Constructing Crime



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Edited by Janet Mosher and Joan Brockman

Constructing Crime Contemporary Processes of Criminalization

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Acknowledgments

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Constructing Crime

Introduction

Janet Mosher and Joan Brockman

This volume of essays marks the last work of the Law Commission of Canada (LCC) before its funding was removed in 2006, forcing its doors to close in December 2007 (Le Bouthillier 2007, 113). The first president of the commission, Roderick A. Macdonald (2007, 118), observed that the LCC, which was created in 1996, had survived only half as long as its predecessor, the Law Reform Commission of Canada (LRCC) (1971-93). Macdonald, along with the second president of the LCC, Nathalie Des Rosiers (2007), and the third and last president, Yves Le Bouthillier (2007), have all written insightful comments about the origins and demise of the LCC. According to Macdonald (2007, 123), the LCC had a radical mandate:

(a) to work towards the development of new concepts of law and new approaches to law; (b) to develop measures to make the legal system more efficient, economical and accessible; (c) to stimulate critical debate in, and the forging of productive networks among, academic and other communities in order to ensure cooperation and coordination in law reform initiatives; and (d) to work toward the elimination of obsolescence and anomalies in the current law.

Although the LRCC had a similar mandate, it slipped into a bureaucratic form "focussed on legislative change and [became] increasingly duplicative of the work of the policy development branch of the Department of Justice" (*ibid.*). Macdonald and others tried to avoid this pitfall by using the LCC's mandate to examine a much broader concept of law than what is commonly referred to as "law in the books." Rather, law in action, which is often interpreted as the discretion of agents of enforcement, also includes "the normative commitments that shape the way most people live their lives" (*ibid.*, 134). The study of law should include how people engage or disengage with the law and with each other. The LCC (2003b, 7) provided examples of how we influence each other's behaviour without invoking the law – for

example, "a man encourages a friend to stop smoking cigarettes. Newspaper articles caution against the rise of childhood obesity."

This volume marks the posthumous and final publication of the LCC's work on its "what is a crime?" project that was launched in 2001. True to its commitment to focus on law in action, the consultation phase began with an online debate, which the Canadian public, as well as experts from several countries, were invited to join, and it continued with roundtable discussions organized across the country and studies requisitioned by the commission. As part of its Legal Dimensions Initiative on "what is a crime?" the LCC commissioned six multidisciplinary research projects that were subsequently published by UBC Press in a volume of essays entitled What Is a Crime? Defining Criminal Conduct in Contemporary Society (Law Commission of Canada 2004).² The research projects explained and illustrated "the political nature of crime, from the enactment of legislation (immigration crisis and middle-class copyright infringement) to the variable enforcement of its provisions (insurance fraud, bad-humour jokes, and criminal negligence in administering water standards)" (Des Rosiers and Bittle 2004, xvii). Although very diverse in their subject matters, many focused on how unequal enforcement of the law affects the more vulnerable people in our society (ibid., xvii) and concluded that the "culture of criminalization" is "indeed a dangerous strategy" (ibid., xxii).

Drawing on these research papers and other consultations, the LCC (2003b, 4-5) drafted a discussion paper in 2003 that called upon Canadians to reflect on questions such as what does "unwanted behaviour" mean in Canada; do we tend to resort too readily to penal law to control behaviours; what are the consequences of excessive reliance on penal strategies; and what strategies would be more consistent with our democratic values for the treatment of unwanted behaviours? The commission hypothesized that "the current ways in which we define and respond to unwanted behaviour may not be appropriate. In general a reflex to criminal law has come to dominate," and it is "a dangerous strategy" (ibid., 5). The commission was interested in the process of defining someone as criminal rather than the law itself and made a direct appeal to Canadians, both experts and social groups, to consider the impact of prohibiting unwanted behaviours through the Criminal Code.3

In 2003, the LCC (2003a, 1) commissioned another series of multidisciplinary case studies to examine "factors that contribute to the definition of 'unwanted' or 'criminal' behaviour, and the mechanisms and techniques that are / have been employed in response to certain behaviour." Realistically, the LCC stated that the project was not expected to "produce *the* definitive" answer in terms of what constitutes a 'crime' or 'unwanted behaviour' [or] a roadmap for dealing with or responding to what often represents complex social issues" (*ibid.*, 1). Rather, the LCC hoped that these projects would assist it in developing "an analytical framework for reflecting on the processes that underlie and inform responses to unwanted behaviour, and the impacts of choosing various response and control mechanisms" (ibid., 2). Unfortunately, funds were pulled from the LCC before it had an opportunity to prepare its report to Parliament. The five case studies in this collection are the result of the LCC's final consultation before its unfortunate demise.

These case studies draw upon original empirical research to elucidate the questions posed by the commission as part of its "what is a crime?" project. The case studies interrogate these questions from a range of disciplinary vantage points – sociology, law, criminology, Aboriginal studies – and through varied research methodologies. Each of the case studies provides a detailed interrogation of "crime" and of "criminalization" in radically different sites: social assistance or welfare receipt; billing practices of health care professionals; traditional harvesting by Aboriginal persons; interactions among social housing residents; and gambling activities. These varied sites help to illuminate both the contradictions and commonalties in "crime" and its deployment, including in the rationalities (ways of thinking) and technologies (ways of acting) employed to both construct and control "crime" within these varied and particular sites (Garland 1997).

At the broadest level, each of the case studies invites and engages a range of questions about criminalization processes. The terminology of "criminalization" has become increasingly commonplace, particularly in analyses of neo-liberal governance, yet its meaning is often less than precise. The case studies reveal three central ways in which criminalization may be understood and its parameters sketched. While these three approaches are by no means mutually exclusive, delineating each of them with some precision assists in sharpening an analysis of criminalization processes and in unpacking the concept of "crime." The first of these approaches focuses upon criminalization as the formal categorization of behaviour as "crime," the second looks beyond categorization to law in action, emphasizing the experiential over the definitional, and the third examines the act of governing through the idea of crime and how the very concept of crime is deployed to govern vulnerable populations.

Criminalization as Categorization

As employed by some, criminalization simply captures a categorization or classification choice – the choice to legislatively define (usually through the exercise of the federal criminal law power) particular unwanted or undesirable conduct as a "crime." As Louk H.C. Hulsman (1986) notes, integral to the choice to define behaviour as "crime" is the logic of individual responsibility and the preference for a particular style of social control (punishment), a particular professional context, and a specialized organizational setting (criminal justice).

As with the earlier collection of case studies (Law Commission of Canada 2004), the studies in this collection reveal that the characterization of behaviour as "crime" is neither natural nor eternal. There is, as Hulsman (1986) points out, no ontological reality of crime. Rather, the characterization of particular conduct or behaviour as a "crime" is but one of many ways to construct and order social reality. Thus, "crime" is not the object of criminal justice policy but, rather, is produced by it (ibid.). The socially constructed and contingent nature of the categorization of behaviour as "crime" is well illustrated in the case studies of gambling, incivilities in social housing, and Aboriginal harvesting.

Originally criminalized as a vice and placed in the same class as soliciting for the purposes of prostitution, gambling today is condoned by the government and has become a legal and legitimate leisure activity, as shown by Colin Campbell, Timothy Hartnagel, and Garry Smith in Chapter 5, "The Legalization of Gambling in Canada." Yet gambling outside the parameters set by government continues to be a vice. The co-existence of legal and illegal gambling provides a poignant illustration that "criminal" status is the result of choice rather than being intrinsic to the quality of the activity itself. The political nature of this choice was very much revealed by the acrimonious battle between federal and provincial levels of government in the mid-1980s over the regulation of lotteries and lottery schemes – a battle that was settled through the granting of exclusive power to the provinces to license various gambling activities, with the provinces, in turn, agreeing to provide a calculated share of their profits to the federal government.

Similarly, the case study of incivilities reveals the choice entailed in the categorization of behaviour as "crime." Rather than being a question of decriminalization, as in the case study of gambling, the central problem posed by Frédéric Lemieux and Nadège Sauvêtre in Chapter 4, "Incivilities: The Representation and Reactions of French Public Housing Residents in Montreal City," is whether the "incivilities" encountered in daily life among public housing residents in Montreal – noise, graffiti, minor damage to property - should be characterized as "crime" and whether the social relations among tenants are best managed through the criminal justice system or some other means. Challenging the reflex to criminalization that is evident in the emerging development of new police "call codes" that detail a lengthy list of incivilities, Lemieux and Sauvêtre seek a deeper understanding of the representations of, and reactions to, incivilities by residents of social housing and, in particular, whether these representations and reactions are mediated by the management modes of different housing providers.

To interrogate the effects of these different modes of housing, the authors conducted a study of some 364 French-speaking inhabitants in the city of Montreal, living in five different areas of the city and in two forms of social housing with different management modes: low-income housing, which is publicly managed, and housing co-operatives, which are managed primarily through participatory, collective tenant structures. The interviewers presented tenants with a list of unwanted behaviours classified as "incivilities." The list included certain legally punishable infractions such as theft and vandalism, along with behaviours that are more associated with a lack of civility, such as graffiti, noisy neighbours, and spitting in lobbies. The respondents were asked a range of questions, including how frequently they had experienced each of these incivilities, how seriously they regarded them, and what they would do, or had done, when confronted with such behaviours. The authors found that the management mode was the most convincing element in accounting for differences in the frequency of uncivil behaviour, in the perceived seriousness of this behaviour, and in the preferred intervention when such behaviour occurs. Those individuals in cooperative housing were more inclined to do nothing and, if they did react, were less likely to pursue a formal intervention strategy than those in the publicly managed low-income housing group. Those in co-operative housing reported being exposed (as either witnesses or victims) less frequently to "incivilities" than did the low-income housing group, and greater exposure was correlated with an increased likelihood of opting for formal strategies. The authors also found that those in low-income housing reported lower levels of social cohesion and lower levels of informal social control than those in co-operative housing.

These various findings led the authors to the conclusion that the form of management within social housing plays an important role in relation to the degree of social cohesion and informal social control, which, in turn, mediates the levels of incivility and response patterns. In light of this finding, Lemieux and Sauvêtre suggest that public actors should "focus on interventions that stimulate the vitality of pro-social mechanisms in difficult neighbourhoods rather than implementing strategies that run a strong risk of further codifying and judicializing social relationships." They resist the turn to categorizing incivilities as "crime" by both questioning the efficacy of criminal justice regulation and illuminating the possibilities of alternative forms of regulation. The argument is made that selecting the right management form within social housing offers a more promising route to increasing the informal mechanisms of social control and, consequently, to reducing incivilities.

In Chapter 3, "Pimatsowin Weyasowewina: Our Lives, Others' Laws," Lisa Chartrand and Cora Weber-Pillwax reveal how various forms of legal regulation have criminalized Aboriginal peoples. The narratives of those who participated in the research project – approximately 100 First Nations, Métis, and non-status Aboriginal persons in four geographical regions in northern Alberta – movingly depict the Aboriginal harvesting practices that are integral to both cultural survival and physical sustenance. Traditional practices

including hunting, trapping, fishing, and gathering, as well as the sharing of the fruits of these practices with family and other community members, are foundational expressions of Aboriginal peoples' social and cultural existence and are deeply intertwined with Aboriginal spirituality. Moreover, in a social context of often-profound poverty, they are practices that are essential to physical survival.

A variety of legal regimes, ranging from quasi-criminal hunting and fishing regulations to contractual arrangements between the state and resource developers, severely curtail, unduly structure, or prohibit these practices. Tellingly, the study by Chartrand and Weber-Pillwax challenges a view of criminalization that limits the understanding of "crime" to only those behaviours defined and proscribed by the formal criminal law (in Canada, the federal Criminal Code). In contrast, their research invites us to consider the common attributes between the formal criminal law and other forms of regulation (both legislation and contractual legal obligations). They explore the relationship between these legal instruments not as constitutional scholars seeking to analyze whether, for example, a province has exceeded its jurisdiction by attempting to exercise the federal criminal law power but, rather, as ethnographers seeking to understand the lived experiences of Aboriginal harvesters. Understood in this way, behaviour becomes a "crime" not only when it is defined through the exercise of the formal criminal law power by federal legislators but also when regulation – whatever its source - is characterized by particular features, including the prohibition or curtailment of harvesting practices, significant levels of surveillance, punitive sanctions, and discourses of criminality.

Chartrand and Weber-Pillwax reveal the contingent nature of "crime" by challenging the reader to imagine different possibilities. They turn on its head the categorization of "criminals" and "crime" by rhetorically asking, "if the right of a people to live is taken away from them for financial benefits to another, does this not constitute a crime against humanity in some definition, in some generation, in some location, and in some future?" The authors map out an array of alternative modes of regulatory options for effectively managing the resources that are so integral to traditional Aboriginal harvesting practices, demonstrating that there exists a range of tools and revealing plainly that the criminal law (or other forms of law sharing its features) is neither indispensable nor always desirable. In laying bare the constructed and contingent nature of "crime," these case studies call out for an explanation of why it is that particular behaviours are selectively categorized as "crime." Although the gravity of social harm is frequently offered by political actors as the underlying rationale, the various case studies in this collection, and perhaps most powerfully the Afterword by Marie-Andrée Bertrand, challenge the plausibility of this explanation. The case studies suggest that a variety of other interests and motivations often underpin the

selective categorization of particular behaviours as "crime" and particular actors as "criminal." Campbell, Hartnagel, and Smith observe that in common law countries such as Canada, Australia, the United Kingdom, and New Zealand, and in several American states, the construct of gambling as a "crime" or an "inherently bad thing" crumbled when the governments of these countries discovered the financial benefits to be reaped from legalization. The "de-criminalization" of gambling was very much in the financial interests of the state since the state stood to profit from gambling's legalization. 4 Significantly, as these authors note, the changes to the Criminal Code did not remove all forms of gambling entirely from its ambit but, rather, simply vested in the provincial and territorial governments the power to grant exemptions to the general criminal prohibitions. This new regulatory regime has created a multi-billion-dollar legal gambling industry from which all levels of government have profited, leading the authors of the study to conclude that the role of the criminal law has been "principally to consolidate provincial authority over gambling as a revenue-raising instrument and to expand its availability rather than restrict it in any meaningful sense."

The social harms that are inherent in many gambling activities have received relatively little attention. To the contrary, the authors conclude that "perhaps the most crucial policy issue concerns the potential conflicts of interest that arise for provincial governments when they both regulate and promote gambling," a conflict that pits revenue maximization priorities against social responsibilities and in which economic exigency almost invariably wins. Pressured by citizen groups and victims' families, governments have had to step up and assume (some) responsibility for the undesirable effects of gambling, and attention has been most decidedly upon the "problem gambler," and a new cadre of professionals has emerged to fashion his or her treatment. These new professionals, whose status and survival are dependent upon the victims of gambling, have a vested interest in the lax consumer protection measures that presently characterize Canada's gambling policy. Significantly, the state has located the "problem" not in the activity of gambling but, rather, in the flawed players who are seemingly incapable of adequate self-responsibilization. Problem gamblers are depicted as the antithesis of homo prudens, the responsible, self-sufficient, entrepreneurial consumer capable of rationally exercising choice to maximize his or her own interests (Garland 1997, 185; Snider 2000, 177; Coleman 2003, 22). Rather, the problem gambler is a person out of control who requires treatment and correction.

While, historically, the criminalization of gambling may well have been aligned with the interests of organized religion and the newly industrialized state in a disciplined workforce, contemporary forms of de-criminalization and regulation protect the fiscal interests of the state. In other words, the choice to categorize forms of gambling as non-criminal protects the financial

interests of the state. In this case, the real work being done by the criminal law is that of consolidating a provincial monopoly over expanding gambling revenues rather than controlling social harm. Indeed, the de-criminalization of gambling may have caused greater harm since gambling addicts feed their addiction through theft, embezzlement, and fraud and leave their dependants to fend for themselves. While the state's interest in profit by no means exhausts - indeed barely begins, as Bertrand's Afterword makes clear - an examination of the rationales underlying the choice of whether to label conduct as "crime," let us shift to the second strand of criminalization and then return to this question of rationales.

Criminalization through Law in Action

The case studies also reveal that the legislative categorization of behaviour provides only a partial account of who and what are, in fact, subject to being positioned within the realms of "crime" and the criminal being. Criminalization understood in the narrow sense described earlier – as categorization - is grounded in a view of the state in which the state commands and individuals obey (or are punished). It presupposes the unidirectional exercise of power between state and subject, which is, of course, an incredibly important component of criminalization. As Laureen Snider (2000, 172) has clearly shown in her work on corporate crime, the very survival of corporate crime "as an object of study is contingent on the passage and enforcement of 'command and control' legislation."

However, the markedly different enforcement practices uncovered by the studies of fraud in two different sites - the receipt of social assistance by low-income persons and the billing practices of health care professionals make clear that to understand criminalization we need to move beyond the examination of categorization alone. What we see in the contrast between these two sites is that, while the categorization of a particular behaviour – fraud, in this case – as "crime" remains constant, the striking differences in surveillance, in the opportunities to "filter out" misconduct, in the punishment, and in the accompanying discourses that signify the moral character of the conduct – or perhaps, more aptly, the persons – suggest that whether the behaviour is in fact labelled and/or processed as "crime" is, like the choice of categorization itself, contingent. Understood in this further sense, the concept of criminalization expands beyond the definitional to capture law in action – the actual deployment of "crime" and crime control as they permeate daily life and selectively entangle citizens in their embrace. What, then, do these particular sites reveal about who is selectively entangled?

In Chapter 1, "Welfare Fraud: The Constitution of Social Assistance as Crime," Janet Mosher and Joe Hermer draw upon interviews with legal representatives in Ontario's community clinic system as well as an extensive review of case law to examine welfare fraud in Ontario, particularly in the post-1995 period when major reforms to social assistance ("welfare") were initiated. Led at the time by a Conservative government, major reforms to welfare legislation included a sharp reduction in benefit levels, a dramatic narrowing of entitlement, and the expansion of webs of surveillance and verification. Mosher and Hermer argue that "welfare fraud" was employed as a central device in transforming social assistance from an entitlementbased program to one of contractual obligation in which recipients were mandated to participate in employment-readiness activities as a precondition of limited eligibility for significantly reduced benefits.

Like the problem gambler, the recipients of social assistance were (and continue to be) portrayed as flawed neo-liberal citizens, having failed to ensure their own self-sufficiency. As the then responsible minister made explicit, "people have got to learn again to take responsibility for themselves and their families and not to leave it to everyone else to do."5 As "flawed" or "partial" citizens, those claiming state assistance were clearly marked as deficient, deviant, and undeserving (Mosher 2007). However, welfare recipients were cast not only as flawed citizens but also as risky and dangerous citizens, threatening the values of individual responsibility, self-sufficiency, and the work ethic (Bauman 2005; Mosher 2007). The view of welfare recipients as slothful, rudderless souls seeking sustenance from the state without being prepared to do anything in return (thus, the need for mandated work activities) has leant itself readily to a depiction of recipients as "fraudsters."

Mosher and Hermer's detailed account of Ontario's welfare system reveals the active participation of the state in the construction of the problem of "welfare fraud" and the proliferation of a new battery of weapons to battle it: enhanced verification; snitch lines; eligibility enforcement officers with additional investigative powers; and harsh new forms of punishment. An extraordinarily large number of fraud investigations are undertaken every year, and, while relatively few are prosecuted through to conviction in criminal courts, a great many more end with administrative sanctions. In addition, the political discourse surrounding welfare and welfare recipients, particularly during the period the Conservative government remained in power (1995-2003), was peppered with language that was evocative of criminality. "Thieves," "fraudsters," and "cheats" comprised the vocabulary used to describe welfare recipients.

The second study on fraud by Joan Brockman, in Chapter 2, "Fraud against the Public Purse by Health Care Professionals: The Privilege of Location," which is based on a review of cases from 1990 to 2003 and interviews with key informants, analyzes the controls exercised over health care professionals suspected of pilfering public funds in Ontario and British Columbia and contrasts these controls with those governing welfare recipients. The fraud examined consists of over-billing by health care professionals, primarily

physicians. For instance, physicians claimed fees for services that were not delivered or for more complicated and costly procedures than those provided, or they billed for more visits than actually took place. Unlike the welfare context, where "fraud" is the terminology invoked to describe virtually all rule transgressions by welfare recipients (irrespective of whether those transgressions have arisen as a result of the unintentional violation of one of the 800 rules that constitute the welfare system), non-criminal language – "upcoding," "over-billing," and "inappropriate billing" - are the terms commonly employed in the health care setting. And, again, while "fraud" lacks precision here, just as it does in the welfare context, this imprecision works in decidedly the opposite direction, and criminal fraud is described in innocuous terms – "fudging" or "padding" – or is dismissed altogether as being merely an oversight or misunderstanding.

Surveillance of physicians' billing practices is significantly less intense than the surveillance of Ontario's welfare recipients. In British Columbia, for the most part, the systems regulating physicians rely upon trust, and there is relatively little monitoring and few routine checks. Moreover, physicians are regulated by a great number of bodies – health insurance boards, colleges of physicians, medical boards, and health care joint committees - which often act to funnel or filter out accusations against deviant professionals. When accusations stand, the physicians can appeal to their professional committees and joint organizations, which may consider the complex rules of the system as an adequate justification for billing mistakes (unlike the treatment of mistakes made within the welfare system). Thus, physicians who commit fraud are treated relatively leniently. In the rare eventuality that a criminal accusation is brought, the physician can call upon a lawyer for assistance. Compared to the physician, the welfare recipient suspected of fraud appears to be in a much more serious predicament.

Rather than sounding a call to "get tough" on white-collar crime (which is engaged in by some health professionals), Brockman invites us to consider whether we could "reduce the use of the criminal law against crimes of the less powerful by transferring to their misconduct some of the attitudes and approaches that we presently have towards the crimes of the powerful." She warns that a call for a heavier hand on white-collar crime may propel us into a game of increased criminalization and fuel the engine of the crime control industry, giving it yet more power and manufacturing yet more needs for crime control professionals to address.

As Snider (2000, 170) notes in the context of corporate crime, increased punitiveness seems to be reserved for the impoverished – the gentle art of persuasive, positive incentives and tax breaks for the grave social harms perpetrated by corporations. Similarly, the comparison of fraud between the context of welfare receipt and that of health care billing suggests that aggressive enforcement is reserved for the "real criminal," the welfare recipient

(ibid., 184). In contrast to the physician – who is assumed to be a virtuous neo-liberal citizen and, as such, capable of self-correction and self-regulation - the welfare recipient poses a significant risk.

A similar observation can be made with regard to gambling. As Campbell, Hartnagel, and Smith point out, the regulatory practices of particular provinces in relation to gambling actually violate provisions of the Criminal Code, yet the provinces' vested interest in the profits of gambling creates a strong incentive to construe and apply the criminal law in ways that are most favourable to those interests. The case study of gambling in Canada also reveals the emergence of different regulatory models across the country and of different roles delegated to private sector companies. While some of these arrangements arguably contravene the provisions of the Criminal Code, as do some of the particular forms of gambling introduced in some provincial jurisdictions, these practices go largely unchallenged. The state's enforcement of its own laws is decidedly weak when its financial interests are at stake.

In sum, the case studies suggest that the law on the ground is interpreted, enforced, and applied in a manner that is consistent with the interests of dominant actors. While enforcement will often mirror the interests of the state, it is also the case that powerful interest groups (physicians, for example) are emboldened and empowered to resist and reshape state interests. The case studies also reveal that the construct of "crime" is infused as much by enforcement practices and the interests of criminal justice and related professionals – those responsible for detecting, processing, and reforming the carriers of "crime" - as by the definitional categorization. As Brockman concludes, "what we do about a law is perhaps as important as, or more important than, what the law says and has a major impact on the ultimate compositions of 'what is a crime?'"

Criminalization as Governing through "Crime"

David Garland (1997, 188 [emphasis in original]) helpfully distinguishes "three practicable objects and three forms of exercising power in respect of them: the legal subject governed by sovereign command and obliged to obey or be punished; the criminal delinquent, governed by discipline and required to conform or be corrected; and the criminogenic situation, governed by the manipulation of interests and the promotion of mechanisms of selfregulation." In our current neo-liberal society wherein hierarchy, order, and self-responsibilization are integral features, governing through crime is centred upon the attempt to identify or predict risky situations or risky populations. Put differently, these are the situations or sub-populations that pose a risk – not necessarily of a violent sort, but a risk to the values and practices integral to neo-liberalism. In what Ulrich Beck (2006, 335) describes as an exquisite irony, promises of security propel the production of risk itself. The more frequently we are assured that steps are being taken to secure

us, the more likely it is that we anticipate danger and call for more law and regulation. Moreover, "in the face of the production of insuperable manufactured uncertainties society more than ever relies and insists on security and control."

To make good on its promise of security, the state must make visible its efforts to manage situations and populations in order to minimize risk. The criminogenic situation (or sub-population) is that which, if left unchecked, will breed "crime" - it and they are carriers of risk. In turn, these criminogenic situations or sub-populations become new sites of intervention and action by the state (Garland 1997). Who - or what - becomes defined as risky? The threat - or risk - is often located in those individuals ascribed with difference – the "other" whose observed "otherness" signals a form of deviance that if not checked and contained will bring in tow incalculable damage. Otherness is signalled in many ways but, most importantly, by reference to departures from the attributes of the neo-liberal citizen – that is, those who are not self-sufficient, not fully responsible for themselves, and inadequate in the role of consumers. As noted in the previous section, it is the failed neo-liberal citizen – the flawed consumer, the dependent or irresponsible citizen – standing as he or she does outside the normative boundaries of neo-liberal citizenship who constitutes a threat and, as such, is to be feared.

Consistent with neo-liberalism's focus on individual responsibility, risk discourse is focused squarely on individuals - not social, economic, and political structures or ideologies – as the source of social problems. As R.C. Schehr (2005, 51) notes, the "discourse of risk complements our dehumanizing and individualizing consumer culture in that it stimulates mistrust and suspicion ... [It] leads to divisions among people based on certain ascribed characteristics of difference. The poor, ethnic minorities, homosexuals and youth each find themselves marginalized by a discourse of fear." While discourses of fear will, inevitably, shape the categorization of behaviour as "crime" and, as we have seen, powerfully influence who is entangled in the actual enforcement of "crime," they also lend themselves not only to the governance of crime but also to governance through crime. In this latter instance, "crime" operates as a modality of governance in a manner only loosely connected with the formal criminal law and criminal justice system. It is the idea of "crime" and the risk it presents rather than a particular proscribed behaviour that is central to this technique of governance. The case studies of welfare fraud and Aboriginal harvesting make visible the form of criminalization that occurs in governing through crime – where "crime" is not constituted solely by defined individual conduct that is interrogated with a burden of proof but, rather, as an assembly of legal and normative practices and authorities that is severely moralized and thus arbitrary.

Mosher and Hermer trace the government's role in the construction of the menace of "welfare fraud." As described earlier, the characterization of rule breaches as "fraud" - conduct that is prohibited by the Criminal Code - the use of evocatively criminal terms in describing welfare recipients (thieves, cheats, and fraudsters), and the ramping up of both surveillance strategies and penalties served to position all welfare recipients as actual or potential criminals. Under the constant gaze of suspicious regard, the looming threat of fraud charges, and the insistent repetition of terminology associating welfare receipt with criminality, recipients feel demeaned, dehumanized, criminalized, and constantly fearful that they will be accused of fraud. They struggle - within a system, one might argue, that has been intentionally constructed to generate rule violations – to avoid accusations and investigations of fraud. The now ready association drawn between welfare receipt, social disorder, and crime effectively regulates the behaviour not only of those in receipt of welfare but, equally as important, of those in lowwage and/or exploitative employment who seek – at almost all costs – to avoid the welfare rolls. The authors conclude that "fighting welfare fraud has little to do with governing crime but more with a systematic attempt to disenfranchise and punish a highly vulnerable and easily stigmatized population who dare to seek assistance from the state." Bauman's (2005, 82) observation of the American context resonates with the conclusions drawn by Mosher and Hermer:

When, however, the image of the idle poor is overlaid with the alarming news of rising criminality and violence against the lives and property of the decent majority, disapproval is topped up by fear; non-obedience to the work ethic becomes a fearful act, in addition to being morally odious and

Poverty turns then from the subject matter of social policy into a problem for penology and criminal law. The poor are no longer the rejects of consumer society, defeated in the all-out competitive wars; they are the outright enemies of society ...

Linking poverty with criminality has another effect: it helps to banish the poor from the universe of moral obligation ... As actual or potential criminals, the poor cease to be an ethical problem – they are exempt from our moral responsibility.

As Peck (2001) has observed, the neo-liberal state, while "rolling back" its provisioning of social welfare, simultaneously "rolled out" vigorous and punitive "law and order" policies and practices. In the context of those in receipt of welfare benefits in Ontario, the "zero tolerance" of welfare fraud and other aggressive law and order policies have worked in tandem with the retrenchment of the welfare state to govern the socially marginalized – not

only those in receipt of welfare but also those who dare not quit dead-end, low-paid, and/or dangerous employment (Beckett and Western 2001). In other words, the socially marginalized are governed through crime.

The study of Aboriginal harvesting by Chartrand and Weber-Pillwax reveals, like the study of welfare fraud, a form of governing through crime. Here, too, it is the language of crime and criminality – fraud, criminals, and cheats – and the constant and looming threat of possible charges and the loss of critical access to food that operate to discipline and control Aboriginal harvesters. What we see at play again is *not* the invocation of formal criminal justice processes to detect and punish specific harmful deeds but, rather, the use of the construct - the idea - of "crime" to stigmatize and disentitle a vulnerable social group. As is the case with welfare fraud, often the rules governing harvesting are complex and counter-intuitive, making it difficult to comply. Similarly, the stark choice is all too frequently between regulatory compliance and survival (in both its physical and cultural senses). A hunter, for example, who shares moose meat with elderly family members commits an infraction but chooses his obligation to provide for family over compliance with the law of others.

While quasi-criminal processes around hunting and fishing are often resorted to by enforcement officials, resulting in readily recognized forms of criminalization, it is also the case that, as with welfare fraud, other more subtle processes of criminalization are deeply entrenched. Participants in the various workshops that formed part of Chartrand and Weber-Pillwax's study often referred to the conduct and language of enforcement officials that clearly signalled that all Aboriginal peoples were suspected criminals. As participants explained, "they have a job to do, but I think they could do it in such a way that they don't make you feel like such a criminal"; "the way the undercover cop talked, we were outlaws, we were thieves." The authors explain that "abusive interrogations by enforcement officers often leave harvesters and their families with a general sense of apprehension of authority figures. As a result of these interactions, people begin to feel that, simply by walking on their traditional lands, they are guilty of some illegal act - in essence, that they are criminals." And what emerges poignantly from the study is the impact upon future generations where traditional practices and their practitioners are widely treated as "criminal" and the social and physical limitation on First Nations' space, created by law and policies, "places the whole people in a state of constant mental, physical, and emotional distress." As such, an entire group of people – and, in this context, also a way of living - become criminally suspect, subject to surveillance and demeaning treatment, and made to feel like they are criminals and widely regarded as such by others. As the authors suggest, "the cumulative effect of these situations in the long term is the broad criminalization of Aboriginal cultures and peoples."

In other words, these two case studies reveal a form of governance through "crime." In the case of welfare fraud, the disentitlement of vulnerable people to social assistance and, in the case of Aboriginal harvesting, the assimilation of Aboriginal peoples both emerge as the political projects accomplished through criminalization. Both projects reaffirm the neo-liberal citizen and the values she or he embraces and, as such, render him or her more secure. The deepening insecurity for low-income and Aboriginal peoples that is the consequence of these projects is rarely acknowledged.

Conclusion

These case studies illustrate, in multiple ways, the complex web of power relations at play in relation to "crime." An over-arching theme of these studies is that the state is not the sole purveyor of regulation that is often rationalized as a "public good" but, rather, that regulation is effectuated by the roles of private companies that profit from gambling, by citizens engaged in the surveillance of those they suspect are in receipt of welfare, and by industries that profit from natural resources and development. Conversely, the study of fraud by health care professionals also reveals, as does the gambling study, that those who already enjoy considerable power can push back and resist criminalization processes, often successfully relocating their conduct not only outside the criminal law paradigm but also outside the boundaries of negative moral judgment.

We conclude then by citing what seemed to be the LCC's hope for the future – an aspiration anchored in democratic ideals of equality and inclusive citizenship:

The reflex to criminal law and punishment is a dangerous strategy. We should strive for a society that is not governed by fear and criminal law but by the values of participation and trust. We hope for society and its governments to develop response strategies that are rooted in an understanding of the limits of a criminal law approach and recognize the benefits of alternative response techniques. (LCC 2003b, 47)

It is our hope that this collection advances these goals by contributing to an understanding of criminalization as a primary and sophisticated resource of political power – one that is dependent on constantly shifting legal and moral boundaries around that which constitutes "crime." Bertrand's Afterword challenges us to go yet further, to move beyond the concept of "crime" in order to meaningfully tackle the truly harmful social conduct of our time.

Acknowledgment

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Notes

- 1 Also see Macdonald's statement prior to his appointment as the first president of the Law Commission of Canada (LCC) (Macdonald 1997). See Nathalie Des Rosiers (2007) for some of the methodological and ethical challenges the LCC faced in working with interdisciplinary and community-based scholarship.
- 2 The LCC launched a series of Legal Dimension Initiatives with the Canadian Association of Law Teachers, the Canadian Law and Society Association, and the Canadian Council of Law Deans. The "what is a crime?" project was its fourth research initiative.
- 3 Criminal Code, R.S.C. 1985, c. C-46, s. 264.
- 4 The most common historical example is alcohol prohibition. Recently, the prohibition of marijuana has come under siege with the reclassification of the substance outside the narcotics schedule, the recognition of the therapeutic properties of the drug, and the amendments allowing for its medical use and private "production" (cultivation) to counter the state's failure to provide the substance to authorized patients.
- 5 Ontario, Legislative Assembly, 28 September 1995, http://hansardindex.ontla.on.ca/ hansardeissue/36-1/l003.htm.

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Welfare Fraud: The Constitution of Social Assistance as Crime

Janet Mosher and Joe Hermer

The past two decades have witnessed a profound and complex shift in how the state is positioned in relation to the ideals of welfare and citizenship. These changes are, in a very broad way, encompassed by two related movements. The first is how the realm of crime and disorder as a legitimate object of state intervention has expanded and dispersed across a broad array of government activity that has traditionally been viewed under the rubric of public policy. Areas of public policy, such as immigration, education, and social welfare, are now increasingly viewed and acted upon as problems of safety, security, and crime. This expansion of social and legal regulation, often through means that are only loosely connected to the typical instruments of criminal justice, has seen the re-entrenchment of state power in a complicated and often invisible way. In tandem with this movement has been a basic reconfiguration of the collective ways in which we are responsible for one another through the instalment of the neo-liberal citizen. Idealized in a wide array of reforms, this ideal citizen is made flexible to labour market conditions (which are viewed as naturally desirable and involving little state intervention), responsible for his/her own particular circumstances under the preferences of "freedom" and "choice," and positioned narrowly as a consumer who must manage individual risk. The result has been that those who are the most socially and economically vulnerable have been widely disenfranchised in terms of making any claim for assistance and support based on social and economic need. This pincer of neoliberalism – the expansion of a net of social regulation and state authority in the social sphere and a significant withdrawal of state commitment to the welfare of vulnerable people – is an overarching feature of the politics of early-twenty-first-century life.

This chapter examines one area where both of these movements have dramatically transformed a significant area of government policy – the reordering of social assistance programs through the policing of welfare fraud. In the past decade, welfare fraud has attracted substantial political and public

attention. The language of "fraud" has been widely invoked in political discourse, together with such terms as "cheats," "liars," and "criminals" to describe social assistance recipients, and accompanied by promises to "crack down" and "get tough." The message that criminal misconduct is widespread within the social assistance system has certainly not been ambivalent. The obvious and logical deduction is that welfare recipients are morally suspect persons, criminals in waiting who are poised to abuse a public trust. These changes in relation to welfare fraud have been occurring within a broader context of fundamental transformation to social assistance regimes not only in Ontario but also throughout North America. A shift away from state provision for those in need, the adoption of workfare programs, reductions in benefit levels, and a sharp winnowing of the categories of the "deserving poor" have been among the most significant features of this transformed landscape.

To better understand the nature and impact of these changes, we undertook a detailed examination of the new legislation, regulations, and policy directives in the province of Ontario. Although our focus was upon fraud, we wanted to locate and understand fraud within the broader constellation of changes that were under way within social assistance regimes. We conducted twenty-three semi-structured interviews with lawyers and community legal workers in Ontario's community legal clinic system between July and October 2004 and interviewed the director of the Ontario Disability Support Program. We also conducted an extensive review of reported criminal cases involving welfare fraud.2

Our study reveals "welfare fraud" to be a problem that has been constructed and deployed to disentitle and punish welfare recipients. Much of the behaviour commonly described as "welfare fraud" bears scant resemblance to actual criminal fraud and, instead, arises as a result of errors and misunderstandings made in the context of an astoundingly complex bureaucratic system composed of some 800 rules. The study also details the ambiguity, vagueness, and capriciousness of the system within which recipients struggle to survive on inadequate incomes and examines how behaviour that may seem innocuous or even socially valued - having dinner at a friend's or forming an intimate relationship – becomes the object of criminal suspicion and intense scrutiny.

While few cases are actually prosecuted as fraud in criminal courts, we argue that an intense form of criminalization of those in receipt of social assistance occurs through other processes that exist outside the criminal justice system: the construction of the menace of welfare fraud; the inadequacy of benefits; and the sweep and depth of surveillance measures. Thus, we view criminalization to be anchored in both a legal and moral field of labelling, condemnation, and punishment that is not limited to criminal justice processes. By broadening our analysis to capture a network of regulation beyond the category of criminal law, we draw attention to a prominent example of how poor people are positioned within the current political conditions of the "welfare state."

Constructing the Problem of Welfare Fraud

Welfare fraud has long been misunderstood and misrepresented (Social Assistance Review Committee 1988). Between 1995 and 2003, under the leadership of a Conservative government, these misrepresentations were amplified. The construction of the problem of welfare fraud was undertaken with a renewed political energy, and measures to combat fraud were central to the reforms introduced in 1997 through the Social Assistance Reform Act (SARA) and beyond.³ The government employed a variety of strategies to construct welfare fraud as a serious problem - indeed, as one that was out of control and requiring more and increasingly harsh measures to curb its proliferation. In constructing welfare fraud as a significant problem, rhetorical claims about its magnitude and harms abounded. In her affidavit in support of the government's defence of the constitutionality of a lifetime ban on the receipt of welfare benefits for those convicted of welfare fraud, the director of the Ontario Disability Support Program, Debbie Moretta, detailed several initiatives undertaken by governments over the years to curb the problem. She concluded that, "despite initiatives to combat welfare fraud, it has remained a serious problem and was seen by the public to be insufficiently addressed by government. The zero tolerance policy is intended to deter welfare fraud, to ensure effective management of public funds and to restore public confidence in the welfare system" (Moretta 2003). In other words, despite valiant attempts, the problem of welfare fraud still needed to be contained, and harsher measures were required. The resort to additional forms of harsh punishment (a lifetime ban) and the introduction of a "zero tolerance" policy signalled the seriousness of welfare fraud as a crime.

The invocation of explicitly criminal terms – "fraud," "cheats," " liars," "theft," and "crackdowns" – in a host of government publications and news releases served to further construct the problem as a criminal menace and, thus, all the more serious and threatening. Welfare fraud "cheat sheets" posted on the government's website and accounts of complex fraud involving multiple fabricated identities that appeared in local news media strengthened the perception of serious and widespread criminality. By declaring the "fight" against fraud to be one of the three objectives of welfare reform, Ontario's welfare system demonstrated how critical fraud had become and also announced the government's intention to battle it.

However, it was the government's use of "official statistics" that provided perhaps the clearest evidence of its role in constructing the problem of

welfare fraud. In the period from 1997 to 2002, the government released its annual Welfare Fraud Control Reports, which purported to document the extent and severity of the welfare fraud problem. The reports were permeated with the language of "fraud" and other references to forms of crime and criminality. The 2001-2 report, for example, makes reference to the Welfare Fraud Hotline, to the fraud control database for tracking fraud investigations, to "anti-fraud measures [that] help catch welfare cheats and deter others from thinking about cheating," and to welfare fraud as a crime that the government is cracking down on through the introduction of a zero tolerance policy (Ministry of Community, Family and Children's Services 2003). The report claims that "over \$49 million was identified in social assistance payments that people were not entitled to receive and an estimated \$12 million in avoided future costs." Given the general thrust of the report and its title, one might be forgiven for concluding that these dollars are directly attributable to welfare fraud. Indeed, this is the very message that the government seems to be intending to convey.4 However, a closer examination reveals a different picture. For instance, in 2001-2, there were 38,452 fraud investigations, resulting in only 393 convictions for welfare fraud, but in 12,816 cases the assistance was reduced or terminated as a result of eligibility re-assessments. Although it is not entirely clear whether the 393 convictions (where benefits are also likely to have been reduced or terminated) are included among these 12,816 cases where benefits were reduced or terminated, it is clear that in more than 12,000 cases criminal "fraud" was not established, no crime was proven, and any dollars saved were not the result of "fraud" detection. Even though a certain number of the 12,000 cases may be instances where prosecution was not recommended even though there existed a strong case, the vast majority are likely to be instances where a rule was broken, but without the requisite mens rea or actus reus to constitute criminal fraud – in other words, as a result of client misunderstanding, error, or oversight. By referring to all of the errors as fraud and using terms such as "cheats," "cracking down on crime," and "zero tolerance," the report portrays a picture of criminal fraud as rampant and, correspondingly, of beneficiaries being actual or potential criminals. Tellingly, the report does not include instances of rule violations that have resulted in underpayments to recipients.

The only evidence that exists pertaining to the incidence of fraud in Ontario is the number of convictions for fraud, and even this evidence must be viewed with some skepticism given the lack of adequate or any legal representation as well as the tremendous pressures to plead guilty and get it over with.⁵ The first year for which province-wide statistics are available is 1997-98, and the most recent year available is 2001-2 (Moretta 2004). All of the statistics in Table 1.1 show the cumulative data from the Ontario Works and Ontario Disability Support Program systems (Ministry of Community, Family and Children's Services 2003). In addition to the number of

Table 1.1

Fraud investigations and outcomes						
Year	2001-2	2000-1	1999-2000	1998-99	1997-98	
Convictions	393	430	557	747	1,123	
Total fraud investigations	38,452	52,582	43,900	49,987	53,452	
Social assistance reduced or terminated	12,816	17,734	15,680	16,946	14,771	
No eligibility problems found	25,636	34,848	28,220	33,041	38,681	

convictions, it is important to observe the very substantial numbers of fraud investigations.

The number of convictions for 2001-2 (393 convictions) is roughly equivalent to 0.1 percent of the combined social assistance caseload and 1 percent of the total number of allegations. Yet it is the broad sweep of "fraud" described earlier, to encompass rule infractions and not criminal fraud, that supports the characterization of welfare fraud as rampant and that no doubt fuels the widespread misconception held by the general public about its incidence.

Responding to Welfare Fraud

In Ontario, fighting welfare fraud was expressly identified as one of three central objectives of the SARA, which was introduced in the late 1990s and ushered in the most significant reforms to social assistance in decades. 6 The SARA contained two schedules, the Ontario Works Act, 1997 (OWA) and the Ontario Disability Support Program Act, 1997 (ODSPA), the former governing the able-bodied and the latter governing those with statutorily recognized "disabilities." 7 Both the OWA and the ODSPA included a vast array of new measures to arm the government in its battle against welfare fraud. While neither the concern regarding welfare fraud nor the ready association of poverty and criminality were new features of the social assistance landscape, clearly they were substantially reinvigorated through these and subsequent legislative reforms.

The Conservative government introduced a broad array of measures, ranging from a controlling fraud protocol to a lifetime ban on eligibility for benefits if convicted of welfare fraud, in order to respond to the serious problem that welfare fraud was portrayed to be. In turn, the extent, breadth, and severity of these measures reinforced the view of the severity of the "fraud" problem. Policy Directive 45 on Controlling Fraud provides the framework in which delivery agents of Ontario Works are to develop local fraud control protocols and practices.8 Every administrator is required, under the

Table 1.2

Source of welfare fraud complaint						
Year	2001-2	2000-1	1999-2000	1998-99	1997-98	
Welfare fraud hotline	6,527	9,348	8,825	8,327	7,910	
Information-sharing agreements	9,988	10,447	12,502	11,577	12,514	
Local provincial/ municipal offices	19,078	33,028	33,714	39,158	41,229	
Total	35,593	53,823	55,041	59,062	61,653	

directive, to "consult with the local police services and the Crown Attorney's Office to develop a written protocol for the effective investigation and prosecution of cases of suspected social assistance fraud." The local protocols are to spell out respective responsibilities for various stages of the investigation, including the collection of information, the securing of evidence, and the preparation of a Crown brief.9

The directive requires that all allegations of fraud, from both internal and external sources, be assessed in a timely manner. This assessment is undertaken by an eligibility review officer (ERO), who is to conduct a "comprehensive investigation" and prepare a written report for an ERO supervisor, including a recommendation regarding ongoing eligibility, any overpayment, and whether to refer the matter to the police. In January 2004, this directive was revised to provide that, "where sufficient evidence exists to suspect intent to commit fraud, the case *must* [bolded in original] be referred to police for possible criminal prosecution." A very substantial number of allegations of welfare fraud are communicated to the ministry each year from a variety of sources. Table 1.2, which was prepared by the ministry, notes these various sources and the numbers of complaints generated by source (Ministry of Community, Family and Children's Services 2003).

While the ministry's position is that the directive provides the framework in which local delivery agents are to operate, the picture that emerged during our interviews suggests that this is not invariably the case. Most significantly, the policy contemplates that the only consideration in deciding whether the matter should be referred to the police is whether sufficient evidence exists to suspect an intent to commit fraud. In practice, however, a range of additional factors is considered. Several municipalities apply a dollar threshold and do not refer cases below \$5,000.10 Variations also exist regarding the types of circumstances that may give rise to a referral to police. Thus, for example, student loans, casual gifts of small value, and spouses are treated differently in various parts of the province. Respondents reported variations among individual caseworkers that often depend upon who the

recipient is and how she responds to the allegation – whether the recipient is sufficiently contrite; whether she is able to explain what is happening in a way that the worker can understand and empathize with; what the reputation of the recipient's family is in the community; how the recipient looks and talks; and what stereotypes inform how she is judged. These are all factors that were identified as influencing the decision whether to refer the matter to the police or not.11

Regions also vary in the significance, if any, that is given to the consideration of personal circumstances. This was an issue that was very much at play during the inquest into the death of Kimberly Rogers, who died in August 2001 while serving a period of house arrest upon a conviction of welfare fraud. She was eight months pregnant with a history of depression and was living under a three-month ban on eligibility (an injunction to lift the ban was granted prior to her death, but, even then, Rogers had only eighteen dollars per month to live on). Pursuant to a recommendation of the coroner's jury, the Fraud Referral Task Force was struck by the Ontario Municipal Services Association. As recommended by the jury, the task force prepared a detailed set of guidelines to ensure the "full appreciation of the person's life circumstances and the impact of the consequences of a fraud conviction," prior to a referral being made to the police (Ontario Municipal Social Services Association 2003). However, the ministry expressly did not endorse these guidelines and specifically declined to participate in the process that generated them (Moretta 2004). In fact, the recommendations of the task force stand in stark contrast to the revision of the ministry's Policy Directive 45 on Controlling Fraud that did occur – a revision that made mandatory the referral to the police of all cases where there is reason to suspect intent to commit fraud.¹² Unlike the task force guidelines wherein personal factors such as health, domestic violence, and the adequacy of benefits would be considered, the only consideration permissible within the framework of the policy directive is suspicion of the intent to commit fraud.

The OWA and regulations thereto also expanded the powers available to EROs to undertake their investigations of welfare fraud. As we discuss later in this chapter, this ramping up of police-type power and authority was not accompanied by commensurate safeguards in terms of protecting the legal rights of those under investigation. EROs have the power to enter any place other than a dwelling if there are reasonable grounds to believe that evidence relevant to eligibility may be found there, to require the production of records, to obtain a warrant to enter a dwelling place, 13 and to "require information or material from a person who is the subject of an investigation ... or from any person who the officer has reason to believe can provide information or material relevant to the investigation."14 These powers are reinforced by subsection 79(3) of the OWA, which makes it an offence to obstruct or knowingly give false information to a person engaged in an investigation.

In the course of their investigations, EROs will often seek information from landlords, neighbours, teachers, and others who may know something of the circumstances of the recipient under investigation. A copy of a routine form letter, which was being mailed out to make inquiries about a neighbour, was provided to us. The letter explains, "we are conducting inquiries relating to an Ontario Works recipient and require information with respect to the above address. If you have any information regarding the tenants of the above address i.e.: number of occupants, sexes, names, employment, length of residence, or any other relevant information please do not hesitate to contact me. Your anonymity can be assured in responding to this inquiry." It is hard to imagine that a person receiving such a letter would not suspect wrongdoing on the part of the neighbour about whom the information is requested.

A fraud investigation will often include a meeting with the person who is the subject of the investigation. As noted earlier, an ERO has the power to compel information and material from the person who is the subject of the investigation. Our research indicates that those under investigation are not warned that statements they provide may be used against them in a criminal proceeding, notwithstanding that evidence so gathered is regularly used against recipients in subsequent criminal prosecutions. Certainly, one characterization of these meetings is that they are solely for the purpose of determining eligibility and are thus integrally connected to the enforcement of a regulatory regime. However, a competing - and compelling - characterization is that they often take the form of *de facto* criminal investigations and, as such, require Charter warnings and limitations on the use of evidence so gathered.¹⁵ While the issue of when a regulatory investigation becomes a de facto criminal investigation has received significant attention in the income tax context, it has received very little critical interrogation within the welfare context. 16 This omission is troubling because it appears to be not at all uncommon for police and Crown attorneys to rely upon nothing but the investigations undertaken by EROs in their prosecution of persons accused of welfare fraud. Indeed, there was evidence given at the Kimberly Rogers inquest about police officers training EROs on how to put together their investigative files so that additional investigative work by the police would be minimized should the files be referred to the police.¹⁷ Given the number of fraud investigations and the statutory power of EROs to compel information, there is a very good argument that the Charter rights of recipients – particularly the right in section 7 to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (among these principles, the right against self-incrimination) and the recipients' reasonable expectation of privacy protected by section 8 – are regularly being violated.

A related concern articulated by respondents in our interviews was that recipients under investigation who are called in for a meeting with an ERO frequently do not fully understand the import of the interview, nor do they comprehend that their statements may subsequently be used against them in a fraud prosecution. In the experience of our respondents, the fear of a possible criminal charge, especially within a broad context where "fraud" language is pervasive and recipients are constantly dehumanized, forces recipients to agree all too readily to administrative sanctions such as terminations or overpayments in hopes of avoiding a criminal charge when they are accused (even inferentially) of fraud. Respondents in our interviews also expressed concern that the threat of the government withholding monthly benefit cheques is sometimes used to extract admissions, particularly of overpayments. They described instances where their clients, desperate for their monthly cheques, simply signed documents – including statutory declarations – without understanding the content of the document or the implications of signing it. As Grainne McKeever (1999, 268) suggests in relation to proposed British social security reforms, suspicion of fraud can be readily "played off against a fear of court proceedings" and against a fear of the termination of benefits. Recipients are also understandably reluctant to complain about mistreatment during investigations. They are, after all, in a position of extreme vulnerability in their interactions with agents of the administrative regime, who can cut them off benefits, assess overpayments, and refer matters to the police. Rocking the boat almost always promises to be more trouble than it is worth.

A further significant development in the arsenal of measures to combat welfare fraud was the introduction of "enhanced verification" and later "consolidated verification procedures" (CVPs). CVPs have changed both the frequency and nature of file reviews (Herd and Mitchell 2002). Previously, reviews were time based, with a review occurring usually every twelve months. In the CVP environment, priority-ranking factors, based upon an assumed risk of fraud, are used to determine when a review will occur. Highrisk factors include high accommodation costs (equal to or greater than 80 percent of the recipient's net revenue, a common occurrence for those in receipt of assistance) and the receipt of social assistance for more than thirty-six months. Medium-risk factors include a social insurance number beginning with a "9" (thus indicating a non-citizen who has yet to secure permanent residence status but who has a work permit), accommodation costs equal to 75-79 percent of net revenue, and the receipt of social assistance for between twenty-four and thirty-five months (ibid., 34-37).

The amount of information required to be provided at the time of applying and during regular or risk-determined reviews can be overwhelming. Among other things, applicants are required to provide documentation to

verify birth and marital status, child or spousal support obligations, immigration status, and any immigration sponsorship, income, property, debts, receivables, funds in trust, boarder(s), accommodation, school attendance for dependent children, employment, and education status (ibid., 38-39). Information must be provided not only at the time of applying but also on an ongoing basis. The sweeping consent to the collection and release of information that must be signed as a pre-condition to the receipt of benefits, the extensive and ongoing reporting requirements, together with a host of information-sharing agreements negotiated with a range of provincial and federal departments (including the Ontario Ministry of Training, Colleges and Universities, social services ministries in other provinces and territories, and the federal Ministry of Immigration and Citizenship), permit the ministry to gather and share vast amounts of information about those in receipt of social assistance. As the earlier statistics reveal, these information-sharing arrangements generate a substantial number of fraud investigations.

Regulation 134/98 also authorizes random "home visits," with or without notice, to verify eligibility. Although consent is required before entering the home, the withholding of consent may result in termination of benefits or denial of eligibility unless the director is satisfied that there was a reasonable basis to withhold the consent. Given the coercive power of the state, backed by the threat of the denial of benefits, it is hard to imagine that consent is being volitionally given. Home visits are restricted to observing what is in "plain view" and, according to the policy directive on home visits, are not to be used for the purpose of investigating a specific participant because of a fraud suspicion. 18 Policy Directive 12 on Home Visits does provide, however, that CVP criteria may be "helpful in determining where random home visits are required" and goes on to note that a home visit can be made with a participant because she or he randomly falls within a specific group. 19 Given that CVP criteria are red flags for fraud and that these may be used to identify "groups" where home visits may be required, there is surely a good argument that home visits are linked through the policy to fraud investigations and are not, in fact, purely random.

In addition to EROs, the public is also charged with a responsibility – a civic duty - to engage in the project of monitoring and scrutinizing welfare recipients. As noted earlier, the public has been told that welfare fraud is rampant and that people not genuinely in need are taking money from those genuinely in need. One way to discharge this civic duty is to call a toll-free welfare fraud hotline (6,527 people called this number in 2001-2, down from 9,348 in 2000-1), and the toll-free line continues to be in operation (Ministry of Community, Family and Children's Services 2003; Ministry of Community and Social Services 2009). Introducing the welfare fraud hotline on 2 October 1995, then minister of community and social services, David Tsubouchi, proclaimed in the House of Commons that "welfare fraud is a problem that

hurts the most vulnerable people in our society. Every cent that is paid to the wrong person through fraud is help taken from the needy." He noted that experience had shown hotlines to be an effective device for ensuring that this does not happen and that they would provide a projected savings of \$25 million per year, and he invited the people of Ontario to call 1-800-394-STOP to help "stop fraud and to protect the system for people who really need help."20 With respect to virtually no other crime that we can identify has there been such a vigorous effort to bring the public so actively into the task of surveillance and denunciation.

A very significant development in the welfare fraud control regime was the introduction of additional penalties upon conviction. The government first introduced a three-month ban on the receipt of welfare for a first conviction, six months for subsequent convictions, and, later, a lifetime ban (for crimes committed after 1 April 2000).²¹ Thus, upon conviction for welfare fraud, one was automatically banned for life from the receipt of social assistance. As noted earlier, these additional and severe penalties were justified by the government as being essential in its battle against welfare fraud. While the sentencing options available under the Criminal Code were adequate for other crimes, harsher penalties were necessary to deter welfare fraud.²² In this manner, welfare fraud was constructed as a particularly intransigent and harmful crime. The constitutionality of the lifetime ban was under challenge when the newly elected Liberal government announced its repeal in December 2003. Yet accompanying the repeal of the lifetime ban was a promise to get tough on welfare fraud and the introduction of the revised policy directive noted earlier, mandating referrals to the police whenever there was reason to suspect the intent to commit fraud.²³

Other Features of the Reformed Character of Ontario's Social Assistance System

In order to fully understand how welfare fraud is presently constituted, it is useful to locate it within a much wider shift that has occurred in how poor people and poverty are positioned within the character of the reformed welfare state and how citizenship has been reconfigured. Our review of welfare reform in Ontario reveals that the ideal of the poor having an entitlement to assistance based on need and by virtue of their citizenship has now been widely diminished and has been replaced with a construction of poor people as a public burden who should themselves be held responsible, and personally blamed, for their circumstances. While the provision of social assistance has always been a contested role of the state, there has been a significant hardening of the view that receiving social assistance amounts to getting "something for nothing" by people who are lazy and simply do not want to be responsible for themselves and their families. Far too many employable men and women are being paid to "sit home and do nothing"

(in the words of former Ontario premier Mike Harris), and the honest, hardworking taxpayer who is footing the bill has every right to resent this use of his hard-earned dollars.24

In the place of need-based entitlement, or any principle stating the importance of providing an adequate level of support to the disadvantaged, is a narrow view of the entrepreneurial citizen, who, as defined by the OWA, is self-reliant, responsible, and accountable to the taxpayers of Ontario. The act's purpose is expressly identified as the establishment of a program that (1) recognizes individual responsibility and promotes self-reliance through employment; (2) provides temporary financial assistance to those most in need while they satisfy obligations to become and stay employed; (3) effectively serves people needing assistance; and (4) is accountable to the taxpayers of Ontario. This emphasis upon self-reliance and employment obligations reflects a profound departure from the principle of entitlement to state support that, while never fully realized in practice, nevertheless formed an articulated basis for both provincial and federal legislation. Indeed, only a decade earlier, a report on social assistance commissioned by the government of Ontario identified a rights-based approach as the defining feature of a social assistance regime and affirmed that "all members of the community have a presumptive right to social assistance based on need ... The support that society provides is not to be understood as a gift or privilege, nor as charity to the disadvantaged. Rather, it represents a right to which all members of society are entitled" (Social Assistance Review Committee 1988, 10-11). In stark contrast, Janet Ecker, then minister of community and social services, when introducing the SARA in 1997, identified "selfsufficiency [as] the overriding goal of social assistance" (Ontario, Legislative Assembly, 26 November 1997). What had long been regarded as a crucial safety net for citizens temporarily or permanently cast off by a market economy was being methodically unravelled.

With the principle of entitlement removed, the reforms constructed a form of contractualism between those on social assistance and the "honest taxpayer," one enforced through the logic of a narrow economic rationalism. Beyond the statement of purpose itself, the introduction of "workfare" (a term that tellingly signals *neither* employment nor social assistance) is the most dramatic tool that enforces this contractualism between the taxpayer and those on social assistance, one that ensures that no one will get "something for nothing." Adult beneficiaries are required to enter into a "participation agreement" with the ministry, spelling out the employment assistance activities that they will undertake. These activities may include anything from job searches, to literacy or substance addiction screening, to job skills training. In addition, every recipient has the obligation to make reasonable efforts to accept and maintain any employment "for which he or she is physically capable"; if employed part-time, to find full-time employment; and if employed and still eligible for assistance, to seek, accept, and maintain employment that would increase his or her income.²⁵ The failure to comply or to make reasonable efforts will result in the cancellation of benefits, first for a three-month period and subsequently for six months.

Workfare has been justified by a discourse that portrays the poor as lacking a proper work ethic and who, for their own good, must be mandated to work as a condition of receiving benefits. The explanation for poverty in this conceptualization is purely individualistic: individuals are poor because they are lazy, dependent, undisciplined, and lack a work ethic. From a neo-liberal vantage point, welfare benefits undermine performance by blunting incentives to work. People choose welfare over work or are so embedded in a culture of dependency that they cannot even appreciate that paid employment is an option. From this perspective, welfare represents a moral hazard, enticing people away from paid employment rather than being a moral opportunity enabling some to escape exploitative work or abusive husbands or to survive with some modicum of dignity when rejected by the market economy.

Consistent with this shift from entitlement to contractualism, and the delimited role of the state reflected therein, benefit rates were dramatically cut and eligibility criteria tightened. Almost immediately upon its election, the Conservative government cut benefit rates by 21.6 percent in October 1995, and no increases were introduced during its term in office. Subsequently, a Liberal government instituted a de minimus 3 percent increase in 2004 and a further 2 percent increase in 2006. Current benefit levels are manifestly inadequate: a single person receives 34 percent of the Statistics Canada low-income cut-off; a single parent with one child receives 56 percent (National Council of Welfare 2006).²⁶ The diminishment of welfare rates to a level that places recipients (many of them single mothers with children) in conditions of abject poverty is, as with workfare, justified by a political discourse that portrays individuals on social assistance as free-riders, pathologically dependent upon government handouts, and lacking the motivation to work. This logic maintains that lowering benefit rates sharpens the spur of poverty and propels people into the labour market.

In addition to the cuts in benefit levels, categories of the "deserving poor" were substantially redrawn. The definition of "disability" within the ODSPA has made it more difficult to qualify for disability benefits, which are somewhat more generous (although still inadequate) and which are not attached to mandated employment readiness activities (Fraser, Wilkey, and Frenschkowski 2003). While the prior legislation had grouped single parents (overwhelmingly mothers) with those with disabilities – demarcating them from the able-bodied and temporarily unemployed – the reforms shifted single

mothers into the broad category of the temporarily unemployed and ablebodied. In other words, single mothers were recast as workers, not mothers/ parents.²⁷ Presently in Ontario, single mothers are exempted from the workfare requirements until their youngest child reaches school age. In some jurisdictions, the age is as young as three months (Smith et al. 2000). The very substantial numbers of single parents rearing children on social assistance (in 2003, 59 percent of Ontario Works recipients were women, and women constituted 94 percent of single parents on Ontario Works benefits) are, in the words of the former premier of Ontario, "doing nothing." The messages are very clear: a job, any job, is a more important contribution than rearing children; raising children with an income substantially below the poverty line is a cakewalk; and child rearing is not a socially valued activity.²⁸

This shift away from state responsibility has simultaneously encompassed a renewed emphasis upon the obligations of family. In the context of the reforms to welfare, this shift has been propelled primarily through the introduction of an expansive definition of "spouse." The impact of this definition has been to disqualify very significant numbers of women, largely single mothers, from eligibility for state economic support and has forced them into relationships of economic dependence upon men who frequently have, at law, no corresponding obligation to support them.

These various reforms have fundamentally restructured the experience of living day in and day out on social assistance benefits. While few recipients are actually convicted of criminal fraud, our research makes clear that the reforms have, through a variety of processes, criminalized virtually all those in receipt of social assistance or, put differently, effectively criminalized the receipt of social assistance itself. It is to an examination of these processes that we now turn by exploring how the social assistance regime structures, orders, and regulates the lives of those dependent upon it.

Processes of Criminalization: Manufacturing Fraud

As our earlier discussion indicated, government statistics released in the Welfare Fraud Control Reports during the period the Conservative government was in office characterized rule violations as "fraud." While the current Liberal government has not, to our knowledge, released publicly any statistics on welfare fraud, it is abundantly clear from our research that the characterization of rule violations as fraud continues to pervade the administration of the social assistance system. Moreover, we have found significant evidence of the conflation of rule violation and fraud even within the criminal justice system.

The system upon which recipients must rely to meet their needs is extraordinarily complex. It has been variously described as "Kafkaesque" or "fiendishly difficult" (both of these descriptors from judges) and "mired in a labyrinth of rules" (R. v. Maldonado 1998; Matthews 2004). It is extremely

difficult to access timely, accurate information about the roughly 800 statutory and regulatory provisions (or the rules of the system) that create both obligations and entitlements. Indeed, it can be difficult on some matters to get a consistent answer from a single welfare office. The rules are not only voluminous but also often counter-intuitive and in constant flux – what may be permissible today may not be tomorrow. Moreover, as noted earlier, the rules themselves are not consistently applied, and significant variations exist from one municipality to another.

In the following discussion, we consider several of the particular rules governing the two areas of social conduct that are most scrupulously policed by the welfare system: the acquisition of income and the formation of an intimate relationship. This examination illustrates the complexity of the system and the near impossibility of absolute compliance. Indeed, it reveals rule violations as a structured and endemic feature of the system itself. When these rule violations are routinely and incorrectly characterized as "fraud" – as in the Welfare Fraud Control Reports and, more broadly, in the day-to-day operation of the welfare system – "fraud" is institutionally manufactured as an endemic feature of the social assistance regime. The misapplication of the term "fraud" is not, however, simply a bureaucratic by-product of a poorly administered system. Rather, the sleight of hand that has created "welfare fraud" has been, we argue, strategically deployed to help construct a phenomenon of widespread criminality to facilitate the state's retreat from social provision.

We begin with a consideration of the criminal construct of fraud before turning to the structures that regulate "income" and "spouses," precisely because an examination of the criminal construct of fraud helps to make evident the significant gap between criminal fraud and "welfare fraud" as commonly invoked. "Fraud" is defined by section 380 of the Criminal Code, which prohibits the defrauding of the public or any person of any property, money, or valuable security or any service by deceit, falsehood, or other fraudulent means.²⁹ The Supreme Court of Canada has identified the actus reus of fraud as containing two elements: the prohibited act (of "deceit, falsehood or other fraudulent means") and deprivation caused by the prohibited act. While "deceit, falsehood and fraudulent means" encompass three separate heads, the real core or nub of the offence of fraud is dishonesty (Ewart 1986; Nightingale 1996). Whether an act is appropriately characterized as dishonest is to be determined not by reference to the accused's subjective mental state (whether the accused subjectively believed the act in question to be dishonest) but, rather, whether the reasonable person would stigmatize the act in question as such. While "dishonesty" is difficult to define with precision, it connotes an underhanded design, or behaviour, that is discreditable and perhaps unscrupulous. Mere negligence will not suffice (R. v. Olan 1978).

In 1993, the Supreme Court of Canada released two significant decisions on the mens rea of fraud, namely R. v. Théroux (1993) and R. v. Zlatic (1993). The Court carefully delineated two elements of the *mens rea* of the offence of "fraud:" subjective knowledge of the prohibited act (the act that is appropriately stigmatized as dishonest, based upon a reasonableness standard) and subjective knowledge that the prohibited act could have the consequence of depriving another. There must be a subjective awareness that undertaking the prohibited act (of deceit, falsehood, or other dishonest means) could cause deprivation. In Théroux, Justice John Sopinka and then Chief Justice Antonio Lamer, while concurring with the majority in the outcome, penned a separate judgment to draw attention to an important distinction relevant to the legal assessment of fraud. In particular, their decision underlines the difference between an accused who honestly, but mistakenly, believes her act to be honest (that is, where viewed objectively the act would be characterized as dishonest, although the accused believes the act in question not to be dishonest) and an accused who believes in a set of facts (and this belief is accepted by the trier of fact) that would deprive the act of its dishonest character (in other words, where viewed objectively the act would not be objectively characterized as dishonest given the belief in these facts). The importance of this distinction is clearly illustrated by the case of R. v. Maldonado (1998) discussed in the next section.

Regulating Income

Various provisions of the OWA and regulations require beneficiaries to provide ongoing information with respect to the "receipt or anticipated receipt of income." The failure to do so shall, administratively, result in the termination of benefits as well as in the possible assessment of an overpayment.³⁰ It may also give rise to an allegation of fraud. However, what is "income," and when might the failure to report it give rise to an allegation of fraud? Pursuant to the regulations, "income" is determined by adding "all payments of any nature paid to or on behalf of or for the benefit of every member of the benefit unit." This calculation is to include the "monetary value of items and services" as well as "amounts deemed available" (such as income from boarders and from support obligations assumed when a family class member is sponsored for immigration).31 The regulations then provide a list of payments that are to be exempted. This list includes donations from religious or charitable organizations, portions of loans approved by the administrator for very specific purposes, certain provincial and federal payments, and casual gifts or casual payments of small value. Loans – except those exempted for limited purposes – and cash advances (as bizarre as it might seem) from a credit card or line of credit are considered income and, as such, result in a dollar-for-dollar deduction in the amount of benefits payable.

The rules regulating "income" are complex, voluminous, and frequently counter-intuitive. Not surprisingly, situations will arise where "income" (as defined by the governing legislation) is not reported simply because the recipient, although aware of the general obligation to report income, has no inkling that, for example, a food basket from her mother would be included in the definition of income. In an analysis of fraud, these are cases where, if the testimony of the accused is accepted, the mens rea for fraud has not been made out because there has been no intent to deprive (her lack of disclosure arises not from her intention to deprive the ministry but, rather, from the reality that she has no idea that a food basket is considered income and is thus to be disclosed). Moreover, as Justices Sopinka and Lamer highlighted in *Théroux*, if we accept the accused's testimony – her belief that the food basket does not constitute income - then we are also driven to the conclusion that, viewed objectively, the act in question is not dishonest. Thus, the actus reus for fraud is also not made out.

The case of R. v. Maldonado (1998), as suggested earlier, is a case in point.³² Mr. Maldonado was in receipt of General Welfare Assistance (the precursor to Ontario Works benefits). He had been told that he must report any change in income. When his wife obtained part-time employment, it was dutifully reported. However, when he began attending school and obtained a student loan, he did not report the loan. Subsequently, when the ministry learned that Mr. Maldonado was in receipt of a loan, he was charged with fraud. His evidence at trial was that he had not considered a loan to be income, so he had never contemplated that the student loan needed to be reported. He did not know that the regulations, in defining "income," include loans and that, therefore, the loan ought to have been reported. Nor did he know that, had it been reported, a reduction in his benefits would have followed. In light of the Supreme Court of Canada's jurisprudence, it will not matter if Mr. Maldonado subjectively believed his actions to be honest. Rather, the question is can his actions be appropriately stigmatized as being dishonest – not merely negligent but of an underhanded or unscrupulous design? To invoke the query of Justices Sopinka and Lamer, is there a belief by the accused in a set of facts (a loan is not income and need not be reported) that would deprive the act of its dishonest character, such that the actus reus for fraud is thereby absent? The answer given by Justice Brian Weagant in Maldonado is affirmative. Indeed, he is loath to characterize Mr. Maldonado's actions as even negligent. When one considers Mr. Maldonado's state of mind, while he did have knowledge of the prohibited act (the non-disclosure of the loan), his belief that a loan is not income and, hence, not reportable deprived the act of its dishonest character. Moreover, given his belief in this set of facts, he lacked the subjective knowledge that the non-reporting could have as a consequence the deprivation of another. Justice Weagant concludes:

Not only do I have a doubt that Mr. Maldonado did not have the subjective knowledge of the possibility of deprivation, I am quite sure he did not ... I would not be surprised if Mr. Maldonado, even if given a copy of the Regulations to read for himself, were unable to glean the true meaning of "income" or "change of circumstances." The Regulations are extremely complicated and difficult to read ... My own experience of wading through the Regulations leads me to believe their inaccessibility plays a major role in the scenario under consideration. The Regulations governing the question of entitlement are fiendishly difficult to understand ... The sense or structure of the policy which might help a person on welfare to determine when he or she is breaking the law, is not apparent on the face of the Regulation. Why would a student loan be income, but a grant not? At first blush, one would think the opposite would be true ... If during a one month period a welfare recipient took a loan from a friend on a grocery shopping trip and repaid the loan to the friend when they reach the recipient's place of residence the very same day, the welfare benefit for that month should be proportionately less to reflect the amount of the loan. Yet no person with an ounce of sense would think that he or she would be obligated to report the amount of the loan. What is Kafkaesque about this scheme, to use Justice Campbell's word, is that the person who does not report the short-term loan from a friend might very well be prosecuted for fraud in the Province of Ontario ... Surely this is an example of something that Madame Justice McLachlin would put in the category of behaviour that does not warrant criminalization. (Ibid., paras. 40, 41, and 43)33

Our research suggests, however, that the careful reasoning employed by Justice Weagant is very much the exception and that "fraud" is routinely the characterization given to rule violations by caseworkers, EROs, police, and, indeed, judges, irrespective of whether the necessary intent is present and, on occasion, irrespective of whether the actus reus is present (in addition to the Maldonado situation, there are also instances of alleged fraud where there has been no deprivation as defined by the Supreme Court of Canada in R. v. Olan [1978]). 34 Pervasively within the social assistance system, the assertion is made that the accused's lack of knowledge of the "fiendishly difficult" requirements of welfare law and regulations is irrelevant to the question of whether a "fraud" has been committed, and the principle of "ignorance of the law is no defence" is invoked in support. The line of reasoning employed is that one is assumed to know the law and that ignorance of the law is no excuse: hence, a lack of knowledge of the detailed requirements of the social assistance regime is irrelevant to the determination of criminal liability. One respondent in our interviews described to us how Ontario Works caseworkers in his district always rely on this line of reasoning: "You're required to disclose everything (the regulations require, for example, the reporting of changes in circumstances and of income), and if you don't you're guilty of fraud; ignorance of the law is no excuse – everyone is deemed to know the law, therefore you are guilty." This respondent went on to observe that "if anyone was genuinely trying to assess if this person intended to defraud the government that would be a very different case than the ones we see presented." Another respondent noted that even within the criminal justice system "the fact that the accused couldn't understand the tome [the complex regulations] doesn't get you to first base."

However, this reasoning reflects a profound distortion of the principle being invoked. One is not claiming that ignorance of the law of fraud is a defence but, rather, that a mistake of fact – in this case, the lack of knowledge or understanding of the underlying rules of the administrative regime - negates mens rea (one did not intend deprivation as a consequence of one's actions) and potentially the actus reus, since the quality of the act in issue is one that is not appropriately stigmatized as dishonest. By contrast, in our review of the literature on income tax evasion - which is also a complex administrative regime – we found not a single instance where this principle was distorted. To the contrary, it is routinely accepted within both the case law and the secondary literature that a lack of knowledge of the requirements of the income tax regime will negate *mens rea*. ³⁵ Sophisticated business people who often have access to a panoply of expert advisors are regularly forgiven for not understanding the complexities of the income-reporting requirements for tax purposes. Yet, by contrast, welfare recipients – most of whom have absolutely no access to expert advice - are held to an impossibly high standard – perfect knowledge of a Kafkaesque labyrinth of rules.

Another very problematic dimension of the income rules relates to "casual gifts or casual payments of small value." Policy Directive 16 on Income provides that

applicants or participants may receive occasional financial help from relatives and friends while in receipt of assistance. Casual gifts and payments of small value are normally exempt from income. However, any income from a person who has an obligation to support the applicant or participant will be deducted at 100 percent unless the gift or payment is tied to a special occasion such as Christmas or a birthday.

Delivery agents may exercise their discretion when determining whether or not gifts or casual payments are chargeable as income. There are occasions where an applicant or participant may be faced with an immediate financial crisis. Help may be obtained from family, friends, or another third party. When making a determination, the delivery agent must consider the source, amount and frequency of the gift or casual payment and the opportunity to resolve the crisis. Exercising discretion should be in favour of applicants or participants to assist them to manage their financial circumstances ...

Examples of casual gifts and payments of small value may include items such as clothing, meals at family members' homes and the occasional purchase of items such as food. Gifts tied to a special occasion are generally exempt. Casual payments are considered infrequent payments. Continuous payments of small value are non-chargeable up to six months. After six months they are no longer considered casual and therefore are considered income to be charged at 100 percent.36

One respondent described the case of a client on Ontario Works who, during a home visit, opened her refrigerator to show her Ontario Works caseworker that her son had given her food. Her worker advised her, kindly, that in the future she should not open the refrigerator to reveal the contents and source of the food.³⁷ The respondent who shared this story noted that this was a compassionate worker and that other workers in the region would, as she described it, "pounce" on this, possibly assigning a dollar value, assessing an overpayment, terminating benefits for failure to disclose "income," and/ or launching an investigation for fraud.

Member of the legislature Deb Matthews (2004, 28) reports a case described to her where this regulation was used to assign a value to the leftovers from Sunday dinner at a parent's house and deducted from the social assistance cheque. In addition, one of the persons interviewed by Herd and Mitchell (2002, 48) described the following situation:

[I had] a form of what was considered a gift that had to be reported. Shoes, and various items like that, you were supposed to report at dollar value. You were allowed a birthday gift and a gift at Christmas. One of the things that I always remembered on that list was that if you were invited to somebody's house on a regular basis for a meal, that meal is a reportable item. Like if every Sunday you went to your Mom's for dinner, you were supposed to say to them, "I had dinner at my Mother's 3 Sundays this month and the value of the meal was \$8.95 or whatever." If you got taken to a restaurant on a regular basis, that was a reportable item ... One of the few things that was excluded was gifts from the church, like from the food bank, but you were allowed one visit a month and no more than a certain dollar value.

One of the respondents we interviewed described a situation where parents of a social assistance recipient, after reading about some welfare fraud cases in the newspaper, came into the office to inquire whether they had committed fraud because they had been giving their daughter money each month to help her get by.

The complexity of this regulation, together with its invocation to assign a dollar value to leftovers, meals, groceries, or other needed items (often provided compassionately by caring friends and family), means that many recipients simply have no idea that the reporting obligation is triggered because they are in receipt of "income" as defined by the regulations. One respondent described a client, struggling to survive, who undertook odd jobs in exchange for meals or a small supply of groceries. This respondent suggested that it would never have crossed her client's mind that the meals or groceries he received may have been characterized as a "casual gift or payment of small value" that was reportable and that could potentially have been deducted from his cheque or have led to the termination of benefits or to a fraud investigation.

Our respondents indicated that in their experience casual gifts or payments of small value generally do not give rise to fraud charges but, rather, more commonly lead to the assessment of overpayment charges and to the termination of benefits. However, one respondent reported that since the change to Policy Directive 45 on Controlling Fraud in January 2004, which requires referrals to the police where sufficient evidence exists to suspect intent to commit fraud, casual gifts or small payments are being referred to the police. Others observed that such cases may be referred, particularly where the payments or gifts continue beyond the six-month time period and become automatically deductible.

Regulating Intimate Relationships

The second arena of intense surveillance and regulation is the formation of intimate relationships. A cursory historical overview reveals that the intimate relationships of single women in receipt of social assistance have long been subject to intense moral scrutiny, and the failure to report the details of such relationships is a common ground for fraud charges. In Ontario, in the period preceding 1987, a single recipient risked having her benefits (the regime impacts almost exclusively upon women) terminated and a possible charge of fraud if a conclusion was made that she was living in a "marriagelike" relationship that she had not disclosed. Needless to say, the concept of a marriage-like relationship was ambiguous, and determinations of the nature of the relationship in issue frequently turned on evidence of sexual intimacy (Little 1998). The practices of welfare officials in enforcing the man-in-the-house rules were vigorously and thoroughly critiqued by feminists and equality activists because such practices not only ignored women's privacy interests but also forced women into relationships of economic dependence with men who had, at law, no obligation to support them. In 1987, Ontario dramatically altered the definition of "spouse" for welfare purposes so that it would largely track the definition in provincial family law legislation (the Family Law Act). 38 Importantly, this change meant that couples could live together for three years before they would be deemed to be spouses for social assistance purposes and before legal obligations of support would arise. This change was incredibly important for women because

it meant that they could continue to receive welfare benefits in their own right as "singles" or as "sole support parents." Significantly, it also meant that, for this period of time, they could enter into intimate relationships without the fear that the formation of the relationship could give rise to a fraud investigation and a possible criminal charge.

Even prior to the introduction of the SARA, the Conservative government acted in October 1995 to amend the regulatory definition of "spouse" for social assistance purposes. This definition (a definition that has been modified on a handful of occasions subsequently) treated persons of the opposite sex presumptively as spouses if they shared a common residence. As such, the definition tracked much more closely the pre-1987 definition. The new definition resulted in 10,013 people being cut off social assistance. Of these, 89 percent were women, and 76 percent were single mothers, presuming that the men in their lives, who had no legal obligation to support them, would in fact do so (Falkiner et al. v. Ontario (Ministry of Community and Social Services) 2002, para. 77; Falkiner et al. v. Ontario (Ministry of Community and Social Services) 2000, para. 82).

The definition of "spouse" that was introduced in 1995 was constitutionally challenged in the case of Falkiner et al. v. Ontario (Ministry of Community and Social Services) (2000 and 2002). Significantly, on appeal the Ontario Court of Appeal found the definition to be overly broad – capturing relationships that do not resemble marriage-like relationships – and deeply ambiguous (since adjudicative boards had come to different findings regarding whether the degree of financial interdependence had to be more than trivial). The government of Ontario (then a Liberal government) abandoned its appeal to the Supreme Court of Canada in October 2004 and introduced a new definition, which apart from the introduction of a threemonth "grace period" (a far cry from the earlier three-year period) largely mirrored its predecessor. Currently, "spouses," for social assistance purposes, are any two persons who reside in the same dwelling (for three months), if "the extent of the social and familial aspects of the relationship between the two persons is consistent with cohabitation" and "the extent of the financial support provided by one person to the other or the degree of financial interdependence between the two persons is consistent with cohabitation."39

The expanded definition of "spouse" – namely, the circumstances in which it is assumed that financial support is being provided – has shifted public responsibility to the private realm, and, in so doing, deepened women's vulnerability not only to economic marginalization but also to domestic violence, by limiting their options to exit abusive relationships (Mosher, Evans, and Little 2004). The message to women is clear: get a man, any man, and keep him or get a job, any job, and keep it. While Ontario has yet to adopt the same extremes of marriage promotion as many American jurisdictions, there

is no doubt that within Ontario's welfare regime the formation of spousal relationships is valued and encouraged.⁴⁰

Yet, while valued and encouraged, the formation of spousal relationships simultaneously plays a significant role in the deployment of the welfare fraud regime. It is telling to observe that, in 1981-82, 84 percent of welfare fraud charges were based upon an allegation of an undeclared spouse, resulting in 200 charges, 161 convictions, and incarceration in 42 percent of those cases. Both Anne Marie Gutierrez (1987, 17 and 28) and the Canadian Research Institute for Law and the Family (1987, 17), in their background reports for the Social Assistance Review Committee, observed that the definition of "spouse" introduced in 1987 (tracking the Family Law Act) resulted in dramatic reductions to these very high rates. The creation of a presumption of spousal status upon co-residency in 1995 signalled a renewed state interest in monitoring and criminalizing poor women's relationships with men.

Policy Directive 19 on Co-Residency lists a variety of factors to consider when determining whether co-residency exists, among them a statement from a landlord that the recipient lives with another person or that another person is listed on the lease, driver's licence history, employment records, or credit checks. 41 There is no formula that weighs these various factors to determine whether a recipient is "co-residing." Not surprisingly, then, there is little consistency – even at the appeal level before the Social Benefits Tribunal – as to what combination of factors will lead to a determination of co-residency. Respondents pointed out to us that in some cases a determination of coresidency is made on very little evidence. One respondent told us of a case in which a finding of co-residency was made, and upheld by the tribunal, on the basis of a common address on their respective drivers' licences. Respondents also observed that many of the factors relied upon as indicative of co-residency are not properly evaluated in the context of the lives of persons who are living in poverty. For example, frequently low-income persons are unable to secure a lease or obtain credit unless a second person co-signs the legal document. A friend, a neighbour, or a current or former boyfriend are among those to whom a recipient might turn to take on this role. So, too, low-income people without a fixed address may use the address of a friend or acquaintance when applying for employment, a licence, or any number of other things for which an address is required. These reflect survival strategies for low-income people but are often interpreted out of context and assumed to be evidence of co-residency.

In addition to the consideration of co-residency, a determination also must be made as to whether the persons in issue are "spouses." ⁴² In some instances, this question is answered readily if, for example, there is an existing obligation of support under the Family Law Act. However, in other cases, the determination will turn on a consideration of financial, social, and familial

factors. While here too the policy lists a host of factors to be considered, there is again no formula that permits any predictability as to the circumstances in which a "spousal" determination will be made. And, as with determinations of co-residency, decisions regarding spousal status are, as one respondent described, "all over the map." Indeed, as noted earlier, the vagueness and ambiguity of the definition were bases on which the Ontario Court of Appeal struck the definition down as being unconstitutional (Falkiner et al. v. Ontario (Ministry of Community and Social Services) 2002). Understandably, then, recipients are frequently uncertain as to when and whether they may be "spouses" or "co-residing."

Imagine, for a moment, the circumstances of a single mother forming a new, heterosexual relationship within this regime where it is difficult, if not impossible, for her – or anyone else for that matter – to predict when she becomes a "co-residing spouse." She agrees to go out on the occasional date. Over the next several months, he begins to spend a great deal of time at her home and shares in many of the household tasks. They now regularly go out together, and, consequently, many people in their neighbourhood see them together. He may move some of his clothing into her place, and he spends a few nights each week there. At what point is she no longer a single person but "co-residing" with her "spouse"? And when does her obligation under the regulations to report a "change in circumstances" arise - with each and every turn of the relationship – and in what circumstances is she guilty of fraud? When can it be established, beyond a reasonable doubt, that she has engaged in the prohibited act of deceiving Ontario Works about the "true" nature of the relationship – that she is co-residing with a spouse – and that she has done so with the intent to deprive?

One common response to the first two questions (the third is almost never asked since the failure to report a detail of the relationship is assumed to constitute fraud) is to say that she does not have to make the determination of whether she is co-residing with a spouse but, rather, leave it up to Ontario Works to decide. Her only obligation is to report any change in circumstances, and then Ontario Works will decide if the change in circumstances renders her a co-residing spouse.⁴³ Indeed, this approach seems to underlie many cases where fraud charges are prosecuted, based again on the fundamental misunderstanding that the failure to report any information that Ontario Works now says it ought to have constitutes fraud. However, neither the statute nor the regulations require the reporting of all changes in circumstances but, rather, only the reporting of changes in circumstances relevant to eligibility. The rights and responsibilities form, for example, states that "you are responsible for following the rules of the Ontario Works program, including honest reporting of all circumstances that affect eligibility" (emphasis added). Similarly, in the application form, the applicant acknowledges that

I/we will notify the Administrator, the Director, or his/her representative as the case may be, of any change of relevant circumstances of any beneficiary of the allowance/assistance to be provided, including any change in circumstances pertaining to assets, income, living arrangements and my/our participation in Ontario Works activity as set out in the participation agreement. (Emphasis added)

However, we have come full circle and must now ask what is relevant to eligibility? Moreover, consider the implications for women's privacy, dignity, and autonomy if the requirement was that a recipient had to report every imaginable change in circumstance. Is a woman required to report each time her boyfriend visits, each time they go out together, each time he cares for her children, each time they have sex, each time he buys her coffee, each time he helps out around the house, and each time he spends a night? And what are the implications for women in receipt of assistance when the mere failure to report any of these circumstances may lead to an allegation of fraud and the termination of benefits? The obvious implication is that the formation of an intimate relationship – something that society generally, and the welfare system specifically, encourages if not valorizes – becomes an object of surveillance for potential criminal charges. The inquisitiveness of front line workers, the policing powers of EROs, and the wide net of intrusive surveillance cast by measures such as the snitch lines are deployed to scrutinize the intimate lives of women in the search of "criminal" misconduct. The stereotyping of poor, single, and especially racialized women makes them particularly vulnerable to this kind of scrutiny. As Dee Cook (1987) argues, single mothers on benefits are seen to have transgressed the borders of acceptable behaviour - they are neither good mothers, good wives, good workers, nor good consumers. Their intimate relationships are regarded with acute interest, suspicion, and often open hostility. They are, in fact, everybody's business. And it is an astoundingly treacherous business. Behaviour that is encouraged and socially valorized simultaneously attracts intense surveillance and criminal suspicion. On a flimsy evidential basis, one might be found to be residing with a spouse and also accused of fraud for not having disclosed this detail. For women on welfare, the border between positively valued social actor doing the right thing by finding a man and criminal transgressor is often extremely difficult to discern with any precision.

A close examination of the concepts of "income" and "spouses" as deployed within the welfare regime reveals how the very complexity and ambiguity of the regulatory regime structure an environment in which rule breaches are endemic. Yet the concepts reveal something even more troubling. Where the nature of the breaches commonly alleged takes the form of

a "failure" to disclose information, and where it is often difficult to know in advance just what information must be disclosed, compliance becomes not merely difficult but virtually impossible. Recipients struggle to get by within a regime that will accuse them of fraud, cut them off, and toss them out for failing to disclose a detail of their lives. It may be that they had no idea of the "obligation" to disclose this detail, and it may be that there was in fact no legal obligation to disclose the detail or that the detail's intimacy and privacy were more important to protect. All too often, however, none of this will matter. The mere fact that the system now says it ought to have been informed will be sufficient to ground an allegation of fraud, an assessment of an overpayment, and/or a termination. Often this failure to inform, and nothing more, is the "fraudulent" behaviour of which recipients are guilty.

It is also deeply troubling that valued forms of social conduct – forms of conduct that are frequently constitutive, positive, and affirming – take on a highly ambiguous character for social assistance recipients. The compassionate gestures of friends and family and the details of one's intimate and private life are suspiciously monitored. Indeed, for some recipients, these forms of conduct are so fraught that they are avoided altogether - food baskets from family are halted and intimate relationships avoided (Mosher, Evans, and Little 2004).

The complex and counter-intuitive rules and the impossibility of compliance in a regime that may characterize the "failure" to share a detail of one's life as a rule violation – when what one is required to disclose is often impossibly difficult to determine in advance – are structural features of the social assistance regime, which, by nature if not by design, will generate significant numbers of rule violations. Accordingly, when these violations are routinely labelled as "fraud," fraud is structurally manufactured by the welfare system itself.

Processes of Criminalization

Benefit Inadequacy

Beyond the mischaracterization of rule breaches as criminal fraud, the welfare system, by its structure and design, generates actual criminal fraud. One of the central ways in which fraud is produced is through the inadequacy of benefits. By far the majority of cases of actual criminal fraud arise as a result of desperate need, a reality acknowledged by the Social Assistance Review Committee (1988, 384) in its review of Ontario's social assistance system. In the committee's view – a view borne out by our interviews and our review of criminal cases of welfare fraud – the single most important measure to prevent actual fraud is the provision of adequate welfare rates. Indeed, the correlation between criminal fraud and the inadequacy of rates is implicitly acknowledged by the system's own red flags for fraud - among them, the length of time on benefits and the percentage of benefits paid for shelter.

The cuts introduced in 1995, the impact of inflation, and the extremely modest increases over the past dozen years have put some recipients in the untenable position of having to choose between feeding their children and complying with the rules. 44 Social assistance recipients struggle to make ends meet, often going without adequate food, shelter, and/or clothing. The challenge of meeting basic needs for themselves and their children often places recipients in the grips of difficult moral binds, where none of the choices is a good choice. Consider, for example, the single mother who receives \$100 from her former boyfriend and father of her child to help her get through to the end of the month. Even with this \$100, she does not have enough to adequately feed and clothe herself and her child. If she discloses the \$100, it will be deducted dollar for dollar from her welfare cheque because the father is a person with a support obligation. If she does not disclose it and it is later discovered (perhaps because he, in fact, reports it to welfare), what action will follow?⁴⁵ Section 14 of the general regulation (134/98) of the OWA indicates that she shall be found to be ineligible for financial assistance since she has failed to disclose income. She may well be cut off, and, while she can re-apply, there will likely be a period of time when she will be without assistance. She will probably be assessed with an overpayment of \$100. The possibility of being charged with fraud has likely been implied if not explicitly stated, and, depending upon which municipality she resides in and her relationship with the staff of the office, the matter may or may not be referred to the police. And what if the money – or the food or the diapers - were to come from a person without a support obligation? The discretionary and complex nature of the rule regarding casual gifts or casual payments of small value makes it exceedingly difficult to know if and when the amount of money (or desperately needed goods) would be treated as "income" and deducted from the cheque.

One respondent described a client who was receiving \$520 per month. His rent was \$500. Paying more than 80 percent of his income on rent, he was identified as a high priority for risk of fraud through the consolidation verification process (CVP). He was called in and asked to explain how he survived on \$20 per month. He explained that he received some food from his grandmother as well as friends and other family members. He was required to itemize exactly what he received. The items were assigned a cost based on local grocery flyers and assessed a total value of \$70. He was then deemed to be in receipt of \$70 income per month, and this amount was deducted from his benefits, and, as a result, he was no longer able to pay his rent. What are his choices now? Will he ask family and friends not to provide food, and, if he does, will he then have adequate nutritious food? Significantly, the dramatic reductions in benefit levels in Ontario occurred in

tandem with the increased focus upon welfare fraud, deepening the horrendous "Catch-22" for recipients.

Surveillance

The Welfare Fraud Control Reports reveal that a staggering number of social assistance recipients suspected of fraud are reported by a variety of sources to welfare authorities, and an equally staggering number are formally investigated. Landlords, neighbours, and concerned citizens are encouraged to utilize the toll-free welfare fraud hotline. Ongoing reporting/disclosure obligations, sweeping consents to the disclosure and sharing of information, information-sharing agreements with other provincial and federal departments, and extensive powers vested in the eligibility review officers all contribute to an environment of near-total surveillance. It is an environment that recipients experience as profoundly hostile, disrespectful, and demeaning and one that recipients commonly describe as treating them like "criminals." Virtually everyone on welfare struggles to survive and comply within this intense and unrelenting web of surveillance, experiencing ongoing and profound violations of privacy and living in constant fear of a "fraud" allegation.

Several of those we interviewed described the CVP environment as analogous to "living under a microscope"; to having "one's life gone through with a fine-tooth comb"; and to having one's "life micro-managed." In addition, because the CVP flags recipients for fraud risk factors, persons who are summoned for a meeting are often put in the position of explaining how they are managing to survive on so little money without breaching the rules, again something that is experienced as profoundly demoralizing. One respondent described how recipients sometimes feel ambushed, having to account for every single entry in their bank books, months after the fact and without warning. As one respondent explained, "it is made clear to people that you're in our scopes because we know you're doing something ... This leaves people on tenterhooks all the time."

Herd and Mitchell (2002, 48) report a concrete example of this occurring to "K," a recipient interviewed for their study. "K" asks rhetorically, "Do you know what my worker told me? She is not giving me enough money to make it on a monthly basis so she knows that I'm defrauding them, but just hasn't figured out how yet. I get \$1,106 a month and between my rent, heat and hydro which is all in one, it's \$950. So she knows I'm defrauding them, she just hasn't figured out how and because of that, and because of the new government standards, they can actually call me in every month for an update." Tellingly, this worker explicitly confirms that the welfare system, by its very design, will inevitably and unavoidably produce fraud.

Herd and Mitchell's finding that the climate is permeated with suspicion and hostility is consistent with what respondents reported to us. As Herd and Mitchell (ibid., 8, 9, and 33) describe, "the new system is more concerned with surveillance and deterrence, than it is with assisting people to find employment. What is new is the intensity of surveillance and the technologies employed, the importation of private sector methods and standardized business practices ... Overall the mood of the focus groups was that the new system was inspiring a greater degree of suspicion and hostility ... more concerned with constant surveillance and treating 'everybody like they're cheating the system." One of our respondents summed it up very effectively with the observation that hardly any of her clients now refer to their welfare workers as their social workers as they did formerly. Rather, welfare workers have become much more closely associated with police officers. Fraud is now the focus of the system, explained another of our respondents.

Respondents also described how intensely scrutinized their clients' lives are by non-state agents: present or current abusive boyfriends or spouses, landlords, and neighbours appear to have all taken up the government's invitation to participate in the surveillance project. As noted earlier, in some instances the state actively solicits information from persons acquainted in some way with those "in their scopes." In others, unsolicited reports are made to the welfare fraud hotline or directly to a local Ontario Works office. Respondents pointed out that when these calls form the basis of the allegation of fraud it is usually difficult to respond because the subject of the allegation is not told who made the allegation and often not told precisely what the allegation is. We also heard of many instances where allegations were reported to welfare for purposes completely extraneous to the prevention or detection of fraud. Abusive men make false reports to Ontario Works to further their power and control over women; landlords make false reports to facilitate the eviction of a tenant; and vindictive neighbours or other acquaintances make false or misleading reports simply out of spite (Mosher, Evans, and Little 2004). Two of our respondents also noted how the snitch lines, in particular, encourage gossip that is very destructive in smaller rural and First Nations communities. And yet none of these abuses and potential harms created by the policing welfare fraud has entered into political discourse as matters of serious public concern, despite the recommendations made by the inquest investigating the death of Kimberly Rogers.

Several respondents also observed how stereotyping plays into the calls that are made. For example, class and race stereotypes of racialized women portray them as bad and potentially dangerous - as likely criminals. Dominant stereotypes also caricature Aboriginal people as "living off the system" and being too lazy to get a job, and single mothers – especially those with children by more than one father - are portrayed as promiscuous, having children to increase welfare dollars, and likely to be hiding men in their homes. Under the gaze of surveillance by concerned citizens who harbour these stereotypes, virtually any racialized woman, any single mother, or any

Aboriginal person is a person suspected of fraud, who ought to be investigated. Thus, not surprisingly, many respondents expressed the view that the sweep and impact of surveillance by non-state actors impact differentially on particular groups of recipients: racialized peoples, women, and racialized women, in particular, are subject to the most intensive surveillance.

When neighbours, landlords, teachers, local shopkeepers, and others in the community are encouraged (through active solicitations from state officials or through devices such as snitch lines) to suspect, watch, and report on social assistance recipients, social relations within communities are transformed. Rather than being regarded as neighbours, customers, or the mothers of children in the classrooms, social assistance recipients become the objects of surveillance – as persons possibly deceiving the social assistance system. In such an environment, recipients find it exceedingly difficult to trust anyone, and the fear of being suspected and reported is for many a constant feature of day-to-day life. In this climate, positive social interactions become extremely difficult to maintain, and recipients feel acutely that they are not welcomed and included.

It is important to emphasize how pervasively fear permeates the lives of those in receipt of Ontario Works. Such fear has multiple sources: fear of not being able to meet the basic needs of one's children; fear of losing custody; fear of declining health; fear of social exclusion and discrimination; and fear, as one respondent put it, "that no matter what choice you make it will be the wrong choice, and the axe will fall." The constant surveillance not only by the state but also by neighbours, landlords, shopkeepers, and so on generates fear as well – fear that virtually whatever one does might lead to an allegation that one has broken a rule and is guilty of fraud. Underlying and integral to this pervasive, constant surveillance is a view of recipients as suspected fraudsters – potential criminals waiting to abuse a public trust. Recipients are effectively criminalized – suspected by others, made to feel like they are criminal, dehumanized, demonized, and intensely surveilled - with only the occasional resort to actual criminal law processes.

Conclusion: The Crime of Social Assistance

There is nothing new about the nexus between poverty and criminality, an intersection that we have explored in the context of social assistance. The poor have historically been subjected to some of the most violent and sweeping criminal laws that, at their core, enforce status offences or "crimes of character" against the morally loose, economically idle, and socially disorderly (Chambliss 1964). While the bodies of poor people are no longer imprisoned in workhouses or subjected to the brutal punishments of the vagrancy statutes, the poor today are nonetheless subjected to exclusionary prejudices and stereotypes that are centuries old. While the letter of the criminal law has, in theory, withdrawn from explicitly targeting the character crime of being poor and disorderly, what we see today instead is an extraordinary net of regulation that is constituted by a mesh of legal, administrative, and informal practices that are highly intrusive, retributive, and punitive.

Is "welfare fraud," as it is now constituted and policed, really the crime that it has been portrayed as? As we have discussed, only a very small fraction of what the government includes as successful policing of "welfare fraud" involves criminal prosecution. Indeed, the actual level of criminal fraud detected across the thousands of cases investigated is remarkably low - and this is particularly notable given the intense level of surveillance and investigation that recipients find themselves under. By far the majority of conduct that is described and promoted as the menace of "welfare fraud" stems from often highly informal and capricious practices of disentitlement that flow from the breaches of any of a mass of complex, often contradictory, and frequently counter-intuitive rules that now govern social assistance administration. Many of these almost 800 rules and regulations are so vague and confusing that they seem intentionally designed to make receiving social assistance an ungovernable activity that inherently involves rule breaking and thus the committing of "welfare fraud."

As should be clear from our discussion, regulation that revolves around "income" and "spouses," in particular, is so capricious and vague that no reasonable person could conduct herself in a way that would not put her in jeopardy of an accusation of "fraud" in receiving social assistance. This is particularly so when one considers the extensive and often arbitrary powers of EROs, the ambiguity of how officials apply rules and regulations in local settings, and the use of the welfare fraud hotline, which translates what can often be malicious gossip into official action. It is the highly informal policing of this network, fuelled by prejudicial stereotypes of those on social assistance, that results in the termination of benefits, assessments of overpayments, accusations of fraud, and, very infrequently, formal fraud charges. Based on the extensive evidence that we have reviewed, one is left to draw the conclusion that there is little actual criminal conduct of fraud in social assistance administration. The constitution of social assistance as a crime itself presents a striking paradox: welfare fraud policing is located primarily outside of criminal law yet in a way that locates social assistance recipients as criminalized objects worthy of being socially disentitled through intense forms of exclusionary regulation.

Two aspects of the criminalization of social assistance can be viewed as particularly troubling. The first is how the largely informal mechanisms that are deployed to fight welfare fraud do not attend very closely to legal principles, including Charter obligations. Even basic legal requirements in investigating a criminal offence, such as the element of mens rea or the Charter right of being cautioned once a criminal investigation is commenced, seem

to be widely viewed as safeguards that should not be extended to poor people. Sweeping informational demands and broad, generic consent forms authorizing disclosure of information about oneself and lifetime bans on benefits are practices reminiscent of the 1834 *Poor Law*, pursuant to which the needs of the poor would be met only if the claimant forfeited his civil and political liberties – that is, if he ceased to be a citizen. As T.H. Marshall (cited in Mc-Cluskey 2003, 789n23) himself noted, the Poor Law "treated the claims of the poor, not as an integral part of the rights of the citizen, but as an alternative to them – as claims which could be met only if the claimants ceased to be citizens in any true sense of the word."

The second aspect revolves around how this criminalization is gendered in a prejudicial and insidious way. The facts that the majority of people on social assistance are women and that the majority of them are single parents have enabled prejudicial, historically embedded views of single women and single mothers – views that they are irresponsible, sexually loose, lazy, and ought to find men to support them. The regulation of women through the re-introduction of the man-in-the-house rule explicitly re-enforces this view. And it is not only the intimate aspect of women's lives that is utilized as an area of control in social assistance regulation but also the sphere of everyday life. Despite a rhetoric of "community responsibility" in government discourse, it is the very people that might constitute a support network in their communities - neighbours, family, boyfriends, landlords, school officials that are either re-responsibilized as agents to snitch on any perceived "fraud" or possibly complicit in rule breaking by being supportive by buying food for a mother and her child, for example, who have exhausted what is a completely inadequate benefit for that month. It is no wonder that being on social assistance has been characterized by an experience of fear, retribution, and isolation - qualities that "cracking down" on welfare fraud intentionally generate. The constitution of social assistance as crime through the policing of "welfare fraud" stands as an acute and dramatic example of how the neo-liberal reform of the welfare state has expanded its regulatory reach and authority while, at the same time, vastly diminishing a collective response to caring for the poor and vulnerable. The centuries-old vagrancy stereotype has been given new life – those on social assistance are morally suspect in being too lazy and shiftless to take responsibility for themselves and are thus a threat to public order. And, in turn, the shift away from state responsibility has enabled a perverse logic of responsibility to be put in place, where poor women in particular are subject to a sphere of blame, admonishment, and stigmatization. The findings of our study suggest that fighting welfare fraud has little to do with governing crime and more to do with a systematic attempt to disenfranchise and punish a highly vulnerable and easily stigmatized population who dare to seek assistance from the state.

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Notes

- 1 We use the terms "welfare" and "social assistance" interchangeably to describe public benefit programs of last resort.
- 2 Our focus in this chapter is on the regulation of welfare fraud. The research for the Law Commission of Canada that forms the basis of this chapter also formed the basis for two earlier publications, each of which contrasted the treatment of welfare fraud with another area of regulation. Mosher (2008) compares and contrasts the treatment of welfare fraud and income tax evasion, and Mosher (2006) considers welfare fraud and employment standards violations.
- 3 Social Assistance Reform Act, 1997, S.O. 1997, c. 25 [SARA].
- 4 The government's press releases regarding its various Welfare Fraud Control Reports and more broadly on the fight against fraud also support this conclusion.
- 5 One of the community clinic lawyers interviewed for our project described the quality of legal representation as "tragic."
- 6 The other two objectives were to make self-sufficiency the overriding goal of social assistance and to meet the unique needs of persons with disabilities. See the closing comments on the third reading of Bill 142 (SARA, supra note 3) of then minister of community and social services, the Honourable Janet Ecker (1997).
- 7 Ontario Works Act, 1997, S.O. 1997, c. 25, Sched. A. [OWA]; Ontario Disability Support Program Act, S.O. 1997, c. 25, Sched. B. [ODSPA].
- 8 Policy Directive 45 on Controlling Fraud, Ontario Works, Ministry of Community, Family and Children's Services, 2001. Ontario Works is delivered by "delivery agents," most of which are municipalities, while others are First Nations. There are forty-seven consolidated municipal service managers and First Nations delivery agents. The Ontario Disability Support Program, by contrast, is delivered by the province. In the discussion that follows, we focus primarily on the Ontario Works system, but much of what we discuss is equally applicable to the Ontario Disability Support Program. Note that the directive was further revised in July 2008, well after the completion of the research. It is now Policy Directive 9.7, Controlling Fraud, Ontario Works, Ministry of Community and Social Services, 2008. While the wording has changed, the development of local protocols continues as a requirement in the revised directive.
- 9 While we understand from the ministry that all delivery agents have negotiated such local agreements, we were unable to secure copies of any. The ministry does not have copies of these agreements, none of the legal advocates we spoke with had ever seen a local agreement, and time did not permit us to try to track these down through the various municipalities.
- 10 Dianne Martin (1992) found similar variations in her work on welfare fraud in the late 1980s.
- 11 These regional variations suggest that particular municipal governments may not accept the provincial rhetoric regarding the scope of the fraud problem. In fact, several municipal councils passed motions formally disapproving the implementation of the lifetime ban.
- 12 Note that this requirement continues in the revised *Policy Directive 9.7, supra* note 8, of July
- 13 Although the power to apply for a search warrant exists, we have been told by the ministry that this power has, to date, never been utilized (Moretta 2004).
- 14 O. Reg. 134/98, s. 65, amended to O. Reg. 231/04.
- 15 Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
- 16 In the income tax context, see R. v. Jarvis (2002). In the welfare context, this issue has been considered, although not adequately, in R. v. Coulter (1995) and R. v. D'Amour (2002).
- 17 Inquest into the Death of Kimberly Rogers, transcript of the evidence of Constable Sheldon Roberts, 28 October 2002.

- 18 O. Reg. 34/08, s. 12(3).
- 19 Policy Directive 12 on Home Visits, Ontario Works, Ministry of Community and Social Services, 2001. The policy directive on home visits was revised in July 2008 and is now Policy Directive 2.8. In large measure, it continues unchanged.
- 20 Ontario, Legislative Assembly, 2 October 1995, Official Report of Debates (Hansard), 36th Leg., 1st Sess., http://hansardindex.ontla.on.ca/hansardeissue/36-1/1004.htm.
- 21 See O. Reg. 134/98, s. 36, as amended by O. Reg. 227/98; O. Reg. 48/00; O. Reg. 314/01; and O. Reg. 456/03.
- 22 Criminal Code, R.S.C. 1985, c. C-46, s. 264.
- 23 The constitutional challenge was mounted in the case of Broomer et al. v. Ontario (A.G.)
- 24 Ontario, Legislative Assembly, 28 September 1995, Official Report of Debates (Hansard), 36th Leg., 1st Sess., http://hansardindex.ontla.on.ca/hansardeissue/36-1/l003.htm.
- 25 O. Reg. 134/98, s. 28.
- 26 Canada does not have any officially recognized "poverty lines." The Statistics Canada lowincome cut-offs are the most commonly used measure of relative deprivation and are intended to convey the income level at which an individual or family is living in "straitened circumstances," spending a greater portion of income on the basic necessities than the average family of similar size within a particular community.
- 27 For an interesting discussion of how workfare in the United States is enforcing a masculine worker-citizen subject through the deployment of various discursive strategies, see Korteweg
- 28 For a discussion of the privatization and devaluation of the tasks of caring for dependents, see Fineman (1999).
- 29 If the value of the subject matter exceeds \$5,000, it is an indictable offence, carrying a maximum penalty of imprisonment not exceeding fourteen years. Below \$5,000, the Crown may proceed by indictment (maximum term of two years) or by summary conviction. Until the provisions of C-13 came into effect in September 2004, the maximum penalty was ten years.
- 30 O. Reg. 134/98, s. 14(1); Policy Directive 9.3, Ontario Works, Ministry of Community and Social Services, 2008.
- 31 O. Reg. 134/98, s. 48; Policy Directive 16 on Income, Ontario Works, Ministry of Community, Family and Children's Services, 2001.
- 32 See also an important Supreme Court of Canada decision, R. v. Parisé (1996), and from the Ontario Court of Appeal, R. v. Wakil (2001).
- 33 Justice Weagant's reference to Justice McLachlin arises from her caution that because the Supreme Court of Canada had cast the net of "fraud" rather widely it was important to ensure that fraud was not interpreted so widely as to capture behaviour that does not warrant criminalization.
- 34 Among this category of cases are those where, had the information been disclosed, no deduction of benefits would have resulted. Also included, arguably, are some of the cases discussed later in this chapter regarding the failure to disclose a spouse. In many of these cases, a single woman in receipt of benefits who is accused of fraud for failing to disclose a "spouse" would be eligible for greater benefits were she to apply jointly with her "spouse."
- 35 See, for example, Innes (2003).
- 36 Policy Directive 16 on Income, supra note 31. Note that, as with other policy directives, this directive was amended as of July 2008. The directive now also provides that a casual gift or payment of large value is considered exempt as income if it is "clear that it will be used to meet an extraordinary need to maintain the health and well-being of a benefit unit, and there are no other financial resources that are accessible." Policy Directive 5.7, Ontario Works, Ministry of Community and Social Services, 2008.
- 37 Note that because a home visit is limited to what is in plain view there is no legislative authority for a worker to open a refrigerator.
- 38 Family Law Act, R.S.O. 1990, c. F.3.
- 39 O. Reg. 134/98, s. 1, as amended. The category of "same-sex partner" was introduced as a result of the Supreme Court of Canada's decision in M. v. H. (1995). The Ontario government

- responded to the Supreme Court of Canada's ruling by introducing an omnibus piece of legislation to add the category of "same-sex partner" to several pieces of legislation, including the OWA and the ODSPA. A further amendment eliminated the distinction between spouses and same-sex partners to include both same-sex and heterosexual couples within the definition of "spouse." O. Reg. 294/05, s. 1.
- 40 For a review of American initiatives to promote marriage within the context of welfare reform, see Smith (2002).
- 41 Policy Directive 19 on Co-Residency, Ontario Works, Ministry of Community, Family and Children's Services, 2001. This directive was renumbered in July 2008 and is now Policy Directive 3.3, Ontario Works, Ministry of Community and Social Services, 2008.
- 42 The interplay of the welfare fraud regime, the definition of "spouses," and the practices of investigating and determining spousal status are developed more fully in Mosher (2010).
- 43 During our interview with Debbie Moretta, the director of the Ontario Disability Support Program, in 2004, she suggested to us that, while the rules may be complex, what is asked of recipients is really quite simple: report changes in their circumstances. Similarly, in her affidavit in the Broomer case (2002), Moretta (2003, para. 54) observes that "the system is designed so that recipients make full disclosure of any changes in their circumstances to the program; individuals are not required to make any self-assessment of eligibility."
- 44 For a discussion of this dilemma in the American context, see Gilliom (2001).
- 45 As discussed later in this chapter, we heard throughout our interviews that abusive past and current boyfriends/spouses frequently call welfare snitch lines or welfare offices to report their partners for "fraud" as a means of furthering their power and control. See also Mosher, Evans, and Little (2004).

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