

ARTICLES

The Rise and Fall of Project 100%: The Troubled History of “Welfare Reform” in San Diego County and Lessons for Social Movement Lawyering Resource Mobilization

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ABSTRACT

Under “Project 100%,” or “P100,” when County residents applied for financial assistance under CalWORKs (“California Work Opportunity and Responsibility to Kids”), the County required them to submit to unannounced searches of their homes by law enforcement investigators. Purportedly an income eligibility and anti-

* Senior Staff Attorney, American Civil Liberties Union of Southern California. Affiliation for identification purposes only. This article is written in the author’s individual capacity and represents solely the views of its author. I am extremely grateful to David Loy, who came up with the idea of the state court challenge to Project 100% that he and I litigated at the ACLU of San Diego & Imperial Counties, with wonderful pro-bono co-counsel at the Fish & Richardson law firm, including Craig Countryman, Alex Gelberg, and Madelyn McCormick. Craig died while the case was still being litigated, but he played a vital role in the lawsuit and in helping to create the political climate leading to the San Diego County Board of Supervisors’ decision to rescind P100 after litigation had ended. This article, and the state court challenge to P100, would not have been possible without the courage of Uhmbaya Laury and her devotion to CalWORKs student applicants at Grossmont Community College. Other staff at the Grossmont College CalWORKs office, including their amazing Program Specialist Geradette Nutt, were also fiercely dedicated to protecting the rights of their students. Advocacy staff at the ACLU of San Diego & Imperial Counties, including Gaia Croston, Savana Doudar, and Esme Flores, were instrumental in the political efforts to abolish P100. I thank San Diego County Supervisor Terra Lawson-Remer and former Supervisor Nora Vargas for being open to our efforts, and for sponsoring the resolution that ended the program. The state court challenge, in turn, built upon the earlier federal court challenge, and would not have been possible without the plaintiffs and lawyers who brought that case. I have the utmost respect and gratitude for all of the plaintiffs and the full legal team in that case. I am especially appreciative of conversations I had about that case with Jordan Budd, Rosemary Bishop and Joni Halpern. I am also grateful to Susan Butler Plum, Kathleen Rubenstein, Kathy Quijije, and the Skadden Fellowship Foundation for all of their support, including a writing stipend that supported the writing of this Article. I am also grateful for all of the support from the staff of the Georgetown Journal on Poverty Law & Policy, especially Yaseen Hashmi, for his careful, thoughtful, helpful, and kind editorial guidance. Peter Eliasberg at ACLU of Southern California and Brooke Weitzman at the Elder Law and Disability Rights Center made it possible to take the time needed to complete my research. Diana Reddy and Sameer Ashar provided crucial advice that helped focus my arguments. My parents, Ruth and Lenny Markovitz, became outraged by P100 the second they learned of it and they avidly followed every step of the litigation. Like Craig Countryman, my mom never saw the Court of Appeal decision upholding P100, and she never got to know that the Board of Supervisors rescinded the program months later. But she couldn’t have been prouder of all of the ACLU’s efforts to get rid of it. This article is dedicated to her memory. © 2026, Jonathan Markovitz.

fraud program, P100 only applied to families who were not suspected of fraud. Other anti-fraud programs kicked in if an application raised any red flags. P100 was challenged almost from its inception, but it took a welfare rights organization, two lawsuits, courageous plaintiffs and witnesses, political advocacy and organizing, and one of the most sweeping social movements in U.S. history to create the climate necessary to eradicate the program. This Article examines the history of the struggle against P100 as a case study assessing some of the barriers courts have created which make it difficult to use the law to fight for social change, and articulates how social movements may reverberate in unpredictable ways, making it possible for movement lawyers to turn ostensibly unsuccessful lawsuits into vehicles for meaningful social change.

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I. INTRODUCTION

On April 6, 2021, the San Diego County Board of Supervisors voted to end a uniquely degrading and punitive public benefits policy that stigmatized and traumatized some of the most vulnerable members of the San Diego community for a generation.

Under “Project 100%,” or “P100,” when San Diego County residents applied for financial assistance under California Work Opportunity and Responsibility to Kids (“CalWORKs”), the County required them to submit to unannounced searches of their homes and intensive questioning by law enforcement investigators.¹ Purportedly an income eligibility and anti-fraud program, P100 only applied to families who were *not* suspected of fraud. *Other* anti-fraud programs kicked in if an application raised any red flags.² For most of its existence, P100 was the only policy like it in the nation—none of the other 3,005 counties in the United States forced public assistance applicants to open their doors to law enforcement investigators as a precondition for receiving benefits.³ After its inception in 1997, P100 impacted hundreds of thousands of families who had done nothing to create any suspicion of wrongdoing, simply because they were

1. CalWORKs “is a welfare program that gives cash aid and services to eligible California families in need. The program serves all 58 counties in the state and is operated locally by county welfare departments.” *California Work Opportunity and Responsibility to Kids*, CAL. DEP’T OF SOC. SERVS., <https://www.cdss.ca.gov/calworks> [<https://perma.cc/W84Y-TC5Z>] (last visited May 27, 2025).

2. Generally, if a CalWORKs application raised any suspicion of fraud, or if an applicant was alleged to have engaged in fraud, the County’s Public Assistance Fraud division would open an investigation into the applicant, which *could* also lead to a search of the applicant’s home, though that was not inevitable. These investigations were coded and tracked and referred to the District Attorney’s office separately from the P100 investigations. *See Villafana v. Cnty. of San Diego*, No. 37-2018-00031741 ¶¶ 31, 33 (San Diego Cnty. Super. Ct. Dec. 7, 2018); Hilda Chan, *P100 Costly Home Searches—Where’s the Fraud?: Data-Based Evaluation of San Diego County’s Blanket Home Search Requirement for Families Applying for Welfare*, PUB. INTEREST L. PROJECT AND OPEN SOC’Y FOUNDS., Apr. 11, 2014, at 11, <https://thepublicinterestlawproject.box.com/s/5tr846dlq6qoxrlnvik4ljkkm83hsrjw> [<https://perma.cc/HLJ2-RL9P>].

3. Greg Moran, *End Of Project 100% in County Marks New Era in Assisting Needy*, SAN DIEGO UNION TRIB. (May 10, 2021), <https://www.sandiegouniontribune.com/2021/05/09/end-of-project-100-in-county-marks-new-era-in-assisting-needy/> [<https://perma.cc/Z2FH-RZJU>] (noting, however, that Los Angeles County “tried a similar program but dropped it in 2008 after concluding it was ineffective”).

experiencing poverty and sought help to which they were legally entitled.⁴ The history of P100 is intertwined with racist, sexist, and anti-immigrant rhetoric and policies that have long infected discussions of poverty in the United States.

Advocates began to challenge P100 almost at its inception, but it took a welfare rights organization, two lawsuits, courageous plaintiffs and witnesses, political advocacy and organizing, and one of the most sweeping social movements in U.S. history to create the climate necessary to eradicate the program.

The story of P100 is ultimately a story of social movement triumph and resilience, but it is also the story of state and federal judiciaries that have spent decades weakening constitutional provisions and state and federal laws that are protective of people's most basic rights. The case against P100 should have been easy—more than one judge rightly understood it as an “assault on the poor” that was in clear violation of basic Fourth Amendment rights.⁵ The program also ran afoul of anti-discrimination principles. But a line of Supreme Court cases has ensured that the Fourth Amendment isn't what it used to be, and federal and state courts have made it increasingly difficult to prove equal protection violations or to state a claim for discrimination. In the end, what should have been an easy case became impossible, and victory could be achieved only through political struggle, not litigation.

This does not mean, however, that the federal and state lawsuits challenging P100 were a waste of time or resources. Instead, the litigation kept P100 in the public eye for decades and played a crucial role in changing the political climate that made the program possible in the first place. The legal challenges to P100 became sites of resistance, helping to galvanize popular opinion in opposition to the program. Litigation ensured that when a newly progressive Board of Supervisors was swept into office in 2020, riding the wave of change inaugurated by the Movement for Black Lives in the wake of the police killings of George Floyd and Breonna Taylor, P100 was squarely in its crosshairs and lobbying efforts to abolish the program would no longer fall on deaf ears.

This Article examines the history of the struggle against P100 as a case study assessing some of the barriers courts have set up that make it difficult to use the law to fight for social change, and the resources that are available to social movement lawyers who have to confront those barriers. While others have argued that courts have failed to protect minority rights, the legal battles against P100 demonstrate that federal and state judiciaries have taken a more actively hostile role than mere “failure” suggests—courts have slowly but systematically weakened constitutional and statutory provisions that Congress and state legislatures intended as tools that could help people challenge oppressive government practices.

4. By 2005, San Diego County had already completed over 118,000 P100 home searches. See Amy Nantkes, *Elite Rhetoric, Target Group Positioning, and Policymaking: Immigrant Women and Project 100% in San Diego County 116* (2021) (Ph.D dissertation, Claremont Graduate University) (unpublished dissertation), https://scholarship.claremont.edu/cgu_etd/219/. The program continued another sixteen years, with an estimated 9,000 searches per year. See Moran, *supra* note 4 (discussing the end of P100 in 2021).

5. Sanchez v. Cnty. of San Diego, 483 F.3d 965, 968 (9th Cir. 2007) (Pregerson, C.J., dissenting).

Some of these tools, including the relatively underutilized California state anti-discrimination statute that provided the basis for the state court challenge to P100, might still retain some vitality and have potential to help creative lawyers fight for change.⁶ But litigation can also provide opportunities for movement lawyers to conduct research, build coalitions, and develop other resources that they can employ in various forms of non-legal advocacy. And, when the timing is right, movement lawyers may also find ways to capitalize on broader social changes fostered by social movements that are not directly connected to their cases or clients.

By definition, movement lawyers work to support social movements.⁷ But support can be a two-way street, and the history of P100 shows that truly transformative social movements may reverberate in unpredictable ways, and they may make it possible for movement lawyers to turn ostensibly unsuccessful lawsuits into vehicles for meaningful social change.

The Article proceeds in five parts. Part II provides an overview of P100 itself, laying out its key requirements and addressing the various types of harm it inflicted on impoverished San Diegans for decades. Part III places P100 into historical context, analyzing its roots in national and local racist and nativist discourse about welfare and immigration. Part IV addresses the lawsuits that challenged P100, assessing the constitutional and statutory provisions that might have provided protections against the punitive and degrading impact of P100, and the ways that courts have eroded those protections in recent decades. Part V examines the relationship between the legal challenges to P100, the political advocacy that ultimately convinced the Board of Supervisors to rescind the policy, and the social movements that helped make that possible.

In the end, the struggles against P100 are a story of “winning for losing” (or “winning while losing” as discussed below),⁸ demonstrating that even failed litigation can provide resources that can be used to mobilize constituencies and fight for change, especially when the litigation resonates with themes that animate complementary social movements. In recent years, as the federal courts have become increasingly conservative, movement lawyers have started to rely on state courts and state constitutions as more promising vehicles for securing justice for politically marginalized and vulnerable populations.⁹ When those promises fail to bear fruit, the ultimate lesson is not that civil rights litigation cannot be successful, but that it isn’t enough, and that it is more important than ever before for lawyers who are interested in social change to work on behalf of, as part of, and alongside social movements.

6. The primary law at issue in the state court challenge to P100 is California Government Code section 11135. CAL. GOV’T CODE § 11135 (West 2017). See *Villafana v. Cnty. of San Diego*, 57 Cal. App. 5th 1012, 1014 (2020).

7. For a discussion of the history of the term “movement lawyering,” see Scott L. Cummings, *Movement Lawyering*, 2017 U. Ill. L. REV. 1645, 1689–90 (2017).

8. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011); see *infra*, Section V.

9. See, e.g., ACLU, OUR NEW FEDERALISM: USING STATE CONSTITUTIONS AND STATUTES TO ADVANCE CIVIL RIGHTS AND CIVIL LIBERTIES (Aug. 08, 2022), https://assets.aclu.org/live/uploads/publications/2022-08-08-federalism_final.pdf [https://perma.cc/D7NN-ZZ53].

II. THE MECHANICS OF, AND THE SUFFERING IMPOSED BY, P100

From 1997–2021, P100 was one component of San Diego County’s process for applying for benefits under the CalWORKs “welfare” program, which provides “cash aid and services to eligible California families in need.”¹⁰ Regardless of the jurisdiction where it is administered, applicants who wish to obtain CalWORKs benefits must go through a rigorous application and income eligibility verification process. The unannounced home searches that were conducted pursuant to P100 imposed *additional* burdens for CalWORKs applicants that were *not* required by the state, or by any other jurisdiction in California.

P100 began in 1997 as a pilot program proposed by the District Attorney’s office and the County Department of Social Services, ostensibly to “increase efforts in Welfare Fraud prevention” at the point of intake.¹¹ As Jordan Budd (who represented the plaintiff class in the federal court challenge to P100 when he was the Legal Director at ACLU-SDIC) has stated, P100, which was formally titled “Project 100%,” was “named in recognition of its requirement that 100% of the County’s aid applicants must submit to its demands.”¹² But this was never quite true. Starting in January 1999, the County expanded P100 to require home inspections for all new CalWORKs applicants whose applications did *not* raise any reasonable suspicion of fraud and who were not “obvious denials.”¹³ The category of “obvious denials” included applicants who stated that their income exceeded the program limits and families that had no children.¹⁴ Ironically, P100 did *not* apply to applicants whose applications *did* create a reasonable suspicion of fraud. These applicants were instead referred for “allegation-based” early fraud investigations.¹⁵ Again, families were only forced to open their doors to law enforcement investigators as a precondition for receiving needed assistance under P100 if their applications provided *no* basis to suspect them of fraud.

The searches and interrogations, referred to by the County as “home calls” or “home visits,” were conducted by licensed peace officers. For most of the program’s existence, they were administered as an “early fraud prevention and detection program by the District Attorney’s Public Assistance Fraud Division (PAFD), which is the County’s Special Investigative Unit (SIU).”¹⁶ When P100 was in effect, county benefit eligibility workers would inform CalWORKs applicants during their initial interviews that a law enforcement investigator would

10. *California Work Opportunity and Responsibility to Kids*, *supra* note 1; Moran, *supra* note 3.

11. SAN DIEGO COUNTY BOARD OF SUPERVISORS, Minute Order No. 45, April 29, 1997; San Diego County CalWORKs Program Guide, Special Notice (“Special Notice”) 98-60 at 1 (quoted in *Villafana*, No. 37-2018-00031741, ¶ 30).

12. Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolable Home*, 85 IND. L.J. 355, 381 (2010).

13. “Obvious denials” were people whose applications provided information indicating that they were clearly ineligible for CalWORKs benefits. Chan, *supra* note 2, at 10–11.

14. *Id.* at 10.

15. *Id.* at 11.

16. *Sanchez v. Cnty. of San Diego*, 464 F.3d 916, 934 (9th Cir. 2006) (Fisher, C.J., dissenting).

come to the applicant's home to conduct an investigation, but they generally did not say when the investigation would occur, though the program required completion of the P100 investigation within ten days of the applicant's initial eligibility interview.¹⁷ If the applicant was not home when the investigator arrived, the investigator was supposed to leave a business card, and if the applicant was not home the second time the investigator arrived at the home, the investigator was supposed to leave a note for the applicant to call the investigator.¹⁸ However, there was no written policy stating that applicants had the right to reschedule an investigation or otherwise informing them of this right if it did exist.¹⁹

When applicants were home, law enforcement officers assigned to the Public Assistance Fraud Division of the District Attorney's Office (and, later, to the Department of Child Support Services) would walk through the applicant's home. During these searches, officers searched for evidence of "ineligibility" that could lead to criminal prosecution either for welfare fraud or other crimes unrelated to the welfare application.²⁰ Because the investigations were carried out by law enforcement officers, they were not limited to eligibility verification. Instead, during the course of litigation, investigators testified that, because they *were* law enforcement officers, they had the duty to (and in fact did) look for and report evidence of crimes.²¹ Indeed, investigators would "make referrals for criminal investigation if they discover[ed] evidence of contraband, child abuse or a subject with outstanding felony warrants."²² They occasionally even arranged for arrests.²³ The investigations, which included a round of questioning and searching the applicant's home, took "anywhere from 15 minutes to an hour."²⁴

The P100 searches could include "searches of the interior of rooms, closets, cupboards, dressers, hampers, and other spaces and containers not in plain view in the home, with no official policy or protocol limiting the scope of the search."²⁵ P100 fraud investigators also regularly interrogated neighbors, landlords, and school officials about the applicant.²⁶ While these "collateral contacts" were ostensibly intended to help investigators evaluate an applicant's eligibility, in practice, investigators frequently asked questions "concerning matters unrelated or unnecessary to the determination of eligibility."²⁷

17. Chan, *supra* note 2, at 11; *see also* Villafana v. Cnty. of San Diego, 57 Cal. App. 5th 1012, 1015 (2020).

18. *Villafana*, 57 Cal. App. 5th at 1015.

19. *See* Chan, *supra* note 2, at 12.

20. *Sanchez*, 464 F.3d at 932 (Fisher, C.J., dissenting).

21. *Id.*

22. *Id.* at 934 n.1.

23. *Id.*

24. *Id.* at 919.

25. *Sanchez v. Cnty. of San Diego*, 2000 WL 34596272, ¶ 6 (S.D. Cal. Sept. 12, 2000).

26. *Sanchez v. Cnty. of San Diego*, No. 00 CV 1467 JM JFS, 2003 WL 25655642, at *2 (S.D. Cal. Mar. 10, 2003), *aff'd*, 464 F.3d 916 (9th Cir. 2006).

27. *Sanchez*, 2000 WL 34596272, ¶ 6 (S.D. Cal. Sept. 12, 2000); *see also* Chan, *supra* note 2, at 13–14.

The County claimed that the home searches were consensual, but “[i]f the applicant refuse[d] to allow a home visit, the investigator immediately terminate[d] the visit and report[ed] that the applicant failed to cooperate. This generally result[ed] in the denial of benefits.”²⁸ In these cases, applicants would lose access to CalWORKs assistance due to this “early fraud” program, but without any finding of fraud. Instead, the law enforcement investigator would file a report indicating that they were unable to complete their investigation, and the eligibility worker who reviewed the report would then make “an eligibility determination based upon a review of the applicant’s entire file,” including the investigator’s report.²⁹ The “County conceded that an applicant’s failure to allow a home visit” would “generally result in the denial of benefits because the [eligibility worker was] unable adequately to verify the applicant’s eligibility without the information” that would have been in the investigator’s report had they been permitted to search the applicant’s home.³⁰

A. *The Harms Inflicted by P100*

P100 harmed CalWORKs applicants and their families in at least three different ways. First, because people risked losing benefits if they weren’t home for unannounced searches, they felt trapped in their homes.³¹ Technically, as already discussed, missing a fraud investigator’s “home visit” should not have meant that applicants would be denied benefits. Investigators were supposed to leave business cards and notes with their contact information, and they were supposed to make an additional attempt at the home search before reporting that they were unable to verify eligibility, which would *then* result in denial of benefits.³² But San Diego County CalWORKs applicants were not always told about these policies.³³ Instead, they were sent notices informing them that county policy “requires” that the investigation be “completed . . . prior to approving ongoing CalWORKs benefits.”³⁴ When applicants did miss a fraud investigator’s visit and called the number on the card or notice left at their home by the investigator, they wouldn’t necessarily be provided an opportunity to actually schedule the next “visit.” Instead, it would only restart the process.

For example, when one applicant called an investigator who had left a card, he told her that he couldn’t tell her when he would return.³⁵ When the applicant explained that she was a full-time student and asked, “[w]hat am I supposed to do, stay home all day and night? I have to take my kids to school, I have to go to

28. *Sanchez*, 464 F.3d at 919.

29. *Id.*

30. *Id.*

31. Field notes on file with the author; *see also* Chan, *supra* note 2, at 11.

32. Chan, *supra* note 2, at 12.

33. *Sanchez*, 2000 WL 34596272, ¶ 36.

34. *Id.* ¶ 37.

35. Chan, *supra* note 2, at 11.

the store,” he just replied, “[w]ell, if I don’t do the search, you can’t have your food stamps. You can’t have your benefits.”³⁶

The unpredictability of the “visits” forced applicants “to postpone job searches, skip medical appointments, and stop taking children to and from school for fear of suffering denial of income necessary to feed their families.”³⁷ This also caused tremendous levels of stress and anxiety, as families reported feeling like they were under house arrest.³⁸ More recently, one applicant looking back on her P100 experience noted that “[e]very mother that wanted assistance for their kids was in the same position. It wasn’t a word you used a lot then, but it is now: quarantine. You were quarantined.”³⁹

Second, the searches could be intrusive and humiliating. They could last up to an hour, as investigators combed through every nook and cranny of a home—laundry bags, hampers, cupboards, closets, desks, dressers, bedrooms, and bathrooms.⁴⁰ Investigators might discover and read personal letters from former spouses.⁴¹ Families were interrogated about the most intimate details of their lives, including living and sleeping arrangements and child care.⁴² Seemingly no topic was off limits—single mothers were even asked how they could afford expensive underwear.⁴³ They were made to feel like suspected criminals. Children became afraid that their parents would be arrested.⁴⁴ Parents feared their children would be taken away.⁴⁵

The fear and resentment fostered by this type of entanglement with the criminal legal system could be particularly pronounced for CalWORKs applicants who were also members of demographic groups that were facing other forms of public and official scrutiny. For example, I met with dozens of Iraqi refugees who had applied for CalWORKs benefits in the buildup to the 2016 presidential election, as anti-immigrant and anti-refugee sentiment was at a fever pitch. Many of the people I spoke with said that P100 investigators had made them feel like criminals in their new homes. They did not become plaintiffs in the litigation against P100 because they were terrified of being on the record criticizing government policy. Nevertheless, they were willing to have long conversations to make sure that I understood the misery inflicted by the program.

In P100’s early years, investigators might ask neighbors if they’d seen strange men coming into an applicant’s home. Even when the County agreed to stop conducting most of these so-called “collateral contacts,” neighbors might see the investigators arrive at an applicant’s home, and think—rightly—that the applicant

36. *Id.*

37. *Sanchez*, 2000 WL 34596272, ¶ 38.

38. Field notes on file author; *see also id.* ¶ 45.

39. Moran, *supra* note 3.

40. *Sanchez*, 2000 WL 34596272, ¶ 3.

41. Nantkes, *supra* note 4, at 101.

42. *Sanchez*, 2000 WL 34596272, ¶ 40.

43. *See* Nantkes, *supra* note 4, at 102.

44. *Sanchez*, 2000 WL 34596272, ¶ 45.

45. *Id.*

was the subject of a law enforcement investigation.⁴⁶ The investigations thus stigmatized CalWORKs applicants as potential criminals in the eyes of some of their neighbors.⁴⁷ The “collateral contacts” could also cause neighbors to realize the applicant had applied for public assistance.⁴⁸ Either way, as P100 shattered applicants’ privacy, it also helped spread the stigma that has long been associated with welfare.⁴⁹

Finally, families were denied crucial benefits for reasons that could only be explained by investigator bias. Investigators were “given wide latitude to make inferences about what [was] seen during the home search.” However, they were not required to document the details or inferences that led them to determine an applicant was not eligible for benefits, or to explain the basis for their decision to the applicants.⁵⁰ All too willing to find fraud where none existed, investigators regularly discovered purported “evidence” that single women were relying on unreported sources of income.⁵¹ They were often looking for signs of money contributed by unacknowledged male wage earners—the proverbial “man in a closet” underlying the shameful history of midnight raids on welfare recipients.⁵² Had an actual man been lurking in an applicant’s closet, this would not have been legally relevant, as CalWORKs applicants were not prohibited from having relationships. But this did not stop investigators from stating that they could not verify an applicant’s eligibility, and, consequently, denying them benefits, when the same closet contained a man’s shirt or large “work boots.”⁵³ Seek and thou shall find: in practice, investigators disqualified families for nothing more than the presence of “extra” toothbrushes, or boxer shorts, or a man’s name on a prescription bottle in the medicine cabinet.⁵⁴

Beyond the toll that P100 took on individual CalWORKs applicants and their families, P100 also deterred people from applying for benefits they were lawfully entitled to. Geradette Nutt, a CalWORKs program specialist at Grossmont College, remembered that “some of the stories were pretty frightening for single women. One inspector went through drawers, pulling out delicate items, scaring [applicants] to, you know, not wanting to do it, withdrawing their actual

46. *Id.* at ¶ 46.

47. *Sanchez*, 2000 WL 34596272, ¶ 45; *see also* Chan, *supra* note 2, at 13–14.

48. Chan, *supra* note 2, at 13–14.

49. *Id.*

50. Chan, *supra* note 2, at 13.

51. Because investigators were not required to explain the basis for their findings, it was not always possible to know exactly why applicants were denied benefits. But details about things like extra toothbrushes or clothing that was deemed “too large” for a single woman were provided in some of their reports, and applicants complained to lawyers that investigators fixated on such items. *See id.*

52. *See* John Lawrence, *San Diego’s P100 Program Targets the Poor and Vulnerable While Letting the Rich and Powerful Off the Hook*, SAN DIEGO FREE PRESS (July 29, 2014), <https://sandiegofreepress.org/2014/07/san-diegos-p100-program-targets-the-poor-and-vulnerable-while-letting-the-rich-and-powerful-off-the-hook/> [<https://perma.cc/ES2K-ETJQ>] (“Authorities are looking for evidence that the applicant has a secret job or a boyfriend who could pay bills.”).

53. *See* Chan, *supra* note 2, at 13.

54. *Id.*; Lawrence, *supra* note 52.

application because they just felt totally invaded and uncomfortable and do not feel safe.”⁵⁵ Because people apply to CalWORKs and CalFresh (food stamps) concurrently, P100 also likely helped to account for “unusually low CalFresh participation in San Diego County.”⁵⁶

III. P100 IN HISTORICAL CONTEXT

P100 is one of a series of intrusive, degrading, and punitive welfare programs enacted in the wake of the passage of the 1996 Federal Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),⁵⁷ more commonly referred to as national “welfare reform.”⁵⁸ PRWORA imposed a \$16.5 billion cap on the federal contribution to state welfare programs, and encouraged local jurisdictions to reduce benefits and institute “punitive welfare policies, including economic sanctions for those who do not follow all of the rules.”⁵⁹ Professor Kaaryn Gustafson has argued that some of these policies have forced people experiencing poverty to submit to a variety of “degradation ceremonies.”⁶⁰ These punishing rituals, such as drug testing of welfare applicants, do nothing to reduce fraud or waste. Instead, they serve only to stigmatize or humiliate those who use public benefits.⁶¹

The toll of these policies has been disproportionately borne by people of color, and “[n]umerous studies have found that the higher the proportion of the state population is non-white, the more punitive the policies.”⁶² As Gustafson has argued, collectively, these “policies and practices . . . burdened welfare receipt with criminality; policed the everyday lives of poor families; and wove the criminal justice system into the welfare system, often entangling poor families in the process.”⁶³ The policies were all created in a media and political climate in which racist and sexist stereotypes of welfare recipients were widely disseminated.⁶⁴

Chief among these stereotypes is the “welfare queen,” best understood as a figure defined by a “sense of entitlement and irrepressible procreative instincts . . . typically represented as a woman whose irresponsible choice to have children out

55. Edward Sifuentes & Alison Ross, *A Closer Look: The 21 Year Fight to Bring Down Project 100%*, ACLU OF SAN DIEGO & IMPERIAL COUNTIES, ACLU (Dec. 21, 2021), <https://www.aclu-sdic.org/en/publications/the-21-year-fight-to-bring-down-project100> [<https://perma.cc/63S9-CYDV>].

56. Chan, *supra* note 2, at 23.

57. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2115–24, 2134–42 (codified as amended at 42 U.S.C. §§ 603, 608 (2006 & Supp. IV 2010)).

58. For example, several state legislatures passed statutes requiring drug testing of welfare recipients after the federal welfare reforms. See Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 313–21 (2013).

59. *Id.* at 305–06.

60. *Id.*

61. *Id.*

62. *Id.*

63. Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 665 (2009).

64. See *id.* at 654.

of wedlock has caused her to turn to the state for financial support.”⁶⁵ Numerous scholars have examined the ways in which invocation of this stereotype served “to demonize poor women of color in need of state assistance.”⁶⁶ While “the welfare queen construct” was initially used “to punish poor African American mothers,” sexist and racist welfare discourse was malleable and not limited to targeting Black women.⁶⁷ In San Diego County, where just over 50% of CalWORKs recipients were Latino, and where, prior to the inception of P100, the County “had been targeting immigrant families on public assistance living close to the U.S.-Mexico border, suspecting that these families actually lived in Mexico,” broader national anti-welfare discourse was thoroughly intertwined with regional anti-immigrant sentiment.⁶⁸

In the buildup to the enactment of P100, the most important newspaper in San Diego County printed a series of articles alleging that the County had done a poor job at preventing welfare fraud, and the County’s Department of Social Services faced complaints about inadequate fraud prevention from the public and from members of the Board of Supervisors.⁶⁹ This “anti-fraud fervor” was “likely due to the misconception that undocumented immigrant families were receiving public benefits to which they were not entitled.”⁷⁰

This misconception was fostered by local and national media accounts that demonized immigrants while expanding the contours of the welfare queen stereotype. While the original welfare queen stereotype posited that “irresponsible black women have too many babies in order to extract a steady welfare check from the government,”⁷¹ later iterations of the stereotype extended to portrayals of “Latina immigrants as irresponsible mothers,”⁷² as a series of pundits and politicians “tapped into [and exacerbated] Americans’ fear of fertile brown mothers as a drain on the state.”⁷³ For example, in June, 1994, a Reader’s Digest article circulated to 15 million households depicted “[t]housands of Mexicans” as “crossing the U.S. border, bearing children, and collecting welfare checks.”⁷⁴ The article presaged the passage of California’s viciously anti-immigrant Proposition 187 (“Prop 187”), which “sought to strip undocumented immigrants of non-emergency healthcare, public assistance, social services, and public education [and]

65. Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDISC. L.J. 257, 260 (2016).

66. *Id.* at 261.

67. *Id.* at 265.

68. Chan, *supra* note 2, at 7.

69. *Id.* at 6.

70. *Id.* at 7.

71. Catherine Powell & Camille Gear Rich, *The New “Welfare Queen”: Donald Meet Ronald, Ronald Meet Donald*, JUST SECURITY (Oct. 23, 2018), <https://www.justsecurity.org/61164/welfare-queen-donald-meet-ronald-ronald-meet-donald> [<https://perma.cc/Q9JD-JCGL>].

72. Catherine Powell, *Race, Gender, and Nation in an Age of Shifting Borders: The Unstable Prisms of Motherhood and Masculinity*, 24 UCLA J. INT’L L. & FOREIGN AFF. 133, 142 (2020).

73. Powell & Rich, *supra* note 71.

74. Nantkes, *supra* note 4, at 1.

also would have required local and state law enforcement agencies, as well as public schools, to report suspected undocumented immigrants to the Immigration and Naturalization Service (INS), the U.S. government’s primary immigration enforcement agency at the time.⁷⁵

The article also helped set the stage for the enactment of P100, as it featured a San Diego County welfare fraud investigator who provided stories about Mexican residents allegedly using fictitious San Diego addresses to fraudulently obtain welfare benefits. They could do so easily, he alleged, “because welfare caseworkers verified neither eligibility nor citizenship,” and, he insisted, “[i]t’s been this way for years.”⁷⁶

No matter that there were no studies or statistics to bear out these anecdotal claims—San Diego County had “never conducted an analysis of the frequency of cases in which applicants actually lived in Mexico rather than in San Diego.”⁷⁷ The lack of meaningful data was beside the point. What matters here is that the idea of new, immigrant, welfare queens could be and was mobilized to garner public support for harsh and dehumanizing anti-immigrant policies, and that the same anti-immigrant stereotypes that help to account for the emergence of and support for Prop 187 and national welfare reform were also at play at the inception of P100.

Courts eventually blocked Prop 187, declaring most of its provisions unconstitutional.⁷⁸ But the enactment of federal “welfare reform” that soon followed had an even more far-reaching and dramatic adverse impact on immigrants in need of public assistance than Prop 187 would have had. Although Prop 187 would have had an undeniably dramatic impact on undocumented immigrants, who would be barred from receiving public benefits had it gone into effect,⁷⁹ PRWORA also “excluded *lawful permanent residents* from eligibility for most federal public benefit programs.”⁸⁰ It threatened an “estimated 500,000 immigrants . . . with losing their Supplemental Security Income (SSI), a federal income supplement for elderly, disabled, and blind persons [and] approximately one million noncitizens stood to lose food stamps.”⁸¹ While Congress ultimately “restored certain benefits for lawful immigrants,” it “failed to restore food stamp eligibility for lawful permanent residents.”⁸² PRWORA, or national welfare reform, was therefore not just an assault on the poor, but a specifically racialized assault on poor women of color that had a clear and clearly intended outsized

75. Kevin R. Johnson, *Proposition 187 and Its Political Aftermath: Lessons for U.S. Immigration Politics After Trump*, 53 U.C. DAVIS L. REV. 1859, 1866 (2020); *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1247–48 (C.D. Cal. 1997).

76. Nantkes, *supra* note 4, at 1.

77. Chan, *supra* note 2, at 7.

78. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 764 (C.D. Cal. 1995), *on reconsideration in part*, 997 F. Supp. 1244 (C.D. Cal. 1997).

79. Johnson, *supra* note 75, at 1878.

80. *Id.*

81. *Id.*

82. *Id.*

impact on immigrant families.⁸³ In that sense, it built upon the legacy of Prop 187, and both measures paved the way for P100, which was just a highly localized response to processes of demonization, punishment, and criminalization that were also playing out in other ways around the country throughout the 1990s.⁸⁴

One last bit of context that is helpful for understanding the legal and political challenges and reactions to P100, and that also strikes a note of rich irony, is that it turns out that P100, ostensibly an anti-fraud program, was itself a massive fraud sold by the County of San Diego and perpetrated upon the public. In 2014, a lawyer named Hilda Chan, who conducted research into P100 as a Soros Justice Advocacy Fellow working with a San Diego welfare rights organization called the Supportive Parents Information Network (SPIN), published a report documenting the ways that the County had been systematically inflating the rates at which P100 investigations had detected or deterred fraud throughout the nearly two-decade existence of the program.⁸⁵ A state audit confirmed that the County was coding its data incorrectly, and the County effectively conceded the point by agreeing to update its coding system for its public benefits fraud data.⁸⁶

When the new coding system was in place, the County's own reported data clearly demonstrated that P100 cost far more money than it saved in fraud prevention or detection.⁸⁷ The Board of Supervisors' Resolution repealing P100 concluded that "P100 is not effective in discovering fraud."⁸⁸ The Resolution approvingly cited Chan's study and noted that, once the County began to recode its data, it produced statistics that "indicate that the vast majority of P100 'home visits' result in no denial or reduction of benefits."⁸⁹ The newly elected Board saw the elimination of P100 as an opportunity to direct needed funds previously spent on an ineffective program to be used instead to "create new opportunities" to investigate "wage theft, elder abuse, . . . consumer scams, insurance/workers'

83. See *Megrabian v. Saenz*, 130 Cal. App. 4th 468, 474 (Cal. App. 2005) ("Congress enacted PRWORA in part to promote self-sufficiency and to discourage aliens from immigrating to the United States just to avail themselves of welfare or other public resources."); 8 U.S.C. § 1601 (congressional statement supporting PRWORA claiming that "it is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.").

84. As of this writing, public benefits for immigrants are once again under assault by the second Trump Administration. See Madeleine Ngo & Lydia DePillis, *Republican Crackdown on Aid to Immigrants Would Hit U.S. Citizens*, N.Y. TIMES (May 27, 2025), <https://www.nytimes.com/2025/05/27/us/politics/immigrants-federal-aid-us-citizens.html> [<https://perma.cc/MA6P-S9VR>].

85. Chan, *supra* note 2, at 30–35.

86. Notes on public records response on file with author. See also Kelly Davis, *County Program Requiring Random Searches for Welfare Applicants is Being Challenged Again*, KPBS (June 28, 2018), <https://www.kpbs.org/news/midday-edition/2018/06/28/county-program-requiring-random-searches-welfare-a> [<https://perma.cc/338P-WTRE>].

87. Cost analysis prepared for litigation (on file with author).

88. SAN DIEGO COUNTY BOARD OF SUPERVISORS, Minute Order No. 22, "Subject: Termination of Early Fraud Prevention/Detection – San Diego County Project 100%" (April 6, 2021), <https://www.supervisorterralawsonremer.com/content/dam/d3/board-letters-pdf/04.06.2021%20Termination%20of%20P100.pdf> [<https://perma.cc/2NUJ-SEYC>].

89. *Id.*

comp. fraud, and other kinds of fraud.”⁹⁰ By rescinding P100, the Board also sought to “redirect resources to get people out of poverty in a meaningful and less invasive way,” stating that the “redirected resources will provide access to jobs, build strong social safety nets, and increase people’s ability to thrive without needing to rely on state assistance.”⁹¹

IV. LEGAL CHALLENGES TO P100: THE EROSION OF LEGAL PROTECTIONS FOR THE POOR

P100 was a wasteful and ineffective program that violated the privacy and assaulted the dignity of poor families in San Diego for decades, and that disproportionately harmed poor women and families of color for the entire duration of its existence. The program appeared vulnerable to legal challenge because the United States Constitution and federal and state laws provide strong protections against unwarranted government intrusions into people’s homes, and against government policies that discriminate by gender and against people of color. Or at least there was good reason to think that was the case.

Of course, this turned out to be an overly optimistic overview of the legal vulnerabilities of P100. When plaintiffs challenged the program in federal court, they had to reckon with decades of case law that had whittled away at the legal resources that ostensibly provided protections for the privacy rights of poor families seeking public benefits, and with a judiciary that was all too willing to continue carving away at those rights. When the federal court challenge failed, and a new set of lawyers and plaintiffs challenged P100 in state court on a disparate impact discrimination theory, they were unable to overcome doctrinal barriers to disparate impact litigation that had been shaped by what Justice Brennan had acerbically referred to as a “fear of too much justice”—the concern that courts would open the floodgates to all sorts of challenges to systemic inequities that the judiciary was ill-equipped to handle if they allowed plaintiffs to challenge policies that disproportionately harm racialized minorities without requiring them to prove that the policies were motivated by an intent to discriminate.⁹²

Section IV.A, drawing heavily on Jordan Budd’s work, discusses the erosion of poor people’s privacy rights that doomed the original federal court challenge to P100, *Sanchez v. County of San Diego*.⁹³ Section IV.B discusses the promise and pitfalls of disparate impact litigation that my colleagues and I confronted when litigating the later state court challenge to P100, *Villafana v. County of San Diego*.⁹⁴ The lawyers litigating both cases had to grapple with precedents that imposed formidable barriers to vindicating the rights of impoverished families in San Diego County. At the outset of both cases, there appeared to be pathways

90. *Id.*

91. *Id.*

92. *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

93. *Sanchez v. Cnty. of San Diego*, 2000 WL 34596272 (S.D. Cal. Sept. 12, 2000).

94. *See id.*; *Villafana v. Cnty. of San Diego*, 57 Cal. App. 5th 1012 (2020).

around those barriers, but state and federal courts systematically cut off those pathways throughout the course of litigation.

A. No Privacy for the Poor: Sanchez v. County of San Diego

The Fourth Amendment to the United States Constitution and Article 1, Section 13 of the California Constitution protect against unreasonable searches.⁹⁵ Fourth Amendment protections are deeply rooted in English law reaching back more than four centuries, and that protection has always been especially pronounced in the home.⁹⁶ There is a long line of cases shielding the home not only from traditional searches conducted by law enforcement agents who would enter a home without a warrant, but also from other forms of intrusion including “apparently unobtrusive” monitoring by thermal imaging, or even unwelcome speech from protestors.⁹⁷ This vigilant judicial protection against government interference with home privacy makes sense given the Supreme Court’s recognition that “[t]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,” and that “the Fourth Amendment has drawn a firm line at the entrance to the house.”⁹⁸ The California Constitution provides even stronger privacy protections that go beyond guarding against unreasonable searches, as its very first section enshrines the right to privacy as a core “inalienable” right.⁹⁹ California’s welfare code and regulations also contain numerous provisions intended to protect welfare applicants’ privacy.¹⁰⁰

The first legal challenge to P100, *Sanchez v. County of San Diego*, a federal case filed in the Southern District of California, sought to take advantage of all of these protections, which might have seemed likely to provide the basis for a compelling case against P100. The *Sanchez* Complaint was based, in part, on dramatic narratives of their plaintiffs’ experiences with P100, which demonstrated that the program had shattered San Diego County’s CalWORKs applicants’ privacy in numerous ways.¹⁰¹ Investigators would “request to look at the contents of applicants’ bedrooms, closets, kitchens, bathrooms, medicine cabinets and drawers,”¹⁰² and ask questions about virtually every aspect of applicants’ lives, including their intimate relationships and child rearing practices.¹⁰³

The *Sanchez* Complaint addressed the full variety of hardships that P100 imposed upon San Diego County’s CalWORKs applicants, but the crux of the complaint centered on these intrusions on applicants’ privacy. While the Complaint

95. U.S. CONST. amend. IV (providing protections for “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”); CAL. CONST. art. I, § 13 (same).

96. See Budd, *supra* note 12, at 359.

97. *Id.* (citing cases).

98. *Payton v. New York*, 445 U.S. 573, 573 (1980).

99. Cal. Const. art. I, § 1.

100. *Sanchez*, 2000 WL 34596272, ¶¶ 97–106.

101. *Id.* ¶¶ 13–29.

102. *Sanchez v. Cnty. of San Diego*, 464 F.3d 916, 936 (9th Cir. 2006) (Fisher, C.J., dissenting).

103. See Section II(3), *supra*.

included numerous causes of action, the District Court judge presiding over the case noted that “[t]he primary federal issue before the court is whether the Fourth Amendment is violated by conditioning the receipt of public aid, i.e., welfare benefits, on consent to entry by government officials into one’s home for purposes of verifying eligibility for aid.”¹⁰⁴

This should have been an easy question. Certainly, it appears to have been uncomplicated to seven Ninth Circuit judges who saw P100 as a clear violation of “core . . . Fourth Amendment protections.”¹⁰⁵ These judges determined that allowing the district court’s decision upholding the program “to stand is an assault on our country’s poor as we require them to give up their rights of privacy in exchange for essential public assistance.”¹⁰⁶

Unfortunately, the judges who issued this pronouncement did so in a dissent from the denial of a petition for a larger Ninth Circuit panel to hear the case en banc, after a three-judge panel affirmed the district court’s decision. For the judges who actually decided the case and upheld P100, the answer was just as clear, though perhaps less straightforward: P100 did *not* violate the Fourth Amendment because it did not trigger Fourth Amendment scrutiny *at all*—for them, the P100 “home visits” did “not constitute ‘searches’ under the Fourth Amendment.”¹⁰⁷

This might seem an odd conclusion. Indeed, for most of the Ninth Circuit judges who would have held P100 unconstitutional, the holding “that highly intrusive, unannounced suspicionless home visits are not ‘searches’ under the Fourth Amendment” was “inexplicabl[e].”¹⁰⁸ As one dissenting Ninth Circuit judge stated, “Project 100% home visits entail a law enforcement agent . . . walking through the applicant’s home in search of physical evidence of ineligibility that could lead to criminal prosecution either for welfare fraud or other crimes unrelated to the welfare application.”¹⁰⁹ The fraud investigators who conducted these “home visits” were “peace officers” who testified that their duty was to “look for and report evidence of crimes.”¹¹⁰ And, as previously discussed, the officers who conducted these “home visits” would go through every nook and cranny of the applicants’ homes, as they were “required not only to question the applicant but to pry into the applicant’s most private spaces—to look through drawers, medicine

104. *Sanchez v. Cnty. of San Diego*, No. 00 CV 1467 JM(JFS), 2003 WL 25655642, at *3 (S.D. Cal. Mar. 10, 2003), *aff’d*, 464 F.3d 916 (9th Cir. 2006).

105. *Sanchez v. Cnty. of San Diego*, 483 F.3d 965, 966 (9th Cir. 2007) (Pregerson, J., dissenting) (joined by Judges Reinhardt, Wardlaw, William A. Fletcher, Fisher, Paez, and Berzon) (denying petition for rehearing en banc). An eighth judge, Judge Kozinski, filed a separate dissent and would also have overturned the district court’s decision. *See id.*

106. *Id.*

107. *Sanchez v. Cnty. of San Diego*, 2003 WL 25655642, at *4 (S.D. Cal. Mar. 10, 2003), *aff’d*, 464 F.3d 916 (9th Cir. 2006).

108. *Sanchez*, 483 F.3d at 967 (Pregerson, J., dissenting).

109. *Sanchez v. Cnty. Of San Diego*, 464 F.3d 916, 932 (9th Cir. 2006) (Fisher, J., dissenting).

110. *Id.* at 934.

cabinets, closets, garbage, and the like.”¹¹¹ For the dissenting Ninth Circuit judges, P100 was not just an “utterly unreasonable . . . search program,” but also “nothing less than an attack on the poor” who were already “suffering from disabilities, loss of work, and other hardships” before being made to “suffer humiliation and further assaults on their dignity” by P100, which “strips” them of “their rights of privacy.”¹¹² How, then, could a court conclude that P100 “home visits” were not Fourth Amendment searches?

There are two principal answers to that question. The district court judge who initially decided the case and the Ninth Circuit majority that upheld his decision would respond by claiming they were bound by a defining Supreme Court welfare case of an earlier era, *Wyman v. James*, discussed at length below.¹¹³ That case restricted the meaning of “Fourth Amendment searches” in ways that severely limited welfare applicants’ privacy rights. But the truth of the matter is that the poor have always had a diminished expectation of privacy in the United States. As Jordan Budd has argued, poor people in the United States have long “faced pervasive discrimination in the exercise of fundamental rights,” and “[n]owhere has the impairment been more severe than in the area of privacy.”¹¹⁴

1. The “Moral Pestilence of Paupers”: The Poor as Inherently Suspect

As Budd and others have documented, legal traditions of treating the “home and the family it shelters” as “sacrosanct” have always been “sharply differentiated on grounds of class, race, and gender.”¹¹⁵ In colonial America “[a]s in the centuries to follow, public opinion regarding the indigent turned largely on the enduring notion that poverty among the able-bodied is a personal failing reflecting sloth, indolence, or some related moral deficit.”¹¹⁶ As Justice Douglas wrote in 1966, the early United States had inherited a centuries-long tradition, that could be traced back at least as far as fourteenth-century English poor laws, of treating the poor as a threat, and of erecting elaborate systems of control, including vagrancy laws and other measures, to address that threat.¹¹⁷ “The wanderer, the pauper, the unemployed—all were deemed to be potential criminals.”¹¹⁸ This understanding of the poor was reflected in an 1837 Supreme Court decision that warned of the need to guard “against the moral pestilence of paupers.”¹¹⁹ And, as Budd writes, “[r]educed to the status of moral pestilence, the poor were broadly excluded from economic and political rights in colonial America and the early United States.”¹²⁰

111. *Sanchez*, 483 F.3d at 969 (Pregerson, J., dissenting).

112. *Id.*

113. *Wyman v. James*, 400 U.S. 309 (1971).

114. *See Budd, supra* note 12, at 355.

115. *Id.* at 363.

116. *Id.*

117. *Hicks v. D.C.*, 383 U.S. 252, 257 (1966) (Douglas, J., dissenting).

118. *Id.*

119. *City of New York v. Miln*, 36 U.S. 102, 142 (1837).

120. *See Budd, supra* note 12, at 364.

Understood as a disease and a threat, the indigent and their families were under assault at the inception of the United States. They could be forced to “abandon their dwellings and move to ‘poorhouses’ or ‘almshouses’ in exchange for meager public relief.”¹²¹ Or they might be required to leave their homes and move in with (or be “literally auctioned off to”) “private families who received public funds to provide basic care and shelter in return for work.”¹²² In later decades, “social reformers” began to focus on the need for “child protection” as a response to poverty, which could entail ripping children away from their parents “for placement with foster families or orphanages.”¹²³ This might be accomplished through “sweeping investigations of private homes that were fundamentally at odds with the judicial exaltations of the home’s sanctity in other settings,” including such practices as warrantless home searches, late-night and early-morning raids, and entry through windows.¹²⁴

When the modern system of welfare administration was starting to form in the early twentieth century, it incorporated the distrust of the indigent that had characterized dominant conceptions of poverty for centuries. Before anyone thought to justify intrusions into welfare applicants’ homes under the guise of guarding against “welfare fraud,” government agencies sent social workers into the homes of single mothers to make sure they were maintaining “suitable homes.”¹²⁵ They “conducted ‘midnight raids in search of male visitors,’ barred male boarders, and even prohibited evening dates” for the same reason.¹²⁶ By 1961, even when the secretary of Health, Education and Welfare issued a rule “barring the arbitrary application of ‘suitable home’ requirements, many welfare offices continued to engage in midnight raids on the homes of [welfare] recipients in order to police ‘man in the house rules.’”¹²⁷ These raids were justified in moralistic terms, as “[u]nmarried women with men in their beds were deemed morally unfit and their households therefore unsuitable for assistance” while the men who were discovered during the raids “were considered household breadwinners who had hidden their income support from the aid office.”¹²⁸ This is the same justification that P100 investigators would use decades later for asking neighbors whether they had seen strange men entering CalWORKs applicants’ homes, or for interrogating applicants about men’s shirts or boots found in their closets.¹²⁹

121. *Id.* at 365.

122. *Id.*

123. *Id.* at 366.

124. *Id.* at 366 (quoting Jonathan L. Hafetz, “A Man’s Home Is His Castle?”: *Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175, 208 (2002)).

125. *Id.* at 367.

126. *Id.* at 367 (quoting JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* 25 (2001)).

127. KAARYN GUSTAFSON, *CHEATING WELFARE* 21 (2011).

128. *Id.*

129. *See* Chan, *supra* note 2, at 13.

In all these ways, the entirety of the welfare system was, therefore, always premised upon deep governmental intrusions into the most personal aspects of indigent families' lives, and into their homes. Because the poor were seen as inherently suspect, responsible welfare administrators were expected not to respect poor people's privacy rights, but to take necessary measures, no matter how invasive, to guard against their presumed moral deficiencies and propensity for criminality.¹³⁰ This history provided the backdrop for *Wyman v. James*, in which the Supreme Court redefined the meaning of a "search" and, as Budd says, "confirmed that the rhetoric of domestic sanctity stopped at the doorstep of the poor."¹³¹

2. *Wyman v. James*: When a Search is Not a Search

The judges who upheld P100 in *Sanchez* did not dispute that the P100 "home visits" were "searches" as that term is colloquially understood, or even as a dictionary might define it. Instead, they were concerned with "Fourth Amendment searches" as a technical legal term of art, and they determined the P100 "home visits" did not meet that technical definition. In reaching this conclusion, they also concluded that P100 was fundamentally indistinguishable from the welfare eligibility verification program that was challenged in a 1971 Supreme Court case called *Wyman v. James*.¹³² *Wyman* offered a particularly cramped understanding of the type of investigation that could rise to the level of a "Fourth Amendment search."

Barbara James, the plaintiff in *Wyman*, was a New York City mother, living with her son, who challenged a city welfare policy that required Aid to Families with Dependent Children (AFDC) applicants and beneficiaries to submit to periodic "home visits" from "caseworkers" (social workers) in order to continue receiving benefits.¹³³ AFDC is the former name of Temporary Assistance for Needy Families, or TANF, which is the federal program that helps fund CalWORKs, and that was governed by P100 in San Diego County from 1997–2023, when the Board of Supervisors rescinded the policy. The "home visits" were intended to verify whether the applicant remained eligible for public assistance, and "to see if there [were] any social services which the Department of Social Services [could] provide to the family."¹³⁴ While Ms. James had allowed the caseworker into her home when she first sought public assistance in 1967, she balked at the requirement two years later. In 1969, when she received a notice from a caseworker that she would visit her home the following week, Ms. James called the caseworker and notified her that "although she was willing to supply information 'reasonable and relevant' to her need for public assistance, any discussion

130. See GUSTAFSON, *supra* note 127, at 43–50.

131. See Budd, *supra* note 12, at 368.

132. *Wyman v. James*, 400 U.S. 309 (1971).

133. See *id.* at 313–14.

134. *Id.* at 314.

was not to take place at her home.”¹³⁵ The caseworker informed her that the “home visit” was required by law, and that refusal to allow it would “result in the termination of assistance.”¹³⁶ Ms. James nevertheless denied permission for the visit, and the city quickly terminated her benefits.¹³⁷ Ms. James then sued on her own behalf and “on behalf of all other persons similarly situated.”¹³⁸

Ms. James’ lawsuit contained a series of claims under 42 U.S.C. § 1983 alleging violations of “the First, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and Fourteenth Amendments, and under Subchapters IV and XVI of the Social Security Act and regulations issued thereunder,” but as in *Sanchez*, the gravamen of her case was that the “home visits” were unwarranted intrusions into welfare applicants’ homes that constituted unreasonable searches in violation of core constitutional rights.¹³⁹ Her “thesis” (shared by the majority of a three-judge district court panel which declared the New York “home visit” requirement unconstitutional) was that a “home visitation is a search and, when not consented to or when not supported by a warrant based on probable cause, violates the beneficiary’s Fourth and Fourteenth Amendment rights.”¹⁴⁰

a. The Majority Opinion

The Supreme Court acknowledged that it might make sense to think that the “home visits” implicated the Fourth Amendment because they did involve “some type of official intrusion into” applicants’ homes, and “over the years, the Court consistently has been most protective of the privacy of the” home.¹⁴¹ The Court concluded, however, that any concerns that the “home visits” might violate the Fourth Amendment were misplaced “for the seemingly obvious and simple reason that we are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term.”¹⁴²

Lest this “seemingly obvious and simple reason” seem less than obvious or simple, Justice Blackmun went on to explain that the “home visits” did not take place in “the traditional criminal law context.”¹⁴³ They may have had an “investigative” component, but the caseworker’s “posture” during the visits was also “rehabilitative.”¹⁴⁴ More importantly, the “home visits” were “not forced or compelled,” and if an AFDC applicant or beneficiary denied permission for the caseworker to enter the home, that denial was “not a criminal act.”¹⁴⁵ There were no consequences to speak of were an applicant to deny permission for the “visit”—the

135. *Id.* at 313.

136. *Id.* at 313–14.

137. *Id.* at 314.

138. *Id.*

139. *Id.* 42 U.S.C. § 1983 provides a cause of action to challenge deprivation of constitutional or statutory rights committed by anyone acting “under color of” law.

140. *Id.* at 313.

141. *Id.* at 316.

142. *Id.* at 317.

143. *Id.*

144. *Id.*

145. *Id.*

applicant would lose benefits, sure—“[t]he aid then never begins, or merely ceases, as the case may be”—but all that really mattered is that when the applicant denied a visit “[t]here is no entry of the home and there is no search.”¹⁴⁶ Never mind that the benefits are a crucial “means of providing food, shelter and clothing to a family” and that families who had applied for benefits were unlikely to feel that they could do anything to jeopardize this aid.¹⁴⁷

Perhaps recognizing that a simple declaration that “there is no search” when social workers enter welfare applicants’ homes to verify eligibility and investigate possible welfare fraud might seem unconvincing, the *Wyman* majority acknowledged that a “visit” under the New York regulations might at least seem to “possess some of the characteristics of a search in the traditional sense.”¹⁴⁸ No matter, though, because even if the visits were searches, they would not violate the Fourth Amendment because they did “not descend to the level of unreasonableness . . . which is the Fourth Amendment’s standard.”¹⁴⁹

The Court concluded that the New York “home visits” were “not unreasonable” for a number of reasons. Most notably: it was “not unreasonable” for the State to “have at its command a gentle means” of obtaining assurance that its funds were properly expended; the public had a right to know how its tax dollars were being spent; the “visits” were chiefly intended to serve a “personal, rehabilitative” purpose and were not intended to obtain “information as to criminal activity”; the visitation guidelines “emphasized” privacy and “snooping in the home” was “forbidden”; it might be difficult for the State to obtain necessary eligibility information in other ways; the visits were conducted by trained caseworkers rather than law enforcement investigators, and did “not deal with crime or with the actual or suspected perpetrators of crime. The caseworker is not a sleuth but rather, we trust, is a ‘friend to one in need’”; the applicant had plenty of advance notice of the date of the “home visits”; and the “home visits” were, on balance, actually less invasive than the alternative possibility of obtaining a warrant, which “would require no notice . . . would justify entry by force,” and would not have any limits on the “hours for execution.”¹⁵⁰ For all of these reasons, even if the “home visits” did rise to the level of a Fourth Amendment search, the majority would have determined that they did not actually violate Ms. James’ Fourth Amendment rights.

b. The Dissents

The dissents by Justices Douglas and Marshall pick apart each of these rationales in great detail. For example, Justice Douglas pointed out that there are all sorts of beneficiaries of government largesse and “social welfare” who receive billions of dollars, including farmers, government researchers, and government

146. *Id.* at 317–18.

147. *Sanchez v. Cnty. of San Diego*, 464 F.3d 916, 942 (9th Cir. 2006) (Fisher, J., dissenting).

148. *Wyman*, 400 U.S. at 318.

149. *Id.*

150. *Id.* at 318–24.

contractors, and that it is possible that evidence of fraud could be found in any of their homes, but none of these beneficiaries are required to allow government agents into their homes: “If the regime under which Barbara James lives were enterprise capitalism as, for example, if she ran a small factory geared into the Pentagon’s procurement program, she certainly would have a right to deny inspectors access to her home unless they came with a warrant.”¹⁵¹ Justice Douglas’s dissent was ultimately based on his determination that constitutional rights are not for sale. He determined that New York’s “home visit” policy forced Barbara James to choose between “the assertion of her constitutional right” and receiving welfare benefits, and he determined the policy should not stand because the government “by force of its largesse” should not have “the power to ‘buy up’ rights guaranteed by the Constitution.”¹⁵²

Justice Marshall took aim at the majority’s characterization of New York’s policy, writing that “the welfare visit is not some sort of purely benevolent inspection.”¹⁵³ Even if the caseworkers who conducted the “visits” were there, in part, to help facilitate access to social services, that was irrelevant to a Fourth Amendment analysis because “they are also required to be sleuths . . . [who] enter AFDC homes to guard against welfare fraud and child abuse, both of which are felonies,” and who are required “to report any evidence of fraud that a home visit uncovers.”¹⁵⁴ It was disingenuous to declare that the “visits” were not intended to obtain evidence of criminal activity when they could, in fact, “lead to criminal convictions.”¹⁵⁵ If properly understood as a search, the “home visits” were also, for Justice Marshall, unreasonable because there were no exigent circumstances (“no suggestion that evidence will disappear, that a criminal will escape, or that an officer will be injured”) that could justify “the failure to obtain a warrant” and no state interests “sufficient to carve out a new exception to the warrant requirement.”¹⁵⁶

Justice Marshall also pointed out that the “home visits” served no real purpose—there was no significant state interest in allowing caseworkers to “enter the homes of AFDC beneficiaries to determine eligibility,” because state agents could obtain the information they need by attempting “to utilize public records, expenditure receipts, documents such as leases, nonhome interviews, personal financial records, sworn declarations, etc.—all sources that governmental agencies regularly accept as adequate to establish eligibility for other public benefits.”¹⁵⁷ Finally, Justice Marshall found the majority’s attempt to justify the searches by saying they were “designed to rehabilitate, to provide aid,” to be a “strange doctrine indeed,” noting that a “paternalistic notion that a complaining citizen’s

151. *Id.* at 327–30 (Douglas, J., dissenting).

152. *Id.* at 328.

153. *Id.* at 339 (Marshall, J., dissenting).

154. *Id.* at 339–40.

155. *Id.*

156. *Id.* at 341.

157. *Id.* at 342–43.

constitutional rights can be violated so long as the State is somehow helping him is alien to our Nation's philosophy."¹⁵⁸

I address the *Wyman* dissents at length to make clear that the outcome of the case was not inevitable given then-existing Fourth Amendment doctrine, and that the Court's majority actively worked to place indigent families' privacy outside of the ambit of Fourth Amendment protection. As Justice Marshall noted, the result in *Wyman* was "clearly inconsistent with the [previous Fourth Amendment] decisions of [the Supreme] Court."¹⁵⁹ Even if reasonable and honest jurists could disagree with this premise, the dissents at least indicate that Fourth Amendment jurisprudence had provided ample precedent that the majority could have relied upon to strike down the New York "home visits" had it been so inclined, and had it placed greater value on poor people's privacy. Nevertheless, even if *Wyman* was wrongly decided, there was no question that it would cast a long shadow over the *Sanchez* litigation.

c. Relevance for Sanchez

Indeed, for the *Sanchez* Ninth Circuit majority, *Wyman* was the first and last word on the matter. For them, the bottom line was that "[t]he Supreme Court . . . has held [in *Wyman*] that home visits for welfare verification purposes are not searches under the Fourth Amendment."¹⁶⁰ The *Sanchez* majority found plenty of similarities between the two cases, noting that:

As in *Wyman*, the home visits are conducted with the applicant's consent, and if consent is denied, the visit will not occur. Also as in *Wyman*, there is no penalty for refusing to consent to the home visit, other than denial of benefits. . . . The fact that the D.A. investigators who make the Project 100% home visits are sworn peace officers does not cause the home visits to rise to the level of a 'search in the traditional criminal law context' because the visits' underlying purpose remains the determination of welfare eligibility.¹⁶¹

Seeing no meaningful difference between P100 and the New York "home visits" that were at issue in *Wyman*, the *Sanchez* majority determined that "we are bound by *Wyman* . . . [so] we conclude that the Project 100% home visits do not qualify as searches within the meaning of the Fourth Amendment."¹⁶²

The *Sanchez* court continued to follow *Wyman* in performing a traditional Fourth Amendment analysis even after determining that the P100 "home visits" were not Fourth Amendment searches. As in *Wyman*, the court determined that "even if" it had concluded the "home visits" were Fourth Amendment searches,

158. *Id.* at 343.

159. *Id.* at 339.

160. *Sanchez v. Cnty. of San Diego*, 464 F.3d 916, 920 (9th Cir. 2006).

161. *Id.* at 921–22 (quoting *Wyman v. James*, 400 U.S. 309 at 325).

162. *Id.* at 922–23.

they would not have violated the Fourth Amendment because, as in *Wyman*, they were not unreasonable.¹⁶³ Here, too, the *Sanchez* court could only find similarities to *Wyman*, and no material differences.

The majority noted that the “home visits” in both cases served “the important governmental interests of verifying an applicant’s eligibility for welfare benefits and preventing fraud.”¹⁶⁴ It was true that the P100 searches “differ from those in *Wyman* in that they are conducted by peace officers” rather than social workers, but that was irrelevant. The “distinction [did] not transform a Project 100% visit into a ‘search in the traditional criminal law context’” because, even though “the investigators will report any evidence of criminal activity for potential prosecution, this is not the underlying purpose of the visit, and no criminal prosecutions for welfare fraud have stemmed from inconsistencies uncovered during a Project 100% home visit since the program’s inception in 1997.”¹⁶⁵

The majority also claimed that P100 contained “procedural safeguards” that were similar to those found important in *Wyman*, noting that applicants were given advance notice that they would be subjected to a mandatory “home visit,” which would “generally” happen during “normal business hours,” and that the applicants could deny consent for the investigators to enter their homes.¹⁶⁶

Ultimately, because the court concluded that “the Project 100% visits serve an important governmental interest, are not criminal investigations, occur with advance notice and the applicant’s consent, and alleviate the serious administrative difficulties associated with welfare eligibility verification,” it held “that the home visits are reasonable under the Supreme Court’s decision in *Wyman*.”¹⁶⁷

I’ve already noted that there were eight Ninth Circuit judges who would have found that P100 “home visits” were Fourth Amendment searches, and that they were unconstitutionally unreasonable. These judges didn’t ignore *Wyman*, but they instead had no difficulty distinguishing it. They found that the types of searches or “home visits” in the two cases were fundamentally different, and that a faithful application of *Wyman* could only lead “to the conclusion that the home ‘walk throughs’ in *Sanchez* are searches and are far too intrusive to be reasonable.”¹⁶⁸ The dissenting judges found numerous ways to distinguish the cases, but the most important differences had to do with the purpose and nature of the “home visits.”

A core part of the *Wyman* rationale for determining that the New York “home visits” were not “Fourth Amendment searches” was that, at least in the majority’s eyes, they were conducted by social workers and had a strong rehabilitative component, so they were analytically distinct from “traditional” searches in the

163. *Id.* at 923.

164. *Id.*

165. *Id.* at 924 (quoting *Wyman*, 400 U.S. 309 at 317).

166. *Id.*

167. *Id.*

168. *Sanchez v. Cnty. of San Diego*, 483 F.3d 965, 967 (9th Cir. 2007) (Pregerson, C.J., dissenting).

“criminal law context.”¹⁶⁹ The dissenting *Sanchez* judges noted that this rationale was untenable and even non-sensical when applied to P100 “home visits,” which were “conducted by agents of the district attorney charged only with verifying welfare eligibility and detecting fraud using investigative techniques” and who were actually “trained *not* to give advice to applicants because their focus [was] ‘highly limited’ to legal compliance.”¹⁷⁰ Indeed, the lead Deputy District Attorney for P100 stated during his deposition that “his office’s investigators were not in the rehabilitation business,” testifying that “I’m trying to imagine what rehabilitation would be . . . Get off the couch. Get a job. I don’t know.”¹⁷¹

For the dissenting *Sanchez* judges, the fact that the P100 “home visits” were conducted by law enforcement investigators meant that P100 was a qualitatively and fundamentally different type of program than the New York “home visits” that were upheld in *Wyman*.¹⁷² Judge Fisher emphasized that San Diego County had conceded “that the visits can and do lead to prosecutions for other crimes—including past welfare fraud.”¹⁷³ And Judge Pregerson found it “inexplicabl[e]” that the majority saw the P100 “home visits” as having “little difference” from the New York “home visits” given that P100 “requires fraud investigators with no expertise in social work and no object of rehabilitating the applicant to detect and report evidence of welfare fraud and other crimes.”¹⁷⁴ Because the P100 investigations lacked even a semblance of a rehabilitative component, it was impossible for the *Sanchez* dissenters to understand them as anything but a law enforcement investigation and a Fourth Amendment search.¹⁷⁵

The *Sanchez* dissents also gave far less credence to the “procedural safeguards” extolled by the majority.¹⁷⁶ The dissenting judges were not reassured by the fact that San Diego County CalWORKs applicants received notice that they would be subjected to the “home visits” given that the applicants were “not given notice of when the visit[s] [would] occur.”¹⁷⁷ They could find no evidence that P100 guidelines genuinely prohibited “snooping” by requiring investigators to ask permission before conducting various parts of their investigation. Instead, they wrote that all the guidelines required was “obtaining consent to snoop,” which did not “change the nature of the ensuing conduct—snooping.”¹⁷⁸

Indeed, the *Sanchez* dissents entirely rejected the relevance of purported “consent” to the P100 investigations. The dissenting judges found no comfort in

169. *Wyman*, 400 U.S. at 317.

170. *Sanchez*, 464 F.3d at 935 (Fisher, C.J., dissenting) (quoting an exhibit from the trial record).

171. Adam Liptak, *Full Constitutional Protection for Some, but No Privacy for the Poor*, N.Y. TIMES (July 16, 2007), <https://www.nytimes.com/2007/07/16/us/16bar.html> [<https://perma.cc/S4EL-E4HR>] (quoting San Diego Deputy District Attorney Luis Aragon).

172. *Sanchez*, 464 F.3d at 936 n.6 (Fisher, C.J., dissenting).

173. *Id.*

174. *Id.*; *Sanchez*, 464 F.3d at 936 (9th Cir. 2006) (Pregerson, C.J., dissenting).

175. *Sanchez*, 464 F.3d at 936.

176. *Id.* at 924.

177. *Sanchez*, 483 F.3d at 968 (Pregerson, C.J., dissenting).

178. *Sanchez*, 464 F.3d at 936 (Fisher, C.J., dissenting).

the fact that the CalWORKs applicants could refuse to allow P100 investigators into their homes because “there can be no true consent” given that the applicants “are not informed of their right to withhold consent; they are told the visit is mandatory; and they are aware of the severe consequences of refusing the search.”¹⁷⁹ Because the dissenting judges found that neither the ostensibly consensual nature of the P100 “home visits” nor the other alleged “procedural safeguards” truly mitigated the severe intrusion on applicants’ privacy, they would have reversed the district court decision and held the program unconstitutional.¹⁸⁰

As in my discussion of the *Wyman* dissents, I highlight the reasoning of the *Sanchez* dissents not only to suggest that the case was wrongly decided, but to help establish that the decision marked a *departure* from precedent, furthering the erosion of poor people’s privacy rights. Much of Judge Pregerson’s critique of the *Sanchez* majority decision could apply with equal force to *Wyman*. Both decisions could fairly be described as “shameful,” and the “home visits” in both cases can be said to have required the poor, including “people who are already suffering from disabilities, loss of work, and other hardships,” to “then suffer humiliation and further assaults on their dignity,” and to have stripped welfare applicants “of their rights of privacy.”¹⁸¹ But *Sanchez* was a much more overt assault on the privacy rights of the poor: *Wyman*’s emphasis on the purportedly “rehabilitative” function of the New York caseworker “visits” at least suggested that the Court would only uphold a blanket home search program for welfare applicants if the searches had some *other* purpose outside of the context of law enforcement. The *Wyman* dissents established that the Court was all too willing to allow such searches even if the “other purpose” was a mere fig leaf. But *Sanchez* abandoned that pretense by allowing the P100 searches to be conducted by law enforcement officers who did not even have a professed interest in assisting the applicants they were investigating and who were intent only on discovering and possibly reporting fraud and other crime.

The *Wyman* majority was clear that the Court’s “holding . . . does not mean, of course, that a termination of benefits upon refusal of a home visit is to be upheld against constitutional challenge under all conceivable circumstances.”¹⁸² The Court’s determination that the New York “home visits” did not violate the Fourth Amendment was fact-specific—based on the ways those particular visits were conducted and on the government interests they were said to serve. A different set of facts would “present another case for another day.”¹⁸³ The decision therefore appeared to leave the door open, at least a crack, to Fourth Amendment challenges to searches of welfare applicants’ homes that were conducted in different ways and for different purposes. *Sanchez* slammed that door shut. With no

179. *Sanchez*, 483 F.3d at 968 (Pregerson, C.J., dissenting).

180. *Id.* at 969.

181. *Id.*

182. *Wyman v. James*, 400 U.S. 309, 326 (1971).

183. *Id.*

real possibility left to challenge P100 on constitutional grounds, it took another decade and tens of thousands of additional P100 searches before anyone would challenge the program again, this time in state court on anti-discrimination grounds.

B. The Thwarted Promise of Disparate Impact Litigation: Villafana v. County of San Diego

One of the most troubling aspects of P100 from its inception was that it targeted some of the most vulnerable residents of San Diego County. As previously discussed, the policy was conceived in a political climate saturated with anti-immigrant sentiment, where racist and misogynistic stereotypes of welfare applicants and recipients proliferated. The San Diego County CalWORKs applicant pool was overwhelmingly composed of indigent women and people of color who were forced to bear the brunt of the policy's impact.¹⁸⁴ For this reason, even after *Sanchez* foreclosed the possibility of another Fourth Amendment challenge to P100, it was possible to imagine another type of legal challenge as the program appeared to run afoul of anti-discrimination laws and principles.

Federal and state legislators have recognized that it is not always possible to prove that a discriminatory policy is motivated by an intent to discriminate. They have enacted a series of laws and regulations making it possible to prove discrimination on a "disparate impact" theory, permitting plaintiffs to prove discrimination by demonstrating that members of a protected class are disproportionately adversely impacted by a government policy, without needing to prove intent to discriminate. For example, Title VI of the Civil Rights Act of 1964 ("Title VI") prohibits any programs or activities that receive federal funding from discriminating on the basis of race, color, or national origin, and in response to that prohibition, "most federal agencies have promulgated 'disparate impact' regulations, which bar grantees from employing any practice that has an unjustified discriminatory effect, even if that practice is not motivated by discriminatory animus."¹⁸⁵

California created a state analog to Title VI in 1977. California Government Code Sections 11135–11139.5 prohibit state funded programs or activities from discriminating on the basis of a series of protected characteristics, which currently include "sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, [and] sexual orientation."¹⁸⁶ As with Title VI, the implementing regulations for Sections 11135–11139.5 expressly allow for disparate impact claims along with claims of intentional discrimination.¹⁸⁷ These regulations provided the basis for the next legal challenge to P100.

184. See Appellants' Corrected Opening Brief at 19, *Villafana v. Cnty. of S.D.*, 57 Cal. App. 5th 1012 (2020) (No. D076120), 2019 WL 699311, at *19 (citations omitted).

185. John Arthur Laufer, *Alexander v. Sandoval and Its Implications for Disparate Impact Regimes*, 102 COLUM. L. REV. 1613, 1613 (2002); see also 42 U.S.C. § 2000d (2000).

186. CAL. GOV'T CODE § 11135 (West 2017).

187. See *Darensburg v. Metro. Transp. Comm'n*, 611 F. Supp. 2d 994, 1041 (N.D. Cal. 2009), *aff'd*, 636 F.3d 511 (9th Cir. 2011).

1. Genesis and Theory of the Case

The ACLU and other organizations continued their advocacy efforts to do away with P100 even after the Supreme Court denied the *Sanchez* plaintiffs' petition for a writ of certiorari in 2007.¹⁸⁸ As part of those efforts, Hilda Chan's research demonstrated that P100 was not cost-effective and convinced San Diego County to begin to recode its data.¹⁸⁹ While Chan was conducting her research, David Loy, then the Legal Director at ACLU-SDIC and one of the lawyers who submitted the cert. petition, "remained appalled that San Diego County was continuing to humiliate people by invading their homes and treating them like suspected criminals when they sought help for their families."¹⁹⁰ When he learned of Chan's work and discussed it with colleagues, he "was inspired to launch a disparate impact challenge on the ground that P100 disproportionately harmed people of color and the county could achieve its ostensible goal of fraud prevention through means that were both less abusive and less expensive."¹⁹¹ That challenge became *Villafana v. County of San Diego*, a disparate impact discrimination lawsuit brought in San Diego Superior Court.

Although the San Diego County District Attorney and Board of Supervisors may not have intended to discriminate against women or families of color when they enacted or presided over P100, it is impossible to separate the policy from the sexist and racist stereotypes that were swirling around public discussions of welfare fraud in the 1990s.¹⁹² Even without smoking gun evidence of discriminatory intent, it was reasonable to believe that these stereotypes influenced county leaders when P100 was conceived and implemented.

Disparate impact liability was designed for precisely this type of circumstance: where there are policies or practices that may have resulted from unacknowledged or implicit biases and that disproportionately harm people based on protected characteristics, where discriminatory intent might be difficult or impossible to prove. As the Supreme Court has recognized, disparate impact liability "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."¹⁹³ "In this way disparate-impact liability may prevent" harmful effects of discrimination "that might otherwise result from covert and illicit stereotyping."¹⁹⁴

188. *Sanchez v. S.D. Cnty., Cal.*, 552 U.S. 1038 (2007) (denying petition for writ of certiorari).

189. See Kelly Davis, *County Program Requiring Random Searches for Welfare Applicants Is Being Challenged Again*, VOICE OF SAN DIEGO (June 27, 2018), <https://voiceofsandiego.org/2018/06/27/county-program-requiring-random-searches-for-welfare-applicants-is-being-challenged-again/> [https://perma.cc/56BE-MS88].

190. Personal email correspondence (on file with author).

191. *Id.*

192. See *supra* Section III.

193. *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 521 (2015).

194. *Id.* at 540.

Disparate impact liability is a crucial method of addressing subtle forms of discrimination where evidence of discriminatory intent is elusive but “the problem of subconscious stereotypes and prejudices . . . remain[s].”¹⁹⁵ As the plaintiffs in the state court challenge to P100 explained to the California Court of Appeal, disparate impact liability therefore appeared to provide a valuable tool for “challenging the discriminatory effects of punitive and degrading welfare policies” like P100 “that were likely to have been influenced by racist and sexist stereotypes and beliefs that may have never been openly expressed or even consciously held.”¹⁹⁶

2. A Fear of “Too Much Justice”: Judicial Skepticism of Disparate Impact Litigation from *Washington v. Davis* to *McCleskey v. Kemp*

Unfortunately, while disparate impact causes of action may still have untapped potential for challenging a variety of forms of subtle and systemic discrimination, many courts have long been skeptical that discrimination exists when discriminatory intent cannot be proven. For example, in *Washington v. Davis*, unsuccessful Black applicants to the District of Columbia police department challenged the department’s application test (which purported to assess verbal ability, vocabulary, reading and comprehension) as racially discriminatory and violative of the Fourteenth Amendment’s Due Process Clause because it weeded out a disproportionately high percentage of Black applicants but had not been shown to be reliable for measuring job performance.¹⁹⁷ Writing for the Supreme Court majority, Justice White stated that “we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies ‘any person . . . equal protection of the laws’ simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.”¹⁹⁸ “Simply” does a lot of work in that construction.

There was a stark racial disparity in passage rates for the application test that was at issue in *Washington v. Davis*. Over a three-year span, from “1968 to 1971, 57 percent of black applicants failed [the test] compared with 13 percent of whites.”¹⁹⁹ Presenting this disparity as a “simple” matter serves to absolve the Court’s majority of any responsibility for determining how the disparity came about. Had the majority *wanted* to understand how the application test could be a racially biased tool for keeping Black applicants off the police force, it might have examined the questions, which were “geared for white cultural norms and

195. *Watson v. Ft. Wor. Bank & Tr.*, 487 U.S. 977, 990 (1988).

196. Appellants’ Corrected Opening Brief at 34–35, *Villafana v. Cnty. of S.D.*, 57 Cal. App. 5th 1012 (2020) (No. D076120), 2019 WL 6999311, at *34–35.

197. *Washington v. Davis*, 426 U.S. 229, 232–35 (1976).

198. *Id.* at 245.

199. Osague K. Obasogie, *The Supreme Court is Afraid of Racial Justice*, N.Y. TIMES (June 7, 2016), <https://www.nytimes.com/2016/06/07/opinion/the-supreme-court-is-afraid-of-racial-justice.html> [<https://perma.cc/3LME-JGEG>].

idioms” and rife with racist stereotypes.²⁰⁰ Or, it might have looked to “decades of racially separate and unequal education” that had systematically disadvantaged Black applicants quizzed about the meaning of idioms like “straight trees are the first to be felled.”²⁰¹

The majority’s “difficulty” understanding the discriminatory nature of the application test betrayed its unwillingness to grapple with the nature of subtle forms of discrimination and racial bias at the same time that it provided a basis for the Court to make it considerably harder for litigants to challenge a variety of forms of structural racism. The Court overturned a decision from the United States Court of Appeals for the District of Columbia Circuit that determined that the application test violated the Equal Protection Clause. In so doing, it rejected the proposition that “a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”²⁰²

In reversing the D.C. Circuit, the Supreme Court recognized, curtailed, and repudiated the potential power of disparate impact discrimination claims. Justice White wrote that allowing challenges to policies that were racially neutral on their face, but that benefitted or burdened “one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes.”²⁰³ Needless to say, these “serious questions” were not ones that the Court wanted future litigants to raise.

In subsequent years and decades, the Court continued to make it more difficult to raise these kinds of questions and to mount disparate impact challenges to aspects of structural racism. As Professor Osagie K. Obasogie has noted, *Davis* “opened the door to what is now known as the ‘intent doctrine,’ which emerged in later [anti-discrimination] cases as a simplistic search for a smoking gun—individual bad actors intentionally doing bad things with nothing but racial animus on their minds.”²⁰⁴ The *Davis* majority’s concerns that recognizing disparate impact discrimination could open the floodgates to other types of challenges to systemic racism were reflected in *McCleskey v. Kemp* a decade later, the infamous death penalty case where Justice Brennan criticized his colleagues’ “fear of too much justice.”²⁰⁵

200. *Id.*

201. *Id.*

202. *Washington*, 426 U.S. at 239.

203. *Id.* at 248.

204. Obasogie, *supra* note 199. It bears noting, however, that the Supreme Court had first opened the door to imposing an intent requirement in Fourteenth Amendment Equal Protection claims a century earlier, in *United States v. Cruikshank*, 92 U.S. 542 (1875). See James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 385 (2014) (writing that “*Cruikshank*, not the canonical *Washington v. Davis*, announced that the Fourteenth Amendment’s Equal Protection Clause protected only against provably intentional race discrimination”).

205. *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

One of the reasons that the *McCleskey* majority required the defendant in that case to prove that the “decision makers” who “enacted or maintained” the administration of the death penalty in Georgia had acted “with discriminatory purpose” was that allowing him to prove discrimination by relying on statistical evidence of racial disparities would have turned the judiciary into an institution where litigants could challenge all sorts of structural inequalities.²⁰⁶ As an initial matter, the Court expressed concern that allowing a challenge to the death penalty based on statistical evidence of racial disparities would, if “taken to its logical conclusion, throw[s] into serious question the principles that underlie our entire criminal justice system.”²⁰⁷ As in *Washington v. Davis*, the Court once again proved allergic to such a “serious question.” Instead, the majority was concerned that allowing *McCleskey* to demonstrate racial bias in the administration of the death penalty without having to prove an intent to discriminate would open the floodgates to “similar claims as to other” aspects of the criminal legal system.²⁰⁸ As Justice Brennan’s critique suggests, the Court never entertained the possibility that the judiciary *should* be faced with such claims.

The Court was aware too that allowing racial discrimination to be proved by reliance on statistical evidence of disparate impact could open the door to similar claims based on “unexplained discrepancies that correlate to membership in other minority groups, and even to gender.”²⁰⁹ Requiring plaintiffs who claimed to have been discriminated against to prove discriminatory intent was a way of creating a limiting principle that would avoid opening the courthouse doors to challenges to a never-ending array of forms of structural inequalities.

3. No Right to Sue: *Sandoval*, *Gonzaga*, and *Save Our Valley*

While *Washington v. Davis* and *McCleskey v. Kemp* required proof of discriminatory intent to prove discrimination under the Federal Constitution, the Court’s skepticism of disparate impact discrimination claims also extended to anti-discrimination statutes. Throughout the entire history of the Civil Rights Act, starting with the enactment of Title VI, as federal agencies promulgated anti-discrimination regulations, including disparate impact regulations, courts, relying on “prevailing principles of statutory construction,” assumed that individuals could rely on these regulations to provide the basis for anti-discrimination lawsuits.²¹⁰ That changed in 2001, in a case called *Alexander v. Sandoval*, which carved out an exception to this standard statutory principle when applied to disparate impact claims.

Sandoval was a class action discrimination case brought under Title VI, challenging the Alabama Department of Public Safety’s policy of administering its

206. *Id.* at 279–82.

207. *Id.* at 314–15.

208. *Id.*

209. *Id.* at 316–17.

210. *Alexander v. Sandoval*, 532 U.S. 275, 294 (2001) (Stevens, J., dissenting).

driver's license examination only in English.²¹¹ The plaintiffs relied on regulations promulgated by the United States Department of Justice (DOJ) under Title VI that prohibited DOJ funding recipients, like the Alabama agency, from utilizing "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."²¹² This is the standard formulation for a disparate impact regulation because it prohibits practices that have the "effect" of discriminating without requiring proof of discriminatory intent. Martha Sandoval, as a class representative, sued for injunctive relief, arguing that the English-only exam administration policy "violated the DOJ regulation because it had the effect of subjecting non-English speakers to discrimination based on their national origin."²¹³ The district court agreed that the policy was a form of disparate impact discrimination in violation of the DOJ regulation and enjoined the policy, ordering the Department of Public Safety "to accommodate non-English speakers."²¹⁴ The Eleventh Circuit Court of Appeals affirmed the district court's decision.²¹⁵

But although private plaintiffs had relied on the disparate impact regulations for "nearly forty years" as "the primary vehicle" to "vindicate their right to be free from racial discrimination by the recipients of federal monies," the Supreme Court granted certiorari to decide whether private actors could sue to enforce disparate impact regulations promulgated to meet agencies' Title VI anti-discrimination obligations.²¹⁶

The Alabama Department of Public Safety did not challenge the validity of the disparate impact regulations, only whether private actors could enforce them. Nevertheless, the *Sandoval* majority expressed some consternation about the very existence of the regulations.²¹⁷ Because the petitioners hadn't challenged the regulations themselves, the majority was willing to "assume for the purposes of deciding this case" that the disparate impact regulations were valid.²¹⁸ The Court appeared to signal, however, that it might have been willing to invalidate them in a future case if the issue were squarely before it.²¹⁹ While it did not invalidate the regulations entirely, the Court did determine that there is no "freestanding private right of action to enforce" them.²²⁰

Sandoval presented a major blow to the promise of disparate impact litigation. The "immediate practical result" of the decision was that "only federal agencies, hamstrung by budgetary limitations and institutional inertia, and influenced

211. *Id.* at 278–79.

212. *Id.* at 278.

213. *Id.* at 279.

214. *Id.*

215. *Id.*

216. Laufer, *supra* note 185, at 1621.

217. *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001).

218. *Id.*

219. See Laufer, *supra* note 185, at 1628–36 for a discussion of the *Sandoval* majority's hostility to the disparate impact regulations.

220. *Sandoval*, 532 U.S. at 293.

by the political agenda of the executive branch, can enforce the [regulations promulgated under Title VI that prohibit] disparate impact discrimination; private plaintiffs cannot.”²²¹

Justice Stevens’ dissent pointed out that the majority had (perhaps inadvertently) left open the door to private actors seeking to enforce Title VI disparate impact regulations by claiming that they were not overturning an earlier case, *Guardians Assn. v. Civil Serv. Comm’n of New York City* that had expressly stated that private parties could sue on a disparate impact theory if they were seeking injunctive relief under 42 U.S.C. § 1983, which provides a cause of action for suits alleging constitutional violations or violations of federal laws committed by persons acting under “color of law.”²²² Because the *Sandoval* majority did not claim to disrupt the holding in *Guardians*, Justice Stevens wrote that the decision was ultimately inconsequential, at least if the majority were taken at their word. He noted that “to the extent that the majority denies relief to the respondents merely because they neglected to mention 42 U.S.C. § 1983 in framing their Title VI claim, this case is something of a sport.”²²³ Under the logic of the majority decision, Justice Stevens determined that the only thing that future litigants would have to do if they wanted to enforce Title VI disparate impact regulations would be to reference § 1983.²²⁴

Sandoval’s failure to repudiate the *Guardians* holding, coupled with Justice Stevens’ *Sandoval* dissent, provided some basis for optimism for the future of disparate impact litigation. “Prior to *Sandoval*, several circuits had permitted individuals to enforce Title VI regulations through private rights of action by asserting that regulations create ‘rights’ within the meaning of 42 U.S.C. § 1983.”²²⁵ Justice Stevens’ dissent suggested that the majority had provided no reason to think this practice was inappropriate. And, once the case was decided, “many civil rights advocates looked to § 1983 with hope that it could sustain causes of action for Title VI regulation violations.”²²⁶ This may have been wishful thinking, however. The year after *Sandoval* was decided, the Supreme Court tightened the rules for § 1983 litigation, determining that private actors cannot use § 1983 to enforce rights created by Congressional action unless Congress states “in clear and unambiguous terms” that it “wishes to create new rights enforceable under § 1983.”²²⁷ Lest there be any doubt about what this meant for disparate impact litigation under the Title VI regulations, the Ninth Circuit quickly resolved the question. In 2003, in *Save Our Valley v. Sound Transit*, a § 1983 challenge brought by a community group to enforce the Department of Transportation’s

221. Laufer, *supra* note 185, at 1623.

222. *Sandoval*, 532 U.S. at 299 (Stevens, J., dissenting).

223. *Id.* at 299–300.

224. *Id.* at 300.

225. Derek Black, *Picking Up the Pieces After Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C. L. REV. 356, 363–64 (2002).

226. *Id.* at 364.

227. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002).

disparate-impact regulation, the court determined that “the Supreme Court’s *Sandoval* and *Gonzaga* decisions, taken together, compel the conclusion . . . that agency regulations cannot independently create rights enforceable through § 1983.”²²⁸ If Justice Stevens’ dissent in *Sandoval* had left the door open a crack for private actors to sue to enforce Title VI disparate impact regulations, *Gonzaga* and *Save Our Valley* slammed it shut.²²⁹

4. State Law to the Rescue?: California Government Code Section 11135

CalWORKs is funded through a combination of a federal block grant and state and county government funds.²³⁰ CalWORKs programs like P100 are, therefore, subject to Title VI requirements governing programs that receive federal government funds, including regulations promulgated to prohibit disparate impact discrimination.²³¹ Before *Sandoval*, *Gonzaga*, and *Save Our Valley*, it would have been possible to challenge P100 under those regulations, either directly, or as a § 1983 challenge. That triumvirate of cases foreclosed the possibility of a disparate impact challenge to the program based on *federal* expenditures, but because CalWORKs also relies on *state* funding, it was possible to challenge P100 under the California analog to Title VI, California Government Code Section 11135 (“Section 11135”), a corresponding enforcement statute, Government Code Section 11139 (“Section 11139”), and their implementing regulations. As discussed above, those regulations prohibit discrimination in state-funded programs or activities, and they expressly allow for claims based on disparate impact discrimination theories.²³² And, while *Sandoval*, *Gonzaga*, and *Save Our Valley* prevent private individuals or organizations from suing to enforce the Title VI disparate impact regulations, there was no similar case law preventing people from bringing suit to enforce the California disparate impact regulations. Instead, “[u]nlike Title VI . . . the analogous California statute and its implementing regulations [expressly] provide a private right of action.”²³³

This is only true because the California Legislature decided to amend Section 11139 to include a private right of action in response to a state court

228. *Save Our Valley v. Sound Transit*, 335 F.3d 932, 939 (9th Cir. 2003).

229. More recently, as this Article was being prepared for publication, the Trump Administration issued an executive order directing federal agencies to “eliminate the use of disparate-impact liability in all contexts to the maximum degree possible,” requiring agencies to “deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability.” Since the Supreme Court has already foreclosed the possibility of private enforcement of these disparate impact regulations, if the executive order survives legal challenge, there will be little left of federal disparate impact liability. Erica L. Green, *Trump Seeks to Strip Away Legal Tool Key to Civil Rights Enforcement*, N.Y. TIMES (May 11, 2025), <https://www.nytimes.com/2025/05/09/us/politics/trump-civil-rights.html> [https://perma.cc/2RXU-RDWG].

230. See California Legislative Analyst’s Office, “The 2024–25 Budget: CalWORKs,” March 4, 2024, <https://lao.ca.gov/Publications/Report/4872> [https://perma.cc/J26Z-J4NN].

231. See 42 U.S.C. § 2000d (2000).

232. See *supra* Section IV(B)(1); *Darensburg v. Metro. Transp. Comm’n*, 611 F. Supp. 2d 994, 1041 (N.D. Cal. 2009), *aff’d*, 636 F.3d 511 (9th Cir. 2011).

233. *Id.* at 1041–42.

decision finding that Section 11135 could *not* be enforced by private actors and was in fact “enacted to provide an administrative *alternative* to private lawsuits.”²³⁴

5. Closing the Floodgates: Judicial Barriers to State Disparate Impact Claims

In fact, even though the California Legislature intended Sections 11135–11139 as powerful tools that individuals could use to combat a broad variety of forms of intentional and disparate impact discrimination, courts have consistently chipped away at their potential, creating a series of barriers to disparate impact claims that plaintiffs have struggled to surmount.²³⁵ Over the course of the first twenty years of their history, the Legislature amended Sections 11135–11139 to broaden their scope on at least eight occasions, often “to correct state court interpretations of [S]ection 11135 that the[L]egislature deemed too narrow.”²³⁶ The Legislature acted not only to broaden the range of classes protected by Section 11135 and to add an explicit private right of action, but also to effectively overrule state court decisions that required plaintiffs to exhaust administrative remedies before bringing a claim under Section 11135 and that determined Section 11135 did not apply to California state universities.²³⁷ In a more general rebuke to the judiciary, the Legislature amended Section 11139 to mandate that the anti-discrimination provisions in the Government Code “shall not be interpreted in a manner that would frustrate [their] purpose.”²³⁸

Even though the Legislature regularly acted to open up possibilities for Section 11135 anti-discrimination claims after courts had shut them down, one apparent effect of the series of decisions that narrowed the scope of Section 11135 is that it was not until relatively recently that courts really began to hear Section 11135 disparate impact claims on the merits. While Section 11135 was enacted in 1977, it was not until 2005 that state courts heard the first “explicit disparate impact case” brought under Section 11135.²³⁹ Thus, to the extent that the Legislature intended Section 11135 to be a tool ordinary people could use to challenge powerful and pervasive forms of discrimination without having to prove discriminatory intent, the courts had, in fact, managed to “frustrate its purpose” for decades. This history of judicial hostility to disparate impact litigation under Section 11135 provides the historical backdrop to our state court challenge to P100.

234. *Arriaga v. Loma Linda Univ.*, 10 Cal. App. 4th 1556, 1563 (1992); *see also* Danfeng Soto-Vigil Koon, *Cal. Gov’t Code S 11135: A Challenge to Contemporary State-Funded Discrimination*, 7 STAN. J. CIV. RTS. & CIV. LIBERTIES 239, 252 (2011).

235. Koon, *supra* note 234, at 251.

236. *Id.* at 252.

237. *Id.* at 252, 254.

238. *Id.* (quoting Government Code Section 11139) (depublished).

239. *Id.* at 224 (citing *Garcia v. Bd. of Trustees of California State Univ.*, 32 Cal. Rptr. 3d 724 (Ct. App. 2005)).

6. Anatomy of a Loss: Our Failure to State a Claim

When we launched the *Villafana* lawsuit, we were aware that plaintiffs wishing to bring disparate impact discrimination claims under Section 11135 have always had to overcome a series of procedural barriers, and that there were some threshold issues we would have to meet. For example, Section 11135 applies to “programs or activities funded by the state,” and courts have dismissed Section 11135 claims when they determined that challenged policies were not “programs or activities.”²⁴⁰ Similarly, courts have also dismissed Section 11135 claims when they determined that the plaintiff had failed to prove that the specific government programs or activities they were challenging were state funded.²⁴¹ But even when plaintiffs have made it past those barriers, courts have made it difficult for them to prevail on the merits by employing daunting tests for meeting the elements of a disparate impact discrimination claim.

Those elements are deceptively simple, but we always knew it could be difficult to convince a court that we met them: a plaintiff “establishes a prima facie case” of disparate impact discrimination under Section 11135 “if the defendant’s facially neutral practice causes a disproportionate adverse impact on a protected class.”²⁴² In practice, courts have made it difficult for plaintiffs to establish either that the policy or practice they are challenging creates a legally cognizable “adverse impact” or that any such adverse impact was “disproportionately” borne by members of a protected class. Both these issues created problems for our state court challenge to P100.

a. Where’s the Harm?: Did P100 Cause an “Adverse Impact”?

One difficulty in bringing a disparate impact challenge against P100 was that disparate impact discrimination law, and anti-discrimination law more broadly, is rooted in the context of housing, voter discrimination, and employment and does not neatly map on to the public benefits context. When people are prevented from voting, or denied housing, or jobs, or promotions, it’s pretty easy to conclude they have been harmed or have experienced an “adverse impact.” On the other hand, there is scant case law recognizing the kinds of stigmatic and dignitary harms inflicted by P100 as legally cognizable forms of “adverse impact.”

Because courts had not addressed invasions of privacy in the context of a disparate impact claim, and because there weren’t many anti-discrimination cases at all that addressed assaults on individuals’ dignity as a form of discrimination, we knew from the outset of the case that we would have to convince the judge that the kinds of harm at issue in the case *could* be addressed through a disparate impact claim.

240. See, e.g., *People v. Levinson*, 155 Cal. App. 3d Supp. 13 (App. Dep’t Super. Ct. 1984).

241. See, e.g., *Kirola v. City & Cnty. of San Francisco*, 74 F. Supp. 3d 1187, 1249 (N.D. Cal. 2014), *aff’d in part, rev’d in part*, 860 F.3d 1164 (9th Cir. 2017); *San Francisco Taxi Coal. v. City & Cnty. of San Francisco*, 979 F.3d 1220, 1228 (9th Cir. 2020).

242. *Darensburg v. Metro. Transp. Comm’n*, 636 F.3d 511, 519 (9th Cir. 2011).

Judges had never had to consider anti-discrimination claims involving things like the shame and embarrassment entailed in having investigators asking neighbors about applicants' relationships, the intrusions into family dynamics resulting from investigators' questions about sleeping arrangements and child rearing practices, or the stress and anxiety that would result from having to wait for days on end for a P100 investigator to show up, or the complete invasion of privacy resulting from intrusive home searches.²⁴³

This lack of familiarity was troublesome because judges "are risk adverse and, therefore, are hard-pressed to recognize new, emerging rights in the absence of precedent," so it was important to assure the court that it would not be going out on a limb in acknowledging what seemed self-evident: P100 was responsible for a tremendous amount of suffering that clearly constituted an "adverse impact."²⁴⁴

We did have some favorable precedent that recognized the toll of dignitary and stigmatic injuries on our side. For example, the Ninth Circuit Court of Appeals determined there was an adverse impact in a case where Black children were inappropriately placed in classes for the "educable mentally retarded . . . [that] stigmatize children improperly placed in them."²⁴⁵ The Supreme Court had also recognized that "discrimination itself, by perpetuating archaic and stereotypic notions or by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy participants in the political community, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group."²⁴⁶ Indeed, one of the foundational anti-discrimination Supreme Court cases, *Heart of Atlanta Motel, Inc. v. United States*, indicated that there is a right to dignity that can be infringed by state practices that cause or allow unnecessary humiliation, while defining discrimination in terms of humiliation and "deprivation of personal dignity."²⁴⁷ Still, there was no denying that our claims did not easily fit within most of the existing universe of disparate impact case law. That would prove to be part of our undoing, at least in the superior court.

The *Villafana* litigation did not get very far because San Diego County demurred (the California state court equivalent to filing a motion to dismiss), arguing that we had failed to show that P100 constituted a form of disparate impact discrimination in violation of Section 11135.²⁴⁸ The superior court and California Court of Appeal agreed, so the case never made it to discovery or trial. One reason the superior court sustained the demurrer was that it determined we

243. See Section II(A), *supra* (addressing the variety of harms imposed by P100).

244. Anthony Michael Kreis, *Stages of Constitutional Grief: Democratic Constitutionalism and the Marriage Revolution*, 20 U. PA. J. CONST. L. 871, 980 (2018).

245. See *Larry P. By Lucille P. v. Riles*, 793 F.2d 969, 983 (9th Cir. 1984).

246. *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984).

247. 379 U.S. 241, 292 (1964) (Goldberg, J., concurring).

248. Technically, the "function of a demurrer is to test whether, as a matter of law, the facts alleged in the complaint state a cause of action under any legal theory." *Cardenas v. Horizon Senior Living, Inc.*, 78 Cal. App. 5th 1065, 1069 (2022).

had not established that P100 created any kind of adverse impact.²⁴⁹ The court relied on employment discrimination case law to assess our claims, and therefore determined that we needed statistical evidence that members of a protected class had been denied benefits *because* of their membership in that protected class.²⁵⁰ We could not meet this burden because we were not claiming that P100 resulted in denial of benefits.

People *were* denied benefits because of the P100 investigations, and the program also likely deterred people from applying for benefits they were entitled to,²⁵¹ but our case was premised on the claim that P100 inflicted many kinds of harm that went well *beyond* benefit denials. The court was unwilling to seriously consider the possibility that any of these other kinds of suffering could constitute a legally cognizable form of adverse impact. Rather than engaging in any type of sustained analysis of these injuries, the court merely observed that the Ninth Circuit had already determined that the kinds of allegations we made about the “stress, anxiety and stigma associated with the P100 home inspections” did not render the P100 investigations unreasonable in *Sanchez*.²⁵² The court did not actually explain the relevance of this observation, but the implication appears to have been that if the P100 investigations did not constitute unreasonable Fourth Amendment searches, they also could not have created a form of adverse impact that could be actionable under anti-discrimination law. As the superior court judge stated during oral argument, “I cannot get past the lack of harm in the policy itself . . . the policy is they go and—you could characterize it as some sort of home invasion . . . and the *Sanchez* case says it was okay to do that.”²⁵³

On appeal, we explained that assessing disparate impact discrimination required a different kind of analysis than determining whether there was an unreasonable Fourth Amendment search and that there could be forms of discrimination that did not rise to the level of a constitutional violation.²⁵⁴ We also argued that “*Sanchez* was a different case, with different parties that addressed different issues and has no preclusive effect on this case.”²⁵⁵ Ultimately, that argument turned out to be irrelevant because the court of appeal determined that we had another equally fatal problem. It decided that even if we were right that *Sanchez* was not dispositive and that P100 had created an adverse impact, we would still have been unable to state a disparate impact claim because we could not establish that women and people of color were “disproportionately” harmed by P100.²⁵⁶

249. *Villafana v. Cnty of San Diego*, San Diego County Sup. Ct., Case No. 37-2018-00031741, Order Sustaining Demurrer to First Amended Complaint (Mar. 22, 2019) at 3 [Hereinafter *Villafana Ord. Sustaining Demurrer*].

250. *See id.* (citing *Jumaane v. City of Los Angeles*, 241 Cal. App. 4th 1390 (2015)).

251. *See* Section II(A), *supra*.

252. *Villafana Ord. Sustaining Demurrer*, at 3 (citing *Sanchez*, 464 F.3d at 925).

253. Quoted in *Villafana v. Cnty. of San Diego*, 57 Cal. App. 5th 1012 (2020), Appellants’ Corrected Opening Brief, 2019 WL 6999311, at *45 (citing transcript of second demurrer hearing).

254. *Id.*

255. *Id.*

256. *Id.* at 1020 n.7.

b. Compared to What?: Establishing Disproportionality

The core promise of disparate impact causes of action is that they can provide a way to address harms that are disproportionately borne by members of a protected class. Once a plaintiff identifies a “facially neutral practice” (a practice or policy that doesn’t have terms that expressly discriminate against a protected class), they can establish a prima facie case of disparate impact discrimination by showing that the practice “causes a disproportionate adverse impact on a protected class.”²⁵⁷ But, by definition, “disproportionate” is a comparative term—you measure whether one group is disproportionately impacted by a practice by considering whether the impact on another group is less dramatic. A key part of any disparate impact claim is, therefore, figuring out the appropriate comparison group. To state a disparate impact claim in *Villafana*, we needed to establish that women and people of color were disproportionately harmed by P100. But disproportionate compared to whom?

Choosing the appropriate comparator group can make or break a disparate impact claim. For example, if a group of Latino homeowners wanted to file a disparate impact suit to challenge the siting of a municipal incinerator in a predominantly Latino neighborhood, they might want to compare the environmental impact on Latinos within the city to the impact on whites in the city. If whites tended to live farther away from the incinerator, and if Latino housing was concentrated in areas close to the incinerator, the plaintiffs would likely be able to establish that the incinerator would have a disproportionate adverse impact (in the form of increased asthma rates, exposure to carcinogens, etc.) on Latinos as compared to whites. But if the plaintiffs were required to provide demographic data only about the specific neighborhood where the incinerator was located, they would probably be unable to demonstrate any demographically significant adverse impact—Latinos and whites who live within a mile of the incinerator would all face the same risk of exposure to toxic particulates. Thus, if the court allowed the plaintiffs to use citywide population data to establish appropriate comparison groups, the plaintiffs would have a good chance of being able to state a prima facie case of disparate impact discrimination. But if they were required to rely on population data for the neighborhood where the incinerator was sited, the claim would likely be dismissed at an early stage of litigation.²⁵⁸ Given these stakes, litigants in disparate impact discrimination cases spend a lot of time struggling over the appropriate basis for comparison.²⁵⁹

No “single test controls in measuring disparate impact.”²⁶⁰ Instead, the proper comparison population depends on the facts of each case.²⁶¹ Developing an

257. *Darensburg v. Metropolitan Transportation Comm.*, 636 F.3d 511, 519 (9th Cir. 2011).

258. For a discussion of the appropriate comparator groups in environmental justice disparate impact cases, see Bradford C. Mank, *Proving an Environmental Justice Case: Determining an Appropriate Comparison Population*, 20 VA. ENV'T. L.J. 365, 373 (2001).

259. See generally *id.*

260. *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 50 (1st Cir. 2000) (citing *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 995–96 n.3 (1988)).

261. *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly*, 658 F.3d 375, 382 (3d Cir. 2011).

appropriate statistical measure for assessing disproportionality involves “a comparison between two groups—those affected and those unaffected by the facially neutral policy.”²⁶² In *Villafana*, it was clear that the group of people who were affected by P100, or the “subset of the population that is affected by the disputed decision,” consisted of the group of people who were subjected to the P100 investigations—in other words, the population of new San Diego County CalWORKs applicants who were not clearly ineligible for CalWORKs benefits and whose applications raised no cause for suspicion. The question was, what population should that group be compared to?

To argue that the harms caused by P100 fell disproportionately on women and people of color, we compared the San Diego County CalWORKs population with the county general population. We noted, for example, that “Hispanics represent 50.33% of County CalWORKs recipients but only 33.5% of the county’s general population. African Americans represent 14.11% of County CalWORKs recipients but only 5.5% of the county’s general population. Adult women represent over 72% of CalWORKs recipients but only 39% of the county’s population.”²⁶³ There were no readily available demographic statistics for the CalWORKs applicant pool, but we argued, and the County effectively conceded, that demographic statistics for the CalWORKs recipient population provided a “reasonable proxy” for the population affected by P100.²⁶⁴

Those statistics made clear that Latinos, African Americans, and women applied for CalWORKs, and were thus subject to the P100 investigations, at much higher rates than would be expected based solely on their percentage of the county’s population. We believed that it was appropriate to compare the demographics of the CalWORKs applicant pool to those of the county’s general population because of a series of Title VI disparate impact cases indicating that “when courts determine disparity, it is appropriate to measure the racial proportionality of the allegedly affected population against the population of the defendant entity’s decision-making jurisdiction.”²⁶⁵ Those cases seemed like a perfect fit because the affected population was San Diego County’s CalWORKs applicant pool, and the County had decision-making authority over the general population of the county.

We also relied on a series of cases that allowed plaintiffs to cite general population statistics as their point of comparison when they were challenging policies that were intended to benefit anyone in the community who met low-income eligibility requirements.²⁶⁶ Many of these cases involved disparate impact claims

262. *Darensburg*, 636 F.3d at 519–20 (citing *Tsombanidis v. W. Haven Fire Dep’t*, 352 F.3d 565, 575 (2d Cir. 2003)).

263. Corrected Opening Brief for Appellant at *19, *Villafana v. Cnty. of San Diego*, 57 Cal. App. 5th 1012 (Cal. Ct. App. 2020) (No. D076120).

264. *Id.* at *37.

265. Julia V. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can A Legal Tool Build Environmental Justice?*, 27 B.C. ENV’T. AFF. L. REV. 631, 689 n.371, 706 (2000) (citing cases).

266. Corrected Opening Brief for Appellant at *9, *Villafana*, 271 Cal. App. 5th 1012 (No. D076120).

brought under the Fair Housing Act and cases challenging “zoning, construction, home loan practices, and rental decisions.”²⁶⁷ In those cases, courts determined it was appropriate to rely on general population statistics because the Fair Housing Act was intended to benefit the community as a whole by integrating neighborhoods and combatting racial segregation.²⁶⁸ We thought that the same logic should support reliance on general population statistics for comparison purposes in a case involving welfare benefits. One reason this made sense was because in *Goldberg v. Kelly*, an earlier major welfare rights case, the Supreme Court recognized that, like the Fair Housing Act, public assistance programs like CalWORKs were created to benefit the entire community, as they stem from “the Nation’s basic commitment . . . to foster the dignity and well-being of all persons within its borders.”²⁶⁹

In *Goldberg*, the Court acknowledged that the direct beneficiaries of welfare were indigent families, and that public benefits could “help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.”²⁷⁰ But the Court had also determined that welfare had broader value for the community as a whole, declaring that because “welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity,” public assistance “is not mere charity, but a means to ‘promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.’”²⁷¹ Moreover, especially in times of economic uncertainty, welfare serves as a safety net that can cushion the fall when people who are not currently eligible for benefits experience economic hardships and fall into poverty. Because San Diego County’s CalWORKs programs were intended to provide a measure of security to everyone in the county, we thought that a court should look to the county’s general population as the point of comparison when considering the harm inflicted by P100 on CalWORKs applicants. Ultimately, the reason we lost the case is that the California Court of Appeal disagreed with that assessment.

Because there is no single test to determine disproportionality in disparate impact discrimination cases, and because there were no directly analogous disparate impact cases involving stigmatic and dignitary injuries caused by a public benefits program, the court of appeal was left to its own devices to determine the kind of comparison population that made sense in our case. The court made quick work dismissing our reliance on Fair Housing Act cases. It recognized that welfare benefits could “foster the dignity and well-being of all persons” by guarding against the “societal malaise that may flow from a widespread sense of unjustified frustration and insecurity,” but decided that this was “not the same as the direct benefit intended by the desegregation goals of the Fair Housing Act” because

267. *Villafana*, 57 Cal. App. 5th at 1018.

268. *Id.* at 1019.

269. *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970).

270. *Id.*

271. *Id.*

welfare benefits weren't "distributed with the express aim of affecting those who do not qualify for them in the same way that the Fair Housing Act does."²⁷² The court didn't explain why these distinctions were material. However, these distinctions were enough for the court to decide to rely on a different type of comparison.

Rejecting our reliance on Fair Housing Act cases and the other cases we cited where plaintiffs had relied on demographic statistics for the general population of the jurisdiction that enforced a challenged policy, the court turned to cases from the employment context. In so doing, the court acknowledged that these cases did not provide a "perfect analogy," but nevertheless found that they offered "a more apt comparison."²⁷³ In many of those cases, courts confined their analyses to the potential or actual applicant pool, considering "whether 'an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants, or, in promotion and benefit cases, in a proportion smaller than in the actual pool of eligible employees.'"²⁷⁴ The court recognized that employment benefit cases didn't "offer an ideal analogy" for our case because they address a different type of adverse impact: "they focus on denial of the employment benefit, not stigma from the hiring or promotion process."²⁷⁵ But the court relied on those cases anyway, "because the issues in both contexts can reasonably impact only a subset of the general population—those qualified for positions in the employment context and those eligible for CalWORKs benefits here."²⁷⁶ The court apparently did not consider our argument that P100 could "reasonably impact" other members of the general population—people who were not currently eligible for CalWORKs benefits but who might become eligible at a later date. And, despite claiming to recognize that CalWORKs is a policy that benefits the entire community by guarding against the "societal malaise" that could flow from widespread economic devastation, the court did not address the ways that a program like P100 that forces CalWORKs applicants to give up their privacy as a condition of receiving needed benefits could compromise the protection that welfare provides to the broader community.

Regardless of the reasons the court may have had for determining that CalWORKs was, at heart, only relevant for people who were eligible for benefits, the next step after making that determination was to decide that anyone who was not eligible for benefits was irrelevant in assessing whether there was a "disproportionate" adverse impact. In the end, the court determined that the only relevant population was the population directly impacted by P100: other CalWORKs applicants. The court held that "the appropriate comparison is between groups to whom [P100] has been or can be applied."²⁷⁷ We might have been able to state a

272. *Villafana*, 57 Cal. App. 5th at 1019.

273. *Id.*

274. *Id.* (quoting *Moore v. Hughes Helicopters, Inc.*, Div. of Summa Corp., 708 F.2d 475, 482 (9th Cir. 1983)).

275. *Id.* at 1020.

276. *Id.*

277. *Id.* at 1018.

claim for disparate impact discrimination if we had looked *within* the CalWORKs applicant population and alleged that women and people of color who applied for benefits were treated differently than other CalWORKs applicants. But, of course, that was not the point of the case. We thought, and alleged, that P100 harmed everyone it touched: it forced the poor, and only the poor, who happened to be disproportionately women and people of color, to open their homes to law enforcement investigators as a condition for receiving benefits they were legally entitled to.

That wasn't enough for the court. We did not claim that "Hispanic, Latino, or female applicants suffer harsher impacts [from P100] than other groups to whom the practice is applied."²⁷⁸ For the court, it was immaterial that the CalWORKs population itself was disproportionately composed of women and people of color, and the county's general population demographics were irrelevant. The court required us to look solely within the CalWORKs applicant pool, and because we could not allege different treatment of different groups within that pool, the court concluded "there is no viable disparate impact claim" and sustained the County's demurrer.²⁷⁹ With that, the decades-long legal struggle against P100 came to an end.²⁸⁰

C. *Summing it Up: Judicial Hostility to Litigating for Social Change*

None of the decisions that made it difficult or impossible to challenge P100 were preordained, and none flowed automatically from controlling precedent. In every one of the key cases that led to the outcome in *Villafana*, from *Wyman* to *Sandoval* to *Sanchez*, there were either lower court opinions or powerful dissents (or both) arguing for different outcomes. Even with those decisions in place, *Villafana* itself was not necessarily destined to be a losing cause. Determining what type of comparison population is appropriate for a disparate impact discrimination claim depends on the facts of each case.²⁸¹ Because there were no directly analogous cases to *Villafana*, the court of appeal had look to other disparate impact contexts to figure out what made sense here. The court acknowledged there were no perfect parallel cases and that none of the existing comparison tests mapped on perfectly to a case alleging the kinds of stigmatic and dignitary injuries inflicted by P100.²⁸² Faced with an imperfect choice, the court actively chose a comparison population that foreclosed the possibility of relief. In so doing, it also made a choice to disregard most of our arguments about the ways that CalWORKs benefits the population as a whole.²⁸³ Regardless of whether one

278. *Id.* at 1020.

279. *Id.*

280. Or rather, mostly came to an end. We requested review of the court of appeal decision by the California Supreme Court, but the review was denied on March 17, 2021.

281. *See* Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly, 658 F.3d 375, 382 (3d Cir. 2011).

282. *Villafana*, 57 Cal. Appt. 5th at 1019.

283. *See* Section IV(B)(6)(b), *supra*.

finds the court's rationale for these choices convincing, it bears noting that this was just one more decision in a line of cases where federal and state judiciaries made it ever more difficult to challenge systemic forms of discrimination through disparate impact lawsuits, even after legislatures went out of their way to signal their belief in the vitality of such cases.²⁸⁴

Others have remarked on the long failure of the judiciary to safeguard minority rights.²⁸⁵ But the cases against P100 provide an illuminating glimpse into the sheer variety of ways that courts have undermined the ability to litigate for social justice for well over a century. It may have taken until 1987 before Justice Brennan excoriated his colleagues for their “fear of too much justice” in *McCleskey v. Kemp*,²⁸⁶ but the Supreme Court had begun to limit the reach of the Fourteenth Amendment so that it could only guard against intentional discrimination as long ago as 1876, in *United States v. Cruikshank*.²⁸⁷ And by the time that the *Villafana* court decided we had not properly alleged that the overwhelmingly Black, Latino, and female San Diego County CalWORKs applicant pool was “disproportionately” harmed by P100, the federal judiciary had already made it impossible to file a similar suit under Title IV, while state and federal courts had spent decades narrowing the scope of Section 11135, even as the Legislature was regularly amending that statute in an attempt to make it a more powerful tool to fight discrimination.²⁸⁸ These decisions were not limited to curtailing the power of Section 11135 alone, but extended even to limiting the reach of 42 U.S.C. § 1983, a Reconstruction-era statute (part of the Civil Rights Act of 1871, or the Ku Klux Klan Act) that was created to help thwart efforts by the Klan and others to maintain systems of white supremacy and racial hierarchies.²⁸⁹

It would be too fatalistic or deterministic to say that the plaintiffs in *Sanchez* and *Villafana* never had a chance. The judges who decided these cases had room to make other decisions, and it is not difficult to imagine different outcomes. But the legal challenges to P100 were not fought in a vacuum. They are part of a longer history in which the federal and state judiciaries had spent decades or longer systematically whittling away at legislative tools that were intended to help vulnerable members of our community challenge systems of inequality. The *Sanchez* and *Villafana* courts could have chosen to vindicate the rights of the impoverished families whose dignity was assaulted by P100 for a generation. But had they done so, that would have marked a dramatic departure from a very long trajectory of poverty and anti-discrimination jurisprudence which has seldom served to secure such rights. Fortunately, however, this story does not end with the closing of the courtroom doors.

284. See generally Section IV(B), *supra*.

285. See, e.g., ERWIN CHERMERINSKY, THE CASE AGAINST THE SUPREME COURT 10–11 (2014).

286. *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

287. See generally Pope, *supra* note 204.

288. See Section IV(B)(5), *supra*.

289. See Section IV(B)(3), *supra*; Osagie K. Obasogie & Zachary Newman, *Colorblind Constitutional Torts*, 95 S. CAL. L. REV. 1137, 1150 (2022).

V. WINNING WHILE LOSING: THE TERMINATION OF P100

Douglas NeJaime has written that “[l]itigation loss may, counterintuitively, produce winners. When savvy advocates lose in court, they may nonetheless configure the loss in ways that result in productive social movement effects and lead to more effective reform strategies.”²⁹⁰ The lawyers who litigated the challenges to P100 had numerous occasions to test this proposition. We (and they) lost again, and again, and again. The district court that originally heard *Sanchez* granted summary judgment to the defendants on most grounds.²⁹¹ The Ninth Circuit Court of Appeals affirmed that judgment, albeit in a divided 2–1 panel decision.²⁹² The full Ninth Circuit then denied the plaintiffs’ petition to hear the case en banc, this time with eight dissenting judges.²⁹³ The standard rule is three strikes and you’re out, but the attorneys who litigated *Sanchez* swung one more time, filing a petition for certiorari with the Supreme Court, which was summarily denied.²⁹⁴

When my team filed *Villafana*, we initially lost about as quickly as possible, when the County demurred. The superior court judge first issued a tentative decision sustaining the demurrer. Then, when we failed to persuade him he was wrong during oral argument, he informed us that he understood that in “these kind of cases” he almost feels “irrelevant” and like he should just “flip a coin, make a ruling, and just let you appeal, because whoever loses is going to appeal.”²⁹⁵ Nevertheless, he granted us leave to amend, but only to be sure that when we got to the court of appeal, we would “have our very best complaint.”²⁹⁶ His comments from the bench were, to say the least, not encouraging about our prospects for the next time we would appear before him. Sure enough, once we amended the complaint to do our best to address his concerns, the County filed another demurrer, and we lost again. Strike two. We then lost at the court of appeal, and the California Supreme Court rejected our petition for rehearing.²⁹⁷ So, four more losses. But, just for good measure, we filed a request with the California Supreme Court to have the *Villafana* decision depublished, so that, at the very least, it could not be cited in other cases. But that request was denied too.²⁹⁸ All told, eight or nine losses, depending on how you count. But I think we put them to good use.

290. NeJaime, *supra* note 8 at 945.

291. Importantly, *Sanchez* was not a complete loss. As a result of the litigation, San Diego County agreed to severely curtail the use of “collateral contacts” (asking third parties questions) as part of the P100 investigations and agreed that it would no longer conduct P100 investigations for families that applied only for CalFresh (food stamps), and not for CalWORKs, in 2003. Chan, *supra* note 2 at 22; *see also Sanchez*, 2003 WL 25655642 at *10 (denying summary judgment on a claim alleging that P100 violated federal food stamp regulations).

292. *Sanchez v. Cnty. of San Diego*, 464 F.3d 916, 931 (9th Cir. 2006).

293. *Sanchez*, 483 F.3d at 965 (denying petition for rehearing en banc).

294. *Sanchez*, 552 U.S. at 1038 (denying petition for writ of certiorari).

295. Transcript of Demurrer Hearing at 3, *Villafana v. Cnty. of San Diego*, 57 Cal. App. 5th 1012 (2018) (No. 37-2018-00031741).

296. *Id.*

297. *Villafana*, 57 Cal. App. 5th 1012.

298. Request for depublication and denial (on file with author).

One of the most important aspects of the legal challenges to P100 was pedagogical—the cases made it possible to inform the public about the nature of the program, the suffering it imposed, the people who were harmed, and the waste of public funds that were expended to run it. Developments in *Sanchez* were covered in the local, regional, and national press, including a lead editorial in the *New York Times* published after the Supreme Court declined the Plaintiffs’ petition for certiorari.²⁹⁹ That editorial decried the “fun-house mirrors version of constitutional analysis” employed by the Ninth Circuit Court of Appeals when it determined that “government agents are not conducting a search when they show up unannounced in a person’s home and rifle through her bedroom dresser.”³⁰⁰ The case even made it to late night TV on *The Colbert Report*, prompting Stephen Colbert to compare “constitutional rights to the amenities of a new car,” noting “that welfare recipients had rights, just not the ‘premium package.’”³⁰¹ The *Villafana* litigation also regularly attracted media attention, especially in San Diego, which provided opportunities to generate awareness (and outrage) about P100.³⁰²

The cases also directly fueled other non-litigation advocacy efforts to challenge P100. Hilda Chan’s research on P100 ultimately convinced San Diego County to recode its early fraud data, which made it possible to demonstrate that the program was ineffective as a method of fraud detection or deterrence and was instead a waste of taxpayer money.³⁰³ Chan’s work was heavily reliant on the factual record developed for the *Sanchez* litigation, including testimony provided by the supervising district attorney investigator in charge of P100.³⁰⁴ Chan started her research as a legal fellow with SPIN, one of the local welfare-rights organizations that had recognized the burdens imposed by P100 early on, and that had worked with the ACLU to bring some of the plaintiffs into the *Sanchez* litigation. SPIN, in turn, worked in coalition with other community groups, including an anti-poverty organization called the Caring Council, to lobby the County. It

299. Editorial, *A Loss for Privacy Rights*, N.Y. TIMES (Nov. 28, 2007), https://www.nytimes.com/2007/11/28/opinion/28wed2.html?_r=0 [<https://perma.cc/VBJ4-G242>].

300. *Id.*

301. Preston L. Morgan, *Public Assistance for the Price of Privacy: Leaving the Door Open on Welfare Home Searches*, 40 MCGEORGE L. REV. 227, 228 (2009) (quoting COLBERT REPORT (Comedy Central television broadcast, aired July 23, 2007)).

302. See, e.g., Davis, *supra* note 189; Lawrence, *supra* note 52; Taylor Walker, *ACLU Sues San Diego Over Warrantless, Unannounced Searches of CalWORKs Applicants*, WITNESS LA (June 29, 2018), <https://witnessla.com/aclu-sues-san-diego-over-warrantless-unannounced-searches-of-calworks-applicants/> [<https://perma.cc/KH69-JAND>]; Jeff McDonald, *San Diego County Again Sued Over Policy of Searching Homes Of Calworks Applicants*, SAN DIEGO UNION-TRIBUNE (June 27, 2018), <https://www.sandiegouniontribune.com/2018/06/27/san-diego-county-again-sued-over-policy-of-searching-homes-of-calworks-applicants/> [<https://perma.cc/V4JR-HJGF>]; Maya Srikrishnan, *What’s Behind the Drop in CalWORKs Enrollment*, VOICE OF SAN DIEGO (Jan. 10, 2020), <https://voiceofsandiego.org/2020/01/10/whats-behind-the-drop-in-calworks-enrollment/> [<https://perma.cc/Q9LV-HWZN>]; Kelly Davis, *No Sanctuary: Welfare Recipients Must Accept Surprise Inspections*, VOICE OF SAN DIEGO (Dec. 25, 2018), <https://voiceofsandiego.org/2018/12/25/shamelessness-at-the-top-injustice-at-the-bottom-our-fave-stories-of-2018/> [<https://perma.cc/R8BX-TUS5>].

303. Chan, *supra* note 2.

304. *Id.*

provided reports to the County's Department of Health and Human Services indicating that P100 was not effective at deterring CalWORKs fraud, but instead deterred people from applying for other public assistance benefits they were legally entitled to.³⁰⁵ And, for much of the time that the ACLU was litigating *Sanchez* and *Villafana*, we were also working as part of the "Invest in San Diego Families" coalition, which included a wide range of local organizations that were devoted to fighting for racial and gender justice and economic equity. We were trying to convince county leaders that P100 was a damaging and ineffective policy, and that the funds used to administer it could be better spent on "investments in community services and for government accountability and transparency."³⁰⁶

All of these efforts finally paid off in the spring of 2021, after a Democratic majority seized control of the San Diego County Board of Supervisors for likely the first time in county history.³⁰⁷ This sea change in county politics rode in on a wave of progressive activism, including voters who were influenced by (or part of) the Black Lives Matter movement, following the police killings of George Floyd and Breonna Taylor.³⁰⁸ This new Board was not only indebted to perhaps the largest social movement in United States history,³⁰⁹ but it was also attentive to calls for anti-racist change.³¹⁰ From the moment the Board was sworn in, the new Democratic majority publicly committed to fighting to "improve racial justice"

305. See, e.g., Bill Oswald, *Assessing System Efficiency in Providing Public Benefits*, SUPPORTIVE PARENTS INFORMATION NETWORK AND CARING COUNCIL, (Feb. 9, 2012), https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/ssp/social_services_advisory_board/documents/Assessing%20System%20Efficiency%20in%20Providing%20Public%20Benefits-Bill%20Oswald%20Presentation.pdf [<https://perma.cc/M9A4-3F3J>].

306. See Sifuentes & Ross, *supra* note 55.

307. Staff Report, *Looking Ahead: These Are the San Diego Stories to Watch in 2021*, SAN DIEGO UNION TRIBUNE (Jan. 1, 2021), <https://www.sandiegouniontribune.com/2021/01/01/looking-ahead-these-are-the-san-diego-stories-to-watch-in-2021/> [<https://perma.cc/TK2W-73WT>] (noting that "Democrats have seized a 3–2 majority on the board for what is likely the first time ever.").

308. See ACLU of San Diego & Imperial Counties, *Villafana v. County of San Diego*, ACLU (June 16, 2018), <https://www.aclu-sd.ic.org/en/cases/villafana-v-county-san-diego-1> [<https://perma.cc/ZS5R-24BN>] ("Supervisors Lawson-Remer and Vargas swept into office as part of a national movement fighting for equity and social justice against racism and nativism."); California Donor Table, *Making Sense of California's 2020 Elections*, MEDIUM (Dec. 8, 2020), <https://cadonortable.medium.com/making-sense-of-californias-2020-elections-ff6080c625e3> [<https://perma.cc/WWR3-78VA>] (noting that "[i]n California's second largest county, San Diego, the 4–1 Republican Board of Supervisor supermajority was broken [in the 2020 elections], and now is a 3–2 progressive Democratic majority" and that the same election also resulted in the victory of a progressive San Diegan mayoral candidate).

309. Larry Buchanan, Qoctrung Bui, & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

310. See *id.* ("In San Diego, a new progressive Board of Supervisor majority, a Democratic mayor, and major city initiative win on police accountability means that for the first time, California's second largest county and city can and will pursue progressive governance."); Jesse Marx, *Dems Want Control of the County—Here's What They Say They'd Do With it*, VOICE OF SAN DIEGO (Oct. 7, 2020), <https://voiceofsandiego.org/2020/10/07/dems-want-control-of-the-county-heres-what-they-say-theyd-do-with-it/> [<https://perma.cc/K7RL-ZB85>] (discussing, inter alia, positions the Democratic Board of Supervisor candidates were taking on policing and environmental justice in the wake of the massive recent Black Lives Matter protests).

and “provide more economic opportunity,” while the new Democratic Board chair promised to “work tirelessly for a county with more opportunity, more fairness, more equity and more justice,” where people “don’t just say, ‘Black lives matter,’” but where the County “backs that up with intentional policies.”³¹¹

All of this meant that the new Board was exceptionally well-positioned to be likely to listen to, and understand and respond to, calls to abolish P100. As a bonus, it probably didn’t hurt that one of the newly-elected Board members, Terra Lawson-Remer, had been an ACLU-SDIC plaintiff as a teenager in a successful challenge to a San Diego curfew ordinance.³¹² The new Board members were willing and able to respond to lobbying efforts to repeal P100 because the litigation and related advocacy efforts had kept the program in the public eye for many years and had developed the factual record. This record not only included evidence of wasted public funds, but also stories of the suffering P100 had inflicted on so many county residents for more than two decades.

When the ACLU’s advocacy team approached Supervisors Lawson-Remer and Nora Vargas about P100, they “quickly brought a motion before the Board of Supervisors” calling for the immediate termination of the program.³¹³ The motion cited Chan’s P100 report while addressing the kinds of stigmatic and dignitary harms we had alleged in the *Villafana* Complaint.³¹⁴ As David Loy, the former legal director of ACLU-SDIC has said, “although [the *Villafana*] litigation was unsuccessful in court, it played an important role in building the policy case for the Board of Supervisors’ vote to rescind P100.”³¹⁵ The entire Board was encouraged to vote to approve the motion by hundreds of people who called in to support it (and who were mobilized by ACLU-SDIC organizers), many of whom waited “nearly 14 hours to provide live testimony by telephone.”³¹⁶ In the end, the Board voted unanimously to terminate P100, thereby turning a painful series of heart-breaking losses into a resounding victory.

I am not sure that this is a case of “winning through losing” in NeJaime’s terms—I don’t know that the Board of Supervisors decided to terminate P100 because of the *Sanchez* and *Villafana* losses, so much as because of the litigation itself and all the efforts surrounding it. The lawyers who litigated these cases weren’t, as far as I know, engaged in the “deployment of loss.”³¹⁷ Instead, I think we were all involved in building resources (a factual record, compelling stories,

311. NBC Staff, *Nathan Fletcher Takes Over as Board of Supervisors Chair After New Members Sworn In*, 7 SAN DIEGO (Jan. 6, 2021), <https://www.nbcsandiego.com/news/politics/nathan-fletcher-takes-over-as-board-of-supervisors-chair-after-new-members-sworn-in/2487265/> [<https://perma.cc/HEL7-FFNN>].

312. Sifuentes & Ross, *supra* note 55.

313. *Id.*

314. SAN DIEGO COUNTY BOARD OF SUPERVISORS, Minute Order No. 22, *supra* note 88.

315. Personal email correspondence on file with the author.

316. *Id.* There were also dozens of written comments submitted in support of the motion. Emails to Board, (Apr. 06, 2021), (on file with the Clerk of the Board), <https://file.sandiegocounty.gov/COB/COBPublicView?id=0901127e80cfd961>.

317. NeJaime, *supra* note 8 at 972.

community coalitions, political connections, and public awareness) that we and others were able to tap into and mobilize when the time was right. Collectively, we spent over two decades losing litigation battles against P100, but those were *only* battles—at the same time we were losing, we were also always laying the groundwork in so many other arenas to pave the way to take advantage of other opportunities that might never have arrived. Of course, it's only in retrospect that I can claim that we were always winning *while* we were losing, because we were always doing the work that made the final outcome possible.³¹⁸

VI. CONCLUSION: MOVEMENT-ADJACENT LAWYERING

NeJaime is particularly interested in the ways that “sophisticated social movement lawyers engage in multidimensional advocacy that moves beyond, but not without, litigation.”³¹⁹ I'll leave it to others to say whether the lawyers who challenged P100 were “sophisticated,” but I think a more interesting question is whether they/we were “social movement lawyers.” This question gets at the broader issue of how lawyers who share social movement goals may support struggles for change and justice even when they are not participating in social movements in traditional ways—when their efforts might be aligned with those of social movements, and when they might be working in parallel alongside those movements, but when they are not necessarily working *with* movement activists or organizations.

One fairly straightforward definition of “movement lawyers” is “lawyers who advise, counsel, and otherwise participate in social justice organizations,” working with such organizations to “use the law to effect social change.”³²⁰ The lawyers might not represent clients who are clearly identified as part of a social movement, as social movements are often “ill-defined” and not necessarily embodied in the form of any particular organization or individual.³²¹ So much so, in fact, that movement lawyers may sometimes serve “an idea” rather than a traditional client.³²² Regardless of who (or what) they represent, movement lawyers work to “help people understand the qualitative difference between improving only [an] individual's circumstances from improving the situation for everyone else.”³²³

There are certainly ways that these characteristics apply to at least some of the lawyers involved in the *Sanchez* and *Villafana* litigation. The ACLU itself can be understood as a “social justice organization.” After all, it proudly advertises

318. A core component of the notion of “winning through losing” is that “litigation loss can push movement activists into other jurisdictions (e.g., state courts) and other venues (e.g., legislative reform).” Catherine Albiston, *The Dark Side of Litigation As A Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 72 (2011). But the P100 lawyers never needed to be “pushed” into fighting for legislative reform and were instead always pursuing this possibility *while* litigation was progressing.

319. NeJaime, *supra* note 8 at 990.

320. Ellen Yaroshefsky, *Symposium Introduction*, 47 HOFSTRA L. REV. 1 (2018) (citation and internal quotation marks omitted).

321. *Id.* at 2.

322. *Id.* at 1.

323. *Id.* (footnote omitted).

that it “has been at the center of nearly every major civil liberties battle in the U.S. for more than 100 years.”³²⁴ The organization rightly trumpets its origins in resistance to the “rounding up and deporting [of] so-called radicals” during the “Palmer Raids” of 1919–20,” along with its contemporary role as a key organization in struggles against assaults on reproductive freedom, immigrants’ and LGBTQ+ rights, free speech, and beyond.³²⁵ If all that is needed to be a movement lawyer is to “participate in social justice organizations,” then arguably every attorney who works for the ACLU is a movement lawyer automatically.

The ACLU also specializes in “impact litigation.” It generally chooses what cases to take on based on whether the litigation can improve the situation “for everyone else.” For example, the ACLU-SDIC, which led the litigation of both *Sanchez* and *Villafana*, informs people who seek its assistance that the “ACLU generally files cases that affect the civil liberties of large numbers of people, rather than those involving a dispute between two parties.”³²⁶ Their website notes that key “questions we ask when reviewing a potential case” include: “Is this a significant civil rights issue?” and, “[w]hat effect will this case have on people in addition to our client?”³²⁷ And I can attest that, in over a decade as an ACLU attorney, all my clients were part of our cases because they wanted to help bring about the type of change that would improve things for other people.

It is also true that *Sanchez* and *Villafana* involved collaboration with other organizations that were also fighting against social inequities. One of the organizations the ACLU co-counseled *Sanchez* with was the Western Center on Law and Poverty, which has long struggled against “systems [that] keep people in poverty—from institutionalized racism to unjust and unequal economic structures” while seeking “to eliminate poverty and advance racial and economic justice by dismantling and transforming systems so all communities in California can thrive.”³²⁸ And some of the *Sanchez* clients were mothers who had been subjected to P100 and who worked with SPIN, a local welfare rights organization.³²⁹

To the extent that all the lawyers involved in *Sanchez* and *Villafana* were fighting for social change, it may be reasonable to see us all as social movement lawyers. But *Sanchez* predated, and *Villafana* was overtaken by, the Black Lives Matter movement (or the Movement for Black Lives³³⁰)—a sprawling mass

324. American Civil Liberties Union, *Donate to the ACLU*, ACLU, <https://www.aclu.org/about/about-aclu> [<https://perma.cc/97KU-8Z5W>] (last visited Sept. 29, 2025).

325. American Civil Liberties Union, *ACLU History*, ACLU, <https://www.aclu.org/about/aclu-history/> [<https://perma.cc/F9VK-QP46>] (last visited Sept. 14, 2025).

326. ACLU of San Diego & Imperial Counties, *Request Legal Assistance*, ACLU, <https://www.aclu-sdic.org/en/request-legal-assistance> [<https://perma.cc/MZ87-AM9A>] (last visited Sept. 14, 2025).

327. *Id.*

328. Western Center on Law and Poverty, *About Western Center*, WCLP, <https://wclp.org/about-wclp/> [<https://perma.cc/7AHZ-5SK3>] (last visited Sept. 14, 2025).

329. *See PILP Welcomes Soros Fellow, Hilda Chan*, INDIAN VOICES, <https://www.indianvoices.net/san-diego-news-2?start=36> [<https://perma.cc/SX75-7PXG>] (last visited Sept. 14, 2025).

330. The Movement for Black Lives’ mission statement. *About Us*, M4BL, <https://m4bl.org/about-us/> [<https://perma.cc/QZL5-52CY>] (last visited Sept. 14, 2025).

movement that was admittedly multifaceted, especially in its recognition of the interlocking forms of domination that support various forms of white supremacy and systemic injustice, but that was also fundamentally an abolitionist struggle that did not prioritize the kind of reformist political project represented by our efforts to eliminate P100. We may have been movement lawyers, but the litigation against P100 was not part of the singular social movement that made it possible for our efforts to succeed. We were not lawyers for *that* movement, even if some of us might have admired or been part of that movement in other capacities.

I say that not in an attempt to avoid taking unwarranted credit for being part of a defining movement of our era, but to express gratitude for having been able to ride on the coattails of that movement. We just happened to be in the final stages of losing our litigation struggles against P100 when the movement reached its peak. And, because our litigation addressed some of the same themes of that movement, including an understanding of the injustice of (literally) unwarranted surveillance of poor families and communities of color, and the concomitant entanglement with the criminal legal system, it resonated with the movement, and the movement breathed new life into the advocacy efforts that we were able to continue pursuing when there were no more opportunities to litigate.

In that sense, while the legal challenges to P100 might be considered examples of movement lawyering, they were also something else. Movement lawyers act to further the goals of a social movement. We may have done that, to some extent, for some social movements. But our efforts also benefitted directly from a movement that just happened to capture the imagination of the nation at the very moment we were getting kicked out of court for the final time. This is another side of movement lawyering. Really, I think it's something different—we might profitably think of it as “movement-adjacent lawyering.”

The legal battles against P100 involved building all sorts of resources with and as part of a variety of social movements, and mobilizing those resources to “engage in multidimensional advocacy that moves beyond, but not without, litigation,” as NeJaime suggests is typical for “sophisticated social movement lawyers.”³³¹ But we didn't just provide or create resources *for* a social movement—the Movement for Black Lives was *itself* a resource, or a font of resources, that we were able to tap into and capitalize upon. That movement changed the basic common-sense understandings of race and social justice throughout San Diego and helped create a climate where elected officials were likely to be responsive to our efforts.³³² The notion of “movement-adjacent lawyering” might be most helpful as a reminder that movement lawyers never fight alone, and that our most meaningful victories are rooted in struggles that long predated our litigation and

331. NeJaime, *supra* note 8, at 990.

332. For a discussion of the racialized politics involved in the construction of “common sense” understandings of the world, see Stuart Hall, *Gramsci's Relevance for the Study of Race and Ethnicity*, in STUART HALL: CRITICAL DIALOGUES IN CULTURAL STUDIES 411 (David Morely & Kuan-Hsing Chen eds., 1996).

that may swirl around us as we draft our briefs, prepare for arguments, and lobby for change. Even when our advocacy might not involve direct participation in any given movement for social justice, our work can benefit immensely if we are attentive to the opportunities to work alongside the most vital movements of our time.