



WELFARE, INCOME DETECTION, AND THE SHADOW ECONOMY

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In the spring of 2009 a humorous parody of the MasterCard Credit Card Company advertising campaign circulated on the Internet, showing an actual photograph of the first lady, Michelle Obama, volunteering at a soup kitchen, having her picture taken by a man waiting in line with his cell phone. The caption on photograph states:

Cost of a bowl of soup at homeless shelter:
\$0.00 . . .

Michelle Obama [serving] you your soup:
\$0.00 . . .

Snapping a picture of a homeless person who is receiving a government funded meal while taking a picture of the first lady using his \$500 Black Berry [sic] cell phone and \$100.00 per month cellular service: Priceless.²

In reality the first lady was volunteering at a private shelter, not a government-funded one, and there is no proof that the individual receiving the meal and taking the first lady's picture

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² Barbara Mikkelson & David P. Mikkelson, *Real Photograph; Inaccurate Description*, SNOPE.COM, <http://www.snopes.com/photos/politics/soupkitchen.asp> (last updated June 16, 2009) (emphasis added).

was either homeless or that his cellular telephone cost \$500.³ The sentiment that is portrayed by the photograph and its humorous caption nevertheless captures a common perception that there are people getting publicly-funded welfare benefits who, for a variety of reasons, should not be.⁴

This concern, that people other than those who actually *need* help are the ones actually *getting* it, has been around since the beginning of publicly-funded welfare benefits. In the past two decades, primarily technological means have been used to detect and verify earnings and income information for individuals applying for federal assistance benefits in order to determine whether they meet the eligibility requirements. Over the same period of time, however, there has been an equally valid competing concern – that due to potentially slow, cumbersome application processes, individuals who need the assistance the most are being precluded from receiving the assistance they need and are qualified to receive. To address this concern, there have been a variety of efforts designed to simplify application procedures for many welfare programs, to include, in some cases, requiring little to no verification of income or resources to determine eligibility. These two competing concerns – wanting to ensure that only the people who need the assistance are receiving it versus simplifying application processes to eliminate barriers to welfare program participation – have conflicted in the past and will continue to do so in the future.

A problem, however, with the primarily technological approach to detecting income to determine eligibility is that not all of the income that people receive is either reported or otherwise able to be tracked via computer databases. Within every economy there are individuals who work “outside” the reported economy or in the “underground” economy; this sector is now commonly referred to as the “shadow economy.”⁵ The

³ *Id.*

⁴ See FRIEDRICH SCHNEIDER & DOMINIK H. ENSTE, THE SHADOW ECONOMY – AN INTERNATIONAL SURVEY 174 (2002).

⁵ Alternative titles for “shadow economy” include “underground,” “informal,” “second,” “cash,” or “parallel.” See SCHNEIDER & ENSTE, *supra* note 3, at 4 n.9; Friedrich Schneider, *Shadow Economies of 145 Countries all over the World: What do we really know?*, BROOKINGS INSTITUTION, 3 n.1 (Aug. 2006), http://www.brookings.edu/metro/umi/events/20060904_schneider.pdf.

shadow economy complicates the issue of ensuring that only those individuals who actually meet the eligibility requirements of the welfare programs are the ones who actually receive the benefits. As our welfare rolls and outlays continue to grow with each passing year, the issues of eligibility and income detection become more and more important. This problem is further complicated in that many need-based welfare programs encourage the recipients to work as much as possible, so that they can go off of welfare and be self-supporting. A variety of complicated rules, differing from program to program, govern whether earned income – normally being of a certain amount for a certain period of time – can serve as a basis to terminate welfare benefits. Before those rules can be applied, and before any determination as to whether an individual's welfare benefits should be continued or not, first and foremost an applicant's or recipient's work-related income needs to be reported – either by the individual, the employer, or some other person.

The purpose of this article is to propose a series of recommendations that not only should assist the current means of income detection to help with the process of determining need-based welfare program eligibility, but could also serve to assist in detecting otherwise unreported earned income for those who work outside the “normal” economy – income which, if properly reported in the first place, might have prevented the applicant from receiving benefits that he would not be eligible to receive. Ultimately, the article argues that while many efforts to remove barriers to participation in public welfare programs are praiseworthy and should be pursued, the fundamental issue of income eligibility for need-based welfare programs requires not only income detection measures, but also better measures than those already being used. As this article will demonstrate, ensuring that only those individuals who meet the eligibility requirements can participate in the various welfare programs not only benefits the tax-paying public that funds the programs, but ultimately benefits the recipients of the aid as well.

To accomplish these goals, this article will examine some of the technological mechanisms that have been devised to detect income and resources to help determine eligibility to participate in these need-based welfare programs, the success (or failure) of these mechanisms, the arguments for eliminating income verification, and a brief overview of the shadow economy. By analyzing these components, this article proposes various steps

that can be taken not only to help strengthen current efforts of income detection, but can further attempt to tackle the issue of welfare recipients and the shadow economy.

A detailed history or overview of existing federal, need-based welfare programs is outside the purview of this article; suffice to say there are a variety of programs in which millions of people receive welfare benefits, costing billions of dollars to fund and operate. More importantly, the number of people participating in these programs has been growing at a rate faster than the population growth of the United States, and the costs of these programs have grown exponentially in some cases. In an average month during 1992, thirty-four million Americans – 13% of the total population – were participating in one or more of the seven welfare programs.⁶ In 2006, there were 57,757,000 people – 19% of the total population – receiving Medicaid alone.⁷ In twenty-one years, the number of people participating in Medicaid grew by 62%, while the population of the United States grew by only 20%.⁸ In fiscal year 2008, over twenty-eight million people participated in the federal food stamp program at a total cost of \$37,665,100,000, or \$1,326 per person.⁹ By

⁶ *Getting a Helping Hand – Long-Term Participants in Assistance Programs*, U.S. CENSUS BUREAU, 1 (Nov. 1995), http://www.census.gov/sipp/sb95_27.pdf (citing thirty-four million as participants in Aid to Families with Dependent Children (AFDC), General Assistance, Supplemental Security Income (SSI), Medicaid, food stamps, federal or state rent assistance, and/or public housing assistance).

⁷ *Medicaid – Beneficiaries and Payments: 2000 to 2006*, U.S. CENSUS BUREAU, <http://www.census.gov/compendia/statab/2010/tables/10s0144.pdf> (last accessed Feb. 12, 2011).

⁸ *Statistical Abstract of the United States: 2008*, U.S. CENSUS BUREAU, 7, <http://www.census.gov/prod/2007pubs/08abstract/pop.pdf> (last visited Apr. 8, 2011). The population in the United States in 1985 was 238,466,000; in 2006, it was 299,801,000. *Id.* In 1985, 21,814,000 people received Medicaid benefits. *Annual Statistical Supplement, 2008*, SOC. SECURITY ADMIN., <http://www.ssa.gov/policy/docs/statcomps/supplement/2008/8e.html#table8.e1> (last visited Apr. 8, 2011).

⁹ *Supplemental Nutrition Assistance Program Participation and Costs*, U.S. DEP'T OF AGRIC. FOOD & NUTRITION SERVICE, <http://www.fns.usda.gov/pd/SNAPsummary.htm> (last modified Mar. 2, 2011). See also *Supplemental Nutrition Assistance Program: Average Monthly Participation (Persons)*, U.S. DEP'T OF AGRIC. FOOD AND NUTRITION SERVICE, <http://www.fns.usda.gov/pd/15SNAPpartPP.htm> (last modified Mar. 2, 2011).

contrast, in 1969, 2,878,000 people participated for a total cost of \$250,500,000 or \$87 per person.¹⁰ In the thirty-nine years, the number of participants grew ten times, and the cost of the program increased over 150 times, while the population of the United States grew in the same time period by only 33%.¹¹ Nearly half of all children in the United States will participate in the food stamp program at some point during their childhood.¹² For demonstration purposes, this article will highlight some of the income detection mechanisms of the largest need-based cash assistance program – the Social Security Administration’s (Administration) Supplemental Security Income (SSI) program.

SOCIAL SECURITY DISABILITY PROGRAMS

On August 14, 1935, President Franklin Roosevelt signed the Social Security Act into law.¹³ The Act was later amended to include the Disability Insurance Benefit (DIB) program, in order to provide monthly monetary benefits to qualified disabled workers and their dependents.¹⁴ Known as Title II, the

The federal Food Stamp Program was renamed the Supplemental Nutrition Assistance Program on October 1, 2008. See *Supplemental Nutrition Assistance Program (SNAP)*, U.S. DEP’T OF AGRIC. FOOD AND NUTRITION SERVICE, <http://www.fns.usda.gov/snap/snap.htm> (last modified July 23, 2009).

¹⁰ *Supplemental Nutrition Assistance Program Participation and Costs*, *supra* note 8.

¹¹ The population in the United States in 1969 was 202,676,946. 1969, INFOPLEASE.COM, <http://www.infoplease.com/year/1969.html> (last visited Feb. 12, 2011). In 2006, it was estimated to be 299,801,000. *Statistical Abstract of the United States*, *supra* note 6.

¹² Lindsey Tanner, *Half of US kids will get food stamps, study says*, ASSOCIATED PRESS, Nov. 2, 2009, available at <http://www.breitbart.com/print.php?id=D9BNKH3O1>.

¹³ Social Security Act, ch. 395, 49 Stat. 620 (1935); *Historical Background and Development of Social Security*, U.S. SOC. SECURITY ADMIN., <http://www.ssa.gov/history/briefhistory3.html> (last modified Feb. 9, 2011).

¹⁴ Dru Stevenson, *Should Addicts Get Welfare? Addiction & SSI/SSDI*, 68 Brook. L. Rev. 185, 187-88 (2002) (describing the creation and the development of the “Disability Insurance program.”); *Historical Background and Development of Social Security*, *supra* note 12.

eligibility to participate in this program and the benefit amounts paid are determined by the worker's contributions to Social Security.¹⁵ In December 2007, there were 7.1 million disabled workers receiving Title II benefits, with an additional 1.8 million qualified family members receiving benefits as well.¹⁶ The total amount of Title II benefits paid in 2007 was \$99.1 billion, with the average benefit amount per person being \$1,004 per month.¹⁷ In 2007, 804,787 disabled workers and 500,875 family members were awarded Title II benefits.¹⁸ While DIB is not a need-based welfare program, it nevertheless has limits on how much an individual can earn from work-related income in order to qualify to receive benefits, and on how much the individual may earn from work-related income after receiving benefits.¹⁹

The Administration also administers the SSI program, known as Title XVI.²⁰ Established in 1972, it is the nation's largest needs-based program, providing cash assistance to persons aged sixty-five or older, blind or disabled adults, and blind or disabled children.²¹ As of fiscal year 2001, 6.8 million

¹⁵ Stevenson, *supra* note 13, at 188; *Historical Background and Development of Social Security*, *supra* note 12.

¹⁶ *Annual Statistical Supplement, 2008*, U.S. SOC. SECURITY ADMIN., <http://www.ssa.gov/policy/docs/statcomps/supplement/2008/highlights.html> (last visited Feb. 12, 2011).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 42 U.S.C.A. § 423 (West, Westlaw through Pub. L. No. 112-3). *See also* *What is "Substantial Gainful Activity?" – 2011 Red Book*, U.S. SOC. SECURITY ADMIN., <http://www.socialsecurity.gov/redbook/eng/overview-disability.htm#6> (last visited Apr. 12, 2011).

²⁰ Social Security Act § 1601, 42 U.S.C.A. § 1381 (West, Westlaw through Pub. L. No. 111-284).

²¹ U.S. Soc. Security Admin., Office of the Inspector General, *Disabled Supplemental Security Income Recipients with Earnings*, U.S. SOC. SECURITY ADMIN., 1 (Apr. 11, 2005), <http://www.ssa.gov/oig/ADOBEPDF/A-01-04-14085.pdf>; U.S. Gov't Accountability Office, *Supplemental Security Income: Progress Made in Detecting and Recovering Overpayments, but Management Attention Should Continue*, U.S. GOV'T ACCOUNTABILITY OFF., 1 (Sept. 2002), <http://www.gao.gov/new.items/do2849.pdf>.

people were receiving approximately \$33 billion in benefits.²² By 2007, the number of people receiving federally-administered SSI payments was over 7.1 million,²³ with a total of \$36.9 billion in benefits being paid with the average per person monthly benefit of \$437.06.²⁴

To determine if an SSI applicant is financially eligible to participate, the Administration performs an initial determination at the time of application and conducts periodic reviews to determine whether the recipient remains eligible.²⁵ When applying for SSI, individuals are required to report any information that may affect their eligibility for benefits, and once they begin receiving SSI benefits they are required to report events such as changes in income, resources, marital status, or living arrangements to Administration field office staff in a timely manner.²⁶ The Administration generally relies on matching computerized data from other federal and state agencies to verify that the information is correct.²⁷ When these computer matches identify discrepancies between data reported by recipients and the data recorded by these agencies, alert notices are sent to Administration field offices which must then determine if the discrepancies impact SSI benefits by contacting and requesting information from the beneficiary.²⁸ To a

²² U.S. Gov't Accountability Office, *supra* note 20, at 1.

²³ *Annual Statistical Supplement, 2008, supra* note 13.

²⁴ *Id.*

²⁵ U.S. Soc. Security Admin., Office of the Inspector Gen., *Review of Controls Over Processing Income Alerts which Impact Supplemental Security Income Payments*, U.S. SOC. SECURITY ADMIN., i, 1 (Sept. 2000), <http://www.ssa.gov/oig/ADOBEPDF/98-21002.pdf>.

²⁶ *Id.*; U.S. Gov't Accountability Office, *supra* note 20, at 3; U.S. Soc. Security Admin., Office of the Inspector Gen., *Supplemental Security Income, Recipients with Excess Income and/or Resources*, U.S. SOC. SECURITY ADMIN., 2 (July 23, 2008), <http://www.ssa.gov/oig/ADOBEPDF/A-01-08-18022.pdf>.

²⁷ *Review of Controls Over Processing Income Alerts which Impact Supplemental Security Income Payments, supra* note 24, at i, 1; U.S. Gov't Accountability Office, *supra* note 20, at 3-4.

²⁸ *See Review of Controls Over Processing Income Alerts which Impact Supplemental Security Income Payments, supra* note 24, at i, 1.

significant extent, the Administration depends on program applicants and recipients to accurately report important eligibility information.²⁹ The SSI program is vulnerable to overpayments due to a variety of factors, including the fact that as a needs-based program, the recipients' resources and assets can often change.³⁰ Today, as will be demonstrated *infra*, the Administration is able to more accurately verify program eligibility and detect payment errors than it was several years ago. However, weaknesses remain in its debt prevention and deterrence processes; the Administration has made limited progress toward simplifying complex program rules that contribute to payment errors and it is not fully utilizing several overpayment prevention tools, such as penalties and the suspension of benefits for recipients who fail to report eligibility information as required.³¹

The program's means-tested nature requires that individuals' income, resources, and living arrangements be assessed on a monthly basis so as to determine eligibility and payment amounts.³² To further ensure that benefits are properly paid, redeterminations of non-medical factors for eligibility to participate are scheduled on a yearly basis or every six years depending on the likelihood of payment error.³³ Redeterminations are one of the Administration's best tools to detect income and prevent SSI overpayments.³⁴ If the recipient reports or the Administration discovers information that could make the person ineligible for benefits, the Administration can conduct an unscheduled redetermination.³⁵ In fiscal year 2004,

²⁹ U.S. Gov't Accountability Office, *supra* note 20, at 3.

³⁰ *See id.* at 1.

³¹ *See id.* at 4.

³² U.S. Soc. Security Admin., Office of the Inspector Gen., *Supplemental Security Income Overpayments*, U.S. SOC. SECURITY ADMIN., 1 (Apr. 16, 2004), <http://www.ssa.gov/oig/ADOBEPDF/A-01-04-24022.pdf>.

³³ *Disabled Supplemental Security Income Recipients with Earnings*, *supra* note 20, at 2.

³⁴ *Supplemental Security Income, Recipients with Excess Income and/or Resources*, *supra* note 25, at 4.

the Administration processed over 2.2 million periodic redeterminations.³⁶

Budget constraints, however, have impeded redeterminations conducted by the Administration.³⁷ In fiscal year 1997, the Administration conducted 1.8 million redeterminations.³⁸ The next fiscal year it conducted 1.9 million redeterminations (29% of the total number of 6.6 million SSI recipients) with \$1.3 billion in overpayments identified.³⁹ Four years later in fiscal year 2002, there were 2.3 million redeterminations (34% of the 6.8 million SSI recipients) with \$1.7 billion in overpayments identified.⁴⁰

In fiscal year 2007, however, the Administration only did one million redeterminations despite the proven success redeterminations have had in preventing improper payments.⁴¹

INCOME VERIFICATION IN WELFARE PROGRAMS

As stated above, to detect and verify the income of the applicants or recipients for need-based welfare programs, welfare agencies primarily rely on two methods: self reporting, and a host, often differing from program to program of technology-based tools. Over the years, these technologically based tools have increased in number, in part because self-reporting of income was deemed insufficient. To a significant extent, the Administration depends on SSI applicants and recipients to accurately report important eligibility

³⁵ *Disabled Supplemental Security Income Recipients with Earnings*, *supra* note 20, at 2.

³⁶ *Id.*

³⁷ *Supplemental Security Income, Recipients with Excess Income and/or Resources*, *supra* note 25, at 4.

³⁸ *Supplemental Security Income Overpayments*, *supra* note 31, at 5.

³⁹ *Id.*

⁴⁰ *Id.* at 6.

⁴¹ *Supplemental Security Income, Recipients with Excess Income and/or Resources*, *supra* note 25, at 4.

information.⁴² However, to verify eligibility information the Administration uses computer matches to compare SSI records against recipient information contained in records of third parties, such as other federal and state government agencies.⁴³

SELF-DECLARATION OF INCOME

Several states have, at one time or another, used self-declaration of income alone to qualify applicants for Medicaid or other welfare programs.⁴⁴ In some of these, unless the statement of verification of income is “questionable” it will be sufficient to qualify the individual or family for health care assistance.⁴⁵ If “questionable,” the state agency may attempt to verify it,⁴⁶ or merely inform the applicant that for *subsequent* applications or redeterminations of eligibility will he or she be required to provide proof of income.⁴⁷ The logic behind using self-declaration of income is that it both simplifies and accelerates the approval process.⁴⁸

⁴² U.S. Gov’t Accountability Office, *supra* note 20, at 3.

⁴³ *Id.* at 3-4.

⁴⁴ See, e.g., *Wisconsin CKF Policy Primer #3: Employer Verification of Insurance and Income in BadgerCare*, COVERING KIDS & FAMILIES, 1, <http://www.ckfwi.org/documents/PP3-Incomeverification.doc> (last visited Feb. 13, 2011). See also Laura Cox, *Allowing Families to Self-Report Income*, CENTER ON BUDGET & POLICY PRIORITIES (Dec. 28, 2001), <http://www.cbpp.org/cms/index.cfm?fa=view&id=1494> (listing thirteen states which accept self-declaration of income).

⁴⁵ See e.g., *Wisconsin CKF Policy Primer #3: Employer Verification of Insurance and Income in BadgerCare*, *supra* note 43.

⁴⁶ *Id.*

⁴⁷ E.g., *Adult Medicaid Manual MA-2250 – Income*, N.C. DEP’T OF HEALTH & HUM. SERVICES (Nov. 1, 2007), <http://info.dhhs.state.nc.us/olm/manuals/dma/abd/man/MA2250-03.htm>.

⁴⁸ See generally Cox, *supra* note 43.

TECHNOLOGICAL MEANS

Over the years, more and more technological approaches have been added to need-based welfare programs to attempt to detect and identify income of their applicants or recipients. This fact is probably the single most convincing piece of evidence that self-reporting of income by applicants or recipients is insufficient; if it were sufficient, there would be no need to have technological means of income detection and verification, nor the need to improve existing technological means and to add new ones. A primary source of income information – in the form of annual wages paid by an employer as reflected on a Form W-2 or self-employment – is provided by the Internal Revenue Service (IRS).⁴⁹ In addition to W-2 information, for SSI cases the IRS also provides Form 1099 information depicting wages and other income, to include interest, dividends, retirement, and pension information.⁵⁰

Another technology-based income identification measure used by the Administration is the quarterly wage data match maintained by the federal Office of Child Support Enforcement's new-hire database.⁵¹ The National Directory of New Hires, as a part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Act), was designed to help aid enforcement of child support orders.⁵² The Act also allowed for this information to be shared with the Administration to help prevent and reduce payment errors by providing information on newly hired employees, quarterly wage information, and quarterly unemployment compensation payments.⁵³ Prior to

⁴⁹ 42 U.S.C.A. § 405(c)(2)(A) (West, Westlaw through Pub. L. No. 111-264); *Review of Controls Over Processing Income Alerts which Impact Supplemental Security Income Payments*, *supra* note 24, at 1.

⁵⁰ *Review of Controls Over Processing Income Alerts which Impact Supplemental Security Income Payments*, *supra* note 24, at 1.

⁵¹ *Disabled Supplemental Security Income Recipients with Earnings*, *supra* note 20, at 1-2; *Supplemental Security Income Overpayments*, *supra* note 31, at 4, app. E-1.

⁵² U.S. Soc. Security Admin., Office of the Inspector Gen., *Review of the Social Security Administration's Office of Child Support Enforcement Pilot Evaluation*, U.S. SOC. SECURITY ADMIN., i (May, 2001), <http://www.ssa.gov/oig/ADOBEPDF/A-01-00-20006.pdf>.

receiving this data, the Administration had to rely solely on the self-reporting by SSI applicants of their wage and income information to determine their initial eligibility; only after they started to receive benefits would the Administration be able to use computer match information.⁵⁴

Since 1998, with field office online access since 2001, this database has been used by the Administration to determine whether applicants have unreported income during the application period in an effort to improve payment accuracy and, in part, to ensure that individuals ineligible to receive benefits do not do so, ultimately reducing the number of overpayment recovery attempts the Administration must process.⁵⁵ It should be noted that the data received from the National Directory of New Hires is not, by itself, used to deny or decrease the payment amounts to a SSI recipient, but rather is used to indicate the need to verify the income information with the claimant or the source of the information.⁵⁶ In the month of September 1998, data match information alone prevented an estimated \$6.5 million in future overpayments and detected \$17.6 million in recoverable overpayments.⁵⁷ The Administration has estimated that the use of the National Directory of New Hires database will result in approximately \$200 million in overpayment preventions and recoveries per year.⁵⁸

In addition to National Directory of New Hires data, the Administration obtains wage, unemployment, and other data from state agencies through a data access system known as Social Security Administration Access to State Records Online (SASRO).⁵⁹ As of September 2000, sixty-six state agencies in

⁵³ *Id.*

⁵⁴ *Id.* at 2.

⁵⁵ *Id.* at i.

⁵⁶ *Id.* at 3.

⁵⁷ *Id.* at 1.

⁵⁸ U.S. Gov't Accountability Office, *supra* note 20, at 8.

⁵⁹ *Review of the Social Security Administration's Office of Child Support Enforcement Pilot Evaluation*, *supra* note 51, at ii, 9.

thirty-seven states were providing information, with twenty-two of the reports being wage and unemployment information.⁶⁰ Additional information is provided by:

Department of Defense – provides the Administration information to verify military retirement and survivor payments in SSI cases⁶¹

Office of Personnel Management – provides data on Civil Service pensions for use in SSI cases⁶²

Veteran’s Administration provides data on the benefits it pays to individuals for consideration in SSI cases⁶³

Department of Treasury, Internal Revenue Service provides current mailing addresses to locate SSI recipients with outstanding overpayments and information on unreported resources and income (other than wages) of SSI recipients⁶⁴

Department of the Treasury, Bureau of Public Debt – reports savings bond information for use in determining SSI eligibility⁶⁵

THE SHADOW ECONOMY

The only agreement by economists regarding the shadow economy ⁶⁶ seems to be that it is extremely difficult to define, let

⁶⁰ *Id.* at 9 n.3.

⁶¹ *Supplemental Security Income Overpayments*, *supra* note 31, at app. E-1.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at app. E-2.

⁶⁶ *See supra* note 4.

alone measure.⁶⁷ One definition of it is “all currently unregistered economic activities that contribute to the officially calculated (or observed) Gross National Product.”⁶⁸ A narrower definition would be all economic activities that would be taxable if they were reported to the government tax authorities.⁶⁹ Broader definitions include an “emigration from the established ways of working”⁷⁰ and “those economic activities and the income derived from them that circumvent or otherwise [avoid] government regulation, taxation, or observation,”⁷¹ both of which can include criminal activity as well as “informal household economy” activities.⁷² The latter includes the value of a parent who foregoes other employment opportunities outside the home in order to care for and raise children.⁷³ The parent’s efforts have economic value, and as periodic media reports constantly remind us, a dollar amount can be attributed to the value of their labor.⁷⁴ The same is true for a family member who cares for an invalid or is performing what would be considered traditional home-maker duties.⁷⁵ While the efforts of a stay-at-

⁶⁷ See Schneider, *supra* note 4, at 3 n.1; SCHNEIDER & ENSTE, *supra* note 3, at 4 n.9; MICHAEL PICKHARDT & EDWARD SHINNICK, THE SHADOW ECONOMY, CORRUPTION, AND GOVERNANCE ix (2008).

⁶⁸ Schneider, *supra* note 4, at 4. See also PICKHARDT & SHINNICK, *supra* note 66, at 123.

⁶⁹ Schneider, *supra* note 4, at 4.

⁷⁰ SCHNEIDER & ENSTE, *supra* note 3, at 7.

⁷¹ PICKHARDT & SHINNICK, *supra* note 66, at 123 (internal quotations and further citation omitted).

⁷² Schneider, *supra* note 4, at 5.

⁷³ *Id.*

⁷⁴ See, e.g., Meredith Hanrahan, *Six Figure Moms*, SALARY.COM, <http://www.salary.com/Articles/ArticleDetail.asp?part=par901> (last visited Feb. 13, 2011) (stating that for 2008 the annual cash compensation for a stay-at-home parent would be \$116,805).

⁷⁵ See, e.g., Liz Pulliam Weston, *What’s a homemaker worth? The shocking truth*, MSN MONEY, <http://moneycentral.msn.com/content/collegeandfamily/p46800.asp> (last visited Nov. 18, 2010) (discussing a variety of methods of calculating the salary

home parent or homemaker are certainly “work,” and an individual engaged in illegal activity could be said to be engaged in a paying occupation, for the purposes of this article the “shadow economy” will be defined as all labor for which an individual is monetarily compensated which is not reported to a government entity at the local, state, or federal levels.

The reasons people are working within the shadow economy are likewise varied, including a desire to avoid paying taxes, to avoid paying social security or other welfare contributions, to avoid labor standards, and to avoid having to comply with certain administrative procedures.⁷⁶ The first two – a desire to avoid paying taxes or social security/welfare contributions on the income they earn – have been cited as the two largest motivators behind working in the shadow economy.⁷⁷ Added to this list of reasons would undoubtedly be the desire, by some, to continue receiving welfare benefits that if they were to report their economic activities – such as working – they would no longer be entitled to receive.

Some welfare recipients have a very strong incentive either to not report their earnings or to work in situations where their earnings are not reported so that their need-based welfare payments are not terminated.⁷⁸ Some individuals may attempt to maintain their work efforts at just below the point where earnings income would terminate their disability benefits.⁷⁹ Other individuals may choose not to report their work activity out of a mistaken belief that any earnings would automatically terminate their benefits.⁸⁰ Welfare programs – such as Social Security disability benefits – allow for a trial work period to

equivalent for a homemaker; one such estimate was \$30,000 per year based upon the functions performed).

⁷⁶ Schneider, *supra* note 4, at 4–5.

⁷⁷ *Id.* at 5–6, 9; SCHNEIDER & ENSTE, *supra* note 3, at 106.

⁷⁸ SCHNEIDER & ENSTE, *supra* note 3, at 174.

⁷⁹ See generally Jacques Chambers, *Working When Collecting Disability Benefits*, HVC ADVOCATE (July 2005), <http://www.hcvadvocate.org/hepatitis/hepC/WORKING%20WHEN%20COLLECTING%20DISABILITY%20BENEFITS.htm>.

⁸⁰ SCHNEIDER & ENSTE, *supra* note 3, at 174.

allow an individual to attempt to reenter the workforce, without their earnings automatically terminating their eligibility for benefits.⁸¹ But because these rules can be complicated and unknown to the worker, they can give some recipients an incentive not to report earnings.

Just as there are a variety of definitions and reasons for the shadow economy, there are a variety of estimates, based on various methodologies, of the size of the shadow economy in the United States. These range from 6.7% to 13.9%,⁸² 8.8% to 9.2%,⁸³ and 8.4% to 8.7%,⁸⁴ with the highest estimate being a whopping 25%.⁸⁵ There have been, however, several trends that have surfaced regarding the shadow economy. First, estimates of its size, while varied, have consistently grown over time regardless of the means used to estimate it.⁸⁶ In the 1970's it was estimated to be between 2.6% and 4.6% of the total United States economy, growing to 3.9% to 6.1% in the 1980's, and 8.8% to 9.4% in the 1990's.⁸⁷ A second consistent feature is that illicit work – work “off the books” – is the largest component of the shadow economy.⁸⁸ A third trend is that males are responsible for approximately two-thirds of this illicit work.⁸⁹ Finally, the more bureaucracy a country has, with the attendant taxation in varying forms to support it, the greater in proportion is that country's shadow economy.⁹⁰

⁸¹ See, e.g., 20 C.F.R. § 404.1592 (West, Westlaw through Feb. 4, 2011; 76 FR 6365).

⁸² SCHNEIDER & ENSTE, *supra* note 3, at 35.

⁸³ *Id.* at 36.

⁸⁴ Schneider, *supra* note 4, at 26. See also PICKHARDT & SHINNICK, *supra* note 66, at 146, 171.

⁸⁵ SCHNEIDER & ENSTE, *supra* note 3, at 41.

⁸⁶ *Id.* at 38-40.

⁸⁷ *Id.* at 38.

⁸⁸ *Id.* at 13.

⁸⁹ *Id.* at 82.

⁹⁰ *Id.* at 125-26.

What these percentages are measuring, however, is the value of the work attributed to the shadow economy compared to the gross national product, not the number of people performing that work. If the shadow economy equates to 8.9% of the United State's economy, it would be worth over one trillion dollars a year – specifically \$1,171,629,000,000.⁹¹ To put that figure in context, it would be the same as over 80 million⁹² people working full-time, 50 weeks a year, at minimum wage.⁹³ Clearly some people in the shadow economy earn much more than minimum wage, others earn much less, and likewise hours worked would vary from a de minimis amount to well over what is considered “full-time” – e.g., forty hours a week. The number of people in the shadow economy, however, has not been measured. One reason why it is so difficult to both measure the size of the shadow economy and the number of people working within it is because the people participating in it do not want to be identified.⁹⁴ It is obvious that there must be a significant number of people who work whose earnings are not accounted for by either employer or employee self-reporting.

One, albeit flawed, way to measure the number of individuals in the shadow economy is to compare the known number of individuals in the workforce with the number of tax returns filed. According to the United States Census Bureau, the current estimated population of the United States is 310,888,616.⁹⁵ Of

⁹¹ See U.S. Dep't of Commerce, Bureau of Economic Analysis, *Real Gross National Product*, FED. RES. BANK OF ST. LOUIS: ECON. RES., <http://research.stlouisfed.org/fred2/data/GNPC96.txt> (last visited Feb. 13, 2011) (stating that the adjusted gross national product of the United States was estimated to be \$12,945.5 billion dollars as of January 1, 2009).

⁹² 80,802,000 to be exact.

⁹³ Minimum wage is currently \$7.25 per hour, effective as of July 24, 2009. *Minimum Wage*, U.S. DEP'T OF LABOR, <http://www.dol.gov/dol/topic/wages/minimumwage.htm> (last visited Apr. 10, 2011). Multiplying that amount times forty hours a week (what is traditionally considered full-time), by 50 weeks a year, would equate to a total gross earnings of \$14,500.

⁹⁴ Schneider, *supra* note 4, at 3.

⁹⁵ U.S. POPClock Projection, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/popclockus.html> (last visited Feb. 25, 2011).

the total population, as of July 2009, there were 154,504,000 people in the official (documented) workforce of the United States with an additional 14,462,000 documented unemployed workers actively seeking employment.⁹⁶ Based on the most recent figures, however, only 131,597,000 Americans filed individual tax returns,⁹⁷ almost 23 million people fewer than the number of people working and required by law to file a tax return. There are two reasons why this approach is flawed. First, by definition, not only are there people working in the shadow economy who do not file tax returns, but they also would not necessarily be counted in the official work force by the United States Bureau of Labor. Second, some people, regardless of whether their income is reported or not, just refuse to file for and pay income taxes.

SCOPE OF THE PROBLEM

It should not be surprising that the exact number of individuals who have applied for or are receiving need-based welfare benefits who are working and not reporting or having their income reported is unknown. From studies and audits that have been done, however, it is possible to see that it is a problem of staggering size. Again, for illustration purposes, it is possible to examine reports from, or regarding, the Social Security Administration's two disability programs to see the scope of the problem which will be reflective of the problems of the other need-based welfare programs. These reports have two primary sources – the Administration's own Office of the Inspector General⁹⁸ and the Government Accountability Office. Report after report has demonstrated that:

⁹⁶ *Employment Situation News Release*, U.S. BUREAU OF LABOR STAT. (Aug. 7, 2009), http://www.bls.gov/news.release/archives/empsit_08072009.htm.

⁹⁷ Terry Manzi, *Projections of Returns That Will Be Filed in Calendar Years 2004-2010*, INTERNAL REVENUE SERVICE, 66, <http://www.irs.gov/pub/irs-soi/04proj.pdf> (last accessed Feb. 25, 2011).

⁹⁸ U.S. Soc. Security Admin., Office of the Inspector Gen., *Congressional Response Report: Integrity of the Supplemental Security Income Program*, U.S. SOC. SECURITY ADMIN. (Aug. 8, 2002), <http://www.ssa.gov/oig/ADOBEPDF/audittxt/A-01-02-22095.htm> (noting that since the Office of the Inspector General was established in 1995, it has

Non-reporting by recipients of eligibility information (wages, resources, living arrangements, etc.) accounts for 71% to 76% of all payment errors;⁹⁹

Errors in reporting recipients' income have historically been the most significant cause for stopping SSI benefits;¹⁰⁰

An estimated 46% of all terminations of welfare benefits were related to income issues;¹⁰¹ and

Unreported income accounts for 22% to 25% of annual SSI overpayments.¹⁰²

But what do these percentages mean? Based upon one Inspector General audit, a total of approximately \$3.1 billion was overpaid to 173,000 disabled beneficiaries due to their work activity, including the payments made to eligible family members.¹⁰³ While the Social Security Administration had identified approximately \$1.8 billion of these overpayments to 141,000 beneficiaries, a further \$1.3 billion to 49,000 beneficiaries went undetected.¹⁰⁴ Of those, more than half would have been ineligible to receive further disability benefits due to their work activity.¹⁰⁵ A different investigation of just SSI

conducted investigations and audits that resulted in almost \$6 billion in savings, potential cost avoidance, and inaccurate payments).

⁹⁹ U.S. Gov't Accountability Office, *supra* note 20, at 13.

¹⁰⁰ *Review of Controls Over Processing Income Alerts which Impact Supplemental Security Income Payments*, *supra* note 24, at 2.

¹⁰¹ *Id.*

¹⁰² U.S. Gov't Accountability Office, *supra* note 20, at 8, 10.

¹⁰³ U.S. Soc. Security Admin., Office of the Inspector Gen., *Follow-Up on Disabled Title II Beneficiaries with Earnings Reported on the Master Earnings File*, U.S. SOC. SECURITY ADMIN. (Apr. 2009), <http://www.ssa.gov/oig/ADOBEPDF/audittxt/A-01-08-28075.html>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

recipients showed that in fiscal year 2000 there was about \$477 million of benefits erroneously paid to individuals whose work activity would have disqualified them from receiving SSI benefits.¹⁰⁶ An additional \$394 million of SSI benefits was erroneously paid based upon recipients' unreported financial resources.¹⁰⁷

An additional danger, not addressed in these studies, is that of "snowballing," where the erroneous receipt of one form of need-based welfare enables the recipient to apply for, and improperly receive, other forms of need-based assistance. An example of "snowballing" is shown in an audit, conducted by the Administration's Office of the Inspector General, of the Medicare prescription drug plan. The audit found that approximately 13% of all approved applications for the prescription drug plan were for individuals whose income and resources exceeded income and/or resource limits for the Social Security benefits they were receiving.¹⁰⁸ This 13% equates to 276,000 individuals at a cost of \$473 million during a twelve-month period, and an additional \$224 million over the following twelve-month period – merely for the prescription drug plan benefits – and does not include the value of the improperly received disability benefits.¹⁰⁹

Unfortunately, the improper payment of benefits has not been an isolated incident. In 1997, after years of reporting specific instances of abuse and mismanagement, increasing overpayments and poor recovery of outstanding SSI debt, the Government Accountability Office designated the SSI program as high-risk.¹¹⁰ But just as it is clear that improper welfare payments are nothing new, it is equally clear that there have

¹⁰⁶ *Id.* at 10.

¹⁰⁷ *Id.* at 5, 10.

¹⁰⁸ U.S. Soc. Security Admin., Office of the Inspector Gen., *The Social Security Administration's Income and Resource Verification Process for Individuals Applying for Help with Medicare Prescription Drug Plan Costs*, U.S. SOC. SECURITY ADMIN., 2 (Feb. 19, 2008), <http://www.ssa.gov/oig/ADOBEPDF/A-06-06-16135.pdf>.

¹⁰⁹ *Id.* at 2-3.

¹¹⁰ *Congressional Response Report: Integrity of the Supplemental Security Income Program*, *supra* note 97.

been multiple efforts over the years to reduce them. A year before the SSI program was identified as being high-risk, the Personal Responsibility and Work Opportunity Reconciliation Act was enacted, prohibiting SSI payments to fugitive felons and parole/probation violators.¹¹¹ Three years later the Foster Care Independence Act of 1999 established additional eligibility requirements for SSI payments, including efforts to count for SSI eligibility purposes money held in trust or resources that were disposed of at less than fair market value in an effort to qualify for SSI.¹¹² In November 2002, Congress enacted the Improper Payments Information Act of 2002, which requires all federal agencies – including the Administration – to report annually on the extent of erroneous payments within their programs and the actions being taken to reduce these payments.¹¹³

Despite these legislative efforts, the problem of improper payments shows no sign of going away. Even when supplied with income information from its own data-match programs, the Administration does not always follow up on the information.¹¹⁴ In one audit of Social Security Disability Insurance Benefits, the agency's own Office of the Inspector General discovered that an estimated \$1.37 billion in overpayments was paid from 1996 to 2000 to 63,000 recipients due to work activity – work activity which had already been reported to the Social Security Administration.¹¹⁵ The inspector

¹¹¹ *Supplemental Security Income Overpayments*, *supra* note 31, at 3-4 (citing Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996)).

¹¹² *Id.* at 4 (citing Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822 (1999)).

¹¹³ *Id.* at 2 (citing Improper Payments Information Act of 2002, Pub. L. No. 107-300, §2, 116 Stat. 2350-51 (2002)).

¹¹⁴ *Disabled Supplemental Security Income Recipients with Earnings*, *supra* note 20, at 5. See also *The Social Security Administration's Income and Resource Verification Process for Individuals Applying for Help with Medicare Prescription Drug Plan Costs*, *supra* note 107, at 3.

¹¹⁵ U.S. Soc. Security Admin., Office of the Inspector Gen., *Follow-Up on Disabled Title II Beneficiaries with Earnings Reported on the Master Earning File*, U.S. SOC. SECURITY ADMIN., (Apr. 15, 2009), <http://www.ssa.gov/oig/ADOBEPDF/audittxt/A-01-08-28075.html>.

general further discovered instances where these wages, which should have at the very least triggered an investigation as to the propriety of individuals who were working while receiving benefits, were instead used to justify, through a convoluted process, an increase in the benefits being paid to the individuals who were working and receiving benefits.¹¹⁶

In other instances, the information was investigated, but not very quickly. In one study, it took Administration personnel an average of ten months to complete the development of an income alert in sample cases.¹¹⁷ The reasons most frequently given by Administration employees for delays in working income alerts were their other workload concerns and the length of time it took to do income verifications.¹¹⁸ There is a further complication in failing to consider an applicant's income information in the SSI program. Unless the Administration discovers fraud on the part of the applicant or similar fault, it will not review its determination to pay SSI benefits after two years even if earnings are subsequently discovered which would have prevented the payment of the benefits in the first place.¹¹⁹ This two year "statute of limitations" is referred to as the rule of "administrative finality."¹²⁰ But for "administrative finality," an investigation by the Social Security Office of the Inspector General discovered 61,380 SSI recipients were still receiving benefits even though their subsequently-discovered income should have terminated them, totaling over \$74.7 million dollars in overpayments.¹²¹ In the same audit, an additional 11,880 recipients were identified who had earnings that had not been considered by the Administration for an additional \$12.4 million dollars in overpayments, even though the two year "administrative finality" period had not yet attached.¹²² Even

¹¹⁶ *Id.*

¹¹⁷ *Review of Controls over Processing Income Alerts which Impact Supplemental Security Income Payments*, *supra* note 24, at 4.

¹¹⁸ *Id.* at i-ii.

¹¹⁹ *Disabled Supplemental Security Income Recipients with Earnings*, *supra* note 20, at 3.

¹²⁰ *Id.*

¹²¹ *Id.*

though the Doctrine of Laches generally does not apply to the government,¹²³ the Administration has voluntarily hobbled itself with regard to paying benefits in situations where it should not have.

What these studies demonstrate is that even if the Administration is provided income information, it might not further investigate that income or otherwise act upon it. Instead, the income may be used to *raise* the recipient's benefits, and if enough time passes, regardless of the propriety of decision to pay the benefits, it will not be reconsidered. As a result, millions upon millions of dollars in overpayments are made to individuals who are working. Nor is this problem limited solely to SSI. Thirty-six percent of SSI recipients also receive Disability Insurance Benefits.¹²⁴ While the Disability Insurance Benefit program is not need-based, it does have both limits on what a person can earn if working while applying for benefits (substantial gainful activity) and afterwards in order to continue to qualify for benefits. Income that is not reported by either employers or the recipient could likewise result in improper awards of Title II benefits. Furthermore, it should be remembered that these studies only deal with the improper payments that have been *discovered*, and may not include all that exist. The technological approach to income detection cannot detect income earned within the shadow economy, as there is no electronic data trail to follow.

Ultimately, one of the biggest problems is not the lack of income information, but rather the lack of priority given to the legal requirement on the agencies to use that information to investigate and terminate improperly paid benefits. The Administration has often placed a greater priority on quickly processing and paying disability claims with insufficient attention being given to verifying recipient-reported information and controlling program expenditures.¹²⁵ In response to the audit of the Medicare Prescription Drug plan cited above, the

¹²² *Id.*

¹²³ See generally *Nevada v. United States*, 463 U.S. 110, 141 (1983).

¹²⁴ U.S. Gov't Accountability Office, *supra* note 20, at 15.

¹²⁵ *Congressional Response Report: Integrity of the Supplemental Security Income Program*, *supra* note 97.

Administration “stated Congress’ intent was for [the Social Security Administration] to enroll, as quickly as possible, the maximum number of eligible citizens into the prescription drug program. To accomplish this, [the Social Security Administration] developed a streamlined income and resource verification process that relied heavily on applicant attestations. . . .”¹²⁶

What this attitude demonstrates are the competing goals at stake in many need-based welfare programs. One goal is to foster as much participation as possible, eliminating as many barriers to participation as possible with the laudable goal of ensuring that as many people that can benefit from the program can do so. This goal, however, is in direct competition with ensuring that only those individuals who truly meet the eligibility criteria – those criteria that are set to ensure that the people who really need the help are the ones getting the help – participate in the program. Stated another way, if society’s goal is to ensure that as many people benefit from a needs-based welfare program as possible, then the means to achieve that goal is to completely eliminate any sort of application procedure or eligibility requirements. Doing so will ensure that everyone who needs benefits will receive them, but so will an inordinate number of people, at great cost, who do not.

Yet another complication is the fact that, because many welfare programs have a goal of getting individuals off of welfare rolls and joining the workforce, they will encourage and allow, under often complicated rules, work-related income as long as the income derived is below a certain level for a certain amount of time, without terminating benefits. Some individuals will very carefully work only to the point where they do not endanger having their benefits terminated.¹²⁷ The challenge is therefore to separate the people working below that level from those working above that level, but who are not reporting their income. First and foremost, however, the income must be reported; only then can it be analyzed to determine its effect on the receipt of welfare benefits. The identification of work-related earnings is therefore merely a starting point.

¹²⁶ *The Social Security Administration’s Income and Resource Verification Process for Individuals Applying for Help with Medicare Prescription Drug Plan Costs*, *supra* note 107, at 3.

¹²⁷ See generally Chambers, *supra* note 78.

THE HARM

What is the harm of people receiving need-based welfare programs without reporting their income? Who is hurt by them doing so? Undoubtedly, there will be some individuals who have received so little income that it would not disqualify them from receiving need-based welfare benefits whether they reported it or not. Nevertheless, there are three groups of people who suffer from individuals improperly receiving welfare benefits due to unreported income: first, those individuals who do properly qualify for welfare benefits and receive them; second, those individuals who followed the rules and had reported their income and were properly disqualified from receiving assistance; and third, the taxpaying public who pay to support the welfare programs.

How is the first group, those who properly qualify for and receive need-based benefits, harmed by those who receive benefits that should not? That fact that there are individuals who receive need-based welfare benefits who are working with incomes that would, had they been reported, disqualify them from receiving those benefits causes a suspicion of *all* individuals receiving the need-based welfare benefit. For example, the parody of the MasterCard advertisement cited at the beginning of this article questions why the individual photographed was “receiving a free bowl of soup” if he can afford a “\$500 cellular telephone.”¹²⁸ This parody reflects our society’s concern as to whether certain individuals truly deserve the assistance that is given to them. Because there are people who are receiving welfare benefits who would not qualify to do so had they reported their income, it can stigmatize, in the eyes of society, those who are legitimately receiving benefits.

Just how much of a stigma there is overall in receiving welfare assistance is a matter for debate.¹²⁹ For instance, since

¹²⁸ Mikkelson, *supra* note 1.

¹²⁹ For a brief overview of the concept of there being a stigma of receiving welfare, see Robert Breunig, Indraneel Dasgupta, Craig Gundersen, Prasanta Pattanaik, *Explaining the Food Stamp Cash-Out Puzzle*, Food and Nutrition Research Report No. 12, U.S. DEP’T OF AGRICULTURE, ECON. RES. SERVICE, 14-16 (Apr. 2001), <http://www.ers.usda.gov/publications/fanrr12/fanrr12.pdf>. See also Colleen Flaherty Manchester & Kevin J. Mumford, *How Costly is Welfare Stigma? Separating Psychological Costs from Time Costs*, AM. ECON. ASS’N, 1

there are over 57 million people in the United States receiving Medicaid (roughly one in every five),¹³⁰ there cannot be too large of a stigma attached to it. In a United States Department of Agriculture survey of households eligible to participate in the federal food stamp program, only 7% of the eligible non-participating households identified “stigma” as the main reason for their non-participation.¹³¹ At the risk of political non-correctness, it is entirely possible that the “stigma” of receiving governmental aid is no longer as strong a deterrent as it might have once been.¹³² But as the parody cited above shows, the fact that some people cheat the welfare system can lead to suspicion that anyone or even everyone receiving benefits is likewise cheating, which is clearly not true.

The second group of people harmed by those who improperly receive benefits are those individuals who, by following the rules and properly reporting their incomes, were denied need-based incomes. While at first glance this may seem as counter-intuitive as the first group, from a perspective of fundamental fairness those who do not cheat are harmed by those who do. By individuals not following the rules and not properly reporting income, which would disqualify them from receiving need-based welfare benefits, the system effectively creates two very different standards where there should be only one. It is fundamentally unfair that individuals who intentionally cheat can get benefits, while those who follow the rules may not.

Unlike the first two groups, there is nothing counter-intuitive about the harm suffered by the third group. Ultimately, the taxpaying, voting public will only support need-based welfare programs if they believe that those actually in need of aid are the

(Dec. 5, 2008),

http://www.aeaweb.org/annual_mtg_papers/2009/retrieve.php?pdfid=430
(stating that a substantial fraction of households that are eligible for welfare, or public assistance, do not participate; with non-participation rates ranging from forty to eighty percent) (citations omitted).

¹³⁰ *Medicaid – Beneficiaries and Payments: 2000 to 2006*, *supra* note 6.

¹³¹ Janet Currie & Jeff Grogger, *Explaining Recent Declines in Food Stamp Program Participation*, BROOKINGS INSTITUTION, 6 (Sept. 2000), <http://www.brookings.edu/es/events/bwpua/2000/02currie.pdf>.

¹³² See JEB BUSH & BRIAN YABLONSKI, *PROFILES IN CHARACTER*, 52-55 (1995) (stating that there is no longer a welfare stigma but rather a *stigma of working*).

ones actually receiving the aid. The failure to report income by individuals is not only against the law with regard to welfare programs, but it is also illegal under the tax code. All income from any source and any country must be reported to the IRS unless it is exempt under the tax code; there is no minimum amount of income that exempts a taxpayer from filing a return.¹³³ Besides wages, salaries, and other forms of income reported on tax returns by employers or financial institutions, the IRS also requires cash payments from side work and the fair market value of bartered exchanges of goods and services to be reported as well.¹³⁴ The failure to report income, and to pay taxes on that income, creates what is known as the “tax gap.”¹³⁵

A consequence of this “tax gap” – especially of individuals who are working in the shadow economy without reporting their income whether or not they are receiving welfare benefits – is to transfer to those working in the official, reported economy an even larger percentage cost of supporting welfare programs. The taxes not paid by those working “under the table” cause those whose income is reported to pay more than their fair share.¹³⁶ This is true for all government-provided benefits – schools, police, fire departments, etc. The working but non-taxpaying individual receives the benefit of these services without paying for them.¹³⁷ This becomes even more ironic, not to say even more offensive, if the individuals who are working and not reporting their income or paying taxes on it are receiving monetary or other welfare benefits paid for by those who do report their income – which they would be ineligible to receive if they had reported their income in the first place.

It is therefore the people who qualify for need-based welfare, those who applied and by following the rules were properly denied benefits, and the people who pay the taxes to provide the welfare assistance (and everything else our government provides

¹³³ *Reporting Miscellaneous Income, FS-2007-26*, IRS.Gov (Nov. 2007), <http://www.irs.gov/newsroom/article/0,,id=175963,00.html>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *See Schneider, supra* note 4, at 8.

¹³⁷ *See SCHEIDER & ENSTE, supra* note 3, at 174-75.

at the local, state, and federal levels) who suffer from individuals who receive need-based welfare benefits to which they would not be entitled had they reported their incomes. In effect these individuals are stealing – they are taking money and other benefits to which they would not be entitled had they followed the law regarding income reporting.

ELIMINATING INCOME VERIFICATION

Whether stigmatizing or not, there are opportunity costs of applying for welfare benefits, such as the time and effort it takes to apply for benefits. In our free society, it is normally left to individuals to weigh those costs for themselves; if they decide that the costs are prohibitive, they should not apply. Regardless of efforts to lower these opportunity costs, they will always remain to a certain degree. Removing too many barriers, such as requiring no income verification, while reducing costs and in theory raising participation, would likewise by definition increase instances of abuse.

Over the years, there have been studies about and efforts to identify and remove barriers between eligibility for various welfare programs and actual participation. Many times these barriers, such as application procedures, may prevent otherwise eligible individuals from receiving the help they need. For example, in a study of Medicaid and state children's health insurance programs, 72% of the parents who did not complete the application process to receive free health care for their children said it was too difficult to obtain the necessary documentation, while 52% of the parents who did not even attempt to enroll their eligible children said the application process was too long and cumbersome.¹³⁸ In other words, for these parents, having to apply at a government office and to provide the necessary documentation for free health care for their children was too onerous.

What many parents did indicate, however, is that they would be willing to have their children receive free health care through

¹³⁸ Timothy W. Westmoreland, *Medicaid and State Children's Health Insurance Program Eligibility Pilots*, CENTERS FOR MEDICARE & MEDICAID SERVICES 4 (June 26, 2000), <http://www.cms.hhs.gov/smdl/downloads/shoo62600.pdf>.

Medicaid or a state children's health insurance program if they could receive the benefits first and then apply.¹³⁹ States which administer the Medicaid program are allowed to grant temporary Medicaid benefits based on preliminary information provided, with the beneficiary/applicant being given a month to either complete a full Medicaid application or have the presumptive application serve as their full application.¹⁴⁰ States have great leeway in simplifying their welfare application procedures, to include eliminating or reducing income verification and asset tests used to determine actual eligibility.¹⁴¹ The logic of granting benefits first and then requiring an application second is that the children need health care to be provided now, and cannot afford to wait for an application process to be completed. This approach, however, maximizes the likelihood that benefits will be provided to those individuals who do not meet the income tests for the need-based aid. For example, it would be impossible to imagine a bank granting loans to individuals before they actually apply for these loans. While efforts to simplify application processes are admirable, they should not be done to the extent whereby those not eligible to receive aid get it inappropriately and thereby undermine the legitimacy of the need-based welfare programs.

THE PROBLEM WITH SELF-REPORTING OF INCOME

Even if welfare agencies utilize a host of technology-based income reporting measures, a common factor for all need-based welfare programs is the requirement placed on applicants or recipients to report their income from employment. Furthermore, agencies will contact beneficiaries to verify the accuracy of use income and resource data that is received through matching agreements with other agencies prior to using

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 5.

¹⁴¹ *Id.*

that data to terminate, deny, or reduce a benefit.¹⁴² If there are discrepancies it is the Administration's policy to accept the individual's reasonable explanation to reconcile the discrepant information.¹⁴³ It is, in effect, asking people seeking benefits if their income or resources are high enough to disqualify them from the benefits they are seeking. Accordingly, there is little monetary incentive for applicants or recipients to honestly report their income, as to do so is to their detriment. While the Administration has the ability to levy sanctions to encourage reporting compliance, the Administration rarely does so.¹⁴⁴ According to the Government Accountability Office, in a multi-year study, over one million recipients of Social Security benefits were overpaid, but only 3,500 recipients were penalized for failing to report eligibility information.¹⁴⁵ Three basic reasons were discovered in the audit for the failure to impose penalties: first, Administration workers believed that the penalty amounts were too low to be effective; second, the Administration workers felt that the process to impose penalties was too administratively burdensome; and third, Administration workers felt that their management officials did not encourage the use of penalties.¹⁴⁶

POSSIBLE SOLUTIONS

Despite the calls to eliminate income reporting for need-based welfare programs or to rely solely on self-reporting, the integrity of our need-based welfare programs requires income detection, and as shown above, better income detection than what currently exists. This will be even more relevant as more and more employers utilize non-standard employees who are hired as independent contractors or temporary employees so as

¹⁴² *The Social Security Administration's Income and Resource Verification Process for Individuals Applying for Help with Medicare Prescription Drug Plan Costs*, *supra* note 107, at D-2.

¹⁴³ *Id.*

¹⁴⁴ U.S. Gov't Accountability Office, *supra* note 20, at 13.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

to be able to avoid many of the costs incumbent with regular, full-time employees.¹⁴⁷ Ultimately, the solution to this problem rests on a three-prong approach. First, the agencies that run the need-based welfare programs need to do a better job with the information that is already being provided to them to detect and follow-up on reported earnings. For example, while the Administration receives IRS Form 1099 information, which it uses when determining SSI eligibility, it does not use that same information in Disability Insurance Benefits cases to see if an applicant is working even though some employee's income is not reported on W-2 forms, but only on 1099 forms.¹⁴⁸ Even though the Administration has employment or wage information, it does not necessarily use it. Likewise, welfare agencies need to utilize all of the income information at its disposal and should consider more than just one report of income. Because some individuals' pay vary from pay-period to pay-period, relying on merely one pay-period report can create a misleading picture of an individual's actual income. A study by the Office of the Inspector General for the State of Illinois found that relying on only one pay stub led to a 13% error rate in determining an individual's income.¹⁴⁹

Perhaps one of the best ways to improve using information already in the possession of a welfare agency to detect and investigate work-related income would be to consolidate those efforts within the agency. In 2005, the Social Security Administration successfully tested consolidating the processing of voluntary wage reports to one central office instead of the ten field offices that handled them previously. The centralized approach relieved the field offices of having to process the wage

¹⁴⁷ See, e.g., Sarah E. Needleman, *Employers Turn to Temporary Help*, THE WALL STREET JOURNAL (Nov. 9, 2009), <http://online.wsj.com/article/SB125752581635334109.html>.

¹⁴⁸ See U.S. SOC. SECURITY ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM § SM 00344.001 (2003) (stating that the Detailed Earnings Query, a report used by the Administration to provide specific income information for claimants of disability benefits, only contains self-reported and W-2 reported income; not income reported via IRS Form 1099).

¹⁴⁹ See Office of the Inspector Gen., Ill. Dep't of Healthcare & Family Servs., *2007 Annual Report*, ILLINOIS.GOV 15-16 (May 14, 2008), <http://www.state.il.us/agency/oig/docs/2007OIGAnnualReportFinalwebsitecorrection.pdf>.

reports and created a centralized cadre whose sole function was to process the reports, creating expertise and consistent application of rules.¹⁵⁰ Ideally, consolidated central offices should be created whose sole function is to detect and report income and employment. This type of specialization can provide for quicker, cheaper, and more effective use of assets as opposed to being merely an additional duty for field office personnel.

Second, the government as a whole needs to better share the information obtained by one agency or entity with other welfare agencies at both the state and national levels. A number of need-based welfare programs are duplicating each others' efforts by monitoring their own applicants and beneficiaries employment and income reporting. Many of these individuals, however, participate in multiple need-based welfare programs, and the different agencies may have information that would benefit other agencies. As shown by the success of the data exchange programs already in place, these type programs have been very effective to date in providing information on earnings. But these efforts to share information are being made between individual agencies, such as the National New Hire database information between the Office of Child Support Enforcement and the Social Security Administration. While each need-based welfare program will likely continue with its own income reporting rules and eligibility requirements, there is no reason why their participants or applicants' income information should not be shared with all other federal and state agencies which also run need-based welfare programs in a single master database. Information could further be gleaned from agencies outside the need-based welfare programs themselves. For instance, state child support agencies collect employment information from child support hearings, to include income information that is used to calculate child support guidelines. As this information is used as evidence in judicial proceedings, there is a presumption of accuracy, and this income information could be shared with welfare programs.¹⁵¹

¹⁵⁰ *Disabled Supplemental Security Income Recipients with Earnings*, *supra* note 20, at app. B.

¹⁵¹ Both administrative and judicial hearings to determine child support guidelines can provide information about non-reported, shadow-economy income as there is normally an individual besides the one working in the

Finally, beyond the current, primarily technological, means of income detection, what is needed to combat the shadow economy are mechanisms to persuade individuals with knowledge of otherwise unreported income information – whether the applicants, recipients, or third-parties – to provide it. Three possible mechanisms are (1) mandatory monthly telephone reporting of earned income by applicants or recipients, (2) mining bank records and credit reports for employment and income information, and (3) telephone hotlines for third-parties to report applicants’ or recipients’ work activity.

Currently, SSI recipients are required to report any change in their resources (such as increased income from working) and may do so by calling a toll-free telephone number.¹⁵² In 2003, the Administration tested a system whereby SSI recipients voluntarily reported their earnings on a monthly basis via telephone instead of merely reporting when there was a change.¹⁵³ Based upon an Administration estimate, implementing a full-scale, mandatory implementation of the telephone reporting system would prevent at least \$80 million in overpayments each year.¹⁵⁴ While it might seem counter-intuitive, as individuals are already required to report income to initially qualify for and continue to qualify for receiving need-based benefits, many people will comply with a legal requirement of reporting income only as long as they are given an easy opportunity to do so. The Administration test could easily be expanded from a voluntary program to a mandatory one – requiring applicants or recipients to report their monthly earnings and the source of those earnings. An automated

shadow economy – the other parent – who has knowledge of the shadow economy work, and furthermore an incentive, to provide information about the income of the other earned in the shadow economy for the calculation of child support guidelines. See generally Drew A. Swank, *The National Child Non-Support Epidemic*, MICH. ST. DCL L. REV. 357 (2003).

¹⁵² *Electronic Booklets: What You Need to Know When You Get Supplemental Security Income (SSI)*, U.S. SOC. SECURITY ADMIN. (Mar. 2008), <http://www.socialsecurity.gov/pubs/11011.html>.

¹⁵³ *Disabled Supplemental Security Income Recipients with Earnings*, supra note 20, at app. B.

¹⁵⁴ *Supplemental Security Income Overpayments*, supra note 31, at 9.

system could be used that would flag only those responses which indicated earnings above a certain level for follow-up investigation. This program would not be overly burdensome for recipients – one toll-free telephone call a month – and it would be possible to have procedures to allow certain applicants or recipients to be excused from the obligation due to special circumstances (such as their age or condition). A failure to report could be used as a basis to impose a penalty; repeated violations could be used to terminate or deny benefits.¹⁵⁵ Obviously, some people could lie about their earnings on a monthly basis, especially if they lied upon applying for benefits. But for those individuals who had not been working when they applied for benefits, and subsequently began working, such a mechanism would provide for inexpensive, effective means of capturing work-related income information, whether or not that work was within the reported or shadow economy.

The second mechanism to find work-related income that is not reported by either employers or recipients would be to examine bank records and credit reports. In 2005, the Administration contracted with a third-party vendor to retrieve electronic bank data to detect unreported bank accounts in SSI cases.¹⁵⁶ Bank statements can be especially useful in identifying those cases in need of a redetermination for SSI benefits, as they not only potentially show wages a person has received, but other types of income – gifts, interest, etc. – all of which are resources which for SSI are considered in eligibility determinations.¹⁵⁷ As recommended by the Administration's own Office of the Inspector General, electronic bank statement information should be obtained to determine additional income and resources as tested for SSI cases.¹⁵⁸ A study conducted by the Office of the Inspector General of bank statement data showed that 7% of SSI recipients had bank accounts reflecting income or resources in excess of the threshold amount that they did not

¹⁵⁵ See U.S. Gov't Accountability Office, *supra* note 20, at 13.

¹⁵⁶ *Supplemental Security Income, Recipients with Excess Income and/or Resources*, *supra* note 25, at 2.

¹⁵⁷ See *id.* at 2, 4.

¹⁵⁸ *Id.* at 4.

report to the Administration.¹⁵⁹ Bank data, however, is more complicated than individual earnings reports, as bank accounts may have joint account holders and the reported data may include income or funds for individuals other than the SSI recipient.¹⁶⁰ Sorting out “who owns what assets” in a bank account is very labor-intensive for Administration personnel.¹⁶¹

Credit reports are another existing information source that can be useful in determining if an applicant for a need-based welfare program has unreported employment or income. The Fair Credit Reporting Act provides that federal agencies can obtain credit reports on individuals, which list both their current employers and former employer.¹⁶² In October 2003, the Social Security Administration began a pilot program to evaluate the use of reports obtained from credit bureaus.¹⁶³ Besides using credit reports as a tool to see if individuals are reporting that they are employed (while informing a need-based welfare program that they are not employed), a credit report can indicate an income stream which otherwise might not have been reported. Obviously, both bank records and credit reports do not offer the same level of proof as employer – or self-reported – income from welfare applicants. What they could be used for, however, is to shift the burden onto the person applying for benefits or already receiving benefits to at least explain the discrepancies. The individual’s failure to do so could be used as a basis to deny their application or terminate their benefits.

The third mechanism, third-party fraud hotlines, has proven to be an effective source for law enforcement data. The principal is very straight-forward – normally someone, somewhere, knows something about a crime that has been committed. The key is to get them to come forward with their information. Some come forward through a sense of civic duty; others come forward when given the opportunity to profit by it. The federal government already pays individuals for providing information

¹⁵⁹ *Id.* at 3.

¹⁶⁰ *Id.* at App. C-2.

¹⁶¹ *See id.*

¹⁶² 15 U.S.C.A. § 1681f (West, Westlaw through P.L. 111-349).

¹⁶³ *Supplemental Security Income Overpayments*, *supra* note 31, at 9.

on employers who fail to pay their taxes, rewarding the informant with between 15% and 30% of the money recovered, after the payment of taxes, penalties, and interest accrued.¹⁶⁴ Some states already have telephone fraud hotlines.¹⁶⁵ Federal welfare agencies could operate such telephone fraud hotlines, or contract them out to businesses that already provide “intelligence retrieval networks” for state and local law enforcement agencies.¹⁶⁶

This could potentially be one of the strongest tools to combat non-reporting of income by applicants and/or recipients of need-based welfare benefits, even of those working in the shadow economy. This is because those individuals who are working for cash in the shadow economy (or bartering for goods or services) are being paid by someone, and that someone may know or discover that the person is also receiving need-based welfare benefits – and the inducement of receiving a cash bounty for reporting them can be very appealing. For any of the need-based welfare programs that would use such a hotline, it would be imperative that an anonymous tip alone should not, by itself, be the basis for denying an application for benefits or terminating benefits already being paid, but instead should trigger an investigation of the individual. Rewards would be paid only for those tips that resulted in the non-payment of

¹⁶⁴ Stephen Ohlemacher, *Tips on tax cheats skyrocket with bigger rewards*, NAT'L WHISTLEBLOWERS CENTER (Oct. 1, 2009), http://www.whistleblowers.org/index.php?option=com_content&task=view&id=957&Itemid=141.

¹⁶⁵ See, e.g., Ind. Family Soc. Servs. Admin., *Fraud Hotline*, IN.GOV, <http://www.in.gov/fssa/2385.htm> (last visited Nov. 9, 2010); *Fraud Investigations*, WASH. STATE DEPT OF SOC. AND HEALTH SERVICES, <http://www.dshs.wa.gov/fraud/> (last visited Nov. 10, 2010); *Welfare Fraud Complaint Form*, MD. DEPT OF HUMAN RESOURCES, <http://www.dhr.state.md.us/oig/fraud.htm> (last visited Nov. 4, 2010).

¹⁶⁶ One such company is “WeTip.” Founded in 1972, WeTip operates an anonymous, toll-free, telephone service in both English and Spanish throughout the entire United States. Dan Mayfield, *Diversified Risk Management – On WeTip*, WETIP (June 7, 2009, 4:29 PM), http://www.wetip.com/index.php?option=com_content&view=article&id=262:diversified-risk-management-promotes-wetip&catid=904:promotional-examples&Itemid=356. Since its founding it has processed over 421,572 tips, leading to 14,786 arrests (4% of all tips), with 7,515 convictions (51% of all arrests made). *Id.*

benefits, and if benefits had already been paid, a portion of any recouped benefits should be paid as an additional award as well.

CONCLUSION

Ultimately, all that is being asked of people who apply for need-based welfare is to be truthful on their applications. Unfortunately, as shown by the prosecutions for welfare fraud and administrative termination and recoupment of benefits, not everyone tells the truth when applying for need-based welfare or subsequently reporting their income. Even if 99.9% accuracy was achieved in income detection and reporting, millions of dollars each year will still be lost just due to the immense size of our national need-based welfare programs. Some cheaters will slip through the cracks and others will be able to beat the system effectively regardless of the income detection and verification measures. While absolute perfection is not a possibility, many means of income detection that are fiscally viable (as defined as the benefits of money saved either through preventing erroneous payments or recouping payments already improperly paid is greater than the cost of the detection or verification means) need to be developed and tried to reduce improper payments and to recoup those payments that were already erroneously made. This is necessary to maintain the integrity of, and the public's trust in, our need-based welfare programs. President Reagan's dictum regarding arms control efforts with the former Soviet Union is equally applicable to our need-based welfare programs – we need to trust what the applicants and recipients report regarding their work-related income, but we also need to effectively verify that information.

the most basic protected constitutional rights.⁷² Enormous deference must be awarded parents absent a powerful countervailing (public) interest.⁷³ Parental rights must be afforded more consideration than is granted under the present statutory scheme. Many parents work as teachers, daycare providers, coaches, nurses, and health aides, and in other fields that involve working with children. One unfortunate parenting mistake and they can become unemployed and stigmatized. Criminals are granted considerably more relief through rehabilitation policies, diversionary programs, or expungement proceedings than are ordinary parents that make a parenting mistake. Serious acts of violence against children are resolved through criminal proceedings and in family court. This discussion is about those cases that involve parenting mistakes or errors that fall into the non-criminal domain.

There is no public need for the lifetime placement on a registry for parents who commit minor acts of neglect or abuse. Government should not intrude into poor decision-making by a parent to the extent that the resulting governmental action *permanently brands* the parent. It is an overbroad and arbitrary response that assumes a parent must be designated a permanent risk to children, without any competent proof supporting the designation. This type of conclusion requires significantly more psychiatric, psychological or similar expert proofs. Social, mental and economic factors should be evaluated before an individual is placed on the Registry. The individual's maturity, history of substance abuse or alcoholism, status as a single parent, experience of unwanted pregnancy, and lack of employment all may be relevant. A long-term placement on the Registry may make sense if certain conditions are proven to exist, but in the absence of such proofs there is no constitutional basis to place an individual on the Registry for the rest of that individual's lifetime. Greater proofs are necessary to brand someone in perpetuity.

Parenting is one of the most rewarding, but also one of the most difficult jobs a person may undertake. Many parenting decisions are made under emotional or stressful circumstances. Parents may believe they are acting in the child's best interest,

⁷² Bohn v. Dakota County, 772 F.2d 1433, 1435-36 (8th Cir. 1985).

⁷³ *Id.* at 1435 (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

but decide, upon reflection, that their actions were debatable or flat-out wrong. A few examples of these debatable actions include using corporal punishment by hitting a child with a belt for shoplifting; leaving an infant at home to pursue the child's father, who stole the rent money; or spanking a child for being extraordinarily disrespectful to adults, and, in the process of spanking him, fracturing the child's thumb. These parents are *permanently branded* as child abusers if they are placed on the Registry. This remedy is overbroad, unnecessary and excessive. It does not serve any valid governmental purpose when weighed against the harm to the parent.

There is no public need to place the non-criminal parent on the same or comparable registry as the criminal parent convicted of child abuse or neglect. Completely dissimilar citizens are being treated in similarly harsh ways (*e.g.*, Megan's Law registrant versus DYFS neglect registrant). Equal protection is being denied to the parents who committed minor child neglect while other citizens who commit much more serious offenses escape long-term implications through diversionary programs, expungements, and rehabilitation submissions. There is a breakdown in logic or rationale that does not square with due process.

Perception is reality when it comes to a stigma created by the Registry scheme. Those who access the Registry presumably cannot, or may not, separate the criminal child abuser (*e.g.*, a sex offender) from the parental abuser (a father who spanked his son). The statutory scheme applies a rigid paradigm and non-discretionary penalty criteria to child rearing, which is an enormously challenging endeavor. Every parent is different, and every child is different. Neither the DCF nor the administrative law judges have any discretion when dealing with poor parental decision-making.⁷⁴ Placement on the Registry is the statutory penalty, even for non-criminal or marginal cases of abuse or neglect.⁷⁵

I question whether one bad parental decision or one bad parental judgment should be recorded in perpetuity, in a government registry open to government employees and

⁷⁴ N.J. STAT. ANN. § 9:6-8.11 (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

⁷⁵ *Id.*

government employers, without the opportunity to have the entry removed upon a clear showing of rehabilitation, or removed for some other valid reason. I am mindful that the protection of children is the underlying purpose of the Registry. However, a convicted criminal can have an offense expunged, or can apply for a conditional discharge.⁷⁶ Even Megan's Law registrants are afforded remedial relief from the registry under certain conditions.⁷⁷ But once an individual's name is placed on the abuse or neglect Registry it cannot be removed, even when the placement results from an administrative matter. I contend the creation of a non-removable record in the Registry is an extraordinary remedy and is inconsistent with other areas where the Legislature permits rehabilitation, expungements, and diversionary programs, protects those with disabilities, and protects parenting rights. In its present form, the Registry is unconstitutional. It deprives parents of the right to redemption where others are afforded the same opportunity, for more egregious violations of law. For these reasons, other remedies or procedures affording due process, equal protection and fundamental fairness should be considered at the legislative or appellate level.

⁷⁶ N.J. STAT. ANN. § 2C:36A-1(West, Westlaw through L.2011, c. 46 and J.R. No. 2); N.J. STAT. ANN. § 2C:52-1 to -32 (West, Westlaw through L.2011, c. 46 and J.R. No. 2).

⁷⁷ N.J. STAT. ANN. § 2C:7-2(f) (West, Westlaw through L.2011, c. 46 and J.R. No. 2).