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THE NEW RACIALLY RESTRICTIVE COVENANT:
RACE, WELFARE, AND THE POLICING OF BLACK WOMEN IN
SUBSIDIZED HOUSING

PRISCILLA A. OCEN

ABSTRACT

This Article explores the race, gender, and class dynamics that render poor Black women vulnerable to racial surveillance and harassment in predominantly white communities. In particular, this Article interrogates the recent phenomenon of police officers and public officials enforcing private citizens' discriminatory complaints, which ultimately excludes Black women and their children from publicly subsidized housing in traditionally white neighborhoods. The Article suggests that these particular mechanisms represent a confluence of the racially exclusionary workings of the social welfare state and the criminal justice system. I thus argue that the concerted effort of welfare and criminal policing institutions, together with private actors, to restrict the housing choices of poor Black women functions in ways that are analogous to the formally repudiated racially restrictive covenant.

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INTRODUCTION

Over sixty years ago, in *Shelley v. Kraemer*,¹ the U.S. Supreme Court outlawed the judicial enforcement of racially restrictive covenants.² Racial restrictions were memorialized in the deeds of homes in subdivisions across the country and enforced by neighbors bringing suit against neighbor in court.³ Such covenants were designed to restrict the ability of individuals of “the Negro or Mongolian Race” to occupy properties subject to the racial covenants.⁴ The racially restrictive covenant, which proliferated during the Great Migration of Blacks⁵ from the South to the North, was a means of preserving white supremacy

¹ 334 U.S. 1 (1948).

² *Id.* at 4.

³ *Id.* at 4–6.

⁴ *Id.* at 5.

⁵ I capitalize the term Black throughout the Article because, like Kimberlé Crenshaw, it is “my view that Blacks, like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.” Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101

and preventing racial mixing.⁶ The physical separation of Blacks and whites, and the resulting exclusion of Blacks from the economic, political, and social benefits of home ownership, sent messages of social inferiority⁷ and maintained segregation in an array of other spaces such as education and employment. Through *Shelley*, the Supreme Court began to chip away at a central pillar of the Jim Crow regime, finding that the judicial enforcement of covenants constituted state-sponsored discrimination in contravention of the Fourteenth Amendment.⁸

Despite *Shelley* and the Fair Housing Act⁹ that followed twenty years later, residential segregation persists, racially identified enclaves flourish, and new mechanisms of policing the boundaries of “racialized space” have emerged.¹⁰ 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,¹¹ imposition of

HRV. L. REV. 1331, 1387 n.2 (1988).

⁶ See generally Joshua L. Farrell, *The FHA's Origins: How Its Valuation Method Fostered Racial Segregation and Suburban Sprawl*, 11 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 374 (2002).

⁷ Cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445 (1968) (Douglas, J., concurring) (arguing that housing discrimination constitutes a badge and incident of slavery).

⁸ *Shelley*, 334 U.S. at 20–21.

⁹ 42 U.S.C. §§ 3601–3619, 3631 (2006).

¹⁰ See generally John O. Calmore, *Racialized Space and the Culture of Segregation: “Hewing a Stone of Hope From a Mountain of Despair,”* 143 U. PA. L. REV. 1233, 1235 (1995) (defining the racialization of space as the “process by which residential location and community are carried and placed on racial identity”).

¹¹ See NAT'L LOW INCOME HOUS. COAL., *THE NIMBY REPORT: SMART GROWTH AND AFFORDABLE HOUSING* (Jaimie Ross ed., 2001) (noting the racial dynamics of community resistance to affordable housing developments); Charles G. Field, *Building Consensus for Affordable Housing*, 8 HOUSING POL'Y DEBATE 801 (1997); Timothy A. Gibson, *NIMBY and the Civic Good*, 4 CITY & COMMUNITY 381 (2005) (noting the ways in which the “not in my backyard” phenomenon can prevent the development of affordable housing projects); Jenna Lee Tighe, *Public Perceptions of Affordable Housing: How Race and Class Influence Views* 192 (2009) (unpublished Ph.D dissertation, University of Texas at Austin), available at <http://repositories.lib.utexas.edu/bitstream/handle/2152/10637/tighej90695.pdf> (finding that “[n]egative ideas about the poor and minorities clearly shape attitudes about affordable housing”).

For a discussion of the integrationist aims of the Fair Housing Act generally and Section 8 in particular, see Rebecca Tracey Rotem, *Using Disparate Impact Analysis in Fair Housing Claims: Landlord Withdrawal From the Section 8 Voucher Program*, 78 FORDHAM L. REV. 1971, 1974–77 (2010). See also Sheryll D. Cashin, *Drifting Apart: How Wealth and Race Segregation Are Reshaping the American Dream*, 47 VILL. L. REV. 595, 600 (2002) (noting that in suburbs, “[o]nce [racial and class] homogeneity is achieved, any policy proposal that threatens to undermine that homogeneity—like affordable housing—is likely to meet with virulent resistance”); Sheryll D. Cashin, *Localism, Self-Interest and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO L.J. 1985, 2030–33 (2000).

restrictive attendance zones for school enrollment,¹² and redlining. Increasingly, racial boundaries are maintained through deployment of law enforcement to police racialized boundaries and bodies¹³ and through the language of welfare, crime, and punishment. While the racially restrictive covenant and contemporary surveillance and regulation (that is, policing) employ different strategies, the result of these strategies is the same: Black exclusion from white-identified enclaves.

Consider the following case of police harassment of Black female-headed households using Section 8 in Antioch, California. Antioch is a small, largely white, middle-class suburb of the San Francisco Bay Area.¹⁴ The population of Antioch, including the Black population, nearly doubled between 1985 and 2005, and the number of newly constructed homes surged.¹⁵ Along with the increase in the number of homes came problems associated with population growth.¹⁶

Like many other cities in California and across the country, Antioch was hit hard by the collapse of the housing market.¹⁷ Following the collapse of the housing market, however, many of the new homes were threatened with foreclosure, and rental housing sat vacant.¹⁸ In response, landlords opened their properties to individuals participating in the Section 8 Housing Choice Voucher Program (Section 8), a federally subsidized housing program for low-income

¹² See generally Gary Orfield, *Housing and the Justification for School Segregation*, 143 U. PA. L. REV. 1397 (1995). See also Erica Frankenberg & Chinh Q. Le, *The Post-Parents Involved Challenge: Confronting Extralegal Obstacles to Integration*, 69 OHIO ST. L.J. 1015, 1027 (2008) (“[R]esearch shows that racial composition differences across district boundary lines contribute more to segregation today than do differences within them.”).

¹³ See generally KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA (2010) (noting the use of civil and criminal law enforcement to prevent racially and economically marginalized populations from occupying public spaces); N.Y. CIVIL LIBERTIES UNION, STOP-AN-FRISK 2011 (2012), available at http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf (documenting the pervasive and racially disproportionate use of “stop-and-frisk” searches in New York City); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011) (striking down a city ordinance barring standing on a street or highway and soliciting “employment, business or contributions from an occupant of any motor vehicle” that targeted Latino day laborers, subjecting them to arrest and fines).

¹⁴ See Solomon Moore, *As Program Moves Poor to Suburbs, Tensions Follow*, N.Y. TIMES, Aug. 8, 2008, <http://www.nytimes.com/2008/08/09/us/09housing.html>; *City of Antioch*, BAY AREA CENSUS, <http://www.bayareacensus.ca.gov/cities/Antioch.htm> (last visited June 4, 2012).

¹⁵ ELIZABETH VOIGHT ET AL., PUBLIC ADVOCATES INC. & BAY AREA LEGAL AID, POLICING LOW-INCOME AFRICAN AMERICAN FAMILIES IN ANTIOCH: RACIAL DISPARITIES IN “COMMUNITY ACTION TEAM” PRACTICES 1 (2007), available at <http://www.publicadvocates.org/sites/default/files/library/antiochreportfinalrev.pdf>.

¹⁶ See Moore, *supra* note 14.

¹⁷ See *City of Antioch*, *supra* note 14.

¹⁸ *Id.* at 1.

renters. Consequently, the number of households using Section 8 vouchers in the city nearly doubled.¹⁹ Slightly over half of the households with Section 8 vouchers that responded to these openings were headed by African Americans,²⁰ most of whom were women.²¹

The increase in the number of Black households alarmed many in the traditionally white community. In race-laden language, Section 8 families were blamed for increased crime, violence, and blight.²² The new tenants were described as “criminal,” “lazy,” and “scary” by Antioch residents.²³ Residents formed a citizen’s organization for the express purpose of reducing the number of families using Section 8 vouchers in their community.²⁴ In response to complaints by residents, Antioch’s city council formed a specialized police unit called the Community Action Team (CAT).²⁵ Private citizens actively monitored the conduct of Black households suspected of utilizing Section 8 vouchers and submitted complaints to CAT officers.²⁶ Upon receiving the complaints, CAT officers targeted Black Section 8 households for surveillance and punishment, seeking noncriminal information that could lead to the termination of Section 8 vouchers and thus the exclusion of such housing from Antioch.²⁷ Officers also stopped at the homes of Black women thought to be utilizing Section 8, searched their homes without consent or a warrant, and used any evidence found as a basis to send a complaint to the county housing authority.²⁸ Frequently, these investigations focused on Black women’s children or the identification of the women’s intimate partners.²⁹ The CAT officers also sent threatening letters to landlords suggesting that they could face criminal prosecution if anything amiss occurred on their properties.³⁰ Many families lost their vouchers and became

¹⁹ *Id.* at 1, 9.

²⁰ *See generally id.*

²¹ Interview With Joycelyn Larkin, Exec. Dir. of the Impact Fund & Lead Counsel for Plaintiffs in *Williams v. City of Antioch* (May 14, 2012).

²² *See Moore, supra* note 14; *East Contra Costa Forums: No More Section 8 in Antioch!!!*, CONTRA COASTA TIMES, <http://forums.contracostatimes.com/topic/no-more-section-8-in-antioch> (last visited June 4, 2012).

²³ *See supra* note 22.

²⁴ *See VOIGHT ET AL. supra* note 15, at 10–11.

²⁵ *See id.* at 11–12.,

²⁶ *See id.* at 19.

²⁷ *Id.* at 19–20.

²⁸ *Id.* at 14–15.

²⁹ *See Rachel Swain, Renting While Black—Antioch Tenants Charge Police With Campaign of Intimidation*, ACLU N. CAL., https://www.aclunc.org/issues/racial_justice/renting_while_black_-_antioch_tenants_charge_police_with_campaign_of_intimidation.shtml (last visited July 22, 2012).

³⁰ *See VOIGHT ET AL., supra* note 15, at 24–25.

temporarily or permanently homeless as a result.³¹ In this Article, I explore the denial of subsidized rental housing opportunities and the surveillance and regulation of Black female-headed households in three California cities—Antioch, Lancaster, and Palmdale—to argue that the dynamics in these cities are functionally analogous to the repudiated racially restrictive covenant. These case studies help illuminate an emerging practice in communities across the country whereby law enforcement collaborates with private landowners to police and ultimately to exclude disfavored racialized groups—including those that live in public housing—from white-identified spaces.³² Like the racially restrictive covenant, the result is the maintenance of deeply entrenched racial boundaries.

In this Article, I argue that the racially restrictive covenant analogy is useful in at least three ways. First, just as in the context of the pre-*Shelley*

³¹ See *id.* at 25; Expert Report of Barry Krisberg at 20, *Williams v. City of Antioch*, No. C-08-2301 (N.D. Cal. Sept. 4, 2009), available at <http://www.impactfund.org/downloads/Antioch.B.Krisberg.ExpertReport.pdf> (noting that 30 percent of the ninety-four cases referred to the housing authority by law enforcement resulted in voucher termination).

³² See, e.g., *Virginia v. Hicks*, 539 U.S. 113 (2003) (upholding public housing policy authorizing the city police to serve notice on any person lacking a “legitimate business or social purpose” for being on housing authority premises and to arrest any person for trespass who remains on or returns to the premises after having received the notice); Complaint at 2, *Ligon v. City of New York*, No. 12 Civ 2274 (S.D.N.Y. Mar. 28, 2012) (challenging a New York City Police Department program called “Operation Clean Halls” and alleging that “[the] program . . . allows police officers to patrol inside and around thousands of private residential apartment buildings across the City. Each year this program results in thousands of illegal stops, searches, summonses, and arrests of those buildings’ residents and their invited guests without cause.”); Katherine Beckett & Steve Herbert, *Penal Boundaries: Banishment and the Expansion of Punishment*, 35 LAW & SOC. INQUIRY 1, 7 (2010) (“In Seattle, police officers may . . . issue ‘trespass admonishments’ that prohibit a person from being on a certain property or group of properties for an extended period of time, typically one year. Officers are granted this authority via a contract with property owners. The contract essentially transfers the property owners’ trespass authority to the police. Officers are thus able to issue trespass admonishments whenever they see an individual ‘without legitimate purpose’ on properties that are normally open to the public.”); Lauren J. Zimmerman, Note, *Exile Without Process: The New York City Housing Authority’s Unconstitutional Trespass Notice Program*, 33 CARDOZO L. REV. 1253 (2012); Michael Zmora, Note, *Between Rucker and a Hard Place: The Due Process Void for Section 8 Voucher Holders in No-Fault Evictions*, 103 NW. U. L. REV. 1961, 1983 (2009) (“The resulting public pressure [against expanded Section 8 participation in a Maryland suburb] forced politicians to drastically cut back the [local Section 8] program. A landlord accepting Section 8 tenants may be cognizant of these community prejudices and might consider removing Section 8 tenants to ensure that property values rise so he may collect higher rents in the future.” (footnote omitted)); *Authorities Nab 20 in Effort to Clean Up Center City Millville*, DAILY J. (Vineland, N.J.), July 3, 2010, available at 2010 WLNR 13517486 (describing police effort to focus on Section 8 tenants in the city); Editorial, *Keep Housing Police on Important Duty*, INDIANAPOLIS STAR, Nov. 8, 2004, available at 2004 WLNR 23113053 (advocating for the continued funding of “housing police” to monitor public housing residents and Section 8 tenants).

racially restrictive covenant, state authority, in the form of the police, is mobilized to maintain racialized boundaries. Second, the logic of each regime rests on the association between Black residents, disorder, and declining home values. Indeed, residents in these communities saw the economic harm of a Black Section 8 household as more deleterious than a foreclosure. Third, each of these three cities was marked by white collective action to exclude Black residents participating in the Section 8 from their communities. Not only did these associations pressure public officials, they pressured and harassed other property holders who would otherwise be inclined to rent to Black Section 8 voucher holders.

There are several important implications that derive from the racially restrictive covenant analogy and the three case studies. The analogy calls our attention to the central role of law in constituting racialized spaces in concert with purportedly “private” action.³³ Indeed, central to the applicability of the racially restrictive covenant analogy is the way in which the surveillance, harassment, and regulation of subsidy-reliant Black women and their families reveal both the public and the (underappreciated) private dimensions of racial exclusion in the context of social welfare programs and policing. Relying on the publicly funded nature of social welfare programs and on widespread perceptions of rampant welfare fraud as justification, private individuals participated in and initiated law enforcement efforts to reduce the size of the welfare state by monitoring and surveilling those believed to be on disfavored forms of public assistance.

Indeed, the racially restrictive covenant analogy highlights the role of law enforcement and punitive discourses regarding social welfare in regulating and policing the boundaries of racialized spaces.³⁴ Within these racialized spaces, whites organize to protect racially identified communities and the maldistribution of resources that skews in their favor.³⁵ To accomplish this boundary

³³ See Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1388 (1997) (“[O]ne cannot neatly sever ‘private choice’ from government imposition, since government helped to create the context in which private choices occur [The state] continues to actively facilitate segregation through a local government structure that predictably undermines desegregation.”); John A. Powell & Stephen Menendian, *Beyond Public/Private: Understanding Excessive Corporate Prerogative*, 100 KY. L.J. 43, 62–67 (2011).

³⁴ See, e.g., I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 43 (2009) (“The ambition of this Article is to draw attention to a component of segregation that has largely been ignored: the significant role that criminal law and procedure have played, and continue to play, in maintaining racialized spaces.”); Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 650 (2009).

³⁵ See generally Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45 (2010).

maintenance, law enforcement is called on to regulate racial bodies that reside at the margins of racially identified spaces. Moreover, state violence in the form of policing is used not only at the border between white and nonwhite racialized spaces but also to police nonwhite bodies as they move within white identified spaces.³⁶ In this context, the presence of Black bodies in racialized spaces signals disorder and is regulated as such. When deployed in this manner, law enforcement's role in boundary maintenance thus serves to perpetuate nonwhite subordination while expanding the reach of the punitive state, often into noncriminal matters.

The reach into noncriminal matters is based on law enforcement's encroachment into other institutional settings, such as social welfare.³⁷ The criminal justice and welfare systems work in tandem to justify surveillance of poor Black households through a mutual use of discursive frameworks that focus on crime and fraud rather than poverty.³⁸ Indeed, subsidy reliance often serves as the basis for landlords' purportedly race-neutral refusal to rent property and provides the hook for government officials to discipline and punish individuals for noncriminal conduct within their homes.³⁹ Subsidy reliance is thereby conflated with and policed as criminality.

Lastly, this Article uses an intersectional⁴⁰ approach to interrogate the ways in which Black women's identities serve as a critical link between the welfare and criminal justice systems, animating the robust surveillance and tight

³⁶ See Regina Austin, *"Not Just for the Fun of It!": Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space*, 71 S. CAL L. REV. 667 (1998) (discussing the policing of Black movement in white-identified spaces and negative white attitudes towards contact with Black people); Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 425 (2010).

³⁷ See, e.g., Gustafson, *supra* note 34.

³⁸ See generally *id.*

³⁹ See generally Kinara Flagg, *Mending the Safety Net Through Source of Income Protections: The Nexus Between Antidiscrimination and Social Welfare Law*, 20 COLUM. J. GENDER & L. 201 (2011) (noting pervasive discrimination against Section 8 voucher holders and the ways in which such denials function as "a thinly veiled means of rejecting tenants on the basis of race, familial status or disability").

⁴⁰ By "intersectional approach" or "intersectionality" I refer to the ways in which identity categories such as race, gender, class, and sexual orientation interact to shape the experiences of marginalized subjects and contribute to structural inequality in ways that are more than the sum its parts. Intersectionality also calls our attention to the ways in which the experiences of women of color are omitted within identity movement and advocacy discourses that only address a single axis of their identities. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140.

regulation that are imposed on the beneficiaries of social welfare programs. In so doing, I contest the distinction that is often implicit in social welfare and criminal justice scholarship that suggests that Black men and women are regulated on the separate and gendered tracks of the criminal justice and the social welfare systems.⁴¹ Rather, as the three case studies highlight, the racial profiling of Black women's bodies through social welfare programs such as Section 8 facilitates contact with law enforcement and other state actors. Thus, the intersection of race, gender, and class is essential to understanding this dynamic and its connection to the maintenance of racial segregation and the burgeoning punitive welfare state.

The regulation and exclusion of Section 8 voucher holders, which is organized around the presumed criminality of individuals on welfare and is ostensibly raceneutral, relies on implicit associations between welfare and Black women to accomplish racial exclusion.⁴² The harassment and surveillance of Black female-headed households is predicated on their exclusion from prevailing notions of womanhood and motherhood, which are normatively grounded in constructions of white feminine identity.⁴³ To the extent that Black women are seen as falling outside the bounds of traditional gender roles—through ascribed identities as “crack mothers” or “welfare queens”—they are assigned a deviant or criminal status that justifies the robust surveillance and monitoring within the social welfare system.⁴⁴ The presumed criminality provides the basis for the

⁴¹ For examples of this dynamic, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 9 (2010) (discussing the impact of mass incarceration on Black men); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA*, at ix (1995) (contending that mass incarceration primarily impacts Black men); and ANGE-MARIE HANCOCK, *THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN* (2004) (discussing welfare reform and the deployment of Black women's identities to generate support for a more regulatory approach to social welfare).

⁴² See, e.g., MELISSA V. HARRIS-PERRY, *SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA* 39 (2011) (“[B]ecause of their history as chattel slaves, their labor market participation as domestic workers, and their role as dependents in a punitive modern welfare state, black women in America live under heightened scrutiny by the state. As members of a stigmatized group, African American women lack opportunities for accurate, affirming recognition of the self and yet must contend with hypervisibility imposed by their lower social status.”); HANCOCK, *supra* note 41, at 23–64 (connecting discourses regarding the “Welfare Queen” with historical and contemporary images of Black women); Angela Onawuachi-Willig, *The Return of the Ring: Welfare Marriage Cure as Revival of Post-bellum Control*, 93 CALIF. L. REV. 1647, 1665–73 (2005); Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871, 873–75 (1994).

⁴³ See, e.g., ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* 5–11 (1981); PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 33–56 (2d ed. 1996).

⁴⁴ See LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL*

abrogation of constitutional protections and the increased intrusions on Black women's privacy rights.⁴⁵

In sum, this Article illuminates the ways in which the strategies of domination are shifting—by increasing collaboration with private actors and by drawing on the punishment system's logics and mechanisms to effectuate racial exclusion—and the ways in which race and gender are critical to the expansion of the punitive state's role in maintaining spacial segregation.⁴⁶ The racially restrictive covenant analogy reveals how the punishment and social welfare systems are converging to police both physical and ideological boundaries. The collaboration between residents and law enforcement functions to police not only the boundaries of racialized geographic spaces, such as communities like Antioch, but also how Black women express their identities.

The particular form of racial discrimination that poor Black women in Antioch experience illustrates how racial reform, like that represented by *Shelley*, produces transformation rather than abolition of policies and practices

INSECURITY 43 (2009); Bridgette Baldwin, *Stratification of the Welfare Poor: Intersections of Gender, Race, & "Worthiness" in Poverty Discourse and Policy*, MODERN AM., Spring 2010, at 4, 4–5 (discussing the emergence of the "welfare queen" racialized imagery); Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 WASH. U. J. URB. & CONTEMP. L. 121, 136 (1994) (noting the public association between maternal drug use and images of Black women); see also Loïc Wacquant, *The Great Penal Leap Backward: Incarceration in America From Nixon to Clinton*, in THE NEW PUNITIVENESS: TRENDS, THEORIES, PERSPECTIVES 3, 15 (John Pratt et al. eds., 2005) ("The prison has been called upon to contain the disorders generated by the rising tide of dispossessed families, street derelicts, unemployed and alienated youths, and the desperation and violence that have accumulated and intensified in the segregated urban core of the metropolis as the 'safety net' of the U.S. semi-welfare state was torn, and desocialized wage labour in the low-wage service sectors was made the normal horizon of work for the deskilled fractions of the working class.").

⁴⁵ See, e.g., *Sanchez v. Cnty. of San Diego*, 464 F.3d 916, 925–28 (9th Cir. 2006) (applying the "special needs" exception generally applicable to individuals convicted of a crime and placed on probation to justify warrantless administrative searches of welfare applicants); cf. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 177–78 (1995) (noting that women's lives become "public" when a husband/father is absent); Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 123 (2011) (noting that the "vulnerability that poor women experience [comes] as a direct result of the lack of privacy").

⁴⁶ The use of police to maintain racialized boundaries, of course, is not new. Indeed, police have been deployed to maintain segregated communities through the failure to protect Black communities from violence, see, e.g., RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 29–75 (1997), and through overpolicing in poor, urban spaces, see, e.g., ALEXANDER, *supra* note 41; BECKETT & HERBERT, *supra* note 13, at 8 ("Increasing swaths of urban space are delimited as zones of exclusion from which the undesirable are banned. The uniformed police are marshaled to enforce and often delineate these boundaries; they use their powers to monitor and arrest in an attempt to clear the streets of those considered unsightly or 'disorderly.'").

that effectuate racial subordination. Stated more specifically, the legal abolition of overt contractual discrimination (in the form of covenants) ushered in new mechanisms of exclusion, including the use of the criminal system to perpetuate racial exclusion. The stories of the poor Black women in these communities challenges notions of racial neutrality and illustrates how deeply entrenched racial stratification is in our neighborhoods and communities. Importantly, the stories of poor Black women and their experiences of racial profiling, harassment, and regulation within white identified spaces challenges the prevailing post-racial narrative that has been deployed to undermine critical antidiscrimination tools designed to facilitate equal opportunity within public and private spaces.

This Article proceeds in four parts. Part I discusses the history of racial segregation in housing and the development of racialized spaces in the United States. I note the ways in which continuous interaction between public and private actors, including through the deployment of the racially restrictive covenant, has informed and maintained racial boundaries in neighborhoods and communities across the country. In Part II, I first explain the role that stereotypes of Black women play in providing the political justifications for the regulation and supervision of poor Black women. In Part III, I discuss how Black women are criminalized through the robust surveillance authorized by the welfare system. In Part IV, I extend this history to explain the role that it played in the development of public housing policy and in the harassment of Black women on Section 8 in the California cities of Lancaster, Palmdale, and Antioch. Lastly, I argue that the surveillance of Black women on Section 8 is analogous to the racially restrictive covenant.

I. RACIALIZATION OF SPACE AND THE CREATION OF THE RACIALLY RESTRICTIVE COVENANT

The contemporary housing landscape of American cities has been profoundly shaped by the legacy of residential discrimination and segregation.⁴⁷ Indeed, residential segregation constitutes a major conceptual fault line, shaping the racial demographics of cities and towns across the country. Beginning in the early twentieth century, often motivated by anxieties and racial stereotypes of Blacks and other racialized populations, whites fled the city center to

⁴⁷ See generally SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004). See also DOUGLAS S. MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 12–14 (1993); Boddie, *supra* note 34, at 433–34; Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 *VAND. L. REV.* 1747, 1754–61 (2005).

take up residence in racially homogenous suburbs.⁴⁸ The newly formed borders between the urban center and the surrounding suburban communities, however, functioned as more than mere markers of jurisdictional boundaries. Rather, the borders served as a symbol of the aggregate power exercised by local and federal governments in the service of white collective interests.

The social harms wrought by persistent residential segregation are more than cosmetic. Rather, racially segregated communities produce, for example, racially isolated and underfunded schools. Within these racially isolated schools, pupils are often exposed to less economic diversity, inexperienced teachers, deteriorating physical plants, and lower scores on standardized tests.⁴⁹ Racially segregated city centers are also marked by crumbling infrastructure, limited investment in social services, a dearth of quality employment opportunities, negative health outcomes, and high rates of criminalization and incarceration.⁵⁰ These negative outcomes are not simply about individual choice or agency but rather indications of the structural vulnerability of racialized communities, locked into spaces with limited mobility and opportunity.⁵¹ In short, spatial inequality affects all aspects of life—social, economic, and political—of those who dwell in racially isolated spaces.

⁴⁸ See, e.g., Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 *FORDHAM URB. L.J.* 699, 788 (1993); Katherine B. Silbaugh, *Women's Place: Urban Planning, Housing Design and Work-Family Balance*, 76 *FORDHAM L. REV.* 1797, 1819–20 (2007); Note, *Locating the Suburb*, 117 *HARV. L. REV.* 2003, 2014–15 (2004).

⁴⁹ See, e.g., Don Corbett, *Stunted Growth: Assessing the Stagnant Enrollment of African-American Students at the Nation's Law Schools*, 18 *TEMP. POL. & CIV. RTS. L. REV.* 177, 191–92 (2008) (“The country’s residential segregation has produced educational segregation that not only routinely produces inferior schooling but also excludes blacks from important social networking structures that can lead to future employment opportunities.”); Deborah Kenn, *Institutionalized, Legal Racism: Housing Segregation and Beyond*, 11 *B.U. PUB. INT. L.J.* 35, 48–54 (2001).

⁵⁰ See, e.g., Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 *COLUM. L. REV.* 1965, 1966 (2000) (“[O]ne’s neighborhood largely determines one’s achievements. Living in the wrong neighborhood often means a poor education, greater exposure to crime, fewer positive role models, and inadequate municipal services.” (footnote omitted)); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 *GEO. L.J.* 1985, 2012–15 (2000) (noting that suburbs have the highest tax base and the lowest tax burden); Sean B. Seymore, *Set the Captives Free! Transit Inequity in Urban Centers, and the Laws and Policies Which Aggravate the Disparity*, 16 *GEO. MASON U. CIV. RTS. L.J.* 57 (2005) (noting transportation disparities in segregated communities).

⁵¹ See John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 *N.C. L. REV.* 791, 796–98 (2008); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 33 (1995).

Moreover, residential segregation distorts public perceptions of the racialized groups that reside in segregated communities and reinforces their marginal status.⁵² As legal scholar Richard Ford has noted, “[R]esidence in a municipality or membership in a homeowner’s association involves more than simply the location of one’s domicile; it also involves the right to act as a citizen, to influence the character and direction or association through the exercise of the franchise, and to share in public resources.”⁵³ In particular, the marginalization and isolation that racialized groups experience in segregated spaces prevents such communities from being recognized as members of the larger polity. In this way, recognition acts as a prerequisite for citizenship in the broadest sense of the term, and exclusion from particular spaces prevents Black people from occupying the role of citizen.⁵⁴ Consequently, the negative racial imagery that justified the initial construction of racialized neighborhood boundaries is reinforced through misrepresentation.⁵⁵

Taken together, the material and symbolic dynamics of racial segregation cohere to produce what scholars have called the “racialization of space.”⁵⁶ Susan Smith defines the term to mean “the process by which residential location is taken as an index of the attitudes, values, behavioural inclinations and social norms of the kinds of people who are assumed to live [there].”⁵⁷ This “racing” of space, in turn, operates as a mechanism for the “racing” of people.⁵⁸ By this, I mean that residential location paints the characteristics of the space to its inhabitants. To the extent that a particular area is presumed to be violent, such a characteristic also attaches to the racial groups thought to occupy those spaces. These ascribed characteristics also serve to justify state actions such as

⁵² See PATCHEN MARKELL, *BOUND BY RECOGNITION* 3, 18, 154 (2003) (discussing how the misrecognition of an individual and his identity can result in injustice).

⁵³ See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1847 (1994).

⁵⁴ See HARRIS-PERRY, *supra* note 42, at 40 (noting “the primacy of recognition as a precondition for citizenship”).

⁵⁵ See Calmore, *supra* note 10, at 1242 (“If white prejudice and discrimination cause the segregation that, in turn, contributes to the poverty concentrations among African-Americans, and if these concentrations in turn fuel such prejudice and discrimination, then urban black Americans are caught in the proverbial ‘vicious circle.’”).

⁵⁶ Susan J. Smith, *Residential Segregation and the Politics of Racialization*, in *RACISM, THE CITY AND THE STATE* 128, 133 (Malcolm Cross & Michael Keith eds., 1993).

⁵⁷ *Id.*; see also Calmore, *supra* note 10, at 1235–36 (defining the racialization of space as the “process by which residential location and community are carried and placed on racial identity”).

⁵⁸ See John A. Powell, *The “Racing” of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. 99, 105 (1997).

overpolicing and mass incarceration. By viewing geographic space in this way, we can see the way it assists in the production and maintenance of racial power.⁵⁹

The racialization of space, however, is not merely a relic of past regimes of overt discrimination. Rather, its existence relies on active methods of racial stratification that create and maintain spatial separation. These methods of racial stratification, as I will discuss below, mirror and deviate from formally repudiated regimes, specifically the racially restrictive covenant, in critical respects. As I describe below, what I am calling the “new racially restrictive covenants” has maintained elements of the racially restrictive covenant of the early twentieth century, particular public enforcement of private discrimination. At the same time, it has incorporated new elements, such as the enlistment of the criminal justice and welfare systems to marginalize Blacks, while eschewing other elements, such as judicial enforcement. Despite these additions and subtractions, however, the structure remains. In other words, whites continue to organize to protect racially identified communities and the maldistribution of resources that skews in their favor.⁶⁰

In many respects, the racially restrictive covenant analogy in the three case studies described in Part IV is emblematic of what legal scholar Reva Siegel has called “preservation through transformation.”⁶¹ Specifically, the dynamics in Antioch, Lancaster, and Palmdale reveal the ways in which legal rules and social norms can be modified “so as to produce a new regime, formally distinguishable from its predecessor, that will protect the privileges of heretofore dominant groups.”⁶² Through the racially restrictive covenant analogy, we can learn important lessons about the shifting nature of contemporary racial discrimination in housing, the availability of ideological constructs to mask racism, and the deployment of new institutional actors to facilitate exclusion.

A. *Black Migration and the Construction of Racialized Boundaries*

The racialization of space in city centers and suburban communities is not a product of happenstance. Rather, the racialization of neighborhoods, cities, and towns has a long history, one that is closely aligned with Black migration from the South to the North. Indeed, as Blacks moved from the South in the 1940s, during a period known as “the Great Migration,” in search of better economic and social opportunities in the rapidly industrializing North, they

⁵⁹ See Ford, *supra* note 53, at 1845.

⁶⁰ See generally Roithmayr, *supra* note 35.

⁶¹ Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2119 (1996); *see id.* at 2178–87.

⁶² *Id.* at 2180.

encountered widespread discrimination in housing markets.⁶³ Barriers were erected by private action and public policy to prevent Blacks from living in the same spaces as whites.⁶⁴ As a result, Blacks were relegated to urban city centers and their attendant dilapidated yet high-cost housing.⁶⁵

Public officials and white property owners utilized various techniques to maintain racialized geographic boundaries. Local governments passed zoning ordinances barring the construction of multifamily dwellings as a means of preventing affordable housing developments that were viewed as benefiting racially marginal populations.⁶⁶ White homeowner associations “lobbied city councils . . . [to] clos[e] . . . hotels and rooming houses . . . [,] threatened boycotts of real estate agents who sold homes to blacks . . . [, and] withdrew their patronage from white businesses that catered to black clients.”⁶⁷ For their part, real estate agents engaged in the discriminatory practice of steering prospective Black purchasers away from white neighborhoods.⁶⁸

While these local efforts contributed significantly to the development of racially defined geographic regions, as Arnold Hirsch has noted, “[t]he most distinguishing feature of post–World War II ghetto expansion is that it was carried out with government sanction and support.”⁶⁹ Indeed, in the post–World War II era, the federal government issued home loans under the auspices of the Federal Housing Administration (FHA) with racially discriminatory underwriting requirements. These loans, which opened up the possibility of homeownership for middle-income earners, facilitated “white flight” from the city center to the suburbs.⁷⁰ Within the white subdivisions that emerged as result of FHA lending practices, the federal government endorsed discriminatory

⁶³ See Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH U. L.Q. 737, 739 (1989) (“Racially restrictive covenants were prompted, in large measure, by the great migration of black families from rural areas to northern and midwestern industrial centers. The migration from field to factory began in the second decade of the twentieth century and reached its peak during the Second World War.”).

⁶⁴ See Aoki, *supra* note 48, at 751.

⁶⁵ See *id.*

⁶⁶ See *id.* at 761 (“Zoning has been used in many communities as an exclusionary device to block social and racial integration.”).

⁶⁷ Ford, *supra* note 53, at 1848.

⁶⁸ See Kenneth R. Harney, *Report Brings an Ugly Practice to Light*, WASH. POST, Apr. 15, 2006, at F1 (noting the pervasiveness of racial steering in the national housing market).

⁶⁹ ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940–1960*, at 9 (Univ. of Chi. Press 1998) (1983).

⁷⁰ Aoki, *supra* note 48, at 751. See generally IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH CENTURY AMERICA* (2005) (noting massive housing build up as a result of GI benefits denied to African Americans).

zoning as a means toward ensuring that nuisances, which were defined to include Black people, were avoided.⁷¹

B. *White Collective Action and the Emergence of the Racially Restrictive Covenant*

Racially restrictive covenants, which are agreements (generally written into deeds of sale) that bar the sale of real property to nonwhites,⁷² became a significant mechanism for maintaining racial stratification after the Supreme Court upheld their use in *Corrigan v. Buckley*⁷³ in 1926. The Court upheld the covenants against Fifth and Fourteenth Amendment challenges, reasoning that the Amendments do not prohibit “private individuals from entering into contracts respecting the control and disposition of their own property.”⁷⁴ The Court’s public–private distinction enabled housing discrimination to flourish.

Indeed, in the 1920s, white property owners in large cities, particularly in the North, incorporated racially restrictive covenants into their deeds to prevent African Americans from purchasing homes in white communities. Property owners worked together to keep African Americans out of their communities, forming white neighborhood associations⁷⁵ and enforcing covenants through the judiciary.⁷⁶ As a result of these actions and the attendant inability of African Americans and other nonwhites to exercise broad choice in purchasing homes, racialized ghettos became a central fixture in the American landscape and operated as a means of social control over Blacks.⁷⁷

The federal government played a central role in the proliferation of racially restrictive covenants.⁷⁸ For example, FHA loans backed by the federal government often mandated the adoption of racially restrictive covenants into deeds.⁷⁹

⁷¹ Ford, *supra* note 53, at 1848.

⁷² See HIRSCH, *supra* note 69, at 9–10.

⁷³ 271 U.S. 323 (1926).

⁷⁴ *Id.* at 330.

⁷⁵ See Ford, *supra* note 53, at 1847–49.

⁷⁶ See Tom I. Romero, II, Kelo, Parents and the Spatialization of Color (Blindness) in the Berman-Brown Metropolitan Heterotopia, 2008 UTAH L. REV. 947, 956 (“For the most part, neighborhoods served to identify such racialized space. Though many neighborhoods lacked ‘formal’ legal boundaries, their lines were marked by a variety of extralegal (violent) and privately enforced means (e.g., racially restrictive covenants).”).

⁷⁷ See generally Loïc Wacquant, *The New ‘Peculiar Institution’: On the Prison as Surrogate Ghetto*, 4 THEORETICAL CRIMINOLOGY 377 (2000).

⁷⁸ Ford, *supra* note 53, at 1848.

⁷⁹ *Id.*; see David M.P. Freund, *Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America*, in THE NEW SUBURBAN HISTORY 11, 16 (Kevin M. Kruse & Thomas J. Sugrue eds., 2006); Douglas S. Massey, *Origins of Economic Disparities: The Historical Role of Housing Segregation*, in SEGREGATION: THE RISING COSTS FOR AMERICA 39,

Because the federal government gave Black neighborhoods low ratings for federally subsidized and insured mortgages, contractors often adopted racially restrictive covenants to ensure continued eligibility for federal programs.⁸⁰ As one scholar noted, “private banks relied heavily on the federal system to make their own loan decisions. Thus, the federal government not only channeled federal funds away from [B]lack neighborhoods but was responsible for a much larger and more significant divestment in [B]lack areas by private institutions.”⁸¹ For example, under what became known as redlining, banks failed to give loans to Blacks or gave loans at a higher cost to Blacks who lived in Black-identified neighborhoods.⁸² The investment policies of the federal government and private banks functioned to divest Black households and communities of the ability to limit the ability of Blacks to compete in the mortgage market and build wealth and devastated Black asset accumulation for generations to come.⁸³

In the years following World War II, the Supreme Court began to limit *de jure* housing segregation. In *Buchanan v. Warley*,⁸⁴ for example, the Court struck down a statute that attempted to racially zone neighborhoods. *Buchanan*, however, continued to adhere to the public–private distinction adopted in *Corrigan* and therefore did not reach the question of private housing discrimination.⁸⁵

In 1948, however, the Supreme Court directly confronted the constitutionality of the enforcement of racially restrictive covenants. In *Shelley v. Kraemer*,⁸⁶ the Court held that judicial enforcement of racially restrictive covenants removed the pernicious clauses from the realm of the private into the category of state action.⁸⁷ The Court noted that “[i]t is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.”⁸⁸ Instead, the Court observed,

71–72 (James H. Carr & Nandinee K. Kutty eds., 2008).

⁸⁰ Ford, *supra* note 53, at 1848.

⁸¹ MASSEY & DENTON, *supra* note 47, at 52.

⁸² Ford, *supra* note 53, at 1848.

⁸³ See generally OLIVER & SHAPIRO, *supra* note 51.

⁸⁴ 245 U.S. 60 (1917).

⁸⁵ See Carol M. Rose, *Property Stories: Shelley v. Kraemer*, in PROPERTY STORIES 189, 193–94, 208–09 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009) (noting three responses by whites to the growth of Black ghettos in the North: (1) violence, (2) white flight, and (3) racially restrictive covenants).

⁸⁶ 334 U.S. 1 (1948).

⁸⁷ *Id.* at 23.

⁸⁸ *Id.* at 19.

[T]hese are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.⁸⁹

Consequently, the Court found the judicial enforcement of racially restrictive covenants to violate the Fourteenth Amendment's Equal Protection Clause.⁹⁰

Even after the Court's decision in *Shelley*, however, the covenants continued to be used to exclude nonwhite buyers from obtaining homes subject to such covenants.⁹¹ Indeed, "many cities themselves attempted to use the full force and authority of the state to accomplish by city ordinance what private covenanting could only unevenly achieve through 'quasi private' means."⁹²

Given this resistance to integration and the fidelity to discriminatory housing practices, it is unsurprising that similar mechanisms of exclusion have persevered through the twenty-first century. More contemporarily, white property owners have enlisted state authority in a different manner to regulate the boundaries of racially identified spaces. In particular, white property owners have called on police and other governmental agencies to monitor, investigate, and exclude poor Black households in an effort to push such households out of traditionally white neighborhoods. In the context of police and community harassment of Black women, Section 8 status is used as a pretext for law enforcement intervention, which ultimately limits landlords' and Black families' ability to transfer an interest in property.

II. SOCIAL CONSTRUCTS OF BLACK WOMEN JUSTIFY THEIR EXCLUSION FROM AND PUNISHMENT WITHIN RACIALIZED SPACES

The use of the receipt of welfare as a proxy toward which to direct racial hostility and for the maintenance of racialized geographical boundaries is not surprising in light of the historical relationship between race, gender, and social welfare discourses. Black women have long been constructed as the paradigmatic welfare recipient.⁹³ Negative stories about poverty often feature Black female faces.⁹⁴ Indeed, as Dorothy Roberts has noted, Black women have been

⁸⁹ *Id.* at 13–14.

⁹⁰ *Id.* at 20.

⁹¹ See Romero, *supra* note 76, at 958–59.

⁹² *Id.*

⁹³ See MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 78 (1999) (discussing historical stereotypes of African Americans as "lazy, shiftless, and unambitious").

⁹⁴ See HANCOCK, *supra* note 41, at 24.

cast as “lazy welfare mother[s] who breed[] children at the expense of taxpayers in order to increase the amount of [t]he[i]r welfare check[s].”⁹⁵ Black women are seen as overrun with pathologies and are situated as the source of Black discontent and disenfranchisement.

The conflation of race, gender, and welfare as embodied by Black women animated efforts to undermine the welfare state and to establish a new social and economic order. Beginning in the late 1960s, social welfare programs were not premised on assistance, but rather on disciplining, regulating, and punishing beneficiaries, who came to be viewed as the supposed undeserving poor.⁹⁶ Katherine Beckett and Bruce Western assert that the welfare system in the United States is an “exclusionary regime [that] emphasize[s] the undeserving and unreformable nature of deviants [and] tend[s] to stigmatize and separate the socially marginal.”⁹⁷ The management of the subsidy reliant, who are imagined to be Black women, has become more punitive over time and has come to adopt the logics of the criminal justice system. Indeed, “criminal justice and welfare policies in modern democracies are historically intertwined—they are, in effect, sub-discourses within a larger policy discourse about the management of social marginality.”⁹⁸

A. *Conflation of Race, Gender, and Social Welfare*

The subordination of Black women via manipulating the public perception of social welfare programs is not a new phenomenon. Rather, ideological constructs of Black women as the undeserving, as the morally corrupt, and as lacking in feminine ideals, were part of the development of the welfare state. These constructs justified exclusion of Black women from early social welfare programs such as the Social Security Act of 1935.⁹⁹ The exclusion of Blacks from the beneficiary class of the initial iteration of the governmental social welfare program provided the political compromise necessary for its passage

⁹⁵ Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U.J. GENDER & L. 1, 26 (1993).

⁹⁶ The term “undeserving poor” reflects a moral distinction among individuals within the broad category of the poor. Those who are deemed to be undeserving are blamed for their poverty, which is characterized as a consequence of their behavior and poor choices. The undeserving poor are contrasted with the deserving poor, those who are poor due to “external circumstances” such as job loss and are therefore viewed with more sympathy. *See, e.g.,* MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 14, 27–35 (1989).

⁹⁷ Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 3 PUNISHMENT & SOC’Y 43, 44 (2001).

⁹⁸ *Id.* at 46 (citation and internal quotation marks omitted).

⁹⁹ Pub. L. No. 74–271, 49 Stat. 620.

in Congress.¹⁰⁰ Black women were deemed undeserving of programs such as Mother's Pensions because of their devalued status as both women and mothers.¹⁰¹ The denigration and marginalization of Black women, therefore, has been a constitutive element in the racialized functioning of the modern social welfare state.

In the late 1960s, the victories of the civil rights movement not only produced a transformation in the material lives of racially marginalized communities but also prompted a shift in the way that racial subordination was expressed in popular discourse.¹⁰² Politicians and pundits could no longer stake their resistance to the demands of the civil rights movement on an outmoded way of life in which Blacks were subordinate. Instead of using outright racial appeals, resistance to the liberatory project of the civil rights movement was couched in terms of "law and order."¹⁰³ At the same time, social welfare programs such as Aid to Families with Dependent Children were assailed for facilitating deviance by disincentivizing work and disrupting the formation of nuclear families.¹⁰⁴ These critiques were made against the backdrop of a racialized discourse regarding Black family pathology and dependency as the cause of Black inequality.

Racial anxiety and rising crime rates provided an opening for conservatives to attack critical components of the welfare state.¹⁰⁵ Subsidy-dependent

¹⁰⁰ Risa E. Kaufman, Note, *The Cultural Meaning of The "Welfare Queen": Using State Constitutions to Challenge Child Exclusion Provisions*, 23 N.Y.U. REV. L. & SOC. CHANGE 301, 328 (1997); JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* 21 (1994).

¹⁰¹ The Mother's Pension emerged during the Progressive Era as a mechanism to provide assistance to families with children but with no adult male in the home to ensure that mothers would not have to leave the home to work. Eileen Boris, *Reconstructing the "Family": Women, Progressive Reform, and the Problem of Social Control*, in *GENDER, CLASS, RACE, AND REFORM IN THE PROGRESSIVE ERA* 73, 73, 78 (Noralee Frankel & Nancy S. Dye eds., 1991).

¹⁰² See Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC'Y REV. 695, 710 (2010).

¹⁰³ See Vesla M. Weaver, *Frontlash: Race and the Development of Putative Crime Policy*, 21 STUD. AM. POL. DEV. 230, 231 (2007) (internal quotation marks omitted).

¹⁰⁴ See generally CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* (1984); LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* (1986).

¹⁰⁵ See KENNETH J. NEUBECK & NOEL A. CAZENAVE, *WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA'S POOR* 17-35 (2001) (analyzing the scholarly literature that attributes declining support for welfare to gendered racism). See generally QUADAGNO, *supra* note 100, at 117-34 (analyzing how expansion of the Aid to Families with Dependent Children (AFDC) program in the 1960s was undermined by resistance to African American struggles for equality).

women became the new bogeymen,¹⁰⁶ epitomized by images of Black women as “crack mothers”¹⁰⁷ and undeserving, fraudulent “welfare queen[s].”¹⁰⁸ As Wahneema Lubiano notes, “Categories like ‘black woman,’ ‘black women,’ or particular subsets of those categories, like ‘welfare mother/queen,’ are not simply social taxonomies, they are also recognized by the national public as stories that describe the world in particular and politically loaded ways—and that is exactly why they are constructed, reconstructed, manipulated, and contested.”¹⁰⁹ In marshalling these and other ideological constructions, race, crime, and social welfare were indelibly connected in the public mind.¹¹⁰

Moreover, in the 1960s, Black women were made highly visible as the cause of instability and inequality in the Black community. Government reports, including a study authored by then–Assistant Secretary for Labor Daniel P. Moynihan (the Moynihan Report), suggested that Black inequality, rather than being a product of institutionalized racism, was caused by a “tangle of pathology.”¹¹¹ Indeed, the report noted that

[t]he gap between the Negro and most other groups in American society is widening.

¹⁰⁶ See Julia S. Jordan-Zachery, *The Female Bogeyman*, SOULS, Spring 2003, at 42, 49.

¹⁰⁷ See DREW HUMPHRIES, CRACK MOTHERS: PREGNANCY, DRUGS AND THE MEDIA 19, 30 (1999) (noting that Black women were frequently highlighted in news media reporting about so-called “crack mothers” and “crack babies”).

¹⁰⁸ See also Wahneema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 323, 332–33 (Toni Morrison ed., 1992) (“[T]he welfare queen is omnipresent in discussions about ‘America’s’ present or future even when unnamed. All of those things are constantly in the news (not that welfare queens were ever much out of the news)—urban crime, the public schools, the crack trade, teenage pregnancy are all narratives in which ‘welfare queen’ is writ large.”). See generally HANCOCK, *supra* note 41 (discussing negative views of welfare recipients in political debates and in public opinion).

¹⁰⁹ Lubiano, *supra* note 108, at 330; see also Baldwin, *supra* note 44.

¹¹⁰ See Jordan-Zachery, *supra* note 106, at 46 (“President Ronald Reagan’s 1982 declaration of a war on drugs ushered in the nation’s contemporary preoccupation with drugs, specifically with crack cocaine. In an attempt to gain support for his war, Reagan often claimed that drug abuse was growing because of, in his words, a ‘new privileged class’ of ‘repeat offenders’ and a criminal subculture spawned by expensive social programs founded on ‘utopian assumptions about man as primarily a creature of his material environment.’”); Murakawa & Beckett, *supra* note 102, at 710 (“At the micro level, experimental studies indicate that the cultural association of blacks with crime (and welfare) has enhanced white support for more punitive anticrime (and antipoverty) measures.”).

¹¹¹ DANIEL PATRICK MOYNIHAN, U.S. DEP’T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 29–45 (1965), available at <http://www.dol.gov/oasam/programs/history/webid-meynihan.htm>.

The fundamental problem, in which this is most clearly the case, is that of family structure. The evidence—not final, but powerfully persuasive—is that the Negro family in the urban ghettos is crumbling. A middle-class group has managed to save itself, but for vast numbers of the unskilled, poorly educated city working class the fabric of conventional social relationships has all but disintegrated. There are indications that the situation may have been arrested in the past few years, but the general post-war trend is unmistakable. So long as this situation persists, the cycle of poverty and disadvantage will continue to repeat itself.¹¹²

The tide of denigration of poor Black people was bolstered by the work of scholars who contested the structural explanation for poverty. Instead, they argued that the biggest contributor to poverty was not economic inequality, but the culture of dependency. For example, in *The New Politics of Poverty: The Nonworking Poor in America*, Lawrence Mead argued that social welfare policy ought to be concerned about whether the poor are deserving or not and how to influence their behavior.¹¹³ In calling for an assessment of who should occupy the identity of the “deserving poor,” Mead implicitly called for more government intrusion and surveillance into the lives of the poor who seek government assistance.¹¹⁴

Within this discursive space, Black women were criminalized as a result of not-so-veiled references to their fraudulent conduct while on government assistance. Indeed, in the push to roll back the gains of the welfare rights movement, “the person caricatured by Ronald Reagan in his 1976 campaign for the Republican nomination and in the 1980 general election was Linda Taylor, a Chicago woman who reportedly collected welfare benefits under several aliases and, as mythology has it, traveled to the welfare office in a rented limousine to pick up her checks.”¹¹⁵ Mobilizing the mythical Black welfare queen in the

¹¹² *Id.*

¹¹³ See LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* 68 (1993).

¹¹⁴ *Id.*

¹¹⁵ TONRY, *supra* note 41, at 10. The “welfare queen” story recounted by Reagan was grossly exaggerated. The woman Reagan spoke of was convicted of defrauding the government out of \$8000 rather than \$150,000 as he claimed. Reagan continued to repeat the story even after he was corrected. See Katherine Anne Paddock Betcher, Note, *Revisiting the Personal Responsibility and Work Opportunity Reconciliation Act and Calling for Equality: Problematic Moral Regulations and the Changing Legal Status of LGBT Families in a New Obama Administration*, 31 *WOMEN’S RTS. L. REP.* 104, 114 (2009); David S. Broder, *Still Learning to Be the Opposition*, *WASH. POST*, Feb. 15, 1981, at C7; see also David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 *IND. L.J.* 797, 804 (1998).

public mind served the dual purpose of enhancing public support for severe reductions in welfare spending while at the same time expanding the scope of social ills toward which a punitive posture could be taken.

Poor Black women were cast not only as criminals because of their reliance on government subsidies but also as incubators of criminal activity through their children.¹¹⁶ Indeed, as Moynihan once noted, “a community that allows a large number of young men to grow up in broken families, dominated by women, never acquiring any stable relationship to male authority, never acquiring any set of rational expectations about the future—that community asks for and gets chaos.”¹¹⁷ The conservative-led backlash against welfare began the shift from poverty alleviation toward the punishment and discipline of those vulnerable members of society in need of public assistance.

Indeed, the language used to describe the subsidy reliant was informed by criminal law, resulting in descriptions of welfare recipients as fraudulent and as threatening to society. Once welfare recipients were understood in this manner, punitive measures traditionally reserved for the criminal justice system, such as surveillance and drug testing, were more easily imported into the realm of social welfare administration. These punitive measures included drug testing, administrative inspections of homes to determine eligibility, DNA tests to determine paternity of children, and cross-references of social welfare databases with law enforcement records to determine if applicants had outstanding arrest warrants.¹¹⁸ Loïc Wacquant argues that this emerging framework of disciplining the poor constitutes a “paternalistic program[]” that “furnish[es] the poor with the ‘directing framework’ supposed to enable them (at long last) to ‘live in a constructive manner,’ and thus to reduce the burdens they impose on the rest of society.”¹¹⁹ Welfare, thus designed to discipline and in some respects punish recipients, became a less viable option for the poor to provide for their basic life’s necessities. Consistent with this expanded punitive posture toward social ills such as poverty, President Bill Clinton vowed to “end welfare as we know it” through passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).¹²⁰ PRWORA ushered in an era of

¹¹⁶ See Gustafson, *supra* note 34, at 650–51; see also Lubiano, *supra* note 108, at 339 (“She is the agent of destruction, the creator of the pathological, black, urban, poor family from which all ills flow; a monster creating crack dealers, addicts, muggers and rapists—men who become those things because of being immersed in her culture of poverty.” (emphasis omitted)).

¹¹⁷ Daniel Patrick Moynihan, *Defining Deviancy Down*, AM. SCHOLAR, Winter 1993, at 17, 26.

¹¹⁸ See Gustafson, *supra* note 34, at 650–51.

¹¹⁹ Loïc WACQUANT, *PRISONS OF POVERTY* 33 (2009).

¹²⁰ Pub. L. No. 104–193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.); see also Joshua J. Dyck & Laura S. Hussey, *The End of Welfare as We Know It? Durable*

policing public subsidy recipients through criminal law. The Act imposed a lifetime limit of five years for receipt of certain kinds of welfare benefits and a lifetime ban on welfare and food stamps for anyone convicted of a felony drug offense.¹²¹ Moreover, the narrowing of the class of public subsidy beneficiaries through criminal law continued as Congress authorized public housing authorities to exclude individuals who had engaged in criminal drug activity, whether convicted or not, and eliminated the availability of student loans for anyone convicted of a drug offense.¹²² Thus, as Roberts has noted, “[t]he contraction of the U.S. welfare state, culminating in the 1996 federal welfare reform legislation, paralleled the expansion of prisons to stigmatize innercity communities and to isolate them further from mainstream society.”¹²³

As scholars such as Kaaryn Gustafson have noted, the 1996 welfare reform act hastened the convergence between the criminal justice and welfare systems.¹²⁴ Increasingly, both systems are governed by the same punitive logics that rest on racialized stereotypes of the imagined targets: Black women and men. Indeed, as Wacquant has observed, “the ‘welfare reform’ endorsed by Clinton in 1996 subjects public aid recipients to intrusive practices of lifelong record keeping and close supervision, and it establishes a strict monitoring of their behaviors—in matters of education, employment, drug consumption and sexuality—liable to trigger sanctions both administrative and criminal.”¹²⁵ Increasingly, for black women the welfare system has become a part of a continuum of punishment that

Attitudes in a Changing Information Environment, 72 PUB. OP. Q. 589, 595 & n.8 (2008).

¹²¹ See 42 U.S.C. § 608(a)(7)(A) (2006) (“A State . . . shall not use any part of the grant to provide assistance . . . for 60 months (whether or not consecutive) after the date the State program funded under this part commences . . .”); 21 U.S.C. § 862a(2)(a) (“An individual convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance (as defined in section 802(6) of this title) shall not be eligible for . . . benefits under the food stamp program or any State program carried out under the Food Stamp Act of 1977.”).

¹²² See, e.g., Higher Education Amendments of 1998, Pub. L. No. 105–244, 112 Stat. 1581 (codified as amended in scattered sections of 20 U.S.C.) (refusing student loans to individuals convicted of certain types of drug offenses); Dep’t of Housing & Urban Dev. v. Rucker, 535 U.S. 125, 130–31 (2002) (upholding statute making “any” drug-related criminal activity cause for termination of public housing lease with no requirement that tenant know of the activity); Donna Leinwand, *Drug Convictions Costing Students Their Financial Aid*, USA TODAY, Apr. 17, 2006, http://www.usatoday.com/news/nation/2006-04-16-drugs-students_x.htm.

¹²³ Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 STAN L. REV. 1271, 1298 (2004).

¹²⁴ See generally KAARYN GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF WELFARE* (2012).

¹²⁵ WACQUANT, *supra* note 119, at 83.

begins with a presumption of criminality and extends through surveillance and incarceration.¹²⁶

Indeed, recent trends have demonstrated that the systems are complementary (rather than separate) in serving to criminalize Black populations.¹²⁷ Focusing on the work that welfare surveillance does in regulating poor Black women reveals that punitive regimes are increasingly capturing them. Indeed, incarceration rates are surging for Black women, who have become the fastest-growing prison population in the country.¹²⁸ When we examine the surveillance and exclusion that occurs in the context of subsidized housing, we can see the ways in which the constructs of Black women are doing significant work in the maintenance of racial stratification and the criminalization of Black populations.

III. PRESUMED CRIMINALITY AND THE RACIAL PROFILING OF BLACK WOMEN IN PUBLIC HOUSING

Poor Black women are vulnerable to surveillance as a result of the presumed criminality that flows from the intersection of race, gender, and poverty.¹²⁹ As a consequence of the deviant welfare queen imagery that policymakers activate in discussions of the welfare system, sets of monitoring systems have been embedded within subsidy eligibility determinations.¹³⁰ Black women must contend with “ongoing historical constructions of themselves as worthless, subhuman, promiscuous, predatory, and hypersexual.”¹³¹ These historical constructions are then mapped onto a contemporary policy terrain that labels them as deviant mothers and pathological heads of households.

¹²⁶ *See id.*

¹²⁷ *See, e.g.,* GUSTAFSON, *supra* note 124; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, in *CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT* 390 (Kimberlé Crenshaw et al. eds, 1995).

¹²⁸ *See* Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-enforcement*, 34 U.C. DAVIS L. REV. 1005, 1017 (2001).

¹²⁹ Poor Black women also experience limited avenues for economic mobility. *Cf.* Michelle S. Jacobs, *Piercing the Prison Uniform of Invisibility for Black Female Inmates*, 94 J. CRIM. L. & CRIMINOLOGY 795, 811 (2004) (“Only four out of ten women reported that they had been employed full-time prior to their arrest, as compared to six out of ten men. More strikingly, just under 8 percent of male inmates had been receiving welfare assistance prior to arrest, while nearly 30 percent of female inmates reported receiving welfare assistance at the time just before arrest.”).

¹³⁰ *See* Michele Estrin Gilman, *Welfare, Privacy, and Feminism*, 39 U. BALT. L.F. 1, 5–7 (2008); Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1579–84 (1996) (reviewing LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE* (1994), and QUADAGNO, *supra* note 100).

¹³¹ JOHNNETTA BETSCH COLE & BEVERLY GUY-SHEFTALL, *GENDER TALK: THE STRUGGLE FOR WOMEN’S EQUALITY IN AFRICAN AMERICAN COMMUNITIES* 188 (2003).

These stereotypes of Black women justify the excessive monitoring by police, public welfare agencies, and private individuals.¹³² Indeed, applicants for social welfare programs are subjected to a variety of degrading treatments that are ostensibly designed to root out fraud. These treatments include fingerprinting, photographing, DNA testing to determine the paternity of children, and drug testing.¹³³ Moreover, law enforcement has utilized information supplied by applicants to pursue unrelated criminal prosecutions. For example, under the changes promulgated by PRWORA, “law enforcement officers now actively use the food stamp records of local social service agencies to locate and apprehend individuals with outstanding arrest warrants.”¹³⁴

The presumption that subsidy reliance is an indicator of criminality animates many of these intrusive practices. This presumption of criminality is made possible by the racialization of welfare recipients as Black and the ideological constructs that attach to Blackness as a racial construct. To the extent that those who are subsidy reliant are viewed as irresponsible or deviant and seeking to obtain benefits fraudulently, governmental oversight into even the most intimate areas of their lives is seen not only as reasonable but also as necessary. Participation in a social welfare program, as in the criminal justice system, is viewed as requiring the relinquishment of rights, such as the right to privacy and the right to be free of unreasonable searches and seizures. In the context of housing, for example, welfare receipt allows governmental officials to “violate the sanctity of the home and degrade and humiliate recipients.”¹³⁵ The notion of presumed criminality within welfare systems therefore legitimizes racial discrimination, as welfare receipt serves as a proxy for race and allows for policing as a mechanism of exclusion and of enforcement of racial boundaries.

Presumed criminality and the authorization of law enforcement’s use of data collected through state welfare agencies grew largely out of the Supreme Court’s decision in *Wyman v. James*.¹³⁶ In *Wyman*, the Court upheld the ability of caseworkers to make warrantless visits to the homes of families utilizing social assistance.¹³⁷ The Court also expressed its distaste for the plaintiff, Ms. James, a Black woman, and how she ran her household. In considering a Fourth Amendment claim, the Court expressed its dislike for her “attitude,”

¹³² See PAULA C. JOHNSON, *INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON* 44 (2003).

¹³³ See Gilman, *supra* note 130, at 2, 6.

¹³⁴ Gustafson, *supra* note 34, at 670; see 42 U.S.C. § 608 (2006).

¹³⁵ Gustafson, *supra* note 34, at 646 (quoting Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 *YALE L.J.* 1347, 1360 (1963)) (internal quotation marks omitted).

¹³⁶ 400 U.S. 309 (1971).

¹³⁷ *Id.* at 326.

“evasiveness,” and “belligerency.”¹³⁸ This disdain for the plaintiff may have influenced the Court’s decision to uphold the search as administrative in nature and therefore outside the scope of the Fourth Amendment. While the visits at issue were designed primarily to ensure “the welfare, not the prosecution, of the aid recipient for whom the worker ha[d] profound responsibility,”¹³⁹ the case has been extended to authorize warrantless searches of households receiving state subsidies when the goal is to detect and prosecute criminal fraud.¹⁴⁰

In *Sanchez v. County of San Diego*,¹⁴¹ for example, a number of women who relied on public assistance challenged Project 100%, a program developed by the San Diego County district attorney. Under the program, San Diego County applicants to the California Work Opportunity and Responsibility to Kids program (CalWORKs) were required to submit to a home visit by a public assistance fraud investigator from the district attorney’s office.¹⁴² During one home visit, the fraud investigator inspected an applicant’s home, peering into closets and even examining the trash. Following the walk-through, “eligibility information [was] then turned over to eligibility technicians who compare[d] that information with information supplied by the applicant.”¹⁴³ Applicants who declined to allow fraud investigators access to their homes were summarily denied assistance.¹⁴⁴

Relying on *Wyman*, the Ninth Circuit found that the inspections did not constitute a Fourth Amendment search.¹⁴⁵ Instead, the majority characterized the inspection as administrative, rather than criminal, in nature. The majority reached this conclusion notwithstanding the fact “that if the home visit reveals information that an applicant may have received CalWORKs benefits in the past to which the applicant was not entitled, this information may lead to a subsequent criminal investigation.”¹⁴⁶ Additionally, investigators routinely made “referrals for criminal investigation[s] . . . if they discover[ed] evidence of contraband, child abuse, or a subject with outstanding felony warrants.”¹⁴⁷

¹³⁸ *Id.* at 322 n.9.

¹³⁹ *Id.* at 323.

¹⁴⁰ See *Sanchez v. Cnty. of San Diego*, 464 F.3d 916, 932 (9th Cir. 2006) (Fisher, J., dissenting).

¹⁴¹ *Id.*

¹⁴² See *id.* at 919 (majority opinion). California Work Opportunity and Responsibility to Kids is California’s state welfare program for which, in general, poor families with children are eligible. See *California Work Opportunity and Responsibility to Kids*, CDSS, <http://www.cdss.ca.gov/calworks> (last visited July 27, 2012).

¹⁴³ *Sanchez*, 464 F.3d at 918.

¹⁴⁴ *Id.* at 919.

¹⁴⁵ *Id.* at 920–21.

¹⁴⁶ *Id.* at 919 n.3.

¹⁴⁷ *Id.*

Furthermore, the court found that even if the inspections constituted a search, the plaintiffs had no reasonable expectations of privacy given their reliance on government *aid*.¹⁴⁸ To support this conclusion, as Judge Raymond Fisher noted in dissent, “the majority relies on *Griffin v. Wisconsin*, a case that upheld the constitutionality of a warrantless search of a probationer’s home.”¹⁴⁹ Thus, subsidy-reliant women were presumed to be criminals and placed on the same level as individuals who, because of a criminal conviction, formally lost Fourth Amendment protections.

The presumed criminality, racialization, and gendering of welfare and the erosion of constitutional rights for subsidy-dependent households combine to create the perfect storm of regulation of Black female-headed households in predominately white communities. What has been deemed the legitimate regulation of welfare recipients masks the racial profiling and policing of bodies and geographic borders. The regulation of subsidy programs and those who rely on them, therefore, operates as pretext for disciplining the private and intimate lives of Black women and regulating the physical spaces they occupy. Although police monitoring of subsidy-reliant households is ostensibly race neutral and devoid of the racial animus typically required for a showing of intentional racial discrimination under the prevailing antidiscrimination regime, I argue that the surveillance of subsidy-reliant Black women in white communities operates in many ways that are analogous to the formally repudiated racially restrictive covenant.

IV. THE “NEW” RACIALLY RESTRICTIVE COVENANT: THE REGULATION AND SURVEILLANCE OF POOR BLACK WOMEN IN SECTION 8 HOUSING

While the racially restrictive covenant has been repudiated as a formal matter, there are a number of ways in which the policing of Black women on Section 8 is analogous to the racially restrictive covenant in both substance and form. First, the logic of each regime rests on the association between Black residents, disorder, and declining home values. Indeed, residents in these communities saw the economic harm of a Black Section 8 household as more deleterious than a foreclosure. Second, each of these communities was marked by white collective action to exclude Black residents through organized neighborhood associations for the express purpose of keeping individuals participating in the Section 8 out of their communities. As I will describe below, not only did these associations pressure public officials, they pressured and harassed

¹⁴⁸ *Id.* at 927 (“[A] person’s relationship with the state can reduce that person’s expectation of privacy even within the sanctity of the home.”).

¹⁴⁹ *Id.* at 932 (Fisher, J., dissenting) (citation omitted).

other property holders who would otherwise be inclined to rent to Section 8 voucher holders. Third, just as in the context of the pre-*Shelley* racially restrictive covenant, state authority is mobilized to maintain racialized boundaries.

In the communities discussed below, white residents invoked state authority in the form of policing as a mechanism to maintain racial boundaries. In Antioch, a suburb of the San Francisco Bay Area, and Lancaster and Palmdale, suburbs of Los Angeles, Section 8 families headed by poor Black women were subject to law enforcement's solicitation of complaints about Section 8 households from residents.¹⁵⁰ Once a resident filed a complaint, police aggressively investigated Section 8 families for largely noncriminal activity and sought to have their vouchers revoked by asserting that these investigations yielded evidence of lease violations.¹⁵¹ Black women on Section 8, however, were not the only individuals subject to harassment. Rather, law enforcement harassed and surveilled Black women who were erroneously presumed to be on Section 8¹⁵² and pressured Section 8 landlords not to rent to Section 8 families.¹⁵³

In communities such as in Antioch, Lancaster, and Palmdale, hostility toward subsidy-reliant households has served as a proxy for racial and gendered animus toward Black women. Black female-headed households were equated with crime, blight, and violence in coded racial language.¹⁵⁴ They were accused of committing welfare fraud because of their reliance on housing vouchers to pay a portion of their rent. The ability of neighborhood associations and law enforcement to utilize Section 8 as a basis to regulate poor Black families, however, is not accidental. Rather, it relies on historical and contemporary associations between race, gender, social welfare, and criminality. These racial and gendered associations are deployed not only in the context of policing but also in political discourses regarding reductions in spending for public benefits and the punitive orientation of social welfare policies.

In the Subparts that follow, I discuss the history of the Section 8 voucher program, its use by public and private actors to regulate households headed by poor Black women, and the ways these strategies cohere into a structure that is analogous to the racially restrictive covenant.

¹⁵⁰ Plaintiff's Motion for Class Certification and Supporting Points and Authorities at 8–9, *Williams v. City of Antioch*, No. C-08–2301 (N.D. Cal. Jan. 12, 2010) [hereinafter Motion for Class Certification].

¹⁵¹ *Id.* at 11.

¹⁵² *Id.*

¹⁵³ *Id.* at 12.

¹⁵⁴ See VOIGHT ET AL., *supra* note 15, at 10; Moore, *supra* note 14.

A. *Section 8 and Racial Panic in Traditionally White Communities*

In 1974, the federal government enacted legislation that “signaled a significant shift in the federal housing strategy from locally owned public housing to privately owned rental housing.”¹⁵⁵ The Housing and Community Development Act of 1974¹⁵⁶ privatized housing and moved away from large-scale public housing projects, which critics charged concentrated poverty.¹⁵⁷ Instead, the Act authorized the creation of the Section 8 Housing Choice Voucher Program, a federally funded housing program designed to “aid lower income families in finding a decent and safe place to live in an economically mixed community.”¹⁵⁸ Indeed, Section 8 housing vouchers were envisioned as a way to break up poor enclaves in urban centers by “dispers[ing] families throughout the community”¹⁵⁹ and to allow more people to move to economically integrated communities, where they could potentially get better jobs and send their children to better schools.¹⁶⁰

To qualify for participation in the Section 8 program, an applicant household must earn below 50 percent of the median income for the relevant jurisdiction.¹⁶¹ Voucher holders pay up to 30 percent of the rent and a local housing authority pays the remainder directly to the landlord.¹⁶² Those who successfully obtain a Section 8 voucher can utilize the voucher in a neighborhood of their choosing.¹⁶³ Individuals, however, are not eligible for the Section 8 voucher if they have been convicted of certain types of criminal offenses. Moreover, families that have successfully obtained a Section 8 voucher may have them terminated if they fail to report income, fail to disclose additional residents who are not listed on the lease agreement filed with the local housing authority, or otherwise violate the terms of their Section 8 lease.¹⁶⁴

¹⁵⁵ U.S. DEP’T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 1–3 (2001), available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11745.pdf.

¹⁵⁶ Pub. L. No. 93–383, 88 Stat. 633.

¹⁵⁷ See, e.g., Cara Hendrickson, *Racial Desegregation and Income Deconcentration in Public Housing*, 9 GEO. J. ON POVERTY L. & POL’Y 35, 40–43 (2002); Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1290–1305 (1995).

¹⁵⁸ 42 U.S.C. § 1437f(a).

¹⁵⁹ U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 155, at 1–3.

¹⁶⁰ *Id.*

¹⁶¹ Rotem, *supra* note 11, at 1978.

¹⁶² See Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act’s New Frontier*, 31 HARV. C.R.-C.L. L. REV. 155, 157 (1996).

¹⁶³ *See id.*

¹⁶⁴ See Angela McNair Turner, *The Elephant in the Hearing Room: Colorblindness in Section 8 Voucher Termination Hearings*, 13 BERKELEY J. AFR.-AM. L. & POL’Y 45 (2011).

As the name suggests, housing choice is an important element of the Section 8 program. According to the Department of Housing and Urban Development (HUD), Section 8 vouchers allow for both “a choice of housing and anonymity.”¹⁶⁵ To function, both the privatization and decentralization of public housing depend on private landlords’ willingness to accept Section 8 vouchers. The program, however, operates on a terrain of racialized community boundaries and in the context of a pervasive history of housing segregation. Consequently, Section 8 recipients often have a very difficult time obtaining housing in the predominately white, high-opportunity neighborhoods that the program was designed to integrate.¹⁶⁶

Despite the intentions of the Section 8 program, recipients are often subject to racial discrimination that prevents them from moving into economically and racially segregated communities.¹⁶⁷ Because the program relies on the private market to provide the rental properties, many Section 8 recipients confront landlords who are unwilling to rent to them. Moreover, Black and Latino recipients confront a higher level of discrimination when seeking housing.¹⁶⁸ A Chicago study estimated that recipients are “denied access to approximately 70% of the market rate units that are supposedly available to them.”¹⁶⁹ Consequently, “[m]any recipients end up using their subsidies to pay for their current low-income housing units or move within their own segregated neighborhoods.”¹⁷⁰

After 2005, however, the economic downturn opened up opportunities for Section 8 recipients to obtain housing in a number of predominately white communities that were formerly unavailable to them.¹⁷¹ Cities like Antioch, Lancaster, and Palmdale had expanded at a rapid pace and were devastated by the foreclosure crisis.¹⁷² Faced with the prospect of going into foreclosure or

¹⁶⁵ U.S. DEPT’ OF HOUS. & URBAN DEV., *supra* note 155, at 1–3.

¹⁶⁶ See generally Flagg, *supra* note 39; Rotem, *supra* note 11.

¹⁶⁷ See generally Rotem, *supra* note 11.

¹⁶⁸ *Id.* at 1981. Manny Fernandez, *Bias Is Seen as Landlords Bar Vouchers*, N.Y. TIMES, Oct. 30, 2007, <http://www.nytimes.com/2007/10/30/nyregion/30section.html>.

¹⁶⁹ Rotem, *supra* note 11, at 1982 (quoting LAWYERS’ COMM. FOR BETTER HOUS., LOCKED OUT: BARRIERS TO FOR HOUSING VOUCHER HOLDERS, REPORT ON SECTION 8 HOUSING CHOICE VOUCHER DISCRIMINATION 11 (n.d.), available at <http://lcbh.org/images/2008/10/housing-voucher-barriers.pdf>) (internal quotation marks omitted).

¹⁷⁰ *Id.* (alteration in original) (quoting Lisa M. Krzewinski, Book Note, *Section 8’s Failure To Integrate: The Interaction of Class-Based and Racial Discrimination*, 21 B.C. THIRD WORLD L.J. 315, 320–21 (2001)) (internal quotation marks omitted).

¹⁷¹ Moore, *supra* note 14.

¹⁷² *Id.* (noting that “Antioch’s population grew to 101,000 in 2005, from 73,386 in 1995,” that “the city built about 4,000 housing units in the early years of this decade,” and that Antioch has “one of the highest foreclosure rates in the state, with about 23 of every 1,000 homeowners losing their homes as of June”).

renting to low-income Section 8 recipients, many landlords chose the latter.¹⁷³ Landlords advertised acceptance of Section 8 vouchers, and Section 8 recipients responded, seeking better opportunities for themselves and their families.¹⁷⁴

In Antioch, for example, the number of Section 8 recipients increased by 50 percent between 2003 and 2005, from 1000 homes to 1500.¹⁷⁵ Nevertheless, the number of Section 8 households was relatively small—roughly 4 percent of all households in the city. African Americans composed roughly 56 percent of the Section 8 recipients in Antioch.¹⁷⁶ At the same time, Antioch's overall Black population, which was driven by non-Section 8 homeowners and renters, increased from 3 percent in 1990 to 20 percent in 2005.¹⁷⁷ In Lancaster and Palmdale, a similar demographic shift emerged. Roughly 3600 families with Section 8 vouchers moved to these cities.¹⁷⁸ According to HUD's statistics for 2008, 70 percent of Lancaster Section 8 tenants were Black.¹⁷⁹ In Palmdale, 67 percent of Section 8 participants identified as Black.¹⁸⁰ Like Antioch, these suburban communities experienced significant increases in their Black populations overall. Over the thirty-year period from 1980 to 2010, the Black population of Lancaster increased from 3 percent to just over 20 percent.¹⁸¹ As the presence of Blacks and Black-headed Section 8 households increased in predominately white, suburban communities, so too did white residents' hostility.

B. *Blackness as Disorder and the Maintenance of Racial Boundaries in White Communities*

The proliferation of the racially restrictive covenant in the early twentieth century relied on and reinforced constructions of Blackness as a disfavored and devalued identity. Today, homeowners in cities such as Antioch and Lancaster likewise contend, albeit in race-neutral terms, that excluding poor,

¹⁷³ *Id.* (“Federal officials and housing experts say that the increase in vouchers was offset by people being forced out of federal housing projects that closed and by renters moving into foreclosed properties.”).

¹⁷⁴ *Id.* (“The United States Department of Housing and Urban Development issued 50,000 more vouchers for suburban relocations in 2007 than in 2005, bringing the total number of renter families to 2.1 million.”); *see also* Motion for Class Certification, *supra* note 150, at 6.

¹⁷⁵ *See* Moore, *supra* note 14.

¹⁷⁶ *See* VOIGHT ET AL., *supra* note 15, at 2.

¹⁷⁷ *See* Moore, *supra* note 14.

¹⁷⁸ *See* Complaint at 3, Cmty. Action League v. City of Lancaster, No. CV11-04817-ODW-VBKx (C.D. Cal. June 7, 2011), *available at* <http://www.publiccounsel.org/tools/assets/files/Antelope-Valley-Fair-Housing-COMPLAINT-060711.pdf>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 2-3.

¹⁸¹ *See* Jennifer Medina, *Subsidies and Suspicion*, N.Y. TIMES, Aug. 10, 2011, http://www.nytimes.com/2011/08/11/us/11housing.html?_r=1.

subsidy-reliant Black women and their families from their predominately white community is a practice that enhances or maintains property values. The homeowners maintain this concern even in the face of foreclosure as the alternative to renting to a Section 8 voucher holder. This justification demonstrates that whiteness and its relationship to a geographic space is the implicit rationale for the widespread efforts to exclude Black women and their families from white communities. Indeed, the notion that homeowners would prefer foreclosure to a Black female-headed household demonstrates that it is not the productive use of property that generates value but rather its owner's racial identity.

For example, Section 8 households in Antioch, Lancaster, and Palmdale were blamed for blight, crime, and violence. Residents and politicians alike used racialized language and imagery to suggest that subsidy reliance was synonymous with criminality that must be policed and regulated. In May 2006, for example, a number of Antioch residents organized under the banner of United Citizens for Better Neighborhoods (UCBN) in response to the growing number of Section 8 households. The organization suggested that Section 8 residents were dragging the city down by increasing "blight and crime" and sought government intervention to reduce the number of Section 8 properties in the city.¹⁸²

At a city council meeting convened largely in response to UCBN, one city council person in Antioch suggested that Section 8 residents were "magnet[s]" for problems in the city.¹⁸³ According to a report issued by the city in November 2006, Section 8 residents' "behavior patterns are disruptive; and they bring crime, drugs and disorder to the neighborhood."¹⁸⁴ Residents testified regarding their fear of African American youth, claiming that they were hanging out unsupervised on city streets.¹⁸⁵ In Lancaster and Palmdale, city officials contended that parents neglected their children's educational needs and attempted to evict parents from Section 8 housing if their children were designated as truant from school.¹⁸⁶ In Antioch, city council members suggested that Antioch was going to become like the cities of Richmond and Oakland, which have large Black populations and reputations for high crime rates.¹⁸⁷

¹⁸² See Sarah Krupp, *Housing Chief Says Satellite Will Help Area*, CONTRA COSTA TIMES, May 19, 2006, at F4 (internal quotation marks omitted).

¹⁸³ See Sarah Krupp, *City Seeking New Rental Regulations*, CONTRA COSTA TIMES, Feb. 27, 2006, at F4 (internal quotation marks omitted).

¹⁸⁴ First Amended Complaint at 9, *Williams v. City of Antioch*, No. C-08-2301 BZ (N.D. Cal. July 16, 2008) (internal quotation marks omitted).

¹⁸⁵ Moore, *supra* note 14.

¹⁸⁶ See Complaint, *supra* note 178, at 7.

¹⁸⁷ First Amended Complaint, *supra* note 184, at 10-11.

The fears that provide the operating logic for the broad use of segregation as a mechanism of racial control are also deeply gendered. For example, while the fear of Black crime and sexual deviance animated the early use of racially restrictive covenants, this fear was most salient with respect to historical constructs of Black men as hypercriminal and as threats to white women's sexual virtue. Against the backdrop of these racialized fears, the racially restrictive covenant was designed to ensure an impassable barrier, embodied by residential borders, between white and Black identities. Racialized barriers established by restrictive covenants regulated broader access to social and economic opportunities in the form of schools and employment.¹⁸⁸ Black exclusion from housing opportunities affected not only where Blacks could live but also the heights to which they could aspire.

More recently, in cities such as Antioch and Lancaster, white homeowners, law enforcement, and community leaders similarly trade on gendered fears of Black crime and sexual deviance as the implicit justification for the regulation and exclusion of Black Section 8 households. Indeed, utilizing Section 8 as the basis for regulation of poor Black women draws upon the racial and gendered history of social welfare programs more generally. Moreover, while the campaign to exclude Black Section 8 households was instigated by concerns about crime and the moral deficiencies of the Black newcomers, the concerns were expressed in both racial and gendered language. The intersectional racial and gender dynamics at play in these communities is most clearly demonstrated through investigations into Black women's intimate sexual lives under the auspices of concerns regarding "unauthorized tenants" who were often the boyfriends or partners of women.¹⁸⁹ Moreover, as public sentiment transformed into a full-blown moral panic, politicians and private citizens alike framed their opposition to Section 8 around concerns related to welfare fraud and the child-rearing abilities of Section 8 voucher holders through references to crimes committed by unsupervised children.

C. *White Collective Action*

In both the era of the racially restrictive covenant and the era of police regulation and surveillance, the collective action of white residents ensured the efficacy of exclusionary efforts. In the early twentieth century, private residents monitored not only Blacks but also their neighbors to determine whether the terms of racially restrictive covenants were being violated. White

¹⁸⁸ See generally IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005).

¹⁸⁹ See *infra* notes 216–219.

property owners who did not adhere to the terms of the racially restrictive covenant were subject to discipline by other white homeowners through ostracism and litigation.

Similar group dynamics operate in communities seeking to exclude Black Section 8 households. In Antioch, Lancaster, and Palmdale, the campaign to eliminate Section 8 households from the cities was led by neighborhood associations that successfully persuaded elected officials to direct police resources toward the regulation of the disfavored class of households. Members of the neighborhood associations disciplined and punished homeowners they suspected of failing to adhere to agreed-upon norms with respect to Black women-headed households on Section 8 by reporting their properties to police and local housing authorities.

The surveillance of Section 8 residences was privatized through the cooperation of neighbors and residents. In Antioch, the residents' group United Citizens for Better Neighborhoods (UCBN) was organized with the stated purpose "to combat problems associated with Section 8 rentals." The group implored residents to send "[a]ll complaints involving Section 8 recipients . . . in writing . . . to the housing authority for investigation."¹⁹⁰ UCBN called for Antioch's "mayor and other city leaders to implement a comprehensive study that would identify Section 8 rental properties that require frequent police intervention."¹⁹¹ In Lancaster, residents prevailed on the city council to create a neighborhood commission that streamlined the process for reporting alleged nuisance issues and Section 8 violations.¹⁹² The complaints submitted to police were typically noncriminal in nature. For example, neighbors often complained about barking dogs, kids playing basketball in the street, and loud music.¹⁹³ One neighbor complained to the city when a vacant house on the street was made available to Section 8 voucher holders. She asked the city to prevent the home from being occupied by a Section 8 family, noting that "[t]hese beautiful homes end up being rented to unscreened, disrespectful, and other criminal tenants and ruin the homes and the surrounding neighborhoods."¹⁹⁴

In Lancaster, residents utilized traditional and social media to monitor Section 8 households. For example, community members posted information

¹⁹⁰ See VOIGHT ET AL., *supra* note 15, at 10 (alterations in original) (quoting Gary Gilbert, Letter to the Editor, *CONTRA COSTA TIMES*, Mar. 24, 2006) (internal quotation marks omitted).

¹⁹¹ *Id.* (quoting Gilbert, *supra* note 190) (internal quotation marks omitted).

¹⁹² Complaint, *supra* note 178, at 28–29

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 9–10 (internal quotation marks omitted).

about suspected Section 8 households on the internet.¹⁹⁵ In one instance, after information about a suspected Section 8 property was posted, the residents of the property reported that neighbors began to take pictures of their house and that vandals spray painted “I hate Section 8” and “Nigger” on their garage.¹⁹⁶ In Antioch, residents posted signs on the doors of people they believed to be Section 8 voucher holders. The signs read, “No more Section 8. Save Antioch NOW. We THE RESIDENTS are watching YOU.”¹⁹⁷ The disciplinary apparatus, however, extended beyond private homeowners to include the police.

D. *Private Collaboration with Public Entities*

An additional, and essential, characteristic shared by the racially restrictive covenant and contemporary policing of Black women in Section 8, is in the deployment of the coercive power of the law. Indeed, the judicial enforcement of the racially restrictive covenant is its most significant characteristic given that such covenants are ineffective without some mechanism to ensure compliance. Prior to the Supreme Court’s decision in *Shelley v. Kraemer*,¹⁹⁸ white homeowners could sue to enjoin the sale of a home to someone who was nonwhite. Moreover, even the threat of litigation could cause homeowners to comply with the terms of the covenant in the absence of legal action. The ability to enforce the covenants in court imbued them and the goal of racial exclusion with a stamp of legitimacy.

Similar dynamics operate in Antioch, Lancaster, and Palmdale, albeit through the use of police and politicians rather than the Court. In Antioch, city council members and law enforcement collaborated with community groups (such as UCBN) to generate complaints regarding Section 8 tenants for submission to police or to the housing authority for further investigation.¹⁹⁹ Officers solicited neighbor complaints by placing door hangers on the homes of suspected Section 8 recipients and their neighbors.²⁰⁰ The door hangers invited neighbors to call police regarding so-called quality-of-life issues in their community.²⁰¹ The complaints usually specified whether tenants used Section 8 vouchers.²⁰² If this

¹⁹⁵ *Id.* at 38.

¹⁹⁶ *Id.* at 13.

¹⁹⁷ VOIGHT ET AL., *supra* note 15, at 10 (quoting Krupp, *supra* note 182) (internal quotation marks omitted)/

¹⁹⁸ 334 U.S. 1 (1948).

¹⁹⁹ *Id.* at 8–9.

²⁰⁰ Motion for Class Certification, *supra* note 150, at 6, 9.

²⁰¹ *Id.* at 9.

²⁰² *Id.*

information was not provided, officers would often follow up with residents to determine whether the subject of the complaint was a Section 8 recipient.²⁰³

Similarly, in Lancaster and Palmdale, white individuals and neighborhood associations who objected to the presence of Black female-headed Section 8 households in their communities used the coercive power of the law to enforce and effectuate their exclusion. For example, individuals and groups prevailed upon legislative bodies to pass nuisance ordinances and to impose a requirement that landlords obtain licenses prior to renting to Section 8 households. Politicians, for their part, were more than willing to align themselves with the rhetoric and demands of residents.

In Lancaster, the mayor asserted that Section 8 was “crushing the community” and that it was “time to go to war.”²⁰⁴ The response to the moral panic regarding Section 8 drew upon longstanding notions of recipients as presumed criminal and morally deviant. Such a framing of recipients invited a response governed by principles of crime and punishment.²⁰⁵ Thus, the coercive power of the law functioned most significantly through the deployment of police units dedicated to regulating and policing Section 8 households.

The cities of Antioch, Lancaster, and Palmdale formed police units specifically to address so-called quality-of-life issues and issues related to rental properties in various neighborhoods.²⁰⁶ In reality, however, the police units focused on surveilling, regulating, and intimidating Black Section 8 voucher holders.²⁰⁷ Non-Black section 8 voucher holders were largely ignored by these units. Rather, in an effort to push Black Section 8 households out of their communities, police engaged in broad surveillance of these households (more often than not for noncriminal activities), engaged in warrantless searches of these homes, and investigated the intimate lives of Black women on Section 8, including seeking information about their children and sexual partners.

In Lancaster and Palmdale, for example, the specialized police and administrative units obtained lists of all Section 8 properties.²⁰⁸ Law enforcement agents engaged in multiagency compliance checks of these properties, bringing together sheriff’s deputies with welfare fraud investigators, often with as many

²⁰³ *Id.*

²⁰⁴ *Id.* at 26 (internal quotation marks omitted).

²⁰⁵ See generally *id.*; Motion for Class Certification, *supra* note 150, at 4–5; VOIGHT AT AL., *supra* note 15, at 12–16.

²⁰⁶ Complaint, *supra* note 178; Motion for Class Certification, *supra* note 150.

²⁰⁷ Complaint, *supra* note 178, at 16–20; Motion for Class Certification, *supra* note 150, at 4–5; VOIGHT ET AL., *supra* note 15, at 14–19.

²⁰⁸ Complaint, *supra* note 178, at 16–23.

as fifteen armed agents entering into homes of Section 8 residents.²⁰⁹ Some sweeps of Section 8 homes “involve[d] not only the Sheriff’s deputies, but also the Department of Children and Family Services, the Probation Department and Code Enforcement officials.”²¹⁰

When officers did not have the right to enter Section 8 properties under the auspices of an administrative compliance check, city ordinances permitted officers to investigate neighbor complaints against Section 8 households.²¹¹ Officers were alleged to have unnecessarily used handcuffs or weapons during searches.²¹² Families often felt threatened with arrest or termination of their housing vouchers if they did not consent to searches of their homes.²¹³ As part of their investigations of Section 8 households, police routinely obtained school and other records of minor children.²¹⁴ In Antioch, members of the specialized unit engaged in searches of homes without consent and monitored Section 8 households by parking squad cars on blocks where voucher holders were known to live.²¹⁵

Instead of investigating crimes against Black women on Section 8, the specialized police units used at least two calls for such crimes as opportunities to investigate potential violations of lease terms. For example, in Antioch, a Black woman phoned police to seek assistance with a domestic violence situation.²¹⁶ When police arrived, she alleged that they did not vigorously investigate her complaint but instead asked her about her Section 8 status and whether her alleged assailant was living with her.²¹⁷ In another case, police came to the home of another Black woman in response to a break-in, and instead of investigating that claim, the police searched her home.²¹⁸ Out of fear of inviting additional harassment, some Black women stopped calling the police when they needed assistance.²¹⁹

²⁰⁹ *Id.*

²¹⁰ *Id.* at 17.

²¹¹ *Id.* at 22 (citing Palmdale and Lancaster city ordinances).

²¹² *Id.* at 18, 37.

²¹³ *See, e.g., id.* at 35.

²¹⁴ *Id.* at 18.

²¹⁵ *See* VOIGHT ET AL., *supra* note 15, at 14–15; Motion for Class Certification, *supra* note 150, at 14, 17.

²¹⁶ *See* Motion for Class Certification, *supra* note 150, at 10.

²¹⁷ *See* First Amended Complaint, *supra* note 184, at 12, 14–15.

²¹⁸ Complaint, *supra* note 178, at 35.

²¹⁹ *Housing Discrimination in Antioch, CA: An Overview*, AFR. AM. POL’Y F., http://aapf.org/housing_discrimination (last visited July 23, 2012) (interviewing the lead plaintiff in *Williams v. City of Antioch*, Santeya Williams, who described her fear of calling the police for protection due to harassment).

Officers also targeted landlords that rented to Section 8 recipients.²²⁰ Landlords were threatened with criminal and civil penalties for any nuisance activity occurring on their property.²²¹ The cities implemented programs to regulate landlords who rented to individuals with Section 8 vouchers. The City of Lancaster, for example, passed an ordinance that required landlords to obtain licenses to rent units in multiand single-family buildings.²²² As part of the application, landlords had to indicate whether they accepted Section 8 tenants.²²³ To obtain the license, the ordinance required that the city inspect all units and allowed for additional inspections to take place if complaints were lodged against tenants.²²⁴ In Lancaster, the city could fine landlords under the nuisance ordinance.²²⁵ Similar types of harassment occurred in Antioch. In one woman's case, officers sent letters and repeatedly called her Antioch landlord regarding her tenancy.²²⁶ Antioch police followed up with in-person visits to the landlord.²²⁷ During one of the calls an officer allegedly told the landlord that he should be careful when renting to African Americans.²²⁸ As a result of the letters and calls, the landlord forced the woman to move out of her home.²²⁹

After surveilling and searching the homes of Section 8 tenants, law enforcement agents petitioned local housing authorities to terminate Section 8 vouchers.²³⁰ During investigations of Black women on Section 8, police often focused their resources on identifying misbehaving children and men who were claimed to be "unauthorized tenants."²³¹ These alleged "unauthorized tenants" were often the children or intimate partners of voucher holders.²³² The aggressive and targeted tactics of law enforcement resulted in four times more termination recommendations by law enforcement in Lancaster than in the remainder of Los Angeles County.²³³ These petitions, however, were largely unsuccessful.²³⁴ Nevertheless, many women lost their homes or their vouchers

²²⁰ *Id.* at 27–28; Motion for Class Certification, *supra* note 150, at 12–13.

²²¹ Motion for Class Certification, *supra* note 150, at 12–13.

²²² *Id.* at 21–25.

²²³ *Id.* at 22.

²²⁴ *Id.*

²²⁵ Complaint, *supra* note 178, at 27–28.

²²⁶ Motion for Class Certification, *supra* note 150, at 13.

²²⁷ *Id.* at 17.

²²⁸ *Id.* at 13, 17.

²²⁹ *Id.* at 18.

²³⁰ *Id.* at 18–21; Motion for Class Certification, *supra* note 150, at 11–12.

²³¹ Complaint, *supra* note 178, at 20.

²³² Larkin, *supra* note 21.

²³³ Complaint, *supra* note 178, at 19.

²³⁴ *Id.* at 20–21.

as a result of police actions.²³⁵ Others decided to leave the communities as a result of the pervasive harassment by police and private citizens. Consequently, the collaboration between law enforcement and private citizens has accomplished many of the same exclusionary outcomes as did the regime of judicial enforcement of racially restrictive covenants.

E. *Racial Disproportionality and Harassment*

Like the racially restrictive covenant of the early twentieth century, the disproportionate burden of the public and private surveillance and harassment of Section 8 tenants fell on African American households, most of which were headed by women.²³⁶ In Antioch, for example, African Americans composed only 20 percent of the population yet constituted two-thirds of the people investigated by CAT officers.²³⁷ For example, they were four times as likely as whites to be searched based on noncriminal complaints.²³⁸

The pervasive racial marginalization of Section 8 tenants led to rampant racial hostilities toward individual Black women and their families. In a suit filed against the City of Lancaster, a Black woman, identified as Jane Roe, noted that after she had been subject to police searches of her home and publicly identified as a Section 8 recipient, she began to receive racist threats and taunts.²³⁹ Another Black woman was identified as a Section 8 recipient when information about her home was posted on the internet.²⁴⁰ Shortly thereafter, community members began to threaten her and her family—even threatening to burn her house down.²⁴¹ Racial epithets were hurled at her children as they walked down the street. Her children were called “dirty Section 8 niggers.”²⁴² On one occasion, a substance that appeared to be urine was thrown at her children as they played outside of her home.²⁴³ Ultimately, her lease was terminated by her landlord after police contacted him regarding her tenancy. Following the termination of her lease, she was unable to find a landlord willing to accept her Section 8 voucher. She felt that her inability to find a rental was based on the fact that “landlords . . . appeared to accept the . . . message that most Section 8 tenants were criminals and should not be welcomed.”²⁴⁴

²³⁵ *Id.* at 35.

²³⁶ Larkin, *supra* note 21.

²³⁷ Complaint, *supra* note 178, at 2–5.

²³⁸ *Id.* at 2.

²³⁹ *Id.* at 35–36.

²⁴⁰ *Id.* at 38.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* at 39.

As I noted previously, within the public outcry over Section 8, the rhetoric from politicians conflated race, criminality, and participation in the Section 8 program.²⁴⁵ The chief of police in Antioch suggested that Section 8 recipients were committing fraud by living in nice homes that were subsidized with public funds, despite the fact that public subsidy for the cost of housing was precisely the intent of the program.²⁴⁶ The mayor of Lancaster suggested that Blacks were committing fraud simply because they were overrepresented in the class of Section 8 recipients in the city.²⁴⁷ Residents also suggested that recipients were improperly housing formerly incarcerated individuals or were themselves formerly incarcerated and that the city would be “inundated” with criminals.²⁴⁸

While ostensibly race-neutral, these rationales from the public and the resulting investigatory practices by police rely on longstanding ideological constructs of Black women. Black women have been derided in their identities as mothers and cast as propagators of their own criminal activity and that of their children. They have been held up as fraudulent recipients of government aid and deployed as tools to generate support for welfare reform. Black women have been constructed as sexually promiscuous and lacking in moral standards. Taken together, these racialized, gendered stereotypes “provide[] the rationale for society’s restrictions on black female” autonomy.²⁴⁹ This rationale provides the basis for intrusive public and private monitoring of even the most intimate aspects of Black women’s lives and legitimizes the use of police force to remove Black women from historically white communities.

These dynamics—and the central role of Black women’s identities—come together in a form that is analogous to the racially restrictive covenant. Through implicit associations between race, criminality, and subsidy reliance, white collective action to resist the inclusion of poor Section 8 voucher holders from white spaces, and police enforcement of the racialized resistance to Section 8, the basic framework of the racially restrictive covenant is preserved. Just as it was used to outlaw judicial enforcement of the racially restrictive covenant, however, the Supreme Court’s rationale in *Shelley*—that public enforcement of private discrimination is constitutionally impermissible—can be leveraged by poor Black women and their advocates to combat their exclusion from white-identified spaces and to achieve the goals of integration and opportunity that are represented by programs such as Section 8.

²⁴⁵ See *id.* at 10; VOIGHT ET AL., *supra* note 15, at 10–11.

²⁴⁶ Motion for Class Certification, *supra* note 150, at 4–5.

²⁴⁷ Complaint, *supra* note 178, at 32.

²⁴⁸ *Id.* at 27 (internal quotation marks omitted).

²⁴⁹ Roberts, *supra* note 127, at 392.

CONCLUSION

Prior to the Supreme Court's decision in *Shelley*, the judicial enforcement of racially restrictive covenants facilitated the racial domination of Blacks in a particular gendered and racial form. Examining the contemporary exclusion of poor, Black female-headed households from white communities in light of the animating ideologies and characteristics of racially restrictive covenants illuminates critical dynamics of the housing discrimination experienced by Black women and by extension the Black community.

Through the racially restrictive covenant analogy, we can see that Black women are not merely experiencing the collateral consequences of overpolicing and mass incarceration; rather, the criminalization of Black communities has proliferated more broadly, as revealed by an understanding of the ideological constructs of Black women. The examination of the harassment of subsidy-reliant Black women also reveals the myriad ways Black women are increasingly vulnerable to sanction by the criminal justice system as a result of societal marginalization. Thus, the interaction between the welfare and criminal justice systems forcefully contributes to preserving racial stratification through exclusion.²⁵⁰ To the extent that we understand the dynamics leading to the criminalization and marginalization of poor Black women, we can draw upon the moral and legal force of the Court's rationale in *Shelley* to challenge such policing and better construct efforts to contest their exclusion from the most critical of resources: safe and healthy housing in which to live and to raise their families.

²⁵⁰ See generally Ian Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010).