

# A Genealogy of Home Visits: Explaining the Relentless Search for Individualized Information Without Individual Suspicion

By PETER MICEK\*

*The principles are clear and explicit. The free market is fine for the third world and its growing counterpart at home. Mothers with dependent children can be sternly lectured on the need for self-reliance, but not dependent executives and investors, please. For them, the welfare state must flourish.*  
—Noam Chomsky<sup>1</sup>

## Introduction

THE HOME HOLDS A SACRED PLACE in American mythology. From the Third and Fourth Amendments<sup>2</sup> to the Due Process Clause,<sup>3</sup> the Constitution is often invoked to protect most Americans' homes from invasion by government forces. Welfare recipients, however, have not been so fortunate. Courts have upheld warrantless, suspicionless searches of their homes by referencing, among other things, welfare recipients' assumed consent and their relationship with the government, and the rehabilitative—or, at least, non-punitive—goal of public assistance distribution.<sup>4</sup> Welfare recipients are not synonymous with poor people, but it is worth noting that courts usually uphold the rights of the poor only when some other important right or

---

\* J.D. Candidate, University of San Francisco School of Law, 2011; B.S., Northwestern University, 2003. I would like to thank Professor Julie Nice and students in Poverty Law for their input and guidance. I would also like to thank Lee Ryan for lending her time and library expertise, as well as Anastasia Dodson, Liz Schott, and Lynn Martinez. I also extend thanks to my family and significant other for their encouragement and support.

1. Noam Chomsky, *Rollback—Part 1*, Z MAGAZINE, Jan. 1995, available at <http://www.chomsky.info/articles/199505—.htm>.

2. U.S. CONST. amends. III–IV.

3. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (protecting consenting adult sexual behavior in the home under the Due Process “liberty” interest).

4. See *Sanchez v. County of San Diego*, 464 F.3d 916, 919 (9th Cir. 2006).



group is at risk.<sup>5</sup> The home, when paired with welfare, does not merit such protection.

Not all “home visits” result in constitutional violations. They are carried out in a variety of ways in different contexts, from welfare and food stamp eligibility monitoring to child protection.<sup>6</sup> In modern California welfare “engagement strategies,” the visits are so widely accepted that they are currently promoted as a “best practice.”<sup>7</sup> Nevertheless, some ongoing uses of home visits raise Constitutional concerns. Many of the justifications for home visits fail to consider the way power functions in our complex, modern state and ignore the underlying purposes of the visits.

This Comment presents a “genealogy” of this long-standing technique used to produce knowledge about the lives of the poor. Part I shows the development of welfare monitoring practices. Recent court decisions approving harsh methods of determining eligibility have received widespread condemnation for furthering the stereotype of welfare as charity and emphasizing the individual’s “relationship with the state.” Explaining the development of the stereotype, Part II outlines the shift in the type of power exercised throughout the state, which transformed society from sovereignty to a diffuse and complex administrative system. Finally, Part III argues extra protection is needed for the poor in the modern disciplinary power system, which gives officials all the reason necessary to enter the homes of the needy independent of individualized suspicion. Assuming the primacy and ubiquity of disciplinary power begs a critique of the government-centric viewpoint of the Special Needs Doctrine. A critique of the blunt methods approved by the courts explains the failure of home visits to produce results beyond burdening welfare clients and workers.

---

5. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage); *Plyler v. Doe*, 457 U.S. 202 (1982) (education); *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (non-marital children); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973) (politically unpopular group); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (travel); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (voting); *Griffin v. Illinois*, 351 U.S. 12 (1956) (criminal appeal).

6. Telephone Interview with Anastasia Dodson, Senior Policy Analyst, County Welfare Dirs. Ass’n of Cal. (Nov. 4, 2009).

7. E-mail from Anastasia Dodson, Senior Policy Analyst, County Welfare Dirs. Ass’n of Cal. (Oct. 29, 2009, 8:10:48 PST) (on file with author).

## I. Welfare Eligibility Monitoring: From Poorhomes to Home Visits

For the state to exercise power over the poor it must know them, sort them, and mold them into a workable shape. They must become “‘legible’ or fit into terms, categories, and characteristics that are observable, assessable, and amenable to the management and information regimes of modern bureaucracy.”<sup>8</sup> Throughout different eras and levels of technology and administrative prowess, the collection and synthesis of knowledge about the poor has attempted to determine whether the poor are deserving, worthy, or eligible for assistance.<sup>9</sup>

### A. Early American Public Assistance

In order to “know” the poor, in both Britain and colonial America, an “overseer of the poor” monitored “the collection and delivery of aid to the poor and kept careful records of their identity and whereabouts.”<sup>10</sup> Poorhouses developed in the United States as a form of “indoor relief” adopted from the British model where participants were required to live, eat, and work inside the institution, often in uniform and under strict rules and labor mandates.<sup>11</sup> The sole source of relief, the nineteenth century American poorhouses, were very effective at sorting and controlling the poor, as well as deterring potential comers through intentionally harsh conditions.<sup>12</sup> As in England, though, “indoor relief” declined toward the end of the nineteenth century as a result of the creation of the experimental “scientific charity” movement and its methodologies that paved the way for modern social workers and investigators.<sup>13</sup>

#### 1. Friendly Visitors and Scientific Charity

As the modern welfare system began, the home visits continued, though curiously without an official mandate. In part to abolish “outdoor relief” from public view,<sup>14</sup> the scientific charity movement began

---

8. JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* 21 (2001).

9. *Id.* at 22.

10. *Id.*

11. *Id.* at 24.

12. *Id.*

13. *Id.*

14. Preston L. Morgan, Comment, *Public Assistance for the Price of Privacy: Leaving the Door Open on Welfare Home Searches*, 40 *McGEORGE L. REV.* 227, 230 n.21 (2009) (citing MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA*, 19 (1996)).

to send “friendly visitors” to the homes of the poor in the United States<sup>15</sup> around the turn of the century. The visitors performed several functions—advising, supporting, instructing, and inspecting—while wearing the hats of investigator and friend.<sup>16</sup> The government had taken its hands out of public assistance, for the most part, under the influence of conservative social Darwinism, but made another inroad during the progressive Reform Era.<sup>17</sup> Mothers’ Pensions, the precursor to the modern Aid to Families with Dependent Children, was established by state and local governments between 1910 and 1920 and gave grants to “deserving,”<sup>18</sup> mostly white,<sup>19</sup> poor, single mothers with children.<sup>20</sup> The programs only allowed grants to “suitable homes” with no unrelated male boarders and attached conditions to the aid, justifying continued surveillance and judgment of the poor and their lifestyles.<sup>21</sup>

## 2. The Great Depression to the Second Great Migration

The Great Depression brought the Social Security Act,<sup>22</sup> which created broad, less-stigmatized social welfare programs for the aged and unemployed, along with more of the same restricted relief for poor women and children. The Act appropriated funds for aid to dependent children (“ADC”),<sup>23</sup> which largely codified the Mothers’ Pensions.<sup>24</sup> Though the Act did not mandate that states, which controlled administration of funds, conduct surveillance of welfare recipients, the Social Security Board soon recommended that social workers keep tabs on clients through home visits.<sup>25</sup> Such visits were “the norm” until budget constraints moved the point of interaction to centralized offices, which clients preferred. Still, though, public assistance recipients were assumed to have “fewer privacy rights than others.”<sup>26</sup>

---

15. GILLIOM, *supra* note 8, at 24.

16. *Id.*

17. *Id.* at 24–25.

18. *Id.* at 25 (quoting LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890–1935*, at 37 (1994)).

19. Morgan, *supra* note 14, at 231 n.32.

20. *Id.*

21. GILLIOM, *supra* note 8, at 25.

22. Social Security Act, 42 U.S.C. §§ 301–1305 (1940).

23. *Id.* § 601–605.

24. Morgan, *supra* note 14, at 232.

25. LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890–1935*, at 296 (1994).

26. *Id.* In modern legal contexts, “privacy” has a “narrow” scope, meaning that it is not necessarily applicable to the eligibility determinations of welfare recipients. Telephone Interview with Liz Schott, Ctr. on Budget and Pol’y Priorities, (Oct. 7, 2009). In particular,

For the first couple of decades, public assistance programs mainly served the elderly, but by the mid-1950s, ADC represented the majority of the need. Increased welfare eligibility restrictions popped up as more diverse groups, including African Americans on the second wave of the Great Migration,<sup>27</sup> joined the rolls.<sup>28</sup> State after state instituted eligibility determinations, including the “suitable home” and “man-in-the-house” policies, and enforced through such tactics as “midnight raids,” i.e., nighttime or early morning home visits, looking for unreported sources of financial support.<sup>29</sup>

### B. The Rise and Fall of Legal Resistance

As part of urban revitalization, a movement formed in the 1960s to recognize the dignity of the recipients of public assistance. Rather than undergo verification through investigation, welfare recipients were trusted to voluntarily report their qualifications, a process termed “Declaration,” to satisfy eligibility requirements.<sup>30</sup> War on Poverty policies,<sup>31</sup> progressive lawyering, and urban militancy, among other factors, assisted in temporarily halting home visits.<sup>32</sup> By the early 1970s, however, the welfare rights movement fractured<sup>33</sup> and surveillance tactics flourished.<sup>34</sup>

Two key court decisions reflecting that fracture curtailed the protection of dependent children and their families’ privacy. In 1970, the U.S. Supreme Court, in *Dandridge v. Williams* (“*Dandridge*”),<sup>35</sup> deferred to a state legislature’s allocation of federal public welfare funds that included a family size cap. While *Dandridge* broadsided the ability of

---

the term privacy conjures a vision of isolated individuality that is entirely foreign to mothers receiving public assistance, who depend on a complex web of interaction with neighbors and social workers to maintain their families. GILLIOM, *supra* note 8, at ch. 5. The term, however, is useful as a catchall for a number of constitutional rights and their resonance in popular culture.

27. Christopher Manning, *African Americans*, <http://www.encyclopedia.chicago-history.org/pages/27.html> (last visited May 4, 2009).

28. GILLIOM, *supra* note 8, at 26–27.

29. *Id.* at 27 n.5, 155 n.31. The “man in the house” restriction was outlawed in *King v. Smith*, 392 U.S. 309, 333 (1968).

30. GILLIOM, *supra* note 8, at 28–29.

31. See Special Message to the Congress Proposing a Nationwide War on the Sources of Poverty, 1 Pub. Papers 375 (March 16, 1964); Economic Opportunity Act of 1964, 42 U.S.C. §§ 2701–2981 (1964).

32. GILLIOM, *supra* note 8, at 28–29.

33. See *id.* at 110 (describing the failure of the National Welfare Rights Organization to adapt the language of welfare rights to its clients’ language of needs, mothering, and childcare).

34. *Id.* at 30.

35. 397 U.S. 471 (1970).



courts to smoke out the ends and justifications of specific welfare policies through higher scrutiny, a year later *Wyman v. James* (“*Wyman*”)<sup>36</sup> carved a specific exception into the Fourth Amendment, which has since widened to a gulch, with the poor, students, and probationers on one side and most Americans on the other.<sup>37</sup> However, the Court in *Wyman* did not so much sanction a new technique of investigation as qualify an old one—the home visit by a *friendly* advisor.

### 1. Help Comes Knocking: *Parrish* and *Wyman*

During the brief Declaration era, a lucid moment on the bench fought through the smokescreen and protected the home. Sitting en banc in 1967, the California Supreme Court in *Parrish v. Civil Service Commission* (“*Parrish*”)<sup>38</sup> outlawed the use of unannounced, early morning, mass raids of welfare recipients’ homes without individualized suspicion.<sup>39</sup> An Oakland, California social worker refused to take part in Operation Bedcheck, as the raids were known, and was fired. The court declared the raids illegal because the consent of welfare recipients, even if given, could not stand in the face of the threat to their livelihood if they refused. The pressure to submit to authorities overrode the residents’ ability to meaningfully consent, according to the court. The opinion also cited the heavy burden on the government to justify waiver of constitutional rights, as recognized in the recent decision in *Miranda v. Arizona*,<sup>40</sup> explicitly drawing a connection between the rights afforded suspected criminals and those of welfare recipients.<sup>41</sup> This connection would surface a few decades later in California’s highest court.

Several years after *Parrish*, the first major Supreme Court decision on home visits came down on the side of the government.<sup>42</sup> Calling the official making a home visit a mainly rehabilitative helper, rather than investigative prosecutor, the court in *Wyman* found no search, and alternatively, no unreasonable search even if there were one. Among myriad factors in the majority’s decision were (1) the non-

---

36. 400 U.S. 309 (1971).

37. See Harvard Law Review Ass’n, Recent Cases, *Constitutional Law—Fourth Amendment—Ninth Circuit Upholds Conditioning Receipt of Welfare Benefits on Consent to Suspicionless Home Visits*, 120 HARV. L. REV. 1996 (2007) (arguing *Sanchez* and other decisions characterize welfare recipients as different from “the rest of the citizenry”) [hereinafter Recent Cases].

38. 425 P.2d 223 (Cal. 1967).

39. *Id.* at 225, 231.

40. 384 U.S. 436 (1966).

41. *Parrish*, 425 P.2d at 270.

42. See *Wyman v. James*, 400 U.S. 309 (1971).

invasive nature of the search (“no snooping”); (2) the fact that it was a planned visit with notice; (3) that it was a personal, rehabilitative service with close contact between the client and officials; and (4) that it safeguarded the public’s interest in the child, in stopping fraud, and in accounting for public funds.<sup>43</sup> The majority recognized that mass raids could present a more grave danger to Fourth Amendment rights, referencing *Parrish*,<sup>44</sup> but likened the case at hand to a request by an Internal Revenue Service agent in auditing a taxpayer—that is to say, a situation where consent is not burdened by any possible deprivation of constitutional magnitude.<sup>45</sup>

In his dissent, Justice Douglas blamed the government for trying to “buy up” the constitutional rights of welfare recipients, and called out double standards facing recipients of government largesse, with more respect afforded farmers receiving “subsidies,” for example, than for impoverished residents receiving “charity”—like welfare checks.<sup>46</sup> In their dissent, Justices Marshall and Brennan noted that federal regulations do not require visits to ensure eligibility, and recommended getting the needed information from other, less invasive methods.<sup>47</sup>

## 2. California Scheming: The Return of Home Visits

In the decades succeeding *Wyman*, the notion of an entitlement to welfare, a form of “new property” that the Court has called more than just “mere charity,”<sup>48</sup> nearly disappeared, though it was not explicitly overruled.<sup>49</sup> For instance, Congress attempted to legislate entitlements out of existence in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,<sup>50</sup> which gave states more power over welfare distribution through block grants from the federal government.<sup>51</sup> In the context of a growing economy and increased criticism of welfare, and following a massive drop in crime rates, local governments in Southern California renewed home visits of welfare

---

43. *Id.* at 318–25.

44. *Id.* at 326.

45. *Id.* at 324.

46. *Id.* at 326–28, 332.

47. *Id.* at 347.

48. *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970); *see, e.g., Wyman*, 400 U.S. at 332 (Douglas, J., dissenting).

49. Recent Cases, *supra* note 37, at 2000 n.44 (charting the course of Professor Charles Reich’s conceptualization of welfare payments as “new property” from *Goldberg* to *Sanchez*).

50. Pub. L. No. 104–193, 110 Stat. 2105 (1996).

51. Morgan, *supra* note 14, at 237.



recipients, this time carried out by members of the law enforcement community.<sup>52</sup>

In 1997, San Diego County instituted a program, dubbed “Project 100%,” mandating home visits of every county welfare applicant *not* suspected of ineligibility.<sup>53</sup> Receipt of welfare benefits was conditioned on acquiescence to the “walk-through”<sup>54</sup> by a police-trained, badge-carrying “peace officer.”<sup>55</sup>

In 1999, following a television news broadcast on welfare fraud, the Los Angeles County Board of Supervisors directed the Department of Public and Social Services to restart home visits in the style of San Diego’s.<sup>56</sup> A district attorney’s office representative noted that Los Angeles County had stopped conducting home visits years earlier due to budget constraints.<sup>57</sup> The new program forced applicants to undergo home visits before enrolling in CalWORKs, the state’s welfare program.<sup>58</sup>

### 3. Legal Response: All Kinds of Affirmation

Two lawsuits were filed in response to these programs. In both courts largely followed the guidance of *Wyman*, which sanctioned home visits that are mainly rehabilitative, not investigative, and identified the purpose of these visits as falling under a Special Needs Doctrine.

#### a. *Smith* and Special Needs

In 1999, a suit was filed in state court against Los Angeles alleging violations not only of state requirements and statutes, but also state and federal constitutions.<sup>59</sup> In that case, *Smith v. L.A. County Board of*

---

52. See MARTIN J. WIENER, RECONSTRUCTING THE CRIMINAL: CULTURE, LAW, AND POLICY IN ENGLAND, 1830–1914, at 258–60 (1990) (arguing that success of anti-crime policing in late- and post-Victorian Britain led to the diversification of law enforcement efforts into new fields of behavior with less overtly criminal nature). The police’s new responsibilities beckoned more extensive tasks of social regulation, and the creation of new crimes, including larceny. *Id.*

53. Recent Cases, *supra* note 37, at 1996.

54. *Id.*

55. Sanchez v. County of San Diego, 464 F.3d 916, 934 n.2 (9th Cir. 2006).

56. Greg Gittrich, *Welfare Claims To Be Checked; Home Visits Aim to Stem Widespread Fraud in L.A.*, LOS ANGELES DAILY NEWS, Apr. 6, 1999, at N4.

57. *Id.*

58. *Smith v. L.A. County Bd. of Supervisors*, 128 Cal. Rptr. 2d 700, 702–03 (Ct. App. 2002).

59. *Id.* at 702.

*Supervisors* (“*Smith*”),<sup>60</sup> the court disagreed and declared that state regulations gave the county the power to set welfare monitoring policy. The county’s social services manual allowed for home visits and, indeed, demanded them if there was no other way to get the required information.<sup>61</sup> State law did not pre-empt, conflict with, or “fully occupy” the area of law, and the court deferred to the agency’s interpretation of its regulations.<sup>62</sup> The county needed no individual reasons for the home visits because their purpose was not “fraud investigation.”<sup>63</sup>

On the constitutional issues, *Smith* followed *Wyman*’s reasoning in calling the search, if it was reasonable. It distinguished *Parrish* on grounds that these visits were not early morning mass raids, but gave notice to residents, and the investigators were not instructed to snoop.<sup>64</sup> As far as snooping, investigators were “prohibited from opening drawers or closets during their walk-through of the home.”<sup>65</sup> The court, however, denied finding anything “improper or insidious in an eligibility worker making observations that bear on an applicant’s entitlement to benefits under CalWORKs.”<sup>66</sup> It also applied the Special Needs Doctrine, “a rapidly expanding area of Fourth Amendment jurisprudence.”<sup>67</sup>

Developed out of *Wyman*,<sup>68</sup> the Special Needs Doctrine recognizes “exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”<sup>69</sup> In applying the exception, the court first looks to the purpose of the government action and whether it fulfills general law enforcement goals, like crime control.<sup>70</sup> If, instead, the government action serves a special need, the threshold is met and courts move to the second prong, balancing the nature of the individual’s Fourth Amendment privacy interest with the character of

---

60. 128 Cal. Rptr. 2d 700 (Ct. App. 2002).

61. *Id.* at 703.

62. *Id.* at 707–10.

63. *Id.* at 711.

64. *Id.* at 713.

65. *Id.* at 712.

66. *Id.* at 710.

67. *Id.* at 711–12.

68. Recent Cases, *supra* note 37, at 1997.

69. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring); *accord Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

70. *Sanchez v. County of San Diego*, 464 F.3d 916, 926 (9th Cir. 2006).

the special intrusion and the extent to which the intrusion promotes legitimate government interests.<sup>71</sup>

The Supreme Court officially adopted this exception in *Griffin v. Wisconsin*,<sup>72</sup> where a probationer's home was searched for a weapon based on reasonable suspicion, not the usual, higher, probable cause standard. The court decided government supervision of the probationer during the "genuine rehabilitation period" after his imprisonment ensured public safety and negated the warrant requirement.<sup>73</sup> The probationer's relationship to the state was found to affect his constitutional rights, including his Fourth Amendment right to freedom from unreasonable searches.<sup>74</sup>

In some cases of *seizure*, not even "reasonable suspicion" is needed, just an assurance that the seizure is not arbitrary, capricious, or intended to harass.<sup>75</sup> The exception applies to work-related searches of employees' desks and offices,<sup>76</sup> searches of highly regulated businesses like vehicle dismantlers,<sup>77</sup> and of the body cavities of prisoners. As specifically applied to students, the exception also applies to backpack searches<sup>78</sup> and mandatory drug testing without individualized suspicion.<sup>79</sup>

In *Smith*, Los Angeles County presented the important purpose of deterring welfare fraud.<sup>80</sup> This special need, beyond mere law enforcement, qualified the searches under a lower standard of suspicion. Additionally, deterring fraud overrode the "minimal" privacy intrusion at issue in Los Angeles.<sup>81</sup>

#### b. *Sanchez Defends Her Home*

In a second challenge to the new round of home visits in Southern California, plaintiffs Rocio Sanchez and other Project 100% applicants in San Diego filed a suit in federal court charging violations of the state and federal constitutions and state welfare prohibitions

---

71. *Id.* at 926–27.

72. 483 U.S. 868 (1987).

73. *Id.* at 875.

74. *Id.* at 879.

75. *In re Randy G.*, 28 P.3d 239, 239 (Cal. 2001).

76. *O'Connor v. Ortega*, 480 U.S. 709 (1987).

77. *New York v. Burger*, 482 U.S. 691, 699–703 (1987).

78. *New Jersey v. T.L.O.*, 469 U.S. 325, 337–42 (1985).

79. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (supporting the lower court's finding that student athletes were at the head of the school's drug culture).

80. *Smith v. L.A. County Bd. of Supervisors*, 128 Cal. Rptr. 2d 700 (Ct. App. 2002).

81. *Id.* at 712–13.

against “mass and indiscriminate” home visits.<sup>82</sup> The decision in *Sanchez v. County of San Diego* (“*Sanchez*”),<sup>83</sup> panned by critics as “driven by stereotypes of the poor,”<sup>84</sup> purports to follow the *Wyman* decision and the Special Needs Doctrine it initiated.<sup>85</sup>

Project 100% home visits were not searches, according to the majority. As the Supreme Court found in *Wyman*, the panel decided home visits were not criminal investigations, as there were no criminal penalties for refusing to consent to the visits.<sup>86</sup> Alternatively, if they were searches, they were reasonable.<sup>87</sup> The Ninth Circuit panel’s majority saw many similarities between the *Wyman* factors proving reasonableness and the *Sanchez* facts, including: (1) the public’s interest in caring for dependent children and stopping welfare fraud; (2) the state’s goal of rehabilitation; (3) the fact that the investigation did not involve a uniformed authority or police officer; (4) the fact that residents had advance notice in writing that a visit would take place; and (5) the fact that there were safeguards against “snooping.”<sup>88</sup>

The searches were also reasonable, the court noted, because they fell under the Special Needs exception. Citing the fact that no one had been subjected to criminal prosecution for welfare fraud resulting from a Project 100% home visit, the *Sanchez* court saw the visits’ purposes as facilitating welfare administration, not general law enforcement.<sup>89</sup> Therefore, Project 100% met the threshold requirement for Special Needs consideration.

Applying the second prong, the balancing test, the court dismissed the individual’s privacy interest and the sanctity of the home as

---

82. Recent Cases, *supra* note 37, at 1997.

83. 464 F.3d 916 (9th Cir. 2006).

84. Recent Cases, *supra* note 37, at 2003 (arguing the court treats welfare distribution as an “above-baseline” activity); *see id.* at 2001 (arguing that judges stereotype public assistance as a special deviation above the “normal baseline” of government activity, and therefore allow the government to attach strings detrimental to recipients’ constitutional rights). This analysis is based on the doctrine of unconstitutional conditions. Robert M. O’Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CAL. L. REV. 443 (1966). California courts recognize this doctrine. *See Robbins v. Superior Court*, 695 P.2d 695 (Cal. 1985). Justice Fisher found it was violated by San Diego’s Project 100%. *See Sanchez*, 464 F.3d at 942 (noting the doctrine “limits the government’s ability to exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary”).

85. Recent Cases, *supra* note 37, at 1997–98.

86. *Id.* at 1997.

87. *Sanchez*, 464 F.3d at 923.

88. *Id.* at 923–24. The applicants are not told, however, “the exact date and time the visit will occur.” *Id.* at 919.

89. *Id.* at 926.

dependent on the individual's "relationship to the state."<sup>90</sup> Welfare is only given if the recipient establishes a "physical residence in the state and actual presence" at the address in the county petitioned for assistance. This, in the majority's eyes, along with the consent offered to the home visits, reduced the applicants' expectation of privacy in their homes.<sup>91</sup> The safeguards and statistical evidence of the searches' effectiveness in reducing welfare fraud were enough to satisfy the second prong and justify the "administrative" searches under the Special Needs Doctrine.<sup>92</sup>

Of the three judges on the *Sanchez* panel, Justice Fisher dissented. Whereas the visits in *Wyman* were "primarily rehabilitative," he wrote, the visits in *Sanchez* were performed by law enforcement-trained peace officers from the district prosecutor's office. In addition, the officers were allowed to ask to peek into drawers and trash bins, seeming to flout the *Wyman* ban on snooping.<sup>93</sup> Justice Fisher also rejected the equation of welfare recipients and other Special Needs Doctrine subjects vis-à-vis the state. "Whatever legal relationship exists between the fraud investigator and the welfare applicant is wholly distinguishable from the relationship between a student and school administrators . . . a probationer and his probation officer . . . or the government as employer and its employees."<sup>94</sup> He noted that only the probationers had been subjected to Special Needs searches in their homes,<sup>95</sup> where privacy interests are at their "zenith."<sup>96</sup>

Of the three judges who heard *Sanchez*, only Judge Fisher voted to grant the petition for rehearing en banc.<sup>97</sup> Once the full court was advised of the petition, a majority voted against the rehearing. Judge Pregerson dissented from the decision not to rehear. His dissenting opinion, joined by six other justices, highlighted factual differences between *Wyman*'s "home visits" and the "walk throughs" in San Diego.<sup>98</sup> He accused the panel of ignoring "over thirty-five years of intervening law" and Fourth Amendment jurisprudence in its attack on the privacy rights of the poor.<sup>99</sup>

---

90. *Id.* at 927.

91. *Id.*

92. *Id.*

93. *Id.* at 933-34.

94. *Id.* at 941.

95. *Id.*

96. *Id.* at 940 (quoting *United States v. Scott*, 450 F.3d 863, 871 (9th Cir. 2006)).

97. *Id.* at 966.

98. *Id.* at 967-69.

99. *Id.* ("The government does not search through the closets and medicine cabinets of farmers receiving subsidies. They do not dig through the laundry baskets and garbage

### C. New Reason for Home Visits: California Goes Far to Increase the Work Participation Rate

The welfare reform in 1996 required states, in order to receive the maximum amount of federal funds, to prove to the federal government that fifty percent of their welfare recipients were working, and other percentages were “compliant” or participating in various ways. Now, recipients who are derelict in complying with program requirements without good cause and refuse to enter into a compliance plan are sanctioned. But the states want the federal money and, therefore, need the sanctioned recipients included in the Work Participation Rate (“WPR”). California is a “strong county” state, meaning the counties have discretion in welfare, food stamp, and other social programs.<sup>100</sup> Each county’s welfare department has an “anti-fraud unit” which refers egregious cases to the district attorney’s office.<sup>101</sup> The counties also use “sanction reengagement strategies”<sup>102</sup> to keep the sanctioned or non-compliant clients from negatively counting against the state’s WPR.

#### 1. The Temporary Assistance to Needy Families Reauthorization Dance

California modified CalWORKs in response to the federal government’s reauthorization of Temporary Assistance to Needy Families in 2006. A home visit program in Los Angeles County, home to the largest population of welfare recipients in California, became a model for the entire state. The GAIN Sanction Home Visit Outreach Project trains senior caseworkers to engage clients in a three-step program with the final step being a home visit.<sup>103</sup> Through GAIN, the county “served” more than 9100 non-compliant or sanctioned clients during a five-month period in 2005 and 2006.<sup>104</sup> Eighty-one percent of those

---

pails of real estate developers or radio broadcasters. The overwhelming majority of recipients of government benefits are not the poor, and yet this is the group we require to sacrifice their dignity and their right to privacy. This situation is shameful.”). For more information on the “double standard” applied to the poor in constitutional interpretation, see Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 *FORDHAM URB. L.J.* 629 (2008).

100. Telephone Interview with Anastasia Dodson, *supra* note 6.

101. *Id.*

102. CAL. DEP’T OF SOC. SERVS., FINAL REP. TO THE LEG. ON STRATEGIES TO INCREASE THE WORK PARTICIPATION RATE 6 (2009), available at <http://www.cdss.ca.gov/cdssweb/entres/pdf/SB84FinalReport.pdf>.

103. SUBCOMM. NO. 3 AGENDA, MAY 4, 2006, SUBCOMM. ON BUDGET & FISCAL REVIEW 26 (Cal. 2006), available at <http://www.sen.ca.gov/budget/Sub3/2006Sub3.pdf>.

104. *Id.* at 26–28.

served had their cases “resolved,” meaning the county contacted them and reached some result other than sanction. Nearly a third (29.7%) of the resolved cases achieved “participation/agreement to participate” and almost one-quarter (24.6%) showed “good cause” for non-compliance.<sup>105</sup> Nearly six percent—714—of those served received home visits.

## 2. Home Visits for All

Recently, counties have unabashedly promoted home visits, even if they have to contract out for third parties to conduct them, and papered over their clients’ aversion to them. Since 2006, most counties in the state—at least thirty-eight—have used home visits as part of their initial meetings with applicants for public assistance or as a “reengagement strategy.” With “intensive outreach” programs the counties, according to a report to the legislature on how to increase the WPR, “have had success at reengaging sanctioned individuals; and in most cases, the individuals appreciate the attention given to their case[s].”<sup>106</sup>

The report recommended home and off-site visits—yet another tactic the strong counties use to reach their clients—for several reasons:

[T]he client is in a comfortable environment and may be more willing to share valuable information about barriers previously unidentified . . . . [T]he case worker or community partner may be able to identify barriers the client has through observation in the client’s home; and it can give the client a sense that they are valued by the county’s efforts to personally inquire about their needs.<sup>107</sup>

Best practices included using trained social workers or “designated staff who are personable” to conduct visits.<sup>108</sup>

Despite the report’s claim that clients are comfortable undergoing the visits and feel valued by them, it recommends as a “promising practice” for reengagement that clients *not* be told the “specific date and time of the visit.”<sup>109</sup> It seems that clients tended not to be home when the workers were supposed to arrive, calling into question the report’s insistence that clients appreciate the outreach.<sup>110</sup>

---

105. *Id.* at 28.

106. CAL. DEP’T OF SOC. SERVS., *supra* note 102, at 7.

107. *Id.* at 25–26.

108. *Id.* at 27.

109. *Id.* at 7.

110. *Id.* at 27. The *Sanchez* and *Wyman* decisions justified home visits in part because clients were given notice beforehand, as opposed to the *Parrish*-type unannounced raids that were struck down. This new round of unannounced visits by California counties, there-

Other problems were identified. Worker safety was an issue in some neighborhoods. When “contracted service providers” executed the outreach, some contract goals were not met.<sup>111</sup> Either clients were not receptive to strangers showing up at their doors purporting to work for the state, or the contractors could not do their jobs. Also, various clients returned to sanctioned status after curing, and others refused services, choosing to remain sanctioned.<sup>112</sup> Due to the recent struggling economic conditions, and the increase of welfare caseloads, many counties have curtailed their outreach programs.<sup>113</sup>

Counties across the state reach into citizens’ homes, sometimes unannounced, and boast about the practice to the state legislature. For having a “special need,” the counties treat their right to enter peoples’ homes in a cavalier way.

## II. Changing Power Relations: From Discrete to Discreet

While the jurisprudence on home visits developed over the past half-century in the United States, criminal justice and welfare administration systems became explicitly intertwined.<sup>114</sup> Postmodern French philosopher Michel Foucault presaged this linkage as necessary for the continued relevance of the penal system.<sup>115</sup> He believed complex modern institutions, like the penal and welfare systems demand a fuller explanation than simply “legal” or “social” viewpoints can provide.<sup>116</sup> These systems use many of the same techniques and accomplish many of the same ends.<sup>117</sup> Due in part to this confluence, this Comment is a multi-disciplinary study, or “genealogy.”

---

fore, raises a concern of whether the counties are following California and federal constitutional guidelines.

111. *Id.*

112. *Id.*

113. Telephone Interview with Anastasia Dodson, *supra* note 6.

114. See Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009).

115. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 22 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (“Today, criminal justice functions and justifies itself only by this perpetual reference to something other than itself, by this unceasing reinscription in non-juridical systems.”).

116. *Id.* at 23 (explaining the pitfalls of a simply legislative and penal, or conversely, social, history of criminal law enforcement and punishment).

117. See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOL. I: AN INTRODUCTION* 141 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1976); see also Frank Munger, *Poverty, Welfare, and The Affirmative State*, 37 LAW & SOC’Y REV. 659, 663 (2003) (book review) (“[S]tate surveillance and public provision for welfare were created by the same impulse.”).

### A. Genealogy: “Effective History” Beyond Good and Bad

A genealogy, or “effective history” based on comprehensive research, does not attempt to reveal “origins” or purport to find the ideal behind the real, or even posit that the past actively operates in the present.<sup>118</sup> Religion, morals, science, and “Truth” are exposed as relative properties, products of particular times and places in history.<sup>119</sup> In the tradition of philosophers Friedrich Nietzsche and Michel Foucault, authors using this method resist the temptation to write a single course of progress onto the past, or put the conclusion before the prologue. A genealogist emphasizes the singularity of the accidents, mistakes, and events that “gave birth to those things that continue to exist and have value for us.”<sup>120</sup> Rather than reducing events to their lowest common denominator and destroying their uniqueness and character, genealogists locate incidents in their respective time and place, preserving uniqueness and idiosyncrasy.<sup>121</sup> Rather than attempt objectivity, the genealogist passionately pursues a remedy.<sup>122</sup>

### B. The New Governance

Is there a greater reason, besides deterring welfare fraud or raising the WPR, why the government is so interested in getting into the homes of the poor? How does a chunk of the budget of a massive state like California depend on whether some poor people have jobs? Aren't we as a society more interested in the lifestyles of the rich and famous than poking around the homes of the destitute? The answer lies in the order and the production of a society functioning like an efficient industrial machine.<sup>123</sup> Michel Foucault, in particular, offered a robust vocabulary and way of understanding the changes in social and governmental institutions that led to highly ordered industrial states. An overview of his ideas helps to explain how we developed

---

118. Michel Foucault, *Nietzsche, Genealogy, History*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 144–46, 152 (D.F. Bouchard ed., 1977).

119. Ian Johnston, *There's Nothing Nietzsche Couldn't Teach Ya About the Raising of the Wrist (Monty Python): A Lecture in Liberal Studies* (Dec. 11, 2000), <http://records.viu.ca/~johnstoi/introser/nietzs.htm>.

120. Foucault, *supra* note 118, at 146, 156–57 (describing Friedrich Nietzsche's historical sense as “slanted”).

121. *Id.* at 157.

122. *Id.*

123. See WIENER, *supra* note 52, at 191 (describing the shift in late Victorian English social policy away from fearing and oppressing the destitute toward recognizing their use in an internationally competitive, fit, and efficient nation state).

suspicion of the lower classes that led to such stereotypes as the Harvard Law Review found in *Sanchez*.<sup>124</sup>

The late theorist Foucault continues to garner respect from such diverse jurists as intellectual property and emerging technology scholars,<sup>125</sup> to Seventh Circuit Judge Richard Posner.<sup>126</sup> Foucault's genealogy of the French penal and punishment system showed their shift from a sovereign system to a disciplinary mode of ordering society.<sup>127</sup> The former emphasized liberty and maintained order through spectacles of power and inflictions of pain and fear, embodied in the "technology" of public executions.<sup>128</sup> The latter induces individuals to produce knowledge, and establishes and communicates norms through surveillance technology.

### 1. Sovereign Power: Old School and Discrete

A *sovereign* power, perhaps run by a single individual, creates spectacles, like great fanciful crowning ceremonies or gruesome public executions, to reinforce its superiority. The sovereign often depends upon a very visible, physical presence through its agents to instill order through fear and punishment.<sup>129</sup> In terms of the history of public assistance, the "overseer of the poor" might have filled this role. The exercise of sovereign power is discrete; the populace is only called upon occasionally to participate. They are fully aware of when and where they come into the gaze of the powerful.<sup>130</sup>

Foucault uses startling examples from the history of public execution in eighteenth century France to illustrate sovereign power at work. Capital punishment was sometimes accomplished through "an almost theatrical reproduction of the crime," and sometimes even in the same place where the crime had been committed.<sup>131</sup> The purpose

---

124. Recent Cases, *supra* note 37.

125. James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 185 (1997) ("Michel Foucault was one of the most interesting postwar French philosophers and social theorists. His work was wide-ranging, sometimes obscure, indeed deliberately so, and his historical generalizations would have been insufferable if they were not so often provocatively useful.")

126. See RICHARD A. POSNER, *SEX AND REASON* 23, 182 (1992) (explaining Foucault's analysis of contemporary sexuality as a social construction); accord Boyle, *supra* note 125, at 186 n.20.

127. See Foucault, *supra* note 118.

128. See *id.* at 7–12.

129. *Id.*

130. John F. Covalleskie, *Power Goes to School: Teachers, Students, and Discipline*, PHILOSOPHY OF EDUCATION 1993, available at [http://www.ed.uiuc.edu/EPS/PES-Yearbook/93\\_docs/COVALESK.HTM](http://www.ed.uiuc.edu/EPS/PES-Yearbook/93_docs/COVALESK.HTM).

131. FOUCAULT, *supra* note 117, at 44–45.

was punitive as well as political, because it restored the invincibility of the sovereign, whose political body had been injured by the crime against the state.<sup>132</sup>

Sovereign power depended on visibility and publicity. The sovereign took things very personally, and his subjects knew it.

## 2. Disciplinary Power: New School and Discreet

Times would change. A new, more pervasive, always-acting form of power took hold, heralded by such ordered displays as military reviews, which stressed the discipline of the masses, rather than the power of the sovereign.<sup>133</sup> The discreet new power is well encapsulated in the Panopticon.

Under English philosopher Jeremy Bentham's design, the Panopticon is a prison wherein a single watcher, placed in the center courtyard of a circular arrangement of cells, can view the entire contents of each cell at all times.<sup>134</sup> The prisoners, unaware of when they were being watched, are forced to assume the omniscience of the guard. Rather than momentarily recognizing the state's power over them, as in a sovereign system, the prisoners come to know the norms of the dominant society and ingest them subconsciously, constantly. They "internalize the gaze."<sup>135</sup> The silent, omnipresent and internalized watcher replaces the tangible, temporal sentry of the sovereign. But the watcher is not passive. Prisoners are constantly examined and objectified, creating more knowledge and enabling more efficient subjection.<sup>136</sup>

### C. More than Just a Number: Individualization and Normalization

In large part, the social sciences help clarify what our conception of the true and normal is through categorization, examination, and individualization.<sup>137</sup> In "the age of infinite examination and compulsory identification,"<sup>138</sup> individuals—perhaps most importantly those individuals at the bottom of the social ladder, or welfare state—create "truth."

---

132. *Id.* at 47–48.

133. *Id.* at 188–89.

134. *Id.* at 200.

135. *See id.* at 187.

136. *Id.* at 204.

137. *Id.* at 184–85.

138. *Id.* at 189.

In sovereign societies, individualization is greatest at the top, with the powerful and prestigious.<sup>139</sup> Literature celebrates and immortalizes deeds of superior strength.<sup>140</sup> In disciplinary systems, individualization is “descending” and power becomes more anonymous and functional as it is practiced on those further down the social ladder. Power is exercised by surveillance, rather than ceremonies; people are compared to “norms” rather than their ancestors. The child is more individualized than the adult.<sup>141</sup> Instead of honoring princes, kings, and queens, a disciplinary system creates stories like those of Charles Dickens’ about impoverished youths. The characters’ very disorder and weakness draws attention.

The government, as well as other institutions, develop, use, and promote certain norms to make a society that is an efficient, ordered, and industrious machine. With information gained through confessions and examinations, social sciences create norms. People are subjected to those norms through schooling and employment, as well as less visible techniques, such as surveillance and monitoring.

In *History of Sexuality*, Foucault illustrated how the disciplinary process of individualization produces bodies that depend on the creation of norms. Formerly, sovereign teachers transmitted the truth of sexuality down the ladder to the naïve, through sexual contact in the discourse of *pleasure*.<sup>142</sup> Now, however, *truth* is a vehicle for sex and pleasure and the production of knowledge goes up the ladder, from the populace to psychologists and other social scientists. People become cases and “analyzable objects” subject to the imposition of norms.<sup>143</sup> In religious and other contexts, though, people act as confessors, accepting the norms and individualizing themselves in relation to them.<sup>144</sup> For example, Christians find new pleasures in giving up information in accordance with detailed confession guides, resulting in rich enumerations of sins.<sup>145</sup> Rather than emanating from an invincible, visible, and voluble sovereign, power in religious confessionals is exercised by “the one who listens and says nothing.”<sup>146</sup> The

---

139. *Id.* at 192.

140. *Id.*

141. *Id.* Consider the notion of finding your *inner child* and the importance of aid to dependent *children*.

142. FOUCAULT, *supra* note 117, at 57–58. Foucault said this is the way erotic truth is historically taught in the East, Rome, and the “Arabo-Moslem societies.” *Id.*

143. MARGARET A. MCLAREN, FEMINISM, FOUCAULT, AND EMBODIED SUBJECTIVITY 146 (2002).

144. FOUCAULT, *supra* note 117, at 61–62.

145. *See id.* at 63–64.

146. *Id.* at 61–62.

power relationship is consummated when the confessors give up their secrets. Confessors are participating, accepting, and creating norms with what they say.

To contribute to the establishment of societal norms, which are presented as our only way of knowing who we are and what we are supposed to do to sustain our world, each individual must reveal him or herself. However, these norms often only perpetuate synthetic conceptions of truth, and coercively promote the whims of the powerful. As society moved from a discrete system of visible power relations to a discreet system based on unseen pressures and surveillance, the poor were put under the microscope. Suspicion increased to the point that even charity became “scientific. Instead of simply accepting that the poor were on the bottom of the social ladder social scientists began to expect them to produce knowledge that the government would use to produce new norms and greater expectations. Techniques like home visits, however, ignore these complex interactions and instead treat welfare applicants and recipients like supplicants receiving unusual attention, in the form of the simplest charity.”<sup>147</sup>

### III. No Quarter: Applying Foucault to Home Visit Rationales

Ironically, the placement of welfare recipients into a class of persons worthy of individualization and central to the production of knowledge negates the need for “individual” suspicion. The new disciplinary power inverts the pyramid of suspicion, placing the whole weight of the social system on the shoulders of the poor and disorderly. They are analyzed and diagnosed ad infinitum.<sup>148</sup> It runs against the grain of our society to let the poor retain secrets and privacy, and assert their own identity according to their own norms. Yet this is precisely what must happen if they are to “transform themselves in order to attain a certain state of happiness, purity, wisdom, perfection, or immortality.”<sup>149</sup>

A genealogical critique of the judicial interpretations supporting “home visits” can start with the Special Needs Doctrine.

---

147. See *Wyman v. James*, 400 U.S. 309, 326–28, 332 (Douglas, J., dissenting) (equating welfare checks with farmers’ subsidies, rather than charity); see also *Recent Cases*, *supra* note 37, at 2001.

148. Ina Jaffe, ‘*The Soloist*’: *Living with Mental Illness on Skid Row*, NAT’L PUB. RADIO, (Apr. 22, 2009), <http://www.npr.org/templates/story/story.php?storyId=103198515> (“A survey in Los Angeles County found that half of the homeless say they suffer from a mental illness.”).

149. MICHEL FOUCAULT, *Technologies of the Self*, in *A SEMINAR WITH MICHEL FOUCAULT* 18 (L.H. Martin, H. Gutman & P.H. Hutton eds., 1988).

### A. A Special Need for Protection

Court rulings put welfare fraud monitoring into the category of Special Needs, letting the government forego individualized suspicion. This development directly correlates with Foucault's notion of descending disciplinary power relations. At such a functional level of power relations, the poor are expected to anonymously succumb to surveillance and individualization. Suspicion is assumed, as part of everyday life.

Recognizing this assumption will help the courts dismantle the Special Needs Doctrine and increase the explicit level of suspicion necessary to enter the homes of the poor, as a safeguard against the state and society's drive to mold individuals to synthetic norms. This nation is not to be "standardized."<sup>150</sup>

#### 1. 'Relationship with the State' Is a Vestige of Sovereignty

Any method of legal analysis that puts a relationship with the government on a pedestal, singling it out for special consideration, flies in the face of the way our society functions. Law no longer retains its central role in power relations as it did under the sovereign.<sup>151</sup> However, courts give the government leeway to deal with the categories of persons in the Special Needs exceptions because of those parties' "relationship to the state."<sup>152</sup> The fetishistic attention paid to an individual's relationship with the government must come into the post-modern era.

Power is diffuse and almost impossible to recognize, while resistance can be difficult to muster, let alone recognize.<sup>153</sup> There are many contemporary examples of diffusion, from home visits to the prison system—even detainment and treatment of suspected terrorists in military prison at Guantanamo Bay—has had segments contracted out to third party service providers.<sup>154</sup> Officials conducting home visits in *Sanchez* needed only minimal identification and did not wear

---

150. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

151. FOUCAULT, *supra* note 117, at 90 ("We must break free from the image of the theoretical privilege of law and sovereignty . . . and construct an analytics of power that no longer takes law as a model and a code.").

152. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (allowing random drug testing of public high school athletes).

153. See *Covaleskie*, *supra* note 130 ("There is no single or visible locus of disciplinary power against which to direct one's resistance.").

154. See CAL. DEP'T OF SOC. SERVS., *supra* note 102; *accord* Class Presentations, Poverty Law, U.S.F. School of Law (Fall 2009) (on file with author).



uniforms.<sup>155</sup> Since welfare reform, counties across the nation are pushing welfare recipients to the low-wage labor market as fast as possible. The government should not have its cake and eat it, too, by claiming a special relationship with welfare recipients, only to cast them aside by deferring to third parties once the actual monitoring and assistance takes place.

The Special Needs Doctrine should be limited to situations clearly contemplated in the Constitution.<sup>156</sup> Otherwise, courts should recognize the diffusion of power and not obsequiously identify individuals' "relationship with the state," in its many veiled forms.

## 2. The True Purpose: Constructing Norms

When courts assert that welfare clients consent to giving up their homes to state officials in return for public assistance, they legitimize the confessor-confessee power relationship. Courts fail to recognize that the power at work in those situations does not extend the authority of the state, but instead is much more slippery and insidious. The courts put the state's awesome power to accuse, condemn, and rehabilitate into the hands of those meant to do no more than survey.

Home visits were initially upheld as supporting the general rehabilitative purpose of welfare laws, but this justification took a subordinate position to the deterrence of fraud. In application, California's home visits have failed to deter much fraud and have exposed their utility only as disciplinary surveillance tactics to examine and mold the poor.

The *Wyman* determination of home visits as non-criminal yet "rehabilitative,"<sup>157</sup> finds no support in modern legal definitions of the word "rehabilitation."<sup>158</sup> Still, in *Sanchez*, the government said the nature of the searches was rehabilitative, in part because no one had been prosecuted for welfare fraud as a result of a visit.<sup>159</sup> The court found that the rehabilitation noted in *Wyman* only meant the searches supported the general purposes of welfare laws. But the agents carrying out the searches in *Sanchez* had actually been trained *not* to give out advice to welfare clients, leaving the rehabilitative purpose on

---

155. See *Sanchez v. County of San Diego*, 464 F.3d 916, 924 (9th Cir. 2006).

156. See, e.g., U.S. CONST. amend. XIII (allowing diminished rights for those convicted of crimes).

157. *Wyman v. James*, 400 U.S. 309, 317 (1971).

158. BLACK'S LAW DICTIONARY 604 (3d Pocket ed. 2006) (defining rehabilitation only in criminal, evidentiary, or bankruptcy contexts).

159. See *supra* Part I.B.3.b.

weak legs.<sup>160</sup> Moreover, when Los Angeles recently terminated its home visit program due to its cost and ineffectiveness at deterring fraud, nothing was said about the loss of “rehabilitative” services.<sup>161</sup>

Rather than punitive or rehabilitative measures, the searches mainly seek to deter fraud and constructively teach the poor to conform to government norms. The techniques exceed examination and punishment, but promote confessions, persuading clients to reveal themselves to the silent, observing authorities, who teach the clients how to order their lives. Every time they look around their houses, clients might see through their observer’s eyes, internalizing the gaze of the welfare department’s fraud or eligibility investigator. These constructive power relations have little to do with the state’s legal, punitive, or sovereign power—or the individual’s relations with the state—and everything to do with the establishment of norms and disciplinary order.

Whatever the definition of rehabilitation in a non-criminal, welfare context, its process should not encompass coercive, automatic, and anonymous reconditioning of individuals through violating their most sacred environs. The rehabilitative, punitive, or deterrence benefits of home visits to welfare recipients and society as a whole, both as theorized and in application, do not outweigh the cost of invading privacy and pressuring the poor to accept imposed norms.

## **B. Outreach or Overreach?**

There are positive aspects to intensive outreach to welfare recipients in some contexts.<sup>162</sup> Hidden needs and barriers are discovered and, in many cases, home visits are not necessary to resolve the sanctions.<sup>163</sup> There is a constructive benefit, too, if one believes the Welfare Directors Association’s claim that clients feel valued by the county’s efforts to contact them personally. Home visits, however, are not necessary to achieve these goals. In good economic times, when the county could afford the effort, less than six percent of the intensive outreach cases studied in Los Angeles received home visits.<sup>164</sup> Los

---

160. *Sanchez*, 464 F.3d at 932 (Fisher, J., dissenting).

161. Telephone Interview with Lynn Martinez, Staff Attorney, W. Ctr. on L. and Poverty (Nov. 19, 2009).

162. See CAL. DEP’T OF SOC. SERVS., *supra* note 102, at 32 (explaining various counties’ outreach to former welfare recipients through home visits to inform them about remaining opportunities for assistance once they have met their time limit for federal aid).

163. Telephone Interview with Anastasia Dodson, *supra* note 6; see also CAL. DEP’T OF SOC. SERVS., *supra* note 102.

164. SUBCOMM. NO. 3 AGENDA, *supra* note 91, at 28.

Angeles' program was recently discontinued due to lack of effectiveness and funds.<sup>165</sup> Why should the courts allow the Constitution to be violated just to defend such a little-used and ineffective procedure, much less San Diego's badly reviewed "walk through" program?<sup>166</sup>

Project 100%, with its mandatory monitoring, hews closer to the basest power relations exercised in disciplinary systems. It deals with the welfare recipients anonymously, teaching them to see with the state's gaze. But society learns little from surveillance of those it finds most suspicious; the welfare clients know too well what the state wishes to see. Moreover, the state's methods can be clumsy and clients (and agents) are always able to "scam" and get around the rules.<sup>167</sup> The surveillance only burdens those under the microscope and the social workers who might wish to help them.

### C. A Better Way

Not all engagement of clients must be normalizing or coercive. Within a disciplinary system, Foucault has allowed for the possibility of individuals freely giving their information.<sup>168</sup> "[T]he process of telling the truth does not necessarily result in domination."<sup>169</sup> In fact, a legal discourse has emerged that takes the lead for welfare clients who tell the truth about their families' situations and the boxes in which that government assistance places them.

---

165. Telephone Interview with Lynn Martinez, *supra* note 161.

166. Telephone Interview with Anastasia Dodson, *supra* note 6.

167. See generally GILLIOM, *supra* note 8, at 95–98 (discussing how welfare recipients create unreported income and social workers skirt the rigid categories of the state's electronic computation system to increase clients' welfare benefits); see also JAMES SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 92–93 (1998) (analyzing states' tendency to ignore the more unruly and random aspects of modernity when designing administrative systems). Any state system will have flaws; when the U.S. criminal justice system seeks the truth, errors are inevitable. Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 895 (2008). In the United States, however, "[b]enefits programs, in fact, make greater systematic efforts to detect and publicly disclose occurrences of fraud than most other agencies." David A. Super, *The Quiet Welfare Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1294 (2004). Anecdotally, fraud comes from within as well as without; the Los Angeles District Attorney's Office lists internal fraud just below "recipient welfare fraud" on its website (<http://da.co.la.ca.us/wf/default.htm#internal>) and convicted one worker of embezzling more than \$700,000 in public funds in 2002. Los Angeles County District Attorney's Office: Welfare Fraud—Convictions, <http://da.co.la.ca.us/wf/conv.htm> (last visited May 5, 2010).

168. McLAREN, *supra* note 143, at 146.

169. *Id.* at 147.

Those in need can construct their own norms free from coercion, diagnosis, and discipline.<sup>170</sup> The legal aid movement of the 1960s, with its push toward “Declaration,” rather than investigation of welfare eligibility, accomplished this by marrying the law with a respect for the everyday needs of welfare recipients.<sup>171</sup> Though today the “language of rights” lacks clout among many welfare clients,<sup>172</sup> there are forms of resistance that respond in kind to the new form of power that operates silently and stealthily across society.<sup>173</sup> Through resistance, the poor are able to be productive, promote their daily needs, build identity, and form a strong ethical ideology.<sup>174</sup>

By articulating the ideology, as it were, one welfare client shuns the language of constitutional rights, preferring to emphasize needs, saying, “[O]ur kids come first. And if I need something to get through the end of the month with them, I will do it.”<sup>175</sup> Appalachian welfare clients mentioned a few of their tactics of “resistance,” including earning money by cutting hair or babysitting, moving kids between households, and neglecting to report financial gifts from their parents.<sup>176</sup> Viewed together, these seemingly isolated incidents form a pattern of activity very effective in bringing about positive results.<sup>177</sup> The clients largely regret having to take what they see as illicit, yet necessary, steps to protect their families. Their attitudes conform to what some scholars label an “ethic or discourse of ‘care,’” which promotes principles of interdependence and responsibility, rather than individualism and rights, and even the storied right of privacy.<sup>178</sup>

170. See generally GILLIOM, *supra* note 8, at 6–7 (framing the statements of welfare clients in a discourse of care); see also THE SOLOIST (DreamWorks Pictures 2009).

171. GILLIOM, *supra* note 8, at 83.

172. *Id.* at 78–80 (referring to privacy-rights based legal consciousness among welfare clients).

173. *Id.* at 99–100, 107 (describing the “politics of everyday resistance” as consistent, though uncoordinated, patterns of subterfuge and evasion that cut across social classes, and noting Foucault’s arguments that “public, organized forms of opposition fit older public displays of the state’s power”).

174. *Id.* at 135.

175. *Id.* at 93.

176. *Id.* at 93–95.

177. *Id.* at 103.

178. *Id.* at 109; see also Laura T. Kessler, *The Politics of Care*, 23 WIS. J.L. GENDER & SOC’Y 169, 169 (2008) (arguing that care giving itself can be a form of political resistance); *id.* at 198 (describing vision of a social welfare state that recognizes the multifarious actors involved in child-rearing and like situations characterized by “human dependency”); compare Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in The Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008). In her alternative to equal protection analysis, Fineman posits a “vulnerable subject” to “replace the autonomous and independent subject asserted in the liberal tradition.” *Id.* at 2. Stressing the universal concept of vulnerabil-

In this way, welfare mothers create their own norms with concrete political implications. The law should recognize and support such productive energy and ideas rather than rubber-stamping society's established suspicions of it. Perhaps courts could recommend that "strong county" welfare agencies distribute grants to groups of clients in the style of Third-World microfinance lender Grameen Bank, which is expanding into the United States.<sup>179</sup> Such lending encourages women entrepreneurs to support each other.<sup>180</sup>

### Conclusion

Each historical period puts its own emphasis on different qualifications for receiving public assistance. The locus of welfare distribution has shifted from the streets, to the poorhouses, to the home. As society became more ordered, the poor were more highly analyzed and individualized, even by *friendly visitors*. Later, a legal defense movement upheld welfare rights, but the Supreme Court failed to protect the home, siding with the special interests of the government. Most recently, expanding police powers and welfare outreach led to an increase in home visits and promotion of their use in mobilizing participants to meet federal work and training requirements, despite their failure to effectively deter fraud.

It is difficult to strike the proper balance between the sanctity of the home and the engagement of welfare recipients in the pursuit of self-sufficiency. The Supreme Court initially struck a course for rehabilitation in home visits, but has since backpedaled, allowing the visits to become "walk throughs." Given the overwhelming pressure on the poor to surrender to examination and individualization, in addition to the multifarious and constructive power relationships that do not depend on the government, courts ought to include welfare clients with the "rest of us" and protect the home as much as possible.

---

ity gives her thesis more political weight than a theory characterized by dependency—a more transitory condition—she argues, and one that is often relegated to family caretakers, "beyond the scope of state concern." *Id.* at 11. Her vulnerability thesis, though, recognizes the important role that state institutions play in conferring assets to protect us against risk. *Id.* at 15.

179. Barbara Kiviat, *Can Microfinance Make It in America?*, TIME MAGAZINE, Jan. 11, 2010, at 38.

180. *Id.*