, 2012, at B1.

195. *Id.*

196. Sara Cunningham, *School Case to Grand Jury*, COURIER-JOURNAL (Louisville, Ky.), Nov. 4, 2011, at B3.

197. Jessica Bock, *School Districts Policing Borders: Efforts Commingle with Debate over Rights of Students to Transfer from Failing Districts*, ST. LOUIS POST-DISPATCH (Mo.), Sept. 6, 2011, at A1.

larceny and conspiracy after she and her daughter enrolled her two grandchildren in the Stratford, Connecticut school district, where Menard lived, rather than in the Milford School District, where her daughter lived.<sup>198</sup>

- Melissa Chapman of Stanfordville, New York was charged with grand larceny in the third degree and falsifying business records after lying about her address in order to enroll her children in the Red Hook School District in New York in 2009.<sup>199</sup>
- Yolanda Miranda, a mother of two and resident of Rochester, New York, was jailed for one night on grand theft charges for sending her children to the schools in the suburb of Greece, New York.<sup>200</sup> After pleading guilty, Miranda was sentenced to three years on probation and 100 hours of community service.<sup>201</sup>

Some of these cases reflect not only parents' and grandparents' desires for better educational opportunities for children, but also the struggles of single parents to juggle the demands of work and parenting. When work schedules are not in sync with school schedules, low-income parents are faced with the difficulties of finding safe and affordable after-school care and transportation for their children. Several of the cases suggest that the parents were trying to resolve these problems by placing their children in out-of-district schools.

Most Americans would probably agree that educational opportunities are not distributed equally in the United States. Local control over who can enroll often results in tight control over access to affluent school districts. While many scholars and policymakers have recommended more open and porous boundaries between school districts, broader sharing of educational resources across existing district lines, and more concerted efforts to do away with school districts that have high concentrations of poor students and/or minority students,<sup>202</sup> little has been done.

School officials consistently describe the parents who are arrested as “setting

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198. Mara Gay, *Education or Bust, More Parents Doing Time for 'Stealing Education' for Kids in Better Districts*, DAILY (Mar. 11, 2012), <http://www.thedaily.com/page/2012/03/11/031112-news-school-moms-arrested-1-5>.

199. *In Brief; Ulster Officials Warn of Phone Scammers*, POUGHKEEPSIE J. (Poughkeepsie, N.Y.) Nov. 9, 2010, at B6.

200. Gay, *supra* note 198.

201. *Mom Admits Sent Kids to School Illegally*, WIVB4 NEWS (Jul. 24, 2009, 5:52 PM), [http://www.wivb.com/dpp/news/new\\_york/Mom\\_admits\\_sent\\_kids\\_to\\_school\\_illegally\\_20090724](http://www.wivb.com/dpp/news/new_york/Mom_admits_sent_kids_to_school_illegally_20090724).

202. *E.g.*, James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (2001) (arguing that goals of racial and socioeconomic integration are best served not through funding reforms but through cooperative efforts between urban and suburban areas, including magnet schools and increased inter-district school choice programs); Erica J. Rinas, Note, *A Constitutional Analysis of Race-Based Limitations on Open Enrollment in Public Schools*, 82 IOWA L. REV. 1501 (1997) (examining the history of open enrollment legislation and litigation in Ohio and other states and recommending consideration of student race in open enrollment programs in order to achieve district diversity goals).



bad examples for their children.”<sup>203</sup> Those statements highlight some of the tensions inherent in these cases. The parents are, indeed, setting bad examples by violating rules. At the same time, those parents are communicating to their children the importance of education and taking huge risks to provide their children with better educational opportunities.

The school officials also seem to recognize the injustices of educational inequities and yet distance themselves from bearing responsibility for addressing those inequalities, either as educators or as citizens. Brian Poe, the Copley-Fairlawn School District Superintendent, stated during an interview about Kelley Williams-Bolar’s case that, “if we disagree with the laws, and we disagree with how things are set up, I think it’s important that we still need to follow those laws and abide by them.”<sup>204</sup> While the problems of systemic educational equality are recognized, there are few people working as the agents of social and economic change; there are, however, many working to maintain the status quo. Economically privileged families have often worked hard to move into academically privileged (and often racially, ethnically, and economically self-segregated) schools.<sup>205</sup> Economically disadvantaged parents are stuck—either struggling to accumulate enough wealth to cross the border, hoping their kids beat the odds on the wrong side of the border, or sneaking their kids across the border.

Policing the school district borders has even produced new business opportunities for contractors. Verify Residence, a private company in New Jersey, contracts with school districts to help them root out students who may be enrolled in the wrong district.<sup>206</sup> The company audits student registration documents, investigates registration inconsistencies (including surveillance of parents and students), and even runs a “24/7 Tips and Reward” hotline that

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203. See, e.g., Cunningham, *supra* note 192.

204. *Mother Jailed for School Fraud, Flares Controversy*, *supra* note 179.

205. See Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 177, 201–03 (2002) (finding that economically privileged parents choose housing and schools based not on neighborhood schools’ curricula but rather on parents’ perceptions that schools have small numbers of low-income students or students of color); Mingliang Li, *Is There “White Flight” into Private Schools? New Evidence from High School and Beyond*, 28 ECONOMICS OF EDUC. REV. 382, 383 (2009) (finding that the higher the percentage of black school-age children in a county, the higher the probability that white students are attending private schools); Haifeng Zhang, *School Desegregation and White Flight Revisited: A Spatial Analysis from a Metropolitan Perspective*, 32 URB. GEOG. 1208, 1214–21 (2011) (offering evidence that, whereas earlier white flight involved families moving from urban areas to the suburbs, more recent white flight involves white families moving from desegregated suburban school districts to segregated suburban districts or enrolling children in private schools).

206. See generally VERIFY RESIDENCE, <http://www.verifyresidence.com> (last visited May 13, 2013). At the time of this writing, the main photograph image on the web site is a picture of five children. In the foreground of the photo, an elementary school-aged boy who appears to be Latino or Asian American stands with a sad look on his face and his head down. Behind him are four children who appear to be white and who are whispering to each other behind the boy’s back. The image offers a disturbing image of white insiders and the non-white outsider.

encourages members of the public to report on parents and students they suspect of attending out-of-district schools.<sup>207</sup> Another business, National Investigations, Inc., advertises on its website: “Our firm is the only one who does door knocks or surveillance of students in increments of a quarter of an hour at a time.”<sup>208</sup> Bill Beitler, owner of National Investigations, admits that there are school districts that target African American, Latino, and special education students, though he says that he has refused to engage in this practice when asked.<sup>209</sup> Thus, students of color can become border-crossing, so-called illegals in their country of birth.

There is a way that students and parents who violate the residency rules can avoid prosecution: by playing sports. There have been numerous investigations of high school sports coaches recruiting students from other school districts and enrolling them in violation of district residency requirements.<sup>210</sup> I have been unable to find instances of coaches facing criminal charges for these actions. Then again, well-attended sports events can raise a lot of money for school districts.<sup>211</sup> It is the single mothers and grandparents of students seeking educations, and not the men seeking sports glory, who are prosecuted.

Using the criminal justice system to punish parents who seek better educational opportunities for their children is a new trend. A research report from Connecticut’s Office of Legislative Research found that only six states and Washington D.C. had statutes specifically addressing false enrollment information and that none of them established these as felonious acts.<sup>212</sup> The cases that have

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207. *Id.*

208. *Residency Investigations*, NAT’L INVESTIGATIONS, INC., [http://www.nationalinvestigations.com/residency\\_investigations.html](http://www.nationalinvestigations.com/residency_investigations.html) (last visited May 13, 2013). The Riverside-Brookfield High School in affluent Oak Park, Illinois hired National Investigations to conduct residency investigations. In 2010, after two years contracting with the company, the school district decided not to use the company any more. The District Interim Superintendent found that National Investigations was providing inadequate information to determine whether or not students actually lived in the district. During the first year with National Investigations, the company recommended outside hearing officers; the second year, the Superintendent served as the administrative hearing officer for the residency hearings. Bob Skolnik, *RBHS Changing Residency Check Firms*, RIVERSIDE-BROOKFIELD LANDMARK (Ill.) (Aug. 17, 2010, 10:00 PM), <http://www.rblandmark.com/News/Articles/8-17-2010/RBHS-changing-residency-check-firms>. It is hard to believe that either the school superintendent or individuals connected with the investigators would be impartial adjudicators in the residency hearings.

209. Gay, *supra* note 198.

210. *See, e.g.*, Charles Elmore, *Charges Fly but Tough to Prove*, PALM BEACH POST (Fla.), Nov. 1, 2011, at 1C; Greg Tufaro, *NJSIAA Strips North Bergen of Sectional Football Title*, ASBURY PARK NEWS (N.J.) (June 6, 2012, 6:05 PM), <http://www.app.com/article/20120606/NJSPOSPORTS01/306060090/NJSIAA-strips-North-Bergen-sectional-football-title>.

211. Robert Eckhart, *Friday Night Under Rival Lights*, SARASOTA HERALD TRIB. (Fla.), Dec. 13, 2010, at A1 (discussing accusations of Venice High School football coaches recruiting and enrolling out-of-district players and noting that “Venice raised \$173,000 last year by selling tickets and hot dogs and T-shirts.”).

212. JAMES ORLANDO, CRIMINAL PENALTIES FOR FALSELY CLAIMING RESIDENCY WITHIN A SCHOOL DISTRICT 1–4 (CONN. OFFICE OF LEGISLATIVE RESEARCH REPORT 2011-R-0214, 2011) (citing ARK. CODE ANN. § 6-18-202(f), D.C. CODE § 38-312, 105 ILL. COMP. STAT. 5/10-20.12b,

been brought in states without statutes specifically addressing school enrollment show prosecutors stretching criminal statutes to ensnare poor mothers. Where state legislators have addressed the issue of parents jumping the borders of school districts, the laws have generally labeled the wrongdoing as a misdemeanor<sup>213</sup> or as a lower-level criminal violation.<sup>214</sup> It is, it seems, not legislators but rather local school districts and overzealous prosecutors who are disregarding the effects of felony prosecutions on families and communities and overcharging parents to make examples of those who refuse to honor school district borders.

These cases are about policing the boundaries of place—neighborhoods, school districts—and selectively distributing public services—including educational opportunities—in efforts to exclude those who represent the inferior other. Educational opportunities are supposed to be a public good, but those opportunities are not equally available. Where access to education determines life chances, it is no surprise that we see poaching.

#### *E. Treating Crimes of Need as Crimes of Greed*

People who are poor often have difficulty accessing the essentials of everyday life. Adults working low-wage jobs or surviving on public benefits often make too little to make ends meet. In addition, the federal poverty level, which is used as a referent to establish money for many government benefits, is low—too low to meet basic needs.

Those families who receive TANF benefits generally make far below the poverty threshold. The Center on Budget and Policy Priorities has found that no state provides enough TANF benefits to raise a family to even half of the poverty line, and many states provide far below half.<sup>215</sup> While costs of living, particularly housing, have risen in the years since federal welfare reform was instituted, welfare

MICH. COMP. LAW SERV. § 380.1812, MO. REV. STAT. § 167.020, OKLA. STAT. ANN. tit. 70 § 1-113(A), and 24 PA. CONS. STAT. ANN. § 13-1302.

213. 105 ILL. COMP. STAT. 5/10-20.12b(f) (2010) (providing false residency information is a Class C misdemeanor); MICH. COMP. LAWS § 380.1812 (2008) (intentionally giving the school enumerator false information is a misdemeanor punishable by a fine up to \$50, imprisonment for up to 20 days, or both); MO. REV. STAT. § 167.020(4) (2012) (submitting false information about school residency is a class A misdemeanor); OKLA. STAT. tit. 70, § 1-113(A)(1) (2011) (false statement about student residency is a misdemeanor and may result up to on one year of imprisonment and/or a fine up to \$500); TEX. PENAL CODE ANN. § 37.10(a), (d) (2011) (falsification of records to enroll a student is a Class C misdemeanor).

214. ARK. CODE ANN. § 6-18-202(f) (giving a false residential address is a violation subject to a maximum fine of \$1,000); D.C. CODE § 38-312 (a person who provides false information may be subject to a fine up to \$2,000 or to imprisonment, but not both); 24 PA. CONS. STAT. § 13-1302(c) (providing false information about school enrollment may result in a fine up to \$300 and/or community service up to 240 hours).

215. Liz Schott & Ife Finch, *TANF Benefits Are Low and Have Not Kept Pace with Inflation*, CENTER ON BUDGET & POL'Y PRIORITIES 1-2 (2010), <http://www.cbpp.org/cms/?fa=view&id=3306>.

benefits have not.<sup>216</sup> In addition, a number of factors—including strict eligibility standards, sanctions, time limits, and the stigma of welfare receipt—have left many families without any cash assistance.<sup>217</sup> In 2007, only thirty-six percent of households eligible for TANF benefits received them.<sup>218</sup>

South Carolina is representative of what is happening nationwide. The state provides very low TANF benefits to families.<sup>219</sup> In 2010 the legislature lowered the maximum TANF benefits for a family of three from \$270 per month to \$216 per month.<sup>220</sup> In fiscal year 2011, an average of 844,405 South Carolina residents received SNAP benefits every month, almost 300,000 more than in 2007.<sup>221</sup> Since the number of Americans receiving food stamps began growing dramatically, both public resentment and political backlash have also grown. In January 2010, South Carolina Lieutenant Governor and then candidate for governor Andre Bauer said, while criticizing the nutrition assistance program, that his grandmother told him to “quit feeding stray animals. You know why? Because they breed.”<sup>222</sup> (There is actually a long history of conservative politicians comparing people who receive government benefits to animals, including wolves, alligators, brood mares, monkeys, and mules.)<sup>223</sup>

The number of Americans receiving nutrition assistance began rising in 2008.<sup>224</sup> Federal officials were aware that the programs was underutilized by those who qualified, that the economy was weak and unemployment high, and that expanding participation in SNAP was perhaps the only politically practical way to direct federal resources to the poor.<sup>225</sup> As a result, the Department of Agriculture

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216. *Id.* at 4.

217. Average monthly TANF caseloads in the U.S. dropped from 3.94 million families in 1997 to 1.95 million in 2011. Pamela J. Loprest, *How Has the TANF Caseload Changed over Time?*, URB. INST. 2 (2012), <http://www.urban.org/UploadedPDF/412565-How-Has-the-TANF-Caseload-Changed-Over-Time.pdf>.

218. *Id.*

219. Three states—Arkansas, Mississippi, and Tennessee—provide lower benefits for a family of three. *Id.*

220. Finch & Schott, *supra* note 41, at 11.

221. *Supplemental Nutrition Assistance Program: Average Monthly Participation*, U.S. DEP'T AGRIC. (Sept. 28, 2012), <http://www.fns.usda.gov/pd/15SNAPpartPP.htm>.

222. Jason DeParle & Robert Gebeloff, *Food Stamps Finding New Acceptance as Enrollment Surges*, N.Y. TIMES, Feb. 11, 2010, at A22 (quoting Bauer).

223. NEUBECK & CAZENAVE, *supra* note 88, at 169–70 (quoting politicians likening welfare recipients to alligators and wolves); Louis Kushnick, *Responding to Urban Crisis: Functions of White Racism*, in A NEW INTRODUCTION TO POVERTY: THE ROLE OF RACE, POWER AND POLITICS 160, 170 (Louis Kushnick & James Jennings eds., 1999) (citing Senator Russell Long's 1967 reference to welfare recipients as “Black Brood Mares,” and citing references to welfare recipients as “breeding mules,” “alligators,” and “monkeys” during the 1995 House debates over the Personal Responsibility and Work Opportunity Reconciliation Act).

224. *Supplemental Nutrition Assistance Program: Average Monthly Participation*, *supra* note 221 (showing that since 2008, 16.5 million more people are receiving federal nutrition assistance).

225. DeParle & Gebeloff, *supra* note 222.

expanded SNAP eligibility and increased outreach.<sup>226</sup> In addition, many states reformed their assets tests, making it easier for their residents to get SNAP benefits (perhaps because SNAP is an easy way to draw federal resources into local communities).<sup>227</sup>

In 2011, SNAP provided food assistance to more than forty-four million households in the United States.<sup>228</sup> For millions of low-income Americans, SNAP is the *only* source of regular government assistance a family is receiving.<sup>229</sup> These households receive neither wages nor other private or public benefits.<sup>230</sup> In the last few years, food prices have been rising; SNAP provides only about \$4.46 per day per individual.<sup>231</sup> An important note: SNAP benefits can only be used for food. Other necessities such as hygiene products, toilet paper, diapers, laundry detergent, vitamins, and medicine are not covered by SNAP.<sup>232</sup>

Retailers nationwide have reported a rise in thefts.<sup>233</sup> Given the high unemployment rate, the high poverty rate, the low rates of receipt of cash assistance benefits, and the fact that SNAP can only be used to purchase food, an increase in retail theft is not entirely surprising. The items being stolen are not luxuries, such as cigarettes and alcohol. Many of the items stolen on a regular basis are items that many Americans would consider essentials: laundry detergent, razors, diabetic test strips, pain relievers, heartburn medication (Prilosec), and even infant formula.<sup>234</sup> (Tide laundry detergent is a particularly hot commodity in underground markets.)<sup>235</sup> That these everyday items are being targeted should not be surprising; they are all high-cost items difficult for those living below the poverty line to afford. They cannot be purchased with SNAP benefit cards. And they are easily portable. Because of its popularity for theft, many retailers now keep infant formula in locked cabinets.<sup>236</sup>

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226. *Id.*

227. *Id.*

228. *Supplemental Nutrition Assistance Program: Average Monthly Participation*, *supra* note 221.

229. Jason DeParle & Robert M. Gebeloff, *Living on Nothing but Food Stamps*, N.Y. TIMES, Jan. 3, 2010, at A1.

230. *Id.*

231. *Policy Basics: Introduction to SNAP*, CENTER ON BUDGET & POL'Y PRIORITIES 7 (2012), <http://www.cbpp.org/files/policybasics-foodstamps.pdf>.

232. *Supplemental Nutrition Assistance Program: Eligible Food Items*, U.S. DEP'T OF AGRIC., <http://www.fns.usda.gov/snap/retailers/eligible.htm> (last modified Feb. 14, 2013).

233. Dante Anthony Fuoco, *State Aims Tougher Penalties Against Retail Theft*, PITTSBURGH POST-GAZETTE (Pa.), July 19, 2010, at A1.

234. GOV'T ACCOUNTABILITY OFFICE, GAO-11-675, ORGANIZED RETAIL CRIME: PRIVATE SECTOR AND LAW ENFORCEMENT COLLABORATE TO DETER AND INVESTIGATE THEFT 6 (2011), available at <http://www.gao.gov/new.items/d11675.pdf>; Fuoco, *supra* note 233; 2012 *Organized Retail Crime Survey*, NAT'L RETAIL FED'N 12 (2012), [https://www.nrf.com/modules.php?name=Documents&op=showlivedoc&sp\\_id=7247](https://www.nrf.com/modules.php?name=Documents&op=showlivedoc&sp_id=7247).

235. Ben Nuckols, *Thieves Clean Up with Loads of Stolen Tide Detergent*, BOSTON GLOBE (Mass.), Mar. 15, 2012, at 7.

236. John Annese, *Couple Charged as 1.4G Formula Filchers*, STATEN ISLAND ADVANCE (N.Y.), May 10, 2012, at A3 ("Baby formula has become a prime target for shoplifters in recent years, with

Retailers complain that a lot of the theft does not appear to be petty, but rather that large quantities are often stolen at one time.<sup>237</sup> According to the Congressional Research Service, these crimes are not done by petty shoplifters but rather by boosters, “professional thieves who make money by stealing merchandise from retail and other venues and reselling it to fences who in turn sell the goods—through legal or illegal economic outlets—for a fraction of the retail cost.”<sup>238</sup> This also is not surprising. A lot of low-income individuals are desperate for these items and anyone stealing them could easily sell them in the underground economy. Indeed, federal reports show that a lot of these items are showing up at flea markets and swap meets in low-income communities, as well as on Internet sites such as Craigslist.<sup>239</sup>

In their study of low-income mothers, Kathryn Edin and Laura Lein found that the women receiving public assistance could not make ends meet on the benefits they received, and that half the women they interviewed “purchased almost all their other necessities from neighborhood fences who sold stolen groceries, clothing, and toiletries at cut-rate prices.”<sup>240</sup> Involvement in underground markets was necessary for these mothers to meet the basic needs of their families.

Underground sales of infant formula, baby food, laundry detergent, and razor blades might easily be seen as an indicator of widespread need, particularly among parents.<sup>241</sup> Demand for non-food essential goods among the poor is generating underground markets in stolen goods.<sup>242</sup> Lobbyists for the retailers’ associations have been framing the thefts as symbolic of increased criminal behavior by individuals.<sup>243</sup>

There have been efforts across the country, many of them successful, to

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many stores keeping the product under lock and key.”); Vik Kirsch, *Willow Road Store Guards Baby Formula to Prevent Theft*, GUELPH MERCURY (Ont.) (Apr. 4, 2011), <http://www.guelphmercury.com/news/local/article/511423—willow-road-store-guards-baby-formula-to-prevent-theft> (reporting that 131 CVS Pharmacies in Connecticut keep infant formula in locked storage because of theft).

237. *Id.*

238. KRISTIN M. FINKLEA, CONGRESSIONAL RESEARCH SERV., R41118, ORGANIZED RETAIL CRIME 1 (2010).

239. *Id.* at 4.

240. EDIN & LEIN, *supra* note 42, at 41.

241. In 2004, infant formula was the fourth-most-shoplifted item in retail stores. Mark Clayton, *Is Black-Market Baby Formula Financing Terror?*, CHRISTIAN SCI. MONITOR, June 29, 2005, at 1.

242. EDIN & LEIN, *supra* note 42, at 43.

243. See *E-Fencing Enforcement Act of 2008, the Organized Retail Crime Act of 2008, and the Combating Organized Retail Crime Act of 2008: Hearing on H.R. 6713, H.R. 6491, and S. 3434 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 11–15, 34–35 (2008) (testimony of Frank Muscato, Organized Retail Crime Field Investigator, Walgreens, and testimony of Joseph J. LaRocca, Vice President, Loss Prevention, National Retail Federation); *Organized Retail Theft Prevention: Fostering a Comprehensive Public-Private Response. Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 100th Cong. 17–20 (2007) (testimony of Karl F. Langhorst, Director, Loss Prevention, Randalls/Tom Thumb Food and Pharmacy).

introduce state legislation that would increase the penalties for retail theft of specific items, most of them necessities such as infant formula.<sup>244</sup> This includes South Carolina, where, in 2011, a bill was introduced that would make stealing infant formula valued over \$100 felony larceny punishable by a fine of up to \$1,000 and up to five years imprisonment.<sup>245</sup> (Under the current statute, shoplifting reaches the level of felony larceny only when the retail value of the stolen items exceeds \$2,000.)<sup>246</sup>

The proposed South Carolina bill would make not only theft of infant formula a crime, but also knowing receipt and possession.<sup>247</sup> Many of the bills or legislative changes also criminalize the buying and selling of everyday necessities outside of retail businesses.<sup>248</sup> While it is the boosters and the middlemen who are most likely engaged in theft for economic gain or to satisfy drug habits, the legislative reforms and their stiff penalties have the potential to negatively affect and criminalize low-income mothers, either for receiving and possessing stolen goods or for engaging in desperate acts of shoplifting that in the past would have been treated as petty crimes.<sup>249</sup>

Some of the lobbying efforts behind these statutory reforms have associated infant formula with drug cartels and terrorism. When there have been interceptions of large hauls of powdered infant formula, law enforcement officers have speculated that the formula was probably headed to drug manufacturers to be used to cut cocaine or heroin.<sup>250</sup> That speculation seems rather specious given that other substances used to cut drugs, such as powdered milk or non-dairy creamer, could be obtained in large quantities much more easily and relatively inexpensively at big box stores. In addition, the high cost of powdered infant formula—about twenty-five dollars per canister—makes it an easy moneymaker without going to the bother of mixing it with drugs. Some cases indicate that the crooks are not low-income women, but rather store owners exploiting low-income women by selling them stolen infant formula at full price, well aware that their

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244. FINKLEA, *supra* note 238, at 21–22.

245. H.R. 3450, 119th Gen. Assemb., 1st Sess. (S.C. 2011).

246. S.C. CODE ANN. § 16-13-110 (2011).

247. H.R. 3450, 119th Gen. Assemb., 1st Sess. (S.C. 2011).

248. For example, in April 2012, the Governor of Wisconsin signed into law legislative changes that banned sales of baby food, infant formula, razor blades, drugs, and cosmetic at flea markets or on the Internet without proof of ownership of these items and lowered the dollar threshold at which point retail theft becomes a felony from \$2,500 to \$500. WIS. STAT. §§ 134.715, 943.50 (2011).

249. One study has found that shoplifting is common type of “occupation” in the underground labor market for women who are disconnected from the mainstream labor market and from public benefits, usually because of previous criminal offenses. *See generally* Gail A. Caputo & Anna King, *Shoplifting: Work, Agency, and Gender*, 6 FEMINIST CRIMINOLOGY 159, 173–74 (2011).

250. Sarah Burge, *Three Arrested in Infant Formula Theft*, RIVERSIDE PRESS-ENTERPRISE (Cal.), Jan. 1, 2013, at A3.

vouchers from the Women Infant Children (WIC) nutrition program will reimburse them at full retail price for the formula.<sup>251</sup>

Underground sales of infant formula are also being associated with terrorism rather than being offered as examples of desperate need or routine criminal activity.<sup>252</sup> In the post-9/11 period when it was particularly difficult for male immigrants from some parts of the world to find employment in the United States, there were several incidents where law enforcement officials caught immigrant men stealing and reselling cases of infant formula and speculated that in some cases the proceeds might be being used to support terrorist groups.<sup>253</sup> Lobbyists have repeatedly used news reports of those cases in state legislative hearings to rouse fears about infant formula theft by associating it with terrorism and to encourage the passage of increased criminal penalties for infant formula theft.<sup>254</sup>

The foreseeable effects of these statutory reforms increasing the penalties for theft of infant formula will, like the federal crack cocaine statutes, be disproportionately borne by low-income women of color. They may also affect immigrant men of color. In many states, courts may soon face the possibility that they will be imposing harsher sentences upon those who shoplift infant formula than those who shoplift alcohol.

It is unclear what the systemic effects of these policies would be. Proponents argue that increasing penalties will deter criminals and reduce the rate of retail theft. If these are, as it appears, crimes of need, then increased penalties will have no deterrent effect. What does appear likely is that more individuals will be serving long sentences for what would have been in better economic times treated as minor property crimes.

What is also clear is that the needs of low-income families do not trigger government response until retailers feel the effects. The government response,

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251. John Diedrich, *Stolen Formula a Hot Scheme*, MILWAUKEE J. SENTINEL (Wis.), Nov. 25, 2007, at B3; see also Chao Xiong, *Four St. Paul Mom-and-Pop Stores Busted*, STAR TRIB. (Minneapolis, Minn.), Sept. 14, 2012, at 3B (reporting instances of store owners buying stolen bottles of Tide laundry detergent for \$2 from boosters and selling it to store customers for \$9.99—\$2 less than full retail price).

252. FINKLEA, *supra* note 238, at 12 (warning that “law enforcement has traced the illicit proceeds from retail crime, specifically from the theft and resale of infant formula, to terrorist organizations and insurgent groups, including Hamas and Hezbollah,” and that “notable investigations of large organized retail crime rings uncovered evidence that the ORC ringleaders had transferred profits from their fencing operations to several countries known to support terrorists”).

253. Clayton, *supra* note 241; Jim Buynak, *Thefts of Baby Formula Spur Wide Investigation*, ORLANDO SENTINEL (Fla.), Mar. 21, 2005, at B1; Edward Hegstrom, *The World in Houston: A New Formula for Terrorism?*, HOUS. CHRON. (Tex.), Aug. 4, 2003, at A12 (“As if dirty bombs and box cutters weren’t enough to worry about, now some officials are warning of possible new terrorist tools: Similac and Enfamil.”).

254. FINKLEA, *supra* note 238, at 12–14.



however, is not to address the underlying needs, but instead to label the issues criminal problems and to call upon the logics of crime control to address them.

### III. THE FUNCTIONS OF THE CEREMONIAL DEGRADATION OF POOR WOMEN

The criminalization of the poor, the policing of the poor, and the spectacle of punishing the poor serve expressive functions. It is not clear, however, whether they are expressing disfavor of individual behaviors or disfavor of the poor as a group. Discussions and policymaking around welfare are so fraught with emotion and with issues of morality that the usual rules of reasonableness, rationality, and restraint do not apply. It is almost impossible to have an unemotional conversation about welfare or to discuss structural issues of poverty without the conversation making a right turn into a discussion of individual behavior and moral desert.

In addition, discussions of the poor have become so attenuated from material need, the persistence of poverty, and the wealth gap, that we do not even give thought to protecting the economically vulnerable. Public discussions of social and economic problems do not touch on issues of dignity, privacy, or voice among the poor in democratic politics. Instead, those with political sway label the poor deviant and inflict harm upon them—both adults and children. Law and policies deny low-income individuals their dignity, intrude on their privacy, exacerbate economic disparity, marginalize, criminalize, and reinforce the idea that low-income mothers are both deservingly poor and inherently criminal.

#### *A. Legitimizing Material Deprivation*

Sociologists tend to approach rule breaking and deviance from a different perspective than most legal academics. They do not assume that laws are neutral and objective; they consider the functions that laws may serve and the effects of law on populations.<sup>255</sup>

Almost fifty years ago, sociologist Lewis Coser wrote that material deprivation and poverty are not one and the same. Coser argued that poverty, like crime, is a socially constructed category.<sup>256</sup> He wrote that “the poor are men who have been so defined by society and have evoked particular reactions from it.

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255. Ruth Sidel, *The Enemy Within: The Demonization of Poor Women*, 27 J. SOC. & SOC. WELFARE 73, 76 (2000) (Sidel writes that welfare recipients “have been portrayed as the ultimate outsiders—marginalized as nonworkers in a society that claims belief in the work ethic, marginalized as single parents in a society that holds the two-parent, heterosexual family as the desired norm, marginalized as poor people in a society that worships success and material rewards, and marginalized as people of color when in reality millions of whites live in poverty.”).

256. Lewis A. Coser, *The Sociology of Poverty*, 13 SOC. PROBS. 140, 140 (1965) (writing that “poverty . . . [is] . . . a social category that emerges through societal definition,” and analogizing poverty to crime, which, he writes “can best be defined as consisting in acts having ‘the external characteristic that they evoke from society the particular reaction called punishment’”).

From this perspective, the poor have not always been with us.”<sup>257</sup> After looking at how those who lacked material resources in various societies and historical moments were treated, Coser concluded that “the poor emerge when society elects to recognize poverty as a special status and assigns specific persons to that category.”<sup>258</sup> Coser added that the “granting of relief, the very assignment of the person to the category of the poor, is forthcoming only at the price of a degradation of the person who is so assigned.”<sup>259</sup>

Something that now seems to be occurring in the United States is the disassociation of the category termed “the poor” with those who are materially deprived and the conflation of two social categories—poverty and crime—that before, even if involving overlapping populations, were treated as distinct categories. People and practices that once might have been associated with material need are now associated with crime.<sup>260</sup> Many scholars have written that both welfare policies and the criminal justice system are used to maintain social order in a society with stark inequalities.<sup>261</sup> U.S. policymakers recognize crime as a social problem but refuse to recognize poverty as a social problem. So it is criminals whose actions arouse political and media attention.

We produce criminality on the practical level through economic policies that create or maintain material need, and on the political level through the construction of criminal behaviors by passing and enforcing pieces of legislation that define individual acts of economic desperation as criminally liable acts. When poor people, not poverty, come to be framed as social problems; when economic desperation comes to be framed as an issue of crime (which is emotionally

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257. *Id.* at 141.

258. *Id.* at 141.

259. *Id.* at 144.

260. The federal welfare reforms of 1996 “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.” Gustafson, *supra* note 5, at 665.

261. See generally Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 35, 46 (David Garland ed., 2001) (concluding that “penal and welfare institutions have come to form a single policy regime aimed at the governance of social marginality”); PIVEN & CLOWARD, *supra* note 22, at 4–8 (arguing that during the twentieth century the abstract market was not sufficient authority to maintain participation among low-wage workers or maintain social order; relief programs for the poor promoted political legitimacy and maintained order in capitalist economies); JOE SOSS ET AL., DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE 294–301 (2011) (arguing that, in addition to the welfare and penal justice systems, other state policies—such as tax and education policies—function to discipline the poor and legitimize social, economic, and racial marginalization); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 41–75 (2009) (arguing that the withdrawal of the welfare state and the growth of neoliberal free market ideologies in the late twentieth century necessitated the growth of punitive penal practices to maintain social order, to render the poor invisible, and to warn away those who might be tempted to disengage from the market).

evocative) rather than an issue of structural economic inequality; and when the solutions to these problems are developed through the logics of crime control rather than through economic redistribution, then material need disappears as a salient social fact. Economic deprivation becomes an individual failing rather than a systemic social problem.<sup>262</sup>

### B. *Punishing Poachers and Property Desperados*

Material inequalities in the United States, not to mention current class and racial hierarchies, cannot be maintained unless economically marginalized poachers of state goods and services are punished and shamed publicly and harshly. Punishing those who engage in property crime upholds and legitimizes the existing system of private property. The cases underlying the degradation ceremonies described in Part III of this Article are akin to cases of poaching in eighteenth-century England. The extensive historical literature on poaching highlights the nexus between property law and criminal law as poaching involved theft and trespass.<sup>263</sup> The 1723 Black Act in England made it a capital offense to engage in poaching; killing deer, hunting hare, or fishing in a forest or royal park could result in severe penalties, including death.<sup>264</sup> The Black Act was instituted in response to groups of poachers who engaged in the activities in overtly political ways, getting goods that, while wild, were considered the property of the King and the landed gentry.<sup>265</sup> At the same time, it is likely that some of the poachers were simply obtaining food. Imposing severe sentences on poachers (and often granting mercy afterwards) demonstrated, often in very ceremonial ways, sovereign authority over the lower classes, who were resisting the inequalities in ownership and status.

Historian Douglas Hay wrote a fascinating history of English wild game laws—laws that limited hunting wild game to men with high incomes.<sup>266</sup> Penalties for violating the laws were stiff.<sup>267</sup> Rising food prices and meat shortages in the second half of the eighteenth century left members of most of the social classes hungry and led to widespread poaching and to the development of a black market

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262. DAVID GARLAND, *THE CULTURE OF CONTROL* 102 (2002) (“In the political reaction against the welfare state and late modernity, crime acted as a lens through which to view the poor—as undeserving, deviant, dangerous, different—and as a barrier to lingering sentiments of fellow feeling and compassion.”).

263. For a well-known collection of writings on the topic, see DOUGLAS HAY ET AL., *ALBION’S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (Allen Lane, ed., Penguin Books Ltd. 1975) [hereinafter *ALBION’S FATAL TREE*].

264. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* 270–71 (1975).

265. *Id.*

266. Douglas Hay, *Poaching and Game Laws on Cannock Chase*, in *ALBION’S FATAL TREE*, *supra* note 263, at 189, 189.

267. *Id.* at 189–91.

in meat.<sup>268</sup> Just as wild game was under the control of the landed gentry, so was the law.<sup>269</sup> Landowners could choose from a host of civil and criminal penalties to bring against poachers.<sup>270</sup> They often brought poachers before the law but they also frequently used their discretionary power to take mercy on the poachers.<sup>271</sup>

Many of the low-income mothers described above as welfare cheats, as education thieves, and as consumers of stolen baby formula hold an analogous position to English poachers of centuries past. They are involved in a game of cat and mouse with the law. Whether intended as expressive acts of political resistance or as desperate acts of need, the acts have political effects and play into class dynamics. Moreover, the class dynamics may be reinforcing law's power and class hierarchies rather than dismantling them.

Historian Douglas wrote of poaching in England:

Theft is given definition only within a set of social relations, and the connections between property, power and authority are close and crucial. The criminal law was critically important in maintaining bonds of obedience and deference, in legitimizing the status quo, in constantly recreating the structure of authority which arose from property and in turn protected its interests.<sup>272</sup>

As the examples of property crimes offered in Part III of this Article demonstrate, the regulation of property and the policing of boundaries through criminal law stand central to the maintenance of power and existing class, race, and gender hierarchies in the United States. There is resistance to the status quo. Both retail theft of necessities from chain stores and low-level welfare fraud look something like taking from the rich and giving to the poor. At the same time, the administration of law adjusts to the challenges to the status quo and shifts to reinforce the law's power over those at the lower tiers of society. Drug testing is a mechanism for keeping the poor in their place. And punishing acts of low-level welfare fraud, where there is no individual victim, amounts to punishing crimes against the sovereign taxpayer. Laws are neither static nor uncontested, yet it is rare for the shifting dynamics to favor the disempowered.

Education theft, more than the other activities discussed here, seems analogous to old-style poaching. While the transgressing of physical boundaries and the theft of public goods become the legal issues, it is really the unequal distribution of educational opportunities that poses the threat to social order. Educational opportunities often mark class hierarchies in the United States.

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268. *Id.* at 202.

269. *Id.* at 248 ("If sporting was one major prerogative of country gentlemen, the other was the administration of justice.").

270. *Id.* at 248–49.

271. *Id.* at 249.

272. Douglas Hay, *Property, Authority and the Criminal Law*, in *ALBION'S FATAL TREE*, *supra* note 263, at 17, 25.

School districts can, it is commonly believed, determine destinies, and members of affluent communities often want to see boundaries drawn that keep out low-income children who are perceived as dragging down standardized test scores in their schools. There is no reason to punish the poaching of publicly provided goods as criminal acts other than to engage in degradation ceremonies and to shame the encroaching parents in ways that send signals to both the rich and the poor that the legal system will honor existing hierarchies.

The deconstitutionalization of poverty has left the issue to Congress and to state legislatures, which means that the lives of the poor are left to political whim, with no check on the power of legislatures but public opinion.<sup>273</sup> Public opinion, however, is informed by legislators and the media. In addition to property dispossession—so closely correlated to rights dispossession—racial, ethnic, and socioeconomic segregation (in housing and in schooling) persists in the United States.<sup>274</sup> While neighborhood segregation is often discussed as the result of many private and individual housing choices,<sup>275</sup> many scholars have noted the ways that government is implicated in neighborhood segregation.<sup>276</sup>

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273. Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 109, 119 (2009) (noting that the U.S. Supreme Court has offered no protection of socioeconomic rights nor recognized socioeconomic rights as fundamental, and arguing that poverty should be given closer scrutiny under Equal Protection doctrine because it has become a “stigmatizing identity category”); Budd, *supra* note 100, at 753 (“[T]he enforced Constitution is not only blind to poverty but frequently antagonistic to it as well. Thus the poor live not merely beyond the Constitution but also beneath it, at once deconstitutionalized and subconstitutionalized in relation to the law.” (footnote omitted)); Martha T. McCluskey, *Constitutional Class Inequality: Due Process in State Farm*, 56 BUFF. L. REV. 1035, 1035 (2008) (“[T]he Constitution treats questions of economic inequality as matters of policy largely immune from scrutiny by the judicial branch.”); Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, and Dialogic Default*, 35 FORDHAM URB. L.J. 629, 631 (2008) (“Not only may poor people not expect equal constitutional protection from the judiciary, they also lack the types of resources typically required for effective political mobilization to pursue protection from the political branches of government.”).

274. JOHN ICELAND ET AL., U.S. CENSUS BUREAU, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980–2000, at 4 (2002) (analyzing census data collected between 1980 and 2000 and finding that, while residential segregation had declined for African Americans, it was still higher than for all other groups; that segregation was also high among Latinos; and that segregation was rising among Asians and Pacific Islanders).

275. Gary Orfield, *Housing and the Justification of School Segregation*, 143 U. PA. L. REV. 1397, 1400–01 (Federal courts “explained that the increasing segregation in many districts was not a public responsibility, but a natural process reflecting private preferences. If spreading segregation is natural and private, it is beyond the reach of the courts and futile for them to try to change—and is therefore an important justification for judicial inaction while schools are resegregated.”).

276. I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 43–47 (2009) (noting that neighborhood segregation is problematically taken as a given, and outlining how police practices contribute to the maintenance of special boundaries); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844 (1994) (“Even as racial segregation is described as a natural expression of racial and cultural solidarity, a chosen and desirable condition for which government is not responsible and that government should not oppose, segregation continues to play the same role it always has in American race relations: to isolate,

Eduardo Moisés Peñalver and Sonia Katyal have argued that some property crimes, particularly *expressive property crimes*, may positively transform law and society.<sup>277</sup> They distinguish between *acquisitive crimes* and *expressive property crimes*, noting that the previous involves self-interest while the latter aims to achieve broader social goals.<sup>278</sup> I think that there may be another category of property violators: *property desperados*. The term expresses the desperation and recklessness at root in their actions.<sup>279</sup> The women described earlier who engaged in welfare fraud, education theft, and theft of essentials are committing acquisitive property crimes, but the benefits flow to the children while the actions put the mothers at high risk of punitive state action. The mothers' actions are self-interested, but not purely self-interested. Their crimes are generally not intended as expressive, and yet they communicate the realities of inequality in the United States. The low-income women I have described are not necessarily working for systemic change. Their property crimes do not necessarily create new frontiers in property law. Instead, their actions intensify negative public reactions to the poor and ratchet up the stinginess of social welfare programs and the punitive quality of criminal penalties targeting the poor. The states' responses simply serve to make things more desperate for low-income families, creating more desperados.

Imposing criminal penalties upon property desperados expresses the importance Americans place on the institution of private property and the perceived threat to the social order posed by property crimes.<sup>280</sup> There are scholars who have argued that shaming might be a more effective, more just, and less costly punishment than incarceration for nonviolent offenders.<sup>281</sup> What

disempower, and oppress."); Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1542–43 (2012) ("White communities and their local government officials have maintained racial space through a variety of race-neutral means, including opposition to public and affordable housing developments in their communities, imposition of restrictive attendance zones for school enrollment, and redlining. Increasingly, racial boundaries are maintained through deployment of law enforcement to police racialized boundaries and bodies and through the language of welfare, crime, and punishment." (internal citations omitted)).

277. EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 11 (2010) (describing property's "ability to change and to fluctuate according to shifting norms, values, and social realities").

278. *Id.* at 16–17.

279. "Desperado" is defined as "1. A person in despair, or in a desperate condition; 2. A desperate or reckless man; one ready for any deed of lawlessness or violence." OXFORD ENG. DICTIONARY ONLINE, <http://www.oed.com> (last visited May 13, 2013).

280. David Garland, *Punishment and Culture: The Symbolic Dimension of Criminal Justice*, 11 STUD. L. POL. & SOC'Y 191, 195 ("[P]enalty communicates meaning not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, social relations and a host of other tangential matters."); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 351–54 (1996) (discussing the expressive functions of criminal law).

281. See, e.g., Kahan, *What Do Alternative Sanctions Mean?*, *supra* note 79, at 631–37 (1996) (examining the functions of shaming in expressing community disapproval for behavior and arguing that this function makes it both effective and just).

shaming advocates do not seem to take into account is how the shaming of an individual can produce social and political ripple effects, shaming individuals' non-offending family members and casting a shadow of shame that extends to large segments of the economically vulnerable.

Describing these low-income parents as desperate is important because desperation merits not disgust or punishment, but empathy. U.S. law and policy create property desperados—first, through an economic system that takes some level of poverty as a given; second, by recognizing only negative rights and refusing to recognize positive rights to subsistence; third, by criminalizing the actions of property desperados rather than using them to inform and reform law and policy that benefits the poor and not just the rich. The current policy choices being made—specifically, decisions to invest in criminalization—signal that we as a society are more committed to the profits of businesses than we are to the basic health, well-being, and dignity of the rising number of low-income citizens.

Admittedly, not all welfare cheats are desperados. Unfortunately, criminal penalties are often established with reference to the most outrageous instances of law breaking. In recent months, I have repeatedly read articles about a Seattle couple found living in a \$1.2 million home while receiving housing benefits, cash assistance, and SNAP benefits.<sup>282</sup> Online comments related to the case point to the couple as exemplifying why we need more frequent and more intrusive fraud investigations and why we need harsher penalties for welfare cheats. That outlandish cases set the stage for everyday behavior is probably not a failing only in criminal law. Still, the effects here are particularly unsettling and fall hard upon low-income women and children.

### *C. Fueling the Myth of the Welfare Queen*

The criminalization of marginalized women shapes our knowledge of law and society. We come to our understandings of the state and the regulation of social problems through these degradation ceremonies. There is, however, a problematic feedback loop. We gain understandings of social issues, marginalized populations, and effective government through the media coverage of criminal cases and pending legislation. Many have come to hold a popular understanding of crime as a social problem, have come to associate it with young men of color, and have come to understand effective policing as involving stops and frisks.<sup>283</sup> Stops and frisks of young men of color reinforce understandings of their criminality,

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282. Gene Johnson, *Welfare Couple Worth Big Bucks: Federal Officials Say Pair Took Costly Trips Abroad While on Dole*, HOUS. CHRON. (Tex.), Dec. 7, 2011, at A6.

283. See Jason L. Riley, *A Safer New York*, WALL ST. J. (Jan. 8, 2013, 2:33 PM), <http://online.wsj.com/article/SB10001424127887323936804578229743259828024.html> (arguing that blacks and Hispanics should be thankful for New York City's aggressive stop and frisk policy and claiming that the practice has a "track record of saving lives and making ghettos safer for the mostly law-abiding people who live in them").

lead to their overrepresentation in the criminal justice system, and reinforce beliefs that they are threatening and inferior and must be heavily policed.<sup>284</sup> Similarly, we have developed shared popular understandings of women, poverty, and criminality through these degradation ceremonies. We come to understand welfare use and welfare fraud—rather than poverty, need, and inequality—as social problems.

Both the criminal justice system and the media now play important roles in the criminalization of poverty and in constructing the economic apparatus.<sup>285</sup> Specifically, they warn everyone away from failing to play their roles as workers and consumers; they discipline low-income individuals who fail to follow the norms of economic behavior and the rules of the welfare system; they impose multiple forms of punishment upon individuals who do violate the rules; they imprint upon welfare rule-breaking a moral disgust that is usually reserved for criminal violations that are seen as a threat to society; and they reflect and reinscribe public understandings of low-income parents and policies aimed at the poor. In sum, they perpetuate the myth of the welfare queen.

Political scientist Murray Edelman wrote extensively about the functions of symbols, myths, and rituals in politics and society. Edelman wrote that the public “wants symbols and not news.”<sup>286</sup> Invoking Bronislaw Malinowski’s definition of myths, Edelman explained that myths function to justify social inequalities and dampen the potential for rebellion.<sup>287</sup> He wrote that, “[w]ithout [myths] the inequalities in wealth, in incomes, and in influence over governmental allocations of resources can be expected to bring restiveness.”<sup>288</sup>

A number of myths inform the American socioeconomic system. Some examples include the myth that one’s economic status reflects one’s moral deservingness and hard work; the myth of the welfare queen; the myth of equal opportunity; and the myth that law is neutral, universal, and fair. Numerous scholars have traced the influence of myths about race and gender, and specifically disgust toward welfare recipients, on welfare policy rhetoric.<sup>289</sup>

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284. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 130–34 (2012).

285. Joya Misra et al., *Envisioning Dependency: Changing Media Depictions of Welfare in the 20th Century*, 50 *SOC. PROBS.* 482, 496 (2003) (conducting content analysis of periodic literature and finding that from the 1960 to the 1990s welfare recipients “are represented as black, unmarried mothers out to cheat the state”).

286. MURRAY EDELMAN, *SYMBOLIC USES OF POLITICS* 18 (1964).

287. *Id.* at 18 (citing BRONISLAW MALINOWSKI, *MAGIC, SCIENCE, AND RELIGION AND OTHER ESSAYS* 93 (1948)).

288. *Id.* at 18.

289. See, e.g., MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* 71 (1999) (examining data on Americans’ attitudes on race and their views on welfare spending, and concluding that “perceptions of blacks continue to play the dominant role in shaping the public’s attitudes toward welfare”); HANCOCK, *supra* note 3, at 147 (writing that the politics of disgust toward low-income women of color “curtail[s] the democratic potential of legislative policy making by infusing the process with misperceptions, misrepresentations, and emotional miscues that reinforce the marginalization of welfare recipients”); ELLEN REESE,



Ceremonial degradation and deniable degradation in policies affecting the poor have centripetal and centrifugal effects on society. Observing and participating in the shaming rituals draws us together as a society, helping us define our core values. At the same time, the public rituals of shaming the poor also have centrifugal effects, pushing those who fail to satisfy the moral ideals—of work, motherhood, economic self-sufficiency, and rule compliance—even farther to the margins.

But the symbolic effects are only part of the story. The political and material effects on low-income individuals and their children are tangible. Disgust toward the poor places them as the objects of scorn and their bodies and homes as the targets of state intrusion. Disgust toward the poor erodes empathy and levels of cash assistance. Disgust toward the poor silences those who are poor and those who will stand beside the poor. Disgust for the poor, including poor children, makes us forget our shared humanity and our interdependent fates.

#### *D. Satisfying the Sadoomasochistic Desire for Degradation Rituals*

The tightly intertwined welfare and criminal justice systems do not relieve inequality; they reinforce inequality. The close relationship between the two state systems perpetuates racial and ethnic divides, gender divides, and the divide between immigrants and non-immigrants. And the interrelationship masks the perpetuation of poverty by couching inequality in the language of morality, choice, and personal responsibility.

Americans associate welfare programs with African Americans, despite the access and use of welfare programs by Americans of all races and ethnicities.<sup>290</sup> As exemplified by the cases discussed in Part III, *supra*, there is a growing trend of portraying low-income women of color as scheming and thieving.<sup>291</sup> Criminal law is sometimes said to express collective beliefs about morality. It is not clear, however, whether the opprobrium aimed at low-income women who violate welfare rules and the criminalizing policies applied to all welfare recipients are an expression that their behaviors reflect morally unsound choices or, rather, are an expression of the raw emotion of disgust against women who are seen as inherently immoral—as lazy, greedy, libidinous, and overly fertile. It is not clear whether actions or status are being punished.

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BACKLASH AGAINST WELFARE MOTHERS 27–29 (2005) (discussing how myths and stereotypes about low-income women have fueled backlash political movements against programs for the poor).

290. Joshua J. Dyck & Laura S. Hussey, *The End of Welfare as We Know It? Durable Attitudes in a Changing Information Environment*, 72 PUB. OPINION Q. 589, 590, 603 (2008) (finding that opposition to spending on welfare and social programs is predicted by respondents' stereotypes about African Americans' work ethic).

291. The ire also seems to extend to immigrants. Media coverage of welfare fraud involving lawful immigrants tends to mention their immigrant status. See, e.g., Ian Ith, *Eight Arrested in 'Blatant' Fraud, Couples Are Target of Federal Task Force*, SEATTLE TIMES (Wash.), (Feb. 23, 2001, 12:00 AM), <http://community.seattletimes.nwsourc.com/archive/?date=20010223&slug=fraud23m>.

It is also not clear that the type of disgust generally aroused by criminality is particularly fitting for the crimes women commonly commit. The crimes with which women are charged and convicted tend to be different from the crimes with which men are charged.<sup>292</sup> While men are overrepresented in all felony arrests, women are catching up to men in several types of crimes—fraud, forgery, and larceny—all of them property offenses.<sup>293</sup> The crimes with which women are most often charged—shoplifting, writing bad checks, welfare fraud, and prostitution<sup>294</sup>—could be seen as crimes of economic desperation. Those mothers charged with welfare fraud or possessing stolen infant formula may indeed know that what they are doing violates welfare rules or violates criminal statutes; but they may also be making informed choices and weighing risks, deciding that meeting the immediate material needs of their children outweighs the broader dictates of conforming with the law.

A growing literature indicates that many low-income mothers who engage in activity labeled criminal, such as welfare fraud, are engaged in acts of need.<sup>295</sup> In my research with welfare recipients I found that many of them engaged in activities that would be deemed cheating.<sup>296</sup> They engaged in petty, under-the-table work activities (for example, babysitting, braiding hair, or selling cupcakes) for cash or received economic support from partners that they did not report in the welfare documents.<sup>297</sup> A few also admitted engaging in illicit activity, including prostitution and identity theft.<sup>298</sup> While the people I interviewed often broke the rules, they did so in different ways, with different levels of intent or knowledge, and with different levels of impact on government resources and on other people.<sup>299</sup> Almost all of them were breaking the welfare rules in some way.<sup>300</sup> All of them were having difficulty satisfying the basic needs of food, shelter, and clothing for themselves and their children.<sup>301</sup> Most of the rule breaking was done simply to make ends meet in desperate circumstances.<sup>302</sup>

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292. Women make up only a quarter of criminal arrests and one-fifth of arrests for violent crimes. MEDA CHESNEY-LIND & LISA PASKO, *THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME* 102 (2012). Women, however, make up almost seventy percent of the arrests for prostitution. *Id.*

293. THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, *FELONY DEFENDANTS IN LARGE URBAN COUNTIES*, 2006, at 20 (2010).

294. CHESNEY-LIND & PASKO, *supra* note 292, at 102.

295. JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* (2001); GUSTAFSON, *supra* note 1; Kathryn Edin and Christopher Jencks, *Welfare*, in *RETHINKING SOCIAL POLICY* (Christopher Jencks ed., 1993); EDIN & LEIN, *supra* note 42; Kathleen J. Ferraro & Angela M. Moe, *Mothering, Crime, and Incarceration*, 32 J. CONTEMP. ETHNOGRAPHY 9, 19 (2003).

296. GUSTAFSON, *supra* note 1, 93–154.

297. *Id.* at 101–07, 141–42.

298. *Id.* at 109–10, 121–22, 152.

299. *See id.* at 118–47.

300. *Id.* at 118.

301. *Id.* at 93–97.

302. *See id.* at 93–110.

Policies shaping the lives of low-income mothers of all backgrounds seem to be shaped by disgust toward low-income women of color.<sup>303</sup> Disgust is an unrefined emotion, a revulsion expressed toward something or someone polluted or sickening.<sup>304</sup> In his book on disgust, William Ian Miller writes that disgust “is an assertion of a claim to superiority that at the same time recognizes the vulnerability of that superiority to the defiling powers of the low.”<sup>305</sup> Disgust as an emotion promotes solidarity. Emile Durkheim wrote that criminal punishment expresses passionate emotional responses to behaviors a society considers morally outrageous.<sup>306</sup> He added that “it is shame that doubles most punishments,” and that shame often spreads to the innocent, including the family members of the guilty.<sup>307</sup>

The justifications proffered by politicians for criminalizing and punishing the poor, namely fiscal integrity and the maintenance of social order, are increasingly thin. The unspoken justifications for criminalization, maintaining the supremacy of current relations of private property and maintaining existing class and racial hierarchies, appear more credible. As many scholars have noted, there are state interests served in penalizing the poor: controlling a marginalized labor force,<sup>308</sup> controlling populations of people who serve as neither producers nor consumers in a capitalist society,<sup>309</sup> controlling sexual reproduction,<sup>310</sup> and controlling populations whose only productive value comes through their role in perpetuating the prison-industrial complex.<sup>311</sup>

303. See generally HANCOCK, *supra* note 3.

304. Kahan & Nussbaum, *supra* note 280, at 285 (“Disgust usually sees the object as one that threatens or contaminates, one that needs to be kept at a distance from the self.”).

305. WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* 9 (1997).

306. DURKHEIM, *supra* note 10, at 44–47.

307. *Id.* at 44, 47.

308. PIVEN & CLOWARD, *supra* note 22, at 407–08 (“[T]he dual imperatives of maintaining civil order and regulating labor which shaped the first poor relief systems in the sixteenth century still go far toward explaining the expansion and contraction of relief in the United States.”); see also Loïc Wacquant, *The Penalisation of Poverty and the Rise of Neo-Liberalism*, 9 EUR. J. ON CRIM. POL’Y & RES. 401, 401–02 (2001) (describing the penalization of poverty as practices designed to regulate those “at the lower end of the social structure” in advanced societies, and involving both “the left hand” of the state (such as education and welfare policies) and “the right hand” of the state (including police, courts, and prisons)) (quoting PIERRE BOURDIEU, *ACTS OF RESISTANCE: AGAINST THE TYRANNY OF THE MARKET* 1–2 (Richard Nice trans., 1998)).

309. Zygmunt Bauman, *Collateral Casualties of Consumerism*, 7 J. CONSUMER CULTURE 25, 31–32 (2007).

310. ANNA MARIE SMITH, *WELFARE REFORM AND THE SEXUAL REGULATION OF WOMEN* 8 (2007) (arguing that state policies are “designed to advance the broader goal of patriarchal and racial population management among the poor”).

311. ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* 40–41 (2005) (“[I]mprisonment is the punitive solution to a whole range of social problems that are not being addressed by those social institutions that might help people lead better, more satisfying lives. This is the logic of what has been called the imprisonment binge: Instead of building housing, throw the homeless in prison. Instead of developing the education system, throw the illiterate in prison. Throw people in prison who lose jobs as the result of de-industrialization,

But those state interests have been served by fetishizing the poor, and the degradation ceremonies have become alluring in ways that even state interests cannot explain. The degree of penalization and degradation express something else: the simple desire to dominate and express disgust for human beings who are considered inferior. Nowhere is this truer than with the costly and degrading practice of urine testing welfare recipients.

Punishing low-income mothers of color has become a sadomasochistic ceremony. To say that criminal law serves expressive functions is nothing new. To say that charging low-income women of color with property crimes as an expression of sadomasochism may be new, and yet seems obvious and unexaggerated against the backdrop of current practices. In *Sadomasochism and the Colorline*, Anthony Farley writes that “White America desires black criminality.”<sup>312</sup> He notes that the spectacle of inferiority is produced through neosegregation,<sup>313</sup> and adds that Whites

glory in . . . [Blacks’] chains and use their pseudofear of criminality to mask their titillation before the spectacle. The body of the black criminal is produced, in fantasy, in enticing crime drama after drama. In living rooms everywhere we see the counterrevolution televised. Whites luxuriate in the spectacle paradise of television as they gaze upon their Others.<sup>314</sup>

I would argue that the spectacle involves not only racial subordination but also class and gender subordination. And at the moment, low-income women of color are central to the sadomasochistic pleasure we as a country take in producing and punishing the inferior “Other.” The effects of stark inequality are being politically reframed as issues of criminality. Through reforms of criminal statutes, issues of need are turned into crimes of greed. We take collective pleasure in punishing and humiliating the offenders we have ourselves produced.

What makes the pleasure sadomasochistic rather than simply sadistic is that the majority of Americans are so prone to economic instability and so financially insecure that the risk of future poverty stands as a possibility for most—even to those who are taking pleasure in the spectacle. My interviews with welfare recipients, those who are already the objects of the sadistic gaze, found that even

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globalization of capital, and the dismantling of the welfare state . . . . Remove these dispensable populations from society. According to this logic the prison becomes a way of disappearing people in the false hope of disappearing the underlying social problems they represent.”); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 91 (2003) (“The massive prison-building project that began in the 1980s created the means of concentrating and managing what the capitalist system had implicitly declared to be human surplus.”); Wacquant, *supra* note 308, at 402–08 (arguing that prisons are now used to “warehouse” black Americans, whose labor was exploited during periods of slavery, Jim Crow segregation, and ghettoization, but is now difficult to obtain).

312. Anthony Paul Farley, *Sadomasochism and the Colorline: Reflections on the Million Man March*, in BLACK MEN ON RACE, GENDER, AND SEXUALITY 68, 70 (Devon W. Carbado ed., 1999).

313. *Id.* at 68.

314. *Id.* at 70.

they were prone to turning that disgustful gaze upon their similarly situated sisters living below the poverty line.<sup>315</sup>

There are even those who deny that poverty is a burden to families. Robert Rector at the Heritage Foundation, for example, publishes a report each year that is released near the publication date of the U.S. Census Bureau's ever-grim statistics on poverty in the United States, ostensibly to delegitimize the notion that poverty is a problem. The argument in the 2011 report was that because most poor people had televisions and microwaves—and eighty-three percent were *not* hungry—they were not really poor.<sup>316</sup> It is as if the members of the Heritage Foundation are dissatisfied with current deprivation and waiting for the real pain to begin. The report denies that poverty is real. As Anthony Farley notes, “Denial of someone else’s pain is a form of torture in itself.”<sup>317</sup>

Heaping excessive punishment upon or publicly humiliating those convicted of welfare fraud and mandating drug testing of welfare recipients are current examples of deniable degradation. Judges, administrators, and policymakers claim that they are engaging in these acts to deter criminal behavior. At the same time, however much they deny such intent, they are tuning in to deeply resonant cultural symbols of the poor—particularly low-income mothers—as deprived and giving those symbols greater cultural power. In addition, they are deploying those symbols in such a way to further marginalize the poor and fuel greater disgust for low-income women.

Several years ago when I was interviewing welfare recipients about their experiences on aid, one of the women stated it bluntly: “The system makes you cheat.”<sup>318</sup> Jeffrey Fagan and Garth Davies have posited a theory of *stigma saturation*, which holds that when punishment becomes too widespread or too routine, it loses its shaming value and its legitimacy.<sup>319</sup> If the current trend of charging low-income parents with property crimes continues over the next few years, the United States may serve as a laboratory where social scientists get the opportunity

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315. GUSTAFSON, *supra* note 1, at 170–71; *see also* Chad Broughton, *Reforming Poor Women: The Cultural Politics and Practices of Welfare Reform*, 26 QUALITATIVE SOC. 35, 47 (2003) (finding that women in a work training program for welfare recipients were acutely aware of the stigma they faced but “attribute[d] pejorative welfare stereotypes to other recipients, while explaining their own circumstances in contrast to those stereotypes and with reference to the structural determinants of disadvantage”); Kerry Woodward, *The Multiple Meanings of Work for Welfare-Reliant Women*, 31 QUALITATIVE SOC. 149, 164 (2008) (finding that welfare recipients commonly describe themselves as deserving while opposing welfare recipients whom they view as morally bad or otherwise undeserving).

316. Robert Rector & Rachel Sheffield, *Understanding Poverty in the United States: Surprising Facts About America’s Poor*, 2607 HERITAGE FOUND. BACKGROUNDER, Sept. 13, 2011, at 1, available at [http://thf\\_media.s3.amazonaws.com/2011/pdf/bg2607.pdf](http://thf_media.s3.amazonaws.com/2011/pdf/bg2607.pdf).

317. Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457, 470 (1997).

318. GUSTAFSON, *supra* note 1, at 169.

319. Jeffrey Fagan & Garth Davies, *Policing Guns: Order Maintenance and Crime Control in New York*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA 191, 209 (Bernard E. Harcourt ed., 2003).

to examine the interactive effects of stigma saturation and the sadomasochistic pleasures of pillorying the poor.

#### IV. SUBVERTING DEGRADATION CEREMONIES AND AFFIRMING DIGNITY

Precedent limits my optimism for dramatic change in the near future. Still, to the degree that the fate of low-income families is often left to political will, I have some hope that it will slowly change over time. Below are thoughts on possibilities.

##### *A. Acknowledging Vulnerability as Universal and Poverty as Structural*

Many discussions of economic need in the United States begin with the statement that anyone who works a full-time job should be able to meet his or her basic needs—food, shelter, and clothing. In a country of vast wealth, it does not seem entirely radical to suggest that everyone—working or non-working, adult or child, law-abiding or law-breaking—ought to be able to meet their basic needs. In the United States, however, that idea is radical—at least within the law. Legal scholar Martha Fineman has mapped various ways that American legal doctrine has justified inequality.<sup>320</sup> She has argued that legal notions of inequality have become so divorced from justice that those concerned about justice should reframe discussions around vulnerability rather than equality.<sup>321</sup> Fineman describes vulnerability as a “characteristic that positions us in relation to each other as human beings and also suggests a relationship of responsibility between state and individual.”<sup>322</sup> Fineman’s theory of vulnerability avoids the narrow (abstract, degendered, deracialized) construct of the liberal subject within American law and appeals to human rights values. More importantly, Fineman stresses the universality of vulnerability, noting that every human being experiences vulnerability and dependence upon others during her lifetime.<sup>323</sup>

We are now in the midst of an economic downturn in the United States, and more people are receiving nutrition assistance benefits than ever before.<sup>324</sup> The time seems particularly ripe for introducing the concept of vulnerability,

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320. Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 251 (2010). Fineman writes, “Increasingly, government is unresponsive to those who are disadvantaged, blaming individuals for their situation and ignoring the inequities woven into the systems in which we all are mired.” *Id.* at 257.

321. *See generally id.*

322. *Id.* at 255.

323. Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13, 17–22 (2000) (discussing different types of vulnerability such as inevitable dependency—experienced by individuals as children, near death, or in periods of illness—and derivative dependency—which befalls those who care for inevitable dependents and is disproportionately experienced by women).

324. Jason DeParle & Robert Gebeloff, *Once Stigmatized, Food Stamps Find New Acceptance*, N.Y. TIMES, Feb. 10, 2010, at A22 (stating that there is record high enrollment in federal nutrition assistance programs, with one in eight Americans receiving aid).

particularly economic vulnerability, to those who may perceive their vulnerability for the first time. The simple rhetorical transition from using the terms “the poor” to “the vulnerable” may help shift and soften some of the disgust now aimed at the poor. More importantly, engaging with human rights values provides more room for discussion and debate and may prompt individuals to think about the globalization of economic connectedness.

Finally, addressing economic vulnerability requires a material commitment to making sure that grim failures of structural economic risk are not borne disproportionately by the most vulnerable members of society, namely low-income women of color and their children. The existence of deep poverty in the United States is not a sign of widespread behavioral failures by individuals; it is an expression of political will. Deep poverty can be willed away by divesting government monies from policies that criminalize the poor and investing monies in basic subsistence.

### *B. Affirming Rights to Dignity and Privacy*

For those who place faith in the American legal system, there may still be room to defend the well-being and dignity of low-income families through that system. Diminution of the rights of the poor, if they are to be addressed, need to be addressed at several levels: in the courts, in the legislatures, in bureaucratic offices, and in the popular media.

The Supreme Court has not directly addressed the Fourth Amendment rights of welfare recipients in the context of current policy proposals and state practices. It is possible that a drug testing case will reach the Supreme Court in the near future. Drug testing welfare recipients without individualized suspicion cannot be reconciled with Supreme Court precedent<sup>325</sup>—at least not if the justices are willing to recognize that fundamental privacy rights are universal among adults and not contingent upon income. The Supreme Court has recognized that constitutional rights express widely shared principles in the United States, including “the dignity and integrity” of its citizens.<sup>326</sup> Should a case addressing the Fourth Amendment rights of welfare recipients reach the Supreme Court, it offers the justices an opportunity to reaffirm the fundamental right to be free from government intrusion; to affirm that poverty, while not recognized as a suspect classification, will also not be recognized as an equivalent to individualized

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325. See *Chandler v. Miller*, 520 U.S. 305, 309 (1997).

326. *Schmerber v. California*, 384 U.S. 757, 762 (1966) (citing *Miranda v. Arizona*, 384 U.S. 436, 464 (1966)). There are, however, signs that the Supreme Court is giving the principle of individual dignity diminishing value. In a recent 5 to 4 decision, the Supreme Court upheld blanket strip-searching of individuals entering jail, including searches of individuals who have not even been arraigned. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1511–13 (2012). Justice Breyer, writing in dissent, argued that statistics showing low rates of contraband discovery render suspicionless strip searches unjustifiable invasions of privacy. *Id.* at 1528–31 (Breyer, J., dissenting).

suspicion under the Fourth Amendment; and to signal that disgust-based animus will not be tolerated as a justification for diminishing the privacy rights of unpopular populations.<sup>327</sup>

Changes need to happen in the lower courts and among prosecutors as well. Prosecutors and sentencing judges are able to exercise broad discretion. The disgust and anger they direct at low-income women who engage in property crime produces arbitrary outcomes. The criminal penalties imposed upon these women may be disproportionate to the penalties imposed on other lawbreakers, and excessive when weighed against the economic harms of the crimes. Judges, in particular, ought to be attentive to these issues when these cases arise in criminal cases.

In addition, legislators need to be careful not to gamble away the rights of citizens for political gain—and lawyers, scholars, and advocacy groups should hold them accountable when they do. Many candidates for office are aware that they can start the flow of contributions and votes by tapping into widely held negative stereotypes of low-income women of color. And interest groups, including retailers and law enforcement officers, have more money and therefore political influence than the poor. Legislators need to be cautious in weighing the influence of those interest groups against the general welfare and against the well-being of low-income Americans. Even if legislators have no empathy for the poor, they should be cognizant of the increased government costs and social costs associated with criminalizing the poor.

Finally, citizens consuming political rhetoric and making decisions about their role in the state ought to be made conscious of their complicity in producing the criminalized poor and their habits of deriving pleasure from punishing the poor. The spectrum of citizen participation in degradation ceremonies ranges from degrading comments about the poor to making anonymous calls to fraud hotlines. We are all involved in staging the drama.

The rich and the poor alike are entitled to basic dignity, and until that dignity is provided to all, everyone in a society founded upon economic risk has the potential of becoming the object of a degradation ceremony.

### *C. Resisting the Creep of Criminalization*

For most of the cases discussed above—including welfare fraud, enrolling children in out-of-district schools, and drug use while receiving welfare—civil

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327. William Eskridge argues that *Lawrence v. Texas*, 539 U.S. 558 (2003), signaled some of the Supreme Court justices' rejection of disgust (or at least anti-homosexual disgust) as a valid basis for policymaking. Eskridge writes: "Such disgust-based regulatory schemes tend to sacrifice the liberties of the minority in pursuit of goals that are often not linked to the common good." William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1048 (2005). He adds that the disgust poses another danger: "A politics of disgust and contagion tends to demonize the minority as subhuman, not just mischievous." *Id.*



penalties were options. In addition, criminal penalties for shoplifting, more organized retail theft, and receiving or possessing stolen property existed in state statutes long before retailers began efforts to increase the criminal penalties for these crimes. There is no evidence that increasing criminal penalties will deter these people, particularly if they are motivated by desperation. In addition, the introduction of practices borrowed from the criminal justice system, such as drug testing, serves no proven deterrent function, inflicts harm on needy children, and imposes additional costs on government.

This Article is not an argument for doing away with property crimes. Nor is this Article an attempt to justify law breaking among low-income individuals. This Article is, however, a plea to lawmakers, voters, lawyers, judges, and members of the media to be attentive to deeper issues influencing what gets defined as criminal and to situate individual cases within the broader context of gross inequality.

We need to be attentive to the interests served by criminalization. We should ask ourselves several questions. First, does proposed legislation promote the general welfare? Second, do the policies promote cost-savings or merely cost-shifting to the criminal justice system? Third, are there particular groups—for example, retailers, prison guards, welfare fraud investigators—whose interests are served at the cost of the general welfare? Fourth, are there larger structural issues—such as material need, gender inequality, racial and ethnic inequality, and the outsourcing of low-skilled jobs—that are contributing to problematic activity, and are there ways to address those issues before or instead of increasing the number of people under the control of the criminal justice system?

Some of the responsibility for degradation ceremonies lies with legislators, who readily adopt the property-maintaining interests of their contributing constituents and interest groups without considering the social and economic costs of poverty and incarceration. Some of the responsibility for degradation ceremonies rests with attorneys, judges, and members of juries. Bringing criminal charges for property crimes against low-income mothers, particularly when civil penalties are available, exemplifies discretion gone wrong. Also, sacrificing low-income mothers to the criminal justice system to make examples and deter others strains principles of fairness. The education theft cases in particular highlight the dangers of unfettered prosecutorial discretion and the potential for selective enforcement of laws by race, gender, and socioeconomic class (though the last category triggers no legal protections).<sup>328</sup> Defense lawyers may be pleading out

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328. Law professor Angela J. Davis has noted:

At every step of the criminal process, there is evidence that African Americans are not treated as well as whites—both as victims of crime and as criminal defendants. And because prosecutors play such a dominant and commanding role in the criminal justice system through the exercise of broad, unchecked discretion, their role in the complexities of racial inequality in the criminal process is inextricable and profound.

Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 16–17 (1998) (citation omitted).

low-income mothers in welfare fraud and education theft cases too easily, fearful that their clients would be unsympathetic before a jury that shares widely held stereotypes of welfare queens. Those lawyers might find, however, that putting a face on poverty and documenting the actual struggles of poor women might not only serve the interests of their clients but also the interests of society.<sup>329</sup> (The jury in Kelley Williams-Bolar's trial for grand theft for enrolling her children in out-of-district schools could not reach agreement on the charge of grand theft.)<sup>330</sup> Judges are in particularly effective positions to recognize the lasting effects of felony convictions on mothers and their children, especially the detrimental effects of felony records on parents' engagement with the mainstream labor market.<sup>331</sup>

Paul Butler has famously called upon black jurors to nullify charges in drug cases.<sup>332</sup> Butler has certainly had his critics.<sup>333</sup> Still, Butler's recognition that there

329. Although a doctrinal defense of duress is available to criminal defendants in narrow circumstances, courts have refused to recognize economic need as a basis for the defense. *State v. Gann*, 244 N.W.2d 746, 752–53 (N.D. 1976) (rejecting a defendant's duress defense in restaurant robberies).

330. Minutes, *supra* note 171, at 3.

331. See generally PAGER, *supra* note 86.

332. Paul D. Butler, *Race-Based Jury Nullification: Case-in-Chief*, 30 J. MARSHALL L. REV. 911, 918 (1997) ("Nullification is a partial cure that I come to reluctantly and for moral reasons."); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 715 (1995) ("African-American jurors should approach their work cognizant of its political nature and their prerogative to exercise their power in the best interests of the black community."); Butler, *supra* note 3, at 149 ("[J]ury nullification sends the message that American democracy will not: Many blacks no longer will tolerate criminal solutions to problems of racism and poverty."); see also Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1159 (1997) (arguing that jury nullification, where jurors follow "their own political and moral beliefs" rather than the letter of the law, often serves the rule of law rather than subverting it); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 50–65 (2003) (arguing that juries serve as a check on government power and offering examples in American and British judicial history of doing just that).

333. Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109, 111–12 (1996) (describing Butler's jury nullification proposal as "foolish and dangerous" because it poses the threat of white backlash that will ultimately leave African Americans worse off). See generally Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 258, 278–82 (1996) (arguing that nullification's benefits are speculative at best and undermining at worst because of the potentials to produce inconsistent verdicts and to discourage guilty pleas); Long X. Do, Comment, *Jury Nullification and Race-Conscious Reasonable Doubt: Overlapping Reifications of Commonsense Justice and the Potential Voir Dire Mistake*, 47 UCLA L. REV. 1843, 1844–47 (2000) (noting that Butler's argument may have had the unintended consequence of making judges sensitive to the nullification-prone jurors, more likely to ask nullification related questions during voir dire, and more likely to exclude jurors legitimately employing race-conscious reasonable doubt); Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563, 2597 (1997) (arguing that the jury is not the proper site for citizens to change the law and that they should, instead, use the lessons they have learned through jury service to use the democratic process for transformation); Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191, 234–35 (1996) (acknowledging that jurors have the power to nullify but recommending that they not be informed at trial of that power for fear that doing so would undermine the rule of law).

are no effective political processes available to undo problems in the criminal justice system that create bias against black drug offenders stands just as true for low-income mothers of color facing charges for property offenses, often for crimes of need, when the criminal charges are intended as nothing more than degradation ceremonies.

*D. Demonstrating Moral Empathy and Moving from Individual to Public Shame*

Earlier in this Article, I referenced the concept of deniable degradation—the idea that even when individuals who are subject to these practices describe them as degrading, those who instituted the practices deny that degradation was the intent. It is time to acknowledge that a growing number of state practices to which low-income women of color are subject are experienced as degrading. It is also high time to acknowledge that those practices, even if not openly or consciously motivated by the desire to degrade, are nurtured by desires to express disgust toward those considered inferior “Others” and are widely consumed and enjoyed as spectacles of degradation.

Low-income women of color perceive the degradation. Political scientist Melissa Harris-Perry, interviewing African American women about self-identity, writes:

Though we seldom think of it this way, racism is the act of shaming others based on their identity. Blackness in America is marked by shame. Perhaps more than any other emotion, shame depends on the social context. On an individual level, we feel ashamed because of how we believe people see us or how they would see us if they knew about our hidden transgressions. Shame makes us view our very selves as malignant. But societies also define entire groups as malignant. Historically the United States has done that with African Americans. This collective racial shaming has a disproportionate impact on black women, and black women’s attempts to escape or manage shame are part of what motivates their politics.<sup>334</sup>

We should not need to be reminded to treat the poor and members of other historically disadvantaged groups as fellow human beings. The fates of the rich, the poor, and everyone in between, are intertwined and interdependent.

Many people in the United States have perceived their long-term economic well-being declining. In a country where wealth, employment status, and dignity are intertwined, the downward economic slide that many have experienced is painful. Examining the relationship that many members of the middle class have with the welfare state, criminologist David Garland writes that, “[w]ith welfare, as with crime, large sections of the middle and working classes see themselves as

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334. MELISSA V. HARRIS-PERRY, *SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN* 109 (2011).

victimized by the poor.”<sup>335</sup> In this culture of neoliberalism, the very people who have benefitted from the welfare state do not recognize the benefits they have received and cannot put themselves in the place of those who have not benefited as well from the welfare state. For example, when discussing Fourth Amendment rights of the poor, the students who attend my taxpayer-subsidized state law school classes and who receive taxpayer dollars in the form of student loans often say that (1) anyone who receives public benefits has no right to privacy, and (2) that they do not want people living on their tax dollar. They are invested in distancing themselves from the more desperate beneficiaries of the welfare state, despite being the recipients of public assistance themselves.

There is a collective pleasure in the degradation process. There is a pleasure in the solidarity it creates among those who are not subject to the degradation. There is also the pleasure taken in seeing others subject to the degradation. The benefits of degradation ceremonies are not economic, for marginalizing and punishing a significant portion of the population is costly.

Sociologist Zygmunt Bauman had made a call for moral empathy. He explains that the poor have been banished from the human community and from “the universe of moral empathy.”<sup>336</sup> Bauman writes:

This is done by rewriting their stories from the language of deprivation to that of depravity. The poor are portrayed as lax, sinful and devoid of moral standards. The media cheerfully cooperate with the police in presenting to the sensation-greedy public lurid pictures of the crime, drug- and sexual promiscuity-infested ‘criminal elements’ who seek shelter in the darkness of their forbidding haunts and mean streets. The poor supply the ‘usual suspects’ rounded up, to the accompaniment of public hue and cry, whenever a fault in the habitual order is detected and publicly disclosed.<sup>337</sup>

Developing moral empathy requires us to put ourselves in the place of mothers struggling to house and feed themselves, and often their children. Years ago, Robert Goodin suggested that policy makers err on the side of kindness,<sup>338</sup> which may mean allowing for some degree of fraud in an effort to make sure that the needy have their needs met.

As a nation, we have not engaged in debates about poverty, we have not examined why we have such high rates of poverty and whether we are politically committed to maintaining or transforming our practices of degrading the poor. Nor have we engaged in debates over the minimum level of dignity to which

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335. GARLAND, *supra* note 262, at 197.

336. Bauman, *supra* note 309, at 34.

337. *Id.*

338. Robert E. Goodin, *Erring on the Side of Kindness in Social Welfare Policy*, 18 POL’Y SCI. 141, 141–42 (1985).

everyone in the United States is entitled.<sup>339</sup> These debates, rather than debates over what new state-inflicted horror to impose upon low-income mothers, might prove productive.

Martha Nussbaum has thought deeply and written extensively about shame and disgust in recent years, which she found to be problematic bases for law and legal reasoning.<sup>340</sup> Nussbaum advocates organizing our social order around values of human dignity and mutual respect.<sup>341</sup> Subordination, she warns, “threatens core political values.”<sup>342</sup> Nussbaum concludes that the emotion of disgust should never inform law,<sup>343</sup> and that law must serve to protect citizens, particularly those who are vulnerable, from humiliation and stigma.<sup>344</sup>

In these degradation ceremonies, we are all—rich and poor—spectators. As spectators, we are all complicit. We do not, however, have to consume the images and meanings uncritically. We can disengage from the sadomasochism of poverty.

#### CONCLUSION: THE IMPORTANCE OF INTERPRETATION AND EMOTION IN EXPLAINING AND REFRAMING

This Article has attempted to interpret and lay bare the role of state institutions and the media in reinforcing women’s poverty and making the degrading treatment of low-income women of color a public spectacle. While the previous Part offered very modest reforms and made a more generalized call for moral empathy, the entire discussion suggests a need for contextualized empirical legal research and deeper interpretive analysis of the empirical work being produced.

There is also a need for scholarly care, particularly among those scholars

339. Martha Minow has considered these issues. *See generally* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1991).

340. *See generally* NUSSBAUM, *supra* note 79. Articulating the functions of *disgust*, Nussbaum writes that:

[P]roperties pertinent to the subject’s own fear of animality and mortality are projected onto a less powerful group, and that group then becomes a vehicle for the dominant group’s anxiety about itself. Because they and their bodies are found disgusting, members of the subordinated group typically experience various forms of discrimination.

*Id.* at 336. When it comes to the functions of *shame*, she writes that:

[A] more general anxiety about helplessness and lack of control inspires the pursuit of invulnerability . . . . An appearance of control is then frequently purchased by the creation of stigmatized subgroups who—whether because they become the focus for social anxieties about disorder and disruption, or because, quite simply, they are different and not “normal,” and the comforting fiction of the “normal” allows the dominant group to hide all the more effectively—come to exemplify threats of various types to the secure control of the dominant group.

*Id.* at 336–37.

341. *Id.* at 321.

342. *Id.*

343. *Id.* at 171 (“[W]hen [disgust] becomes a constructive criterion of legally regulable conduct, and especially when it conduces to the political subordination and marginalization of vulnerable groups and people, disgust is a dangerous social sentiment. We should be working to contain it, rather than building our legal world on the vision of human beings that it contains.”).

344. *Id.* at 282.

engaged in empirical research around low-income people of color. Maia Green and David Hulme have argued that academics need to take greater care in their thinking about poverty. They argue that scholars, to the detriment of social science, “have tended to highlight the precipitating causes of poverty at individual and household levels, while underplaying the social relations and categorizations which can contribute to long-term poverty.”<sup>345</sup> Sociologist Beth Richie, who has worked closely with low-income women who have become ensnarled in the criminal justice system, has complained that social scientists who study low-income women of color focus on (and therefore help construct) pathologies and typically conclude their studies with narrow policy recommendations, often limited to changes in law enforcement policies.<sup>346</sup> As Richie notes, they tend to avoid larger structural issues “such as poverty, racism, inequality, and gender oppression, which are typically outside the domain of study.”<sup>347</sup> She writes that focus must shift away from punishment “so that it is reoriented towards the re-distribution of power and resources to meet the goals of justice and equality.”<sup>348</sup>

Social scientists need to be expansive in their focus on social problems. They must cross-disciplinary boundaries to search for trends and methodologies. Scholars cannot limit themselves to doctrinal holdings or quantitative studies of opinions, attitudes, and perceptions. Moreover, as CRT scholars have stressed, studies cannot treat individual behavior as somehow dislocated from social structures or from emotionally evocative cultural symbols.<sup>349</sup> Moreover, studies cannot treat individual behavior as somehow dislocated from social structures or from cultural symbols; individual behavior, popular beliefs, social structures, and cultural symbols mutually reinforce each other. Thick description of American society and American legal culture needs not only qualitative research, but also media studies, opinion polls, psychological experiments, and other methods that can map the feedback loops involving emotion, stereotypes, and policy. There is a pressing need for broad, interpretive analysis to accompany empirical findings.<sup>350</sup> Law and policy are not purely rational. Emotion drives policy decision, court judgments, and the selection of criminal penalties. Social scientists need to find better approaches to taking emotion into account.

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345. Maia Greene & David Hulme, *From Correlates and Characteristics to Causes: Thinking About Poverty from a Chronic Poverty Perspective*, 33 *WORLD DEV.* 867, 868 (2005).

346. Beth E. Richie, *Women and Drug Use: The Case for a Justice Analysis*, 17 *WOMEN & CRIM. JUST.* 137, 139 (2006).

347. *Id.*

348. *Id.* at 139–40.

349. For example, Angela Harris has argued that we should view racism as a cultural phenomenon rather than as characteristics or actions of ignorant or bad people. Harris, *supra* note 4, at 770–71.

350. Feminist criminologist Amanda Burgess-Proctor urges not only mixed-method research design but also approaches that require scholars “to explore what it is like to ‘live as’ as victim or offender.” Amanda Burgess-Proctor, *Intersections of Race, Class, Gender, and Crime: Future Directions for Feminist Criminology*, 1 *FEMINIST CRIMINOLOGY* 27, 41 (2006).

Many CRT scholars have already adopted these approaches. By making race, ethnicity, and racism (and often other axes of privilege and subordination) central to their analyses, they have recognized the power of emotionally resonant symbols and myths in constructing and reconstructing hierarchy and in legitimizing inequality.<sup>351</sup> Indeed, much of the work of critical race scholars engages directly in efforts to expose deniable degradation by demonstrating the biases that inform legal doctrines, by highlighting the unequal effects of these doctrines, and by exposing the effects of degradation on the human psyche.<sup>352</sup>

Recent collaborations between empirical social scientists and more theoretical critical scholars (including the authors of the articles in this symposium volume), as well as a growing number of scholars whose work draws upon both scholarly traditions, leave hope that future interpretive work will help dismantle both the understandings and the state structures that promote subordination. In addition, scholars, relatively insulated from the influences of popular public sentiment, are well positioned to call out lawmakers when they participate in myth-laden narratives or when they propose policies driven by outlier cases or motivated by unvarnished disgust for subordinated groups. My hope is that more scholars will make use of their positions to do so, bringing realism to a policy world now dominated by symbolism.

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351. See, e.g., Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (examining the various ways that the non-recognition of race promotes and maintains racial hierarchies); Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims,* 69 N.Y.U. L. REV. 162, 163 (1994) (discussing how Americans "mythologize colorblindness as racial justice" although the myth itself maintains that status quo of racial inequality).

352. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism,* 42 U. MIAMI L. REV. 127, 129 (1988) (demonstrating that being the object of racial discrimination and prejudice is so emotionally painful that it amounts to "spirit-murder").