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The Class Differential in Privacy Law

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INTRODUCTION

Many Americans are willing to divulge personal information and even sacrifice civil liberties for the benefits of a wired world. They will turn over their spending habits for the convenience of shopping on-line, submit to body scanners and suitcase searches to travel by air, and tolerate Facebook selling their personal information to third parties in order to network with friends.[1] These sorts of surveillance bargains are rarely struck by the poor. Low-income Americans travel more often by bus than plane, they lack money to shop at Amazon.com, and they are less likely to have a computer that makes social networking possible in the first place.[2] This digital and economic divide does not mean, however, that the poor are insulated from privacy intrusions. On the contrary, they endure a barrage of

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[1] *See* Gary T. Marx, *Soft Surveillance: The Growth of Mandatory Volunteerism in Collecting Personal Information—"Hey Buddy Can You Spare a DNA,"* 10 LEX ELECTRONICA 2 (Winter 2006), http://www.lex-electronica.org/articles/v10-3/marx.pdf (listing various bargains individuals strike between privacy and surveillance). "Although people acknowledge the importance of privacy, most value other things even more." Jeff Sovern, *Opting in, Opting out or No Options at All: The Fight for Control of Personal Information*, 74 WASH. L. REV. 1033, 1058 (1999). For instance, while many people will claim to oppose privacy intrusions, they will willingly turn over Social Security numbers and other personal information to telemarketers. Andrew Askland, *What, Me Worry? The Multi-Front Assault on Privacy*, 25 ST. LOUIS U. PUB. L. REV. 33, 34 (2006); *see also* James P. Nehf, *Recognizing the Societal Value in Information Privacy*, 78 WASH. L. REV. 1, 4 (2003) (people support information privacy, but "understand that [their] interests in privacy must be balanced against other interests").

[2] *See* Lindsay Greer, *Questioning Digital Citizenship: The Answer to Economic and Political Inequity?*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 651, 655-57 (2008) (reviewing KAREN MOSSBERGER ET AL., DIGITAL CITIZENSHIP: THE INTERNET, SOCIETY, AND PARTICIPATION (2008)) (explaining that historically disadvantaged groups, including low-income Americans, have less access to the Internet and lower rates of use).

information-collection practices that are far more invasive and degrading than those experienced by their wealthier neighbors. The law reinforces this class differential in privacy.

Consider the case of Rocio Sanchez.[3] In June 2000, Ms. Sanchez, after separating from her husband, applied for welfare benefits and food stamps at a San Diego County welfare office to support her infant daughter.[4] One month later, an investigator from the Public Assistance Fraud Division of the San Diego District Attorney's Office made an unannounced visit to her home pursuant to a county policy called Project 100%, which required home visits of all welfare applicants who were *not* suspected of fraud or ineligibility.[5] The investigator asked Ms. Sanchez a series of questions about her husband and his whereabouts, when she had last talked with or seen him, and the reasons for their separation.[6] He then searched the home, including her bedroom closet, and left to question her neighbors.[7]

Ms. Sanchez encountered the investigator a few days later when he arrived at her former residence searching for her husband.[8] She was there alone, cleaning the residence so that she could recover the rental security deposit.[9] In her presence, the investigator proceeded to search the bathroom cabinets, the bedroom, and the dresser drawers—all of which were empty.[10] Again, he questioned Ms. Sanchez about her husband, including asking why she was still speaking to her sister-in-law if she was in fact separated.[11] He demanded that she pull out papers from her husband's trash can that might lend clues to his location, remarking that it was "funny" that she had never filed a domestic violence complaint.[12] Two months later, the county approved her application for benefits.[13] Nevertheless, Ms. Sanchez was upset by these interrogations, particularly the accusatory tone taken by the investigator,[14] and she became

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[3] These facts are taken from the First Amended Complaint in *Sanchez v. County of San Diego*. First Amended Complaint for Declaratory & Injunctive Relief, Sanchez v. Cnty. of San Diego, No. 00-CV-1467JM(JFS), 2003 WL 25655642 (S.D. Cal. Mar. 10, 2003), *aff'd*, 464 F.3d 916 (9th Cir. 2006).

[4] *Id.* ¶ 12.

[5] *Id.* ¶¶ 12-13.

[6] *Id.* ¶ 14.

[7] *Id.*

[8] *Id.* ¶ 15.

[9] *Id.*

[10] *Id.*

[11] *Id.* ¶ 16.

[12] *Id.*

[13] *Id.* ¶ 17.

[14] *Id.* ¶ 16.

a plaintiff in a class action lawsuit challenging the constitutionality of Project 100%.

Ultimately, in *Sanchez v. San Diego*, the Ninth Circuit relied on *Wyman v. James*, a Supreme Court opinion from 1973, and upheld the home visits against a Fourth Amendment challenge, reasoning that "a person's relationship with the state can reduce that person's expectation of privacy, even within the sanctity of the home."[15] In a bitter dissent from a denial of a petition for rehearing en banc, seven Ninth Circuit judges called the case "nothing less than an attack on the poor."[16] As the dissenters stated, most government benefits do not flow to the poor, "yet this is the group we require to sacrifice their dignity and their right to privacy."[17] By contrast, "[t]he government does not search through the closets and medicine cabinets of farmers receiving subsidies. They do not dig through the laundry baskets and garbage pails of real estate developers or radio broadcasters."[18] As the dissenters concluded, "This situation is shameful."[19]

Welfare administration is highly devolved in that states and localities have great discretion in how they structure their welfare programs.[20] So in another jurisdiction, Ms. Sanchez might have been subjected to drug tests or finger imaging or unsolicited family-planning advice, such as pressure to implant a Norplant birth control device.[21] Throughout the country, poor women such as Ms. Sanchez face constant surveillance as they must comply with extreme verification requirements to establish eligibility for welfare benefits, travel to scattered offices to procure needed approvals, reappear in person at welfare offices at regular intervals to prove their ongoing eligibility and answer intrusive questions about their child

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[15] Sanchez v. Cnty. of San Diego, 464 F.3d 916, 927 (9th Cir. 2006).

[16] Sanchez v. Cnty. of San Diego, 483 F.3d 965, 969 (9th Cir. 2007) (Pregerson, J., dissenting from the denial of rehearing en banc).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *See* Christine M. Cimini, *Welfare Entitlements in the Era of Devolution*, 9 GEO. J. ON POVERTY L. & POL'Y 89, 101-04 (2002).

[21] *See, e.g.*, Harry Murray, *Deniable Degradation: The Finger-Imaging of Welfare Recipients*, 15 SOC. F. 39 (2000) (discussing finger imaging); *see also* Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401, 404-10 (2000) (discussing Norplant); Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, 19 WM. & MARY BILL RTS. J. 751 (2011) (discussing drug testing).

rearing and intimate relationships.[22] Further, under federal law, all jurisdictions engage in extensive data sharing with other government and private offices to ferret out fraudulent public assistance applications.[23]

The poor are subjected to privacy intrusions not only by governments but also by private parties, such as employers. Although a stated goal of welfare is to move welfare recipients into the workforce,[24] even if Ms. Sanchez obtained a low-wage job,[25] surveillance of her life and personal choices would likely continue. In the white collar workforce, employers regularly monitor e-mail, Internet, and phone communications of their employees, raising the specter that information could "fall[] into the wrong hands or . . . [be] used for a purpose we did not envision when we disclosed it."[26] Nevertheless, most white collar workplace monitoring is invisible and easy to ignore, which may in part explain the lack of public outrage or legislative protections against workplace surveillance.[27] By contrast, low-wage workers are concentrated in service industries.[28] They are more subject to visible—sometimes humiliating—surveillance tactics such as psychological testing, regular drug screening, and overt videotape monitoring.[29]

Criminal justice scholars have described a class differential in privacy under the Fourth Amendment,[30] which protects reasonable expectations of privacy from warrantless government searches and seizures.[31] People who live in crowded, urban neighborhoods and who cannot afford "a freestanding home, fences, [and] lawns," have a lowered expectation of privacy and are thus more likely to suffer

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[22] *See* Amy Mulzer, Note, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means-Tested Welfare Programs*, 36 COLUM. HUM. RTS. L. REV. 663, 664-65 (2005).

[23] *Id.* at 672-73.

[24] 42 U.S.C. § 601(a) (2006) (stating that a purpose of Temporary Assistance for Needy Families (TANF) Act is to "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage").

[25] JOEL F. HANDLER & YEHESKEL HASENFELD, BLAME WELFARE, IGNORE POVERTY AND INEQUALITY 191-99 (2007) (describing how TANF welfare departments have adapted to the work-first mandate).

[26] *See* Nehf, *supra* note 1, at 27.

[27] *See* Daniel O'Gorman, *Looking Out for Your Employees: Employers' Surreptitious Physical Surveillance of Employees and the Tort of Invasion of Privacy*, 85 NEB. L. REV. 212, 273 (2006).

[28] *See* Devah Pager et al., *Employment Discrimination and the Changing Landscape of Low-Wage Labor Markets*, 2009 U. CHI. LEGAL F. 317, 320.

[29] *See infra* notes 219-24 and accompanying text.

[30] U.S. CONST. amend. IV.

[31] *See, e.g.*, Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 401-05 (2003).

warrantless searches by government agents.[32] These realities of geography also mean that poor families are far more likely to become entangled in intrusive child welfare and domestic violence investigations.[33] In addition, the homeless have virtually no privacy at all; courts have held that their meager shelters are not entitled to protection from government searches.[34] At the same time, the federal government mandates computerized tracking of the homeless, requiring them to divulge personal data when they seek social services.[35] Meanwhile, more Americans with financial means are moving into gated and private communities, thus buying themselves privacy.[36] As the experience of Ms. Sanchez reveals, this class differential extends beyond the criminal justice context into every corner of daily life.

Low-income Americans are a diverse group living individualized lives; they are "indescribably varied and multifaceted."[37] Despite this diversity, they share the reality of

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[32] *Id.* at 401.

[33] *See* Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 433-41 (2005) (describing child welfare investigations); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 59-60 (2006) (describing criminal justice interventions in domestic violence cases that result in "poor man's divorce").

[34] *See, e.g.*, D'Aguanno v. Gallagher, 50 F.3d 877, 880 (11th Cir. 1995) (people who lived in a homeless campsite on private property did not have a reasonable interest in privacy); United States v. Ruckman, 806 F.2d 1471, 1473 (10th Cir. 1986) (no reasonable expectation of privacy in a cave located on public lands); Amezquita v. Colon, 518 F.2d 8 (1st Cir. 1975) (squatters on public land had no reasonable expectation to privacy); People v. Thomas, 45 Cal. Rptr. 2d 610, 613 (Cal. Ct. App. 1995) (no reasonable expectation of privacy in a cardboard box used as a residence); Whiting v. State, 885 A.2d 785, 799-801 (Md. 2005) (squatter's expectation of privacy was not reasonable); Commonwealth v. Cameron, 561 A.2d 783, 786 (Pa. Super. Ct. 1989) (squatter in abandoned rowhouse did not have a reasonable expectation of privacy). Homeless persons have had better success with Fourth Amendment challenges to the searches of their personal property. Pottinger v. City of Miami, 810 F. Supp. 1551, 1570-71 (S.D. Fla. 1992) (homeless persons had reasonable expectation of privacy in their personal belongings); State v. Mooney, 588 A.2d 145 (Conn. 1991) (defendant had a reasonable expectation of privacy in a duffel bag and box located in the area under a highway bridge where he was living; court did not rule on whether he had a reasonable privacy interest in his "home" itself). The law is contradictory with regard to homeless shelters. *See* Steven R. Morrison, *The Fourth Amendment's Applicability to Homeless Shelters*, 32 HAMLINE L. REV. 319, 333 (2009).

[35] *See infra* notes 52-63 and accompanying text.

[36] *See* Georgette Chapman Phillips, *Boundaries of Exclusion*, 72 MO. L. REV. 1287, 1302-03 (2007) ("in 2001 there were 7,058,427 households living year-round in gated communities in the United States" and the law upholds these residents' expectations of privacy and rights to exclude others).

[37] JOHN GILLIOM, OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY 20-21 (2001) (describing demographic, political, physical, and regional variations among the poor). On the importance of seeing and understanding the poor as individuals with their own narratives, see Frank Munger, *Identity as a Weapon in the Moral Politics of Work and Poverty*, *in* LABORING BELOW THE LINE 1, 20

experiencing privacy quite differently on a daily basis than do middle and upper class Americans. Given that at least 15 percent of the population—or one out of seven Americans—currently lives below the poverty line,[38] this differential demands attention and discussion. To be sure, sophisticated surveillance technology combined with limited legal protections should be a serious concern for all Americans. Still, for most Americans, these privacy intrusions are felt as a vague sense of unease over being watched along with concerns about identify theft (an old-fashioned crime with a new twist). By contrast, low-income Americans suffer tangible harms from government and corporate surveillance that go beyond discomfort. The privacy intrusions they face are often overt, and the harms are concrete.

The American privacy law regime has developed to reflect middle-class concerns, and as such is focused on preventing the misuse of information after it is collected. By contrast, low-income people tend to face stigmatization at the time information is gathered. The poor interact with the government and low-wage employers in ways that are ongoing and interpersonal, and, as a result, a "right to be left alone"[39] does not protect their interests in dignity and autonomy. This article argues that poor Americans experience privacy differently than those with economic resources and that the law reinforces this differential. This differential has costs not only for the poor, but for all citizens. Our privacy laws and policies should reflect equality norms to ensure that poor Americans are not unfairly subjected to humiliating surveillance tactics.

The class differential in privacy law results from complex interactions between class, race, and gender. Because poor Americans are disproportionately minority and female,[40] it is impossible to talk about class without taking into account how subordination is linked to race and gender. Critical legal theorists have shown that anti-poverty public policies are built on racist, gendered notions about the people who need relief. In

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(Frank Munger ed., 2002). Munger writes, "If we understand [poor persons] not as sinners or saints but as constituents of the mainstream like ourselves, we will be willing to allow them the same latitude to fail or succeed that we grant insiders within our own communities." *Id.* at 15.

[38] *See* Sabrina Tavernise, *Poverty Rate Soars to Highest Level Since 1993*, N.Y. TIMES, Sept. 14, 2011, at A1 (stating that the Census Bureau reported a 15.1 percent poverty rate for 2010).

[39] This foundational concept of privacy was articulated by Samuel D. Warren & Louis D. Brandeis in *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890); *see also* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[40] *See* JOHN ICELAND, POVERTY IN AMERICA 81, 88 (2d ed. 2006).

turn, these public policies impact all poor people—even those who are not minorities or female.[41] The result is that the poor as a group suffer extreme privacy violations, which in turn pose a barrier to self-sufficiency and democratic participation.

Part I of the article describes how low-income Americans experience privacy in the welfare system and low-wage workforce. Women moving along the welfare-to-work continuum face a bevy of humiliating surveillance tactics, and, as Part I explains, the physical and mental health consequences of unfair surveillance undermine welfare's statutory goal of self-sufficiency.[42] Part II of the article analyzes how the law privileges middle-class privacy interests but fails to protect the poor from privacy intrusions. As a constitutional matter, courts often hold that the poor do not have reasonable expectations of privacy entitled to protection. As a statutory matter, laws primarily protect against the misuse of data, rather than its collection, and thus reflect middle-class privacy concerns. As a common law matter, the law focuses on reputational injuries; it has not expanded to prohibit demeaning surveillance practices that target the poor. Accordingly, Part III explores robust conceptions of privacy that focus on values safeguarded by privacy, such as dignity, respect, and trust. This part views privacy as a means rather than an end. It concludes that class equality needs to be a central concern of privacy law and suggests this can be achieved, in part, by ensuring that data collection practices are fair and undertaken with respect for their subjects.

I. SURVEILLANCE OF THE POOR

Privacy is an amorphous concept, despite the considerable efforts of theorists to pin it down. Scholars have variously described privacy as the right to be let alone;[43] the

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[41] *See infra* text accompanying notes 300-03 (discussing Dorothy Brown's theory that racist ideas underpinning Earned Income Tax Credit (EITC) enforcement impact poor white Americans as well); *see also* ICELAND, *supra* note 40, at 38-39 (discussing research showing a misperception that that most poor people are black and how that perception has political consequences); MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 3-4, 60-80, 154-73, 204-06 (1999) (explaining how negative media coverage of poor black Americans has perpetuated stereotypes of the black poor as undeserving and generated public opposition to welfare).

[42] From the perspective of welfare recipients, economic self-sufficiency has multiple dimensions, including "the exercise of personal power and freedom." Elizabeth A. Gowdy & Sue Pearlmutter, *Economic Self-Sufficiency: It's Not Just Money*, 8 AFFILIA 368, 383 (Winter 1993). As discussed *infra*, surveillance undermines autonomy.

[43] Warren & Brandeis, *supra* note 39, at 193.

ability to control personal information[44] and access to the self;[45] a precondition to intimate relationships and the development of community;[46] and an essential component of human dignity, autonomy, personhood, and self-determination.[47] Clearly, privacy is connected with multiple values, and thus a lack of privacy can impact the self as well as interpersonal relationships. For the poor, surveillance by the government and employers implicates multiple values. Part A describes the nature of privacy invasions suffered by the poor in the areas of welfare receipt and the low-wage workplace. These focus areas are not comprehensive, but they illustrate how large societal institutions encroach upon the lives, homes, and bodies of poor individuals. Part B then examines emerging psychological research to assess the harms caused by privacy invasions. These harms amount to far more than hurt feelings; the poor suffer physical and mental health injuries associated with extreme stress.

A. Privacy in Welfare and Low-Wage Employment

Poor people regularly experience privacy deprivations related to their personal information, bodies and homes, and decision making.[48] This surveillance serves to control and limit the autonomy of poor people, and has strong historical roots. "Politically, the purposes of surveying the poor have largely stayed constant for three centuries: containment of alleged social contagion, evaluation of moral suitability for inclusion in public life and its benefits, and suppression of working people's resistance and collective power."[49] Technology has enhanced the ability of the state and private corporations to achieve these ends. Although participation in government entitlement programs and particular employment is technically voluntarily, the reality of life and the marketplace is such that the poor

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[44] ALAN WESTIN, PRIVACY AND FREEDOM 7 (1967).

[45] Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 428 (1980).

[46] *See* JULIE INNESS, PRIVACY, INTIMACY, AND ISOLATION 56, 58 (1992).

[47] *See* Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1655 (1999).

[48] The three broad categories of privacy interests are information, spatial, and decisional. *See* Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1202-03 (1998).

[49] Virginia Eubanks, *Technologies of Citizenship: Surveillance and Political Learning in the Welfare System*, *in* SURVEILLANCE AND SECURITY: TECHNOLOGICAL POLITICS AND POWER IN EVERYDAY LIFE 89, 90 (T. Monahan ed., 2006) (emphasis omitted); *see also* GILLIOM, *supra* note 37, at 19 ("From today's computerized information systems . . . and back to the surveying and badging of the poor in sixteenth-century Europe, governments have closely examined those who seek assistance.").

have little choice but to subject themselves to these privacy invasions. Notably, the surveillance imposed on the poor is usually overt; indeed, part of the purpose is to create stigma. By contrast, other Americans are increasingly subject to "soft" surveillance, which involves less invasive techniques, hidden technologies, and implied consent.[50] These methods of soft surveillance raise deep concerns about civil liberties and lack of choice,[51] but they are profoundly different in character and effect than the unconcealed, coercive surveillance tactics used with low-income populations.

1. Welfare

As discussed in the Introduction, Ms. Sanchez, a welfare applicant, faced informational, spatial, and decisional privacy intrusions by the state. She had to provide welfare officials with detailed information about her family, submit to home searches, and justify the state of her marriage. Her experience is emblematic.[52] A typical applicant for welfare, called Temporary Assistance for Needy Families (TANF), must undergo a multistage, multiday application process consisting of screening interviews, application interviews, group orientations, and employability assessments.[53] She must answer questions

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[50] *See* Marx, *supra* note 1, at 1-3. For instance, Marx describes police asking community members to provide voluntary DNA samples by mouth swab. *Id.* at 1. Marx also describes other "disingenuous communication that seeks to create the impression that one is volunteering when that isn't the case," such as building signs stating that one agrees to a search upon entering the premises and consumer reward programs that rely on giving up personal information. *Id.* at 2.

[51] *Id.* at 5-6. These new tactics are driven by "the mass media's encouragement of fear and perceptions of crises," "the seductiveness of consumption," and "the development of inexpensive, less invasive broad searching tools." *Id.* at 6 (footnote omitted).

[52] For the similarly intrusive questioning poor pregnant women are subjected to as a condition of receiving Medicaid benefits, see *infra* text accompanying notes 358-61, discussing Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 114-16 (2011).

[53] *See* HEALTH SYS. RESEARCH, INC. ET AL., STUDY OF THE TANF APPLICATION PROCESS 2-3, Exs. 2-1 & 3-3 (2003) [hereinafter STUDY OF THE TANF APPLICATION PROCESS], *available at* http://aspe.hhs.gov/hsp/app-process03; PAMELA HOLCOMB ET AL., THE APPLICATION PROCESS FOR TANF, FOOD STAMPS, MEDICAID, AND SCHIP: ISSUES FOR AGENCIES AND APPLICANTS, INCLUDING IMMIGRANTS AND LIMITED ENGLISH SPEAKERS 3-6 to 3-9 (2003), *available at* http://www.urban.org/UploadedPDF/410640.pdf; MARCIA K. MEYERS & IRENE LURIE, THE DECLINE IN WELFARE CASELOADS: AN ORGANIZATIONAL PERSPECTIVE 26 (2005) (conference draft), *available at* http://www.npc.umich.edu/news/events/newdirections/Meyers1.pdf. In Los Angeles County, the criminalization of welfare is seen in the application process:

> Today, a person who wants to apply for public assistance in L.A. County must visit an Eligibility Office. In these prisonlike structures, visitors pass through

ranging from her resources and sustenance needs to her psychological well-being.[54] Her own word is not enough; she must also provide independent verification of her answers to many of these questions, either through her own documentation or through information gathered from third parties,[55] and in some cases, caseworkers conduct investigations themselves.[56] As part of TANF, an applicant must also comply with child support enforcement efforts by providing detailed paternity information about her children.[57]

Once a welfare mother turns over personal data, this information is electronically shared and compared with numerous federal and state databases, as well as commercial databases, to verify eligibility and to ferret out duplicate or otherwise fraudulent applicants.[58] At any time, law enforcement officials can demand that welfare and housing officials turn over personal information about benefits recipients, even when the recipient is not herself suspected of any crime.[59] By contrast, state officials cannot conduct similar fishing expeditions into the bank accounts of those individuals with the means to maintain savings.[60]

Many jurisdictions distribute benefits electronically, which allows them to monitor when and how funds are spent.[61] While affluent Americans submit to market-research surveillance designed to cater to their purchasing preferences, the electronic systems that monitor the poor "facilitate the invasive scrutiny of their purchases and discipline of their

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> metal detectors and past armed security guards on their way to the clerk who is cloistered behind a Plexiglas window. There they must wait for hours in a crowded waiting room before being seen by an Eligibility Worker.

Alejandra Marchevsky & Jeanne Theoharis, *Dropped from the Rolls: Mexican Immigrants, Race, and Rights in the Era of Welfare Reform*, 35 J. SOC. & SOC. WELFARE 71, 79 (2008).

[54] *See* STUDY OF THE TANF APPLICATION PROCESS, *supra* note 53, at 3-7.

[55] *See* MEYERS & LURIE, *supra* note 53, at 27; HOLCOMB ET AL., *supra* note 53, at 3-16.

[56] *See* Mulzer, *supra* note 22, at 676.

[57] 42 U.S.C. § 608(a)(2)-(3) (2000).

[58] *See* Allison I. Brown, *Privacy Issues Affecting Welfare Applicants*, 35 CLEARINGHOUSE REV. 421, 427 (2001); *see also* Samuel V. Schoonmaker IV, *Consequences and Validity of Family Law Provisions in the "Welfare Reform Act,"* 14 J. AM. ACAD. MATRIM. LAW. 1, 10-21 (1997).

[59] *See* Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 668-69 (2009).

[60] *Id.* at 669.

[61] *See* Christopher D. Cook, *To Combat Welfare Fraud, States Reach for Debit Cards*, CHRISTIAN SCI. MONITOR, May 25, 1999, at 5 (describing how states monitor purchases by welfare recipients).

behavior."[62] As a result, these systems limit "clients' autonomy, opportunity, and mobility: their ability to meet their needs in their own ways."[63]

Physical privacy is not only invaded by home searches, but public benefits recipients may also be fingerprinted and photographed, usually through biometric imaging.[64] Moreover, as part of child support enforcement, TANF recipients must agree to DNA testing for themselves and their children if paternity is contested.[65]

Further, TANF permits states to invade the decisional privacy of welfare mothers in order to control their behavior to align with middle-class norms.[66] While the law governing decisional privacy is outside the scope of this article (it involves reproductive rights and family autonomy), it overlaps with data collection because the state transmits its behavioral expectations to poor mothers during the application and certification stages of public benefits programs.[67] The most controversial of these sexual regulation policies is the imposition of family caps.[68] Typically, family caps provide no cash benefit increases for any children conceived while the mother is on welfare.[69] Several jurisdictions have also pushed "Norplant" bonuses, which cover the cost of

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[62] Torin Monahan, *Surveillance and Inequality*, 5 SURVEILLANCE & SOC'Y 217 (2008).

[63] Eubanks, *supra* note 49, at 90-91.

[64] *See* Nina Bernstein, *Experts Doubt New York Plan to Fingerprint for Medicaid*, N.Y. TIMES, Aug. 30, 2000, at B1 (listing states that fingerprint welfare recipients); *see also* HOLCOMB ET AL., *supra* note 53, at 3-1 to 3-25 (explaining that Dallas, TX and New York, NY use fingerprinting and photographing to screen public benefit recipients); Murray, *supra* note 21, at 39-40.

[65] 42 U.S.C. § 654(29)(C) (2006).

[66] *See* HANDLER & HASENFELD, *supra* note 25, at 282-315 (describing and critiquing the "family values" provisions of TANF).

[67] *See* Anita L. Allen, *Taking Liberties, Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 461-63 (1987) (defending and defining concept of decisional privacy); Bridges, *supra* note 52, at 135-48 (tracing development of Supreme Court jurisprudence on decisional privacy); Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847, 847-49 (2000) (describing feminist and legal conceptions of decisional privacy); Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 124-50 (1992) (describing development of Supreme Court case law on decisional privacy and how it relates to poor women); Elizabeth M. Schneider, *The Synergy of Equality and Privacy in Women's Rights*, 2002 U. CHI. LEGAL F. 137, 147-52 (describing connections between equality and decisional privacy rights).

[68] *See* Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 173-77 (2002). Slightly less than half the states have adopted a family cap. *Id.* at 174.

[69] *See* Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151, 165-67 (2006). In states with the family cap, about nine percent of the caseload has been impacted by the family cap policies, resulting in about twenty percent less in cash assistance per family. *Id.* at 170-71.

implanted, long-term contraceptive devices for welfare mothers, sometimes with an additional cash award.[70] In addition, many states bestow upon welfare mothers unsolicited family-planning advice in the form of counseling sessions, family-planning classes, pamphlets, and encouragement to give their children up for adoption.[71] In short, poor women seeking public benefits face limitations across multiple dimensions of privacy.

2. Low-Wage Workplace

Low-wage workers—currently one-third of the workforce—are workers whose wages are so low that full-time work does not push them over the poverty line.[72] Immigrants, single mothers, and African-Americans are disproportionately represented among low-wage workers.[73] They are concentrated in the service sector, often working in retail, as custodians, as care providers for children and the disabled, and as security guards.[74] The service sector uses the widest range of surveillance techniques. With modern technology, employers can log computer keystrokes, listen to telephone calls, review e-mails and Internet usage, conduct drug tests, employ mystery shoppers, watch closed-circuit television, track employee movements through GPS or radio frequency devices, and require psychometric tests.[75] Yet the uses of the data generated by these tactics "are not made clear to employees, policies outlining their use are not in place, and information practices are not subject to any third-party audits or checks."[76]

While there are ample studies and recommendations about employer surveillance in the white collar workforce, the low-wage workforce remains mostly ignored by privacy scholars. Due to the lack of study, much evidence about surveillance practices in the low-wage workforce is anecdotal. In the best-selling book *Nickled and Dimed*, author Barbara Ehrenreich went undercover in a series of low-wage jobs such

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[70] *See* Smith, *supra* note 69, at 168-69; *see also* Bridgewater, *supra* note 21, at 404-05 (arguing that the state's coercive use of Norplant to hinder the reproductive rights of African-American women violates the Thirteenth Amendment).

[71] *See* Smith, *supra* note 68, at 169, 177-81.

[72] PAMELA J. LOPREST ET AL., DEP'T OF HEALTH & HUMAN SERVS., WHO ARE LOW-WAGE WORKERS? ASPE RESEARCH BRIEF (2009), *available at* http://aspe.hhs.gov/hsp/09/LowWageWorkers/rb.pdf.

[73] Michael Selmi, *Unions, Education, and the Future of Low-Wage Workers*, 2009 U. CHI. LEGAL F. 147, 151-52.

[74] LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 329 (2009).

[75] Kristie Ball, *Workplace Surveillance: An Overview*, 51 LAB. HIST. 87, 88-90 (2010).

[76] *Id.* at 91.

as a diner waitress, nursing home attendant, cleaning woman, and Wal-Mart salesperson.[77] Throughout the book, she explains how each job was physically and mentally demanding as well as financially draining, given the costs of housing, food, and lengthy commutes.

The jobs were also privacy-stripping. Of all the workforce indignities, Ehrenreich was most surprised and offended at the loss of self-respect engendered in low-wage jobs.[78] For instance, as a waitress, Ehrenreich "was warned that my purse could be searched by management at any time."[79] She remarks that "[d]rug testing is another routine indignity. . . . In some testing protocols, the employee has to strip to her underwear and pee into a cup in the presence of an aide or technician."[80] Ehrenreich also found pre-employment personality tests demeaning; they include "questions about your 'moods of self-pity,' whether you are a loner or believe you are usually misunderstood."[81] Reflecting on these intrusions, she states, "It is unsettling, at the very least, to give a stranger access to things, like your self-doubts and your urine, that are otherwise shared only in medical or therapeutic situations."[82]

Ehrenreich's experience appears widespread in the low-wage workforce. For instance, a study of Latina nannies found that they escaped the isolation of their jobs by congregating with other nannies in public parks.[83] Thus, when their employers came to the park to check on their children, the nannies felt that it signaled a lack of trust.[84] Whereas the nannies wanted autonomy to do their jobs, these visits transformed the park from "the nannies' space into another site of surveillance" similar to the employers' homes.[85] For these workers, a public space was a private refuge, which demonstrates the context-specific nature of privacy and how it promotes values of dignity and autonomy. In other words, domestic workers sometimes have too much "bad" privacy (they work isolated in someone else's home) and not enough "good" privacy (ability to work and live

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[77] BARBARA EHRENREICH, NICKLED AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001).

[78] *Id.* at 208.

[79] *Id.*

[80] *Id.* at 209.

[81] *Id.*

[82] *Id.*

[83] Armada Ameta, *Creating Community: Latina Nannies in a West Los Angeles Park*, 32 QUALITATIVE. SOC. 279, 279 (2009).

[84] *Id.* at 289.

[85] *Id.* at 290.

with some measure of respect and independence).[86] For domestic workers, privacy can be hard to come by, even as they are expected to respect the privacy of their employers by discreetly staying out of sight.[87] Moreover, their working conditions are negotiated in the privacy of the employer's home, where the bargaining differential is pronounced and where workers are susceptible to abuse.[88]

Migrant farmworkers also face an alarming lack of privacy, as they live in employer-provided housing.[89] David Shipler describes a North Carolina barracks used to house migrant workers during sweet potato season, in which up to fourteen men live in a room that measures twelve by fifteen feet with no opportunity for solitude.[90]

These sorts of class differentials are found throughout the low-wage workforce. For most white collar workers, drug testing is limited to situations that implicate public health or safety.[91] By contrast, drug testing is regularly part of pre-employment screening for low-wage jobs.[92] Routine drug testing and location tracking via satellite positioning devices are also most prevalent in jobs with the lowest status and salaries.[93] Likewise, "[t]he majority of employees being electronically monitored are women in low-paying clerical positions."[94] Similarly, pre-employment psychological tests—commonly called

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[86] *See* Joy M. Zarembka, *America's Dirty Work: Migrant Maids and Modern Day Slavery*, *in* GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY 142, 142 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2002) (describing the isolation and dangers faced by domestic workers). This is true for home health care attendants as well, who are supposed to be "invisible" to foster the independence of those for whom they care. *See* Lynn Mae Rivas, *Invisible Labors: Caring for the Independent Person*, *in* GLOBAL WOMAN, *supra*, at 70, 72-74.

[87] *See* MARY ROMERO, MAID IN THE U.S.A. 147 (2002). Speaking about live-in maids, Romero writes: "The combination of not having a bedroom and not having access to the rest of the house for resting or leisure activity continually affirms the worker's inferior status in the employer's home." *Id.*

[88] *Id.* at 129.

[89] DAVID K. SHIPLER, THE WORKING POOR: INVISIBLE IN AMERICA 98-99 (2004).

[90] *Id.* at 98 ("its configuration could have had no purpose other than to house workers—and to deprive them of their dignity").

[91] Nancy D. Campbell, *Everyday Insecurities: The Microbehavioral Politics of Intrusive Surveillance*, *in* SURVEILLANCE AND SECURITY, *supra* note 49, at 65.

[92] *Id.* at 66.

[93] KENNETH D. TUNNELL, PISSING ON DEMAND: WORKPLACE DRUG TESTING AND THE RISE OF THE DETOX INDUSTRY 24 (2004) ("The body of evidence clearly shows that social class and income are inversely related to drug testing; working-class members with the lowest incomes are those most likely to be subjected to drug testing.").

[94] Paul S. Greenlaw & Cornelia Prundeanu, *The Impact of Federal Legislation to Limit Electronic Monitoring*, 26 PUB. PERSONNEL MGMT., Summer 1997, at 227, 229, *available at* http://connection.ebscohost.com/c/articles/9707093594/impact-federal-legislation-limit-electronic-monitoring.

honesty tests—are concentrated in the "retail, fast food, banking, and other service industries," even though "their accuracy and predictive value are doubted."[95]

Many low-wage employers use multiple methods to control their workers. For instance, a study of workers in the fast food and grocery industries found extensive forms of surveillance, ranging from rows upon rows of hanging video cameras to drug tests to honesty tests, in which applicants were "asked about illegal behavior, such as whether they have taken drugs or stolen anything in the past, or about the behavior of their friends and acquaintances, such as whether they know anyone who takes drugs or steals," as well as questions about how they would react in various scenarios.[96]

At the same time, just because "people give up information in exchange for jobs and other valued outcomes should not be construed as meaning that doing so is voluntary."[97] Rather, in today's workplace, an employer has almost no restraints on the forms and extent of surveillance it chooses to adopt, and in today's tight labor market, employees have little choice but to submit.

B. Harms and Justifications

Poor individuals, families, and communities suffer tangible harms—psychological, material, and physical—as a result of the class differential in privacy policies and law. These harms are disproportionate to the justifications underlying privacy intrusions, and yet they remain invisible to many Americans. One privacy scholar has criticized other privacy theorists for failing to show how "privacy violations can negatively impact the lives of living, breathing human beings beyond simply provoking feelings of unease."[98] She argues that if we do not identify the harms of privacy invasions, privacy will continue to deteriorate. Part of the apathy may be that privacy theorists have neglected the poor. Indeed, one privacy

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[95] Sharona Hoffman, *Preplacement Examinations and Job-Relatedness: How to Enhance Privacy and Diminish Discrimination in the Workplace*, 49 U. KAN. L. REV. 517, 540 (2001). There are almost no legal protections against these tests. *Id.* at 541.

[96] STUART TANNOCK, YOUTH AT WORK: THE UNIONIZED FAST-FOOD AND GROCERY WORKPLACE 47-48 (2001).

[97] Eugene F. Stone-Romero et al., *Personnel Selection Procedures and Invasion of Privacy*, 59 J. SOC. ISSUES 343, 345 (2003).

[98] Ann Bartow, Response, *A Feeling of Unease About Privacy Law*, 155 PA. L. REV. PENNUMBRA 52, 52 (2006), *available at* http://www.pennumbra.com/responses/11-2006/Bartow.pdf.

scholar admits that "privacy is seldom a matter of life and death;" rather, "[m]ost of the injuries caused by the misuse of data in modern society are not particularly embarrassing or emotionally disturbing."[99] This is not true for the poor.

For the poor, the injuries are concrete. Recent studies within the public health field show that when the state treats marginalized people with a lack of dignity, the results can include "loss of respect, loss of self worth, ego, sense of self, and soul, loss of status, social standing, and moral standing, loss of confidence and determination."[100] There are long-term effects as well, such as "social isolation or marginalization, a reluctance to seek help or access resources, passivity or 'learned helplessness,' a 'small' life of constrained choices, chronically poor physical and mental health, and a cycle of victimization and abuse, in which the violated individual turns to violating others."[101] These are psychological attributes that undermine the odds that poor families will become self-sufficient,[102] which is the goal of the welfare system and, indeed, our liberal society.

1. Welfare

The welfare system of surveillance causes recipients to suffer psychological injuries including stress, fear, and feelings of degradation.[103] While procedures such as drug tests and finger imaging may have instrumental purposes, they also send a degrading message to and about welfare recipients.[104] This is because these procedures have symbolic meaning within our cultural traditions—"drug testing challenges traditions that urination is a private affair; and finger-imaging conjures up an image of criminality."[105] These procedures "freeze a moment in time while ignoring the ongoing context of inequality and structural violence."[106] Not only is the subject's dignity degraded by these procedures, but society also receives a message that "reinforce[s] negative stereotypes of the

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[99] Nehf, *supra* note 1, at 30.

[100] Nora Jacobson, *A Taxonomy of Dignity: A Grounded Theory Study*, 9 INT'L HEALTH & HUM. RTS. 3, 7 (2009).

[101] *Id.*

[102] *See generally* Joaquina Palomar Lever et al., *Poverty, Psychological Resources and Subjective Well-Being*, 73 SOC. INDICATORS RES. 375 (2005) (describing how certain psychological attributes help people cope with poverty, while others are harmful).

[103] *See* GILLIOM, *supra* note 37, at 66-67, 78 (summarizing interviews with welfare recipients in Appalachia in the early 1990s).

[104] Murray, *supra* note 21, at 40.

[105] *Id.*

[106] Campbell, *supra* note 91, at 72.

targets."[107] In turn, these stereotypes drive punitive laws directed at the poor.

Not surprisingly, the privacy deprivations and humiliations associated with welfare discourage many needy women from seeking assistance.[108] Without state assistance, these nonentrants to the TANF system and their children often lack adequate resources for food, shelter, and other basic needs—even if they are working. Studies have shown that nonentrants struggle to make ends meet by juggling a shifting array of nonpublic resources and that this hardship negatively impacts their health.[109] In short, accepting welfare can subject one to humiliation, but refusing it can result in hunger. This "choice" hardly promotes autonomy or dignity.

Further, mandatory child support cooperation policies can result in the unintentional perpetuation of domestic violence.[110] Battered women are overrepresented in the TANF population.[111] To reduce the dangers of exacerbating domestic violence through reporting requirements, TANF attempts to protect victims by allowing states to grant these victims an exemption from the cooperation requirement.[112] Yet many eligible women are not claiming the exemption for a variety of reasons, including the public setting of the welfare office, fear that child welfare authorities may take their children, stringent requirements for independent corroboration, and feelings of humiliation and embarrassment.[113] As a result, the paternity

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[107] Murray, *supra* note 21, at 42.

[108] *See* ROBERT MOFFITT ET AL., DEP'T OF HEALTH & HUMAN SERVS., A STUDY OF TANF NON-ENTRANTS: FINAL REPORT TO THE OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION 2, 14 (2003) (new welfare reform policies discourage participation). "[Many] non-entrants in our study felt that applying for TANF was an unpleasant, time-consuming experience that resulted in little financial benefit. . . . Many felt the application process to be overly intrusive." *Id.* at 20 (Part B).

[109] *Id.* at 45. One study found that:

> mothers jeopardized their own health and well-being when trying to provide for their families by taking on second, third, and fourth jobs, working odd hours, or commuting long distances via public transportation. . . . [Moreover, i]n order to acquire and maintain affordable housing, many families were forced to live in unsafe neighborhoods. . . . [And finally, m]others with young children consistently had trouble securing stable care for [their children.]

Id.

[110] Susan Notar & Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL'Y & L. 657, 664 (2000).

[111] *See* Smith, *supra* note 68, at 153-54 (although batterers come from all social classes, TANF clients are especially vulnerable because they have fewer economic supports).

[112] 42 U.S.C. § 602 (2006). State implementation varies widely, and most state policies are not adequate to protect battered women. *See* Smith, *supra* note 68, at 158.

[113] *See* Smith, *supra* note 68, at 165-66; Notar & Turetsky, *supra* note 110, at 672-76.

disclosure required by the child support system poses a substantial risk to domestic violence victims for very little benefit. After all, these mothers do not receive any of the child support checks that are collected; rather, the state keeps the money to repay itself for the costs of welfare.[114] Notably, TANF recipients lack the decisional autonomy of nonpoor single mothers, who are "not forced to identify, marry, live with, seek support from, or interact with the biological father."[115]

Fraud prevention is the usual justification underlying welfare surveillance.[116] For welfare mothers, this translates into home visits, fingerprinting, and elaborate third-party verification schemes. However, there is scant data on welfare fraud, even though states presume it is widespread.[117] To be sure, there are applicants who do not report all sources of income. Because it is impossible to survive on welfare benefits (the average monthly benefit for a family of three is $363),[118] some welfare applicants accept support from family members or earn additional income from jobs such as babysitting or cutting hair.[119] Welfare mothers are in a bind—they must earn unreported income to provide for their children, but this conduct is considered "fraud." Thus, in some cases, the state's low welfare stipends and rigid earning limits create the very fraud that the state seeks to eliminate.

Further, studies show that women convicted of welfare fraud sometimes fail to report income for circumstances out of their control, such as when their partners hide their income or force them to keep it secret.[120] In addition, many cases of fraud are unintentional and occur when welfare applicants either do not understand the complex income and resource reporting rules of

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[114] *See* Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1045 (2007).

[115] *See* Smith, *supra* note 68, at 140. Non-welfare families can use child support enforcement services, but they can withdraw on a voluntary basis. *See* Notar & Turetsky, *supra* note 110, at 671.

[116] *See* Gustafson, *supra* note 59, at 658-61, 674-81, 683-88 (describing how fraud concerns have spurred the criminalization of welfare).

[117] Murray, *supra* note 21, at 50 ("There is little systematic information on the form of welfare fraud known as double-dipping.").

[118] DEP'T OF HEALTH & HUMAN SERVS., ADMINISTRATION ON CHILDREN AND FAMILIES: SEVENTH ANNUAL REPORT TO CONGRESS 75 (2006).

[119] *See* GILLIOM, *supra* note 37, at 67, 100; *see also* KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 168 (1997).

[120] Richelle S. Swan et al., *The Untold Story of Welfare Fraud*, 35 J. SOC. & SOC. WELFARE 133, 140 (2008).

TANF, or are misinformed by their caseworkers.[121] The jobs obtained by welfare mothers tend to be unstable with fluctuating schedules and incomes, which can also lead to reporting problems when anticipated and actual income differ.[122] "In short, the U.S. system both produces and punishes lawbreakers."[123] Better clarity in welfare rules and improved training of caseworkers could go far in fixing the sorts of errors that get mislabeled as intentional fraud.

Still, fraud is grossly overstated in welfare programs, making the draconian methods for rooting out fraud unreasonably invasive. For instance, New York City began fingerprinting welfare applicants in 1995 in an effort to root out imagined fraud.[124] However, out of 148,000 recipients, the city found only forty-three cases of double dipping.[125] Even purveyors of electronic fraud detection systems have admitted that fraud is extremely rare.[126] Moreover, studies suggest welfare fraud is no more rampant in welfare than in other government programs,[127] which are not subject to the same withering scrutiny. "The government takes a far greater risk on graduate student loans, for example, than on any welfare recipient."[128] Yet graduate students do not have their homes searched and are not fingerprinted.

Similarly, the annual cost of tax fraud, including underreporting and offshore tax shelters, is immense, but nevertheless is not considered "morally indecent."[129] Because the government can root out welfare double-dipping by computerized

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[121] *Id.* at 140, 143. In turn, convictions for fraud leave these women with serious collateral consequences, such as inability to pass screenings for housings, credit, or employment. *Id.*

[122] *Id.* at 140.

[123] Gustafson, *supra* note 59, at 681.

[124] Preston L. Morgan, Note, *Public Assistance for the Price of Privacy: Leaving the Door Open on Welfare Home Searches*, 40 MCGEORGE L. REV. 227, 251 (2009).

[125] *Id.*

[126] *See, e.g.*, Joshua Dean, *Texas Nears Rollout of Fingerprint System*, FED. COMPUTER WEEK (Aug. 5, 1999), http://fcw.com/articles/1999/08/05/texas-nears-rollout-of-fingerprint-system.aspx (official from private contractor states that out of 700,000 people fingerprinted for public benefits, twelve cases were referred for further investigation).

[127] *See* Mulzer, *supra* note 56, at 688-89 ("[F]ear of fraud has always played a larger role in the administration of public benefits programs than it realistically should have."); Julilly Kohler-Hausman, *"The Crime of Survival": Fraud Prosecutions, Community Surveillance, and the Original "Welfare Queen,"* 41 J. SOC. HIST. 329, 343 (2007) ("[M]uch of what became defined as fraud were simply attempts to supplement welfare grants with additional income from low wage work or living with another wage earner.").

[128] David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231, 249 (1988).

[129] Donald Crump, *Criminals Don't Pay: Using Tax Fraud to Prohibit Organized Crime*, 9 HOUS. BUS. & TAX L.J. 386, 397 (2009); *see also* Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV 1781, 1783-84 (2000) (stating that "the audit rate is currently under 2%, and of those audited only a small fraction (4.1% in 1995) are penalized").

matching of welfare applicants against social security numbers, more intrusive measures such as fingerprinting, photographing, and home visits serve only to stigmatize recipients.[130] In addition, welfare surveillance has societal consequences, because it reduces democratic participation by welfare recipients.[131] Obviously, a government program must ensure that the proper persons are receiving the appropriate levels of benefits. Further, welfare caseworkers cannot link welfare recipients to available social services without information about their needs. However, the level of information required from TANF applicants goes far beyond what is necessary to meet these goals and is often gathered through demeaning techniques.

2. The Low-Wage Workplace

The privacy losses suffered by low-income employees can cause humiliation, shame, and stigma. After working a series of low-wage jobs, Barbara Ehrenreich concluded: "If you are treated as an untrustworthy person—a potential slacker, drug addict, or thief—you may begin to feel less trustworthy yourself."[132] Psychological research confirms that "workplace humiliation can itself be as devastating as the physical or economic harms that are legally actionable in employment and other settings."[133] Moreover, "women, minorities, and some 'outsider' groups" suffer disproportionate levels of humiliation.[134]

In the employment context, surveillance serves many purposes. Employers use monitoring to deter theft, protect proprietary information, guard against lawsuits, discourage improper conduct, and monitor work performance.[135] These are legitimate objectives. At the same time, social scientists who study the workplace generally conclude that employer surveillance tactics are overly broad to accomplish these goals, with damaging effects on employees' stress levels.[136] For

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[130] Gustafson, *supra* note 59, at 677 n.153.

[131] *See infra* notes 373-82 and accompanying text.

[132] EHRENREICH, *supra* note 77, at 210.

[133] Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 76 (2001).

[134] *Id.*

[135] *See* Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263, 1287-88 (1993); Robert Sprague, *Orwell Was an Optimist: The Evolution of Privacy in the United States and its De-Evolution for American Employees*, 42 J. MARSHALL L. REV. 83, 111-12 (2008).

[136] *See* D. Scott Kiker & Mary Kiker, *A Quantitative Review of Organizational Outcomes Related to Electronic Performance Monitoring*, 11 BUS. REV. 295, 300 (2008) (analyzing research studies of electronic performance monitoring).

instance, a prominent two-year study of telecommunications employees who worked in directory assistance, as service representatives, and in clerical jobs linked employee monitoring to headaches, backaches, wrist pains, greater fatigue, a 12 percent increase in depression, and a 15 percent increase in extreme anxiety.[137] Other studies confirm that a variety of health problems can flow from employer surveillance "such as stress, high tension, headaches, extreme anxiety, depression, anger, severe fatigue, and musculoskeletal problems."[138] Moreover, the consequences of stress are magnified in jobs where employees lack control over their privacy or a voice in establishing monitoring procedures.[139]

Employers also pay a cost. At the outset of the employment relationship, invasive application procedures can limit the pool of eligible applicants, as they perceive a lack of trust from potential employers.[140] This distrust may disproportionately impact the disabled as well as racial and ethnic minorities who "may fear that they will be stigmatized unfairly by the information revealed by various selection procedures."[141]

The corporate bottom line can also suffer from decreased employee productivity and creativity, low morale, diminished trust, and high turnover caused by intrusive monitoring.[142] Extreme surveillance can increase employee resistance.[143] For instance, a study of call centers found that workers

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[137] M.J. Smith et al., *Employee Stress and Health Complaints in Jobs With and Without Electronic Performance Monitoring*, 23 APPLIED ERGONOMICS 17, 23-27 (1992).

[138] Scott C. D'Urso, *Who's Watching Us at Work? Toward a Structural-Perceptual Model of Electronic Monitoring and Surveillance in Organizations*, 16 COMM. THEORY 281, 287 (2006).

[139] *See* Stone-Romero et al., *supra* note 97, at 346. By contrast, "monitored participants who were given the opportunity to voice their opinions about the design and implementation of monitoring systems had higher perceptions of procedural justice." Laurel A. McNall & Sylvia G. Roch, *A Social Exchange Model of Employee Reactions to Electronic Performance Monitoring*, 22 HUMAN PERFORMANCE 204, 205 (2009); *see also* A.F. Westin, *Two Key Factors That Belong in a Macroergonomic Analysis of Electronic Monitoring: Employee Perceptions of Fairness and the Climate of Organizational Trust or Distrust*, 23 APPLIED ERGONOMICS 35, 35-42 (1992). Likewise, monitoring can be beneficial when it results in productive feedback to employees. *See* David Holman, *Phoning in Sick? An Overview of Employee Stress in Call Centres*, 24 LEADERSHIP & ORG. DEV. J. 123, 128 (2003).

[140] Stone-Romero et al., *supra* note 97, at 351, 364. A study found that employees consider the most invasive procedures to be lie detector tests, drug tests, medical examinations, background checks, and honesty tests. *Id.* at 363.

[141] *Id.* at 364.

[142] *See* D'Urso, *supra* note 138, at 287; Ball, *supra* note 75, at 93.

[143] *See* Ball, *supra* note 75, at 94 (citing George Callahan & Paul Thompson, *We Recruit Attitude: The Selection and Shaping of Routine Call Centre Labour*, 39 J. MGMT. STUD. 233 (2002); Stephen Frankel et al., *Beyond Bureaucracy? Work Organization in Call Centres*, 9 INT'L J. HUM. RESOURCE MGMT. 957 (1998)).

circumvented surveillance by pretending to talk on the phone, leaving call lines open without a customer on the line, and misleading customers, among other tactics.[144]

Studies also show that privacy intrusions can inhibit organizational citizenship, defined as "discretionary behavior that promotes effective organizational functioning but is not formally recognized by reward systems."[145] Surveillance can also lessen communication within an organization because there is less need for managers to interact with surveilled employees.[146] In turn, less communication "may lower productivity, limit the development of important informal organizational networks, and prevent employees from exchanging key job-related information."[147]

By contrast, "information privacy [is] directly associated with psychological empowerment," as well as "a greater willingness [on the part of employees] to engage in behaviors that help the organization."[148] For instance, Federal Express implemented a successful monitoring program of call center employees by including their input into setting work standards, promoting trust, and providing a comfortable work environment.[149] In sum, both workers and employers pay hidden costs as a result of unfair and intrusive employee monitoring.

II. PRIVACY, POVERTY, AND THE LAW

This part surveys the legal system's regulation of privacy for low-income people. It concludes that privacy law does not protect the poor. As a constitutional matter, the Fourth Amendment's reasonableness standard provides scant protection because our society has long deemed it reasonable to intrude upon the lives of the poor. As a statutory matter, our laws focus on ensuring against the misuse of data, which is a middle-class priority, rather than data collection, which tends

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[144] *Id.* Obviously, these forms of resistance are not good for a corporate bottom-line. Yet resistance is an inevitable response to surveillance systems; as Gary Marx writes, "[S]urveillance targets often have space to maneuver and can use counter-technologies. . . . Humans are wonderfully inventive at finding ways to beat control systems and to avoid observation." Gary T. Marx, *A Tack in the Shoe: Neutralizing and Resisting the New Surveillance*, 59 J. SOC. ISSUES 369, 372 (2003).

[145] Bradley J. Alge et al., *Information Privacy in Organizations: Empowering Creative and Extrarole Performance*, 91 J. APPL. PSYCHOL. 221, 221, 223 (2006); *see also* Myria Watkins Allen et al., *Workplace Surveillance and Managing Privacy Boundaries*, 21 MGMT. COMM. Q. 172, 192 (2007) ("High levels of surveillance can damage trust, leading to a less efficient workforce . . . and other costly consequences for organizations.").

[146] *See* Allen et al., *supra* note 145, at 193.

[147] *Id.*

[148] Alge et al., *supra* note 145, at 228.

[149] Westin, *supra* note 136, at 300.

to stigmatize the poor. As a common law matter, the law is geared toward elite concerns about reputation rather than the humiliation that surveillance causes to low-income Americans.

At bottom, the core principle of privacy law—the "right to be left alone"—ill-fits the needs of low-income Americans. Their vulnerable economic status leaves these citizens dependent on government assistance, which inevitably entails an ongoing relationship between the citizen and the state. Likewise, an employment relationship is necessarily continuing and interactive. Yet privacy is like an on/off switch; you either have it or you don't. Privacy law does not account for intertwined relationships between citizens and larger institutional actors.

A. Constitutional Privacy Rights

The Fourth Amendment to the Constitution protects citizens from unreasonable searches by the state.[150] In addition, the Supreme Court has recognized a constitutional right to information privacy, which protects certain personal information from government disclosure.[151] However, these constitutional privacy protections are applied differently to the poor than to their wealthier counterparts. As this part explains, this differential arises from an ingrained bias against the poor.

1. Fourth Amendment

Fourth Amendment privacy hinges upon reasonableness.[152] In assessing government searches, courts balance the individual's reasonable expectation of privacy against the government's rationale for the intrusion. This test is widely criticized as malleable and overly favorable to the government.[153] Moreover, encroaching technology has put personal information in the public square. The resulting dilemma is that when everyday expectations of privacy diminish, it becomes less reasonable to expect the government to respect individual privacy.[154]

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[150] U.S. CONST. amend. IV.

[151] *See infra* text accompanying notes 199-207.

[152] Katz v. United States, 389 U.S. 347, 353 (1967).

[153] *See, e.g.*, John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 656 (calling the Supreme Court's reasonableness standard "just about the most unhelpful guidepost one could have concocted").

[154] *See* Scott Sundby, *Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1761 (1994).

Nevertheless, the Supreme Court has held steadfast to the principle that people have a reasonable expectation of privacy in their home.[155] Based on the deep-rooted Anglo-American maxim that "a man's home is his castle,"[156] the Court has drawn "a firm line at the entrance to the house,"[157] stating that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[158] The Court's "housing exceptionalism"[159] is consistent with empirical research showing that people rate searches of bedrooms and home interiors as highly intrusive.[160] The Court's property-based conception of privacy therefore favors property owners.[161] By contrast, the Supreme Court has held that a person who seeks government assistance gives up her rights to privacy, even in her home.[162] The Court thus "define[s] privacy in a way that makes people who are less well-off more likely to experience warrantless, suspicionless government intrusions."[163]

a. Home Visits

The primary case demonstrating this discrepancy is the 1971 case of *Wyman v. James*, in which the Court upheld home visits by welfare officials, reasoning that the visits were not searches covered by the Fourth Amendment because they were consensual.[164] Of course, one can question whether someone who is hungry and who would otherwise be homeless without public benefits can truly consent in a voluntary manner. Nevertheless, the Court applied a rational basis standard, ruling that even if the home visits were searches, they were reasonable given the state's interest in deterring fraud, the

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[155] *See* Kyllo v. United States, 533 U.S. 27, 31 (2001) ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (citations omitted)).

[156] Jonathan L. Hafetz, *"A Man's Home Is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175, 180, 198-99 (2002).

[157] Payton v. New York, 445 U.S. 573, 590 (1980).

[158] United States v. U.S. Dist. Court (Keith), 407 U.S. 297, 313 (1972).

[159] Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 908 (2010).

[160] Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 739 (1993).

[161] *See* Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 401 (2003).

[162] Wyman v. James, 400 U.S. 309, 326 (1971); *see also infra* text accompanying notes 164-72.

[163] Slobogin, *supra* note 161, at 400.

[164] 400 U.S. at 317-18.

need to protect the children of welfare mothers, the rehabilitative purpose of the searches, and the lack of criminal consequences that flowed from the searches.[165] In finding that the privacy deprivations were negligible, the *Wyman* Court disregarded affidavits from twelve aid recipients alleging that the unannounced visits were not only embarrassing when guests were in the home, but also when personal questions were asked in front of their children.[166] In silencing the voices of poor women, the Court ignored the social context in which these women live and mistakenly equated forced consent with free choice. Moreover, the Court's disregard of their voices is inconsistent with psychological and sociological research showing that people value home privacy because it protects interpersonal relationships.[167]

The *Wyman* Court further intimated, based on Ms. James's social services case file (and not evidence adduced at trial), that Ms. James's son had been physically abused and bitten by rats, concluding that "[t]he picture is a sad and unhappy one."[168] The Court's clear assumption was that poor, single women are terrible mothers who warrant suspicion and distrust. Throughout the opinion, the Court also expressed its distaste for Ms. James and how she ran her household.[169] The Court disliked her "attitude," "evasiveness," and "belligerency"—all of which arose from her resistance to the state and her entirely reasonable belief that the state could verify her eligibility through personal interviews and documents.[170] Her request was simply to be treated the same as other beneficiaries of governmental largesse. As Justice Douglas remarked in dissent, "No such sums are spent policing the government subsidies granted to farmers, airlines, steamship companies, and junk mail dealers, to name but a few."[171] Because the poor are not a protected class under the Fourteenth Amendment, equality law arguments based on class will likely be insufficient.[172] Legislation that discriminates

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[165] *Id.* at 318-24.

[166] *Id.* at 320 n.8.

[167] Stern, *supra* note 159, at 940. Search activity in the home can "disrupt domestic life, engender interpersonal conflict, reveal personal information that is private to and constitutive of relationships, and chill socialization and intimacy." *Id.*

[168] 400 U.S. at 322 n.9.

[169] *Id.*

[170] *Id.*

[171] *Id.* at 332 (Douglas, J., dissenting) (quoting J. Skelly Wright, *Poverty, Minorities, and Respect for Law*, 425 DUKE L.J. 425, 437-38 (1970)).

[172] *See* Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law & Dialogic Default*, 35 FORDHAM URB. L.J. 629, 630 (2008).

against or burdens the poor is reviewed under a lenient rational basis standard.[173]

In 2006, in *Sanchez v. San Diego*, the Ninth Circuit reaffirmed the current validity of *Wyman*, when it ruled that Project 100% (discussed in the Introduction) was constitutional.[174] The court expressly lumped welfare mothers with criminals on probation to conclude that neither group has a reasonable expectation to privacy.[175] In holding that *Wyman* was governing precedent, the *Sanchez* Court refused to recognize differences between the *Wyman* home visits and those of San Diego's Project 100%. Key to the *Wyman* holding was the Court's view that the social worker visits at issue were "rehabilitative."[176] By contrast, Project 100% is "expressly investigatory in nature, with no rehabilitative or service component," and is carried out by law enforcement fraud investigators.[177]

Moreover, the *Sanchez* Court disregarded thirty years of post-*Wyman* jurisprudence, which has significantly limited suspicionless, administrative searches.[178] Under current law, a warrant and probable cause are not required for administrative searches that are driven by "special needs, beyond the normal need for law enforcement."[179] Yet this special needs doctrine applies only where public safety is at issue, such as in drug testing of railroad employees and federal customs agents, or where necessary to protect the health and safety of public school students under a loco parentis theory.[180] Nevertheless, the *Sanchez* Court wedged welfare home visits into the special needs category, even though welfare is not an issue of public safety.

Despite the evolution of thirty years of Fourth Amendment law, courts in other states have also upheld TANF home visits, leading Jordan Budd to conclude that "the law actually matters little; the poor, presumptively different, inhabit their own constitutional universe."[181] The adherence to *Wyman* is all the more indefensible given how welfare has changed since

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[173] Dandridge v. Williams, 397 U.S. 471, 485 (1970) (holding that rational basis review applies to economic regulation).

[174] 464 F.3d 916, 916 (9th Cir. 2006), *reh'g en banc denied*, 483 F.3d 965 (2007).

[175] *Id.* at 927.

[176] *Wyman*, 400 U.S. at 319-20.

[177] Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolate Home*, 85 IND. L.J. 355, 387 (2010).

[178] *Id.*

[179] Skinner v. Ry. Labor Exec. Ass'n, 489 U.S. 602, 619 (1989) (citation omitted).

[180] Budd, *supra* note 177, at 398.

[181] *Id.* at 403-04.

the 1970s, when it was a means-tested program that came under attack for encouraging welfare dependency.[182] Since 1996, welfare recipients have not only been subject to a five-year lifetime limit on receipt of benefits, but they also must work as a condition of receiving aid.[183] They are fulfilling their part of this new social contract, but the terms still include humiliation and stigma.

b. Drug Testing

Welfare recipients have fared somewhat better in challenging state-mandated drug testing, which is expressly authorized in TANF.[184] However, their victory here is tenuous and may be short-lived. In 2000, the district court in *Marchwinski v. Howard* struck down a Michigan law authorizing suspicionless drug testing of TANF applicants.[185] The court stated that although the state's professed need to address substance abuse as a barrier to employment was "laudable and understandable," it was not a public safety issue and thus, did not justify dispensing with the ordinary Fourth Amendment requirement of individualized suspicion.[186] The court rejected the state's argument that a "special need" arose from its interest in protecting children from drug abusing parents, explaining that TANF is not directed at child abuse or neglect.[187] Thus, the TANF program "cannot be used to regulate the parents in a manner that erodes their privacy rights in order to further goals that are unrelated to the welfare program."[188] In so holding, the district court refused to allow governmental assistance to become an unlimited tool for social control.

By contrast, the initial Sixth Circuit panel concluded on appeal that welfare mothers have a diminished expectation of privacy because "welfare assistance is a very heavily regulated

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[182] *See* WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 362-85 (6th ed. 1999) (describing attacks on AFDC that lead to enactment of TANF).

[183] 42 U.S.C. § 602(a)(1)(A)(ii) (2006) (work requirement); *id.* § 608(a)(7) (five year limit).

[184] 21 U.S.C. § 862b (2006).

[185] 113 F. Supp. 2d 1134 (E.D. Mich. 2000). The decision was overturned by the Sixth Circuit, 309 F.3d 330 (6th Cir. 2002), but subsequently the en banc court split evenly on the issue, 319 F.3d 258 (6th Cir. 2003). Under Sixth Circuit rules, the split resulted in an affirmance of the district court's opinion. 60 F. App'x 601, 601 (6th Cir. 2003).

[186] *Marchwinski*, 113 F. Supp. 2d at 1140.

[187] *Id.* at 1142.

[188] *Id.*

area of public life."[189] In reversing the district court, the Sixth Circuit identified two public safety justifications for conducting a suspicionless search: (1) the need to protect children from abuse by drug-addicted welfare mothers; and (2) the need to protect the public from the crime associated with illicit drug use and trafficking.[190] This reasoning ignores empirical evidence that the use of illicit drugs by welfare recipients is no greater than in the U.S. population at large.[191] The appellate court also found that there was a "special need" to protect the public fisc from abuse.[192] Yet under this expansive reasoning, "the simple receipt of a tax deduction, credit, or subsidy empowers the state to conduct warrantless and suspicionless searches to verify that the beneficiary does not use the funds to buy contraband."[193] Of course, this reasoning can justify drug testing on all Americans, but the government is unlikely to use such strategies on middle-class Americans.

On en banc review of the court of appeals decision, the Sixth Circuit split evenly, leaving the result of the district court opinion intact—for now.[194] Across the country, state legislatures have expressed a renewed interest in suspicionless drug testing of welfare recipients,[195] and Florida recently implemented drug testing for all welfare applicants.[196] Some congresspersons have even suggested drug testing for recipients of unemployment insurance.[197] As the class of economically stressed Americans grows, so do calls for increased public drug testing programs. The stigma of drug testing is a way to discourage the needy from seeking assistance. It diverts attention

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189 *Marchwinski*, 309 F.3d at 337.

190 *Id.* at 335-36.

191 Budd, *supra* note 21, at 776-77.

192 *Marchwinski*, 309 F.3d at 337.

193 Budd, *supra* note 21, at 799.

194 Marchwinski v. Howard, 60 F. App'x 601, 601 (6th Cir. 2003).

195 *See, e.g.*, Chris L. Jenkins, *Bill Would Require Some to Pass Drug Test to Get Aid*, WASH. POST., Feb. 19, 2008, at B5 (discussing proposed bill in Virginia, as well as efforts in Kentucky and Arizona); Budd, *supra* note 21, at 754 ("[O]ver half of the states have considered legislation linking the receipt of public assistance to mandatory screening for drug use.").

196 *Florida: Welfare Recipients Face Drug Tests*, N.Y. TIMES, June 1, 2011, at A18. A federal district court judge enjoined implementation of the law. Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011). In 2011, Missouri and Arizona passed bills requiring welfare drug testing of suspected drug users. *See Drug Testing and Public Assistance*, NCSL.ORG, *available at* http://www.ncsl.org/default.aspx?tabid=23676 (last updated Oct. 7, 2011). In all, thirty-six states in 2011 considered drug testing laws for various forms of public benefits. *See id.*

197 *See* Vicki Needham, *House Republicans Propose Drug Testing for Unemployment Benefits*, HILL (Dec. 9, 2011, 1:08 PM), http://thehill.com/blogs/on-the-money/801-economy/198441-house-republicans-propose-drug-testing-for-unemployment-benefits.

away from systemic problems underlying the modern economy and towards the private behavior of citizens. It allows the government to wash its hands of need.

2. Informational Privacy Under the Constitution

The Supreme Court has suggested there might be a right to informational privacy under the Fourteenth Amendment's substantive due process clause, although the contours of this right remain murky.[198] The right appears to protect against disclosure of personal information to third parties, rather than its collection, and as a result, it provides scant protection for the poor.

The Court's most recent articulation of this right occurred in 2011 in *NASA v. Nelson*,[199] which involved twenty-eight employees, including scientists, engineers, and administrators, who worked for the Jet Propulsion Laboratories at the California Institute of Technology pursuant to a contract with the National Aeronautics Space Agency (NASA).[200] In 2007, NASA began requiring that these workers submit to a background investigation, regularly used for federal workers, that asks whether they have used, possessed, manufactured or sold drugs in the past year, and if so, if they received drug counseling or treatment in the past year, and that also asks a wide range of personal references if they have any reason to believe that the employee is unsuited for federal work.[201] Failure to comply with the background investigation results in termination of employment.[202] The employees at issue were all classified as "non-sensitive" employees for security purposes, and thus claimed that the background investigation violated their constitutional right to information privacy.[203] The Ninth

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[198] NASA v. Nelson, 131 S. Ct. 746, 756 (2011) (assuming without deciding that there is a constitutional informational privacy right).

[199] *Id.* at 746. Prior to *Nelson*, the only Court precedent on point dated from other thirty years ago. In *Whalen v. Roe*, 429 U.S. 589, 599 (1977), the Court recognized "an individual interest in avoiding disclosure of personal matters." *Id.* at 599. Still, the Court in *Whalen* held that New York State could maintain a centralized computer file containing the names and addresses of all persons who obtained legal prescriptions for Schedule II drugs, which are drugs that have both legitimate and illegal uses. *Id.* at 591. In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the Court held that despite an information privacy right, President Nixon could not prevent government archivists from reviewing his papers because there were adequate protections against dissemination and the intrusion was limited. *Id.* at 455-65.

[200] 131 S. Ct. at 752.

[201] *Id.* at 752-53.

[202] *Id.* at 752.

[203] *Id.* at 752, 754.

Circuit agreed and enjoined the investigations, reasoning that the requested information was not narrowly tailored to the government's interests in a drug free and secure workplace.[204]

The Supreme Court reversed. It assumed, without explicitly holding, that there is a right to informational privacy under the Constitution.[205] The Court concluded, however, that the background investigation did not implicate that right because there were adequate safeguards against public disclosure.[206] The Court also pointed to the government's interest in ensuring the security of its facilities, the fact that the employees engage in "important work" on the space program, and the pervasiveness of background checks in private employment.[207]

In concurrence, Justice Scalia said he would reject a constitutional right to informational privacy because it is unmoored to any constitutional provision, and he mocked the majority's "sheer multiplicity of unweighted, relevant factors."[208] He asked if the outcome would be different if the employees were not engaged in "important work," but were instead "janitors and maintenance men."[209] Of course, the answer is no: low-wage employees have never had reasonable expectations of workplace privacy. Under current law, the informational right to privacy is not implicated by the manner of the government's collection of personal information.[210] At most, it protects against public disclosure of that information.[211] For the poor, public disclosure is a concern, but so is the humiliating procedure by which personal information is gathered. On this, the courts are silent.[212]

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[204] *Id.* at 754.

[205] *Id.* at 756.

[206] *Id.* at 756-57.

[207] *Id.* at 757-60.

[208] *Id.* at 763, 768 (Scalia, J., concurring).

[209] *Id.* at 768.

[210] *Id.* at 761 (majority opinion) (the concern is protecting against government disclosure of private information).

[211] *Id.* at 755-56.

[212] A few state constitutions protect privacy, and California has extended privacy protection to private conduct. Interpreting the California Constitution, a California appellate court held that pre-employment personality tests that asked about sexual orientation and religion violated the rights of applicants for security guard positions at Target. *See* Soroka v. Dayton Hudson Corp., 1 Cal. Rptr. 2d 77 (Cal. Ct. App. 1991). The court held that the questions were not related to job competence. *Id.* at 86. The case settled before it could be reviewed by the California Supreme Court.

B. *Privacy Statutes*

Unlike many other countries, the United States does not have comprehensive privacy regulation.[213] Instead, our federal and state statutes tackle discrete privacy issues in a piecemeal and reactive fashion.[214] A high-profile, but typical example is the Video Privacy Protection Act of 1988, which forbids video stores from disclosing video rental records.[215] This law was enacted after the Supreme Court confirmation hearings of Judge Robert Bork, when newspapers published a list of videos rented by the judge, thereby causing a public uproar.[216] Rather than a comprehensive privacy law, the United States relies mostly on self-regulation by the entities that gather and maintain personal data and puts the onus on individuals to police their own data disclosures.[217]

Generally, American privacy statutes are guided by Fair Information Practices, which the Department of Health Education and Welfare developed in 1973 in recognition that "people have come to distrust computer-based record-keeping operations."[218] There are five underlying principles: (1) record-keeping systems should not be secret; (2) people should be able to find out what personal information is contained in records; (3) people should be able to prevent information obtained for one purpose from being used for another; (4) people should be able to correct records about them; and (5) organizations that maintain personal data should ensure the data is reliable and take steps to prevent its misuse.[219] These principles require transparency in data collection and storage, but otherwise do not constrain the methods or manner by which data is collected. As one scholar has summarized, "the Golden Rule of informational privacy [is that] sensitive personal information given for one purpose ought not be used for other purposes

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[213] *See* DANIEL J. SOLOVE ET AL., PRIVACY, INFORMATION, AND TECHNOLOGY 225-29 (2006); Paul Schwartz, *Preemption and Privacy*, 118 YALE L.J. 902, 910-12 (2009) (arguing that the United States should refrain from enacting comprehensive federal privacy legislation).

[214] Schwartz, *supra* note 213, at 912.

[215] 18 U.S.C. § 2710 (2006).

[216] Schwartz, *supra* note 213, at 935-36.

[217] *See* Nehf, *supra* note 1, at 6-7.

[218] U.S. DEP'T OF HEALTH, EDUC. & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS: REPORT OF THE SECRETARY'S ADVISORY COMM. ON AUTOMATED PERSONAL DATA SYSTEMS 28-30 (1973).

[219] *Id.* at 41-42.

without the express consent of the person to whom the information relates."[220]

1. The Golden Rule and Information Disclosure

Certainly, adherence to this Golden Rule would benefit all Americans, including the poor. For instance, the federal government oversees the Homeless Management Information System (HMIS), which requires homeless service providers to gather data about the homeless for the stated purpose of having a more accurate count of the homeless and better understanding for meeting their needs.[221] The homeless are asked to reveal general biographical information (such as name, birth date, and social security number), and can also be asked about any physical or developmental disabilities, HIV/AIDS status, mental health, substance abuse, and domestic violence.[222] Each homeless person is given a "unique person identification number."[223]

The Department of Housing and Urban Development (HUD), which regulates HMIS programs, is aware that homeless individuals might be reticent to turn over personal data due to "not wanting to be tracked, general privacy issues, vanity, embarrassment, paranoia, a desire not to qualify for a particular service, fear of being turned away, or simply not caring enough."[224] Accordingly, HUD standards regulate the uses and disclosure of personal information by homeless service providers. Disclosures are permitted only under certain circumstances, such as to avert a serious threat to health or safety.[225] Yet there are still concerns that these protections are

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[220] Gregory T. Nojeim, *Financial Privacy*, 17 N.Y.L. SCH. J. HUM. RTS. 81, 82 (2000).

[221] *See* J.C. O'Brien, Comment, *Loose Standards, Tight Lips: Why Easy Access to Client Data Can Undermine Homeless Management Information Systems*, 35 FORDHAM URB. L.J. 673, 685 (2008). *See generally* U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF CMTY. PLANNING & DEV., HUD'S HOMELESS ASSISTANCE PROGRAMS: ENHANCING HMIS DATA QUALITY (2005) [hereinafter ENHANCING HMIS DATA QUALITY]. "Universal data elements" are collected and aggregated across linked, regional Communities of Care. O'Brien, *supra*, at 687-88.

[222] ENHANCING HMIS DATA QUALITY, *supra* note 221, at 50-51.

[223] *Id.* at 53.

[224] *Id.* at 12.

[225] *See* Homeless Management Information Systems (HMIS), Data and Technical Standards Final Notice, 69 Fed. Reg. 45,888, 45,928 (July 30, 2004). Domestic violence advocates were concerned about HUD requirements that shelters collect data about clients because:

> The confidentiality of the data can be breached in various ways. The rules permit disclosures to oral law enforcement requests, which facilitates impostors pretexting the data. The technical standards do not require that data disclosures be logged, which limits the ability to track these impostors.

inadequate. For instance, permissible disclosures include those made in response to oral requests by law enforcement officials for the purpose of identifying or locating a suspect or material witness. As one commentator has noted, "The ease of accessibility to client [personal information] through oral requests threatens to compound the already challenging task of eliciting complete and accurate information from homeless clients,"[226] who are, by virtue of their homelessness, often living in violation of laws that regulate their public conduct. Thus, homeless individuals may decline social services in order to protect themselves from arrest. Accordingly, protections against disclosure of personal information are extremely important for the homeless.

At the same time, even the best protection against disclosures does not ameliorate the impact of data collection. "[W]hether or not a specific individual can be related back to data generated out of that individual, the life of that data will absorb and transform the life of that individual."[227] This is because the entire homeless population is subject to the decisions that result from the aggregation of the data.[228] In other words, "the data determines what kinds of life are made available by programs targeting the homeless."[229] For this reason, one commentator states, "Contrary to HUD's claims, this population does not merely present an accurate picture of homelessness in the U.S., but it rather re-makes homelessness by reconfiguring what needs are allowed to register, and what services can address those needs."[230] In short, data collection has group consequences, in addition to individual ones.[231] Yet privacy law focuses resolutely on the individual. Moreover,

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Insider fraud in law enforcement agencies can also be used to breach security.

Homeless Management Information Systems and Domestic Violence, ELEC. PRIVACY INFO. CTR., http://epic.org/privacy/dv/hmis.html (last visited Feb. 1, 2012). HUD is planning guidance that responds to these issues in light of requirements in the Violence Against Women Act that require client consent before data disclosures are made. *Id.*

[226] O'Brien, *supra* note 221, at 694.

[227] Craig Willse, *"'Universal Data Elements,' or the Biopolitical Life of Homeless Populations,"* 5 SURVEILLANCE & SOC. 227, 245 (2008).

[228] *Id.* ("The population is a living entity injected with biopolitical force that acts back upon that which made it.").

[229] *Id.* (noting that the agencies are using the data to secure funding and HUD approval, rather than to improve services).

[230] *Id.* at 248.

[231] *See* J.P. v. DeSanti, 653 F.2d 1080, 1081-82 (6th Cir. 1981) (finding no constitutional violation when juvenile social histories were shared with fifty-five different social, governmental, and religious agencies).

even with adherence to the Golden Rule, poor people would still suffer the stigmatization and humiliation that occur when information is collected because statutes do not generally address this phase of information transfer.

2. Federal and State Privacy Statutes

The Privacy Act of 1974 is the primary statute regulating how federal government agencies manage information about individuals.[232] In 1998, the Act was extended to "computer matching," which occurs when federal and state agencies compare data about individuals.[233] TANF applicants are subject to extensive computer matching. The Privacy Act requires, among other things, that individuals subject to matching have opportunities to receive notice and to refute adverse information when benefits are denied or terminated.[234] As a result, when an applicant applies for TANF, she should receive notice that the state agency may be obtaining and matching federal records to verify her eligibility information.

The Act's protections are detailed and elaborate, but offer limited protection for welfare applicants. To begin with, the Privacy Act is focused on protecting information from governmental misuse once it is gathered. It does not focus on the methods or forms of collection, which in the welfare system are demeaning and stigmatizing. Further, the Act's requirements of notice and consent are generally meaningless, because on welfare applications these provisions usually contain difficult to understand jargon hidden among the reams of information and questions contained in the forms.[235] Finally, the Privacy Act does not govern the massive amounts of personal information held by state and local agencies, and statutory protections at this level diverge widely.[236]

There are other federal privacy laws that are concerned with protecting individuals from the disclosure of personal information that could be embarrassing if revealed to the

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[232] 5 U.S.C. § 552(a) (2006).

[233] The Computer Matching and Privacy Protection Act of 1988, Pub. L. No. 100-503, amended the Privacy Act to add several new provisions. *See* 5 U.S.C. § 552a(a)(8)-(13), (e)(12), (o)-(r), (u) (2000).

[234] *See* Brown, *supra* note 58, at 428-29 (describing requirements of Privacy Act as they apply to TANF applicants). Brown also discusses important privacy issues surrounding immigration status. *Id.* at 430-32.

[235] *Id.* at 428.

[236] Schwartz, *supra* note 213, at 916-18 (discussing state statutes addressing privacy).

public. Thus, there are statutes that protect against disclosure of credit histories, student records, debts, bank records, tax returns, television viewing habits, health information, and (as discussed above) video rentals.[237] Obviously, Americans from every social class benefit from these protections. Still, this bevy of statutes does not protect anyone from the embarrassment that occurs when the government or private entities gather information in an intrusive or demeaning manner in the first place. This mistreatment tends to happen disproportionately to the poor and other marginalized groups. Yet another group of statutes protects individuals from unwanted intrusion into their private affairs, including laws that limit hacking and unsolicited e-mails and that create do-not-call registries.[238] Again, these statutes erect a wall; they do not mediate ongoing relationships between individuals and the government or corporations. As such, these statutes are not models for reconsidering surveillance of the poor.

Neither are employment laws. In our at-will system of employment, private employers face few restraints in monitoring their employees.[239] Although employee monitoring is a subject for collective bargaining for those employees who are members of unions, this is an ever-decreasing share of the workforce.[240] While the Electronic Communications Privacy Act of 1986 prohibits the interception of data transmitted by electronic means, it is riddled with exceptions that essentially take private employers out of its reach.[241] As a result, companies can

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[237] *See* Scot Ganow & Sam S. Han, *Model Omnibus Privacy Statute*, 35 U. DAYTON L. REV. 345, 349-58 (2010) (listing federal privacy statutes).

[238] *See* 18 U.S.C. § 1030 (2008) (criminalizing unauthorized access to a computer); 47 C.F.R. § 64.1200(c)(2), (f) (2005) (creating Do-Not-Call Registry); Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (amending 47 U.S.C. § 227) (regulating unsolicited faxes); Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699 (regulating unsolicited commercial e-mails).

[239] O'Gorman, *supra* note 27, at 217-18. Some notable exceptions are laws prohibiting lie detector tests as a condition of employment and laws limiting employers from making employment decisions based on arrest records that disproportionately impact minorities. MADELEINE SCHACHTER, INFORMATIONAL AND DECISIONAL PRIVACY 41 (2003). Employers are also subject to the Fair Credit Reporting Act if they conduct background credit checks of applicants or employees. *Id.*

[240] Video surveillance, physical examinations, drug and alcohol testing, and polygraph testing are all mandatory subjects of collective bargaining under the NLRA, and notice must be provided. Alexandra Fiore, Note, *Undignified in Defeat: An Analysis of the Stagnation and Demise of Proposed Legislation Limiting Video Surveillance in the Workplace and Suggestions for Change*, 25 HOFSTRA LAB. & EMP. L.J. 525, 540-41 (2008). Penalties for employers, however, are merely a "slap on the wrist." *Id.* at 542.

[241] Lawrence E. Rothstein, *Privacy or Dignity? Electronic Monitoring in the Workplace*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 379, 401-03 (2000).

monitor their employees as they work on computers or engage in phone calls. Over the years, Congress and state legislatures have considered bills that would limit employer surveillance by, for instance, giving employees greater notice of when they were being monitored or limiting monitoring of long-term employees, but none has passed.[242] This lack of statutory protections falls hardest on low-wage employees who are monitored most extensively.[243]

C. The Common Law

The entire body of privacy law emerged from the common law, largely as a result of a path-breaking law review article written in 1890 by Samuel Warren and Louis Brandeis called *The Right to Privacy* which articulated a "right to be let alone."[244] Concerned about an overzealous and sensationalistic press coupled with instantaneous photography,[245] Warren and Brandeis asserted that the "common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."[246] This new conception of privacy influenced state courts to recognize a common law right to privacy, and by the mid-twentieth century most states recognized four distinct privacy torts: (1) intrusion upon seclusion, (2) public disclosure of embarrassing private facts, (3) publicity that places a person in a false light in the public eye, and (4) commercial appropriation of a person's name or likeness.[247]

As few poor people are celebrities, the most relevant tort for this discussion is the tort of intrusion upon seclusion, which protects an individual from intrusion upon his "solitude or seclusion . . . or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person."[248]

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[242] *Id.* at 409-10.

[243] Even public employees have limited protections because private employment law concepts have seeped into the constitutional analysis such that there is not much of a difference. *Id.* at 400; Sprague, *supra* note 135, at 114 ("Both the constitutional and common law rights to privacy require an underlying expectation of privacy; so, in this regard, the analysis is the same in both the public and private employment scenario."). Moreover, the Fourth Amendment "does not address questions of the intensity or impersonality of the surveillance." Rothstein, *supra* note 241, at 401.

[244] Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[245] Sprague, *supra* note 135, at 98.

[246] Warren & Brandeis, *supra* note 244, at 198.

[247] *See* Dean Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

[248] RESTATEMENT (SECOND) OF TORTS § 652B (1977).

Employees have occasionally been successful in asserting this tort against highly offensive privacy violations committed by employers, such as video surveillance of bathrooms and locker rooms.[249] Being videotaped covertly while engaged in private acts is distressing and causes psychological trauma.[250] Of course, this sort of conduct occurs disproportionately in low-wage workplaces,[251] and most of it is never the subject of legal action.[252] In addition, overt employer monitoring is not actionable because employees usually consent to it as a condition of employment.[253] If employees refuse consent, they protect their privacy but lose their jobs.

Moreover, the tort of intrusion upon seclusion is essentially impotent against electronic monitoring. As one court summarized,

> When courts have considered claims in the workplace, they have generally found for the plaintiffs only if the challenged intrusions involved information or activities of a highly intimate nature. . . . Where the intrusions have merely involved unwanted access to data or activities related to the workplace, however, claims of intrusion have failed.[254]

Today, electronic monitoring by employers includes keystroke loggers that trace every key pressed on a keyboard, phone monitoring, and video surveillance, as well as smart ID cards and GPS enabled cell phones and vehicles that track employee movements.[255]

Tort challenges to these practices usually fail because the tort protects only reasonable expectations of privacy (thus mirroring Fourth Amendment standards).[256] Under the common law, it is not reasonable to expect privacy in a public

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[249] Fiore, *supra* note 240, at 547 ("It is extremely difficult for an employee to succeed on an intrusion claim in all but the most egregious circumstances.").

[250] Robert I. Simon, *Video Voyeurs and the Covert Videotaping of Unsuspecting Victims: Psychological and Legal Consequences*, 42 J. FORENSIC SCI. 884, 884 (1997).

[251] NAT'L WORKRIGHTS INST., PRIVACY UNDER SIEGE: ELECTRONIC MONITORING IN THE WORKPLACE, *available at* http://epic.org/privacy/workplace/e-monitoring.pdf (listing reports of intrusive video surveillance, many of which occur in the service industry and manufacturing plants).

[252] At least three states have codified this common law protection and ban video recordings in locker rooms and restrooms and the like. *See* Fiore, *supra* note 240, at 543.

[253] *See* Sharona Hoffman, *Preplacement Examinations and Job-Relatedness: How to Enhance Privacy and Diminish Discrimination in the Workplace*, 49 U. KAN. L. REV. 517, 570 (2001).

[254] Med. Lab. Mgmt. Consultants v. Am. Broad. Co., 30 F. Supp. 2d 1182, 1188 (D. Ariz. 1998), *aff'd*, 306 F.3d 806 (9th Cir. 2002) (citations omitted).

[255] *See* Sprague, *supra* note 135, at 84-85; William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 103-04 (2003).

[256] *See* Corbett, *supra* note 255, at 110; O'Gorman, *supra* note 27, at 227-30.

context, and the workplace is considered public.[257] Even if an employee can demonstrate a cognizable privacy interest, the courts then proceed to balance employee and employer interests—a test employees rarely win because their injuries are considered isolated and individualized.[258] While all employees face these common law limitations, the privacy intrusions for white collar workers are less visible and less humiliating. This may in part explain the lack of public outrage over employer monitoring.

The limits of the common law for securing privacy for the poor can be traced to its roots. The right to be left alone was conceived to protect society's elites (such as Warren and Brandeis) from the glare of public scrutiny.[259] It was grounded in property law conceptions; people "own" their own identity and should be able to decide how they present themselves to the world.[260] In the United States, "[p]rivacy is territorial and is seen as a possessive right that may be alienated preemptively and wholesale."[261] Once you enter the workplace or ask for governmental assistance, you leave that right at the door.[262]

Notably, at the time Brandeis and Warren wrote their article, the poor were subject to "scientific charity," a movement that relied on middle-class "friendly visitors" to enter the homes of the poor and to provide them moral and religious counseling.[263] Prior to the scientific charity movement, the eighteenth-century poor were warehoused in poorhouses, which required "the poor to live within the walls of a total institution, often in uniform, and under strict rules of behavior and mandates of forced labor."[264] In the colonial era, the poor were

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[257] O'Gorman, *supra* note 27, at 237 ("[A]ctivities that are work-related are generally not considered private vis-á-vis one's employer.").

[258] *Electronic Monitoring in the Workplace: Common Law & Federal Statutory Protection*, NAT'L WORKRIGHTS INST., http://workrights.us/?products=electronic-monitoring-in-the-workplace-common-law-federal-statutory-protection (last visited Feb. 1, 2012).

[259] Warren and Brandeis bemoaned the "idle gossip" of the daily papers and the resultant "mental and pain and distress" suffered by the subjects. Brandeis was eventually a Supreme Court justice, while Warren was a wealthy lawyer about whom stories appeared in the local press. SOLOVE ET AL., *supra* note 213, at 10-11.

[260] Courts have interpreted privacy as a component of property, but a countervailing narrative asserts that Warren and Brandeis understood that privacy derived from "inviolate personality," meaning "the individual's independence, dignity, and integrity." Rothstein, *supra* note 241, at 407 (quoting Edward J. Bloustein, *Privacy as an Aspect of Human Dignity*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 6, 163 (Ferdinand D. Schoeman ed., 1984)) (internal quotation marks omitted).

[261] *Id.* at 382.

[262] *Id.*

[263] *See* TRATTNER, *supra* note 182, at 67-68; MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE 70 (10th ed. 1996).

[264] GILLIOM, *supra* note 37, at 24.

often bound out as servants to wealthier members of the community.[265] Today, as explained *supra*, the welfare system continues to control the lives of poor mothers. Simply put, there has never been a historical conception of privacy for the poor. Surveillance has always been the government's prerogative and a tool for social control. Thus, the common law right to be let alone is of little use to people who rely on public assistance for survival and who navigate an ongoing relationship with government officials and/or corporations.

III. RECONCEPTUALIZING PRIVACY AND POVERTY

The legal system provides scant privacy protections for the poor. Our body of privacy law is built upon the "right to be left alone," which ill-fits the nature of the intertwined relationships between poor people and larger institutional actors. The idea of being left alone creates a class differential that shelters those who can afford it. The result is that the poor are often subject to humiliating and stigmatizing data collection practices. This raises the question of how the law can better equalize privacy among all citizens. This part explores various remedies for the class differential in privacy law and policy. First, it examines and rejects nonlegal solutions such as improved "customer" relations, on the one end, and increased automation, on the other. Then, this part explores other values that give meaning to privacy. Privacy is not an end to itself; rather, it fosters and furthers other values. Accordingly, this part suggests how norms of dignity, respect, and trust—as articulated by criminal-justice scholars—can enhance privacy for the poor in the civil realm. While each of these approaches has limitations, they provide valuable guideposts for reconceptualizing privacy for the poor.

A. Nonlegal Solutions

1. Service with a Smile

One optimistic, but ultimately infeasible, solution is to make interactions between low-income people and larger institutions more pleasant and less humiliating. Indeed, some welfare offices have policies that encourage caseworkers to treat "clients" with respect. Still, it is difficult to mandate

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[265] *See* William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. REV. 35, 55 (1996).

politeness and questionable whether new rights-based regimes are desirable or effective, especially with populations that do not view themselves as rights-bearing individuals.

Susan Bennett has articulated how and why welfare bureaucracies use privacy-stripping tactics to discourage poor people from applying for assistance, with devastating consequences for the needy.[266] Churned out of public bureaucracies, the poor suffer hunger and homelessness, as well as a "dampening of the spirit, a lowering of expectations of any kind of fair treatment."[267] In her study of a waiting room at the District of Columbia's Office of Emergency Shelter and Support Services, she found an "ethos of undisclosed information, unexplained delays, and, above all, endless waiting, punctuated by humiliating demands for information."[268] This ethos arose from a variety of factors, such as a vague regulatory regime that permitted workers to demand extreme forms of proof;[269] the front-line workers' fear of "being spare-changed" and distrust of applicants;[270] bureaucratic pressures to prevent the needy from filing applications so as to reduce welfare rolls and avoid providing due process protections;[271] "external demands for fraud control,"[272] and an inability to cope with rising demand in the face of decreasing resources and reduced staffing.[273] In this environment, norms of "customer service" seem laughably optimistic.

On the employment side, low-wage workers experience a different workplace than white collar workers. They usually lack employment benefits such as health insurance or retirement accounts. They face inflexible or unpredictable work hours that limit access to child care and transportation. They have few opportunities for career advancement. They are more likely to work in unsafe or unhealthy conditions.[274] They also have less privacy. These features of the low-income workforce are deeply structural, and require far more change than an attitude adjustment. As David Yamada explains, employment

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[266] *See generally* Susan D. Bennett, *"No Relief but Upon the Terms of Coming into the House"—Controlled Spaces, Invisible Disentitlements, and Homelessness in an Urban Shelter System*, 104 YALE L.J. 2157 (1995).

[267] *Id.* at 2182.

[268] *Id.* at 2158.

[269] *Id.* at 2187.

[270] *Id.* at 2188.

[271] *Id.* at 2193-94.

[272] *Id.* at 2194.

[273] *Id.* at 2198-99.

[274] *See* HEATHER BOUSHEY ET AL., UNDERSTANDING LOW-WAGE WORK IN THE UNITED STATES 9-10 (2007), *available at* http://www.inclusionist.org/files/lowwagework.pdf.

law "cannot force organizations to care about the health and well-being of their employees, require workers to vote for union representation, or simply order everyone to be 'nice' to one another."[275] And even if the law could mandate politeness, the stigma of surveillance would stick. The sweetest social worker in the world might search your medicine cabinets with a smile. An employer may hand over a cup for a urine test with a polite request. The effect is still demeaning.

2. Automation

In lieu of mandated courtesy, it might be tempting to move in the opposite direction and limit interpersonal interaction between low-income Americans and larger institutional actors. Arguably, the more things are automated, the less opportunity there is for insult. Supporters of automation promote technology as a way to save money and ensure consistent decisions.[276] However, as Danielle Citron explains, automation can and does fail.[277]

To begin with, computer programmers struggle to properly translate complex public benefits programs into code, resulting in violations of federal and state law.[278] For instance, Citron describes how programmers in Colorado incorrectly coded nine hundred different public benefits rules into an automated system, resulting in people wrongfully losing food stamps and Medicaid.[279] Furthermore, computers are not fail-safe; they "misidentify individuals [with] . . . same or similar names,"[280] send faulty notices, and terminate benefits without warning.[281] At the same time, many computer programs fail to maintain audit trails of decisions, which then make it impossible for individuals to challenge automated decisions in due process hearings.

At due process hearings, hearing officers are biased in favor of automated systems, with their veneer of objectivity and

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[275] David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523, 554 (2009). Yamada notes, however, that the law can help workers by "safeguarding the rights of association and collective bargaining." *Id.*

[276] Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1252-53 (2008).

[277] *Id.* at 1256-58 (listing examples of automation failures).

[278] *Id.* at 1267-68.

[279] *Id.* at 1268, 1271-72.

[280] *Id.* at 1273.

[281] *Id.* at 1275-76; *see also* Willse, *supra* note 227, at 240 (discussing homeless information management systems and stating that "database programs of course also fall short or fail—systems crash, networks go down, files get mysteriously deleted").

correctness, and laypersons are hard-pressed to challenge the source code underlying automated programs.[282] The end result is that computer programmers are, in effect, rewriting regulations without notice and comment.[283] Automation can also be dehumanizing. As Virginia Eubanks writes, "the structure of technological systems erase the embodied contexts and knowledge of the people described in them."[284]

Even if the errors inherent in automation could be erased, the poor would likely still face differential treatment. Consider the Earned Income Tax Credit (EITC).[285] The EITC, enacted in 1975, provides low-income, working Americans with a refundable tax credit, which amounted to as much as $5666 in 2010, depending on family size.[286] The program lifts five million families above the poverty line each year.[287] The program has significantly increased employment among single mothers and simultaneously lowered the receipt of welfare cash assistance.[288] Notably, the tax credit is granted via an "impersonal and invisible process" that is far less demeaning than public benefits programs.[289]

Nevertheless, low-income taxpayers claiming the EITC receive far greater scrutiny than middle-class taxpayers.[290] They are audited at higher rates,[291] even though over two-thirds of audited EITC claims are ultimately found to be proper.[292] The IRS believes that the EITC has a high

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[282] Citron, *supra* note 276, at 1283-84.

[283] *Id.* at 1288.

[284] Eubanks, *supra* note 49, at 99.

[285] I.R.C. § 32 (2008).

[286] *EITC—Don't Overlook It*, INTERNAL REVENUE SERV. (Jan. 28, 2011), http://www.irs.gov/newsroom/article/0,,id=106429,00.html.

[287] Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 792 (2007). Brown notes, "More children are lifted out of poverty as a result of the credit than any other governmental program." *Id.*

[288] *Id.* at 799-800.

[289] Leslie Book, *Freakonomics and the Tax Gap: An Applied Perspective*, 56 AM. U. L. REV. 1163, 1182 (2007).

[290] "No other taxpayers are subject to such scrutiny." Brown, *supra* note 287, at 791-92.

[291] EITC audits "comprise roughly 36 percent of all individual taxpayer audits." Kate Leifeld, *Creating Access to Tax Benefits: How Pro Bono Tax Professionals Can Help Low-Income Taxpayers Claim the Earned Income Tax Credit*, 62 ME. L. REV. 543, 544 (2010).

[292] *See* Brown, *supra* note 287, at 791. The government focuses disproportionate time and energy on EITC audits—since 1998, the IRS has poured over $1 billion into EITC audits. *See id.* at 792. However, the data shows that audits of wealthier taxpayers are far more productive. *See id.* at 808 (these audits "generally result in at least four times the recommended additional tax than audits of low-income taxpayers").

overpayment rate due to fraud,[293] but studies show that the vast majority of errors result from other, unintentional factors such as the "notoriously confusing" complexities of the program,[294] the turnover as claimants move in and out of poverty,[295] low literacy rates among low-income taxpayers,[296] a lack of access to professional tax preparers, and a fear of turning over personal information to the government.[297]

Due to the distrust of EITC taxpayers, the IRS rolled out a precertification process between 2003 and 2005 among selected portions of the EITC population, which required claimants to provide third party affidavits and documentation in support of their EITC tax filings.[298] By contrast, the rest of the tax system relies on self-reporting. Thus, critics of the precertification process charged that this differential treatment for low-income filers was unfair and unduly burdensome.[299]

Dorothy Brown explains the discrepancy in audit rates and filing requirements for the poor.[300] She states that politicians publicly equate the EITC with welfare, thus knowingly triggering racialized welfare stereotypes in which, "low-income taxpayers are viewed as lazy former welfare recipients who . . . will lie and cheat in order to line their pockets with government money."[301] By contrast, "government subsidies that flow to predominantly white beneficiaries are not considered to constitute welfare," such as farm subsidies.[302] Ironically, most EITC recipients are white,[303] which means the racial stereotypes harm all EITC-eligible taxpayers. EITC enforcement shows that perceptions of class and race lead to differential treatment even in programs that involve little face-to-face interaction. Automation alone is not the answer.

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293 *See* Stephen D. Holt, *Keeping It in Context: Earned Income Tax Credit Compliance and Treatment of the Working Poor*, 6 CONN. PUB. INT. L.J. 183, 185 (2007).

294 Leifeld, *supra* note 291, at 547. "[T]he IRS publication associated with the [EITC] is over fifty pages long with six separate worksheets." Brown, *supra* note 287, at 792.

295 *See* Leifeld, *supra* note 291, at 547 (stating that the "pool of taxpayers who claim the EITC is constantly changing").

296 *See* Leslie Book, *The IRS's EITC Compliance Regime: Taxpayers Caught in the Net*, 81 OR. L. REV. 351, 396-97 (2002).

297 *See* Leifeld, *supra* note 291, at 550.

298 *See* Brown, *supra* note 287, at 809-10.

299 *See, e.g.*, *id.* (explaining that "[n]o other tax provision requires precertification, while all welfare-type programs require it").

300 *Id.* at 799-810.

301 *Id.* at 793-95.

302 *Id.* at 814

303 *Id.* at 820.

B. Giving Content to Privacy Under Law

Privacy is not an end to itself; it supports and enhances other important values. Accordingly, enhancing the relationship between the poor and larger institutions requires more than leaving the poor alone. In related contexts, scholars have been working to shape a richer conception of privacy, particularly under the Fourth Amendment as it relates to criminal searches. Frustrated with the malleable reasonableness standard and its failure to restrain government surveillance, these scholars have strived to give content to the meaning of privacy. These approaches, developed mostly in the criminal law context, are helpful in considering the welfare-to-work continuum because they focus on the individual's relationship to the state. They are also relevant because welfare has become increasingly criminalized, and because criminal law jurisprudence most impacts poor communities. These theories focus on dignity, respect, and trust as values secured by privacy. Privacy is not an end to itself; rather, it secures higher values.

To be sure, there is a tension between seeking governmental assistance and simultaneously demanding privacy from the state.[304] Yet wealthier Americans would recoil in horror if the government put them through similar scrutiny as a condition of receiving governmental subsidies, such as tax deductions for mortgages and retirement plans, and childcare tax credits.[305] Moreover, poor people do not need to be "left alone" by the state or employer to benefit from privacy. Rather, the advantage of the dignity-respect-trust models discussed below is that they can accommodate intertwined relationships in a way that privacy has not been able to bear. In the end, surveillance needs to be proportional to its purposes. The goal is not to shut out the state or employers, but to make them partners with low-income Americans in a flourishing democracy.

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[304] *See* Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931, 940 (1995).

[305] *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 191 (1995) ("[M]iddle-class families benefit from extensive entitlement programs, be they FHA or VA loans at below mortgage market rates or employer health and life insurance. These families receive untaxed benefits as direct subsidies.").

1. Dignity

John Castiglione argues that dignity is an equally important Fourth Amendment value as privacy.[306] As he points out, under the reasonableness standard's balancing test, it is almost impossible for an individual's "abstract, indeterminate"[307] privacy interest to outweigh the state's concrete interest in law enforcement and social control.[308] Accordingly, he posits that dignity can support the scaffolding of the Fourth Amendment in a way that privacy cannot.[309] He notes, people (such as prisoners) can completely lack privacy but still claim "a legitimate expectation of being treated with dignity."[310] In philosophical terms, dignity is the "right to be treated as an end, not as a means."[311] In practical terms, it is the opposite of "unnecessarily degrading, humiliating, or dehumanizing government behavior."[312] In legal terms, the Supreme Court often uses the concept of dignity to inform constitutional interpretation, so it is recognized as a constitutional commitment even if rarely enforced in the Fourth Amendment context.[313] Castiglione helpfully contrasts privacy, which protects access to the self, with dignity, which "generally concerns a limitation on the manner in which an individual is interacted with."[314] Under his proposal, government searches and seizures would be unlawful if they degrade or humiliate individuals without a sufficient countervailing law enforcement interest.[315]

Similarly, David Yamada has posited that dignity should replace "markets and management" as the framework for American employment law.[316] The current employment law regime is dominated "by a belief system that embraces the idea of unfettered free markets and regards limitations on

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306 John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 655.

307 *Id.* at 664.

308 *Id.* at 660.

309 *Id.* at 674-75.

310 *Id.* at 675.

311 *Id.* at 678.

312 *Id.* at 687.

313 *Id.* at 680-81. *See generally* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011) (setting forth a typology of how the Supreme Court uses dignity).

314 Castiglione, *supra* note 306, at 688-89.

315 *Id.* at 696.

316 Yamada, *supra* note 275, at 524. *See generally* RANDY HODSON, DIGNITY AT WORK (2001) (describing threats to dignity in the workplace).

management authority with deep suspicion."[317] Yet this framework benefits the rich at the expense of the poor, as income inequality grows and workers face increasing job insecurity, stress, and negative health consequences—all without adequate legal recourse.[318] At the same time, the law fails to protect against humiliation "by having a remedial structure that is arbitrary, expensive, and difficult."[319] By contrast, a dignitary conception of the workplace would, among other things, support unions and collective bargaining "as an invaluable source of countervailing power in society," because they give workers a voice as well as leverage to demand a better workplace.[320] Notably, collective bargaining is one of the few ways in our system to limit employer surveillance. Although low-wage workers often do find dignity in their work, they do so in spite of the law.[321]

Other authors have contrasted the American system—in which "dignity is denied by treating the employee as a mere factor of production . . . and ignoring . . . the worker's individuality"—to European workplace law, which emphasizes dignity and sharply limits surveillance.[322] In Europe, dignity is connected to "notions of community and citizenship [rather] than property."[323] Under this conception, private power is seen as great a threat to dignity as public power.[324] Thus, privacy is considered a fundamental human right.[325] For instance, workers in France have a say in when and how employer monitoring occurs, they have the right to be informed about the automated treatment of their personal

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[317] Yamada, *supra* note 275, at 523; *see also* RICHARD SENNETT, THE CORROSION OF CHARACTER 31 (1998) (describing how the "new capitalism" emphasis on flexibility "loosens bonds of trust and commitment, and divorces will from behavior"). Sennett writes that information systems "give individuals anywhere in the network little room to hide." *Id.* at 55.

[318] Yamada, *supra* note 275, at 530-31.

[319] Fisk, *supra* note 133, at 92.

[320] Moreover, unions are particularly important in the low-wage workforce, where exploitation is rampant. Yamada, *supra* note 275, at 557. Dignitary norms would also provide protections against unjust or unfair dismissal, *id.* at 558-61, limit workplace bullying, *id.* at 562-65, and improve dispute resolution procedures for employment-related conflicts, *id.* at 566.

[321] *See, e.g.*, Clare L. Stacey, *Finding Dignity in Dirty Work: The Constraints and Rewards of Low-Wage Home Care Labour*, 27 SOC. HEALTH & ILLNESS 831, 832 (2005) ("[A]ides import dignity into a stigmatised and relatively invisible occupation.").

[322] Rothstein, *supra* note 241, at 383-84. *Cf.* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161-62 (2004) (comparing European privacy norms, which are rooted in notions of personal honor, with American privacy law, which is rooted in notions of liberty).

[323] Rothstein, *supra* note 241, at 383; Nehf, *supra* note 1, at 81-82.

[324] Rothstein, *supra* note 241, at 386.

[325] Nehf, *supra* note 1, at 81-82.

information, they receive notice about the scope of monitoring, and monitoring must be proportional to the employers' objectives.[326] Reforming privacy to reflect dignitary values could be helpful to low-income Americans because dignity is an inviolable, core human right that cannot be bought or sold by those with more access to wealth. At the same time, the individual emphasis on dignity can obscure the class-based motivations for and consequences of surveillance.

2. Respect

Andrew Taslitz suggests a class-conscious approach that hinges upon respect as a central value underlying privacy.[327] He explains that courts envision the "reasonable person" interacting with the police from the perspective of a white middle-class person "rather than the poor person familiar with police abuse."[328] Taslitz is particularly attuned to the disparate impact of current Fourth Amendment doctrine on racial minorities entangled in the criminal justice system.[329] As he defines respect, it "is also about inclusion, about being considered full members of the wider political community."[330] He explains how a lack of governmental respect impacts communities, which suffer when they are targeted for suspicionless searches.[331] Those searches "send a message to their victims that they are unworthy of the government's respect."[332] Accordingly, he urges courts to expand their perspectives to better understand and acknowledge minority group experiences.[333] This idea of respect would be helpful in shaping the experiences of low-income Americans as they interact with welfare offices and low-wage employers. Under his conception of respect, courts would have to consider both the impact of privacy law from the perspective of those under surveillance as well as the costs to civil society and

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[326] Rothstein, *supra* note 241, at 387-90; *see also* William A. Herbert, *Workplace Electronic Privacy Protections Abroad: The Whole Wide World Is Watching*, 19 U. FLA. J.L. & PUB. POL'Y 379 (2008). Regarding the more vigorous protections against workplace video surveillance in Australia and Canada, see Fiore, *supra* note 240, at 550-52.

[327] Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 30-32 (2003).

[328] *Id.* at 56.

[329] *Id.* at 21.

[330] *Id.* at 27.

[331] *Id.* at 23.

[332] *Id.* at 23-24.

[333] *Id.* at 92-97.

democratic participation when entire groups are demeaned and subordinated.

The challenge to this approach is that the poor have long been deemed undeserving of respect. The majority of Americans believe that this country is a meritocracy, by which anyone can lift themselves up by their bootstraps. This myth leads to cultural explanations for poverty that blame the poor for their own predicament.[334]

As I have explained elsewhere, the cultural explanation of poverty is founded on conjecture masquerading as common sense, but has no empirical support.[335] Nevertheless, it has had remarkable staying power because it demands less from government and it appeals to the economically insecure middle class.[336] By contrast, the real causes of poverty are far more complex. An amalgamation of economic and demographic factors contribute to poverty, including declining labor market opportunities, the erosion of the minimum wage and low-wage income, deindustrialization, technological changes in the economy, globalization, the decline of unions, and the increased use of contingent workers who are low-wage, part-time, and lack benefits.[337] In addition, governmental urban policies have segregated poor minority communities into areas of concentrated poverty.[338] Nevertheless, the entrenched myth of the meritocracy makes it difficult to build a legal theory around respect.

3. Trust

Scott Sundby is similarly dismayed by the Fourth Amendment balancing test, and he advances a reciprocal government-citizen trust model under which the government could not "intrude into the citizenry's lives without a finding that the citizenry has forfeited society's trust to exercise its

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[334] *See* HANDLER & HASENFELD, *supra* note 25, at 159-61 (describing culture of poverty theories).

[335] *See* MICHAEL B. KATZ, THE PRICE OF CITIZENSHIP 320 (2008) ("In the welfare debates of the 1990s, conservative accounts of research simply misrepresented the evidence.").

[336] *See* Kathleen A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990's Welfare Reform and the Exploitation of American Values*, 4 VA. J. SOC. POL'Y & L. 3, 32-35 (1996) (the culture of poverty thesis "satisfies so many political and ideological needs").

[337] *See id.* at 66-72; ICELAND, *supra* note 40, at 77-78; *see also* MICHAEL B. KATZ, IMPROVING POOR PEOPLE: THE WELFARE STATE, THE "UNDERCLASS," AND URBAN SCHOOLS AS HISTORY 77-78 (1997); Joel Handler, *"Ending Welfare as We Know It"—Wrong for Welfare, Wrong for Poverty*, 2 GEO. J. ON FIGHTING POVERTY 3, 10-12 (1994).

[338] *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 149 (1998).

freedoms responsibly."[339] In other words, citizens would not be searched unless they did something to raise suspicion of wrongdoing. His citizen-trust model applies most appropriately to situations in which the state initiates an intrusion into individual privacy (as is the case with public benefits regimes) rather than responds to perceived wrongdoing.[340] This model recognizes that "[g]overnment action draws its legitimacy from the trust that the electorate places in its representatives by choosing them to govern."[341] Right now, poor Americans do not feel "they have the opportunities and capabilities to participate meaningfully in society," in part due to privacy invasions that signal a lack of trust by government. "Rights are not simply enclaves of protection from government interference but also affect the citizen's view of his or her role in society."[342]

Unfortunately, welfare mothers and low-wage workers have almost no conception of rights—they are "the inverse of the rights-bearing individual."[343] Moreover, a citizenship based approach to privacy does not extend to the private market, which often has just as much power over individuals as does the state. Nor does it protect noncitizens, who are nevertheless entitled to the human right of dignity. Finally, poor people who are citizens are often excluded from mainstream norms of citizenship. As Dorothy Roberts explains, the welfare system treats its recipients as subjects rather than citizens for reasons of class, gender, and race.[344] Whereas citizens receive government benefits such as social security as an entitlement free of stigma, subjects "receive inferior, inadequate, and stigmatizing relief at the government's discretion."[345] She concludes, "While welfare for citizens enables them to be self-ruling persons, welfare for subjects enables the government to rule them."[346] Until our conception of citizenship includes the poor, a citizen-trust model may not advance their privacy.

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339 Sundby, *supra* note 154, at 1777.

340 *Id.* at 1787.

341 *Id.* at 1777.

342 *Id.* at 1784.

343 GILLIOM, *supra* note 37, at 91.

344 Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1577 (1996).

345 *Id.*

346 *Id.*

C. *The Fragile Nature of Privacy*

All three of these models—dignity, respect, and trust—add to our understanding of why privacy is valuable, particularly for our most vulnerable citizens. Adoption of any of these theories could transform the experiences of poor citizens as they interact with the state and their employers. Nevertheless, the courts appear reluctant to weave these strands into privacy jurisprudence, even when courts rule in favor of privacy.

Consider *Ferguson v. City of Charleston*,[347] in which the Supreme Court used the Fourth Amendment to strike down a public hospital's policy (created in conjunction with local police and prosecutors) of drug testing poor, pregnant patients suspected of using drugs.[348] The hospital implemented the policy in the wake of a perceived crack epidemic in which thousands of babies were reportedly being born to drug addicted mothers.[349] Under the policy, patients who tested positive were referred to substance abuse treatment programs under the threat of arrest if they did not comply or if they tested positive in a subsequent screening.[350] The policy was enforced only in the hospital's Medicaid maternity clinic; it was not used in other hospital departments or for pregnant women who paid for their care.[351] The class, race, and gender differential in privacy was clear.

The Court first ruled that the urine tests constituted searches within the meaning of the Fourth Amendment.[352] As the Court stated, "The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent."[353] Further, prior cases approving drug testing involved a special need disconnected from law enforcement.[354] By contrast, in *Ferguson*, "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment."[355]

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347 Ferguson v. City of Charleston, 532 U.S. 67 (2001).

348 *Id.* at 70-73.

349 *Id.* at 70 n.1.

350 *Id.* at 71-72.

351 Campbell, *supra* note 91, at 69; Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in* Ferguson v. City of Charleston, 9 DUKE J. GENDER L. & POL'Y 1, 23 (2002) ("[T]he Policy was applied almost entirely to economically disadvantaged African-American women.").

352 *Ferguson*, 532 U.S. at 76.

353 *Id.* at 78.

354 *Id.* at 79.

355 *Id.* at 80.

While the hospital argued that it had identified criteria that raised suspicion of cocaine use, the Court found no evidence in the record "that any of the nine search criteria was more apt to be caused by cocaine use than by some other factor, such as malnutrition, illness, or indigency."[356] In so doing, the Court implicitly recognized the harmful effects of poverty and refused to punish the mothers for being poor. Thus, the positive narrative of *Ferguson* is that it took into "account the experiences and values of women," and "gave patient and parental autonomy great weight" in a manner that "was offended by paternalistic notions."[357] The Court appraised the context of the searches, recognized the stigma that attached to the women who were drug tested, and limited the criminalization of poverty.

However, the real-life impact of *Ferguson* remains limited. The Court's holding hinges entirely upon its disapproval of police involvement in crafting and enforcing the hospital's policy; at no time does the Court articulate any values underlying the patients' claim for privacy. This absence increases the difficulty of stretching *Ferguson* to cases lacking police involvement, as the Court seemed to intend with its narrow holding.

Thus, the scrutiny of the lives of poor, pregnant women remains. In her ethnographic study, Khiara Bridges describes how poor, pregnant patients seeking Medicaid coverage for prenatal health care costs are subject to mandatory interviews that probe the most intimate corners of their lives.[358] The information gathered goes far beyond what wealthier pregnant women are expected to divulge to their doctors: it involves detailed assessments regarding nutrition, psycho-social factors, and finances conducted by a range of nurses, social workers, and other professionals.[359] The women receive education about contraceptive options throughout their pregnancies and access to long-acting contraception following the birth of their babies.[360] As a result, the state has "all the information necessary to sweep poor families within the ambit of child protective services, the foster care system, Immigration and Customs Enforcement, and, if deemed necessary, the criminal justice system."[361]

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[356] *Id.* at 77 n.10.

[357] Taslitz, *supra* note 351, at 3.

[358] Bridges, *supra* note 52, at 113, 114.

[359] *Id.* at 124-34. Among other things, the inquiries involve "women's sexual histories, experiences with substance use and abuse, histories of sexual and domestic violence, and strategies for preventing the conception and birth of more children . . . ." *Id.* at 163.

[360] *Id.* at 131-32.

[361] *Id.* at 132.

Moreover, *Ferguson* does not change the fact that many states criminally and civilly penalize a woman's drug use during pregnancy.[362] In addition, at least three states have mandatory drug testing of pregnant women in some circumstances.[363] One of the harshest state statutes is in South Carolina, where the *Ferguson* case originated. In South Carolina, a positive drug test at the time of birth results in a presumption of parental neglect that warrants removal of a child from the mother's custody.[364] South Carolina also stands alone in approving criminal prosecutions of women who have used drugs during pregnancy. Although an estimated two hundred women with drug addictions have been criminally prosecuted in thirty states for fetal abuse,[365] most appellate courts have overturned those convictions. In South Carolina, by contrast, the state Supreme Court held that "fetuses are 'person[s]' under the state's criminal child endangerment statute,"[366] and affirmed the conviction of a mother who had used cocaine during her pregnancy. Not surprisingly, drug treatment programs in South Carolina have seen their admissions of pregnant women drop, infant mortality rates have risen, and there has been a 20 percent increase in abandoned babies.[367] Without a value-driven approach to privacy, the class differential in privacy policies is likely to continue. Dignity, respect, and trust are values that can inform privacy law and policy.

IV. EQUALITY IN PRIVACY LAW

As *Ferguson* demonstrates, the courts do not explicitly equate spatial or informational privacy with the values of dignity, respect, or trust, even though these principles would provide meaningful guideposts to distinguishing appropriate

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[362] *See* Lynn M. Paltrow, *Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs*, 8 DEPAUL J. HEALTH CARE L. 461, 464-65 (2005). In some jurisdictions without specific laws on the subject, government officials have nevertheless implemented policies that extend civil child abuse laws to pregnant women. *Id.* at 467, 474.

[363] *Id.* at 467.

[364] *Id.* at 465.

[365] *Id.* at 485.

[366] *Id.* at 488.

[367] *Id.* at 490-91. These punitive, privacy-stripping approaches are fueled by media hysteria rather than science. *Id.* at 475. The science shows that cocaine is not always harmful to children; that drug abuse is a treatable addiction, rather than a moral failing; that a single drug test does not predict parenting ability; and that removing children from their mothers inflicts grave harm on children. *Id.* at 475-82.

data collection from demeaning surveillance.[368] Interestingly however, there is one consistent strain in privacy cases that emerges over the years: class equality. In his *Wyman* dissent in 1971 (upholding welfare home searches), Justice Douglas pointed out the class differential in privacy law, stating, "No such sums are spent policing the government subsidies granted to farmers, airlines, steamship companies, and junk mail dealers, to name but a few."[369] Over thirty years later, the dissenting judge in *Sanchez v. San Diego* (a modern welfare home visit case) wryly pointed out, "I doubt my colleagues in the majority would disagree that an IRS auditor's asking to look in ['medicine cabinets, laundry baskets, closets and drawers for evidence of welfare fraud'] within their own homes to verify the number of dependents living at home would constitute snooping."[370] Similarly, the district court in *Marchwinski* (overturning drug testing of welfare applicants) quoted Justice Marshall to ask, "Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse?"[371] As Justice Marshall stated in 1971, "Such a categorical approach to an entire class of citizens would be dangerously at odds with the tenets of our democracy."[372]

Justice Marshall's warning is today's reality. Poor people continue to suffer privacy invasions that generate stigma and humiliation. In addition to individual harms, this class differential in privacy harms democracy. Two in-depth studies demonstrate the link between surveillance and decreased democratic participation by the poor. First, Joe Soss, in his study of welfare, has explained that poverty "strip[s] individuals of the ability and time needed to follow or participate in political affairs," as well as "the autonomy needed for self-government."[373] Moreover, interactions with welfare workers leave recipients "pessimistic about government's responsiveness and the efficacy of political action."[374] As a result, being a welfare

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[368] In cases involving decisional privacy, the Court has moved away from privacy rhetoric, instead relying on liberty. *See generally* Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715 (2010).

[369] Wyman v. James, 400 U.S. 309, 332 (1971) (Douglas, J., dissenting).

[370] Sanchez v. Cnty. of San Diego, 464 F.3d 916, 936 (9th Cir. 2006).

[371] Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1142 (E.D. Mich. 2000) (quoting *Wyman*, 400 U.S. at 342 (Marshall, J., dissenting)) (internal quotation marks omitted).

[372] *Wyman*, 400 U.S. at 342.

[373] JOE SOSS, UNWANTED CLAIMS: THE POLITICS OF PARTICIPATION IN THE U.S. WELFARE SYSTEM 187 (2000).

[374] *Id.* at 164.

recipient "reduces the odds that a person will vote to slightly less than half of what it would have been otherwise."[375] For poor women, public benefits programs are their "most direct exposure to . . . [political] institution[s],"[376] and the lessons welfare recipients learn there "have significant consequences for broader patterns of political action."[377] Surveillance is one way that the welfare system "position[s] clients as objects of paternalism," which in turn leaves them feeling that government is not responsive to their concerns.[378]

Second, John Gilliom has also studied how welfare surveillance suppresses political action. He found that while welfare mothers resist state control over their lives, they do not use litigation or democratic processes to do so.[379] Rather than viewing privacy violations from a rights-based perspective, they "focus on *need* and on their duties to *care for their families*."[380] Thus, their methods of opposition are more subtle; for instance, they earn unreported income to supplement meager welfare checks.[381] While this defiance sustains individual autonomy in the face of the state's power, it also causes stress to welfare mothers who fear getting caught and possibly losing benefits or being punished criminally.[382] Moreover, it obviates political organizing and leaves surveillance structures intact.

Likewise, among her low-wage coworkers, Barbara Ehrenreich found a complete lack of political consciousness or defiance of workplace privacy intrusions. As she explains, her co-workers could not just "get-up-and-go"; rather, their mobility was constrained by lack of transportation or child care, as well as a lack of information with which to compare employers.[383] As a result, there is no competitive market pushing employers to treat employees more fairly. Further, management engenders a lack of self-respect in employees by subjecting them to random searches.[384] Resistance in the low-wage workforce often comes in

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375 *Id.* at 162.

376 *Id.* at 184.

377 *Id.* at 4.

378 *Id.* at 200.

379 Gilliom found that welfare mothers do not assert rights; there is "no sign of the mobilization and empowerment which might follow." GILLIOM, *supra* note 37, at 85. "Wherever there is unjust power, resistance inevitably follows." HODSON, *supra* note 316, at 42 (citing MICHEL FOUCAULT, POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS (1988)).

380 GILLIOM, *supra* note 37, at 96.

381 *See id.* at 99-106, 113.

382 *See id.* at 87-88.

383 EHRENREICH, *supra* note 77, at 205-06.

384 *Id.* at 208.

the form of lower productivity; sometimes, workers quit in frustration.[385] There is little political resistance. Ehrenreich comments, "We can hardly pride ourselves on being the world's preeminent democracy, after all, if large numbers of citizens spend half their waking hours in what amounts, in plain terms, to a dictatorship."[386] The "dictatorship" is maintained, in part, by surveillance.

This class differential in privacy should be a concern to all Americans. It harms individuals by denying them full respect as citizens and limiting their autonomy. It decreases democratic participation, which in turn means there is less political check on privacy violations. The privacy differential also exacerbates income inequality by reinforcing class lines and disempowering people who in turn become too downtrodden—or busy trying to survive—to challenge public policies. The result is a downward cycle of disempowerment and class division. These costs are incurred with almost no countervailing benefits to individuals or society, other than the societal satisfaction that comes from censuring the "moral laxity" of people "unable to thrive within a capitalist economy."[387]

Of course, an equality approach means that privacy is only as secure as the majority has it. If Americans cross class lines and advocate together to preserve privacy and resist surveillance, we are more likely to restrain abuses of power. The scientists in *Nelson v. NASA* objected to intrusive government questioning conducted for what they believe are bogus security reasons. Poor Americans can relate; they have long been exposed to the prying eyes of the state. Middle-class and wealthy Americans need to realize that novel surveillance techniques are typically used first on the poor. By the time these strategies spread beyond controlling the poor, any "reasonable expectations" against their use have dissolved.

What can equality add to privacy law and policy? It has limited constitutional legs due to the lack of equal protection for the poor. Laws that distinguish on the basis of wealth are

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[385] HODSON, *supra* note 316, at 42-43, 60-68. Hodson describes how employees resist employer abuse by withdrawing cooperation and violating cumbersome rules. *Id.* at 42. "All of these forms of resistance are attempts to regain dignity in the face of organizations that violate worker's interests, limit their prerogatives, or undermine their autonomy." *Id.*; *see also* Carol Cleveland, *A Desperate Means to Dignity: Work Refusal Amongst Philadelphia Welfare Recipients*, 6 ETHNOGRAPHY 35, 54 (2005) (stating that low-wage employees find their dignity under assault and often quit rather than submit to perceived abuse and disrespect).

[386] EHRENREICH, *supra* note 77, at 210.

[387] *See* Bridges, *supra* note 52, at 163 (critiquing the use of poverty as a moral index).

subject to mere rational basis review, and the state can usually assert a societal reason for intruding on individual privacy. It is a difficult scale to tip. Nevertheless, equality can inform other constitutional provisions. For instance, under the Fourth Amendment, a government search may not be reasonable if targeted at individuals solely on class grounds.[388] This is intimated in *Ferguson* and articulated in *Marchwinski*. Moreover, equality norms could be folded into the Fair Information Principles that inform privacy laws and policies. These principles currently focus on preventing unknowing disclosure to third parties. However, they could be expanded to cover the data collection phase and to forbid collection practices that intrude on privacy in a demeaning, humiliating, or stigmatizing way. In addition, statutory protections for workplace monitoring could be enacted that give employees greater notice about surveillance and limit tactics that are disproportionate to achieve employer objectives. At the same time, employers should recognize and replicate successful monitoring programs that give employees notice about monitoring, as well as a voice in surveillance strategies. Finally, the common law could recognize the privacy interests of and harms to low-wage employees as a group, rather than disaggregating claims down to an individual level. Rather than asking if a specific person has a reasonable expectation of privacy in a specific workplace, courts could consider whether employees have any reasonable expectation to be treated with dignity by employers. In short, our privacy policies and practices should be examined to ensure that they do not single out a specific class of persons for stigma. The ideal of equality can help provide a check against such targeted surveillance.

CONCLUSION

Due to advanced technologies, all Americans face corporate and governmental surveillance. However, poor Americans face different and more intense privacy violations than do wealthier Americans. While most Americans are vaguely aware that they are subject to surveillance, they do not feel its effects concretely, and they are willing to relinquish some privacy for increased security and for the conveniences of technology. Yet for the poor, surveillance is neither vague nor invisible. Rather, along the welfare-to-work continuum, poor

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[388] *See* Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1142 (E.D. Mich. 2000).

people face privacy intrusions at the time that the state or their employers gather data. This data collection tends to stigmatize and humiliate, not only compounding the harmful effects of living in poverty, but also dampening democratic participation by the poor.

Yet privacy law is focused on middle-class concerns about limiting the disclosure of personal data so that it is not misused. By contrast, the poor interact with the government and low-wage employers in ways that are ongoing and interpersonal, and as a result, the "right to be left alone" embodied in current privacy law does not protect their interests in dignity and autonomy. Privacy law, in its constitutional, statutory, and common law dimensions, protects reasonable expectations of privacy, but courts have long held that people give up expectations to privacy when they seek help from the government or go to work. The law thus reinforces the existing class differential in privacy practices. This class differential has costs not only for the poor, but for all citizens. The poor do not need to be left alone; they need to be treated with dignity. Privacy should not be for sale. All Americans would benefit from enhancing the privacy rights of the poor, and united, we can provide a powerful check on expanding surveillance that impacts the poor and rich alike.