

## Section 8 Is the New N-Word: Policing Integration in the Age of Black Mobility

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*“Black effer. . . . That’s why you live in Section 8 homes. . . .”*<sup>1</sup>

### INTRODUCTION

From 2003 through 2004, the Alexanders, a black family, lived on Matsqui Road in Antioch, California.<sup>2</sup> Members of the Antioch Police Department visited the Alexanders’ home between four and six times while they lived in this house.<sup>3</sup> On at least one of these visits, police officers approached the Alexander family home with guns drawn.<sup>4</sup> The reason given by the police officers for these visits was noise complaints from the neighbors about the five Alexander children, who ranged in age from approximately two to twelve years old.<sup>5</sup> During some of these visits, the police officers questioned the

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1. Abby Phillip, *‘Go Back to Your Section 8 Home’: Texas Pool Party Host David Describes Racially Charged Dispute with Neighbor*, WASH. POST (June 8, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/06/08/go-back-to-your-section-8-home-texas-pool-party-host-describes-racially-charged-dispute-with-neighbor/>. This statement was made on July 5, 2015 by a white female resident of McKinney, Texas to black teens at a neighborhood pool party. In the fight that followed, a white police officer drew his service weapon on the teens and threw one girl to the ground, using his knee to restrain her.

2. Declaration of Che Alexander in Support of Plaintiffs’ Motion for Class Certification at 1, *Williams v. City of Antioch*, No. C-08-2301 SBA (N.D. Cal. Oct. 26, 2009).

3. *Id.* at 2–3.

4. *Id.*

5. *Id.* at 1–2.

Alexanders about whether they were on Section 8.<sup>6</sup> Also during this time, Mr. Alexander's white neighbors wrote two letters stating that Mr. Alexander and his family should "go back to Oakland," referred to Mr. Alexander and his family as "niggers" and to his children as "fat black kids."<sup>7</sup> Concurrently, one of Mr. Alexander's neighbors, an older white man, yelled to him from the street "Why don't you move?" and "We don't want you here."<sup>8</sup> The Alexanders reported the first letter to the police department and were told there was "nothing that they could do."<sup>9</sup> The Alexanders did not bother reporting any subsequent harassment by their neighbors.<sup>10</sup> Eventually, the Alexanders relocated to another house also in Antioch.<sup>11</sup> In May 2008, police officers visited the family residence looking for a "dark-skinned black kid" that they claimed had been down the street "selling drugs" and then seen running into the Alexanders' home wielding a gun. Mr. Alexander and his family are light-skinned.<sup>12</sup> On another occasion, the Alexander family was targeted by the SWAT team early one morning.<sup>13</sup> The SWAT team entered the home and pointed machine guns at the entire family, only to later apologize.<sup>14</sup>

The Alexanders were not alone. A class action lawsuit, *Williams v. City of Antioch*,<sup>15</sup> was filed on July 16, 2008, on behalf of more than eight-hundred African-Americans who were or were thought to be on Section 8, against the city of Antioch for engaging in a concerted campaign to reduce the African-American population and discourage any additional black families from moving to the city.<sup>16</sup> Moreover, other cities have echoed Antioch's response to black newcomers. In July 2015, the cities of Lancaster and Palmdale, California and the Housing Authority of Los Angeles County settled

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6. *Id.* at 2.

7. *Id.* at 1–2.

8. *Id.* at 1.

9. *Id.*

10. *Id.* at 2–3.

11. *Id.*

12. *Id.*

13. *Id.* at 4–5.

14. *Id.*

15. First Amended Complaint, *Williams v. City of Antioch*, No. C 08-02301 SBA (N.D. Cal. Sept. 2, 2010), available at <http://www.clearinghouse.net/chDocs/public/FH-CA-0006-0001.pdf> [hereinafter First Amended Complaint].

16. *Id.* at 10–11.

a similar case with the Department of Justice.<sup>17</sup> The Los Angeles County Sheriff's Department had settled a related lawsuit on similar facts two months before in May 2015.<sup>18</sup>

This dynamic between whites and blacks living in suburbs is not new.<sup>19</sup> Since the end of the nineteenth century when whites first began relocating to the new American suburbs they have fought even slight influxes of blacks into their communities regardless of the blacks' socio-economic status.<sup>20</sup> Specifically, whites have used

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17. See Settlement Agreement at 2, *United States v. Hous. Auth. of L.A.*, No. CV 15-5471 (C.D. Cal. July 20, 2015) (settlement of an action where plaintiff alleged that Housing Authority of the County of Los Angeles, the City of Lancaster, Cal., and the City of Palmdale, Cal., were in violation of several laws, including 42 U.S.C. §§ 3601 of the Fair Housing Act, for intentional race based exclusion and discrimination of Black Families).

18. *Id.* at 2 n.1. See also Settlement Agreement at 2, *United States v. Cnty. of L.A.*, No. CV15-03174 (C.D. Cal. Apr. 28, 2015) (settlement of a civil suit brought against the Los Angeles County Sheriff's Department and the County of Los Angeles for patterns of practices and conduct by law enforcement officers and agents of the County, that deprived persons of rights, privileges, and immunities secured and protected by the Constitution and the Fair Housing Act).

19. This "tipping point" phenomenon is defined as the point at which whites begin to leave a residential locale en masse as African-Americans or other minorities move in. See Thomas B. Edsall, *Whose Neighborhood Is It?*, N.Y. TIMES (Sept. 9, 2015), [http://www.nytimes.com/2015/09/09/opinion/whose-neighborhood-is-it.html?\\_r=0](http://www.nytimes.com/2015/09/09/opinion/whose-neighborhood-is-it.html?_r=0). This phenomenon was explored first by Thomas C. Schelling in *Dynamic Models of Segregation*, 1 J. MATHEMATICAL SOC. 143, 181-86 (1971), and has been carefully analyzed by Junfu Zhang in *Tipping and Residential Segregation: A Unified Schelling Model*, 51 J. REGIONAL SCI. 167 (2011). Zhang writes of Schelling's work:

[I]n an all-white neighborhood, some residents may be willing to tolerate a maximum of 5 percent black neighbors; others may tolerate 10 percent, 20 percent, and so on. The ones with the lowest tolerance level will move out if the proportion of black residents exceeds 5 percent. If only blacks move in to fill the vacancies after the whites move out, then the proportion of blacks in the neighborhood may reach a level high enough to trigger the move-out of the next group of whites who are only slightly more tolerant than the early movers. This process may continue and eventually result in an all-black neighborhood.

*Id.* at 171. See also David Card et al., *Are Mixed Neighborhoods Always Unstable? Two-Sided and One-Sided Tipping* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 14470, Nov. 2008), available at <http://www.nber.org/papers/w14470> ("Most major metropolitan areas are characterized by a city-specific 'tipping point,' a level of the minority share in a neighborhood that once exceeded sets off a rapid exodus of the white population").

20. DOUGLAS S. MASSEY & NANCY A. DENTON, *ç* 85 (1993) (asserting that "[e]ven if black incomes had continued to rise through the 1970s, segregation would not have declined: no matter how much blacks earned they remained spatially separated from whites." Put another way, "[u]p until at least 1980, money did not buy entry into white neighborhoods of American cities. Among northern metropolitan areas, for example, blacks, no matter what their income, remain highly segregated from whites.").

various tactics, including restrictive covenants, certain real estate practices, and violence to limit black access to housing.<sup>21</sup> Municipalities have affirmed the community's desire to remain all-white through denial of basic water services, zoning decisions regarding affordable housing, and intimidation by law enforcement.

Overtly racist conduct designed to intimidate black newcomers in historically all-white suburbs became illegal with the passage of the Fair Housing Act (FHA).<sup>22</sup> In its place, facially neutral terms and policies have come into use, including "Section 8," to serve the same purpose. Simply put, Section 8 is the new n-word.<sup>23</sup> A close look at the rhetoric of modern integration oppositionists, the municipalities' responses to the historical white community and the black newcomers makes clear that race and not opposition to welfare, more generally, is the driving force behind municipal actions like that seen in Antioch.<sup>24</sup> Yet, welfare rights organizations have been slow to describe Section 8 enforcement schemes like that in Antioch, as racially discriminatory.<sup>25</sup> And litigators have been reluctant to plead

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21. JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 4 (2005). "Many towns drove out their black populations and then posted sundown signs. Other towns passed ordinances barring African Americans after dark or prohibiting them from owning or renting property; still other established such policies by informal means, harassing and even killing those that violated the rule." *Id.*

22. Fair Housing Act of 1968, 42 U.S.C. § 3604 (2012). The Fair Housing Act aimed to provide for fair housing throughout the United States by deeming it unlawful to discriminate in housing on the basis of race, color, sex, national origin, or religion.

23. Gregory S. Parks & Shayne E. Jones, *Nigger: A Critical Race Analysis of the N-Word Within Hate Crimes Law*, 98 J. CRIM. L. & CRIMINOLOGY, 1305, 1316 ("The N-word is derived from the Latin word for the color black, nigger. . . . If, at any point, there was a benign intent behind the word, it eventually took a pejorative turn. . . . as early as 1837 the N-word was considered an 'approbrious [sic] term, employed to impose contempt upon [Blacks] as an inferior race. . . . The term in itself[] would be perfectly harmless[] were it used only to distinguish one class of society from another; but it is not used with that intent . . . it flows from the fountain of purpose to injure.'").

24. In November 2006, the City issued the following statement: "City leaders . . . believe Antioch is home to a disproportionate number of subsidized tenants . . . [T]heir behavior patterns are disruptive; and they bring crime, drugs and disorder to the neighborhood." ELIZABETH VOIGHT ET AL., PUB. ADVOCATES INC. & BAY AREA LEGAL AID, *POLICING LOW-INCOME AFRICAN AMERICAN FAMILIES IN ANTIOCH: RACIAL DISPARITIES IN "COMMUNITY ACTION TEAM" PRACTICES* 11 (2007), available at <http://www.publicadvocates.org/sites/default/files/library/antiochreportfinalrev.pdf>.

25. Rose Ernst, *Localizing the Welfare Queen Ten Years Later: Race, Gender, Place and Welfare Rights*, 11 J. GENDER RACE & JUST. 181, 205 (2008) (exploring "how racial inequalities at the state and local level impact individual welfare rights' groups decisions to

violations of the most critical sections of the FHA when bringing lawsuits against municipalities for the type of actions that were directed at the Alexanders.<sup>26</sup> Because the Act does not have “source of income” protection, the FHA cannot address what I allege is actually old-fashioned race discrimination necessarily disguised as class-based attacks.

What explains this reluctance to treat Section 8 as an epithet or at the very least a proxy for race (black)? One potential explanation for the disconnect is the influence of conflation of poverty and crime. Welfare organizations, fair housing advocates, and blacks themselves are hindered or blinded by cultural myths, such as the single black mother on welfare as undeserving.

Part I of this essay describes the new age of black mobility, which threatens the historical lines between the black inner city core and all-white suburbs. Part I also explores how Section 8 enforcement schemes—facially race neutral class-based attacks targeting black newcomers—have arisen in reaction to the new age of black mobility.

Part II seeks to briefly outline the history of race based housing discrimination in America through the passage of the Fair Housing Act and the case law that has emerged to argue that the kind of conduct engaged in in Antioch is covered under the Act. Part II also

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address the national racial stereotype of welfare”). For example, according to Ernst’s research, in Houston, where racial minorities are the majority of the welfare docket organizers expressed a feeling that publicizing issues of poverty and welfare might serve only to reinforce stereotypes because of the “deeply embedded image of African American welfare parents.” *Id.* On the other hand, an organization in a white community, “where coverage of poverty is perceived as ‘white’ wants to both ‘correct’ the notion that the majority of welfare parents are parents of color while not reinforcing the racist image of these families.” *Id.* Ernst reveals that welfare rights organizations face “political perils . . . of ignoring the racist trope of the welfare queen in the realm of welfare politics.” *Id.* On a related, if not identical note, Michelle Alexander argues that there is a similar “widespread aversion to advocacy on behalf of those labeled criminals reflects a certain political reality.” MICHELLE ALEXANDER, *THE NEW JIM CROW* 228 (2010) [hereinafter ALEXANDER, *THE NEW JIM CROW*].

26. See Joint Motion in Support of Preliminary Approval of Class Action Settlement, *Williams v. City of Antioch*, No. C 08-02301 SBA, (N.D. Cal. Sept. 2, 2010), available at <http://www.clearinghouse.net/chDocs/public/FH-CA-0006-0006.pdf> (settlement of class action lawsuit accusing Antioch and its police department of engaging in a campaign of intimidation, harassment and discrimination against African-American families that participate in the Section 8 program).

analyzes the rise of the use of racially coded language in the wake of the passage of the FHA.

Part III uses the intersectionality approach<sup>27</sup> to consider how the narratives about single, black mothers on welfare and the trend towards criminalizing poverty affects our collective implicit bias such that even potential allies of the targets of Section 8 enforcement schemes—mothers, single women, and middle class blacks—are alternately hindered in their advocacy or blinded by these frames. It argues that the discriminatory purposes motivating Section 8 schemes are overlooked to the detriment of the larger black community, of course, but also society as a whole.

Part IV explores the failings of the Section 8 analogy; specifically, there can never be another n-word *per se* because Civil Rights laws have permanently altered the landscape of discrimination. Once allies, advocates, and blacks themselves recognize racially-neutral coded language is the new normal in discrimination it will help raise their awareness to trends in the language of discrimination.

I conclude by suggesting that if blacks are to move out of “hyper-segregated” neighborhoods,<sup>28</sup> then Section 8 enforcement schemes and other facially race neutral policies that perpetuate segregation must be eradicated. And that eradication of these policies will only come about once welfare rights organizations, fair housing advocates and other allies reject the myth of the criminally minded, single black mother and the narrative of mass incarceration.

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27. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) (Crenshaw has been attributed with devising a theory, intersectionality, which analyzes how different types of discrimination interact. For instance, Crenshaw has noted that “the many of the experiences black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are generally understood and that the intersection of racism and sexism factors into Black women’s lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately”).

28. MASSEY & DENTON, *supra* note 20, at 77 (describing “hyper-segregation” as “conditions of intense segregation”). According to their research “one-third of all African Americans in the United States live in areas that are “hyper-segregated,” including “spatially isolated, geographically secluded and suffering extreme segregation across multiple dimensions simultaneously. . . . In plain terms, they live in ghettos.” *Id.*

## I. THE AGE OF BLACK MOBILITY

In recent decades, Black Americans have relocated in numbers similar to that of the Great Migration era.<sup>29</sup> More specifically, blacks who have historically resided in the urban core are relocating into neighboring historically all-white suburbs.<sup>30</sup> There are several explanations including, although not limited to, gentrification<sup>31</sup> and

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29. ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS* 9–11 (2010) (describing the Great Migration as the relocation of over six million black southerners to nearly “every other corner of America” over the course of six decades).

The imprint of black migration from the South is everywhere in urban life. The configuration of the cities as we know them, the social geography of black and white neighborhoods, the spread of housing projects as well as the rise of the well-scrubbed black middle class, along with the alternating waves of white flight and suburbanization—all of these grew directly or indirectly, from the response of everyone touched by the Great Migration.

*Id.*

30. VOIGHT ET AL., *supra* note 24, at 9 (between 1995 and 2005, Antioch’s population rose from 73,386 in 1995 to 101,000 in 2005. Between 2000 and 2006, the city’s African American population nearly doubled from 8,824 (9.7 percent) to 15,687 (15.9 percent). During this same time, the white population decreased from 59,148 (65.3 percent) to 49,246 (50.1 percent)). Interviews reflect that many of Antioch’s new African American residents were from neighboring cities such as Pittsburgh, Richmond and Oakland. These cities have historically had higher concentrations of black residents. In 2000, Pittsburgh, Richmond and Oakland had black populations that were significantly higher than Antioch’s at 18.9 percent, 36.1 percent and 35.7 percent, respectively. See *Census 2000 Gateway*, U.S. CENSUS BUREAU (July 19, 2013), <http://www.census.gov/main/www/cen2000.html>. Yet, gentrification and displacement in the Bay Area have resulted in the relocation of residents from the most urban areas in many cases to suburbs. See also Tanvi Misra, *Mapping Gentrification and Displacement in San Francisco*, CITYLAB (Aug. 31, 2015), <http://www.citylab.com/housing/2015/08/mapping-gentrification-and-displacement-in-san-francisco/402559/> (citing MIRIAM ZUK, REGIONAL EARLY WARNING SYSTEM FOR DISPLACEMENT TYPOLOGIES FINAL PROJECT REPORT (July 23, 2015), available at [http://www.urbandisplacement.org/sites/default/files/images/rews\\_final\\_report\\_07\\_23\\_15.pdf](http://www.urbandisplacement.org/sites/default/files/images/rews_final_report_07_23_15.pdf)).

31. “Gentrification” is defined as “the process of renewal and rebuilding accompanying the influx of middle-class or affluent people into deteriorating areas that often displaces poorer residents.” *Gentrification Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/gentrification> (last visited Mar. 13, 2016). The term was first coined in 1964 by sociologist, Ruth Glass, writing about the “working class quarters (that) ha[d] been invaded by the middle class—both upper and lower.” Richard Florida, *No One is Very Good at Identifying Gentrification*, CITYLAB (Dec. 15, 2014), <http://www.citylab.com/housing/2014/12/no-ones-very-good-at-correctly-identifying-gentrification/383724/>. Today, despite the term’s continued wide-spread use there is significant disagreement among scholars and commentators over what it actually means. See Richard Florida, *The Complicated Link Between Gentrification and Displacement*, CITYLAB (Sept. 8, 2015), <http://www.citylab.com/housing/2015/09/the-complicated-link-between-gentrification-and-displacement/404161/>; Emily Badger, *It’s Time to*

policy shifts away from public housing towards the Housing Choice Voucher Program, commonly referred to as Section 8.<sup>32</sup>

*A. HUD's Housing Choice Voucher Program—Section 8*

The Housing Choice Voucher Program (“voucher program” or Section 8) is funded by the Department of Housing and Urban Development (HUD) and administered by local public housing authorities.<sup>33</sup> The voucher program is expressly intended to offer a “housing choice” and provide an opportunity for low-income citizens to relocate to higher opportunity neighborhoods such as those found in Antioch, where better schools and jobs may be found, and where they can escape the social conditions that often exist in primarily poor, lower opportunity neighborhoods.<sup>34</sup> Federal housing assistance programs date back to the Great Depression when the National Housing Act of 1934 was passed.<sup>35</sup>

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*Give Up the Most Loaded, Least Understood Word in Urban Policy: Gentrification*, WASH. POST. (Dec. 17, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/12/17/its-time-to-give-up-the-emptiest-word-in-urban-policy-gentrification/>. When used in this Article, “gentrification” indicates the process by which the transformation of a neighborhood through social and economic forces results in the displacement of its residents, specifically its black residents, as is happening in Oakland, California. Gentrification is the process of neighborhood change that results in the replacement of lower income residents with higher income ones. *See also* MAUREEN KENNEDY & PAUL LEONARD, *DEALING WITH NEIGHBORHOOD CHANGES: A PRIMER ON GENTRIFICATION AND POLICY CHOICES* (2001) (noting that issue of gentrification “has historically included a strong racial component—lower income African American residents are replaced by higher income white residents”).

32. Rahim Kurwa, *Deconcentration without Integration: Examining the Social Outcomes of Housing Choice Voucher Movement in Los Angeles County*, 14:4 CITY & COMMUNITY 364, 365 (2015) (arguing that “the Antelope Valley fits broader trends of voucher suburbanization and clustering, including those observed in economically and racially segregated neighborhoods and neighborhoods affected by foreclosures”).

33. 42 U.S.C. § 1437f (2012).

34. U.S. DEP’T OF HOUS. & URBAN DEV., *HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK* ch. 2 (2001), available at [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/programs/hcv/forms/guidebook](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/forms/guidebook) [hereinafter *VOUCHER PROGRAM GUIDEBOOK*].

35. The National Housing Act of 1934, Pub. L. 84–345, 48 Stat. 847, was enacted on June 28, 1934, as part of President Franklin D. Roosevelt’s “New Deal” legislative initiative, which was aimed at restoring the economy following the Great Depression. The purpose of the law was to provide affordable housing and mortgage options for low and middle income families through extending low interest, long term loan opportunities to lenders for home repairs and the construction of new units under the guise of urban renewal, or slum clearance.



Congress passed the Housing and Community Development Act of 1974, which amended the U.S. Housing Act of 1937 to create the Section 8 Program.<sup>36</sup> Under the Program, tenants pay about 30 percent of their income for rent, while the rest of the rent is paid with federal money.<sup>37</sup> Eligible individuals or families are provided with a voucher for a portion of the voucher-holder's rent based on the fair market value for the region.<sup>38</sup> In exchange for the voucher, the voucher-holder must agree to abide by a set of tenant obligations, including prohibitions on drug use and criminal activity.<sup>39</sup>

Notably, the programs created by the Housing Act, like many federal government aid programs during the first half of the twentieth century, supported white, male workers and their families, and excluded families of color.<sup>40</sup> Since the 1960s, however, an increasingly diverse cross-section of the United States receives federal housing subsidies.<sup>41</sup>

### *B. Section 8 Enforcement Schemes*

Section 8 enforcement schemes are often implemented in historically white cities or suburbs where a seemingly sudden influx of black residents threatens the majority-white status of the community.<sup>42</sup> Virtually any grievance lodged by a white resident

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36. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633. The Housing and Community Development Act of 1974 was enacted on August 22, 1974 to establish a program of community development block grants to take the place of racially inept categorical grant programs such as urban renewal. *Id.*

37. VOUCHER PROGRAM GUIDEBOOK, *supra* note 34, ch. 6.

38. *Id.*

39. *Id.* at ch. 15.

40. Kaaryn S. Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 648 (2009) (citing Barbara J. Nelson, *The Origins of the Two Channel Welfare State: Workmen's Compensation and Mother's Aid*, in WOMEN, POLITICS, AND CHANGE 89 (Louise A. Tilly & Patricia Gurin eds., 1990)) [hereinafter Gustafson, *The Criminalization of Poverty*].

41. As of 2010, 4.8 million families receive some kind of housing subsidy from HUD and 1.3 million of those families are recipients of Section 8 vouchers. Among these Section 8 voucher-holders, 19 percent were elderly and 28 percent had at least one family member who was disabled living in the home. 43 percent of voucher-holder families have children. Also as of 2010, 45 percent of all voucher-holders were black, 35 percent were white and 16 percent were Hispanic. NAT'L LOW INCOME HOUS. COAL., WHO LIVES IN FEDERALLY ASSISTED HOUSING 1-2 (Nov. 2012), available at <http://nlihc.org/sites/default/files/HousingSpotlight2-2.pdf>.

42. Solomon Moore, *As Program Moves Poor to Suburbs, Tensions Follow*, N.Y. TIMES (Aug. 8, 2008), [http://www.nytimes.com/2008/08/09/us/09housing.html?\\_r=0](http://www.nytimes.com/2008/08/09/us/09housing.html?_r=0) ("I know it

against his or her black neighbor—including minor infractions involving yard maintenance, noise complaints, and vehicle parking—can result in a Section 8 enforcement scheme.<sup>43</sup> Section 8 enforcement schemes may consist of the following types of conduct against voucher holders and by municipal actors: surveillance, levying of fines, criminal investigations and prosecutions, denial of public services, and the institution of ordinances designed to penalize landlords for renting to voucher holders.<sup>44</sup>

The fact that Section 8 enforcement schemes have a disparate impact on black residents suggests that Section 8 is being used as code for black.<sup>45</sup> The fact that this conduct mirrors pre-1968 housing

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sounds horrible, but they're scary. I'm sorry,' said Ms. Reynolds, who like her two friends said she was conflicted about her newfound fear of black youths. 'Sometimes I question myself, and I think, would I feel this way if they were Mexican or white?''

43. See KURWA, *supra* note 32, at 380 (recounting the story of a Section 8 voucher-holder living in Lancaster, California, who described feeling “scrutiny[ized] by her neighbors and the Housing Authority”).

In her interview, Barbara describes an incident when the police visited her for a noise complaint while she was moving into her current rental. She asked the officer, “How am I supposed to have loud music playing when I don’t even have any furniture or anything?” When she asked the officer where the complaint originated from, he responded that a neighbor had called it in. This type of police visit has happened three times since her most recent move.

*Id.*

44. See *supra* notes 17, 18 and accompanying text.

45. For example, according to the expert in *Williams*, the disparity in termination rates in Antioch suggested there that African American households were being referred to the housing authority for less significant or less well-documented conduct than were non-African Americans. Expert Report of Barry Krisberg, Ph.D, *Williams v. City of Antioch*, No. C-08-2301, 1–2 (N.D. Cal. Sept. 4, 2009), available at [http://www.publicadvocates.org/sites/default/files/library/krisberg\\_expert\\_report\\_antioch\\_final.pdf](http://www.publicadvocates.org/sites/default/files/library/krisberg_expert_report_antioch_final.pdf). And the large number of African American Section 8 referrals in conjunction with the insufficiency of the evidence presented in those referrals, supported an allegation that African Americans were being intentionally targeted by the Community Action Team (CAT) of the Antioch Police Department for termination. *Id.* More specifically, in 2006, “Section 8 households comprised 5% of all households, but 58% of all CAT locations” in Antioch. *Id.* at 10. From mid-2006 to the start of 2009, Section 8 households represented 5.9% (1,920 of 32,067) of all Antioch households and 23.7% (1,920 of 8,041) of Antioch rental households, but 48.0% (170 of 354) of all CAT locations and 64.9% (170 of 262) of renter CAT households. *Id.* at 11. These highly statistically significant disparities indicate a strong focus on Section 8. The expert in *Williams* asserted that “[f]or the period 2006 to 2009, African Americans represented 55.8% of all Antioch Section 8 households (1,061 to 1,902), but 68.2% of investigated Section 8 locations (116 of 170).” *Id.* at 10–11. Since African Americans made up a disproportionate portion of Antioch’s Section 8 households, the expert concluded “[i]t is likely that CAT activities disproportionately targeted African Americans.” *Id.* at 23.

discrimination in many ways, also buttresses the argument that race and not class is at issue in these Section 8 enforcement schemes.<sup>46</sup>

## II. HOUSING DISCRIMINATION AND THE FAIR HOUSING ACT

### A. Pre-1968 Housing Discrimination

#### 1. The Proliferation of All-White Towns and Suburbs

After 1890, white Americans established thousands of towns ranging in size and income levels for white-members only.<sup>47</sup> Ordinances and racially restrictive covenants were a common tool used to exclude blacks from these towns.<sup>48</sup> The methods used to maintain all-white towns went beyond these racially restrictive covenants and ordinances.<sup>49</sup> The harshest of the tactics used to establish all-white towns included violence,<sup>50</sup> un-official governmental action,<sup>51</sup> and freeze-outs.<sup>52</sup>

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CAT used the results of their investigations of Section 8 houses to justify referral of those houses to the local housing authority for termination. In 2006 and 2007, the APD referred over 100 voucher participants to the housing authority for termination. *Id.* at 24. Between 2006 and 2009, African Americans represented approximately 55.8% of Section 8 households in Antioch (1,061 of 1,902), but 68.2% of investigated Section 8 locations and 68.6% of Section 8 referrals to the housing authority (94 of 137). *Id.* at 16. Interestingly, over 60% of all Section 8 referrals from the police department to the housing authority did not ultimately result in termination of benefits because it was determined, upon review, that the referrals lacked merit. *Id.* at 22.

46. See generally Leadership Conference on Civil & Human Rights, *How We Got Here: The Historical Roots of Housing Segregation*, CivilRights.Org, <http://www.civilrights.org/publications/reports/fairhousing/historical.html> (last accessed Sept. 6, 2016).

47. LOEWEN, *supra* note 21, at 4. See also LOÏC WACQUANT, *POLICING POVERTY 47* (2009) (arguing that the United States is “endowed with a racial state in the sense that, much like Nazi Germany and South Africa until the abolition of apartheid, the structure and functioning of the bureaucratic field are thoroughly traversed by the imperious necessity of expressing and preserving the impassable social and symbolic border between ‘whites’ and ‘blacks,’ incubated during the age of slavery and subsequently perpetuated by the segregationist system of the agrarian South and the ghetto of the Northern Industrial metropolis”).

48. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1848 (1994) (Thompson argues that “[e]xplicit governmental policy at the local, state, and federal levels (including racially restrictive covenants) has encouraged and facilitated racial segregation.”).

49. LOEWEN, *supra* note 21, at 4.

50. *Id.* at 92 (quoting a July 14, 1902, New York Times article titled “*Negro Driven Away: The Last One Leaves Decatur, Ind., Owning to Threats Made*,” which recounted a mob of 50 men driving out “all the Negroes who were then making that city their home. . . . The

## 2. *Buchanan, Shelley* and the End of Legalized Housing Discrimination

In 1917, the Supreme Court held in *Buchanan v. Warley* that ordinances prohibiting African Americans from owning or renting property within a municipality's limits were illegal.<sup>53</sup> *Buchanan* also prohibited state and local governments from passing segregation laws.<sup>54</sup> Thus, after *Buchanan* intentionally all-white towns would appear to have been illegal.

Yet, *Buchanan's* holding appears to have had little impact on public opinion surrounding the need for racial segregation. Some state and local governments disregarded *Buchanan's* holding altogether by continuing to enforce their ordinances.<sup>55</sup> Jurisdictions that did acknowledge *Buchanan* began turning to racially restrictive covenants as an alternative.<sup>56</sup>

Racially restrictive covenants continued to be used routinely in real estate transactions until 1948, when in *Shelley v. Kraemer*, the Court held that they too were illegal.<sup>57</sup> Again, there was little appetite

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anti-negroites declare that as Decatur is now cleared of Negroes they will keep it so, and the importation of any more will undoubtedly result in serious trouble”).

51. *Id.* at 103.

52. *Id.* at 105–07.

53. *See Buchanan v. Warley*, 245 U.S. 60 (1917) (holding that ordinance prohibiting blacks from living on a block where the majority of residents were white was unconstitutional). Notably, the Court held that “the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person” was protected under law. *Id.* at 81.

54. *Id.* at 82.

55. Erin Miller, *The Neglected Case of Buchanan v. Warley*, SCOTUSBLOG (Feb. 10, 2010, 12:05 PM), <http://www.scotusblog.com/2010/02/the-neglected-case-of-buchanan-v-warley/>.

56. Racially restrictive covenants are agreements, between property owners not to rent or sell their property to racial minorities. These covenants proliferated during the Great Migration of Blacks from the South. Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1542, 1555 (2012).

57. *Shelley v. Kraemer*, 334 U.S. 1 (1948). In *Shelley*, a white couple that owned a home in a Missouri neighborhood were party to a racially restrictive covenant that should have prevented African Americans from owning property in that area. Nevertheless, the white couple sold to a black couple, the Shelleys. The Kraemers (another white couple in the neighborhood) sought enforcement of that covenant after the Shelley moved in. *Id.*

amongst the public to abandon restrictive covenants and they remained commonplace for almost two decades.<sup>58</sup>

### *B. Post-1968 Housing Discrimination and the Fair Housing Act*

#### 1. The Fair Housing Act

In the wake of the assassination of Martin Luther King, Jr., Congress passed Title VIII of the Civil Rights Act of 1968, otherwise known as the Fair Housing Act.<sup>59</sup> For the first time, the federal government deemed all types of housing discrimination on the basis of race, color, religion or national origin to be illegal.<sup>60</sup> Congress passed the Act recognizing that “persistent racial segregation had left predominantly black inner cities surrounded by mostly white suburbs and the deleterious effects of such a pattern.”<sup>61</sup>

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58. Ocen, *supra* note 56, at 1557.

59. Fair Housing Act, 42 U.S.C. §§ 3604–3619 (2012).

60. 42 U.S.C. § 3604. In 1988, Congress amended the Fair Housing Act, expanding the scope of the legislation to include persons with disabilities. UNITED SPINAL ASS’N, UNDERSTANDING THE FAIR HOUSING AMENDMENTS ACT 1 (2004), *available at* [https://www.unitedspinal.org/pdf/fair\\_housing\\_amendment.pdf](https://www.unitedspinal.org/pdf/fair_housing_amendment.pdf).

61. Tex. Dep’t of Housing and Comm. Aff. v. Inclusive Comm. Project, Inc., 135 S. Ct. 2507, 2510 (2015). The passage of the Fair Housing Act was preceded several months prior by the publishing of the Report on the National Advisory Commission on Civil Disorders. The National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission after its Chair Otto Kerner, was established by President Lyndon B. Johnson on July 28, 1967, with the purpose of addressing the widespread pattern of race riots taking place in major cities throughout the United States. Among a plethora of other issues, the report cited the institutionalization of segregated ghettos and recommended significant investment in to housing opportunities specifically designed to curtail segregation. OTTO KERNER, THE REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS (1967), *available at* <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf> (“Black in-migration and white exodus [. . .] have produced the massive and growing concentrations of impoverished Negroes in our major cities, creating a growing crisis of deteriorating facilities and services and unmet human needs.”). *See also* Brian Patrick Larkin, *The Forty-Year “First Step”: The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1623 (2007) (“The Commission’s report boldly concluded that urban civil disorder was the effect of ‘[w]hite racism.’ All Americans sought both the material assets of the capitalist system and its subsequent psychological benefits of dignity and peace of mind. However, according to the report, neither of these two American aspirations was attainable for the majority of black households . . . . In light of the causes of civil disorder, the Kerner Report recommended actions that would move the United States toward being a single nation instead of a dual society. Three objectives for national action were suggested: (a) eliminating barriers to choice (antidiscrimination); (b) removing the frustration of powerlessness (empowerment); and (c) increasing contact across racial lines to destroy stereotypes and hostility (integration). The

Section 3604(a) of the Act makes it unlawful to “refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race [or] color. . . .”<sup>62</sup> Claims under Sections 3604(a) and 3604(b) may be brought against municipalities.<sup>63</sup> Courts have broadly construed the language of Section 3604(a)—specifically, “otherwise make unavailable.”<sup>64</sup> Indeed, a number of courts have held that Section 3604(a)’s “otherwise makes unavailable or denies” language “that appears to be as broad as Congress could have made it, and all practices which have the effect of making dwellings unavailable on the basis of race are therefore unlawful.”<sup>65</sup> Section 3604(b) of the Act

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objectives were to operate as steps, with antidiscrimination opening up the marketplace for African Americans who were financially empowered to choose to leave the ghetto and integrate. In order to achieve the first stage of this process, the Commission called for the ‘[e]nactment of a national, comprehensive and enforceable open-occupancy law.’ Such legislative action would operate as a first step in allowing those who could afford to leave the ghetto to be able to do so immediately.”)

62. See 42 U.S.C. § 3604(a).

63. In *Campbell v. City of Berwyn*, plaintiffs alleged that the city terminated police protection of their home because they were black. The court held that the denial of police service by the city constituted a violation of the “services and facilities” provision of Section 3604(b) because that “subsection applies to services generally provided by governmental units such as police and fire protection or garbage collection.” *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1143–44 (N.D. Ill. 1993) (citing *Southend Neighborhood Improvement Ass’n v. Cnty. of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984)). See also *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982) (upholding municipal liability because there “can be no doubt that the defendants knew that a significant portion of the public opposition was racially inspired, and their public acts were a direct response to that opposition”); *Cnty. Hous. Trust v. Dep’t of Consumer and Regulatory Affairs*, 257 F. Supp. 2d 208, 227 (D.D.C. 2003) (“The law is quite clear that ‘even where individual members of government are found not to be biased themselves,’ plaintiffs may demonstrate a violation of the FHAA if they can show that ‘discriminatory governmental actions are taken in response to significant community bias.’”) (citing *Tsombanidis v. City of W. Haven*, 129 F. Supp. 2d 136, 152 (D. Conn. 2001); *Ass’n of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin.*, 740 F. Supp. 95, 104 (D.P.R. 1990) (“[I]f an official act is performed simply in order to appease the discriminatory viewpoints of private parties, that act itself becomes tainted with discriminatory intent even if the decision-maker personally has no strong views on the matter.”)). But see *Metro. Hous. Dev. Corp. v. Arlington Heights*, 558 F.2d 1283, 1292 (7th Cir. 1977) (cautioning that from the bigoted comments of a few persons, one cannot infer that community opposition to a proposal was based on a discriminatory motive).

64. *Campbell*, 815 F. Supp. at 1143–44.

65. *Cal. Hous. Rights Ctr. v. Krug*, 564 F. Supp. 2d 1138, 1150 (C.D. Cal. 2007) (“3604(a)’s language of ‘otherwise make unavailable’ appears to be as broad as Congress could have made it, and all practices which have the effect of denying a dwelling on prohibited grounds are therefore unlawful”) (citing *United States v. Youritan Constr. Co.*, 370 F. Supp.

makes it unlawful to “discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith. . . .”<sup>66</sup> Claims under Sections 3604(a) and 3604(b) may be brought against municipalities. Either disparate treatment or disparate impact theory can prove a city’s actions are in violation of the FHA.<sup>67</sup> Circumstantial evidence can be used to prove intentional discrimination under the Fair Housing Act. Circumstantial evidence is especially important in proving intentional discrimination against municipal defendants because “municipal officials, acting in their official capacities, are seldom going to announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a [protected group].”<sup>68</sup>

## 2. Residential Segregation Persists in the Face of the FHA

Despite the FHA’s explicit ban on discrimination in the sale and rental of housing, as well as a body of case law broadly interpreting the language, segregated housing patterns worsened through the 1970s and 1980s.<sup>69</sup> Whites continued to be resistant to integration in

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643, 648 (N.D. Cal. 1973); *Hous. Rights Ctr. v. Sterling*, 404 F. Supp. 2d 1179, 1190 (C.D. Cal. 2004) (“3604(a) also prohibits actions that make apartments effectively unavailable.”).

66. See 42 U.S.C. § 3604(b) (2012).

67. *Inclusive Comm. Project, Inc.*, 135 S. Ct. at 2513 (“In contrast to a disparate-treatment case, where a “plaintiff must establish that the defendant had a discriminatory intent or motive,” a plaintiff bringing a disparate-impact claim challenges practices that have a “disproportionately adverse effect on minorities” and are otherwise unjustified by a legitimate rationale) (citing *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)).

68. In *Arlington Heights*, the Supreme Court suggested some types of circumstantial evidence that courts should consider when trying determining whether discriminatory intent was a motivating factor in an official action by a local government. The first of the *Arlington Heights* factors is the “impact of the official action—whether it ‘bears more heavily on one race than another’ . . . .” Other *Arlington Heights* factors to be considered include: (1) the historical background of the decision, (2) the specific sequence of events leading to the decision, (3) departures from normal procedural sequence, (4) substantive departure; and (5) legislative or administrative history. *Arlington Heights*, 558 F.2d at 1283. Circumstantial evidence is especially important to prove intentional discrimination against municipal defendants because “municipal officials, acting in their official capacities, are seldom going to announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a [protected group].” *Town of Clarktown*, 682 F.2d at 1066.

69. *Jones v. Mayer* required “all housing, with no exception, open without regard to race, at least as a matter of legal right.” See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). See also LOEWEN, *supra* note 21 (“The combination of rapid white suburbanization with coupled

housing and relocating to the suburbs provided an appealing alternative to staying in “racially threatened” neighborhoods.<sup>70</sup> By 2000, more people lived in suburbs than in central cities and rural areas combined.<sup>71</sup> Many all-white suburbs still had no significant black population.<sup>72</sup>

Scholars differ on why housing discrimination persists after the passage of the FHA.<sup>73</sup> Some commentators suggest that blacks prefer to live in black neighborhoods.<sup>74</sup> Still others argue it is a result of

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with black in-migration had led to the unprecedented increase in the physical size of the ghetto during the 1950s and 1960s. The percentage of blacks in most northern cities doubled during this time—from 14% to 33% in Chicago, 16% to 38% in Cleveland, 16% to 44% in Detroit, and from 18% to 34% in Philadelphia.”)

70. MASSEY & DENTON, *supra* note 20, at 46–57.

71. LOEWEN, *supra* note 21, at 139.

72. Massey & Denton argue that “[e]ven if black incomes had continued to climb through the 1970s, segregation would not have declined: no matter how much blacks earned they remained spatially separated from whites. Up until at least 1980, money did not buy entry into white neighborhoods of American cities.” MASSEY & DENTON, *supra* note 20, at 85. The numbers alone are striking. Black families only accounted for 0.6 percent and 1.5 percent of the 1980 population in Boston and Indianapolis, respectively, and in other major cities like Chicago and Cleveland the average black-white segregation factor was 90.6 and 88.2, respectively, indicating an extremely high degree of segregation. *Id.* at 70–71.

73. Opponents argue that patterns of housing segregation exist because of personal choice and economic disparity; yet income differences alone account for only 10 percent to 35 percent of racial segregation actually observed. Moreover, the myth that African Americans want to live amongst other African Americans is unfounded. In a sociological study of the underlying attitudes of whites and blacks toward integrated housing, for example, blacks overwhelmingly chose to live in integrated neighborhoods. Among the blacks surveyed, only 17 percent indicated that they would like to live in a completely black community as their first or second choice. Only a small number of blacks indicated that their unwillingness to move to an all-white neighborhood was based on a desire to live with other blacks. Approximately 82 percent of the black respondents chose a racially mixed community, described as being comprised of 45 percent African Americans.

Of African Americans willing to move into predominantly white areas, however, about 90% feared that they would be unwelcome by whites. Additionally, 17% of the African American respondents were concerned about physical retaliation from white residents if they moved into a white community. The evidence of pervasive intentional housing discrimination illustrates that the fears of African Americans have not been unfounded.

Marc Settles, *The Perpetuation of Racial Segregation in America: Historical Discrimination, Modern Forms and Inclusionary Remedies*, 14 J. LAND USE & ENVTL. L. 89, 97–98 (citing Farley, Schuman, Bianci, Colasanto, & Hatchett, “Chocolate City, Vanilla Suburbs:” *Will the Trend Toward Racially Separate Communities Continue?*, 7 SOC. SCI. RES. 319, 322 (1978)).

74. ERIC M. USLANER, SEGREGATION AND MISTRUST: DIVERSITY, ISOLATION, AND SOCIAL COHESION 218 (2012) (“When minorities live apart from majority groups, we often presume that they prefer to live among their own kind—even as data show that minorities often



“impersonal social and economic forces”—a question of class and not race.<sup>75</sup> One scholar writing on this topic has offered that this pattern of isolating blacks in the urban core is “analogous to the formally repudiated racially restrictive covenant,” and that “the persistence of segregation is in large part due to the fact that white people do not want blacks in their suburbs.”<sup>76</sup> I would agree and go even further.

While Section 8 enforcement schemes have the same effect as racially restrictive covenants they go further than covenants in at least two notable ways. First, Section 8 and advances in housing discrimination laws allow some African Americans to gain access to white suburbs. This means that municipalities are faced with the question of how to remove blacks, versus preventing their arrival in the first place. Second, the use of municipal law and law enforcement to criminalize previously non-offensive behavior—such as participation in Section 8—by black newcomers makes “the current regime of segregation both more effective and dangerous than covenants.”<sup>77</sup>

### III. SECTION 8 ENFORCEMENT SCHEMES: AFFIRMING THE MYTHOS OF THE POOR, SINGLE & CRIMINALLY-MINDED BLACK MOTHER

While the majority of welfare beneficiaries include the elderly, disabled, and working poor—and only a small minority are able-bodied, working adults—the American public has an opposite view.<sup>78</sup> Indeed, the word “welfare” alone conjures up feelings of racial

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avoid integrated neighborhoods because they fear discrimination. . . . There is little evidence that minorities choose to live in segregated neighborhoods because they reject mainstream society.”).

75. Settles, *supra* note 73, at 98; MASSEY & DENTON, *supra* note 20, at 2.

76. Ocen, *supra* note 56, at 1568.

77. MASSEY & DENTON, *supra* note 20, at 2.

78. “Nine-tenths of entitlement spending goes to the elderly, disabled and working poor.” ARLOC SHERMAN, ROBERT GREENSTEIN, & KATHY RUFFING, CONTRARY TO ENTITLEMENT SOCIETY RHETORIC OVER NINE-TENTHS OF ENTITLEMENT BENEFITS GO TO ELDERLY, DISABLED AND WORKING HOUSEHOLDS 2 (Feb. 10, 2012), *available at* <http://www.cbpp.org/files/2-10-12pov.pdf> (discussing the fact that “able-bodied, working age adults receive only 9% of the benefits”).

animus to many hearers.<sup>79</sup> If we understand this, why have Section 8 enforcement schemes continued largely unfettered (judging by the absence of legal challenges) until very recently? Here, I would argue, Section 8 enforcement schemes have evaded legal challenge, in part, because they exist at the intersection of the persistent narrative about the black welfare mother, unwed mothers and the increasing criminalization of poverty.<sup>80</sup> What if we consciously put these narratives aside? Would mothers of all races galvanize to protest Section 8 enforcement schemes—the police power of which created an environment of terror—as a violation against American children? Would single women of all races galvanize against Section 8 enforcement schemes if they saw them not as justified through a racialized lens, but as reinforcing patriarchal norms and parochialism? If middle and upper-class blacks could address their implicit biases, would they see Section 8 enforcement schemes as tools for the expansion of the industrial prison complex outside of the confines of cells, and an effort to reduce all blacks to second-class status?

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79. See Michelle Gilman, *Return of the Welfare Queen*, 22 AM. U. J. GENDER SOC. POL'Y & L. 247, 257 (Noting that “a majority of Americans oppose welfare spending because they hold stereotypes of blacks as lazy, and the media reinforces these racial attitudes.”) (citing MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* 5 (1999) (“Most white Americans believe that blacks are less committed to the work ethic than are whites, and this belief is strongly related to opposition to welfare.”)).

80. See IAN HANEY LOPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE WRECKED THE MIDDLE CLASS* 3–4 (2014) (arguing that “[t]he new racial politics presents itself as steadfastly opposed to racism and ever ready to condemn those who publicly use racial profanity. We fiercely oppose racism and stand prepared to repudiate anyone who dares utter the n-word. Meanwhile, though, the new racial discourse keeps up a steady drumbeat of subliminal racial grievances and appeals to color-coded solidarity. But let’s be honest: some groups commit more crimes and use more welfare, other groups are mainly unskilled and illiterate illegals, and some religions inspire violence and don’t value human life. The new racism rips through society, inaudible and also easily defended insofar as it fails to whoop in the tones of the old racism, yet booming in its racial meaning and provoking predictable responses among those who immediately hear the racial undertones of references to the undeserving poor, illegal aliens, and sharia law.”). See also ALEXANDER, *THE NEW JIM CROW*, *supra* note 25, at 21 (“Any candid observer must acknowledge that racism is highly adaptable. . . . The valiant efforts to abolish slavery and Jim Crow and to achieve greater racial equality have brought about significant changes in the legal framework of American society—new ‘rules of the game,’ so to speak. These new rules have been justified by new rhetoric, new language, and a new social consensus, while producing many of the same results.”).

Many have written extensively on both the narrative of the single black mother on welfare<sup>81</sup> and the criminalization of poverty.<sup>82</sup> I do

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81. See, e.g., Risa E. Kaufman, *The Cultural Meaning of the "Welfare Queen": Using State Constitutions to Challenge Child Exclusion Provisions*, 23 N.Y.U. REV. L. & SOC. CHANGE 301 (1997) ("The stereotype of the lazy, black welfare mother who 'breeds children at the expense of the taxpayers in order to increase the amount of her welfare check' informs and justifies the ongoing welfare debate."); Bridgette Baldwin, *Stratification of the Welfare Poor: Intersections of Gender, Race, & "Worthiness" in Poverty Disclosure and Policy*, 6 MOD. AM. 4 (2010) ("In his highlighting of welfare programs, Reagan hailed black women as the ultimate 'welfare queens.' You have heard the story, with minute details which differ from region to region: the Black 'welfare queen' had a generally lavish lifestyle driving around in her nice new Cadillac never really going anywhere in particular, unless off to pick up her welfare checks . . . or to dine on steak and lobster. However, she usually stayed at home watching soap operas like 'Days of our Lives,' generating more income by producing baby after baby. She was cunning yet shiftless, clever in her manipulation of the system yet uneducated, and active in her endeavor to con the system yet lazy in her work ethic. All hail the 'welfare queen.'"); Laura Parker West, *Soccer Moms, Welfare Queens, Waitress Moms, and Super Moms: Myths of Motherhood in State Media Coverage of Child Care During the "Welfare Reforms" of the 1990s*, 25 S. CAL. INTERDISC. L.J. 313 (2016) ("The Welfare Queen myth encapsulates a range of characteristics that crown her the ultimate deviant mother in American culture: she is African American, she is 'unwed' or single, she started child-bearing as a teen, and she does not put her children first though she stays home full time and does not work.").

82. See, e.g., Alexander Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445 (2015) ("These two phenomena are the flip sides of the same coin. Public defenders and other criminal justice actors are morphing into service providers in response to the tight connection between criminalization and their clients' poverty, the same connection that drives teachers and welfare caseworkers to treat their poor clients as presumptive criminals. This phenomenon is sometimes referred to as the 'criminalization of poverty:' namely, that many aspects of being poor have been rendered criminal. The homeless are punished for sleeping on the street. Working women are punished for their lack of access to childcare. The poor are punished for their dependence on government benefits or informal sources of income. . . . But the phenomenon also includes the converse: brushes with the criminal system tend to make people poor. They do so directly by imposing fines and fees, and indirectly by making it harder to get jobs, credit, and other resources. Moreover, because the social safety net itself is retracting, the criminal justice system has become a 'peculiar social service' for the incarcerated and their families. In all these ways, the criminal system and the welfare state knit poverty and criminality together, functionally as well as ideologically, norm by norm, and encounter by encounter. Public defenders are responding to this tight nexus by providing poverty-sensitive legal representation, even as welfare workers are reacting to it by treating the poor as 'latent criminals.'"); George Lipsitz, "In an Avalanche Every Snowflake Pleads Not Guilty": *The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. REV. 1746 (2012) ("Housing segregation, in turn, promotes the concentration of poverty in neighborhoods inhabited largely by blacks and Latinos, making members of these groups especially vulnerable to the criminalization of poverty, the proliferation of punishments inside the criminal justice system, and the expansion of the collateral consequences of arrests and criminal convictions for ex-offenders, their families, and their communities. . . . The criminalization of poverty has been combined with the stigmatization of social welfare policies as entitlements funneled to unworthy people of color and both have become central weapons in the longstanding counterrevolution against the New

not seek to duplicate those efforts. Instead, the point here is to briefly illuminate the narratives that are being played on in Section 8 enforcement schemes and acknowledge that these myths are perhaps expanding to encompass blacks inside and outside of the welfare state in ways that are harmful, discriminatory and unlawful, but being overlooked.<sup>83</sup>

### *A. Black, Single and on Welfare*

#### 1. The Persistence of the Welfare Queen Archetype

In 1965, Daniel Patrick Moynihan—the Assistant Secretary of Labor for President Lyndon Johnson—issued a report titled *The Negro Family: The Case for National Action*.<sup>84</sup> The report asserted that the problems of the inner cities—poverty, joblessness, and crime—could be attributed to “the tangle of pathology” perpetuated by unwed black mothers.<sup>85</sup> Though he received a good deal of credit for first having espoused these ideas, Moynihan’s depiction of black mothers was not original.<sup>86</sup> The exclusion of unwed mothers and black women resulted as early as 1936, when the first federal Aid to

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Deal welfare state. More recently, they have also functioned to advance neoliberal policies aimed at the privatization of state assets and resources and the fiscalization of social services.”); and Gustafson, *The Criminalization of Poverty*, *supra* note 40, at 649. See also ALEXANDER, *THE NEW JIM CROW*, *supra* note 25, at 21 (“In the era of mass incarceration, what it means to be criminal in our collective consciousness has become conflated with what it means to be black, so the term *white criminal* is confounding, while the term *black criminal* is nearly redundant. . . . This conflation of blackness with crime did not happen organically; rather, it was constructed by political and media elites as part of a broad project known as the War on Drugs. This conflation served to provide a legitimate outlet to the expression of anti-black resentment and animus—a convenient release valve now that explicit forms of racial bias are strictly condemned.”).

83. See WACQUANT, *supra* note 47, at 41. America is engaged in the “gradual replacement of a (semi-) welfare state by a police and penal state for which the criminalization of marginality and the punitive containment of the dispossessed categories serve as a social policy.” *Id.*

84. DANIEL P. MOYNIHAN, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 29 (1967).

85. *Id.* at 29–30.

86. Despite his liberal politics, Moynihan, is often attributed with “pathologizing” black mothers and thereby spawning for the “conservative blockade of social welfare policy.” At the time, however, that at the time the report was praised by liberals, including Dr. Martin Luther King, as a call to action and questions how it could do both. DANIEL GEARY, *BEYOND CIVIL RIGHTS: THE MOYNIHAN REPORT AND ITS LEGACY* 4 (2015).

Dependent Children (ADC) program instituted “suitability provisions,” which set requirements that mothers to be “fit” and “proper.”<sup>87</sup>

By the 1980s, the image of low-income black mothers had found a permanent home in politics,<sup>88</sup> which appears to have immortalized it in the American lexicon.<sup>89</sup> Most notably, California Governor Ronald Reagan relied on imagery of the “welfare queen” to promote his ideas of limited government and increased crime control during his presidential campaign.<sup>90</sup> Reagan declared at a campaign rally in January 1976: “In Chicago, they found a woman. She used eighty names, thirty addresses, fifteen telephone numbers to collect food stamps, Social Security, veterans’ benefits for four nonexistent deceased veteran husbands, as well as welfare. Her tax-free cash income alone has been running \$150,000 a year.”<sup>91</sup> Reagan continued to focus his legislative efforts on reducing the role of welfare and negatively depicting beneficiaries, often at the expense of black women.<sup>92</sup>

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87. The Aid to Dependent Children’s (ADC) vague “suitable home” provisions provided a space for eligibility to be determined based on “local” and “parochial” white middle class standards that and resulted in the “almost wholesale exclusion” of blacks. DEBORAH E. WARD, *THE WHITE WELFARE STATE: THE RACIALIZATION OF U.S. WELFARE POLICY* 11–117, 121 (2005). For example, in some states to be “suitable” meant that you did not regularly work outside of the home or that you did not have male suitors. *Id.* at 72.

88. Conservatives do not have a monopoly on the welfare queen narrative. Democrats, too, have taken to it. The vilification of low-income mothers was bi-partisan in the lead up to the federal welfare reforms of 1996. It was Bill Clinton who “vowed to end welfare as we know it” and ultimately passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which fundamentally transformed aid to poor families by reducing the size of the benefits and escalating the sanctions for failure to conform. Gustafson, *The Criminalization of Poverty*, *supra* note 40, at 661–62.

89. Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233, 245 (“[C]onservative politicians arguing for eradication of a welfare safety net ‘triumphed intellectually in the 1980s because they offered ordinary Americans a convincing narrative that explained their manifold worries. In this narrative, welfare, the undeserving poor, and the cities they inhabited became centerpieces of an explanation for economic stagnation and moral decay.’ To this end, the metaphor of the Welfare Queen has proven to be a devastatingly effective master ‘narrative’ of the dysfunctional Black family that takes more than its fair share of public resources.”)

90. Reagan also openly opposed integration. He stated during his campaign to become California’s governor in 1966 “[i]f an individual wants to discriminate against Negroes or others in selling or renting his house; it is his right to do so.” LOPEZ, *supra* note 80, at 58.

91. *Id.*

92. Ronald Regan, *Radio Address to the Nation on Welfare Reform* (Aug. 1, 1987),

The “welfare queen” was and is a fiction.<sup>93</sup> This is not to say that welfare fraud does not exist. Of course it does—just as tax evasion exists. The woman whose story apparently Reagan re-told on the trail, Linda Taylor, was actually convicted in 1977 of welfare fraud albeit for using two aliases to collect \$8,000.<sup>94</sup> The problem lies in the fact that these isolated instances of arguably criminal activity by welfare recipients are intentionally being used by politicians and the media to as a stereotype of all poor, black women on welfare.<sup>95</sup>

Unfortunately, there is no indication that the myth of the “welfare queen” is fading.<sup>96</sup> To the contrary, she is alive and well in modern political discourse, even if retooled.<sup>97</sup>

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available at <http://www.presidency.ucsb.edu/ws/?pid=34638>. See also Cammett, *supra* note 89, at 246 (“Reagan continued to symbolically deploy his polarizing approach throughout the primary season. He was not reticent to exploit Americans’ racial fears, doing so consistently, selectively, and with language culturally resonant to each group of listeners.”) (citing Paul Krugman, Op-Ed, *Republicans and Race*, N.Y. TIMES (Nov. 19, 2007), <http://www.nytimes.com/2007/11/19/opinion/19krugman.html> (“Reagan often talked about how upset workers must be to see an able-bodied man using food stamps at the grocery store. In the South—but not in the North—the food-stamp user became a ‘strapping young buck’ buying T-bone steaks.”)).

93. See Ernst, *supra* note 25, at 194 (“The welfare queen stereotype is a grotesque racist caricature of African American women.”) (citing WAHNEEMA LUBIANO, *BLACK LADIES, WELFARE QUEENS AND STATE MINSTRELS: IDEOLOGICAL WAR BY NARRATIVE MEANS* (1992)).

94. Michele Gilman, *Poverty and Communitarianism: Toward a Community-Based Welfare System*, 66 U. PITT. L. REV. 721, 746–47 (2005) (explaining the false premises of welfare reform).

95. One purpose behind creating these stereotypes is what Lopez describes as “strategic racism,” which “refers to purposeful efforts to use racial animus as leverage to gain material wealth, political power or heightened social standing.” LOPEZ, *supra* note 80, at 46. See also Ian Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023 (2010). See also Gustafson, *The Criminalization of Poverty*, *supra* note 40, at 657 (“They are treated not merely as stereotypes of poor black mothers on aid, but as archetypes . . .”).

96. Cammett, *supra* note 89 at 233 (Cammett suggest that the “food stamp president” metaphor utilized by Newt Gingrich against Barack Obama in the 2011 presidential race is “only the latest rhetorical device laden with strong racial undercurrents that serves to trigger the politics of resentment, rather than empathy, during a time of economic insecurity for many Americans”).

97. See Gilman, *supra* note 79, at 248 (explaining how during the 2012 presidential campaign season Mitt Romney revived “‘dependency rhetoric’ dredging up the old welfare queen to appeal to white, working class voters who oppose government aid programs”). Obama like Clinton before him fought to appear equally “tough” on welfare recipients and only served to promote the “ongoing vilification of welfare mothers.” *Id.* at 256. See also Lisa Crooms, *Don’t Believe the Hype: Black Women, Patriarchy and The New Welfarism*, 38 HOW. L.J. 611, 613 (1995) (“[N]ew welfarism” makes racist claims about welfare recipients using race-neutral language. It “abandon[s] the early (welfare) rhetoric’s explicit language about black women”

## 2. Policing Single Mothers

Almost as soon as unwed and black mothers made their way onto the welfare rolls in any significant number, the government began policing them.<sup>98</sup> Indeed, one of the goals of the modern welfare system has been to police the sexuality of single mothers.<sup>99</sup> We can trace the government's desire to police the manner in which single and black mothers conducted their homes at least back to the "man in the house rules" and "midnight raids" of the 1960s.<sup>100</sup> At that time, it was routine for authorities to make unannounced inspections of welfare recipients' homes to determine eligibility.<sup>101</sup> These searches were most often conducted without a warrant and in the middle of the night.<sup>102</sup> While some of these visits were based on specific

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and yet does not "reflect a similar change in the focus of the poverty paradigm from . . . the social pathologies that poor, black, inner-city communities are thought to represent." And in the absence of a substantive shift in our thinking about these poverty paradigms "the racial subtext of the rhetoric simply makes use of the explicit language unnecessary").

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

99. Gustafson, *The Criminalization of Poverty*, *supra* note 40, at 649 ("The unstated but underlying goals of the rules were to police and punish the sexuality of single mothers, to close off the indirect access to government support of able-bodied men, to winnow the welfare rolls, and to reinforce the idea that families receiving aid were entitled to no more than near-desperate living standards."). *See also* Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347, 1348 (1963) (noting welfare offices engaged in "midnight raids" in order to police "suitable home" and "suitable parent" standards well into the the 1960s).

100. Reich, *supra* note 99, at 1360 ("[V]iolat[ing] the sanctity of the home and degrad[ing] and humiliate[ing] recipients" undermines the fundamental purpose of welfare.").

101. *Id.*

102. Morgan, *supra* note 98, at 233. The absence of warrants begs the question of whether these searches are legal or if they violate the Fourth Amendment of the Constitution. In 1971, the Supreme Court in *Wyman v. James*, upheld the constitutionality of home visits to welfare recipients' homes. The Court reasoned that these home visits did not violate the Fourth Amendment because they were consensual. More specifically, the Court held that "even if home visits possessed some of characteristics of a search in traditional criminal law sense, the visits did not fall within the purview of the Fourth Amendment's proscription against unreasonable searches and seizures because the program was "reasonable." Importantly, many of the distinctions that the *Wyman* court drew between home visits by housing authorities and Fourth Amendment searches in the criminal context are not applicable in modern cases such as *Antioch*, where the searches were conducted by law enforcement officers and the consequences of the search are not only administrative but are also potentially criminal.

There is no indication of a change in course here. Thirty-five years after *Wyman* was decided the Ninth Circuit took up similar questions in *Sanchez v. San Diego*. In *Sanchez*, the Court recognized a change in how home visits were conducted acknowledging that now the

information about the home and its occupants, it was not uncommon for housing officials to conduct “mass raids” that targeted homes where no specific complaints had been lodged.<sup>103</sup> The purpose behind such surprise visits was to catch a man sleeping in the home of a woman receiving welfare.<sup>104</sup>

Decades later, our social welfare system continues to be preoccupied with controlling the intimate lives of single mothers as a means for undermining this “anti-patriarchal conduct.”<sup>105</sup> Some argue that this preoccupation with the lives of single women stems from the fact that welfare is perceived to encourage single motherhood and thus undermines the traditional two-parent family.<sup>106</sup>

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inspectors were “sworn peace officers” and was at least a quasi-enforcement bent to the inspections because conduct could potentially be referred for criminal prosecutions, but dismissing that purpose as “not the underlying purpose.” Indeed, the Court went so far as to compare welfare recipients to probationers and holding that neither had any expectation of privacy in the home. *Id.* at 235–39.

103. Mass raids included investigations of a home where no particular suspicion had been raised. Reich, *supra* note 99.

104. Gustafson, *The Criminalization of Poverty*, *supra* note 40, at 649 (quoting WINIFRED BELL, AID TO DEPENDENT CHILDREN 208 n.24 (1965) (“Unmarried women with men in their beds were deemed morally unfit and their households unsuitable for assistance.”)).

105. Crooms, *supra* note 97, at 625. One potential explanation for the disconnect is the influence of conflation of poverty and crime. Welfare organizations, fair housing advocates, and blacks themselves are hindered or blinded by cultural myths, such as the single black mother on welfare as undeserving. On January 16, 2007, CAT officers Sergeant Schwitters, and Officers Bittner and Dillard, forcibly entered Ms. Scott’s house without a warrant to arrest Tyrone Young, the father of Ms. Scott’s children, while he was at the home visiting. While there, the officers asked Ms. Scott how she could afford such a nice house. Two days after the search, on January 18, 2007, APD sent a letter to the housing authority alleging violations of Ms. Scott’s obligations as a participant in the voucher program. The letter stated that CAT “received a complaint from an APD patrol officer, who advised [them] that there had been numerous domestic disputes at [Ms.] Scott’s residence.” The letter also advised that the residence was possibly a Section 8 house and that an unauthorized male named Tyrone Young was living at the location. First Amended Complaint, *supra* note 15, at 16–18. This occurred even though section 42 U.S.C. 1437f (o)(7)(c) (2012), in an effort to avoid blaming victims for the actions of perpetrators, excludes disturbances resulting from domestic violence from the list of permissible reasons for terminating a participant’s benefits or evicting a tenant.

106. And, it follows, that our punitive welfare policies are designed to “penalize poor single mothers for their anti-patriarchal irresponsible childrearing which is aided by the availability of [welfare],” or in this case Section 8 vouchers. Crooms, *supra* note 97, at 625. The punitive nature of the welfare system and Section 8 enforcement schemes, specifically, towards single, black mothers is no more evident than in the response of those schemes to victims of domestic abuse. Even in the face of HUD regulations that prohibit penalizing victims of domestic abuse, Section 8 enforcement schemes do so. For example, one of the named plaintiffs in *Williams*, Alyce Payne, was recommended for termination after having too many calls for service to the police department in connection with domestic related incidents. Ms. Payne



It is not surprising that this paradigm of the single black mother on welfare is racialized.<sup>107</sup> Single black women are made an example of and publically punished, which sows the seed among the single, white, female public that if they do not modify their “black woman’s” conduct they too may become targets of the penal system.<sup>108</sup>

### *B. Conflating Poverty with Criminality*

The Clinton Administration’s welfare policy, The Personal Responsibility and Work Opportunity Act of 1996 (PRWORA), helped solidify the federal government’s decades-long trend towards treating social welfare recipients as criminals. Among other things, PROWRA’s passage resulted in drastic increases in the intrusiveness of applying for aid and the severity of administrative penalties for fraud abuses.<sup>109</sup>

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moved to Antioch in May 2003 and lived at 1972 Mokelumne Drive with her five children and grandson. Ms. Payne is separated from her husband, Edward Shivers, Sr. Mr. Shivers has a history of being violent towards Ms. Payne. Ms. Payne called the police to her home in January and February 2007 requesting assistance during domestic violence incidents. When APD officers responded to her home in connection with those calls they questioned Ms. Payne about her housing status. On March 21, 2007, CAT Officers Dillard and Bittner sent a letter to the housing authority stating that “the constant need for police presence and nuisance to the immediate vicinity of the premises constitutes a violation of . . . [the Section 8 Voucher Program’s] Family Obligations Form . . . .” The letter recommended that the housing authority terminate Ms. Payne’s participation in the program. On March 28, 2007, the housing authority issued a notice of proposed termination from Section 8 to Ms. Payne. On March 28, 2007, Sergeant Schwitters sent a letter to Ms. Payne’s landlord alleging that Ms. Payne’s household had been involved in criminal activity and that the APD had responded to the residence for two “disturbance calls” and had responded to Ms. Payne’s previous residence nearly thirty times for “disturbance related incidents.” Neither letter mentioned that the police presence was in response to acts of domestic violence that were being committed or threatened against Ms. Payne. First Amended Complaint, *supra* note 15, at 20–24.

107. Crooms, *supra* note 97, at 626 (“The racial image of the black welfare dependent mother and her poverty-causing, extramarital childbearing jibes with the social construction of black womanhood.”).

108. *Id.*

109. Gustafson, *The Criminalization of Poverty*, *supra* note 40, at 682. It is worth noting that a substantial number of fraud abuses are for underreporting income. The reality is that the welfare benefits are so low compared to the cost of living that they no longer provide enough aid to support an entire family. “As a result, almost all recipients engage in some kind of income generating activity that they hide from the welfare office, and that could therefore be deemed as fraud. This impossibility of living on welfare grants alone means that for many families receiving government assistance, their everyday activities of making ends meet amount to crime.” *Id.*

Moreover, since the mid-1990s there has been a purposeful “blurring of the lines between administrative and criminal penalties for welfare fraud generally.”<sup>110</sup> In more than half of California’s counties, welfare fraud investigators are no longer housed inside housing authority offices.<sup>111</sup> Instead, these fraud investigators have been moved to either sheriff’s or District Attorney offices.<sup>112</sup> For example, in Lancaster and Palmdale, California city officials initiated Section 8 campaigns by working with the local housing authority to hire and pay for dedicated fraud investigators.<sup>113</sup> Unlike in the rest of Los Angeles county, all of the fraud investigators in Lancaster and Palmdale were former sheriff’s deputies, worked out of office space in the Lancaster or Palmdale sheriff’s stations, and conducted their housing authority business via sheriff’s department email addresses.<sup>114</sup> In Palmdale, a sheriff’s deputy was assigned to coordinate with a district attorney investigator to specifically develop criminal fraud cases against voucher holders for violations of the voucher program’s rules, such as unreported income and unauthorized tenants.<sup>115</sup> One practical implication of this shift means that, in the course of resolving allegations of overpayment, welfare recipients may be interviewed in the presence of members of the criminal justice system without knowing it or unwittingly sign repayment agreements containing admissions that can be used as a basis for felony charges.<sup>116</sup> As a result, the welfare system and criminal justice system have effectively merged, largely unbeknownst to the targets of both.<sup>117</sup>

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110. Gustafson, *The Criminalization of Poverty*, *supra* note 40, at 686.

111. *Id.*

112. *Id.* See also Ernst, *supra* note 25, at 184 (arguing that localization of welfare politics has only “exacerbated” the myth of the “welfare queen” and the problems with her “public identity”).

113. Findings Letter from Assistant Attorney Gen. Thomas E. Perez to Sheriff Lee Baca Regarding the Investigation of the Los Angeles Sheriff’s Department Stations in the Antelope Valley 4 (June 28, 2013), available at [https://www.justice.gov/sites/default/files/crt/legacy/2013/06/28/antelope\\_findings\\_6-28-13.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2013/06/28/antelope_findings_6-28-13.pdf) [hereinafter Antioch Findings Letter].

114. *Id.*

115. *Id.*

116. Gustafson, *The Criminalization of Poverty*, *supra* note 40, at 686.

117. *Id.* at 687 (observing “[w]elfare recipients continue to treat the welfare and criminal justice systems as distinct, unaware that the two are merging”). Under the Clinton administration, “[m]illions of dollars were slashed from public housing and child-welfare

Considering the type of offenses that are most often reported (i.e., for unreported or underreported income), the research that suggests many welfare recipients may not realize that they have been sanctioned,<sup>118</sup> and how much these enforcement schemes cost,<sup>119</sup> one might wonder why we are criminalizing mothers and penalizing our most vulnerable families in this way at all. It is impossible to consider this question without also contemplating the implications of conflating poverty and crime for the rise of the prison industrial complex. Scholars such as Loïc Wacquant have noted that America is engaged in the “gradual replacement of a (semi-) welfare state by a police and penal state for which the criminalization of marginality and the punitive containment of the dispossessed categories serve as a social policy.”<sup>120</sup> Michelle Alexander in her groundbreaking book *The New Jim Crow* offers much support for this theory. In 2007, approximately 2.4 million black adults were under correctional supervision, meaning in prison, jail, probation or parole, which is more than were enslaved in 1850.<sup>121</sup> When one looks at the system in aggregate, it becomes obvious that mass incarceration operates to “sweep” large swaths of black people off of the streets, relegate them to the correctional facilities, and then release them back into society as second-class citizens unable to secure education, employment or

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budgets and transferred to the mass-incarceration machine. By 1996 the penal budget was twice the amount that had been allocated to food stamps. During Bill’s tenure, funding for public housing was slashed by \$17 billion (a reduction of 61%), while funding for corrections was boosted by \$19 billion (an increase of 171%)—‘effectively making the construction of prisons the nation’s main housing program for the urban poor.’” Michelle Alexander, *Why Hillary Clinton Doesn’t Deserve the Black Vote*, NATION MAG. (Feb. 29 2016), <https://www.thenation.com/article/hillary-clinton-does-not-deserve-black-peoples-votes/>.

118. Gustafson notes that unreported or underreported income are two of the most common violations of the welfare rules. Gustafson, *The Criminalization of Poverty*, *supra* note 40, at 664, 687 (citing study by Yeheskel Hasenfield et al., *The Logic of Sanctioning Welfare Recipients: An Empirical Assessment*, 78 SOC. SERV. REV. 304, 314 (2004). Criminal charges for fraud on the program can result from allegations of unreported and underreported income. See Antioch Findings Letter, *supra* note 113.

119. Gustafson, *The Criminalization of Poverty*, *supra* note 40, at 689.

120. See also Angela Y. Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998), <http://www.colorlines.com/articles/masked-racism-reflections-prison-industrial-complex> (“The focus of state policy is rapidly shifting from social welfare to social control.”).

121. “One in eleven black adults was under correctional supervision at year end, 2007, or approximately 2.4 million people. According to the 1850 Census, approximately 1.7 million adults were slaves.” ALEXANDER, *THE NEW JIM CROW*, *supra* note 25, at 180.

housing.<sup>122</sup> Moreover, the hyper-segregation of blacks in the inner-city ghetto has helped fuel the prison industrial complex; this is happening unnoticed and unopposed by those on the outside.<sup>123</sup>

As compelling as it is, the story of the prison industrial complex is often told as a story of the black male, which makes it incomplete.<sup>124</sup> Women are being confined at a faster pace than men, and black and Latina women are sixty percent of those among them, largely for violations that are barely criminal, if at all.<sup>125</sup> A “female-responsive” movement to undo policies that penalize black women for non-criminal behaviors, including violations of welfare program such as Section 8 enforcement schemes, especially those that derive from a basic need to survive such as unreported income and underreported income, is thus necessary.<sup>126</sup>

#### IV. EPILOGUE: SECTION 8 IS NOT THE N-WORD

In my view, it is an unfortunate reality that the Fair Housing Act has not achieved the level of access to high opportunity neighborhoods that had been hoped for. Perhaps that was too much to

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122. *Id.* at 103.

123. Alexander counts civil rights advocates among those to blame for the relatively slight opposition to mass incarceration. *Id.* at 224 (“[C]ivil rights organizations—like all institutions—are comprised of fallible human beings. The prevailing public consensus affects everyone, including civil rights advocates . . . (who) are not immune to the racial stereotypes that pervade media imagery and political rhetoric; nor do [they] operate outside of the political context.”).

124. “[B]lack men today are stigmatized by mass incarceration—and the social construction of the ‘criminal black man’—whether they have ever been to prison or not.” *Id.* at 199. See also Alexander’s discussion of the narrative of the absentee black father as discussed and espoused from the male leadership of the black community from Barack Obama, to Bill Cosby, Louis Farrakhan and Sidney Portier and how they largely ignore the impact of mass incarceration on the absenteeism of black men choosing instead to make lack of personal responsibility the culprit. *Id.* at 178–81. But that narrative may be myth. Sociologist Rebekah Levine Coley’s research reveals “black fathers not living at home are more likely to keep in contact with their children than fathers of any other ethnic or racial group.” *Id.* at 179.

125. Julia Sudbury, *Celling Black Bodies: Black Women in the Global Prison Industrial Complex*, 70 FEMINIST REV. 57, 60 (2002).

126. MONIQUE W. MORIS, RACE, GENDER AND THE SCHOOL TO PRISON PIPELINE: EXPANDING OUR DISCUSSION TO INCLUDE BLACK GIRLS 10 (Oct. 2012), available at <http://schottfoundation.org/resources/race-gender-and-school-prison-pipeline-expanding-our-discussion-include-black-girls> (Morris argues for “a culturally competent female-responsive” approach).

expect from one piece of legislation.<sup>127</sup> Armed with this hindsight, however, I often have cause to wonder whether black people would be better off if the n-word were still acceptable for public use in a way that could be helpful and not merely entertaining.<sup>128</sup> Perhaps I am speaking out of naiveté having never been called the n-word to my face, nor seen it written on a sign in a public place disqualifying me from access. I ponder this question, however, having spent numerous hours interviewing dozens of victims of Section 8 enforcement schemes who largely had no clue that they were unwanted in the cities they chose to live in before they were targeted. Each one in turn, when asked why they had moved to their respective city, would reply with some version of “for a better life.” And when pressed about why they did not heed newspaper articles that almost weekly, in Lancaster and Palmdale especially, at a point on almost a weekly basis plastered black, allegedly Section 8 voucher holders on the front page alternately handcuffed being walked out of their homes, booked or surrounded by sheriffs, they all almost uniformly replied in some version of “I thought that they must really be doing something wrong. And since I was not doing anything wrong. I didn’t think it would happen to me.” Or you might hear from blacks who owned their homes or rented apartments with no aid from HUD, “I thought they were after Section 8.” African Americans, too, have bought into the narrative of mass incarceration and the myth of the single, black mother on welfare. Here lies, for blacks, the most

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127. In the years following the Civil Rights Act’s passage and a year before the FHA would be passed, it seems that Martin Luther King, himself, questioned whether this package of legislation as promising as it had been would be sufficient. In his New York Times Best Seller, *A Death of A King: The Real Story of Dr. Martin Luther King Jr.’s Final Year*, author Tavis Smiley chronicles the twelve months prior to King’s assassination in April, 1968. In the book, Smiley offers a more radical depiction of Dr. King, who became increasingly leery of the changes spurred by the passage of the Civil Rights Act of 1964, and the law’s ability to ensure the long term stability of minority communities. Most notably, Smiley quotes American singer, songwriter, actor, and social activist Harry Belafonte, who quoted King from a conversation the two shared in 1967, saying “we are integrating into a burning house.” Smiley opines that Dr. King’s political transformation prior to his death was directly related to the purported end of the Civil Rights Movement, and the real fear that African Americans across America saw the passage of the Civil Rights Act as the culmination of the movement. TAVIS SMILEY, *A DEATH OF A KING: THE REAL STORY OF DR. MARTIN LUTHER KING JR.’S FINAL YEAR* 123 (2014).

128. Parks & Jones, *supra* note 23, at 1322 (“Back comedians, rappers, and spoken-word artists have introduced the N-word into popular American culture by peppering their routines and lyrics with the word.”).

dangerous part of the Section 8 enforcement schemes—Section 8 and other racially coded words is neutral on its face in a way that prevents blacks from “getting the message.” They simply have no idea that the “welfare queen” exists for many black mothers, irrespective of whether she receives aid, her socio-economic status, marital status, or criminal record. Similarly, the black public, perhaps, is naïve to the fact that their criminality is assumed and the image of it is perpetuated regardless of whether or not they are many of their brothers and sisters have “done anything wrong.” And this naivete allows them to unwittingly move into cities and next door to people that do not want them there with all of the attendant interrogation, investigation and scrutiny that comes with that. To go back to my point about the word “nigger” and its effectiveness, at least when it was popular, in open use one knew where they were and were not wanted. And people still proceeded to integrate blocks and suburbs, but they went with a different armor on prepared for the war that they were about to face and with a community galvanized to support them. Now, neither is true. Blacks suffering from “exceptionalism” and “the politics of respectability” and civil rights advocates and other welfare recipients themselves, turn their backs blaming the targeted instead of those that are targeting them. Perhaps we need to go back to the n-word.

#### CONCLUSION

*A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.*

—Oliver Wendell Holmes

Barriers to mobility in housing for African-Americans, including relocation to all-white suburbs when desired, need to be eradicated if the wealth, education, and opportunity gaps plaguing America’s lower class are to close at all.<sup>129</sup> Unlike mobility among whites,

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129. Douglas S. Massey, *Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas*, in *AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES* 391 (Neil J. Smelser et al. eds., 2001) (“Opportunities and resources are unevenly distributed in

which leveled off in the late twentieth century, black mobility began falling after 1960 or 1970.<sup>130</sup> By 2010, 70 percent of black Americans in their thirties lived in their birth state, compared with 62 percent of whites, and up significantly from a historical low of 55 percent in 1960.<sup>131</sup> A similar share of Hispanics, 71 percent, lived in their birth state in their thirties, though that figure has stayed roughly constant since 1950, when it reached a low of 68 percent. And moving matters more than ever: The expected earnings gap between men from low-income states who picked up and moved and those who stayed put has widened in recent years. Women from low-income states who moved experienced a similar widening in economic mobility.<sup>132</sup> Moreover, Raj Chetty and Nathaniel Hendren’s article, *The Impacts of Neighborhoods on Intergenerational Mobility Childhood Exposure Effects and County-Level Estimates*, shows the neighborhood in which a child grows up has significant causal effects on her prospects for upward mobility.<sup>133</sup>

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space; some neighborhoods have safer streets, higher home values, better services, more effective schools, and more supportive peer environments than others.”). See SCOTT WINSHIP, MANHATTAN INST. WHEN MOVING MATTERS: RESIDENTIAL AND ECONOMIC MOBILITY TRENDS IN AMERICA, 1880–2010 2 (Nov. 2015), available at <http://www.manhattan-institute.org/sites/default/files/R-SW-1115.pdf>. Winship suggests policy fixes that could encourage mobility, such as an increase in zoning for affordable housing in high-opportunity cities and regions, which would remove one of the biggest barriers to moving. He also urges tackling housing discrimination in mortgage lending and among real estate agents, which for decades has translated into African-Americans living in poorer neighborhoods, with all of the attendant disadvantages, such as worse schools, more crime and fewer jobs. “While mobility is no longer climbing, as it did for the first half of the 20th century, it has been fairly consistent for most Americans since the 1980s. Unfortunately, one group has been left behind: African-Americans.” Anna Louie Sussman, *Mobility Is More Important Than Ever, and Here’s Who’s Missing Out*, WALL ST. J. (Nov. 16, 2015), <http://blogs.wsj.com/economics/2015/11/16/mobility-is-more-important-than-ever-and-heres-whos-missing-out/>. See also WINSHIP, *supra* (suggesting policy fixes that could encourage mobility, such as an increase in zoning for affordable housing in high-opportunity cities and regions, which would remove one of the biggest barriers to moving). He also urges tackling housing discrimination in mortgage lending and among real estate agents, which for decades has translated into African-Americans living in poorer neighborhoods, with all of the attendant disadvantages, such as worse schools, more crime and fewer jobs. While mobility is no longer climbing, as it did for the first half of the 20th century, it has been fairly consistent for most Americans since the 1980s. Unfortunately, one group has been left behind: African-Americans. *Id.* at 34.

130. Sussman, *supra* note 129.

131. *Id.*

132. *Id.*

133. RAJ CHETTY & NATHANIEL HENDREN, THE IMPACTS OF NEIGHBORHOODS ON INTERGENERATIONAL MOBILITY CHILDHOOD EXPOSURE EFFECTS AND COUNTY-LEVEL

Some scholars argue that tackling housing discrimination in mortgage lending and among real estate agents, which has long resulted in African-Americans living in poorer neighborhoods, as one way to encourage black mobility. This no doubt would help, but would not solve the problem, which continues once blacks move into all white neighborhoods. When one drills down it becomes apparent that some of the obstacles that prevent blacks from staying in higher opportunity neighborhoods, once they move into them, are rooted in discrimination. These barriers, such as ordinances, freeze outs and police power, are identical to those that all white municipalities have historically used to keep blacks out. And the race neutral language of modern segregationists is belied by their actions and the results that flow from them.

As demonstrated in cities like Antioch, Section 8 voucher holders are diverse, but the targets of municipal Section 8 “enforcement” schemes are a majority African-American (whether they are on Section 8 or not). Even when whites are swept up in this scheme the resulting punishments for more severe violations are different—termination and removal from the program and/or community are not sought. The use of police to enforce an administrative program is itself telling and rooted in segregationist history. Indeed, all the problems identified in 1968 that justified the passage of the FHA and all of the tactics that were used to avoid the Act’s reach are still being utilized or have gotten worse. Section 8 is merely code for black. It is for all intents and purposes the new n-word.

Those fair housing advocates and allies interested in opening access to higher opportunity neighborhoods for children, single mothers and black families have a legal tool at their disposal—the main provisions of the federal Fair Housing Act. It applies with as equal force to race-based attacks on integration of housing disguised as Section 8 enforcement schemes as it did to “sundown signs.” If we view Section 8 enforcement schemes through an intersectional lens

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ESTIMATES 1–6 (May 2015), available at [http://scholar.harvard.edu/files/hendren/files/nbhds\\_paper.pdf](http://scholar.harvard.edu/files/hendren/files/nbhds_paper.pdf). See also Sheryll D. Cashin, *Drifting Apart: How Wealth and Race Segregation Are Reshaping the American Dream*, 47 VILL. L. REV. 595, 599 (2002) (“Racially segregated neighborhoods, unless they are white ones, typically offer poorer schools, higher crime, higher taxes, and fewer jobs than the aspirational ideal most Americans (of all races) have in mind for themselves.”).



that illuminates the impacts the myths of the black “welfare mother” and missing black father have on our collective consciousness we might successfully build coalitions around exposing these schemes as the discriminatory practices that they are under the FHA.