

The AALS Workshop on Shifting Foundations in Family Law: Family Law's
Response to Changing Families

Poor Support, Rich Support: Re(viewing) The American Social Welfare State
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This article focuses on disparities in the way that the state either supports or undermines families. These disparities fall along class and race lines, and manifest structurally in profound differences in both the amount of support families receive and the balance between support and punishment inherent in the governing structures of the various programs. The effect of these disparities is to both perpetuate subordination and to reinforce privilege along race and gender divisions.

In a recent article (*The Hyperregulatory State: Women, Race, Poverty and Support*, 25 YALE J. LAW & FEMINISM 319 (2014)) I attempted to engage, in some senses, at the intersection of work by Dorothy Roberts and Martha Fineman. In that article I argued that, if we are to conceptualize a road to, “a more active and responsive state” (Fineman) it is productive to start the conversation by looking closely at the lived institutional realities of those who are, by virtue of race, class, gender and place, rendered particularly vulnerable. For poor women and disproportionately for poor African American women, it is largely inaccurate to describe the mechanisms of state support social support as passive or non-responsive. Instead I argued that they are *hyperregulatory*, meaning that, “the mechanisms of social support are targeted, by race, class, gender and place, to exert punitive social control over [disproportionately] poor, African-American women, their families and their communities.”¹ Although that paper points to inequalities in administration between the *hyperregulatory state* and other mechanisms of social support in the American context, the focus was on the mechanisms of the *hyperregulatory state* and not on the contrast between those mechanisms and the mechanisms of support that lend assistance to those with class, race and gender privilege.

This paper begins that analysis. Part I provides a theoretical frame for this project, defining what I am arguing are two conceptually separate forms of assistance: the first is the *hyperregulatory state* and the second is the *submerged state*. My definition of the *hyperregulatory state* draws on my previous work. The hyperregulatory state stands in sharp contrast to what Suzanne Mettler has termed the *submerged state*. In her book bearing the title, Mettler argues that vast swaths of the American social welfare state are, in effect, invisible to the American public.² In these programs, which include tax expenditures, student loans and even Medicare and Medicaid, the government's extensive support role is obscured from view. The use of the tax code and the role of

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¹ Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty and Support*, 25 YALE LAW AND FEM. 319(2014).

² Suzanne Mettler THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE DEMOCRACY 2011.

private entities (banks, insurance companies, health care providers) render the presence of the government invisible. Obscured within these programs are two key facts: first, people across class receive extensive financial support from the government and second huge swaths of the current social welfare state distribute benefits upward and exacerbate income inequality.

Part II focuses on the provision of housing support across class and race lines as an example and delves into the issues of structural inequalities between these two social welfare states. Part II describes two related phenomena. First, as a nation we provide extensive financial assistance across class lines in a way that often exacerbates income inequality by distributing support upward. Second, the structures and means of support function in very different ways across class, race, gender and place. Support given to those through the *submerged state*, to those who are comparatively wealthy (in this example the Home Mortgage Interest and state and local property tax deductions) comes with little visibility and few risks. In contrast, support for poor disproportionately African American single women (in this example public housing, project-based Section 8 and the Housing Choice Voucher Program) comes enmeshed within the *hyperregulatory state* -- at the price of startling deprivations of privacy and significant punitive risk.

Part III begins to explore, in the particular world of social welfare provision, how we might begin to move from these structural inequalities towards a more universally responsive state. The remedy I propose that we consider has to do with rights. Primarily, at least for now, I am referring to rights with a small r – rights embedded in regulatory and statutory schema that both protect the integrity of the recipient of social welfare and rights that demand some level of support. Small r rights in my scheme also refers to statutory anti-discrimination rights that are sometimes effective at addressing the targeting at the heart of the hyperregulatory state. I also begin to explore how naming structural inequalities in social support might inform our conceptions of Roberts’ right to privacy,³ or Fineman’s idea that vulnerability theory gives rise to a “demand” for support.⁴

³ As she frames it, “merely ensuring the individual’s ‘right to be let alone’—may be inadequate to protect the dignity and autonomy of the poor and oppressed.” Indeed, a better notion of privacy “includes not only the negative proscription against government coercion, but also the affirmative duty of government to protect the individual’s personhood from degradation and to facilitate the processes of choice and self-determination.” Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 HARV. L. REV. 1419, 1478-79 (1991).

⁴ Martha Albertson Fineman, The Vulnerable Subject and the Responsive State, 60 Emory L.J. 251, 255-56(2010) ([C]onsideration of vulnerability brings societal institutions, in addition to the state and individual, into the discussion and under scrutiny The nature of human vulnerability forms the basis for a claim that the state must be more responsive to that vulnerability. It fulfills that responsibility primarily through the establishment and support of societal institutions.”).