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WELFARE, PRIVACY, AND FEMINISM

By: Michele Estrin Gilman

The whole system is based on the assumption that you are trying to screw [welfare officials] over. There are constant check-ins and impossibly long lists of 'verifications' to submit to the state in order to back your story; inquisitions involving a battery of questions asked by countless supervisors behind closed doors when it appears that your story does not add up... [and] if you don't comply... your benefits can be cut.

— María Cristina Rangel, former welfare mother and third-wave feminist.¹

Privacy rights are in the headlines. In the wake of technological advances and post 9/11 surveillance tactics, Americans are debating the tensions between civil liberties and security; between internet consumerism and the marketing of personal data; and between improved health care and protection of patient records. Feminists have also long debated privacy and what it means for women. Second-wave feminists focused primarily on two aspects of privacy. First, they assailed the patriarchal divide between the public and the private spheres that trapped women in the home and subjected them to domestic abuse. Second, feminists argued in favor of a sphere of privacy that would allow women to make reproductive choices without state interference. These were powerful critiques of existing power structures. Through political action and legal challenges, women made significant advances in gaining decisional privacy while shedding unwanted physical privacy. Women entered new workplaces. Domestic abuse was criminalized. The Supreme Court located a right to reproductive choice in the Constitution. Despite

these advances, the second-wave critiques embodied a white, middle-class perspective and tended to overlook the experiences of poor women.  

As a historical matter, poor women have always had less privacy than other women. To begin with, they often worked outside the “sanctity” of the home, serving as a cheap form of labor. Further, the government freely intruded into the homes of poor, single mothers, often as a surrogate for the absent male. These intrusions continue today. As a condition of receiving welfare benefits, poor women have been subjected to drug tests, and they continue to face unannounced home inspections by government officials, fingerprinting, and restrictions on their reproductive choices. These formal welfare requirements overlay routinized surveillance of poor women, who must comply with extreme verification requirements to establish eligibility, 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 rearing and intimate relationships. Thus, while many Americans are uneasy about their privacy in a time of technological transformation, the harms poor women face from privacy deprivations go far beyond unease.

This essay discusses the relationship between feminist critiques of privacy and poor women. It explores how second-wave feminism considered privacy as experienced by poor women, and it analyzes whether third-wave feminism is up to the task of better securing privacy rights for poor women. Part I describes how the welfare system strips poor women of privacy and the harms they suffer as a result. Part II explains how the legal system shapes and defines the

2 See MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 29 (1st ed. 1988) (“To generalize from the lives of middle-class, native-born, white women to other groups of women as if no differences existed, creates distortions . . . .”).

3 See id.

4 Id. at 313.


6 Second-wave feminism is associated with the movement for equal rights for women during the 1960s and 1970s; while third-wave feminism is associated with women “who came into a political consciousness in the 1980s and 1990s.” See Bridget J. Crawford, Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure, 14 MICH. J. GENDER & L. 99, 108 (2007). The theoretical differences between the movements are discussed in Part III.
privacy rights of poor women. Part III discusses second-wave and third-wave feminist perspectives on privacy and how those theoretical positions relate to welfare mothers. The Conclusion suggests a feminist advocacy strategy that would include the voices of poor women within a conception of privacy that respects the dignity of poor women while providing them with the support they need to care for their families.

I. WELFARE AND PRIVACY

The welfare system strips poor women of privacy not simply as a necessary precondition for processing applications, but also to reinforce the subjugation of the poor. The government has historically sought to make public assistance so stingy and so unappealing that few will bother to apply. At the same time public policy punishes women who do not fit the patriarchal norm of a married, two-parent family with a male breadwinner. Privacy invasions are a primary tactic for stigmatizing welfare and single motherhood.

A. Welfare History

Since this country's founding, the poor have been categorized as either deserving, meaning they cannot be blamed for their poverty, such as children, widows, and the disabled, or undeserving, meaning they should be self-sufficient, such as able-bodied adults. Single

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7 Welfare applicants are an extremely diverse group of women with varied life experiences. This essay does not intend to devalue the individuality of those whose lives are impacted by the welfare system. Instead, this essay focuses on the shared experience of state surveillance faced by welfare mothers.


9 See Martha Albertson Fineman, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies 106-10 (1995).


11 See generally Michael B. Katz, The Undeserving Poor: From the War on Poverty to the War on Welfare 8 (1989); Joel F. Handler, “Constructing the Political Spectacle”: The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History, 56 Brook. L. Rev. 899, 906 (1990) (“[T]he heart of poverty policy centers on the question of who is excused from work. Those who are excused are the ‘deserving poor’; those who must work are the ‘undeserving.’ Ultimately, this is a moral distinction.”); Thomas Ross, The Rhetoric of Poverty: Their Immorality, Our Helplessness, 79 Geo. L.J. 1499, 1505 (1991) (“[This] distinction created a line running through the poor, putting the aged, infant, and disabled on one side of the line, and the able-bodied on the other side.”).
mothers of children have always occupied a shifting and uneasy space between these two poles; white widows have received the most sympathy, while unmarried women of color have been the targets of approbation. The modern welfare state arose out of the New Deal, which treated relief for white men differently than relief for minorities and women. Social insurance programs designed for white working men, such as social security and unemployment insurance, have carried no stigma, provided generous benefits pursuant to objective criteria, and been federally administered. By contrast, cash assistance programs for single mothers, primarily Aid to Families with Dependent Children (AFDC), have been stingy, stigmatized, state-administered, and discretionary.

From the 1950s to the 1970s, AFDC roles grew rapidly as women of color obtained rights to welfare, family structures changed across society, and economic dislocations disproportionately impacted African-Americans. A backlash against welfare mothers reached a frenzy in the 1980s, as the media and policymakers portrayed welfare mothers as lazy and promiscuous. President Reagan famously attacked them as “welfare queens.” In 1996, AFDC was replaced with Temporary Assistance for Needy Families (TANF), largely due to the public perception that AFDC was encouraging dependency in welfare mothers and discouraging the formation of two-parent families. Accordingly, TANF abolished the entitlement to welfare and put a five-year lifetime limit on the receipt of welfare benefits. Significantly, TANF requires that recipients work within two years of receiving benefits, although most states impose a shorter timeframe. Still, even though TANF recipients must now work in exchange for welfare benefits, they continue to face the same sorts of stigma and

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13 See GORDON, supra note 8, at 5-6, 293-99.
14 Id.
15 Id.
16 See MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 267 (1986); see also ABRAMOVITZ, supra note 2, at 319, 334.
privacy deprivations that were rampant under AFDC, and the advent of new technologies has only exacerbated the situation.

B. Privacy

When a woman applies for and receives TANF, she faces the loss of informational, physical, and decisional privacy, each of which is considered in turn. 19

1. Informational Privacy. — Informational privacy concerns the interest individuals have in controlling their personal data and limiting access to such information by others. 20 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.

A typical TANF applicant must undergo a multi-stage, multi-day application process consisting of screening interviews, application interviews, group orientations, and employability assessments. 21 She must answer questions ranging from her resources and sustenance needs to her psychological well-being. 22 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, 23 and in some cases, caseworkers conduct investigations themselves. As part of TANF, an applicant must also comply with child support enforcement efforts by providing detailed paternity information about her children. 24 All of 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

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19 These are the three major categories of privacy interests. See Jerry Kang, Information Privacy in Cyberspace Transactions, 50 STAN. L. REV. 1193, 1202-03 (1998).
22 See Study of the TANF Application Process, supra note 21, at 3-7.
23 See MEYERS & LURIE, supra note 21, at 27; HOLCOMB ET AL., supra note 21, at 3-16.
applicants. After benefits are awarded, many jurisdictions monitor how welfare recipients are spending their welfare funds through electronic surveillance.

2. Physical Privacy. — Physical privacy concerns the ability to keep one’s bodily integrity and home free from the intrusions of others. In the name of fraud prevention, many jurisdictions fingerprint applicants and photograph them. As part of child support enforcement, TANF recipients must agree to DNA testing for themselves and their children if paternity is contested. Further, several jurisdictions send investigators into the homes of welfare applicants to verify eligibility information; investigators scour the premises, including closets, medicine cabinets, and laundry baskets, looking for proof of who lives in the home.

3. Decisional Privacy. — Decisional privacy is related to autonomy; it preserves an individual’s ability to make personal and familial choices without external interference. TANF permits states to invade the decisional privacy of welfare mothers in order to control their behavior in line with middle-class norms. The most controversial of these sexual regulation policies is the imposition of family caps; typically, family caps provide no cash benefit increases for any children conceived while the mother is on welfare. Several


26 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).

27 See Kang, supra note 19, at 1202.

28 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., ISSUES FOR AGENCIES AND APPLICANTS, supra note 21, at 3-1 to 3-25 (Dallas, TX, and New York, NY use fingerprinting and photographing).


30 See Mulzer, supra note 10, at 675-77; San Diego v. Sanchez, 464 F.3d 916 (9th Cir. 2006) (upholding San Diego’s conditioning of welfare benefits on consent to suspicionless home visits).

31 See Kang, supra note 19, at 1202-03.

32 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.

33 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
jurisdictions also offer “Norplant” bonuses, which cover the cost of implanted, long-term contraceptive devices for welfare mothers, sometimes with an additional cash award. 34 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. 35

C. Harms

Poor women suffer tangible harms — psychological, material, and physical — as a result of the welfare system’s intrusions into their privacy. To begin with, the system of surveillance causes welfare recipients to suffer psychological injuries including stress, fear, and feelings of degradation. 36 Studies have shown that poor women resist welfare surveillance in subtle but widespread ways in order to care for their families, such as by earning unreported income to supplement meager welfare checks. 37 While this resistance to surveillance defends individual autonomy in the face of the state’s power, it also causes women even further stress due to the fear of getting caught and possibly losing benefits or being punished criminally. 38

Moreover, the privacy deprivations associated with applying for welfare discourage many needy women from seeking assistance. 39 Without state assistance, these non-entrants to the TANF system often lack adequate resources for food, shelter, and other basic needs — even if they are working. Studies have shown that non-entrants struggle to make ends meet by juggling a shifting array of non-public

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.

34 See Rebekah Smith, supra note 33, at 168-69; see also Pamela D. Bridgewater, Reproductive Freedom as Civil Freedom: The Thirteenth Amendment’s Role in the Struggle for Reproductive Rights, 3 GENDER RACE & JUST. 401, 404-05 (2000) (Bridgewater argues that the state’s coercive use of Norplant to hinder the reproductive rights of African-American women violates the Thirteenth Amendment).

35 See Anna Marie Smith, supra note 32, at 169, 177-81.

36 See GILLIOM, supra note 8, at 66-67, 78, (summarizing interviews with welfare recipients in Appalachia in the early 1990s).

37 See GILLIOM, supra note 8, at 99-106, 113.

38 See GILLIOM, supra note 8, at 87-88.

39 See Robert Moffitt, et al., A Study of TANF Non-Entrants, Final Report to the Office of the Assistant Secretary for Planning and Evaluation, Department of Health and Human Services, Nov. 14, 2003, at 2, 14 (new welfare reform policies discourage participation). Id. at 19-20 (“Most 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.”).
resources and that this hardship negatively impacts their health and well-being. 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, in order to acquire and maintain affordable housing, many families were forced to live in unsafe neighborhoods. And finally, mothers with young children consistently had trouble securing stable care for their children.

Non-entrants also tend to miss opportunities to collect other, less stigmatizing forms of public assistance, such as food stamps and medical assistance. Even TANF recipients can suffer material deprivations when they are sanctioned or terminated for failing to provide requested information or when newborns are denied assistance as a result of family cap policies.

Finally, mandatory child support cooperation policies can result in the unintentional perpetuation of domestic violence. Battered women are overrepresented in the TANF population. 43 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. Yet many eligible women are not claiming the exemption for a variety of reasons, including caseworker failure to advise women of the exemption, a lack of training by social service workers, 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. The paternity 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 get any child support checks that are collected; rather, the state keeps the money to repay itself for the costs.

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40 Id. at 47-48.
41 Id. at 48.
43 See Anna Marie Smith, supra note 32, at 153-54 (although batterers come from all social classes, TANF clients are especially vulnerable because they have fewer economic supports).
45 See Anna Marie Smith, supra note 32, at 165-66; see also Notar and Turetsky, supra note 42, at 672-76.
Welfare privacy invasions might be tolerable if there were substantial, countervailing justifications. The primary justification is fraud prevention. It is impossible to survive on welfare benefits (the average monthly benefit for a family of three is $363), 48 so many welfare applicants accept support from family members or earn additional income from jobs such as babysitting or cutting hair — and suffer dire hardship nonetheless. 49 The state forces welfare mothers to earn unreported income to provide for their children, but declares this conduct as "fraud." Still, fraud is grossly overstated in welfare programs, and studies suggest it is at the same levels as other government programs. 50 Even purveyors of electronic fraud detection systems have admitted that fraud is extremely rare. 51 Accordingly, the true reason for these policies is to control and stigmatize poor women.

II. LAW

Our most disadvantaged citizens have long had less privacy than their wealthier counterparts. As a constitutional matter, the poor have fewer protections under the Fourth Amendment, which protects reasonable expectations of privacy from warrantless government searches and seizures. People who live in crowded, urban neighborhoods and who cannot afford "a freestanding home, fences,

47 See Anna Marie Smith, supra note 32, at 140. Non-welfare families can use child support enforcement services, but they can withdraw on a voluntary basis. See Notar & Turetsky, supra note 42, at 671.
48 DEPT. OF HEALTH AND HUMAN SERVICES, ADMINISTRATION ON CHILDREN AND FAMILIES, SEVENTH ANNUAL REPORT TO CONGRESS, at 75 (2006).
49 See GILLIAM, supra note 8, at 67, 100. See also KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK (1997).
50 See Mulzer, supra note 10, 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."); see also Julilly Kohler Hausman, "The Crime of Survival": Fraud Prosecutions, Community Surveillance, and the Original "Welfare Queen," 41 J. SOC. HIST. 329, 343 (2007) ("Much 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.").
51 See, e.g., Joshua Dean, Texas Nears Rollout of Fingerprint System, FED. COMPUTER WEEK, Aug. 5, 1999, available at http://www.fcw.com/print/5_150/news/61522-1.html (official from private contractor states that out of 700,000 people fingerprinted for public benefits, twelve cases were referred for further investigation).
[and] lawns,” have a lowered expectation of privacy and are thus more likely to suffer unregulated intrusions by government agents. In addition to these class distinctions, welfare mothers bear the brunt of sexist and racist assumptions that courts use to justify state surveillance.

A. Home Visits

In 1971, the Supreme Court upheld home visits by welfare officials in Wyman v. James, reasoning that the visits were not searches covered by the Fourth Amendment because they were consensual. Moreover, even if they were searches, they were reasonable, given the state’s interest in deterring fraud, the need to protect the children of welfare mothers, the rehabilitative purpose of the searches, and the lack of criminal consequences. In finding that the privacy deprivations posed by home visits 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 children. In silencing the voices of poor women, the Court ignored the social context in which they live and mistakenly equated forced consent with free choice.

The Court also expressed its distaste for Ms. James, the plaintiff, and how she ran her household. 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. Her request was simply to be treated the same as other beneficiaries of governmental largesse. As Justice Douglas bitterly 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.” The Wyman Court also intimated, based on Ms. James’ social services casefile (and not evidence adduced at trial), that Ms. James’ son had been physically abused and bitten by rats, concluding that “[t]he picture is a sad and unhappy

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54 Id. at 318-24.
55 Id. at 321 n.8.
56 Id. at 322 n.9.
57 Id. at 332 (Douglas, J., dissenting).
one. 58 The Court’s clear assumption was that poor, single women are terrible mothers who warrant suspicion and distrust. The end result was that privacy is “dependent on the poverty or affluence of the beneficiary” 59 — a result at odds with the Fourth Amendment, or any concept of fair and equal treatment. In a post-TANF case, the Ninth Circuit upheld Wyman, refusing to recognize differences between AFDC and TANF or to apply post-Wyman jurisprudence significantly limiting suspicionless searches. 60 Instead, the court in Sanchez v. San Diego expressly lumped welfare mothers with criminals on probation and concluded that neither group has a reasonable expectation to privacy. 61

B. Drug Tests

Welfare recipients have fared better in challenging state-mandated drug testing, which is expressly authorized in TANF, 62 although the victory is tenuous. In Marchwinski v. Howard, the district court, in a controlling opinion, 63 struck down a Michigan law authorizing suspicionless drug testing of TANF applicants. Although the State’s professed need to address substance abuse as a barrier to employment is “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. 64 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. 65 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 [Family Independence Program].” 66 In so holding, the district court refused to allow governmental assistance to become an unlimited tool for social control. The decision thus reflects a feminist understanding of the power imbalances between the state and poor women, as well as the

58 Id. at 322 n.9.
59 Id. at 332 (Douglas, J., dissenting).
60 San Diego v. Sanchez, 464 F.3d 916 (9th Cir. 2006), reh’g denied en banc, 483 F.3d 965 (2007).
61 Id. at 927.
63 113 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 an en banc panel 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 Fed. App’x 601 (6th Cir. 2003).
64 113 F. Supp. 2d at 1140.
65 Id. at 1142.
66 Id.
state’s singling out of poor women as compared to other citizens. Still, state legislatures have expressed a renewed interest in drug testing, and are bolstered by the Sixth Circuit’s opinion that welfare mothers have a diminished expectation of privacy because “welfare assistance is a very heavily regulated area of public life.”

### C. Decisional Privacy

The Supreme Court has long held that individual decisions relating to childbearing and the raising of children are fundamental rights that cannot be abridged without a compelling state interest. However, the Supreme Court has also held that the government has no duty to subsidize the exercise of these rights. As the Court has explained, “[t]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”

Further, the Supreme Court has held that the poor are not a suspect class under the Equal Protection Clause, and thus, statutory classifications that fall more harshly on the poor are subject only to rational basis review. There is an unavoidable tension between advocating for privacy along with assistance for poor women. “Choice rhetoric within the privacy doctrine can often operate in diametric opposition to the reproductive needs of poor women.”

The Court’s holdings have drastic implications for poor women. Even though they have a right to an abortion, the government has no

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67 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).


69 See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES §§ 10.2.4, 10.3 (right to control upbringing of children and reproductive autonomy, respectively) (3rd ed. 2006).

70 Maher v. Roe, 432 U.S. 464 (1977) (government does not violate Equal Protection by failing to fund abortions, even though it pays for childbirth); Harris v. McRae, 448 U.S. 297 (1980) (upholding the Hyde Amendment, which prohibited the use of federal fund for performing abortions except where the mother’s life was endangered or in cases of rape or incest that had been reported promptly to law enforcement).


72 See Dandridge v. Williams, 397 U.S. 471 (1970) (upholding a state law that capped welfare benefits to families regardless of their size). The Court stated, “the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.” Id. at 487.

73 Bridgewater, supra note 34, at 407-08.
duty to provide them with financial assistance if they cannot afford to exercise this right. Likewise, even though welfare mothers have the right to bear additional children, the government has no duty to subsidize that choice with additional welfare benefits. Courts upholding family cap policies have blithely accepted legislative determinations that the caps give welfare mothers an incentive to work and to have fewer children — even though empirical studies have shown no basis for either assumption.

D. Privacy Laws

The Privacy Act of 1974 is the primary statute regulating how federal government agencies manage information about individuals. In 1998, the Act was extended to “computer matching,” which occurs when federal and state agencies compare data about individuals. As described above, 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. 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 shelter 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 purposefully demeaning and stigmatizing. Further, the Act’s requirements of notice and consent are generally meaningless, because on welfare applications these...
provisions are usually jargon filled, difficult to understand, and hidden among the reams of information and questions contained in the forms. 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.81

III. FEMINISM AND PRIVACY

Second-wave feminists focused on privacy because they identified a public/private divide in society and law that perpetuated gender inequality.82 By contrast, third-wave feminists do not debate privacy. To the contrary, they eagerly shed privacy in pursuit of consciousness-raising and personal liberation. Whereas second-wave feminists viewed the personal as political, third-wave feminists see the personal as public. This part explains how the two waves differ and what their perspectives on privacy mean for welfare mothers.

A. Second Wave Feminism

Second-wave feminists attacked the physical privacy and the boundary between public and private that legal systems and social norms historically upheld.83 In the traditional view, the public domain was the world of work and politics, where men dominated and women were excluded.84 By contrast, the private domain was that of home and family, where autonomous individuals lived free from state interference.85 However, feminists made clear that autonomy within families extended only to men, who were free to dominate women and children because of their dependence on men for social goods.86 In turn, this led to the abuse of women within the home and the concomitant failure of the state to intervene.87 Feminists rejected the view that the government’s hands-off approach was neutral, because

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80 Id. at 428.
81 Id.
85 Id. at 568-69.
86 See Higgins, supra note 82, at 850-51.
the state set the legal ground rules that permitted private inequality to flourish unchecked.\textsuperscript{88} Moreover, feminists argued that the idea of autonomy was a myth for women; they were enmeshed within family relationships of dependency and attachment.\textsuperscript{89} Catherine MacKinnon raised a radical critique of privacy, arguing that privacy could never be a basis for claiming rights because it is a tool of gender subordination that leaves men alone to oppress women one at a time.\textsuperscript{90} The feminist critique of the public/private divide had powerful repercussions. For instance, the state today criminalizes domestic violence and provides legal recourse for women demanding equal treatment in the workplace.\textsuperscript{91}

The second-wave critique, however, is largely based on the experiences of white, middle-class women. It ignores differences of class and race, particularly the experiences of poor, African-American women, who have historically lacked privacy.\textsuperscript{92} During slavery, society denied African-American women privacy by expropriating “their labor, sexuality, and reproductive capacity” and treating their bodies “as items of public . . . display.”\textsuperscript{93} Post-slavery, the state coerced poor black women into sterilization, disproportionately removed black children from their homes through the child welfare

\textsuperscript{88} See Frances Olson, \textit{The Family and the Market: A Study of Ideology and Legal Reform}, 96 \textit{Harv. L. Rev.} 1497, 1502, 1506-10 (1983); Okin, supra note 87, at 111.


\textsuperscript{90} Catharine A. MacKinnon, \textit{Toward a Feminist Theory of the State} 194 (1989). Further, she argued that privacy obscures women’s lack of choice and consent within the private realm, and, by isolating women, it obscures “women’s shared experience.” \textit{Id.}

\textsuperscript{91} See Elizabeth M. Schneider, \textit{Battered Women and Feminist Lawmaking} 4-5 (2000). At the same time, engagement with the state to combat domestic violence has costs; the state often reflects and enforces patriarchal norms and state enforcement limits women’s autonomy. \textit{Id.} at 181-98 (describing tensions inherent in the criminalization of domestic violence).

\textsuperscript{92} See Jennifer C. Nash, \textit{From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory}, 11 \textit{Cardozo Women’s L.J.} 303, 319 (2005) (“because the black female body is inscribed and engraved with particular gendered and racialized cultural meanings, the black female subject has never been granted the same kind of privacy as the white female, the privacy that some feminists have argued needs to be ‘exploded.’”); see also Anita L. Allen, \textit{Uneasy Access: Privacy for Women in a Free Society} 61 (1988) (“It is plain that in the United States domestic privacy is a virtual commodity purchased by the middle class and the well-to-do.”).

system, and criminally prosecuted black, drug-addicted mothers.\(^{94}\) Although African-Americans have always been a minority of welfare recipients, welfare has been debated in racial terms and “viewed as a program benefitting black women.”\(^{95}\) As a result, welfare history is replete with state intrusions into the homes and bodies of the poor, such as through home raids, drug tests, and forced sterilizations. Thus, for poor, minority women, privacy in the home can offer a refuge from the oppression and racism of the outside world.\(^{96}\)

The second-wave critique also downplayed certain positive liberal values associated with privacy. In response, liberal feminists such as Anita Allen and Linda McClain have stood up for privacy, unwilling to “toss out the baby . . . with the bath water.”\(^{97}\) These liberal feminists acknowledge the harms done to women under cover of “privacy,”\(^{98}\) but contend that a reconceived notion of the public/private divide can be valuable for women both as a descriptive tool and normative goal. Privacy is essential to moral personhood and self-development;\(^{99}\) without privacy, women’s lives contain a “disproportionate burden for domestic labor, child care, and lack of leisure and time.”\(^{100}\) Following liberal tradition, their argument is that women “should be permitted to live out their disparate, nonconforming preferences,” and that privacy is essential to achieve this good because it gives individuals space to develop and carry out their own ends.\(^{101}\) Tracy Higgins adds that the private/public distinction can capture important differences between harms that the state inflicts versus harms inflicted by private parties. While both harms must be taken seriously, they can require different responses.\(^{102}\) As Dorothy Roberts points out, for African-American women, the state typically poses a greater risk of oppression than does private power.\(^{103}\)

\(^{94}\) See Roberts, supra note 93, at 1440-50.


\(^{96}\) Roberts, supra note 93, at 1470-71. Indeed, “family often provided some of the few comforts poor and working class black families could enjoy.” Nadasen, supra note 17, at 237.

\(^{97}\) Allen, Uneasy Access, supra note 92, at 71, 81; see also McClain, supra note 93, at 765.

\(^{98}\) See Allen, Uneasy Access, supra note 92, at 70; McClain, supra note 93, at 776.

\(^{99}\) See Allen, Uneasy Access, supra note 92, at 36.

\(^{100}\) McClain, supra note 93, at 783.

\(^{101}\) Allen, Uneasy Access, supra note 92, at 86-87.

\(^{102}\) See Higgins, supra note 82, at 863.

\(^{103}\) See Roberts, supra note 93, at 1471.
Martha Fineman, whose influential work focuses on how law and society ignore familial relationships of dependency, has also called for reinvigorating common law notions of family privacy that would blanket single mothers and children as entities. While traditional families are deemed private, poor mothers are treated by the state as "public," because they are seen as deviant and dangerous for rejecting patriarchal sexual affiliation as the sole definition of family. As a result, the state justifies "regulation, supervision, and control" of poor, single mothers. Although most feminists have abandoned the private sphere ideology, and for good reason, Fineman notes that the ideology "nonetheless has established the concept of the desirability of a family or private space into which the state, absent compelling reasons, is not free to intrude." Still, she is pessimistic that we can re-imagine family privacy without "its patriarchal baggage."

The welfare rights movement demonstrates the intractability of this baggage. In the 1960s, a vibrant welfare rights movement flourished in which poor black women, building upon the civil rights and feminist struggles, asserted their political and economic rights. Through organizing, political protests, and litigation, the welfare rights movement achieved many of its goals, including objective eligibility criteria rather than discretionary morals tests, higher monthly AFDC benefits, fair hearing rights to appeal adverse welfare decisions, elimination of restrictive residency laws, and a voice within public policy. The movement challenged the two-parent family as the norm and highlighted the economic and social value provided by domestic work, thus embodying feminist insights. Most importantly, the movement empowered poor women to demand rights.

Yet despite these substantial achievements, the welfare rights movement never secured privacy for poor women, and the movement ultimately dissolved due to financial constraints, staff conflicts, and public backlash. Welfare mothers remained the targets of public hostility and distrust, and many gains were undermined by TANF, which reinserted discretion into the welfare bureaucracy.

104 FINEMAN, supra note 9, at 186-89.
105 Id. at 106-18, 189.
106 Id. at 190.
107 Id. at 188.
108 Id.
109 NADASEN, supra note 17, at xiv.
110 Id. at 232.
Still, the enactment of TANF has spurred new pockets of activism on the local level, which may contain the seeds for a more sustained claim to privacy. For instance, the Mothers for Justice, an activist group of low-income women in New Haven, Connecticut organized against many TANF reforms, including fingerprinting. Through a direct action campaign, they confronted state leaders and expressed their outrage over the policy. The policy, however, remained.

In addition to physical privacy, second-wave feminists also considered decisional privacy, in the context of reproductive rights. In *Roe v. Wade*, the Supreme Court based the constitutional right to abortion on privacy, which is “implicit in the concept of ordered liberty,” and contained within the “penumbras” of the Constitution, even if not found in the text of the Constitution itself. Yet for poor women, this privacy “right” can be illusory if they lack the resources to exercise it. As Catharine MacKinnon has argued, the Supreme Court’s equation of privacy with state non-intervention, or privacy as a negative liberty, means that poor women can constitutionally be denied Medicaid coverage for abortions. Further, poor women are disproportionately impacted by restrictions on abortion, such as waiting periods and hospitalization requirements, because these restrictions make the choice of abortion more expensive and time-consuming.

Accordingly, many scholars have argued that reproductive rights should be founded on equal protection, rather than privacy, because equality analysis better captures how lack of reproductive choice permanently subordinates women, and only women, as a class. Still, it is not clear that reproductive rights can be defended without some conception of privacy. Privacy allows women space to reflect and

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113 See NADASEN, supra note 17, at 241; see also Mothers for Justice & Giovanna Shay, *The Phenomenal Women of Mothers for Justice*, 8 YALE J.L. & FEMINISM 193 (1996). This groundbreaking article shares the voices and experiences of welfare mothers in New Haven as they confronted TANF reforms.

114 See NADASEN, supra note 17, at 236-38.


deliberate on moral choices. This sort of deliberation “is necessary to the development and expression of personhood and personality, including the freedom to exercise moral responsibility.” Moreover, reproductive choice is not only a matter of decisional privacy, but also leads to more spatial privacy, because women who choose to limit childbearing do not face the privacy losses associated with motherhood.

In sum, second-wave feminists established that women have had too much unwanted privacy, but can greatly benefit from certain forms of privacy. However, in their focus on domestic violence, workplace equality, and reproductive choice, second-wave feminists did not address the unique privacy intrusions faced by welfare mothers, which continue unabated — even now that welfare recipients are working. Nor did the second-wave acknowledge that poor women have less privacy than other women and that this shortfall results largely from the intersection of gender with class and race. In advocating for decisional privacy, the feminist agenda did not confront other reproductive choice issues that particularly impacted low-income, black women, such as forced sterilization.

Moreover, the second-wave emphasis on autonomy and individual self-control may have intensified public animosity against welfare mothers, because it reinforced perceptions that welfare mothers make irresponsible choices not to work and to bear too many children. Mainstream feminists have not mobilized against this privatization of poverty, i.e., the idea that individual choices alone cause poverty. Indeed, feminists were largely ineffective during the passage of TANF. TANF’s emphasis on personal responsibility privatizes the causes of poverty by blaming women for their economic status, rather than acknowledging the complex intersection of the economic, social, and demographic forces that produce poverty. As a result, TANF’s

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121 See ALLEN, UNEASY ACCESS, supra note 92, at 100 (“Lives spent bearing and rearing children and without adequate solitude and seclusion from others are stunted lives.”).
122 See ALLEN, UNEASY ACCESS, supra note 92, at 37. There are other critiques of the second-wave view of privacy. For instance, Robin West offers an alternate view of privacy that considers women’s experience, including connection, dependence, and caring.
123 See NADASEN, supra note 17, at 213-19.
124 Id. at 196.
125 Id. at 219-22.
emphasis on work makes poor relief a matter of personal initiative, but
the law fails to provide adequate supports that make life above the
poverty line possible, such as child care, transportation, training and
education, and a living wage. Further, TANF’s emphasis on
“personal responsibility” rejects communal accountability or collective
solutions for income inequality. The end result is ironic. The state has
deemed poverty a matter of private choice, but has simultaneously
denied the poor the privacy and concomitant dignity that could
actually lead to increased self-sufficiency. Women who are materially
deprived, psychologically damaged, or physically abused are unlikely
to gain a footing for self-sufficiency. Is third-wave feminism better
situated to defend privacy?

B. Third-Wave Feminism

Third-wave feminism is not a uniform movement, but rather an
emerging and evolving assemblage of feminist voices defining
themselves against the second-wave movement. It began as a dialogue
by a generation of “daughters” who grew up with the benefits of
second-wave feminism, reacting to the feminism of their “mothers.” Third-wave feminists have particularly criticized the second-wave for
failing to recognize the diversity in the lives of women and for linking
sex to oppression. The third-wave is generally marked by its
confessional, narrative approach; its emphasis on sexual empowerment
and liberation; its anti-essentialist perspective; and its embrace of
technology as a tool of the movement. Whereas second-wave
feminists fought patriarchy from a unified political front, third-wave
feminists are not overtly political. They are focused less on

127 Id. at 742-44 (describing lack of work supports under TANF).
128 It is rooted in criticism by women of color of the white women’s feminist movement. See LEBEYWOOD & JENNIFER DRAKE, Introduction, to THIRD-WAVE AGENDA: BEING FEMINIST, DOING FEMINISM 8 (Leslie Heywood and Jennifer Drake eds. 1997). Bell hooks has stated that “the focus on feminism as a way to develop shared identity and community has little appeal to women who experience community, who seek ways to end exploitation and oppression in the context of their lives.” Id. at 12 (quoting BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 28 (1984)).
129 Second-wave feminists reject this characterization of their movement. See Gloria Steinem, Forward to REBECCA WALKER, TO BE REAL: TELLING THE TRUTH AND CHANGING THE FACE OF FEMINISM (1995). Steinem writes, “[I] want to remind readers who are younger or otherwise new to feminism that some tactical and theoretical wheels don’t have to be reinvented.” Id. at xix.
131 See HEYWOOD & DRAKE, supra note 128, at 3 (“[W]e define feminism’s third-wave as a movement that contains elements of second wave critique of beauty culture, sexual abuse,
collective revolution, and more on personal evolution. Third-wave feminism offers both promise and peril for the privacy rights of poor women.

The potential of third-wave feminism lies primarily in its anti-essentialist approach. Second-wave feminists tended to adopt an essentialist perspective that viewed inequity through a gender prism that assumed a white, middle-class viewpoint. By contrast, third-wave feminists are inclusive and celebratory of the diversity among women—race, culture, class, sexual orientation, disability, geography, and religion—and the multiple identities women bear. They invite new voices to join feminist debates, and they seek to raise the feminist consciousness of all women.

One former Chicana welfare mother, Maria Cristina Rangel, writes movingly in a third-wave anthology of her harried and stressful attempts to work, care for her children, and attend college on a scholarship from Smith. She ruefully counts herself lucky to have applied for public assistance in the waning days of AFDC, because TANF does not allow college attendance to count as a work activity. She describes how, at each recertification meeting, “I had to explain myself over and over again, always living with the fear that I would not be believed and my benefits would be cut as a result.” Then, “[a]fter each humiliating, intimidating interrogation,” she would have to make her way out through the waiting room with its patronizing posters exhorting, “Mommy, will we always be on Welfare?” and “Work Works!” Frustrated by the abuses of the welfare system, Rangel formed an Association of Low Income Students to address issues surrounding poverty and class on campus and beyond. Hers is a rare voice in any wave of feminist writing. As she notes, she had advantages that other welfare mothers often lack, she spoke English
and had access to a four year college education. As a result, "I think about all the other stories that are not heard, all the other injustices that remain unresolved."\textsuperscript{140}

Those stories remain largely untold. Despite the open arms of the third-wavers, most welfare mothers will not receive the invitation. Third-wave feminist thought is widely disseminated through online sources such as webzines, videos, alternative music, and blogs,\textsuperscript{141} but these fora are not easily accessible if a woman does not have a computer or technological know-how. Even with access to technology, welfare mothers might find that the middle-class concerns that permeate most third-wave writing does not speak to them. Further, in popular culture, third-wave feminism manifests in images of sexually liberated women such as the Pussycat Dolls and the professional quartet frolicking in Sex and the City. These are women who link their sexuality to power and who do not have to fight the battles of earlier feminists. While these glamorous commercial images do not reflect real life for any women, they are particularly removed from the messages the welfare system sends to its beneficiaries.

Moreover, third-wave feminism is not yet about political activism.\textsuperscript{142} The movement has produced a 13-point \textit{Manifesta} that contains some goals that relate to poor women, including safeguarding the right to bear or not to bear children regardless of impoverishment; equal access to health care; and a living wage that would bring workers over the poverty line.\textsuperscript{143} However, activism among third-wave feminists is oriented more towards community action and engagement with non-profits than political activism and social reform. For instance, \textit{Manifesta} highlights the efforts of Dressed for Success, a non-profit that provides professional clothes for welfare women who are transitioning to work.\textsuperscript{144} This is a valuable initiative, but it reinforces, rather than challenges, the norms of the welfare system.

At bottom, the current third-wave movement is not about privacy. It is about public confession and open expression. Third-wavers assume that throwing off the mantle of privacy is a freely directed choice by a liberated woman, or at least a positive step toward claiming autonomy. If anything, the pendulum has swung so far away

\textsuperscript{140} See Rangel, \textit{supra} note 1, at 194.
\textsuperscript{141} See Crawford, \textit{supra} note 6, at 127-29.
\textsuperscript{142} The "[k]ey sites of struggle" are cultural production and sexual politics. See Heywood & Drake, \textit{supra} note 128, at 4.
\textsuperscript{143} \textsc{Jennifer Baumgardner & Amy Richards}, \textit{Manifesta: Young Women, Feminism, and the Future} 278-81 (2000).
\textsuperscript{144} Id. at 292.
from valuing privacy, that Anita Allen has suggested a possible need to coerce privacy to retain liberal values of “human dignity, personhood, moral autonomy, workable community life, and tolerant democratic political and legal institutions.” Describing the phenomenon of the Jenni cam, in which a young woman voluntarily broadcast her entire life over the internet, Allen reflects, “women first reconstructed privacy by rejecting outmoded conceptions of domesticity, modesty, reserve, and subordination to men; now they reconstruct privacy by exploiting it for income, celebrity, or both.” She claims that while she is “not suggesting that Jenni should turn off her camera and sweep floors for her boyfriend,” she should, “turn off her camera so that, free from the gaze of others, she can live a more genuinely expressive and independent life.” By contrast, welfare mothers have not chosen to give up privacy as do the Jennis of the third-wave; it is stolen from them. While Jenni’s sexual freedom is celebrated; the sexuality of welfare mothers is demonized. Jenni can exploit the private in public without any state regulation; welfare mothers live under the gaze of the state. In sum, the third-wave welcomes the diverse stories and experiences of welfare mothers, but lacks the theoretical framework to deal with privacy deprivations.

IV. CONCLUSION

Despite inadequate economic or social support, welfare mothers have moved into the workplace and accomplished what society has asked of them. Nevertheless, they face the same level of privacy intrusions that have historically been used against them. A rights-based litigation tactic has staved off drug testing by the narrowest of margins, but leaves untouched the larger administrative apparatus of investigation and surveillance. The welfare system continues to use privacy intrusions as a method for imposing stigma and judgment on vulnerable women. This failure raises the issue of strategy. Second-wave feminists disagreed over whether rights-based rhetoric is an appropriate scaffold for achieving justice. On the one hand, many feminists feel that fighting for rights, such as a “right to privacy,” forces women to advocate within a male framework that is

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146 Id. at 750-51.
147 Id. at 752-53.
148 This debate is summarized in Elizabeth M. Schneider, The Dialectic of Rights and Politics: Perspectives from the Women’s Movement in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 318-32 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).
individualistic and liberal, resulting only in marginal gains within a patriarchal system. Furthermore, in many ways, welfare mothers are so oppressed by the welfare bureaucracy that they "are almost the inverse of the rights-bearing individual who would rise up against surveillance with a legal challenge." On the other hand, some feminists contend that obtaining rights can lead to tangible improvements in women's lives and serve as a starting point for changing societal expectations of women's potential and reality. The welfare rights movement reveals truths for both perspectives.

Given the entrenched nature of welfare's privacy-stripping practices, a multi-faceted approach is needed to enhance the privacy of poor women. Some important rights are already on the books, such as the exemption for domestic violence victims within the child support enforcement program, and these laws need better enforcement and caseworker training. Other laws and regulations, such as those requiring home visits, should be the subject of legal reform through both courts and lawmaking bodies. Advocates need to change the rhetoric surrounding welfare and move it away from individual blame towards collective responsibility. Welfare recipients are working, and thus embody mainstream American values. Certainly, middle-class Americans would recoil in horror if the government put them through similar scrutiny as a condition of receiving valuable governmental subsidies, such as tax deductions for mortgages and retirement plans, and childcare tax credits. Accordingly, advocates can make equality-based arguments, which can enhance the privacy framework by putting a communal gloss on issues of individual dignity. While all Americans face deteriorating privacy as a result of new technologies, no other group of Americans suffers the same forms of stigma when receiving governmental assistance. Still other welfare practices are matters of bureaucratic compulsion, and thus advocates and welfare clients need to make the case to welfare administrators that stripping welfare clients of their dignity is contrary to the goals of self-sufficiency mandated by TANF.

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149 GILLIOM, supra note 8, at 91.
150 SCHNEIDER, supra note 91, at 40-41 (discussing the benefits and limits of rights claims).
151 See supra notes 106 to 111 and accompanying text (discussing the welfare rights movement).
152 See FINEMAN, supra note 9, at 191 (middle-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.").
This symposium asks, *Can You Hear Us Now?* The idea of being heard presumes a conscious choice to throw off privacy to shout into the public square. Welfare mothers do not have a meaningful choice to keep the personal private. Their private lives are public fodder for social control tactics that tout self-sufficiency while undermining actual opportunities for independence. Moreover, feminism has not included poor women within the “Us,” that is presumed in this question. Too often, the voices of poor women, including their perspectives on how the intersectionality of gender, class, and race shapes their lives — have been muted in both second-wave and third-wave feminism. Further, a third-wave feminist might rightly take issue with the notion of an “Us” voicing a unified message. There is no monolithic feminist movement; we are united only in our shared commitment to defeat inequality. At the same time, the multiplicity of feminist identities should not become so splintering that we cannot find common grounds for a shared fight. Welfare mothers need each other, as well as concerned feminists everywhere, to fight for economic justice and insulation from state surveillance. Thus, this paper asks a different question, “Can You Hear Us Fight For The Privacy and Dignity of All Women?”