Poor Support / Rich Support: (Re)viewing the U.S. Social Welfare State

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INTRODUCTION

I begin on high theoretical ground, with the premise, driving Martha Fineman's recent work, that everyone is vulnerable. We all have needs that we cannot meet on our own. In her conceptualization, the existence of vulnerability gives rise to a claim that we are collectively entitled to a state (defined broadly) that is responsive to that vulnerability. And yet, some are rendered more vulnerable --- not because of some inherent characteristic but because of extraordinary structural prejudices and privileges built in the fabric of our society. Bias and privilege, along the intersecting lines of race, class, gender and place justify and are reinforced by state systems. Some are privileged and other subordinated through the operation of the state. Given this structural subordination, if we are to theorize a path from here to there – from structural inequality to universal responsiveness, how do we get there?

I pose these questions at the outset not because I purport to answer them, but because I want to explore one piece of that puzzle. Specifically, I want to begin to explore a few related questions about social welfare policy as it exists today and how we might move from where we actually are toward a more responsive state. My first set of questions has to do with structural inequalities embedded in the means of social welfare provision as it exists in the United States today. I am looking here at both inequalities in the amount of support provided across class lines and real disparities in the regulatory frameworks in various systems of support. My second set of questions has to do with rights and inequality. In this paper, I begin to ask how various conceptions of rights might move us toward a state that is less structurally unequal and that is more responsive.

Although the work of Dorothy Roberts and Martha Fineman differ in many respects, their work comes together on the issue of autonomy-enhancing support.[1] In a sweeping intervention in classic liberal theory, Fineman argues that, rather than imagining the traditional autonomous subject, we should think of the human subject as inherently vulnerable, inherently in need.[2] Although we may be more or less vulnerable at different

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[1] For a discussion of these issues that includes not only an extensive discussion of Fineman's theory but also the important work of Maxine Eichner, see Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty and Support*, 25 YALE LAW AND FEM. 319(2014).

[2] See Fineman; Martha Albertson Fineman, The Vulnerable Subject and the Responsive State, 60 Emory L.J. 251, 257 (2010) [hereinafter Fineman, Responsive State]; Martha Albertson Fineman, The Vulnerable Subject: Anchoring Equality in the Human Condition, 20 Yale J.L. & Feminism 1 (2008).

moments in life, each of us has needs that we cannot meet alone. In Fineman's analysis, vulnerability theory is certainly—but not merely—descriptive. Instead, it forms the basis of a claim that state institutions must provide support:

> [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.[3]

For Fineman, this theory does hard work. If the "primary objective [were] ensuring and enhancing a meaningful equality of opportunity and access, we may see a need for a more active and responsive state."[4] This envisioned state would not "simply protect citizens' individual rights from violation by others."[5] Instead, it would "actively support the expanded list of liberal goods by creating institutions that facilitate caretaking and human development."[6] Such a state would also move past constrained notions of formal equality toward a much more robust and substantive demand on state institutions to create the possibility for real equality. The "primary objective [would be] ensuring and enhancing a meaningful equality of opportunity."[7]

Dorothy Roberts has written extensively on the devastation wrought upon poor African-American families by the child-welfare system[8] as well as at the intersections of child-welfare, social-welfare, and criminal-justice systems.[9] In general she focuses less on universality and more on the particular lived institutional realities and needs of those who are, in Fineman's terms, most vulnerable. In the face of this devastation, Roberts argues that poor women need not just rights in their traditional sense, but they need a reconceptualized version of rights. Specifically in the context of child welfare, Roberts envisions a right to privacy that not only offers protection from incursion but also offers affirmative support.[10] As she frames the matter, "merely ensuring the individual's 'right to be let alone'—may be inadequate to protect the dignity and autonomy of the poor and oppressed."[11] 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

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[3] Fineman, Responsive State, at 255–56.
[4] Id. at 260.
[5] Maxine Eichner, The Supportive State: Families, Government, and America's Political Ideals 70 (2010)
[6] Id.
[7] Martha Albertson Fineman, The Vulnerable Subject and the Responsive State, 60 Emory L.J. 251, 260 (2010).
[8] Dorothy Roberts, Shattered Bonds: The Color of Child Welfare 13–14 (2002) (documenting that African-American children are more likely to be separated from their parents, spend more time in foster care, and receive inferior services than white children).
[9] See Dorothy E. Roberts, Prison, Foster Care, and the Systemic Punishment of Black Mothers, 59 UCLA L. Rev. 1474 (2012).
[10] Id. at 1495–96.
[11] Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 Harv. L. Rev. 1419, 1478 (1991).

choice and self-determination."[12] Robert and Fineman come together in a vision for a responsive state but diverge on the relevance of difference along race and gender lines.[13]

In a recent article (*The Hyperregulatory State: Women, Race, Poverty and Support)* I attempted to engage, in some senses, at the intersection of Roberts and Fineman. In that article I argue that, if we are to conceptualize a road to, "a more active and responsive state" 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 ague 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."[14] 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 the 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. Part II delves into the issues of structural inequalities between these two social welfare state. Part 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 who are comparatively wealthy comes with little visibility and few risks, whereas support to the poor (disproportionately, single moms, disproportionately African American) comes enmeshed within the hyperregulatory state -- at the price of startling deprivations of privacy and significant punitive risk. For the purposes of this draft, Part II focuses on support for housing as the example of these disparities.

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,

[12] Id. at 1479.

[13] I do not seek, in this paper, to engage in the very important debate about the relevance of social action and/or litigation around identity that is arising in response to Fineman's work. For a sampling of that debate *see e.g.*

[14] Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty and Support*, 25 YALE LAW AND FEM. 319(2014). The term "hyperregulation" is derived from Loic Wacquant's framing of the carcercal state as characterized not by mass but by hyperincarceration. The prefix hyper, in both formulations, is meant to suggest the means by which systems collectively target communities, by race, class and place. Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 DAEDALUS 74, 74, 78–79 (2010). *See also* KAARYN, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 1 (2011).

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 refer to statutory anti-discrimination rights that are sometimes effective at addressing the targeting at the heart of the hyperregulatory state. I also want to explore, although, I don't yet in this draft, how Roberts' conception of a right to support, or Fineman's conception that vulnerability theory gives rise to a "demand" for support, might lend some assistance to this project and how understanding distributive and structural inequality might inform that project.

I. The Hyperegulatory and the Submerged State: Defining Terms

In *The Hyperregulatory State* I build on the work of Dorothy Roberts, Kaaryn Gustafson, Khiara Bridges, Loic Wacquant and others to describe what I call the *hyperregulatory* nature of the poverty-focused social welfare state. As stated above, *the hyperregulatory state* is a set of "mechanisms of social support [that] are targeted, by race, class, gender and place, to exert punitive social control over [disproportionately] poor, African-American women, their families and their communities."[15] In that paper I describe a key mechanism of the hyperregulatory state, which I term *regulatory intersectionality*. That term describes what I argue is a key feature of many programs providing poverty-focused social welfare support. When poor applicants (who are disproportionately African American and female) seek support from poverty-focused social welfare programs several things tend to happen. First, applicants are required, as a condition of application, to divulge significant amounts of personal information. Similarly in the course of benefit receipt recipients are monitored and information about what the social welfare system deems non-compliant and/or deviant conduct is collected and stored. That information, collected in the social welfare system, travels from the original social welfare system into other even more punitive systems. As a result of this collection and transfer of information, recipients face ever more punitive consequences in both the child welfare and the criminal justice systems. Thus the request for or receipt of support puts them at substantial risk of additional punitive action.

Some data about what happens when poor pregnant women seek health care provide a particularly clear example of both the specific phenomenon of regulatory intersectionality and the broader phenomenon of hyperrgulation. When poor women in general and poor African-American women in particular seek health care during their pregnancy, they expose themselves to a highly intrusive state. Take, for example the Prenatal Care Assistance Program ("PCAP") in New York City. Khiara Bridges performed an extensive ethnographic study of that program.[16] As she documents, a PCAP client must provide

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[15] Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty and Support*, 25 YALE LAW AND FEM. 319(2014). The term "hyperregulation" is derived from Loic Wacquant's framing of the carcercal state as characterized not by mass but by hyperincarceration. The prefix hyper, in both formulations, is meant to suggest the means by which systems collectively target communities, by race, class and place. Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 DAEDALUS 74, 74, 78–79 (2010). *See also* KAARYN, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 1 (2011).

[16] Khiara M. Bridges, Privacy Rights and Public Families, 34 HARV. J.L. & GENDER 113 (2011).

extensive personal information to a wide variety of professionals about subjects ranging from her diet, her income, her history with child-welfare agencies, her immigration status, her mental-health history, her relationship history, any history of violence, her use of contraception, and her parenting plans—all well before she has access this support. Through these mechanisms, "poor women's private lives are made available for state surveillance . . . and they are exposed to the possibility of punitive state responses."[17] Exposure to those regulatory systems creates a serious punitive risk, particularly and disproportionately for poor African-American women.[18] This plays out quite clearly when women are suspected of using drugs while pregnant. To understand this disproportionate risk, it is important first to know that African-American pregnant women are no more likely to use drugs during pregnancy than white women.[19] One study in fact revealed that a slightly higher percentage of white pregnant women (15.4%) than black pregnant women (14.1%) test positive for drugs. Similarly, poor women are no more likely to use drugs than women who are not poor.[20] Despite the essentially equivalent rates of drug use, African-American women are far more likely to be tested for drugs when seeking prenatal and birthing care. One revealing study focused on the rates of drug testing in a hospital that had detailed (race-blind) protocols to determine when infants should be drug tested. The researchers sought to determine whether "race was used as a criterion for screening infants for intrauterine cocaine exposure."[21] They examined the records of 2,121 mother–infant pairs and controlled for "standard screening criteria and income, insurance status, and maternal education."[22] The researchers concluded that "race remained independently associated . . . with drug screening."[23] "Infants born to black mothers were more likely than those born to white mothers to have screening performed whether they met screening criteria . . . or did not."[24] Of the women and infants who met the relevant screening criteria, 35% of infants born to black mothers were tested while only 13% of infants born to white women were tested.[25]

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[17] Id. at 131.

[18] For a far more extensive discussion of these phenomena, see Bach, supra note **Error! Bookmark not defined.**.

[19] Bach, supra note __, at 357 (citing Ira J. Chasnoff et al., The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida, 322 New Eng. J. Med. 1202, 1203–04 (1990)).

[20] Id. ("During a one-month period the researchers obtained a urine sample from 'every woman who enrolled for prenatal care . . . at each of the five Pinellas County Health Unit clinics and from every woman who entered prenatal care . . . at the offices of each of 12 private obstetrical practices in the county.' In total they obtained a sample from 715 women. Of the 715 women, 14.8% tested positive for alcohol, cannabinoids (marijuana), cocaine or opiates. A slightly higher percentage of white women (15.4%) than black women (14.1%) tested positive. As to socioeconomic status, which the researchers determined from the economic demographics of the zip code in which women lived, the researchers concluded that 'socioeconomic status . . . did not predict a positive result on toxicologic testing.' " (quoting Chasnoff et al., supra note 19, at 1203–04)).

[21] Marc A. Ellsworth et al., Infant Race Affects Application of Clinical Guidelines When Screening for Drugs of Abuse in Newborns, 125 Pediatrics 1379, 1379, 1383 (2010) (finding that "criteria indicating that screening should be performed seemed to be selectively ignored . . . for infants born to white women").

[22] Id. at 1379.

[23] Id.

[24] Id.

[25] Id. at 1382 tbl.3.

African-American women are also far more likely to be referred to child-protection services, to suffer worse outcomes once that referral is made, and to face prosecution related to their drug use. As to rates of referral, despite equivalent rates of drug use, pregnant African-American women are between four[26] and ten times[27] more likely to be referred to authorities. Once these women are referred, their children remain in the system longer, experience worse outcomes, and receive inferior services.[28] These same women face heightened punitive consequences in the criminal-justice system. In one study that focused on the prosecution of pregnant women stemming from drug use during pregnancy, 59% of the women prosecuted were of color and 52% were African-American.[29] Nearly all were poor.[30] Moreover, African-American women were more likely to be charged with felonies than their similarly situated white counterparts.[31] \

In a phenomena I term *regulatory intersectionality,* this disproportionate referral and punishment is enabled through the regulatory structures of the social-welfare, child-welfare and criminal-justice systems.[32] Federal and state law and regulatory structures often mandate and facilitate reporting. Social workers and health-care personnel regularly report poor women to child protection agencies, even when the law suggests that they should not. Prosecutions rely on information gathered in social-welfare and child-welfare settings to make their case against poor women.[33] In light of this disturbing data, as well as the extraordinarily punitive nature of much of the social- and child-welfare systems themselves,[34] it is no surprise that these systems are viewed with profound distrust in poor communities.

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.[35] 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 private entities (banks, insurance companies,

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[26] Sarah C.M. Roberts & Amani Nuru-Jeter, Universal Screening for Alcohol and Drug Use and Racial Disparities in Child Protective Services Reporting, 39 J. Behav. Health Services & Res. 3, 12 (2011) (finding that African-American newborns are 4.1 times more likely to be reported to Child Protective Services than white newborns).

[27] Chasnoff et al., supra note 19, at 1204 (finding that African-American newborns are 9.6 times more likely to be reported to health authorities than white newborns).

[28] Dorothy Roberts, Shattered Bonds: The Color of Child Welfare 13–14 (2002) (documenting that African-American children are more likely to be separated from their parents, spend more time in foster care, and receive inferior services than white children).

[29] Lynn M. Paltrow & Jeanne Flavin, Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health, 38 J. Health Pol. Pol'y & L. 299, 311 (2013).

[30] Id.

[31] Id. at 311, 322.

[32] Bach, supra note .

[33] See id.

[34] E.g., Kaaryn S. Gustafson, Cheating Welfare: Public Assistance and the Criminalization of Poverty 1 (2011 (social welfare); Roberts, supra note __, at 16 (child welfare).

[35] Suzanne Mettler THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE DEMOCRACY 2011.

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.

Mettler divides social welfare policy into two distinct categories: those that are visible and those that are submerged. In the first category are those programs traditionally thought of as run by the state. Falling into that category are both means-tested program and social insurance. In the means-tested category are programs like TANF and Food Stamps (now SNAP), both of which fall within the frame of what I call *the hyperregulatory state*. In the social insurance category is social security. For all these benefits, one generally applies at a government office and receives payments from the government. There are of course deep differences between means tested benefits and social insurance, but for Mettler's purposes these are similar in that they are visible mechanisms of support.

In her second category are supports that are administered in a way that obscures the role of government:

> The 'submerged state' includes a conglomeration of federal policies that function by providing incentives, subsidies, or payment to private organizations or households to encourage or reimburse them for conducting activities deemed to serve a public purpose.[36]

Chief among the programs of the submerged state are tax expenditures, which are "departures from the normal tax system that are designed to promote some socially desirable objective."[37] Prime examples include the exemption of employer-provided health insurance from taxable income and the home mortgage interest deduction ("HMID"). Although in popular discourse tax expenditures are not social support because they simply allow people to keep 'their own money,' the federal government and the OECD have acknowledged since the 1970s that these are in fact a form of spending.[38] Christopher Howard explains the rationale behind this view:

> . . . with tax expenditures, the government is essentially collecting what taxpayers would owe under a 'pure' tax system and simultaneously cutting some taxpayers a check for behaving in certain desired ways, such as buying a home. In a pure system, everyone with the same income would pay the same amount of income tax. In the real world, people with the same income often do not pay the same tax, because some are able to take advantage of tax expenditures while others are not.[39]

[36] *Id.* at 4.
[37] Christopher Howard, THE WELFARE STATE NOBODY KNOWS 16 (2007).
[38] *Id*.
[39] *Id*.

For Mettler the submerged nature of these programs leads to a profound democracy deficit. If the mechanisms of social support are largely invisible to the American public, the public does not have the information it needs to participate in making judgments about social welfare policy. Members of the public cannot, for example, pass judgment on the question of whether American social welfare policy should in fact exacerbate income inequality. Mettler's point is a strong one, but for the purposes of this paper I want to borrow her terminology to make a related but distinct point. That point, briefly stated, is that the submerged state not only renders invisible the ways in which social welfare policy is fundamentally regressive, but that the invisibility is part and parcel of structural inequalities in the means by which we provide support and the price we ask people to pay for that support.

II. Exploring Structural Inequalities: The Example of Housing Support

Looking at social welfare provision from the perspective of the hyperrergulatory and submerged states allows us to ask several questions about inequalities of various forms. These inequalities, I will argue in Section III, compel us to think hard about how to move from the social welfare state as it exists right now to a genuinely and universally responsive or supportive state. In particular in Section III I will argue that a variety of rights protections as well as a frame the focuses on structural inequality are essential to any conception of a responsive state. To understand these arguments, this Section focuses for its example on support programs that enable individuals and families to buy and rent homes. Subsection A below takes a look at the amount and distribution of housing support across the hyperregulatory and submerged states and subsection B examines structural inequalities in the nature of the regulatory mechanisms and their relationship to punitive systems.

A. Housing Support in the US: Regressive Distribution and Exacerbating Income Inequality

The United States provides extensive support for housing to individuals across the income spectrum. Although arguably many economic supports (defined broadly) provide additional income to individuals and families thereby indirectly supporting the economic ability of families to secure housing, specific benefits are targeted particularly at enabling individuals or families to own or rent their homes. Included in this range are both income supports for various groups and extensive tax subsidies for property owners.

1. Housing Support for those in Poverty

The federal government provides direct housing assistance to those in poverty through a number of programs. The three largest are the Housing Choice Voucher program (commonly referred to as Section 8), Public Housing and Project-Based Section 8. Together they supply over 90% of federally subsidized housing units to those at or slightly above the poverty line.[40]

40 Center on Budget and Policy Priorities, Federal Rental ASssistance Fact Sheet (http://www.cbpp.org/files/4-13-11hous-US.pdf).

Note: In a later draft, I will provide more details about the origin, structures and different purposes of these three programs. I'll also highlight the ways that the voucher program differs from project based section 8 and public housing (in that it is a voucher that travels rather than housing in place) but retains many regulatory mechanisms in common with the older model of housing support. I will also highlight the differences, along race, gender, class and family structure lines of who receives this form of housing support.

2. Housing Support Through the Tax Code

As noted above, the federal government also provides substantial assistance for housing through tax expenditures. There are two principle tax expenditures that subsidize housing directly. First, homeowners who pay interest on their mortgages are able to deduct those expenses from their taxable income through the Home Mortgage Interest Deduction (HMID). Second, homeowners who pay state and local property tax are also able to deduct that expense. The net effect is to significantly lower the effective tax rate for those households.

Here again in later drafts I want to take a brief look at the historical justifications for these benefits as well as the distribution by race, class, gender and family structure.

3. Expenditures for Housing Support: Regressive Distribution

While it is clear that the federal government spends significant sums on housing, what is surprising is the comparative size and distributive effect of these policies. As to size, for FY 2015 the HMID will cost approximately $74 billion[41] and the state and local property tax deduction will cost $34 billion, for a total of $108 billion in tax expenditures for housing. In contrast, in 2015, together the Housing Choice Voucher Program, Public Housing and Project-Based Section 8 will cost a total of approximately $43 billion.[42] So the bottom line is that spending for housing tax expenditures outstrips spending for poverty-focused housing support by well over 100%.

Not only does spending for the expenditures far outstrip spending for poverty-focused programs, but distribution of these benefits exacerbates income inequality. The vast majority of this support goes to those with substantial incomes. According to the Center on Budget and Policy Priorities in 2012 the federal government spent $270 billion "to help American buy or rent homes."[43] More than half of this support went to households with incomes above $100,000. Moreover, "the 5 million households with incomes of $200,000 or more receive a larger share of such spending than the more than

41 ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2011-2015. This leaves out the capital gains deduction. Should I fold that in? Have to confirm that it still works the same way.

[42] Analytical Perspectives Budget Chart 25-12. *This includes only the big three. Perhaps I should fold in the other small programs?*

[43] The Center on Budget and Policy Priorities, *Chart Book: Federal Housing Spending is Poorly Matched to Need* available at http://www.cbpp.org/cms/?fa=view&id=4067 (last visited May 19, 2014).

20 million households with incomes of $20,000 or less."[44] The net effect is that housing support in the United States is distributed regressively, significantly exacerbating rather than alleviating income inequality.

[*In later drafts of this paper, I want to delve much more deeply into the data and in particular who benefits from the various forms of support. I will be looking for data that paints a more detailed picture across a variety of axis – race, gender, family form, etc. Although it's fairly easy to make the class point – that support is distributed regressively to exacerbate income inequality, it will be interesting to try to look at this in terms of race, gender, family form and geography – inner city v. rural and suburban areas. We'll see what I can find.*]

B. Structural Inequalities in the Administration of Housing Support

Section I briefly outlined what I mean by the terms *hyperregulation* and *regulatory intersectionality* and introduced Suzanne Mettler's concept of the submerged state. Mettler's description of the submerged state stands in sharp contrast with the profoundly different mechanisms of the hyperregulatory state. These differences result in structural inequalities not just in the amount of support (as detailed in subsection A above) but in the price one pays and the risks one takes as a result of support. In short, recipients of poverty-based housing support are subjected to the mechanisms of the hyperregulatory state as a result of receipt of the benefit whereas tax expenditure beneficiaries are not. Ultimately these structural inequalities demand resolution in any path towards a universally responsive state. Below, again for the purposes of this draft, I draw out the example of housing support to make these points.

1. Hyperregulatory Structures in Poverty-Focused Housing Support

Poverty-focused social welfare supports are structured very differently from tax expenditures. Privacy protections for applicants and recipients are quite weak; recipient homes (and communities) are regularly monitored and policed, and data about their families are regularly shared across social welfare, child welfare and criminal justice agencies. These regulatory intersections give rise to significant punitive risk and regulary result in sanctions both within and beyond the social welfare system. Below I briefly describe the intersecting regulatory and legal structures that give rise to these consequences and gives a few examples of the impact of these regulatory structures and legal rules on the lives of subsidy recipients. In short, as was the case in *The Hyperregulatory State*, receipt of the benefit comes at a very serious punitive risk particularly and disproportionately for African American and Latino/Latina recipients. In addition, as was the case in the examples in welfare and healthcare, these intersecting regulatory mechanisms serve to subordinate and control (or hyperregulate) these communities.

i. Public Housing and Project-Based Section 8

[44] *Id*.

Although public housing and project-based Section 8 differ in important respects, both provide housing support to individuals who live in particular housing locations. Whereas public housing is administered by a local agency under the regulatory guidance of the U.S. Department of Housing and Urban Development ("HUD"), project-based Section 8 is managed privately but receives significant funding (and agrees to significant oversight) by the local housing agency and HUD.

The regulatory framework for both public housing and project-based Section 8 contemplate extensive data-sharing between those public and private entities administering the support and other more punitive government agencies. Many of these data-sharing arrangements arise from the focus on barring families with criminal histories from receiving subsidies and evicting families whose members are accused of criminal activity from public housing. The ability to evict entire households based on the conduct of its members or guests, stems from the one-strike policy, put in place under President Clinton. Under that policy, families residing in public housing can be evicted upon proof that a member of the household or a guest of that household has engaged in criminal activity.

The full import of the one strike policy, which allows evictions regardless of the knowledge or control of the head of household as to the conduct, was solidified in the Supreme Court's decision in *Department of Housing and Urban Development v. Rucker.*[45] Pearlie Rucker, the named plaintiff in the suit, was being evicted under 42 U.S.C. 1437d(l)(6) which requires that every public housing lease contain a provision stating, "that any . . . drug-related criminal activity on or off [public housing] premises, engaged in by a member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of the tenancy." The facts leading to her eviction involved an allegation that her mentally disabled daughter was found three blocks from Rucker's apartment with cocaine and a crack cocaine pipe.[46] Rucker had no knowledge of these acts nor could she control her daughter's conduct.[47] Nevertheless the Supreme Court held that 42 U.S.C §1437d(l)(6), "unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related criminal activity of household member and guests whether or not the tenant knew, or should have known, about the activity."[48]

In a clear example of regulatory intersectionality, the statutory and regulatory mechanisms that allow for eviction give rise to a myriad of legal and informal mechanisms by which agency actors share data about public housing residents. HUD regulations make clear that public housing agencies have free access to criminal justice data. Under 24 CFR § 5.903 all public housing applicants must sign a consent form allowing law enforcement agencies to release and public housing authorities to use criminal conviction records. Public housing agencies are authorized "to obtain criminal

[45] 535 U.S. 125 (2002).
[46] Rucker at 128; Lauren E. Burke, "One Strike" Evictions in Public Housing and the Disparate Impact on Black Public Housing Tenants in Washington D.C., 52 HOW. L. J. 167, 173 (2008).
[47] *Id.*
[48] *Rucker* at 130.

conviction records from a law enforcement agency [and may use such records] to screen applicants for admission to covered housing programs and for lease enforcement or eviction of families . . . ." In addition to these formal rules, it is clear that there is a substantial informal overlay ensuring that criminal justice data about public housing tenants is regularly shared with local housing agencies. Local police are regularly hired to serve as security officers in public housing complexes; the fourth amendment rights of tenants are regularly abrogated through a variety of legal and suspect means, and there is no question that these agencies work together closely to ensure that the information about alleged crimes gets into the hands of those who have the power to evict tenant families.

In addition, Professors Kristin Henning, Wendy J. Kaplan and Davis Rossman have unearthed a good deal of evidence that public housing agencies are receiving and acting on information concerning purportedly confidential juvenile delinquency proceedings records.[49] In my own jurisdiction, Knoxville Tennessee, an interagency partnership that includes the Juvenile Court, the local police, local schools and the local housing authority all regularly share data about children who have been adjudicated delinquent, leading to evictions of the families of these children.[50] This data sharing is of course taking place in the context of the well-documented overpolicing of poor communities of color.

While Project-Based Section 8 is administered quite differently from public housing, when it comes to the policing of households and data access, there are striking similarities. For example 24 CFR § 5.903 requires applicants for those programs to sign the same consent form as a condition of residing in project-based Section 8 building. While under the regulations property owners cannot receive conviction records directly from law enforcement agencies, they can request them of their local public housing agency and, if the information reveals information relevant to acceptance or termination, the public housing agency can then share the data with the private owner.[51] This set of legal and extra-legal mechanisms are a clear example of both regulatory intersectionality and hyperregulation

ii. The Housing Choice Voucher Program

The housing choice voucher program is structurally quite different from public housing or project-based Section 8 because the voucher is issued to the eligible recipient and then that tenant uses it to rent private housing. Very briefly stated, idea of a voucher, as opposed to subsidized housing, is to allow low income families to move away from neighborhoods characterized by high concentrations of poverty and to "better" communities. In theory a Section 8 voucher allows low income families to access the supportive attributes of wealthier communities – good schools, parks, safety and the like. Interestingly for the purposes of this analysis is the idea, embedded within the Housing

[49] Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should School and Public Housing Authorities Be Notified*, 79 NYU L. REV. 520 (2004). Wendy J. Kaplan and David Rossman, *Called "Out" At Home: The One Strike Eviction Policy and Juvenile Court*, DUKE FORUM FOR LAW AND SOCIAL CHANGE (2011).
[50] Cite SHOCAP agreement (on file with author) and shocap press and study.
[51] *Id.*

Choice Voucher Program, that receipt of a voucher is, in theory, not nearly as visible as receipt of a housing subsidy through public housing. It is, in theory, a private arrangement between the voucher holder and the private landlord. In theory the private and less visible (more submerged) nature of the support would make it, as a practical matter, more difficult to subject voucher holders to hyperregulation. Sadly, however, as the example below demonstrates, this is still very possible. While the data sharing, regulatory intersections and punishment mechanisms are different in structure, in the example below, the hyperregulatory results are the same.

In a recent article,[52] Professor Priscilla Ocen described the targeting of Section 8 Housing Choice Voucher program recipients in three California suburban communities. From her analysis it is clear that, despite the transportability of the voucher, Section 8 recipients are easily targeted by communities seeking to stigmatize and exclude them. It is also clear that this targeting was facilitated through data sharing and was accomplished through an astoundingly aggressive campaign by multiple punitive agencies in the communities she analyzes.

The story Ocen tells arose initially from depreciating housing values in three white suburban communities in California, two (Palmdale and Lancaster) outside of Los Angeles, and one (Antioch) outside of San Francisco. As housing prices depreciated, rents went down and properties that previously would not have been accessible for households in receipt of Section 8 started to fall within their price range. The response of these predominantly white communities was swift and hostile. Ocen argues convincingly that what happened in these three communities represents a resurgence, in a new form, of racially restrictive covenants. Like Michelle Alexander's New Jim Crow, this is old modes of subordination in new clothes. For the purposes of this piece, though, I want to spend time looking at the very particular regulatory mechanisms by which the various private individuals and government agencies came together to hyperregulate voucher holders. Looking closely at how this occurs will, I hope, give us a clearer vision of how we might addresses the harms at issue. Although ultimately I want to tell this story in a great deal more detail, for the purposes of this draft, just a few examples of what happened give a sense of the privacy incursions, data sharing and multi-system punishment that occurred.

In Lancaster, Palmdale and Antioch resistance to voucher holders was clearly about both race and poverty. While these communities were previously demographically fairly homogenously white, the voucher holders were predominantly African American. The communities, in the words of Lancaster's mayor went to "war."[53] In Antioch, for example, the initial response was private, through the formation of "United Citizens for Better Neighborhoods - an Antioch-based group created 'to combat problems associated with Section 8 rentals.'[54] In response to this private activism, the Antioch Police Department formed a specialized unit, the "Community Action Team" the explicit

[52] Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV 1540 (2012).
[53] *Community Action League v. City of Palmdale*, CV-11-4817 (2012).
[54] Antioch Public Advocates Report at 10.

purpose of which was to monitor and police Section 8 households. This regulatory structure was mirrored in Lancaster and Palmdale. Lancaster established its *Lancaster Community Appreciation Project* (LAN-CAP) police team to target multi-family rental properties and Palmdale created *Partners Against Crime*. In a remarkable example of regulatory intersectionality, in all three communities, it was explicit purpose of these police units to monitor families not only for criminal activity (the traditional purpose of policing) but to monitor for them on issues related to subsidy eligibility. For example, "a substantial portion of LAN-CAP officers' time was . . . devoted to conducting 'compliance checks' on Section 8 tenants and encouraging landlords and managers to police their Section 8 tenants."

The utter conflation of regulatory functions (policing, child protection and social welfare benefit compliance) that took place is astounding. "At least on some occasions the sweeps of Section 8 homes in Lancaster and Palmdale involve[d] not only Sherrif's deputies, but also the Department of Children and Family Services, the Probation Department, and Code Enforcement officials."[55] Officials regularly used aggressive police tactics in these raids, appearing with multiple heavily armed officers, drawing guns and putting household members in handcuffs.

The key to these efforts, in the view of the communities, was accessing information about voucher holders and trying to force termination of subsidies by the local housing agencies. Both communities worked closely with the relevant local housing authority to accomplish these ends. For several years Lancaster and Palmdale paid the housing authority "to hire additional investigators to work with the local sheriff's office and focus on eliminating purported Section 8 fraud."[56] Although at various points the local housing agencies chose not to comply with requests for information, in all three communities the local housing authorities complied with requests to disclose the identity and address of voucher holders, took referrals for voucher termination from the local police and terminated vouchers based on evidence provided by local officials.

The overlapping "policing" of subsidy recipients had the intended effect. "'[In one year alone in LAN-CAP] over 1,500 arrests were made – three times the normal apprehension rate. They have trained over 300 property owners and managers on how to spot potential problems and have performed over 200 Section 8 compliance checks.'" Voucher terminations were referred to the local housing authority at astonishingly high rates and vouchers were often terminated. Landlords willing to rent to voucher holders were successfully targeted and officials succeeded in creating a climate to extreme fear for those who remained. At every step along the way the negative impact was experienced disproportionately by African American voucher holders.

2. Housing Support in the Submerged State: The Home Mortgage Interest Deduction and the Local Property Tax Deduction

As Mettler describes the submerged state, its mechanisms are so invisible that many individuals receive its benefits without being aware of the support. Indeed the regulatory

[55] Complaint para. 38.
[56] Complaint para 9

mechanisms of housing-related tax deductions and poverty-focused housing support are so dissimilar that it is almost difficult to make the comparison. Although I have just begun to research these programs, it appears that none of the features of what I describe as regulatory intersectionality or hyperregulation can be found in the regulatory structures of the HMID or the deduction for state and local property taxes. As to application process, to receive the benefit you fill out a form that is not even half a page long. When the IRS receives n filing claiming the HMID they do match it with filing by the banks and will, if they find a discrepancy, seek to resolve the issue with the taxpayer. They may also fine or audit the taxpayer. For the deduction for state and local property taxes, there is apparently no mechanism to run a data match.

Even with this mild sanction mechanism in place for the HMID, there is nothing that I have discovered to date that matches the multi-systemic targeting, surveillance and punishment systems described above. And in fact, such a set of mechanisms is, I would argue, culturally unimaginable. Imagine, for example, the uproar if the juvenile court records of children whose parents claimed the deduction were pulled by local police and were then used to justify inspections of the home and denial of the deduction. Imagine losing one's subsidy, or one's home, as a result of drug use by a child. Imagine police sweeps and task forces targeting deduction recipients. I would argue that all of this is nothing short of unimaginable. The mechanisms of the submerged state share none of the mechanisms of monitoring, regulation and punishment that so dominate the hyperregulatory state. The two states are, in these sense, structurally unequal.

III. The Hyperregulatory State, the Submerged State and the State of Rights

At this point several things should be clear: first that federal support for housing is far more extensive than the public generally perceives it to be; second, that it is on the whole regressive; and finally that the regulatory schema of the two general types of support (poverty-focused and submerged) are quite radically different. One set of mechanisms (which I call hyperregulatory) facilitates breaches of privacy and punishment while the other (which I borrow from Mettler to call submerged) is virtually invisible and carries with it virtually no stigma and no risk. It should also be clear (although later drafts will do more work to prove this) that, whether or not one can prove intentional discrimination on the basis of race, class, gender and/or family structure, the incursions and punishments at the heart of the hyperregulatory state are meted out disproportionately on poor, female-headed, African American families. Returning to where this article started, in a vision of a responsive or supportive state, the question I want to begin to address in this final section is whether or not recentering rights might help us address the structural inequalities described above and move toward a more universally responsive social welfare state. I will argue below that, in order to reach this universalist goal, one needs to imbed and enforce particular rights within the hyperregulatory state and we need to incorporate robust notions of equality analysis in the demand for a responsive state.

Before going further in talking about rights, I want to acknowledge the extreme difficulties associated with constitutional rights and poverty. In fact, to speak of constitutional rights and poverty in the American context is in some ways almost absurd.

As Julie Nice has extensively documented, when it comes to those in poverty, courts apply "no scrutiny whatsoever."[57]

> Poverty Law in the United States subsists within a constitutional framework that constructs a separate and unequal rule of law for poor people. Across constitutional doctrines, poor people suffer diminished protection, with their claims for liberty and equality formally receiving the least judicial consideration and functionally being routinely denied.[58]

In effect, this jurisprudence endorses a regime where constitutional law makes significant class distinctions—according rights to those with privilege and denying them to the poor. In 1971, Justice Douglas noted this class distinction in his dissenting opinion in *Wyman v. James*.[59] His words are a potent reminder that we have long differentiated the mechanisms of support by class. Those with class privilege receive extensive support, but they are not asked to trade their dignity, autonomy, or rights for that support. Those in poverty, however, regularly face this trade-off. While Justice Douglas dissented in *Wyman*, the majority had found that conditioning welfare on consenting to a home inspection did not abrogate Barbara James's Fourth Amendment rights.[60] But Justice Douglas asked the following:

> If the welfare recipient was not Barbara James but a prominent, affluent cotton or wheat farmer receiving benefit payments for not growing crops, would not the approach be different? Welfare in aid of dependent children . . . has an aura of suspicion. There doubtless are frauds in every sector of public welfare whether the recipient be a Barbara James or someone who is prominent or influential. But constitutional rights—here the privacy of the home-are obviously not dependent on the poverty or on the affluence of the beneficiary. . . . [T]heir privacy is as important to the lowly as to the mighty.[61]

Douglas' words, although sadly not adopted by the Court, provide some insight into why it might be unimaginable to subject deduction beneficiaries to the same hyperregulatory mechanisms that we regularly employ against the poor. Although deduction recipients would perhaps not characterize themselves as rights holders, their (imagined) utter shock at the mere suggestion that they might be targeted and punished as a result of benefit receipt comes, I think, from a sense of entitlement (as well as a sense of privilege). And in fact, as a matter of law, as to entitlement, they would be right. There is, for tax deductions no five-year limit, no work requirement, no behavioral compliance nor any other of the myriad conditions we place on poverty-focused social welfare benefits. As was the case, at least in theory, with welfare before 1996, and is still the

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[57] Julie A. Nice, No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default, 35 Fordham Urb. L.J. 629 (2008). The phrase "no scrutiny whatsoever" was originally penned by Justice Marshall in dissent in James v. Valtierra, 402 U.S. 137, 145 (1971) (Marshall, J., dissenting).

[58] Nice, supra note __, at 629.

[59] 400 U.S. 309, 330–33 (1971) (Douglas, J., dissenting).

[60] Wyman, 400 U.S. at 326 (majority opinion).

[61] Id. at 332–33 (Douglas, J., dissenting) (footnote omitted).

case for Social Security and some other poverty-focused benefits, if you meet the statutory criteria you get the benefit. Similarly, as Douglas suggests, deduction beneficiaries would likely assume that they would not and should not be asked to trade their Fourth Amendment (or for that matter any other constitutional) rights for the benefit of the deduction.

Douglas's views, however, did not prevail, and *Wyman* is a prime example of how we force poor people to trade rights for support.[62] This lack of rights is at the heart of the structural inequalities described above. While those with class privilege are supported by the submerged state, those in poverty are subject to a hyperregulatory state.

But to talk of rights is not to talk solely of constitutional rights. As those who litigate on behalf of people in poverty know well, rights can be embedded in statutory and regulatory schemes. Embedding and vigorously protecting those rights (small r) can, in some circumstances, provide a bulwark against the mechanisms of the hyperregulatory state. In addition, and moving onto more theoretical ground, looking closely at the structural inequalities between the hyperregulatory and the submerged states helps to remind us that, any theory of a Right (capital R) to a responsive state has to include a demand that inequalities in both distribution and regulatory structure are addressed and resolved. Below is just a few thoughts about these rights claims.

A. rights with a Small r

The social welfare programs of the hyperregulatory state provide essential assistance to those in need. But they also, as I have argued here and elsewhere, come at an extraordinary punitive risk. To address these issues, we must create statutory and regulatory mechanisms to separate social welfare bureaucracies from other, more punitive, regulatory systems. Programs need strong privacy protections and the current balance in the law leaning toward data sharing needs to be addressed. In addition, due process rights remain tremendously important. It was administrative due process that allowed voucher holders in the Section 8 case to contest the aggressive terminations of their subsidy. In many of those cases, the evidence put forward simply did not justify eviction. If not for the due process protections announced in *Goldberg* and incorporated into the regulatory schema of federal benefits programs, even more households would have lost the vouchers that provide essential support to their families.

Finally, it is crucial to remember that statutory discrimination protections still play a vital role. Although I have not fully researched the Section 8 case I describe above, it appears that these practices were ultimately addressed through litigation based in disparate impact claims under the Fair Housing Act. Particular in circumstances where

[62] A notable recent divergence from this trend is found in an Eleventh Circuit decision holding that Florida's suspicionless welfare drug testing violated the Fourth Amendment. Lebron v. Sec'y, Fla. Dep't of Children & Families, 710 F.3d 1202, 1218 (11th Cir. 2013). This decision echoed the reasoning of the earlier decision in Marchwinski v. Howard, 113 F. Supp. 2d 1134 (E.D. Mich. 2000), rev'd, 309 F.3d 330 (6th Cir. 2002), vacated en banc, 319 F.3d 258 (6th Cir. 2003), aff'd by an equally divided court, 60 F. App'x 601 (6th Cir. 2003).

the racial intent and impact are so clear, it is essential to continue to use those statutory schema to address these harms.

B. Rights with a Capital R

I began this draft, however, on theoretical ground, focusing on what Martha Fineman characterizes as a claim but here what I am calling a right to a, "state [that is] responsive to . . . vulnerability [and which] fulfills that responsibility primarily through the establishment and support of societal institutions.[63] In a slightly different vane, Roberts suggests that poor African American women subject to punitive state systems need both negative and affirmative rights – as she frames it in the context of privacy such a right "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."[64] A responsive state, then, would include, in common parlance, both negative and positive rights.

What I want to begin to explore in later drafts of this paper, though, is how notions of equality and structural inequality might inform such a claim or right. If, in the responsive state, everyone (regardless of class, race, gender, place or family form) is entitled to responsive societal institutions and if in fact, as I have argued, we have a current system of support that is unequal both in its distributive effects and in the regulatory balance between support, punishment and control, than any notion of a responsive state must address these inequalities. The demand cannot be simply for supportive institutions or a responsive state but it must be for institutions that treat all individuals equally both in the means and the measure of support.

[63] Fineman, Responsive State, at 255–56.
[64] Id. at 1479.