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## WELFARE FRAUD, NECESSITY, AND MORAL JUDGMENT

Eyal Kimel<sup>1</sup>

### I. INTRODUCTION

Moral Judgment has always played a major role in judicial decision-making, especially in cases involving poverty-related offences. An analysis of recent court decisions in such cases shows the same values that informed the courts in their deliberations more than 150 years ago continue to do so today.

The ability of lower courts in Canada and the United States to criticize the government's policy is very limited. When confronted with cases arising from the so-called tough-love war on poverty, also known as the war on the poor, courts are limited to examining the elements of the crime rather than the constitutionality or the desirability of a particular policy, even if they wish to act differently. For example, in *Masse v. Ontario (Minister of Community and Social Services)*, an Ontario Court of Appeals decision, the court upheld as constitutional a cutback in welfare benefits, holding that welfare benefits exist to provide a minimum level of assistance not a minimum level of subsistence.<sup>2</sup> However, the court nonetheless noted the cutbacks' devastating impact on welfare recipients:

The daily strain of surviving and caring for children on low and inadequate income is unrelenting and debilitating. All recipients of

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<sup>1</sup> The author is a Ph.D Candidate at Osgoode Hall Law School, Toronto, Canada.

<sup>2</sup> [1996] 89 O.A.C. 81.

social assistance and their dependants will suffer in some way from the reduction in assistance. Many will be forced to find other accommodation or make other living arrangements. If cheaper accommodation is not available, as may well be the case, particularly in Metropolitan Toronto, many may become homeless. There will be disadvantage suffered from the effects of having less income available for food, basic necessities, and education-related expenses. There can be no doubt the effects of reduced income will be severe for all and devastating for some.<sup>3</sup>

In light of the *Masse* court's sympathetic words, its decision seems all the more severe. Consider that as compared with the decision in *R. v. Wilson*, a sentencing hearing in the Ontario Superior Court of Justice involving a welfare recipient who was charged with, and pled guilty to, welfare fraud.<sup>4</sup> Although the charge typically calls for a custodial sentence, the court sentenced Ms. Wilson much more leniently to a conditional discharge because she had used the funds she falsely received to obtain an education and buy a house.<sup>5</sup> The implications that flow from these two cases are problematic, and they clearly illustrate the debate over welfare and dependency.

While politicians and academics remain conflicted about how to alleviate poverty, almost all agree that something should be done – from the extremists among neo-liberal economists, to the most enthusiastic advocates of budget cutbacks and tough-love policies. Indeed, welfare cutbacks and tough-love policies often have been introduced as means to eradicate poverty and sever the dependency of the poor on welfare. However, in practice, tough-love policies and welfare cutbacks achieve nothing but the opposite result. Cases like *Wilson* illustrate this point vividly as they reveal the insufficiency of current welfare allowances. Tough-love policies, welfare cutbacks and the

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<sup>3</sup> *Id.* at 107.

<sup>4</sup> No. 03 07002, [2005] O.J. No. 382, 2005 ON.C. LEXIS 387 (O.N.C.J. Jan. 27, 2005).

<sup>5</sup> *Id.*

criminalization of poverty only breed further dependence on the welfare system and create greater hardships to the people who rely on it.

## II. WELFARE FRAUD

Welfare fraud refers to the fraudulent receipt of funds from public social assistance programs for which an individual otherwise would not be eligible. Few of the prosecuted welfare fraud cases involve individuals who actively defraud the social assistance authorities by, for example, applying for assistance under false identities or doing so in more than one province or state. Indictments for welfare fraud typically involve misrepresentation of one's financial status in benefits applications and caseworker interviews, or failure to report changes in personal or financial status, such as a common law relationship or a new job. Such changes, if reported, usually result in a reduction in the amount of assistance.<sup>6</sup>

Prevailing public discourse in Canada and the United States represents welfare fraud as widespread. Consequently, many people no longer consider welfare in a positive manner as help or support for the needy, but in a negative way, as a burden and a matter for "regulation, policing and crime control."<sup>7</sup> It is no surprise that some governments expressly identify fighting welfare fraud as a central objective.<sup>8</sup> Many regulations now direct social assistance caseworkers to refer all suspected cases of fraud to police for investigation.<sup>9</sup> Such policies are indeed the

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<sup>6</sup> [Sentencing] Canadian Encyclopedic Digest 3d (Carswell) III(10)(f) §392 (Date).

<sup>7</sup> Janet Mosher & Joe Hermer, *Welfare Fraud: The Constitution of Social Assistance as Crime, A report prepared for the Law Commission of Canada* 5 (Mar. 31, 2005), available at [http://osgoode.yorku.ca/osgmedia.nsf/0/271AE1B3D9D286D38525709A00521FBC/\\$FILE/Welfare%20Fraud%20Report.pdf](http://osgoode.yorku.ca/osgmedia.nsf/0/271AE1B3D9D286D38525709A00521FBC/$FILE/Welfare%20Fraud%20Report.pdf)

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., Government of Ontario, News Release, *McGuinty Government Scraps Lifetime Welfare Ban, Police and Courts to handle fraud, punitive policy repealed*, (Jan. 9, 2004), available at <http://www.mcsc.gov.on.ca/mcsc/English/news/releases/040109.htm>; Ministry of Community and Social

most visible form of assault on welfare in Canada and the United States, but certainly not the only one.<sup>10</sup> Scholars Mosher and Harmer argue that welfare fraud is a symbol of a larger change in how poverty is characterized within a larger debate over the nature of the new welfare state.<sup>11</sup> Poor people are blamed, or are at least responsible for their own destitution.<sup>12</sup> The public considers welfare recipients, overwhelmingly women and children, as people of suspect moral quality. In reality, however, this behavior which the system considers fraudulent more often than not falls short of criminal conduct, and instead, generally stems from a misunderstanding of the system's many complex rules.<sup>13</sup>

Conviction rates of welfare fraud cases in Ontario amount to no more than 1.36 percent of the total number of welfare recipients in the province.<sup>14</sup> The relatively insignificant numbers cannot explain policies of "enhanced verification"; the use of

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Services, Ontario Works, *Directive 45.0: Controlling fraud*, 5 (Jan. 2004); Ministry of Community and Social Services, Ontario Disability Support Program, Income Support Policy Directives, *Directive 12.1: Controlling fraud*, 4 (Jan. 2004); North Carolina Division of Social Services, *Welfare Fraud*, available at <http://www.dhhs.state.nc.us/dss/fraud/index.htm>; Legal Aid Services of Oregon and Oregon Law Center, *DHS Overpayments*, available at <http://www.oregonlawhelp.org>.

<sup>10</sup> Dorothy E. Chunn & Shelley A. M. Gavigan, *Welfare Law, Welfare Fraud, and the Moral Regulation of the Never Deserving Poor*, 13(2) SOC. & LEGAL STUDIES 219 (2004).

<sup>11</sup> Mosher and Hermer, *supra* note 7, at 6.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Ontario Ministry of Community and Social Services, *Welfare Fraud Control Report 1997-98*, Toronto: M.C.S.S. (1999), available at <http://www.gov.on.ca/css/page/brochure/fraudnov98.html>; Ontario Ministry of Community and Social Services, *Welfare Fraud Control Report, 1998-99*, Toronto: M.C.S.S. (2000), available at <http://www.gov.on.ca/css/page/brochure/fraudnov99.html>; Ontario Ministry of Community and Social Services, *Making Welfare Work: Report to Taxpayers on Welfare Reform*, Toronto: M.C.S.S. (2000), available at <http://www.gov.on.ca/css/page/brochure/makingwelfarework.html>.

“snitch lines”; “zero tolerance”<sup>15</sup>; a requirement to broadly consent to the release of personal information; information-sharing agreements with a host of state and non-state entities; expanded powers for caseworkers; complex verification procedures that require ongoing production and verification of documentation; and the creation of provincial and local fraud control units. Far more alarming is that in several states in the United States and in Ontario,<sup>16</sup> the state administers suspensions of benefits.<sup>17</sup> For a few years, the Ontario provincial government administered a lifetime ban from the receipt of welfare where a welfare recipient has been convicted of welfare fraud.<sup>18</sup> This shift in the direction of criminalizing welfare recipients “illustrates that the (coercive form of) criminal law and (the regulatory form of) welfare law are inseparable.”<sup>19</sup>

In Canada, a conviction of welfare fraud often involves a harsh sentence.<sup>20</sup> Often, judges order several months of incarceration for relatively small amounts of fraud (less than \$5,000) for a first offender.<sup>21</sup> In their decisions, judges refer to welfare fraud as a breach of trust against the community, as well as theft from those who really need it.<sup>22</sup> In the United States, the sentences for welfare recipients convicted of welfare fraud vary, but normally involve imprisonment.<sup>23</sup> For example, the average

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<sup>15</sup> Chunn & Gavigan, *supra* note 10, at 219.

<sup>16</sup> Mosher and Hermer, *supra* note 7, at 6.

<sup>17</sup> See, e.g., Mosher and Hermer, *supra* note 10 (regarding suspensions for two to three years or longer in North Carolina).

<sup>18</sup> Mosher & Hermer, *supra* note 7, at 6.

<sup>19</sup> Chunn & Gavigan, *supra* note 10.

<sup>20</sup> Mosher & Hermer, *supra* note 7, at 7.

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., *R. v. Dugbazah*, 1995 W.C.B. (2d) 606; *R. v. Oghide*, [1993] O.J. No. 1006 at § 1.

<sup>23</sup> See, e.g., *People v. Montano*, 2005 Cal. App. Unpub. LEXIS 961 (sentencing Ms. Montano to 5 years probation, a condition of which was a 180-days incarceration in county jail, for a misdemeanor welfare fraud charge).

sentence for welfare fraud in Michigan was imprisonment for a term of four years.<sup>24</sup> Equally alarming are policies administering suspensions of benefits. In 1998 the Ontario conservative government amended the Ontario Disability Support Program Act<sup>25</sup> and the Ontario Works Act.<sup>26</sup> Individuals convicted of welfare fraud would now be subject to a suspension of welfare benefits for three months.<sup>27</sup> Later, in April 2000, the penalty for fraud was increased again, from a three-month suspension to a lifetime ban from receiving welfare benefits.<sup>28</sup> The court in *Broomer v. Ontario* noted some of the effects of such a ban, which:

targets persons who are already most disadvantaged in our society, and punishes them by making them more disadvantaged. It takes food and shelter away from people who need assistance to avoid hunger and homelessness; it tolerates the possibility that single mothers will give children into state care so that the children can be fed and clothed; it enables wheelchairs and other assistive devices to be taken away from people with disabilities. These impacts are imposed without concern for the devastation caused to families, children and all persons in need who live in the shadow of the Lifetime Ban. Social assistance recipients are the only people in society that are subject to such degrading and inhumane treatment.<sup>29</sup>

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<sup>24</sup> John T. Hammond, *The Top 50 Felonies: Useful Statistics Regarding the Most Frequently Charged Offenses*, 81 MI BAR J. 20, 25 (2002).

<sup>25</sup> Ontario Disability Support Program Act, 1997, S.O. 1997, c. 25.

<sup>26</sup> Ontario Works Act, 1997, S.O. 1997, c. 25; *see also*, Ontario Works Act Regulation, O. Reg. 134/98, s. 36; Ontario Disability Support Program Act Regulation, O. Reg. 222/98, s. 25.

<sup>27</sup> *See, e.g., Rogers v. Administrator of Ontario Works for Greater Sudbury*, 2001 O.T.C. Uned 539.

<sup>28</sup> *See supra* note 26.

<sup>29</sup> No. 02-CV-229203CM3, [2002] O.J. 2196. The Factum of the Intervenor Coalition consists of the Charter Committee on Poverty Issues, the Canadian

The court in *R. v. Rogers* encountered a tragic example of the adverse effect of this policy on recipients.<sup>30</sup> Kimberley Rogers had been sentenced to six months of house arrest during which she was allowed to leave her house for three hours per week.<sup>31</sup> The automatic three month benefit suspension, combined with the house arrest sentence, left her without a source of income to cover rent, food or other expenses. Rogers, in turn, challenged the constitutional validity of the regulations that resulted in the suspension of her benefits.<sup>32</sup> The court noted Canada's human rights commitments:

In the unique circumstances of this case, if [Ms. Rogers] is exposed to the full three month suspension of her benefits, a member of our community carrying an unborn child may well be homeless and deprived of basic sustenance. Such a situation would jeopardize the health of Ms. Rogers and the fetus, thereby adversely affecting not only mother and child but also the public...<sup>33</sup>

Rogers' benefits were reinstated for the interim, but her problems did not end here. Even with the benefits she received, she was unable to support herself. After a deduction of ten percent towards restitution, and a previous welfare benefits cutback of twenty-one percent in 1996, she was left with \$468 per month, \$450 of which covered her rent. In August 2001, Rogers died in her apartment from a lethal overdose of a prescribed anti-depressant that she had accumulated in anticipation of losing her welfare entitlement to drug coverage. On December 19, 2002, the coroner's jury assembled to inquire into Rogers' death and recommended lifting the lifetime ban

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Association of Elizabeth Fry Societies, the Women's Legal Education and Action Fund, the Disabled Women's Network Canada, the Income Security Advocacy Centre, the Steering Committee on Social Assistance and the Ontario Social Safety Network.

<sup>30</sup> *Rogers*, 2001 O.T.C. Uned 539.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at § 19.

policy for welfare fraud convictions.<sup>34</sup> The Ontario Government refused, explaining that the zero tolerance policy was successful and would continue.<sup>35</sup> Only the 2004 change of government following provincial elections marked the end of the lifetime ban policy.<sup>36</sup>

### III. BOUNDARIES OF PROSECUTION

The way that we characterize the criminal act of welfare fraud influences the level of punishment attached to it, the type of behavior society considers criminal, and the degree of guilt it assigns to those acts we choose to define as welfare fraud. Despite numerous opportunities to limit the scope of welfare fraud, courts in both Canada and the United States continue to broadly define the term, which enables the state to prosecute a greater number of welfare recipients on charges of fraud.

In the early 1980's, the Canadian courts examined the question of whether all cases of welfare overpayment due to a recipient's misrepresentations should be regarded as fraud, or whether those that involved merely passive failures to disclose certain personal or financial information should be excluded from the definition. In *R. v. Monkman*, the court held that the term "other fraudulent means" in section 338(1) of the Criminal Code of Canada was to receive "the broadest possible meaning" and, thus, would include passive failures to disclose information.<sup>37</sup> Following *Monkman*, to prove the charge of fraud, all the government would need to establish is "dishonesty" and "deprivation," which could include mere secrecy and concealment of material facts.<sup>38</sup>

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<sup>34</sup> Canadian Broadcasting Corporation, *Editorial: Jury Urges Ontario to Ease Crackdown on Welfare Cheats*, (Jan. 10, 2004), available at [www.cbc.ca](http://www.cbc.ca).

<sup>35</sup> *Id.*

<sup>36</sup> Canadian Broadcasting Corporation, *Editorial: Ontario Ends Lifetime Ban on Welfare Cheats*, (Jan. 10, 2004), available at [www.cbc.ca](http://www.cbc.ca) (last visited Mar. 31, 2005).

<sup>37</sup> *R. v. Monkman*, [1980] 4 Man. R. (2d) 352; see also *R. v. Feddema*, [2005] A.J. No. 789; 1985 R.S., ch. C-46, § 338 (Can.).

<sup>38</sup> *Monkman*, at §29.



Canadian courts also have refused to narrow the scope of what constitutes welfare fraud with regard to the perpetrator's intent or mens rea. While courts typically are required to acquit in the absence of mens rea, as Mosher and Harmer point out, Canadians often will be indicted and convicted of welfare fraud in instances where there was clearly no presence of the necessary mens rea.<sup>39</sup> Prosecutors indict welfare recipients in all incidents of rule violations, including over-payments arising from bureaucratic error.<sup>40</sup> To escape a conviction for welfare fraud, individuals now must prove in court that they did not know, and practically could not have known, that they had to disclose the relevant information. For example, in *R. v. Maldonado*, the defendant failed to disclose his receipt of student loans, although he did disclose his wife's income from part-time work.<sup>41</sup> In response to his argument that he did not know that student loans constituted income, the court noted:

[T]he 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? . . . Surely this [should be put] . . . in the category of behaviour that does not warrant criminalization.<sup>42</sup>

More often than not, however, recipients are convicted even when the judge is certain they were not aware of the obligation to disclose certain information. *R. v. Bond* involved a single mother of two teenage children, Donna Bond, who had been

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<sup>39</sup> Mosher & Hermer, *supra* note 7, at 18.

<sup>40</sup> *Id.*

<sup>41</sup> *R. v. Maldonado*, [1998] W.C.B (2d) 286.

<sup>42</sup> *Id.*

charged with welfare fraud after she received nearly \$16,500 over a sixteen month period due to her failure to disclose a bank account in her annual update report.<sup>43</sup> Bond had saved all the money she had ever received from part-time employment, baby bonuses, child tax credits, and income tax refunds, all of which she had disclosed in her annual reports.<sup>44</sup> While she had initially planned to buy a car, she instead set the money aside in a trust fund for the future medical expenses she anticipated would arise from her children's serious health problems.<sup>45</sup> The court expressed sympathy for Bond's circumstances, noting it was:

very impressed by the sincerity and achievement of the accused and troubled by the paradox of criminalizing the actions of this woman who scrimped as a hedge against the future financial health needs of her children... If she had spent this money on drinking, or drugs, or in any other irresponsible way, there would be no basis for any criminal charge. A conviction seems to send the message it was wrong to be conscientious about the welfare of her children and foolish to be frugal.<sup>46</sup>

Nevertheless, the court convicted Bond, stating that "her selfless motives for committing the offence are matters for consideration on sentencing."<sup>47</sup>

#### IV. POVERTY, NECESSITY AND THE CRIMINAL PROCEDURE

Generally speaking, Canadian and American courts have rejected the idea that the constitution should protect social and economic interests, or positive rights that require the

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<sup>43</sup> *R. v Bond* [1994] O. J. 2185, § 8.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at § 14.

<sup>47</sup> *Id.*, at § 23.

government to take affirmative action to assist (as opposed to negative rights, or restrictions on the government).<sup>48</sup> The United States Supreme Court, in *Dandridge v. Williams*, thus held that social and economic rights involve “intractable economic, social, and even philosophical problems ... [that] are not the [court’s] business.”<sup>49</sup> The Court has further denied the existence of any constitutionally guaranteed “affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”<sup>50</sup>

Similarly, the Canadian Supreme Court recently limited the scope of protection of social and economic rights afforded by Section VII of the Charter of Rights and Freedoms, which provides that “[e]veryone has the right 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.”<sup>51</sup> The Canadian Supreme Court held, in *Gosselin v. Quebec*, that although the Charter may protect a minimum standard of living under Sect. VII, only extreme situations merit judicial interference. *Gosselin* illustrates what the Canadian Supreme Court means by “extreme situation.”<sup>52</sup> Louise Gosselin could not find work through the workfare program, and her benefits were cut by sixty-six percent to \$173.<sup>53</sup> At the time, it

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<sup>48</sup> See, e.g., H. Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1132-33, n. 9, n. 10 (1999). For Canadian, South African and Israeli perspectives see, D. M. Davis, P. Macklem & G. Mundlak, *Social Rights, Social Citizenship, and Transformative Constitutionalism: A Comparative Assessment*, in Joanne Conaghan, MICHAEL FISCHL & KARL KLARE, *LABOR LAW IN AN ERA OF GLOBALIZATION*, (2001).

<sup>49</sup> 397 U.S. 471, 487 (1970).

<sup>50</sup> *Deshaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S. 189, 196 (1989).

<sup>51</sup> See Canadian Charter of Rights and Freedoms, § 7.

<sup>52</sup> [2002] 4 S.C.R. 429.

<sup>53</sup> See National Association of Women and the Law, *Gosselin v. Quebec: an important case for the future of social assistance*, available at <http://www.nawl.ca/gosselin.htm> (last visited: Mar. 29, 2006). While there

cost between \$180 to \$200 to rent a room in Montreal. Gosselin rented one, but the men with whom she shared the boarding house sexually harassed her, so she spent some time homeless -- living on the streets or in shelters, and for a period of time engaging in prostitution for food, shelter, clothes, or transportation to job interviews.<sup>54</sup> Still, the Court held that Gosselin's circumstances did not amount to an "extreme situation" that would merit its intervention.<sup>55</sup>

Likewise, the lifetime ban policy, before its revocation in 2004, had been limited by courts on a constitutional level in two extreme situations. One involved the drug benefits of an individual who needed funds to buy his medication,<sup>56</sup> and the other was Kimberly Rodgers, who successfully prevented the suspension of her benefits while she was pregnant and on house arrest.<sup>57</sup> In both cases, the courts held that imposing a suspension of benefits under such circumstances could create a life-threatening situation that would infringe on the basic Charter rights of the security of the person.<sup>58</sup>

On the other hand, Canadian courts appear more willing to recognize necessity as a viable legal doctrine and a potential mitigating factor, if not a defense, during sentencing proceedings in welfare fraud cases.<sup>59</sup> Scholar Allan Manson, in discussing the causal relationship between poverty and crime, noted that, when a community's efforts to alleviate poverty and prevent crime fail, "some recognition to disadvantaged background must be paid within the sentencing process."<sup>60</sup>

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were 75,000 welfare recipients in Gosselin's category, the government provided only 30,000 spots through the employment programs.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Boomer v. Ontario*, [2004] O.J. 2431.

<sup>57</sup> *See Rogers*, [2001] O.T.C. Uned 539.

<sup>58</sup> *Id.* at § 19; *Boomer*, [2004] O.J. 2431.

<sup>59</sup> *See, e.g., Masse*, [1996] 89 O.A.C. 81.

<sup>60</sup> Allan Manson, *Law of Sentencing* (Toronto: Irwin Law, 2001) (QL), CHAPTER 7-B-15, Disadvantaged Background.

On several occasions, the Canadian courts have followed suit, particularly when they have found the defendant has used the money fraudulently obtained to better himself or herself while becoming a productive member of society. The British Columbia Court of Appeal in *R. v. George* observed:

The dangerous offender provisions may fall more heavily on the poor and disadvantaged members of our society if their childhood misconduct is counted against them. This appellant had to face school as an aboriginal foster child living in a non-aboriginal culture with an I.Q. at or near the retarded level, without having ever acquired a sense of discipline or self-control. It is understandable that any child with this background would get into a lot of trouble by lashing out aggressively when challenged by his or her environment.<sup>61</sup>

*R. v. Wilson* provides another example. *Wilson* involved an unmarried woman who resorted to welfare after becoming pregnant during her teens and decided to raise her child despite her parents' disapproval and without their support.<sup>62</sup> She failed to disclose to her case workers that, during a five year period, she received nearly \$26,000 in student loans that otherwise would have rendered her ineligible.<sup>63</sup> Additionally, she reported a monthly rent of \$760 when she paid only \$228, and she declared receiving about \$1,500 for child support when she had received closer to \$2,300. In turn, she received an overpayment of benefits for housing amounting to more than \$44,000.<sup>64</sup> She pled guilty to fraud, but the court only ordered the relatively light sentence of a conditional discharge and probation.<sup>65</sup> The court noted how she used the money to fund her education and a home, and that a conviction would only result in her losing her

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<sup>61</sup> [1998] C.C.C. LEXIS 1235, 391-92 (1998).

<sup>62</sup> *R. v. Wilson*, [2005] O.J. 382, at § 15.

<sup>63</sup> *Id.* at §§ 5, 16.

<sup>64</sup> *Id.* at §§ 4, 11.

<sup>65</sup> *Id.* at §§ 1, 20.

job and home while plunging her into bankruptcy and leading her back to welfare.<sup>66</sup>

Wilson has obtained two Bachelor of Arts degrees... and is now working on a Master's degree while employed full time... She is constantly upgrading herself... The community would lose the benefit of her specialized training in child welfare. She would no longer be a contributing member of society . . . While I acknowledge that welfare fraud is a serious crime and has an impact on the entire community, I ask myself whether it would be contrary to the public interest in this particular case to grant her a discharge. And my answer is no, it would not.<sup>67</sup>

Several other Canadian cases have produced similar results. *R. v. Trigueros* involved an immigrant who similarly failed to disclose his receipt of student loans, which resulted in an overpayment of benefits that he used to improve his education and his chances of getting off welfare.<sup>68</sup> The court commented that it was...

...impressed with the fact that (he) ha[d] now obtained an education, [he] ha[d] obtained employment, [he was] now fluent in the language and in [the court's] opinion, [he] ha[d] much to offer as a citizen.<sup>69</sup>

Similarly, the court in *R. v. Xavier* recognized the defendant's use of funds as a mitigating factor when it ordered a conditional sentence for Ms. Xavier, a forty-two year old single mother who used the money for the educational expenses of her two daughters, ages eleven and thirteen, who had learning disabilities.<sup>70</sup> At the time of her court appearance, she had a

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<sup>66</sup> *Id.* at §§ 13, 18.

<sup>67</sup> *Id.* at §§ 13, 18, 19.

<sup>68</sup> [1997] O.J. 6089, at §§ 7, 24, 43, 46.

<sup>69</sup> *Id.* at § 44.

<sup>70</sup> [1999] O.J. 5601, at §§ 34, 47.

bachelor's degree, was taking computer courses, and had an upcoming job interview.<sup>71</sup> Since she was “managing fairly well,” the court held she should not receive a custodial sentence, particularly since “the chances of [her] getting a good job without a discharge and tak[ing her] off the family benefits is greater if [she] ha[d] no convictions.”<sup>72</sup> The court followed the same reasoning in *R. v. Lamptey*, which involved a 35-year-old man who was married with two children.<sup>73</sup> At the time of sentencing, he was employed and had just finished a computer repair course.<sup>74</sup> The court granted him a conditional discharge to avoid creating any further difficulties for him in obtaining employment in his field with a criminal conviction for fraud.<sup>75</sup>

The court in *R. v. Lalonde* took a step further in its acknowledgment of the defendant's “extreme hardship” as a complete defense and, in turn, granted her an acquittal for a fraud case stemming from her failure to disclose that she had a common law partner.<sup>76</sup> Lalonde had been physically and emotionally abused by her common law partner, who frequently threatened to kill her and take her children.<sup>77</sup> The court reasoned that, were she to have made the disclosure, her abusive partner would have received the welfare checks rather than her, and she was “concerned and rightly so that she and her children would be at serious risk that he would drink the money from welfare and they would be without food or shelter or both.”<sup>78</sup>

Why is Lise Lalonde in any different position than  
the mother who steals a loaf of bread to feed her

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at § 45.

<sup>73</sup> [1998] O.J. 6401, at § 59.

<sup>74</sup> *Id.* at § 61.

<sup>75</sup> *Id.* at § 109.

<sup>76</sup> [1995] O.J. 160.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 23.

children, or a mother who steals a loaf of bread every month to feed her children . . . the answer for Lise Lalonde, a battered wife, lies in the fact that she had, in her mind no reasonable alternative and putting food on the table for her children, in her financial circumstances, was pressing.<sup>79</sup>

Not all Canadian decisions reflect such an understanding approach. The court in *R. v. Rogers* dealt with a woman convicted of welfare fraud after collecting both social assistance and student loans to help cover the costs of attending four years of community college.<sup>80</sup> She was sentenced to six months under house arrest, eighteen months probation and loss of the right to have part of her student loan forgiven.<sup>81</sup> She also was ordered to repay more than \$13,000 she had received in benefits.<sup>82</sup> According to the court:

This is how serious the matter is, Ms. Rogers. There is a jail term that is going to be involved, it just happens to be a jail term that will be served in your home, and not at the expense of the community. You have taken enough from the community.<sup>83</sup>

Likewise, a Saskatchewan Court of Appeals in *R. v. Durocher* was reluctant to regard the defendant's explanation as a mitigating factor during sentencing, despite its expression of sympathy, if not admiration for the thirty-two year old mother of six who had defrauded social services of nearly \$26,400.<sup>84</sup> Still, the court sentenced her to five months imprisonment, but did so while noting:

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<sup>79</sup> *Id.* at §§ 38, 42.

<sup>80</sup> Rogers, [2001] O.T.C. Uned 539; see also Jennifer Keck, *Remembering Kimberly Rogers*, 25.3 Canadian Council on Social Development (2002), available at <http://www.ccsd.ca/perception/2534/kimberly.htm>.

<sup>81</sup> *Supra* note 34.

<sup>82</sup> *Id.*

<sup>83</sup> Mosh & Hermer, *supra* note 7, at 94.

<sup>84</sup> [1992] S.J. No. 690 (C.A.), at §§ 1-2.



There is a great deal to be said for the personal circumstances of the appellant, a divorced mother of six, struggling to get by. With perseverance and despite enormous hardship, she has managed over time to better her conditions, enrich her education, and improve her ability to provide for herself and her children.<sup>85</sup>

The court in *R. v. D'Amour* also refused to acknowledge need as a mitigating factor when sentencing a defendant who used the fraudulently obtained funds for her daughter's schooling.<sup>86</sup> She, too, received a custodial sentence.

(S)he was prepared to operate on the basis that the ends justified the means. She believed that her daughter was entitled to "the best education" that she could get and if that education could not be funded within the limits of the law, the appellant was prepared to break the law to get the money from the public purse.<sup>87</sup>

Courts in the United States remain split on the issue while they grapple with the question of whether indigent individuals possess a genuine choice between crime and normative behavior. The D.C. Circuit in *U.S. v. Barker* noted:

There are many "escape valves" in the law which permit largely unreviewable discretion for certain officials to mitigate harshness caused by the law's inability to meet its highest ideals, including the ideal of punishing only the free choice to do wrong.<sup>88</sup>

The United States Supreme Court has limited the courts' obligation to consider impoverishment as a mitigating factor, explaining in *Bearden v. Georgia* that the state

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<sup>85</sup> *Id.* at § 2.

<sup>86</sup> *R. v. D'Amour*, [2002] C.C.C. LEXIS 157.

<sup>87</sup> *Id.* at §71.

<sup>88</sup> 514 F.2d 208, 236 (D.C. Cir. 1975).

has a fundamental interest in appropriately punishing persons – rich and poor – who violate its criminal laws. A defendant’s poverty in no way immunizes him from punishment. Thus, when determining initially whether the State’s penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources.<sup>89</sup>

In *Williams v. Illinois*, the Court further explained that nothing “precludes a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law.”<sup>90</sup>

It is obvious that judges have broad discretion in how they treat necessity as a mitigating actor during sentencing in welfare fraud cases. Often judges do not recognize the notion of necessity at all. Some judges recognize it but choose to ignore it. And a few judges go so far as to acknowledge it as a mitigating factor to consider during sentencing. Judges who fail to recognize or accept need as a justifying motivation in welfare fraud cases tend to describe the accused as taking from those “genuinely in need,” thus implying that the accused actually was not really in need.<sup>91</sup> Those judges describe the accused’s poverty as being of his or her own making, and they seldom consider personal circumstances as mitigating factors for sentencing.<sup>92</sup>

## V. DISCUSSION

As the decisions in *Wilson*, *Trigueros*, *Lampzey* and *Xavier* show, poor people are not necessarily destined to stay poor. Many welfare recipients attempt to better their lives and are intent on escaping their destitution. We as a society have an

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<sup>89</sup> 461 U.S. 660, 669-70 (1983).

<sup>90</sup> 399 U.S. 235, 243 (1970). On the question of necessity as a criminal defense and a mitigating factor in sentencing; see generally, George Vuoso, *Background, Responsibility and Excuse*, 96 YALE L.J. 1661-86 (1987).

<sup>91</sup> See, e.g., *supra* note 25.

<sup>92</sup> *Id.* at 7.

obligation to help them do that. Ironically, the flaw in the neo-liberal ideology that justifies tough love policies and extreme welfare cutbacks is its inability to translate into practice the fundamentals of liberal thought about the self-sufficiency of the reasonable person. According to classic liberal theory, social and economic diversity is justified as long as there are no barriers for anyone to achieve certain positions.<sup>93</sup> Diversity is expected to benefit the least advantaged members of society.<sup>94</sup> The average welfare recipient may very well be resourceful, self-sufficient, and rational, as liberals assume humans are, if only he or she would have had an equal opportunity to be self-reliant. Welfare cutbacks and tough love policies, while claiming to increase autonomy, actually deepen the dependency of welfare recipients on the system. As long as they remain systemically disadvantaged, they will continue to need a helping hand to reach positions in society that the majority of citizens take for granted.

This explains the manner by which Wilson used the overpaid funds to fund her education; a common practice among welfare recipients. Unlike the stereotype that is often attached to welfare recipients, the individuals in these cases worked in at least one job while receiving assistance, they each attempted and ultimately succeeded in bettering their education, and secured lasting employment in their area of expertise. Further, they all spent the overpaid assistance in a responsible manner; they did not use the funds to buy alcohol or drugs, but instead they supported their families. For some welfare recipients, contrary to the dogma espoused by tough-love advocates, help is necessary to escape poverty. The failure of Wilson and the others to disclose their student loans or another sources of income enabled them to achieve post-secondary education and ultimately to become productive members of society. The calculation is simple: more support equals a better chance to escape poverty.

That said, there is something fundamentally wrong with the reasoning of the judges in *Wilson*, *Trigueros*, *Lamptey* and

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<sup>93</sup> See, generally, JOHN RAWLS, POLITICAL LIBERALISM, LECTURE VIII: THE BASIC LIBERTIES AND THEIR PRIORITY (1993).

<sup>94</sup> *Id.*

*Xavier*. The standard used by judges to determine the extent of punishment for welfare fraud should not be the success of welfare recipients in securing jobs. The resources available for welfare in today's neo-liberal state are insufficient to maintain the survival of its clients, let alone improve their chances of breaking away from the system. The system is putting obstacles in their way by simultaneously doing three things: 1) it constantly shrinks its levels of assistance; 2) it makes the standards of eligibility constantly higher; and 3) it penalizes violations. By making people choose between work and welfare, it creates either dependency, or encourages criminal behavior. Thus, at face value, we should congratulate decisions like *Wilson*, *Trigueros*, *Lampzey* and *Xavier* for doing the "right thing," by setting a more appropriate sentencing level for welfare law violations. Still, the reasons for setting this standard, and for the leniency in these cases are problematic because they suggest a form of moral regulation in which judges seemingly decide whether people should go to jail based on the Judges' subjective moral judgment.<sup>95</sup>

Throughout history, moral beliefs and classifications have influenced welfare legislation. From the first poverty laws of England, welfare has been tied to moral distinctions. The British poor law amendment of 1834 that introduced the principles of deserving and undeserving poor greatly influenced what we now know as the Ontario welfare system.<sup>96</sup> The notions of deserving

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<sup>95</sup> Chunn and Gavigan, *supra* note 10, at 223. In their illuminating 2004 article, *The Moral Regulation of the Never Deserving Poor*, Dorothy Chunn and Shelley Gavigan discuss the relationship between law, welfare and moral regulations. Moral regulation they contend normalizes words, it takes for granted ontological and epistemological premises of the formation of a particular social order. The formation of state and moral regulations are simultaneous. The formations of states are facilitated by a moral code. Law is crucial to the preservation, indeed the progression, of a states moral ethos. Law is not merely the reflection of moral codes, rather there exists a dialog between the law and the material framework of society's overarching morals. It is "in sum, the major means through which the boundaries of preferred moral classifications can be regulated: defined, emphasized, focused, nuanced, shifted."

<sup>96</sup> Province of Ontario, *Report of the Social Assistance Review Committee: Transitions*, 71-72 (1988).

and undeserving poor have become a common thread of seemingly different welfare structures throughout the years.<sup>97</sup>

In *The Undeserving Poor*, Michael Katz explains how certain methods of classifying people as undeserving or poor are so old they are part of the way we think.<sup>98</sup> The process of compartmentalizing, writes Katz, defines the line between normality and deviance, ignores the perspective of the powerless, and accepts existing social and economic arrangements as natural.<sup>99</sup> When we identify one thing as unlike the others we are dividing the world, and “we use our language to exclude, to distinguish-to discriminate.”<sup>100</sup> One of the reasons for this behavior, Katz adds, is the standard on which the culture of capitalism measures people—their ability to produce success. This normally leads to the condemnation of those who, for no matter what reasons, fail to contribute or prosper. “Capitalism systifies the exploitive relations that allow some to prosper so well at the expense of so many.”<sup>101</sup>

Recent years have seen a regression in the concept of what is regarded as moral in the context of welfare law. Scholars Chunn and Gavigan note an ideological change in recent welfare legislation, from liberalism to neo-liberalism: “virtually no one is considered ‘deserving.’”<sup>102</sup> Social assistance is perceived as a temporary mechanism contingent upon the recipients’ willingness to work and become independent of the welfare system.<sup>103</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> M. B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* (1989).

<sup>99</sup> *Id.* at 5-7

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* Katz’s argument complies with Max Webber’s argument in *The Protestant Ethic and the Spirit of Capitalism*, 2nd ed, (London : Allen & Unwin, 1976), which argues that capitalism is a development of the Protestant ethos that views being rich as an earthly sign for a heavenly afterlife, and thus poverty as a sign for being sinful.

<sup>102</sup> Chunn and Gavigan, *supra* note 10, at 230.

<sup>103</sup> *Id.*

The constant pressure to become independent of welfare has made its way into judicial decisions. The pressure to become self-reliant has forced people to resort to what is deemed to be criminal behavior in their efforts to achieve success. Accordingly, those who used the benefits overpayments to obtain an education, or those who, at the time of sentencing, are either off of welfare or show promise of getting off of it soon, received more lenient sentences. Comparatively, those who used the overpayments for food, or who are less successful in finding employment, received harsher punishment.

The historic moral ideas of the deserving and undeserving poor have been internalized by judges to create a tacit form of moral regulation. Courts penalize certain immoral activities and praising others as moral. Independence becomes moral and dependence immoral. At the same time, the state creates an impossible situation. On one hand, dependency is deemed immoral, and on the other hand, the state makes it less and less possible to become independent by shrinking assistance. By doing so, the state pins individuals into impossible corners where it often becomes necessary to resort to criminal activities simply to become independent. Meanwhile, those who succeed in becoming independent of state assistance are praised by judges and receive lenient sentences.

## VI. CONCLUSION

While necessity is slowly recognized by the courts, some decisions remain infused with moral judgments and old ideas of deserving and undeserving poor. Welfare fraud should not be criminalized, but if criminal penalties are to be accorded to violations of administrative rules, then judges should set a much lower standard of punishment. However, judges should do so, not because they appreciate some recipients' vocational success and disapprove of the failures of others, but because they recognize the fact that welfare fraud often follows great hardship and disparity – or perhaps because they disapprove of dramatic changes in the welfare system that inflict all the more pain and hardship on people that were disadvantaged in the first place.<sup>104</sup>

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<sup>104</sup> See, *R. v. Wilson*, [2005] O.J. 382.