The Hyperregulatory State: Women, Race, Poverty, and Support

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INTRODUCTION

Imagine yourself for a moment as a mother seeking help from the state. Your need might be for education, safety, housing, money, health care, or childcare. Depending on where you live, your race, your gender, your class position, and the composition of your family, the support you seek is likely to arrive, if it arrives at all, in radically different packages. If you are economically privileged and, more likely than in a world without structural racism, white, help is likely to come in to you in a particular form. For you, help may come in the form of high quality public schools, childcare, home mortgage deductions, safe streets, or employer-based but government-subsidized health care. The support you receive from that subject position is certainly not enough to meet your needs, but it is not likely to be structured to penalize you for seeking support. The only real risk you run by seeking support is the possibility that you might not get it.

In contrast, if you are poor and, more likely than in a world without structural racism, African American, and if you are living as a parent in the inner city, any support you receive is likely to be structured quite differently. The meager support that may be available comes in the form of welfare; food stamps; public housing; underfunded, overpoliced schools; and publicly funded, overcrowded health care facilities. Moreover—and central to the arguments put forward here—this support is likely to come at an enormous punitive risk both within the initial social welfare system and beyond. The regulatory mechanisms of these systems of support are likely to function in at least two ways. They will, if you are lucky and resourceful enough to navigate the many barriers to receipt, dole out some much-needed but meager support. But the price of that support is exposure to a set of mechanisms, here termed “regulatory intersectionality,” by which regulatory systems intersect to share information and heighten the adverse consequences of what those systems quite easily deem to be unlawful or noncompliant conduct. Quite simply if you are poor, African American, and living in the inner city, by seeking support you risk far more than simply being deprived of support. By seeking support you elevate your risk of exposure to ever more punitive consequences. You risk exposure, in the examples in this Article, to a child welfare system that is far more likely to take and keep your children and in which your children are likely to fare horribly. You also risk exposure to a criminal “justice” system that is more likely to impose harsh criminal consequences for your allegedly deviant conduct. The state you encounter not only fails to respond to your needs in any meaningful way, but is instead hyperregulatory, meaning here that its mechanisms are targeted by race, class, gender, and place to exert punitive
social control over poor, African-American women, their families, and their communities.

Feminist political and legal theorists are currently engaged in a vital project. This work, led by scholars like Martha Fineman and Maxine Eichner, teaches that both dominant American political theory and, more importantly, the structures of current state institutions fail to enable families to meet dependency needs and are, in the name of an emaciated view of autonomy, obscenely content to leave gross inequality in place. This work provides a potent critique, a clearly better vision of the state we need, and a theory that holds great promise in getting us there. As we consider their vision, however, we must remember—as the work of Kimberlé Crenshaw, Khiara Bridges, Kaaryn Gustafson, and Dorothy Roberts, among many others, counsels—that if we are to build institutions that are responsive to some of the most vulnerable among us, we must seek to understand the particular institutional realities that constitute the relationship between poor and disproportionately African-American women and the current state, and we must ask how these particular realities impact the path to a supportive or responsive state.1

This Article builds on the work of critical race theory, intersectionality theory, and critical sociology to make three interrelated arguments. First, the Article argues that social welfare institutions that serve and target poor communities are characterized by phenomena here termed “regulatory intersectionality,” defined as the means by which regulatory systems intersect to share information and heighten the adverse consequences of unlawful or noncompliant conduct originally observed in a social welfare setting. Second, in addition to introducing and exploring the specific functioning of regulatory intersectionality, the Article borrows from the work of Loïc Wacquant to introduce a second broader set of terms: “hyperregulation” and the “hyperregulatory state.” While regulatory intersectionality describes

1. Feminist theory has long been criticized for centering the experiences of white, citizen, middle-class women and eliding the experiences of women who differ along the lines of race, citizenship, class, or other identity axes. Historically, by centering the experiences of white women of privilege, streams within feminist discourse have given rise to social policy that at best fails to meet the needs of poor women and women of color and at worst contributes to their continued subordination. The critique raised by Kimberlé Crenshaw in 1991 that the domestic violence and anti-rape movements, by centering the experiences of white citizen women, at best erased and at worst undermined the safety and needs of women of color is among the most trenchant of such critiques. See Kimberlé Crenshaw, Mapping The Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241 (1991). For foundational pieces on this topic, see, for example, bell hooks, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM (1981); ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE: BLACK WOMEN'S STUDIES (Gloria T. Hull et al. eds., 1982); THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (Cherrie Moraga & Gloria Anzaldúa eds., 2d ed. 1983). For relevant readings specific to some of the social welfare policy that is discussed in Part III of this Article, see, for example, Jill Quadagno, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994). This article does not argue that either Fineman or Eichner ignore the institutional structures that target poor, disproportionately African-American communities. The critiques of feminist theory mentioned above do, however, counsel careful attention to these particular experiences and the particular responses that might lead to a truly supportive state.
functioning of a particular set of administrative structures, the hyperregulatory state is broader. It encompasses a wide range of state mechanisms that are targeted by race, class, gender, and place and that exert social control over poor African-American women, their families, and their communities. Third and finally, the Article builds on and responds to theories of vulnerability and the supportive or responsive state. In this vein it argues that the mechanisms of regulatory intersectionality render poor African-American women, their families, and their communities radically more rather than less vulnerable. Because of this, in order to realize a truly supportive state we must ask difficult questions about how we might meet the extraordinary needs of those living in poverty (as well as those who are not living in poverty) in a way that supports rather than undermines the abilities of families and communities to thrive.

The article proceeds as follows. Part I provides an overview of the political theory referenced above with a particular emphasis on its description of the functioning of the social welfare state. Part II then contextualizes this political theory within current discussions of social welfare history, sociology, and critical race and intersectionality theory and introduces the framework of hyperregulation and the hyperregulatory state. Part III offers a description of regulatory intersectionality as it plays out in public health and welfare settings. Drawing together the formal and informal structures of legal regulatory institutions and research documenting the disproportionate impact of these policies on poor women and poor communities of color, this Part highlights first the exposure of poor pregnant women to child welfare intervention and criminal prosecution as a result of drug testing in public hospitals; and second the referral of individuals to child protective agencies when welfare applicants test positive for drugs or refuse drug tests. In each of these cases, the poor women seeking support, who are disproportionately African-American, find themselves subject not only to extraordinary surveillance but to a far-reaching, interconnected set of civil and criminal regulatory systems designed to impose escalating punitive consequences for their behavior. Finally Part IV concludes by offering a very preliminary discussion of the theoretical and practical implications of regulatory intersectionality and of hyperregulation for building a supportive state.

I. THE FAILURES OF LIBERAL THEORY AND THE IDEA OF THE SUPPORTIVE STATE

The recent work of Martha Fineman and Maxine Eichner challenges us to reconceptualize the very subject of law and the role of the state. As to the

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2. When referencing the work of Fineman I am referring primarily to Fineman’s work on Vulnerability and Dependency: see MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004) [hereinafter FINEMAN, THE AUTONOMY MYTH]; Martha Albertson Fineman,
subject, Fineman and Eichner call the fundamental bluff of liberalism. They remind us that, as much as liberal political theory is built around the assumption that we are all autonomous and able if simply left alone to realize our full potential, in lived experience this is very far from true. They remind us that, while we are sometimes autonomous, we are frequently not. We are instead dependent and vulnerable. In addition, and crucially, some subjects are tremendously privileged while others "are caught in systems of disadvantage that are almost impossible to transcend." As to the current operations of the state in the domestic context, Fineman and Eichner offer a searing indictment. Each posits that the result of liberal rhetoric is a fundamentally unresponsive state. Vulnerable and dependent subjects are left alone to succeed or fail and the profound impacts of privilege and prejudice remain undisturbed. When people fail to live up to idealized notions of autonomy, they are blamed and either deprived of support or, as Eichner vividly describes in her discussion of U.S. child welfare policy, severely punished.

The positive vision of the state that Eichner and Fineman offer is markedly different and, this article maintains, far better than the current state of affairs. While Fineman and Eichner differ on crucial issues of policy, the focus of their critique, and the results they envision, they both call for a state that responds to vulnerability through the creation of policies and institutions that address

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3. Fineman and Eichner's work focuses on U.S. social policy in the domestic context, as do references to the "state" in this Article.

4. Fineman, Responsive State, supra note 2, at 257. Eichner's critique of liberal theory begins not in current political discourse and its manifestations in social policy but in a fundamental critique of Rawlsian political theory as exemplified by his work in A Theory of Justice. See, e.g., EICHNER, supra note 2, at 17-26 (critiquing the failure of Rawls to incorporate the role of the family in meeting dependency needs). In this Article, however, I focus not on Eichner's critique of Rawls per se but on her analysis of how the idea of autonomy profoundly limits the ability of American political discourse to justify government institutions that meet dependency needs.

5. Fineman, Responsive State, supra note 2, at 257.

6. EICHNER, supra note 2, at 119-23.

7. For discussion, by Eichner, of the differences between her vision of the mechanism of the supportive state and Fineman's, see id. at 75-77. Eichner identifies crucial differences between her vision and Fineman's, particularly on the issue of whether parents should be compensated for care work. In addition, although their work is extraordinarily complementary, they do differ in significant ways in terms of emphasis. In particular Fineman frames her vulnerability theory around the profound failure of Equal Protection doctrine to support the conditions for substantive, as opposed to formal, equality. Eichner's work in THE SUPPORTIVE STATE focuses primarily on how state policies and social mechanisms can be restructured to support the work of families in meeting dependency needs.
dependency. Rather than structuring policy in a way that either leaves families alone to meet needs or punishes them for failing to meet needs, the supportive state would, in Eichner's terms, "[a]t a minimum . . . arrange institutions in such a way that family members can, through exercising diligent but not Herculean efforts, meet the basic physical, mental and emotional needs of children and other dependents and promote human development while avoiding impoverishment or immiseration." 8

Moreover, Fineman in particular believes that a focus on vulnerability on the one hand and responsiveness on the other provides a powerful mechanism to address the profound inequalities that exist in U.S. society. Vulnerability theory, in Fineman's analysis, forms the basis of a claim that state institutions must provide not just formal equal access but the material conditions necessary to achieve substantive equality. 9 Fineman and Eichner provide an essential critique and a compelling vision.

Building on that work, this Article shifts the focus of inquiry to the punitive mechanisms of the state. It seeks to describe the specific ways that the mechanisms of the state actually operate for those who are, by virtue of the intersecting implications of class, race, gender and geography, among the most vulnerable. The article argues in Part III that in institutions like public hospitals and welfare offices, poor people, and disproportionately poor people of color, face a hyperregulatory state. Mechanisms of the state that purport to provide what remains of a shredded social safety net do not just fail to provide adequate support or even exact a punitive price for the support within the social welfare system. Instead, because of their position and their need, poor families face an extraordinarily punitive state, one whose systems intersect, in a mechanism referred to here as regulatory intersectionality, to exact escalating punitive consequences on those who seek its support. Before describing those mechanisms, however, this Part lays out in more detail Fineman and Eichner's theory of the liberal subject; the current, largely unresponsive state; and the responsive state they collectively envision.

A. The Autonomous Subject and the Vulnerable Subject

The theory of the supportive state begins, fundamentally, with a critique of the American ideal of the person who is governed. Liberal political theory, as manifested in dominant U.S. political discourse, is built "on its conceptualization of individuals as autonomous and able." 10 We are, in this

8. Id. at 78-79.
9. See infra Section I(B).
10. EICHH, supra note 2, at 17. Fineman makes clear that in her view notions of autonomy "defined in terms of expectations of self-sufficiency" dominates our political discourse. Fineman, Responsive State, supra note 2, at 259.
formulation, people who can pull ourselves up by our proverbial bootstraps. The purpose of government, then, is to make sure that nothing gets in our way. We need liberty to protect against incursions on the exercise of our autonomy, and we need formal equality, some sense not that we will all end up equal but that we perhaps start the race at the same point, so that we can all reach our ultimate potential. In popular discourse, this proverbial race is primarily an economic one. We are all, in theory, free participants in the market, and nothing is supposed to get in the way of realizing our economic potential.

The problem with these liberal ideas is, in short, that they "[seem] to mistake this moral ideal for an account of the human condition." They do so in two fundamental ways. First, they entirely fail to account for the fact that we are often dependent. We are young, old, sick, and unable to meet our needs. We are vulnerable. Second, the theory fails to acknowledge that, "[f]ar from having equal opportunity, many individuals are caught in systems of disadvantage that are almost impossible to transcend." Moreover, these failures are not just issues of theory. These fallacies are manifest in the state of American law and policy.

1. The Failure to Account For and Respond to Dependency

The first broad critique of liberal theory is that this political discourse, as manifested in U.S. social welfare policy, fails almost entirely to account for the way that families, broadly defined, meet the dependency needs of their members. Adults in families care for the young and old, and adult members care for each other in a myriad of ways. And, in a phenomenon termed "derivative dependency," when family caretakers, who are almost always women, provide this care work they do so at the expense of their own ability to be idealized economic actors.13

A few examples make this point evident. In the last several decades we have experienced radical shifts in the nature of work and family. The conceptual ideal of the two parent family with one breadwinner barely exists and in fact never existed as a significant presence in large swaths of communities of color. Nevertheless it still forms the conceptual basis for many work-related policies. Today, seventy percent of children live in households where all parents in the household, be there two or one, work. Despite these radical shifts in the nature of family and work, the workplace has barely shifted to accommodate these changes. In fact, as Eichner notes, "a comparison of policies in 173 countries found that when it came to parental leave protections in the workplace, the United States came in dead last, tied with only three other

11. EICHNER, supra note 2, at 21.
12. Fineman, Responsive State, supra note 2, at 257.
countries: Liberia, Papua New Guinea and Swaziland." In addition to facing a workplace that is tremendously inflexible, American workers are consistently called on to work far more hours than workers in other western countries. Adding to the difficulties created by the lack of flexible workplace policies and long hours is the absence of high-quality, affordable care. Although children who receive high-quality care tend to fare quite well, due in large part to the extraordinarily low compensation offered to those who engage in paid care work, the vast majority of available childcare is lightly regulated and of low quality.

Women who both work and fulfill caregiving roles find themselves lagging behind on a variety of economic indicators. While women in couples struggle to maintain economic equality, single women raising children face harsher circumstances and harder choices. They generally must attempt to balance care work with employment, but the lower they are on the economic ladder, the more difficult this balance and the harsher the consequences should their carefully calibrated work and care plans fall apart. For the poorest women, who are disproportionately women of color, attempting to provide care for their own dependent children and family members, all these statistics and policies are significantly worse. Low-wage workplaces tend to be less flexible and more precarious than those higher on the economic ladder. The extraordinary expense of childcare and the lack of any significant effort to subsidize that care force women into unstable and often unsuitable childcare arrangements and into a set of arrangements that are nearly guaranteed to fail. And whereas prior to the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), some women could rely on Aid to Families With Dependent Children (AFDC) to provide some level of support should they choose or be forced into unemployment, today the combined impact of work requirements, time limits, and the extraordinary push in many states to eliminate welfare makes the choices poor women face all the more difficult. Moreover, as wealthier women seek to meet the care needs of their families, they employ poor, disproportionately immigrant women and provide them with generally low wages and even fewer benefits.

In short, despite the ideal of an autonomous adult actor and a family that is supposed to provide care work, the reality is that meeting these care obligations is extraordinarily difficult. It is, for both Fineman and Eichner, our autonomy-centered political rhetoric that allows the state to fail to intervene to provide additional support: "[The] assumptions—that individual liberty and equality are

15. EICHER, supra note 2, at 39-40.
16. Id. at 40.
appropriately recognized by law, that dependency is not a condition that law needs to recognize; that the state should be neutral on issues of family; and that the state should not adulterate families internal dynamics—prevent policies that effectively support families."

2. The Failure to Account for and Respond to Structural Inequality

The second theoretical and practical critique of the way the autonomous subject drives policy focuses on structural inequality. As Fineman aptly puts it, in our society "[p]rofound inequalities are tolerated—even justified—by reference to individual responsibility and the working of an asserted meritocracy within a free market." We are a nation characterized by profound economic inequalities, inequalities that are again more starkly felt in communities of color.

Although an in-depth discussion of the profound inequities woven into our current society is well beyond the scope of this Article, a few statistics serve as a potent reminder of these phenomena. Since the 1970s, the income gap between those at the bottom and those at the top has continued to widen, with an ever-smaller share of wealth going to those at the bottom and in the middle and more going to those at the top. According to the Congressional Research Service, "U.S. income distribution appears to be among the most unequal of all major industrialized countries and the United States appears to be among the nations experiencing the greatest increases in measure of income dispersion." Looking in particular at African Americans, who are disproportionately affected by the social welfare policies examined in Part III of this Article, reveals significant income disparities between African Americans and whites. For example, sixty-five percent of African Americans studied in the most recent Pew Charitable Trusts Economic Mobility Project report "were raised at the bottom of the [family] income ladder compared with only 11 percent of whites."

In addition, although popular rhetoric about autonomy might suggest that it is quite possible by hard work and effort to move up the economic ladder

17. Id. at 27.
18. Fineman, Responsive State, supra note 2, at 251. Fineman’s critique is aimed squarely at the failures of Equal Protection doctrine. In this piece and in a prior piece on vulnerability, Fineman, Anchoring Equality, supra note 2, Fineman indicts the doctrine for its utter failure to provide any means to realize substantive equality. This Article draws on Fineman’s work on vulnerability, however, not to engage in the important debates around how that theory might add to Equal Protection analysis but for its description of the theory and practice of the state as it operates in American society.
during one's lifetime, the Congressional Research Service claims that "empirical analysis suggests that children born into low-income families have not become more likely and may have become less likely to surpass their parents position at the bottom of the income distribution."21 In fact, according to recent data, only four percent of those raised in the bottom fifth of household earnings make it all the way to the top quintile.22 In contrast, forty-three percent of Americans raised in the bottom quintile will remain there as adults.23 Blacks are also significantly more likely to be stuck at the bottom of family income and wealth ladders than whites: "[m]ore than half of black adults raised at the bottom (53 percent for family income and 50 percent for family wealth) remain stuck there as adults, but only a third of whites (33 percent for both) do."24

Despite these and other clear inequalities woven into our society along lines of gender, class, and race, our social policy does little to nothing to address these inequalities. Instead, and this is the heart of the critique of what Fineman terms "the autonomy myth,"25 American social policy is largely "unresponsive to those who are disadvantaged, blaming individuals for their situations and ignoring the inequity woven into the systems in which we are all mired."26

B. Towards a More Responsive State

The social policy and jurisprudence that results from this constricted view of autonomy justifies and gives rise, in Fineman and Eichner's view, to a non-responsive state.27 "[T]he same problematic assumptions that are embodied in political theory are also present in US law."28 If, rather than accepting this constrained view of autonomy and the non-responsive state, the "primary objective [was instead] ensuring and enhancing a meaningful equality of opportunity and access, we may see a need for a more active and responsive

22. Pursuing the American Dream, supra note 20, at 6.
23. Id. at 3.
24. Id. at 20.
26. Fineman, Responsive State, supra note 2, at 257.
27. By characterizing their collective description of the state as absent and unresponsive, I do not mean to suggest that either author fails to acknowledge that means by which law and social policy constitute both the family and the overlapping means by which dependency needs are met or unmet. In fact, both authors clearly acknowledge the way that law shapes the very nature of the family. See, e.g., EICHNER, supra note 2, at 55-57 (2010) ("Just as there is no natural, pre-political family, there are no natural, pre-political ways in which families function. In today's complex society, the ways in which families function are always deeply and inextricably intertwined with government policy." (citing Frances E. Olsen, The Myth of State Intervention in the Family, 18 MICH. J. L. REFORM 835, 836 (1985)). See also FINEMAN, THE AUTONOMY MYTH, supra note 2, at 151 ("While the family may be viewed as private in our rhetoric, it is highly regulated and controlled by the state.").
28. EICHNER, supra note 2, at 27.
state.” This envisioned state would not “simply protect citizens’ individual rights from violation by others.” Instead, it would “actively support the expanded list of liberal goods by creating institutions that facilitate caretaking and human development.” This envisioned state would also move past constrained notions of formal equality towards 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...”

The non-responsive state manifests itself in two primary ways: first, in its failure to regulate the workplace in ways that allow families to balance employment and caretaking; and second, in the constricted and punitive ways in which it provides assistance to those in need. The envisioned state would be restructured to respond in both these areas.

1. The Failure to Regulate the Market and Regulation of the Market in the Supportive State

The state’s failure to regulate the market is a central concern of the theory of the supportive state. With a few limited exceptions, American law provides comparatively few restraints on the market designed to support families in meeting the care needs of their dependents. The supportive state, in contrast, would “focus on limiting coercion by the market,” and would enact policies to “allow families the institutional space to make important decisions and to accomplish important tasks without being completely beholden to the market.” For example, upper-hour restrictions on work would be imposed, time off to meet caretaking needs would be expanded and compensated, and workers would be allowed flexible work hours if needed to meet caretaking obligations.

29. Fineman, Responsive State, supra note 2, at 260.
30. EICHNER, supra note 2, at 70.
31. Id. Although Fineman frames it differently, and again focuses more squarely on the failures of equality doctrine to meet the challenges of structural inequality, Fineman’s framing is similar. In her terms, “[C]onsideration of vulnerability brings societal institutions, in addition to the state and individual into 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.” Fineman, Responsive State, supra note 2, at 255-56.
32. Id. at 260.
33. Id. at 64-65.
34. Id. at 64-65.
35. Id.
2. The Limited and Punitive Nature of the Safety Net and a Newly Envisioned Set of Supports

Current U.S. social policy provides a severely limited and highly punitive safety net for those in poverty. In order to receive the meager support offered by the state, poor women are stigmatized, forced to surrender their autonomy, and subjected to an extraordinarily punitive system.36 Eichner's devastating description of the operation of the current child welfare system provides a vivid example of how current social policy assumes autonomy as a baseline and stigmatizes and punishes those who fail to meet their own needs. Poor families receive little to no support in parenting successfully while attempting to survive the sometimes tremendously difficult conditions of poor communities and the low wage labor market. The vast majority of interventions are punitive and, for both the children and the families involved, devastating. As a general matter, the state only enters when there is an allegation of abuse or neglect. Once the state intervenes, the vast majority of resources go not to supporting families to parent successfully, but to moving children into foster care. Once in foster care, the vast majority of children fare very badly. And, as in the case in so many of these punitive systems, they focus these punitive resources overwhelmingly on communities of color. The consequence, as Dorothy Roberts has so thoroughly and persuasively demonstrated, is a concerted and often devastatingly effective attack on poor African-American families.37

The supportive state would respond quite differently both for poor women and for women who are farther up on the economic ladder. In place of the current child welfare system, the supportive state would be "premised on the view that children's welfare is a concurrent rather than residual responsibility of the state, and that this responsibility [would be] best met through supporting families in the normal course of events."38 The goal of such a state would be "supporting the development of flourishing children."39 The supportive state then would seek to alleviate child poverty and would provide high quality early education and childcare,40 sufficient access to low income housing,41 and "policies that ensure access to mental health services and drug-treatment programs."42 More generally, the supportive and responsive state would provide significantly more access to support for all families in the form of

36. Fineman, Responsive State, supra note 2, at 259 ("[T]hose who must resort to certain forms of state assistance are asked to surrender their autonomy (and privacy) and are stigmatized as dependent and failures.").
37. See infra notes 87-93 and accompanying text.
38. EICHNER, supra note 2, at 123.
39. Id.
40. Id. at 123-124.
41. Id. at 124.
42. Id.
universal health care, subsidized childcare, and in some iterations, compensation for care work.\footnote{Eichner and Fineman diverge to a certain extent on this issue. Fineman suggests in THE AUTONOMY MYTH that care work should be publicly compensated. FINEMAN, THE AUTONOMY MYTH, supra note 2, at 285-87. Eichner rejects this proposal. EICHNER, supra note 2, at 76-77. It is important to note that Eichner and Fineman also both devote substantial parts of their analysis to the crucial questions of how the supportive state should support women’s equality. For example, Eichner suggests policies that would encourage both men and women to provide care work. Id. at 82-83.}

II. HYPERREGULATION AND POVERTY

The political theories described above offer a tremendously productive reframing of the liberal subject and the role of the state and a strong vision of what the supportive or responsive state might entail. The idea of placing vulnerability, as opposed to constrained notions of autonomy, at the center of liberal theory creates a shift in the burden placed on the state. As Fineman frames it, “[t]he nature of human vulnerability forms the basis for a claim that the state must be more responsive to that vulnerability.”\footnote{Fineman, Responsive State, supra note 2, at 255-56.} These theorists also clearly understand and acknowledge that poor women, and, disproportionately, communities of color, are stigmatized and punished in the current social welfare system. Their revision of the subject, privacy, and dependency, if adopted, would likely result in some movement towards eschewing the stigma currently associated with seeking support.

My concern is not that these theorists fail to pay attention to how poor women are treated. In fact to varying degrees these realities are in fact described in their work. Instead, I want to argue as a next step for a heightened focus on the specificity of the mechanisms of support as they currently operate in low-income communities. This focus is crucial because it seems very possible, given the repeated marginalization of poor women of color within some of feminist theory,\footnote{See supra note 1 and accompanying text.} that unless these issues are foregrounded, the appeal of the narrative of the state as it operates for those not in poverty could easily dominate the development of this work. This possibility would leave uninterrogated and untouched those wide swaths of policy that uniquely and disproportionately impact poor communities in general and poor communities of color specifically. In this scenario, the important task of realizing a more supportive state could easily focus on creating legal structures to facilitate caretaking for some at the expense of interrogating and dismantling the punitive and hyperregulatory mechanisms of the those parts of the state targeted at poor women generally and poor women and communities of color specifically.\footnote{One example of this phenomenon in popular discourse was clear from the extraordinary focus among professional women on the publication of Anne-Marie Slaughter’s Why Women Still Can’t Have
A variety of sources from critical race theory, history, and sociology provide a rich context for understanding the mechanisms of the state as they function specifically in poor communities. In particular, some specifics from the history of social welfare policy in the United States explain the bifurcation of support systems in U.S. social policy, which has split our safety net into one for those in poverty and another for everyone else. In addition, recent discussions within both sociology and law about the status of privacy rights in poor communities and the means by which legal and social welfare systems, both civil and criminal, intersect to control poor communities of color provide an essential framework.

A. A Bit of Social Welfare History

As has been well told elsewhere, at the advent of the New Deal the United States made a crucial set of decisions about how to structure its welfare state. Very roughly speaking, the set of supports created in the 1930s and then significantly expanded and reconfigured during 1960s and the Great Society were split in two.47 One set of supports was created for a group viewed as workers and therefore deserving of support. These programs, like Social Security and Medicare, did not have income cutoffs. Although of course certain categories of workers were originally excluded,48 this category of social supports was created and remained in place for those who, politically speaking, paid into the system.49

During the same period (starting during the New Deal and continuing through the 1960s) another very different set of supports were created for some in poverty: those deemed worthy of support but still poor and in need not just of support but, so the dominant political consensus dictated, of behavioral control.50 Originally Aid to Dependent Children (later renamed Aid to Families with Dependent Children) was created primarily to enable poor white widows to remain in their homes and care for their children. This program was, like poverty programs that preceded it, focused strongly on controlling the behavior

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50. For a discussion of the historical origins of this split in U.S. social welfare policy and their relationship to who was "deserving," see KATZ, supra note 47, at 238-39.
of its recipients. Later, during the War on Poverty and the Great Society, programs like Food Stamps and Medicaid were added to those programs exclusively for those in or near poverty. The poverty programs have been, since their very inception, focused on scrutinizing and controlling the behavior of recipients. Moreover, as AFDC was transformed in the 1960s as the result of extensive activism and litigation, from a program primarily for poor white widows to a program open to poor communities of color, the nature of extent of behavioral controls became inextricably linked to structures of racial subordination.  

B. Privacy Deprivation and Criminalization as the Price of Support

Social and behavioral control in American poverty programs is often accomplished through privacy incursions almost unimaginable in the regulatory framework of support programs provided to those of means. Although one could scarcely imagine policies like this as a condition of receipt of benefits such as the child care or home mortgage tax deductions, poverty programs regularly invade both the homes (and more recently the bodies) of poor people as a condition of support. The jurisprudential approval of these practices began in the Supreme Court’s decision in Wyman v. James. At issue in that case was a New York State requirement that welfare recipients consent to a home inspection as a condition of eligibility. The plaintiffs argued that while the State was clearly entitled to gather all information relevant to establishing Ms. James’s eligibility for AFDC, it could not abrogate her Fourth Amendment right against unreasonable searches of her home as a condition of her eligibility for AFDC. Despite the fact that an applicant or recipient who, by definition, has no other means of support must consent to the search or lose that support, the Court held that the requirement did not violate the Fourth Amendment right to be free from unreasonable searches and seizures. In dissent Justice Douglas states clearly the class distinction at the heart of the majority opinion:

If the welfare recipient was not Barbara James but a prominent, affluent cotton or wheat farmer receiving benefit payment 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


52. See infra notes 196-206 and accompanying text.


54. Id. at 317.
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; and their privacy is as important to the lowly as to the mighty.\(^{55}\)

Justice Douglas’s views, however, did not hold sway. In fact, in recent years, scholars have carefully detailed the way that poverty-focused social welfare programs increasingly offer proof both that poor people hold no genuine right to privacy once they seek support and that, more and more frequently, poverty-focused social welfare programs employ the methods and modalities of the criminal justice system. These two related conclusions are strongly articulated in the work of Khiara Bridges and Kaaryn Gustafson.

Khiara Bridges’s work on New York State’s Prenatal Care Assistance Program (PCAP) program provides strong support for her thesis that the suggestion that poor women exchange their privacy rights for support significantly understates the problem.\(^{56}\) Bridges centers her analysis around the extraordinary amount of information collected from low-income women as a price of PCAP. In that program, as Bridges extensively documents, poor women seeking prenatal care are forced to provide extensive information to a wide variety of professionals (nurses, social workers, and the like) 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 accesses this support.\(^{57}\) As is the case in the examples in Part III of this article, in the PCAP setting, the effect is that “poor women’s private lives are made available for state surveillance and punitive state responses and they are exposed to the possibility of punitive state responses.”\(^{58}\) Bridges concludes that rather than bartering their privacy for benefits, it is more accurate to state that, in our current socio-political and legal environment, poor families have no privacy rights to begin with.\(^{59}\)

Kaaryn Gustafson’s work on the criminalization of welfare adds another crucial piece to the framework for understanding the current administrative modalities of poverty programs. Gustafson demonstrates in extraordinary detail that, today, “[w]elfare rules assume the criminality of the poor . . . [and] the logics of crime control now reign supreme over efforts to reduce poverty or to ameliorate its effects.”\(^{60}\) Gustafson provides ample evidence for these claims.

\(^{55}\) Id. at 332-33.
\(^{57}\) Id. at 124-133.
\(^{58}\) Id. at 131.
\(^{59}\) Id. at 173.
The expanding reach of the criminal justice system is manifested in social welfare programs in at least two ways: first, in the use of the mechanisms and modalities of the criminal system within the benefit application process; and second, in the increasing use of the welfare system as an extension of law enforcement. Leading the trend toward rendering the welfare system analogous to the criminal justice system is the use of biometric imaging technology. In response to a series of federal studies revealing some instances of receipt of benefits in more than one jurisdiction by individuals, the 1996 welfare reform law “required states to institute fraud prevention programs.” Several states instituted a program of biometric imaging in which, in most cases, applicants' fingerprints and possibly photographs are scanned and then run through a variety of state databases, purportedly to detect instances in which recipients are attempting to “double dip” by receiving benefits in more than one jurisdiction. Even before these systems were in place, instances of welfare fraud in the form of double dipping were characterized more by infamous individual instances rather than by any data showing a widespread practice. Today, given the extensive system of data cross-checking now in place, these processes are even more unlikely to and in fact do not actually uncover significant instances of welfare fraud. But, as Gustafson observes, biometric imaging “serves another purpose: the collection of biometric data scrutinizes and stigmatizes low-income adults in a way that equates poverty with criminality.” In these states, because of the extensive interviewing, data checks, and finger imaging, “applying for welfare mirrors the experience of being booked for a crime.”

In a related trend, it is quite clear that, post 1996, the welfare system has been employed as yet another tool in criminal law enforcement. This is manifested in several ways. First, post-1996, law enforcement officials need merely ask for public benefit records in order to receive them. Absolutely no legal process is required. This allows law enforcement agencies to use the extensive personal information held within these databases for investigation and prosecution of crimes. Beyond this, there have been several instances in

61. Id. at 56.
62. Id. at 56-57.
63. For example, in California, the state identifies only three matches per month and refers only one of these cases per month for more extensive fraud investigation. Id. at 57. Although policymakers claim that the purpose of these programs is to as much to deter as to detect fraud, there is also extensive evidence that it deters not fraud but applications of needy individuals. Id. at 57-58. Policymakers continue to persist in requiring finger imaging despite extraordinary evidence of its high cost and low utility in detecting fraud. For example, according to a report evaluating its effectiveness in Texas, it failed to reduce caseloads, cost the taxpayers $15.9 million between its implementation in 1996 and 2000, and, over the same period, “resulted in only nine charges filed by the DA, 10 administrative penalty cases, and 12 determinations of no fraud.” Id. at 58 (citations omitted).
64. Id. at 57.
65. Id.
which welfare agencies have collaborated with law enforcement to apprehend individuals for reasons utterly unrelated to their public benefits. For example, under a program called Operation Talon, Food Stamps\textsuperscript{67} offices collaborate with law enforcement to apprehend individuals with outstanding warrants. After a computerized match is run between the relevant databases, individuals receive a pretextual letter asking them to come in to discuss an issue concerning their benefits. When they arrive, they are met by law enforcement and arrested.\textsuperscript{68} Between 1996 and September 20, 2009, 14,645 individuals were arrested under this program.\textsuperscript{69}

This article will argue, in Part IV, that remembering the fundamental structural divide in U.S. social welfare policy, the wholesale lack of privacy rights, and the remarkable criminalization of support—along with the inextricable ties to racial subordination embedded in all these trends—is crucial to conceptualizing a path to the supportive state.

C. From Less Eligibility to Hyperregulation

In 1971, Frances Fox Piven and Richard Cloward published Regulating the Poor, a groundbreaking treatise that would shift the way that left scholars talked about U.S. poverty policy. Piven and Cloward argued that “relief programs are initiated to deal with dislocations in the work system that lead to mass disorder, and are then retained . . . to enforce work.”\textsuperscript{70} Highlighting current manifestations of the age-old social welfare theory of “less eligibility,” Piven and Cloward persuasively chronicled the systematic expansion and contraction of public aid as a mechanism to keep workers vulnerable and beholden to the vagaries of the low wage labor market. Loïc Wacquant has recently and persuasively argued, however, that it is no longer sufficient to analyze the operation of the social welfare state in isolation. Instead, Wacquant and others urge us to widen the frame and see how both

\textsuperscript{67} In 2008, the Food Stamp Program was renamed and is now called Supplemental Nutrition Assistance Program or SNAP. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, §4001(b), 122 Stat. 1651 (2008). Nevertheless for the purposes of name recognition this article continues to use the better-known term “Food Stamps.”

\textsuperscript{68} GUSTAFSON, supra note 60, at 54.

\textsuperscript{69} Hearing to Review Quality Control Systems in the Supplemental Nutrition Assistance Program Before the H. Subcomm on Dep’t Operations, Oversight, Nutrition, and Forestry of the H. Comm. on Agric., 111th Cong. 28 (2010) (statement of the Hon. Phyllis K. Fong, Inspector General, U.S. Dep’t of Agric.). For more information on Operation Talon, see GUSTAFSON, supra note 60, at 54.


\textsuperscript{71} “Less eligibility” describes the principle, long established within social welfare policy, that any means of support offered to the poor should leave them in circumstances worse than those they would face if participating in the market. See id. at 35. For a historical description of this concept, see id. at 35-36.
social welfare and criminal justice mechanisms interweave to control poor communities. As Wacquant frames it,

[T]his cyclical dynamic of expansion and contraction of public aid has been superseded by a new division of the labor of nomination and domination of dependent populations that couples welfare services and criminal justice administration under the aegis of the same behaviorist and punitive philosophy. The activation of disciplinary programs applied to the unemployed, the indigent, single mothers, and others "on assistance" so as to push them onto the peripheral sectors of the employment market, on the one side, and the deployment of an extended police and penal net . . . on the other side, are the two components of a single apparatus for the management of poverty that aims at effecting the authoritarian rectification of the behaviors of populations recalcitrant to the emerging economic and symbolic order.72

Wacquant thus insists that the U.S. social welfare state operates as one of two interlocked systems that work together to discipline those who threaten the neoliberal economic order.73 In his terms, "workfare" and "prisonfare" are inextricably linked.74 And those disciplined are, of course, raced black, both actually and as a matter of symbolic ordering.75

Frank Rudy Cooper recently noted that Wacquant also offers valuable terminology for describing the targeted nature of these interlocking systems. Cooper, citing Wacquant, recently argued that we should use the prefix "hyper" as opposed the descriptor "mass" to describe the phenomena of incarceration in poor, urban communities of color in the United States. Cooper notes that the use of the prefix "hyper"


73. Wacquant genders the two systems (penal and social welfare) female and male respectively. Id. at 14-15. Although this article does not focus on the question of the gender of the penal arm as Wacquant describes it, the gendering of the penal system as male is problematic in its elision of one of the fastest growing incarcerated populations, poor women of color. For a broad ranging discussion of the implications of this trend, see the symposium issue recently published by the UCLA Law Review entitled Overpoliced and Underprotected: Women, Race and Criminalization, 59 UCLA L. REV. 1418 (2012). As described by Kimberlé Crenshaw, whose article introduces the volume, "More than simply adding women of color into the mix, this symposium interrogates the terms by which women are situated both within the discourse of mass incarceration as well as within various systems that overlap and that contribute to the vulnerability of racially marginalized women." Kimberlé Crenshaw, From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race and Social Control, 59 UCLA L. REV. 1418, 1422 (2012).

74. WACQUANT, supra note 72, at 79.

75. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLORBLINDNESS (2010) (showing that the criminal justice system and its associated civil feeder and postincarceration classifications systems serve to strip black communities of their freedom and of the fundamental privileges of citizenship and to recreate, in Alexander's terms, a New Jim Crow).
is not generalized, but targeted . . . [H]yper-incarceration should be seen as a multidimensional attack on a specific group of people. Wacquant reveals that hyper-incarceration has "been finely targeted, first by class, second by that disguised brand of ethnicity called race, and third by place." The class targeted is, of course, the poor. The races targeted are, of course, blacks and then Latinos/ as. The place targeted is the inner city.  

While Wacquant is referring here to the targeting of penal policies, for the purposes of this article I use the prefix "hyper" and the term "hyperregulatory state" to describe a wide ranging set of mechanisms embedded primarily in the social welfare state that are, like the mechanism Wacquant describes, targeted by race, class, place (and, I add, gender) to control and subordinate poor communities in general, and poor communities of color in particular.

In addition to widening the frame and defining terms, we also need to focus sharply on the details of these "structural and institutional intersections."  

As Dorothy Roberts's work continually reminds us, describing "particular systemic intersection[s] . . . help[s] elucidate how state mechanisms of surveillance and punishment work to penalize the most marginalized women in our society."  

We must, in short, look at these intersections from the ground up.

In my review of the work of scholars such as Bridges and Gustafson I have already described some of the mechanisms that could be categorized as mechanisms of the hyperregulatory state. The following section turns to one less-explored piece of this puzzle: outlining the mechanisms of regulatory intersectionality as it is manifested when poor people seek assistance from


77. Crenshaw, supra note 73, at 1427. Crenshaw uses the term "structural-dynamic discrimination" to describe "intersections [that] are constituted by a variety of social forces that situate women of color within contexts structured by various social hierarchies and that render them disproportionately available to certain punitive policies and discretionary judgment that dynamically reproduce these hierarchies." She uses the term "intersectional subordination" to describe "outcomes produced in the interface between private institutional configurations such as the housing market or neighborhood watches and the policing power of state actors." Id.


79. Dorothy Roberts uses the term "system intersectionality" to describe how the policies of the child welfare and criminal justice system work together to perpetuate the subordination of poor African American women. Roberts, supra note 78. The focus here is slightly different. While Roberts's analysis looks at how a variety of policies, such as incarceration for low level drug offenses and the emphasis on adoption in the Adoption and Safe Families Act work together to lead to African-American women losing their children, the analysis here looks at a particular kind of intersections whereby information travels from one regulatory system to another, resulting in heightened consequences for the person
some of the most basic social support mechanisms that exist in the United States: public health and welfare. In each example, information that is deemed to indicate non-compliant and/or deviant conduct travels from the original social welfare system into other even more punitive systems. It is in large part through the mechanisms of these processes that the systems work together to impose ever-heightening penalties on the families that seek assistance.

To understand the impact of regulatory intersectionality (and the broader concept of the hyperregulatory state) on the theory and path to realization of a more responsive or supportive state, it is important to understand both whom these policies impact and how those impacts shape perceptions of users of the U.S. social welfare system. In every system described below, be it the social welfare settings (public health and welfare) or the systems into which data is transmitted and further punishment imposed (child protection and criminal justice), these systems disproportionately serve and target poor communities which are, in turn disproportionately composed of African-American families. Moreover, as other scholars have amply demonstrated, both the child welfare and the criminal justice systems contribute to the destruction of poor Black communities and the recreation of a racial caste-like system. This article takes those arguments to be true. However, it is not necessary, for the purposes of this article, to re-prove those well-substantiated claims. Here only two specific pieces of this larger argument are crucial. First, it is important

seeking support. In addition the word regulatory (as opposed to system) calls attention to the focus here on the myriad of detailed structures that lead to the devastating punitive outcomes described in Part III. Having said that, however, the terms are clearly closely related.

80. It is important to note that each of these phenomena could be and in some cases has been studied in more detail than is presented here. For example, Kaaryn S. Gustafson’s CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2011) provides a detailed and extensive description of how welfare programs are characterized by both assumptions of latent criminality among recipients and extensive interactions between the welfare and criminal justice systems. John Gilliom’s OVERSEEERS OF THE POOR: SURVEILLANCE, RESISTANCE AND THE LIMITS OF PRIVACY (2001) provides an astounding look at the mechanisms of surveillance and data sharing that dominate public assistance programs and fuel welfare fraud prosecutions. Similarly, Dorothy Roberts has for many years been tracing the means by which poor Black women, through the wielding of racial tropes, the geography of race and poverty, and the disproportionate targeting of their communities, face interlocked public health, child welfare and criminal systems that expose them to escalating punishments and reinforce the U.S. racial hierarchy. See, e.g., DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) [hereinafter ROBERTS, SHATTERED BONDS]; Roberts, supra note 78; Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy 104 HARV. L. REV. 1419 (1991) [hereinafter Roberts, Punishing Drug Addicts]. The point of this article is not to reproduce these descriptions and analysis, but rather to build on them and, more specifically, to begin to draw attention to the pervasive nature of intersectional regulation across social welfare settings and beyond.

81. The literature on the topic of race and the criminal justice system is extensive. For a compelling description of the way that mass incarceration and its concomitant over-policing, targeted prosecution, and post-conviction civil consequences operate to institute a system of racial caste in American society, see ALEXANDER, supra note 75. For a devastating chronicle of the impact of punitive child welfare policies on poor African-American children and families, see generally ROBERTS, SHATTERED BONDS, supra note 80. For a discussion of the way that child welfare and criminal justice systems work together to devastate black families, see Roberts, supra note 78.
simply to understand that the systems at issue affect poor, African-American communities disproportionately. Second, it is important to understand both the validity and widespread existence of the perception within poor communities of the child welfare and criminal justice systems as tools of racial subordination. These perceptions and realities matter a great deal if we are, as this Article proposes, to center the experiences of poor African American women in our analysis of how the state currently operates and how we might theorize a path from its current operation to a more responsive state. Below is a brief summary of the data that underlies the claims of disproportionate representation and disproportionate negative impact.

D. Race, Gender, and Poverty in Social Welfare, Child Welfare, and Criminal Justice Settings

In both examples described in Part III, clients enter a particular social welfare setting: public health and welfare. As a result of that entrance, the original social welfare system comes to the conclusion that the client has broken some rule of the system or has engaged conduct that system actors or policies define as deviant or dangerous. In both systems, the conduct leads to some overt sanction within the social welfare setting: in the example of public health, an overt deterrence to accessing prenatal care and in the welfare setting, a denial of benefits.\(^{82}\) The punishment, however, does not cease with the imposition of those penalties. The information about that person or that family then travels from that system to another, resulting in ever-heightening negative consequences for some or all members of the family. In both systems, the information flows from the social welfare setting to the child protection agency and, in some circumstances, to the criminal system. In each of these systems (social welfare, child protection, and criminal justice), poor African-American people are disproportionately represented.

Of the two social welfare settings considered below, one serves, by definition, only those in poverty.\(^{83}\) Although, under the terms of the federal Temporary Assistance to Needy Families program, states have broad discretion to design their programs, a central purpose of the program is “to provide

\(^{82}\) In the public health setting, the fact that a pregnant mother tests positive for drugs does not lead overtly to a sanction within that system. For example, unlike in the welfare context, that mother is not subject to a rule that would deny her health benefits as a result of that test. Instead, in that setting, the punishment comes with the transmission of information from the public health system to the child welfare and criminal systems.

\(^{83}\) In using the term poverty, it is crucial to note that those who fall below the poverty line are very, very poor. The U.S. poverty measure has been widely criticized as inaccurate and outdated. See Wendy A. Bach, Governance, Accountability and the New Poverty Agenda, 2010 Wis. L. Rev. 239, 278-79.
assistance to needy families."³⁴ In contrast, although the health care facilities that serve pregnant women are by definition open to all, by virtue of geography and the race and class stratification of the health care system in the U.S., these settings serve, disproportionately, poor communities of color.³⁵

Analyzing these systems at their intersections reveals legal mechanisms that facilitate and, in some cases, mandate the transmission of information about poor clients from the social welfare setting into other regulatory systems that are even more intrusive and punitive. In particular, both social welfare settings are structured to facilitate the transmission of purportedly negative information about clients from the social welfare setting into the agencies of the child welfare and criminal justice systems, thereby imposing escalating punitive consequences on those who seek support. The disproportionate representation of poor African-Americans in both the child welfare and criminal justice systems and the means by which these systems work to perpetuate the subordination of poor African-American communities in the U.S. have been extensively and compellingly chronicled elsewhere.³⁶ Nevertheless, because of the way that regulatory intersectionality facilitates this subordination, it is important to review these arguments here.

As to the child welfare system, Dorothy Roberts's seminal work leaves little doubt that the child welfare system is "a state-run program that disrupts, restructures, and polices Black families."³⁷ Her work also leaves little doubt that "[b]lack families are being systematically demolished"³⁸ by that system. A few statistics paint this picture clearly. Although the cause of overrepresentation is disputed, it is beyond dispute that African-American children are far more likely to be subject to child welfare intervention than white children³⁹ and that poor children, who are disproportionately African-American, are also far more likely to be subject to intervention than children who are not poor.⁴⁰ For example, in 2008, while African-American children

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³⁶ For a concise description of these phenomena as they impact African American women in particular, see Geneva Brown, The Intersectionality of Race, Gender and Reentry: Challenges for African American Women, THE AMERICAN CONSTITUTIONAL SOCIETY FOR LAW AND POLICY (Nov. 2010), http://www.acslaw.org/files/Brown%20issue%20brief%20-%20Intersectionality.pdf. On the issue of racial disproportionality in the criminal justice system, see generally ALEXANDER, supra note 75.
³⁷ ROBERTS, SHATTERED BONDS, supra note 80, at viii.
³⁸ Id. (emphasis omitted).
⁴⁰ EICHNER, supra note 2, at 120-21.
were only 14% of the total population, they were 31% of the children in foster care. It is also beyond dispute that African-American children and African-American families fare far worse than their white counterparts once they come to the attention of child welfare authorities. As Roberts systematically chronicles in Shattered Bonds, black children are more likely to be separated from their parents, spend more time in foster care, and receive inferior services. Although it is difficult to capture the extraordinary presence of child protection agencies in the lives of poor Black families, the fact at the time Roberts wrote that “[o]ne out of twenty-two Black children in New York City [was] in foster care” and one out of ten children in the low income neighborhoods of Central Harlem was in foster care gives some sense of the incredible depth of this presence and its impact on these communities.

As to the criminal justice system, although many have long documented the extraordinary negative impact of the War on Drugs and hyper-incarceration on poor African-American communities, Michelle Alexander’s The New Jim Crow has captured public imagination on this issue as perhaps no other work has before it. Paralleling Roberts’s work on the way that the child welfare system targets African American communities, Alexander persuasively argues that the criminal justice system writ large (including the full gamut of systems from over-policing in poor African-American neighborhoods, through prosecution and plea bargaining, incarceration, and post-conviction collateral consequences) “creates and maintains racial hierarchy much as earlier systems of control did. Like Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race.” It is in part through the mechanisms of regulatory intersectionality that the social welfare systems described below feed negative information about poor women and children out of the already punitive social welfare setting into these even more harmful and punitive systems.

III. REGULATORY INTERSECTIONALITY

To examine in detail the interactions (or intersections) between social welfare systems and even more punitive systems, this article focuses on two specific examples. In the first example pregnant women seeking prenatal care find themselves and their children subject to often coerced or non-consensual drug testing and, as a result of that testing, find themselves subject to child welfare and criminal justice interventions. In the second example, welfare

91. Addressing Racial Disproportionality, supra note 89, at 3 tbl. 2.
92. ROBERTS, SHATTERED BONDS, supra note 80, at 9.
93. Id.
94. ALEXANDER, supra note 75, at 13.
applicants are subject to drug testing as a condition of receiving public benefits and, as the analysis shows, not only risk non-receipt of subsistence level benefits but are also vulnerable to child welfare and criminal interventions. These examples are highlighted in detail here because of the relative ease of tracing the legal and structural mechanisms that facilitate this process. Having said that, it is clear that the phenomenon of intersecting systems that escalate punishment in poor communities is broader than these two examples. For example, public housing residents are subject to extraordinary surveillance, which can lead not only to eviction but also to criminal prosecution. Similarly, the close and continuous interactions between schools and the juvenile justice system that make up the school-to-prison pipeline could also be described and examined through this lens. Nonetheless, because of the specificity with which one can trace the intersecting regulatory systems, the two examples provide a particularly clear sense of the legal and regulatory mechanisms that facilitate escalating punishment.

A. Seeking Prenatal and Pregnancy Care in Public Health Facilities: Drug Testing, Child Protection Interventions, and Criminal Prosecutions

Poor women seeking health care during the course of pregnancy face a set of systems that quite clearly demonstrate the phenomenon of regulatory intersectionality. The program at the center of the 2001 Supreme Court decision in Ferguson v. City of Charleston provides an apt example. In Ferguson, the Court addressed the constitutionality of a drug testing program established by a task force of police and public hospital employees in Charleston, South Carolina. Under the program, women who sought prenatal care or gave birth at a particular state hospital were drug tested without their knowledge or consent if they met one of nine specified, facially race- and class-neutral criteria. If a woman tested positive for cocaine, she was subject to prosecution for crimes such as simple possession of a controlled substance, unlawful distribution to a minor, and endangering the welfare of a child. Over the course of its implementation, the program took on various forms, sometimes offering the women a chance to avoid prosecution if they enrolled in treatment programs. Ten women who received care at the public hospital were subject to drug tests, and were subsequently prosecuted, challenged the program on the basis that it


96. Ferguson, 532 U.S. at 71. The nine criteria were: no prenatal care, late prenatal care after 24 weeks' gestation, incomplete prenatal care, abruptio placentae, intrauterine fetal death, preterm labor of no obvious cause, intrauterine growth retardation of no obvious cause, previously known drug or alcohol abuse, and unexplained congenital abnormalities. Id.

97. Id. at 72-73.

98. Id. at 72.
violated their rights under the Fourth Amendment. The Court held that the tests were searches under the Fourth Amendment,99 and that they violated the "general prohibition against nonconsensual, warrantless, and suspicionless searches."100

It may be true that the program at issue in Ferguson was a product of the much-hyped phenomenon of "crack babies"101 and was perhaps, in the overt and targeted nature of the collaboration between the police and hospital, sui generis. Nevertheless, across the country today, the statutory and regulatory frameworks that govern confidentiality of health information, child protection agencies, and criminal justice agencies provide ample opportunities to facilitate the gathering and transmission of data about drug use by pregnant women out of the public health setting and into child welfare and criminal systems. Despite some protections embedded in the laws governing the conduct of health care providers, significant research indicates that information often does in fact flow from the public health setting into the child welfare and criminal justice setting despite the law. These intersecting regulatory systems thus provide a clear example, in a generic social welfare setting, of regulatory intersectionality.

1. Drug Testing: The Basic Legal Framework

Although drug testing in a variety of contexts is becoming increasingly commonplace,102 when looking particularly at the drug testing of pregnant women in a health care setting, it is crucial to remember that, except in very narrow circumstances, information obtained by health professionals in the course of providing medical care must be kept confidential and can only be disclosed with the patient's consent.103 In addition, as noted by the Supreme Court in Ferguson, "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent."104 Finally, as the Supreme Court noted in Ferguson, unlike in the welfare setting or in an employment setting, a pregnant woman seeking health

99. Id. at 76.
100. Id. at 86.
101. See infra notes 128-129 and accompanying text.
102. See, e.g., Craig M. Cornish & Donald B. Louria, Mass Drug Testing: The Hidden Long-Term Costs, 33 WM. & MARY L. REV. 95, 95 (1991) ("Widespread drug testing in the American workplace began with President Ronald Reagan's enactment of Executive Order 12,564[]."); Mary Pilon, Drug-Testing Company Tied to N.C.A.A. Stirs Criticism, N.Y. TIMES, Jan. 5, 2013, at SP1 (discussing the proliferation of drug testing in professional and collegiate sports); Mary Pilon, Middle Schools Add a Team Rule: Get a Drug Test, N.Y. TIMES, Sept. 23, 2012, at A1 (discussing middle schools that now test for drugs).
104. Ferguson, 532 U.S. at 78.
care in a public health setting is not seeking some benefit conditioned on passing a drug test. The woman is seeking medical care, the quality of which has always depended on a relationship of trust between doctors and patients.

In the context of drug testing pregnant women, these basic rules of law are complicated by a variety of factors. First, in the vast majority of circumstances, once a pregnant woman goes to a hospital to give birth and signs a generalized consent form, health care professionals can legally order virtually any medical test that they believe to be medically indicated to diagnose and treat the patient. Second, in the context of pregnancy and childbirth, there are valid medical concerns for the health of both the mother and the fetus during pregnancy and the child after birth. It is certainly possible that the interests of the mother and fetus or child may diverge during the course of treatment. Another complicating factor has to do with laws concerning the reporting of suspected child abuse. Health professionals are, in the vast majority of jurisdictions, mandatory reporters. Although child abuse reporting laws vary significantly by state, it is always true that health care professionals who see evidence of abuse or neglect have a duty to report that to child protection agencies. Finally, in every state, child abuse is a crime.

These final two facts bear repeating and emphasis. In virtually every jurisdiction, health care professionals are under a duty to report suspected

105. In discussing the constitutionality of the search at issue in Ferguson, the Court distinguished the Ferguson facts from the four previous settings in which the Court had ruled on the issue of whether a drug test violated the Fourth Amendment. The four cases involved "drug tests for railway employees involved in train accidents, Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), for United States Customs Service employees seeking promotion to certain sensitive positions, Treasury Employees v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), and for high school students participating in interscholastic sports, Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), [and]... for candidates for designated state offices. Chandler v. Miller, 520 U.S. 305, 117 S.Ct. 1540, 137 L.Ed.2d 513 (1997)." Ferguson, 532 U.S. at 77. As the Court explained, in those cases, "there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties. The use of an adverse test result to disqualify one from eligibility for a particular benefit, such as a promotion or an opportunity to participate in an extracurricular activity, involves a less serious intrusion on privacy than the unauthorized dissemination of such results to third parties." Id. at 77-78.


107. Elizabeth A. Warner, Robert M. Walker & Peter D. Friedmann, Should Informed Consent be Required for Laboratory Testing for Drugs of Abuse in Medical Settings?, 115-1 AM. J. MEDICINE 55 (2003) (footnote omitted) ("Currently, explicit informed consent is not required for clinical drug testing. In many cases, such as trauma or overdose, explicit consent is not possible. However, even when substance abuse is suspected and the patient is able to provide consent, clinicians often order drug testing without the patient's knowledge and consent."). See also infra note 121 and accompanying text.

108. See infra note 224.

109. See infra note 224.

110. See infra note 224.

abuse. And in every jurisdiction, people can be prosecuted for various crimes that constitute child abuse. Given this long-standing, pre-existing legal background, arguably we need no other law or regulatory scheme in place either to create a duty to report or for prosecutors to have the authority to prosecute. In light of this, the remarkable mechanisms put in place to facilitate reporting and the legal contortions engaged in by prosecutors and some appellate courts to allow for criminal prosecution\textsuperscript{112} constitute a set of legal mechanisms to put society’s finger on the scale in favor of child protection and criminal interventions and against the health care and privacy interests of the women involved. Thus, in this example, the mechanisms of regulatory intersectionality serve to facilitate the imposition of escalating punishment on the poor, disproportionately African American women who seek assistance. This finger on the scale is part and parcel of the hyperregulatory state.

2. Drug Testing of Pregnant Women and Their Children: The Legal Framework and Hospital Practice

Despite the basic legal framework concerning patient autonomy and informed consent, a combination of legal rules and medical practices make it nearly impossible for some pregnant women to both obtain care and avoid drug testing. Moreover, as discussed extensively below, the discretionary framework established around drug testing leads to disproportionate punitive impacts on poor African-American women.\textsuperscript{113}

In two states, Iowa\textsuperscript{114} and Kentucky,\textsuperscript{115} health care providers are authorized by statute to test women and/or infants for exposure to controlled substances without informed consent. The Iowa provision states:

If a health practitioner discovers in a child physical or behavioral symptoms of the effects of exposure to cocaine, heroin, amphetamine, methamphetamine, or other illegal drugs, or combinations of derivatives thereof, which were not prescribed by a health practitioner, or if the health practitioner has determined through examination of the natural mother of the child that the child was exposed in utero, the health practitioner may perform or cause to be performed a medically relevant test. . . on the child.\textsuperscript{116}

\textsuperscript{112} See infra notes 166-168 and accompanying text.
\textsuperscript{113} See infra Subsection III(A)(6).
\textsuperscript{114} IOWA CODE ANN. § 232.77 (West 2013).
\textsuperscript{115} KY. REV. STAT. ANN § 214.160 (West 2013).
\textsuperscript{116} IOWA CODE ANN. § 232.77 (West 2013) (emphasis added).
Minnesota and Louisiana go even further, mandating, as opposed to authorizing, a test on certain newborns. The Minnesota statute provides that:

[a] physician shall administer to each newborn infant born under the physician’s care a toxicology test to determine whether there is evidence of prenatal exposure to a controlled substance, if the physician has reason to believe based on a medical assessment of the mother or the infant, that the mother used a controlled substance for a nonmedical purpose during the pregnancy.

Although one might assume, from the lack of legislation authorizing testing without consent in the vast majority of states, that in most circumstances newborns are not tested without the mother’s consent, in practice there is evidence to suggest that hospitals either routinely test without explicit consent or use the threat of child protective interventions as a means to pressure women to consent. When a pregnant woman goes to a hospital to give birth, she is generally asked to sign a generalized consent form giving health care providers authorization to treat both the mother and the eventual newborn child. Although practices developed in the field of obstetrical care suggest that no test should be run on a pregnant woman without explicit consent to that test, there is substantial evidence to suggest that hospitals routinely test pregnant women without their consent. In addition, although the law continues to require informed consent, protocols for obtaining consent are set at the hospital level. Crucial decisions, including for example whether a general consent to testing includes drug testing or whether specific consent to drug testing is required instead, are left to hospitals to determine.

117. MINN. STAT. ANN §626.5562 (West 2013); LA. CHILD. CODE ANN. art. 610 (2013).
118. MINN. STAT. ANN §626.5562 (West 2013) (emphasis added). Minnesota law mandates testing of pregnant women pursuant to similar rules. Pursuant to the same statutory provision, “A physician shall administer a toxicology test to a pregnant woman under the physician’s care or to a woman under the physician’s care within 8 hours after delivery to determine whether there is evidence that she has ingested a controlled substance, if the woman has obstetrical complications that are a medical indication of possible use of a controlled substance for a nonmedical purpose.” Id.
119. See infra notes 123-127 and accompanying text.
122. A 2009 guideline issued by the Dartmouth-Hitchcock Medical Center, Guidelines for Care of the Known or Suspected Drug (Illicit Substance) Exposed Newborn, provides an example of such a
Despite legal mandates and best practice suggestions, it appears that both pregnant women and their newborn children are often tested without notice or consent. A study funded by the Robert Wood Johnson Foundation as part of the Substance Abuse Policy Research Program and conducted at the National Abandoned Infants Assistance Resource Center at Berkeley examined a variety of laws, policies and practices across eight large urban areas in 2005. The study authors surveyed public and private hospital personnel in each of the eight cities and interviewed hospital personnel on a variety of topics. Hospital staff were asked questions about notification and consent for drug testing of both mothers and newborns. As to informed consent for the testing of the mother, 87% of hospital respondents told the researchers that the mother would be informed about her own test and 83% told them that the mother would be informed about a test of her child. As to consent, however, the data were quite different.

If the 34 hospital employees who responded, 41% stated that consent is not required for mothers to be tested, 41% reported that specific consent is required, and 18% reported that consent is included in the hospital’s general admission consent. In contrast, a greater number reported that consent is not required for the newborn to be tested: 66% of the respondents indicated that consent is not required for the newborn to be tested; 23% reported that consent is not required for the newborn if the test is medically necessary, and 11% noted that the consent to test the newborn is included in the hospital’s general consent. It is important to note that no respondents reported that a mother’s consent is explicitly required to test a newborn.

Moreover, while some hospitals clearly do discuss drug testing of both mothers and newborns with their patients, women face substantial risks if they choose not to consent. For example, internal guidelines issued by the Dartmouth-Hitchcock Medical Center in New Hampshire specify that if a parent refuses drug screening for their infant, the need for the test is documented in that mother’s medical record and “[t]he parent’s refusal of drug screening is reported to the state Child Protective Services . . . as being policy. Under this guideline, “[p]arental permission is not required for newborn drug screening, but is recommended. The care agreement signed on admission serves as consent to testing.” Dartmouth-Hitchcock Medical Center, Guidelines for Care of the Known or Suspected Drug (Illicit Substance) Exposed Newborn (on file with author).

123. Drescher-Burke & Price, supra note 121.
124. The study authors interviewed staff from twenty-nine hospitals across the eight cities studied. These included ten public and four private for-profit and twelve private non-profit hospitals. They conducted a total of thirty-nine interviews of hospital staff. Id. at 6. Presumably to preserve the anonymity of their research subjects, the report does not reveal the names of the urban areas studied.
125. Id. at 9.
potentially 'neglectful.' Hospital practice indicates concurrence with such policies. For example, in a model form issued by the West Virginia Perinatal Partners, the pregnant woman, while clearly being given the right to refuse a drug test for herself, is told,

If you do not agree to testing when it is recommend by your doctor or midwife, it may result in your baby being tested after birth if the baby’s medical provider has reason to be medically concerned for the baby’s health. If you newborn is tested and the test results are positive for addictive substances (drugs/alcohol), [Child Protective Services] will be notified.

Thus, for all intents and purposes, pregnant women who enter into a hospital setting at birth and who, for whatever reason, are determined to have potentially exposed their fetuses to controlled substances, have little means to avoid drug testing.

3. The Consequences Within the Initial Social Welfare System that Results from the Drug Testing Information

A variety of researchers agree that the cultural hysteria around drug addicted newborns, both at the height of the “crack baby” scares in the mid 1980s and today, misconstrue the complex relationship between drug use and the health of children exposed in utero to controlled substances. For example, as Lynn Paltrow and Jeanne Flavin have noted, the U.S. Sentencing Commission concluded that “[t]he negative effects of prenatal cocaine exposure are significantly less severe than previous believed’ and those negative effects ‘do not differ from the effects of prenatal exposure to other drugs, both legal and illegal.” Nevertheless, it is certainly true in some circumstances that the mother’s addiction so dominates her choices that it is appropriate to remove her child temporarily or permanently from her care. In addition, where appropriate, respectful, comprehensive and affordable services are available to support women in facing addiction and in addressing the poverty-related conditions that make it hard to parent, referring women to treatment and support services might make a great deal of sense. But what does

126. Guidelines for Care of the Known or Suspected Drug (Illicit Substance) Exposed Newborn, supra note 122 (alteration in original).
127. Model Informed Consent, supra note 120.
not make sense, and what is manifest in the systems described below, is a focus not on genuine support but on the facilitation of punishment that far too often leads to devastating consequences for both the parent and the child.

There is no question that the possibility that a drug-addicted pregnant woman will be drug tested and face both intervention by child welfare agencies and criminal prosecution has significant negative consequences for both the woman and her child in terms of access to quality health services. First, and most importantly, punitive policies deter pregnant women from seeking care both for their addiction and for their pregnancy. As detailed below, South Carolina has consistently wielded the mechanisms of the child welfare and criminal justice systems against pregnant women. The impact on pregnant women’s utilization of drug treatment programs is disturbing. In the year following a decision by the South Carolina Supreme Court to treat a viable fetus as a “child” for the purposes of South Carolina’s child abuse and endangerment statute, “drug treatment programs in the state experienced as much as an 80% decline in admission of pregnant women.”

In addition, as noted by Seema Mohapatra in her article advocating public health as opposed to criminal responses to drug use during pregnancy, organizations as wide-ranging and respected as the American Medical Association, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, and the American Public Health Association have raised serious concerns that the emphasis on punitive responses to drug use during pregnancy results in less utilization of vital prenatal care. This is of particular concern for poor women of color. Women in poverty already face substantial barriers to accessing comprehensive prenatal care. For example, the Medicaid program, which provides health-care coverage to poor pregnant women, varies significantly by state in terms of the income guidelines,
excluding a significant portion of poor pregnant women.\textsuperscript{135} In addition, depending on the state, coverage for prenatal care can be limited. For example many states do not provide coverage for prenatal care until several weeks into a pregnancy.\textsuperscript{136} Given the importance of prenatal care to maternal and child health, creating an additional substantial disincentive to access care has clear negative impacts on both women and children.


Despite the emphasis within the health-care profession on patient confidentiality, state and federal law, as well as widespread practice, facilitate the transfer of information out of the public health system and into the child protection and criminal justice systems. On the federal level, the Child Abuse Prevention and Treatment Act (CAPTA) provides a significant amount of funding to state child welfare programs.\textsuperscript{137} In order to participate in the program and receive federal funds, each state must submit a plan for the administration of its CAPTA program that complies with a variety of federal requirements.\textsuperscript{138} Among other conditions, states must put in place policies and procedures to address the needs of infants “born with and identified as being affected by illegal substance abuse . . . including a requirement that health care providers involved in the delivery or care of such infants notify the child protective services system of the occurrence of such condition in such infants.”\textsuperscript{139}

State law varies significantly both in how health care providers are to identify substance abuse and the criteria they are to use in making a determination about whether to report suspected substance abuse. In addition, there is some evidence to suggest that, despite variations in state law, in practice, hospitals usually report women to child protective agencies whenever a drug test comes back positive.


\textsuperscript{136} INST. OF MEDICINE COMM. TO STUDY OUTREACH FOR PRENATAL CARE, PREGNATAL CARE: REACHING MOTHERS, REACHING INFANTS 59 (Sarah S. Brown ed., 1988).


State laws vary significantly as to when a health-care practitioner can and must make a report to a child protection agency. These reporting laws tend to vary along two basic questions: whether a positive test result itself is a sufficient basis on which to make a report, and whether the report is voluntary or mandatory. Three states (Missouri, Illinois, and Kentucky) allow but do not require reporting of a positive test result. Six states (Alaska, Maine, Massachusetts, Montana, Nevada, and Pennsylvania) require reporting based upon evidence of something more than just a positive test result. For example in Alaska, providers must report after making a determination that the child is in some way “adversely affected by a controlled substance.” In seven states (Arizona, Iowa, Louisiana, Michigan, Minnesota, Oklahoma, and South Carolina), the report is required based solely on the positive test. It is important to keep in mind that, as is often the case with occasional alcohol use during pregnancy, a positive test does not necessarily mean any harm has occurred. Despite this, in the aforementioned states, any positive test result leads to a report to the child protective agency. Finally, four states (South Carolina, Colorado, Maryland, and Wisconsin) legislate not just in the area of when a report should be made, but also by defining certain acts as abuse per se and allowing for the detention of a child without a court order. For example, in Colorado, a child can be detained without a court order “when a newborn child is identified... as being affected by substance abuse.” The South Carolina statute is without question the most aggressive. That statute creates a presumption, “that a newborn child is an...

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140. MO. REV. STAT § 191.737 (West 2013).
141. ALASKA STAT. ANN. § 47.17.024(a) (West 2013).
142. KY. REV. STAT. ANN. § 416.160(3) (West 2013).
144. ME. REV. STAT. tit. 14 § 4011-B(1) (West 2013).
145. MASS. GEN. LAWS ch. 119 § 51A(b)(a) (West 2013).
146. MONT. COMP. LAWS § 41-3-201(3) (West 2013).
147. NEV. REV. STAT. ANN. § 432B.220(3) (West 2011).
148. 23 PA. CONS. STAT. ANN. § 6386 (West 2013).
149. ALASKA STAT. § 47.17.024.
150. ARIZ. REV. STAT. ANA. §§ 13-3620(E) (West 2013).
151. IOWA CODE ANN. § 232.77(2) (West 2013).
152. LA. CHILD. CODE ANN. art. 610 (2013).
154. MINN. STAT. ANN. § 626.5561(1) (West 2013).
156. S.C. CODE ANN. §§ 63-7-1660(F)(1) (West 2013).
157. See supra note 129 and accompanying text.
158. S.C. CODE ANN. §§ 63-7-1660(F)(1) (West 2013).
159. COLO. REV. STAT. ANN. §§ 19-3-401(3)(b-c) (West 2013).
160. MD. CODE ANN., CTS. & JUD. PROC. § 3-818 (West 2013).
161. WIS. STAT. ANN. § 48.02(11) (West 2013).
162. COLO. REV. STAT. ANN. §§ 19-3-401(3)(c)(d) (West 2013).
abused or neglected child . . . and that the child cannot be protected from further harm without being removed from the custody of the mother" if the infant or mother tests positive for a non-prescribed controlled substance or if the mother or any child she gave birth to in the past tested positive for a controlled substance.163

ii. Reporting in Practice

Despite the significant variation in state law described above, and the clear suggestion in several states that reporting requires some evidence of abuse beyond just a positive test result, in practice, a positive test result alone often results in a report of abuse to the child welfare agency. The Drescher-Burke and Price study of policies and procedures concerning substance-exposed newborns in eight urban centers reveals that “[r]egardless of the state’s laws, most (87%) of the 39 respondents indicated that all identified [substance-exposed newborns] are reported to [child protective services]. A positive test alone appears to trigger a report in most cases.”164 This was true across the eight jurisdictions examined, and despite significant variations in state law.

5. Pregnancy and Childbirth at the Intersections: Intervention by the Criminal Justice System

The use of the criminal justice system to punish women for exposing their unborn children to controlled substances is among the most disturbing examples of the way regulatory intersectionality facilitates escalating punishment. To date, no state has passed legislation explicitly criminalizing the transmission of drugs in utero. Despite this lack of explicit legislation, prosecutors have attempted to contort existing criminal laws to punish drug use during pregnancy by charging women with crimes such as felony endangerment, criminal child neglect, delivering drugs to a minor, assault, and

163. S.C. CODE ANN. §63-7-1660(F)(1) (West 2013). In full, the statutory provision states that, “[i]t is presumed that a newborn child is an abused or neglected child as defined in Section 63-7-20 and that the child cannot be protected from further harm without being removed from the custody of the mother upon proof that:
(a) a blood or urine test of the child at birth or a blood or urine test of the mother at birth shows the presence of any amount of a controlled substance or a metabolite of a controlled substance unless the presence of the substance or the metabolite is the result of medical treatment administered to the mother of the infant or the infant, or
(b) the child has a medical diagnosis of fetal alcohol syndrome; and
(c) a blood or urine test of another child of the mother or a blood or urine test of the mother at the birth of another child showed the presence of any amount of a controlled substance or a metabolite of a controlled substance unless the presence of the substance or the metabolite was the result of medical treatment administered to the mother of the infant or the infant, or
(d) another child of the mother has the medical diagnosis of fetal alcohol syndrome.” Id.
homicide. In these prosecutions, as a general matter, prosecutors charge women with crimes against the fetus as a child or person and then seek to prove that the fetus at issue counts as a child or person as contemplated by the statute. While these prosecutions have led to punishment through plea negotiations, they generally fail when fully litigated. With only two exceptions, every appellate court to consider the issue has overturned these convictions as falling outside the conduct contemplated by these statutes. Despite the lack of explicit legislation and the spate of negative court decisions, hundreds of women have been charged with criminal offenses arising from their drug use during pregnancy.

The most comprehensive study to date on state actions in which "a woman's pregnancy was a necessary factor leading to attempted and actual deprivations of the woman's physical liberty" was conducted by Lynn M. Paltrow and Jeanne Flavin. Paltrow and Flavin comprehensively reviewed 413 cases that took place between 1973 and 2005, 354 of which involved "efforts to deprive pregnant women of their liberty . . . through the use of existing criminal statutes intended for other purposes."

165. Mohapatra, supra note 133, at 248-52; Flavin & Paltrow, supra note 128, at 233.
167. In Whitner v. State, 492 S.E.2d 777 (1997), the South Carolina Supreme Court upheld the prosecution of Cornelia Whitner for criminal child neglect. Ms. Whitner’s son was born in good health but tested positive for cocaine at birth. The Court held that the fetus is a viable “person” for the purposes of the criminal child neglect statute and upheld her conviction. To date this appears to be the only case that has so held. See also Ex parte Ankrom, 2013 WL 135748, 1 (2013) (holding that the term “child” found within Alabama’s child endangerment statute includes a fetus).
168. Ex parte Ankrom, 2013 WL 135748, 17. For cases so holding, see, for example, Cochran v. Kentucky, 315 S.W.3d 325 (Ky. 2010) (holding that an indictment charging a woman for first-degree wanton endangerment based on her ingestion of illegal drugs during pregnancy was invalid on its face); State v. Aiwohi, 123 P.3d 1210 (Haw. 2005) (holding that a mother who smoked crystal meth, leading to the death of her unborn son, could not be prosecuted for manslaughter); State v. Cervantes, 223 P.3d 425 (Or. App. 2009) (holding that ingesting drugs during pregnancy was not reckless endangerment); Ex parte Perales, 215 S.W.3d 418 (Tx. App. 2007) (holding that a controlled substance entering a child through the umbilical cord is not the “knowing delivery” of that substance to the child).
169. Paltrow & Flavin, supra note 166, at 299. See also Flavin & Paltrow, supra note 128, at 233 (“National Advocates for Pregnant Women has ... documented hundreds of known cases in at least 40 states where pregnant women who are identified as drug users have been arrested.”).
170. Paltrow & Flavin, supra note 166, at 321. In addition to prosecutions, the 413 cases included other forms of forced detention including detentions in hospitals, mental institutions, and treatment programs, as well as forced medical interventions such as surgery. Id. at 301. The study argues that, due to the extraordinary difficulty in obtaining data about these forced interventions and prosecutions, this figure represents a substantial undercount of those subject to prosecution for crimes involving their pregnancies. Id. at 303-05.
i. The Mechanisms of Reporting: From the Health Care Setting to Child Welfare and Law Enforcement

Despite the prevailing weight of judicial opinions holding that these prosecutions are not lawful, in January of 2013, the Alabama Supreme Court held in Ex parte Ankrom that the term “child” found within Alabama’s child endangerment statute included a fetus. In so holding, the court upheld the convictions of Hope Ankrom and Amanda Kimbrough based on their use of controlled substances during their pregnancies. This case, like its counterpart in South Carolina, raises a whole host of concerns related to reproductive justice. For the purposes of this article, however, what is striking is that the facts in both prosecutions demonstrate the phenomenon of regulatory intersectionality. In the Ankrom case, for instance, the parties stipulated to the following facts:

On January 31, 2009, the defendant, Hope Ankrom, gave birth to a son, [B.W.], at Medical Center Enterprise. Medical records showed that the defendant tested positive for cocaine prior to giving birth and that the child tested positive for cocaine after birth. . . . Department of Human Resources worker Ashley Arnold became involved and developed a plan for the care of the child. During the investigation the defendant admitted to Ashley that she had used marijuana while she was pregnant but denied using cocaine. Medical records from her doctor show that . . . she had tested positive for cocaine and marijuana on more than one occasion during her pregnancy.

In this case, the prosecution was facilitated by the drug tests conducted by health-care providers both during and after the pregnancy, the referral to child protective services, the collection of information by health-care and child-protective service staff, and the subsequent use of that information in the criminal prosecution of Ms. Ankrom. The facts in Ms. Kimbrough’s prosecution reveal the same set of intersecting regulatory mechanisms. As recited by the Alabama Supreme Court, in Ms. Kimbrough’s case,

[t]he Colbert County Department of Human Resources (‘DHR’) was notified regarding Kimbrough’s testing positive for methamphetamine and Timmy’s death, and Kimbrough’s other two children were temporarily removed from her home and placed with Kimbrough’s mother. A DHR social worker spoke with Kimbrough regarding a safety plan for her children on two occasions. During one of those conversations, Kimbrough admitted that she had smoked

172. Id.
methamphetamine with a friend three days before she had experienced labor pains. In July 2008, after having determined that the children would be safe in Kimbrough’s home, DHR returned Kimbrough’s children to her custody.173

Thus, in Kimbrough’s case too, the information about drug use started with the health-care system, was transmitted to the child protective agency, and was ultimately crucial to support the prosecution. Kimbrough’s facts are particularly striking in that the purpose of the conversation between Kimbrough and the child protection worker was ostensibly benevolent. According to the court, the child protection agency held out that they were interviewing Kimbrough for the purpose of creating a “safety plan” for her family. It was during those conversations that Kimbrough admitted to drug use during her pregnancy. Moreover, the agency ultimately concluded that Kimbrough’s home was safe for her two other children, and those children were returned to her care. Despite this, the admission of drug use by Kimbrough was ultimately utilized not to facilitate the safety of her children but to prosecute Ms. Kimbrough and sentence her to the mandatory statutory minimum penalty: ten years in prison.

Paltrow and Flavin’s study confirms that the pattern revealed in the Anrkom case is characteristic of the mechanisms of regulatory intersectionality. Paltrow and Flavin traced the “mechanisms by which the case came to the attention of police, prosecutors and courts.”174 In 112 of the 413 cases examined, disclosure came from “health care, drug treatment or social work professionals.” In 47 cases, “health care and hospital-based social work professionals disclosed confidential information about pregnant women to child welfare or social service authorities, who in turn reported the case to the police.”175 As Paltrow and Flavin describe it, “[flar from being a bulwark against outside intrusion and protecting patient privacy and confidentiality, we find that health care and other ‘helping’ professionals are sometimes the people gathering information from pregnant women and new mothers and disclosing it to police, prosecutors and court officials.”176

6. The Disproportionate Impact on Poor African-American Women

At every step along the way, the intersectional and escalating punitive impact of drug testing of pregnant women falls disproportionately on poor African-American women.177

173. Id. at 4.
174. Paltrow & Flavin, supra note 166, at 326.
175. Id. at 326-27.
176. Id. at 327.
177. Although it would certainly be important to trace these phenomena for other communities of color, I focus on the African-American community for two reasons. First, the majority of available data
As detailed above, the process of regulatory intersectionality begins with the decision to administer a drug test to the mother or infant. A recent study tested whether race is used as a factor in deciding whether to test newborns when detailed protocols that do not include race as a screening factor are already in place to guide the decision to test the newborn.178 After examining the records of 2,121 mother-infant pairs, the researchers discovered that, despite the existence of detailed protocols dictating when testing should occur, 35.1% of infants born to black mothers who met the screening criteria were tested. In contrast, only 12.9% of infants born to white women who met the screening criteria were tested.179 The researchers therefore concluded that “race was used as an independent criterion for screening [for illicit drugs] even at an institution in which an established, apparently objective, screening protocol that did not include race as a factor was in place.”180

Other researchers have focused on the rate of referral of children to child protective agencies. A study conducted in 1990 by Chasnoff et al. as well as a more recent 2012 study conducted by Sarah Roberts and Amani Nuru-Jeter provide compelling data on the extent of disproportionality in the rate of referrals. Chasnoff et al. sought to determine the rate of drug use among pregnant women throughout public and private health care facilities and to explore whether the rates of reporting drug test results correlated with the rates of drug use. They conducted the study shortly after Florida adopted a statewide policy mandating “the reporting [to the Department of Health] of births to mother who used drugs or alcohol during pregnancy.”181 Pursuant to state policy, a positive toxicology screen from either the mother or the child was sufficient to require such a report.182

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.”183 In total they obtained samples from 715 women. The results across race and class were striking. Of the 715 women, 14.8% tested positive for alcohol, cannabinoids (marijuana), cocaine or opiates. A slightly higher percentage of

has more detailed and reliable information for African-Americans as opposed to other groups. Second, given the targeting of social welfare, child welfare, and criminal justice mechanisms at poor African-American communities in particular, this analysis is an important place to start.

179. Id.
180. Id. at 1383. The researchers also found that “criteria indicating screening should be performed seemed to be selectively ignored . . . for infants born to white women.” Id.
182. Id. at 1203.
183. Id.
white women (15.4%) than black women (14.1%) tested positive for these substances. 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."²⁸⁴ Despite essentially equivalent rates of positive toxicology screens across race and class, only 1.1% of white women were reported, whereas 10.7% of black women were reported: "[T]hus, a black woman was 9.6 times more likely than a white woman to be reported for substance abuse during pregnancy."²⁸⁵

Roberts and Nuru-Jeter's study suggests similar findings. Relying on a variety of government data collected for administrative reasons, Roberts and Nuru-Jeter examined data from providers in California that had implemented universal testing of pregnant women for drug and alcohol use.²⁸⁶ They sought to determine whether drug and alcohol use varied by race and whether there were disparities in reporting by race. They concluded that, "[d]espite Black women having alcohol-drug use identified by prenatal providers at similar rates to White women and entering treatment more than expected, Black newborns were four times more likely than White newborns to be reported to [Child Protective Services] at delivery."²⁸⁷ Moreover, the study authors also noted that, due to some differences among the data sets that they drew on in order to reach their findings, it is likely that African-American children were reported at even more disproportionate rates than their data suggests.²⁸⁸

It is also the case that the criminal prosecution of pregnant women for crimes arising from their pregnancies falls disproportionately on poor African-American women. Of the 368 women²⁸⁹ in the Paltrow and Flavin study for which the race of the woman was available, 59% of those women were women of color and 52% were African-American.²⁹⁰ African-American women were particularly overrepresented in the South, and were also more likely to be more harshly prosecuted. Of the 354 cases involving prosecutions, 295 were felony

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²⁸⁴. Id. at 1204.
²⁸⁵. Id.
²⁸⁷. Id. at 3.
²⁸⁸. Id. at 14-15 (explaining that, due to some variations in information available in the multiple data sets they used to reach their conclusions, "comparison of racial distributions of identification data (including the data from the private provider) and reporting data would be expected to show an even greater overrepresentation of Black women among those reported to CPS than among those identified through screening in prenatal care.").
²⁸⁹. Paltrow & Flavin's study focused on 413 cases in which "a woman's pregnancy was a necessary factor leading to attempted or actual deprivations of the woman's physical liberty." Paltrow & Flavin, supra note 166, at 299. Of those 413, data on the race of the woman involved was only available for 368. Id. at 311.
²⁹⁰. Id.
prosecutions.191 While 71% of the white women were charged with felonies, 85% of the African-American women were charged with felonies.192 In addition, 71% of the women in the study qualified for indigent defense, a clear indication that these state interventions disproportionately affect poor women.193

B. Applying for Welfare: Drug Testing, Child Protection Interventions, and Criminal Prosecutions

In recent years, Congress and state legislatures across the country have considered, and in seven states passed, legislation to condition the receipt of TANF benefits on consenting to and passing a drug test. In comparison to the research on pregnant women and drug use discussed above, we know very little about how these programs actually operate, whom they affect and how, and the extent and mechanisms of transmission of information from this part of the welfare system into the child protective and criminal systems. Although we do know in general that punitive policies in the welfare context tend to be targeted disproportionately at recipients of color,194 we do not have specific data to indicate that that this is occurring in welfare drug testing programs or at the intersections of those programs and other systems. This lack of information comes in part from the relative newness of these programs and in part from the lack of scholars from other disciplines that focus on these issues. Nevertheless, this article highlights this example for a few reasons. First, given the growing trend within state legislatures to institute drug testing as part of their welfare programs, the information below highlights how variations in how statutes are framed can matter a great deal for those who need welfare. To that extent, it gives some information to advocates trying to oppose or shape these programs. In addition, while the majority of scholarship to date on welfare drug testing has focused on the Fourth Amendment and unconstitutional conditions issues at play,195 this article highlights how, in this relatively new area of social welfare

191. Id.
192. Id. at 322.
193. Id. at 311.
194. See Hearing Series on Welfare Reform, Work Requirements on the TANF Cash Welfare Program: Hearing Before the Subcomm. on Human Resources of the H. Comm. on Ways and Means, 107th Cong. 60-69 (2001) (statement of Steve Savner, Senior Staff Att’y, Cir. for Law & Soc. Policy). National data suggests that both the outcome and the quality of service provision in welfare programs vary along race lines. For example, data measuring “leavers,” or households exiting welfare, in Illinois from June 1997 to June 1999 revealed racial disparities in the reasons for case closure: “A total of 340,958 cases closed . . . of which 102,423 were whites and 238,535 were minorities. Fifty-four percent of minority cases, but only 39 percent of white cases, closed because the recipient failed to comply with program rules.” Id. at 65. In addition, various studies indicate better treatment of white recipients than African-American recipients in regard to positive encouragement and assistance in job searches and provision of supportive assistance such as transportation help. Id.
policy, all the pieces are being put in place to use these systems to impose ever escalating punitive consequences on those who seek aid. In this sense, describing it in this way again provides fodder for those who seek grounds to expose the punitive nature of these programs. Finally, noting the way that regulatory mechanisms are being put in place to facilitate the imposition of ever-escalating consequences in this relatively new program provides further evidence of its significance as a key feature of how we govern through social welfare programs.

1. Welfare Drug Testing: Federal Authority and a Trend on the Rise

This legislative trend finds its roots in the devolution of welfare policy embodied in the 1996 welfare reform law. In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), legislation that fundamentally altered the domestic social safety net by eliminating the entitlement to cash assistance for needy families with dependent children, eliminating benefits for a wide range of lawful immigrants and, among other key elements, devolving significant authority for designing the newly-termed Temporary Assistance to Needy Families (hereinafter TANF) to the states. To guide states in exercising their newly-devolved authority, the legislation included a series of provisions permitting the states to include various features in their TANF program. For example, although the PRWORA generally bars receipt of TANF benefits to adults after five years, states are authorized to, and in fact have, significantly shortened that period of time.\textsuperscript{196} Similarly, the PRWORA includes a provision authorizing states to condition receipt of benefits under the TANF program to those who do not test positive for drugs. As the legislation states, “[n]otwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances.”\textsuperscript{197} Although in the several years directly following welfare reform, the focus of state activity around drug abuse was on screening, referral to treatment, and drug felony bans,\textsuperscript{198} in the last several years, there has been an increasing focus on drug testing in both TANF and other public benefit programs.


The trend toward conditioning receipt of public benefits on passing drug tests began in earnest late in 2009, when over twenty states proposed legislation. Over the course of the next several years, despite an unfavorable court ruling holding that suspicionless drug testing programs cannot survive scrutiny under the Fourth Amendment, states continued to try to enact this legislation. In 2010, at least twelve states proposed legislation mandating drug testing of welfare recipients. In 2011, bills were introduced in thirty-six states. In addition, twelve legislatures proposed drug testing for unemployment benefits and two cities, Chicago, Illinois and Flint, Michigan, proposed a program to ban those who fail a drug test from public housing. In 2012, at least twenty-eight states proposed such legislation. In addition, in 2012, Congress enacted a provision authorizing states to condition receipt of unemployment benefits, in some circumstances, on passing a drug test. Since the 2012 presidential election, legislators in at least four states have said they will introduce or have introduced bills. Today, seven states – Arizona, Florida, Missouri, Tennessee, Georgia, Ohio and Utah – have enacted welfare

199. Marchwinski v. Howard, 113 F. Supp. 2d 1134 (E.D. Mich. 2000), rev’d, 309 F.3d 330 (6th Cir. 2002), reh’g granted en banc, vacated, 319 F.3d 258 (6th Cir. 2003), aff’d by an equally divided court, 60 F. Appx. 601 (6th Cir. 2003). The state of Michigan was the first state to enact a suspicionless drug testing provision that led to denial of benefits. This program, which was enacted in 1999, was immediately challenged and enjoined by the District Court. The District Court held that Michigan’s suspicionless drug testing program violated the Fourth Amendment. On appeal, the Sixth Circuit initially reversed that opinion only to have the case accepted for hearing en banc. The en banc court split down the middle, with half of the justices voting for affirmance and half voting for reversal. The result in the case was therefore affirmative of the District Court’s opinion. Despite the fact that, for the purposes of the Michigan program the provisions are unconstitutional, the split between the judges and between the District and the original appellate bench that heard the case clearly indicate that the law in this area remains profoundly unsettled. More recently, the District Court in the Middle District of Florida preliminarily enjoined Florida’s suspicionless drug testing program. See Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011). The case is currently being appealed.


201. Id.


203. Drug Testing and Public Assistance, supra note 200 (“At least 28 states put forth proposals requiring drug testing for public assistance applicants or recipients in 2012.”).

204. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, sec. 2105, § 303, 126 Stat 156, 162-63 (2012) (allowing states to condition receipt of unemployment benefits on passing a drug test for any applicant who, “(i) was terminated from employment with the applicant’s most recent employer (as defined under the State law) because of the unlawful use of controlled substances; or (ii) is an individual for whom suitable work (as defined under the State law) is only available in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary of Labor).”)

drug testing programs that allow for partial or complete denial of benefits for refusing to take or failure to pass a drug test.206

Both the enacted and the vast swath of proposed legislation vary significantly on several key issues: the severity of the penalty imposed;207 the emphasis on sanction versus treatment;208 and crucially for the purposes of the Fourth Amendment, whether or not the state must have some reasonable suspicion before testing.209 States law and legislative proposals also vary as to what public benefits are included, ranging from proposals that limit testing to TANF to proposals that include TANF, Supplemental Assistance to Needy Families (formerly termed Food Stamps), unemployment and Medicaid.

2. The Penalty for Failing a Drug Test Within the TANF Program

Although each statute imposes a penalty on the applicant and/or the applicant’s dependent children for the applicant’s failure or refusal of the drug test, the penalties vary substantially. For example, in Arizona applicants who fail or refuse a drug screen are ineligible for benefits for one calendar year.210 In other states the penalties are progressive, based on the number of times one fails a drug screen. For example, in Georgia the first time one fails the applicant loses one month of benefits, but subsequent failed tests lead to progressively longer sanctions. In addition, some states will allow applicants to receive benefits if they enroll in or once they have completed drug treatment. For example, in Tennessee, if an applicant enrolls in drug treatment, they can receive benefits for six months while in treatment. If the applicant refuses treatment or is positive at the end of treatment, benefits are denied for at least six months. Similarly, in Oklahoma, if one enters treatment, the penalty can be reduced to from twelve months to six months without benefits. However, it is important to note that no state legislation creating drug testing mandates include provisions giving priority for drug treatment to welfare applicants nor

209. Compare MO. ANN. STAT § 208.027(1) (West 2012) (requiring that the Department of Social Services, “screen each applicant or recipient who is otherwise eligible for temporary assistance for needy families benefits under this chapter, and then test, using a urine dipstick five panel test, each one who the department has reasonable cause to believe, based on the screening, engages in illegal use of controlled substances . . .”) with GA. CODE ANN. § 49-4-193(c) (West 2012) (requiring a drug test for “each individual who applies for assistance”). For an extensive summary of proposed and enacted legislation as of 2011, see Drug Testing Welfare Recipients: Recent Proposals and Continuing Controversies, supra note 197, at Appendix A.
are there any provisions within those statutes granting additional funding for drug treatment. Given the overall dearth of drug treatment programs for the poor, the inclusion of provisions allowing individuals to receive benefits as long as they are in treatment is somewhat disingenuous.

In looking at this program through the lens of regulatory intersectionality, it is important to understand the financial consequence to the family for what the program defines as sanctionable or deviant conduct, which in this case is the failure or refusal of a drug screen. In evaluating the nature and severity of this consequence, it is helpful to keep a few facts in mind. First, in order to qualify for TANF benefits, you must, among other criteria, be extremely poor. Take as an example a three-person household with one adult, one pre-school age child, and one school-age child living in Phoenix, Arizona. That family would not qualify for benefits if they have countable income in excess of Arizona's defined standard of need for their family size: for this family of three, they could only qualify for TANF benefits if they have less than $964 in monthly income. That same family, however, would not receive $964 in TANF benefits were they accepted into the program. Instead, if all three household members received benefits, they would receive a maximum of $278 per month, or $3,336 per year. If the adult in that family fails or refuses the drug screen, the family would receive, for an entire calendar year, benefits only for the two children. Their TANF grant would then be reduced by 21% from $278 per month to a mere $220 per month, or $2,640 per year.

To understand just how low this cash grant is, it is helpful to compare it to two different measures. A first point of comparison is the federal poverty threshold, a measure that is nearly universally acknowledged as outdated and is regarded in many quarters as far too low. The Arizona family of three would fall below the federal poverty line if they earned less than $19,090 in income per year. So the reduced cash grant that results from the drug test sanction lowers the families cash assistance from 18% of the federal poverty level for full benefits to 14% of the poverty level once the sanction is imposed.

Another useful way to look at these numbers is to compare the family's income under the sanction to what they actually need to meet basic needs. The

213. See id.
216. For an in-depth discussion of the insufficiency of the current federal poverty measure, see Bach, supra note 83, at 278-81.
Center for Women's Welfare at the University of Washington School of Social Work and its director Diana Pierce developed the Self-Sufficiency Standard to assist in such analysis.\(^\text{218}\) The standard provides a rigorous methodology for calculating how much income particular families, in particular geographic locations, need to meet their basic needs\(^\text{219}\) without public or private assistance. According to the 2012 Arizona Self-Sufficiency Standard, were our hypothetical family of three to receive no private or public assistance whatsoever, the adult would need to work full time and earn $24.20 per hour for a total of $51,115 in income per year to meet all the families' basic needs.\(^\text{220}\) Even if one makes the optimistic assumption that this family is receiving other benefits, such as Supplemental Nutrition Assistance, Medicaid, and, perhaps if they are very lucky, subsidized housing, losing $696 in annual income is a devastating blow.


The penalty to the family for the failed or refused drug screen does not stop at the drastic reduction in their already tremendously low level of assistance. The second aspect of regulatory intersectionality describes what else might happen to this family as a result of the stigmatized conduct. As noted above, one variable along which various welfare drug-testing statutes differ is the extent of privacy protections built into the legislation. Of particular interest, for the purposes of discussing regulatory intersectionality, are provisions concerning the sharing of this information among government agencies. These include provisions that allow or mandate the sharing of results with child protective agencies, require some level of child protective investigation, and raise the specter of data-sharing with criminal justice agencies.

When looking at these intersecting system phenomena, it is crucial to keep in mind some basic background rules in the area. First, although the extent of privacy protections for drug tests has been eroding in a variety of contexts,\(^\text{221}\) it remains true that requiring individuals to consent to a drug test which requires that person to urinate, likely in the presence of a government employee, and


\(^{219}\) Under the standards methodology, basic needs include geographically specific calculations of expenses in six categories: housing, childcare, food, transportation, healthcare and an additional 10% in miscellaneous expenses. How is the Self-Sufficiency Standard Calculated, THE CTR. FOR WOMEN'S WELFARE, http://www.selfsufficiencystandard.org/standard.html#howis (last visited Jan. 9, 2013).


\(^{221}\) See supra note 102.
then give that urine sample to the agency, invades a long-protected and long-recognized zone of bodily integrity and privacy. As the Court of Appeals for the Fifth Circuit has stated, "[t]here are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all." For this reason, the Supreme Court in Skinner v. Oklahoma made clear that a mandatory urinalysis constitutes a search for the purposes of the Fourth Amendment.

Moreover, as was the case in the health care setting described above, even before the advent of this spate of welfare drug-testing legislation, welfare officials across the nation and in six of the seven states that have enacted welfare drug testing programs were already required to report suspected abuse to child protective agencies. Thus, the mechanisms to facilitate and in some cases mandate reporting and investigation in light of a positive drug test seem at best superfluous and at worst, yet another hyperregulatory mechanism to target, punish and criminalize poor African-American mothers.

Jurisdictions vary significantly in the use and strength of privacy protections. One jurisdiction appears to bar the use of test results in collateral investigations and proceedings; many are silent, and a few permit disclosure. In two jurisdictions, however, the programs go beyond permissive disclosure, and instead mandate disclosure to, and in some cases require intervention by, child protection agencies. In addition, in many jurisdictions, results of welfare drug tests are available to police and prosecutors. In these cases, the programs seem to be designed to snowball the possible detrimental effect of the positive test far beyond the sanction included in the statute and described above.

Of the seven states that have enacted welfare drug testing programs to date, the statute enacted in Georgia is the only one that appears to provide a comprehensive ban on the use of test results in other investigations and proceedings. The statute provides that,

224. See, e.g., Child Welfare Information Gateway, Mandatory Reporters of Child Abuse and Neglect at 2, https://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf ("Approximately 48 States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands designate professions whose members are mandated by law to report child maltreatment. Individuals designated as mandatory reporters typically have frequent contact with children. Such individuals may include . . . Social workers; Teachers, principals, and other school personnel; Physicians, nurses, and other health-care workers; Counselors, therapists, and other mental health professionals; Child care providers; Medical examiners or coroners, Law enforcement officers."). See also Kathryn Krase, Making the Tough Call: Social Workers as Mandated Reporters, THE NEW SOCIAL WORKER: THE SOCIAL WORK CAREER MAGAZINE (Apr. 6, 2013) http://www.socialworker.com/feature-articles/practice/Making_the_Tough_Call%3A_Social_Workers_as_Mandated_Reporters_Part_1/.
the results of any drug test done according to this Code section . . . shall not be used as a part of a criminal investigation or criminal prosecution. Such results shall not be used in a civil action or otherwise disclosed to any person or entity without the express written consent of the person tested or his or her heirs or legal representative. 226

In contrast to the Georgia provision, most statutes enacted in the past several years allow disclosure of the drug test results to some or all government agencies. For example, while the Oklahoma and Arizona statutes are silent on the issue of privacy protection, 227 each state’s general records access provision allow the sharing of data between government agencies. 228 Similarly, although the Utah statute bars public disclosure of the test results, 229 underlying records access provisions allow government agencies to provide data to any entity that “enforces, litigates, or investigates civil, criminal, or administrative law, and the record is necessary to a proceeding or investigation.” 230 Tennessee’s statute is more restrictive, barring the use of all information received by the department in connection with the drug testing program, “in any public or private proceeding. . . .” 231 However an exception is carved out for any proceeding, “concerning the protection or permanency of children.” 232 In addition, although the ban clearly forbids the use of the drug test results in formal proceedings, there appears to be no ban on using them in investigations of any criminal or civil nature, thus leaving open the possibility that the results could be shared with child protection agencies and police.

Two states, Florida and Missouri, go beyond permissive sharing of data to mandate data transmission and investigation by the child protective agencies. The underlying statutes also clearly allow the use of positive drug tests in

227. The silence of the particular welfare drug testing statutes in these states could very well mean, as was the case in Florida, that in implementing the statute, the agencies will enact policies that mandate reporting and action by other parts of the state administrative structure. For a discussion of how this occurred in Florida, see infra notes 232-234 and accompanying text.
228. See, e.g., ARIZ. REV. STAT. ANN. § 8-807 (2013) (requiring disclosure of child protection records to various government entities to enable such entities, “to meet their duties to provide for the safety, permanency and well-being of a child, provide services to a parent, guardian or custodian or provide services to family members to strengthen the family pursuant to this chapter; [t]o enforce or prosecute any violation involving child abuse or neglect. . . . [and t]o provide information to a defendant after a criminal charge has been filed as required by an order of the criminal court; OKLA. STAT. ANN. tit. 10A, § 1-6-103 (1993) (allowing inspections without a court order of Juvenile and Department of Human Services records by offices of the Attorney General, and law enforcement personnel).
229. UTAH CODE ANN. § 35A-3-304.5(5) (West 2012) (“The result of a drug test given under this section is a private record in accordance with Section 63G-2-302 and disclosure to a third party is prohibited except as provided under Title 63G, Chapter 2, Government Records Access and Management Act.”).
232. Id.
criminal prosecutions. Like some of the statutes discussed above, the Florida statute that implemented the drug testing program was silent as to the issue of privacy and data sharing. 233 Nevertheless when designing the program’s implementation, the Florida Department of Children and Families instituted procedures that included the sharing of positive drug tests with the Florida Abuse Hotline. 234 As described by the District Court in its decision enjoining the Florida program,

DCF shares all positive drug tests for controlled substances with the Florida Abuse Hotline. . . . After receiving a positive drug test, a hotline counselor enters a Parent Needs Assistance referral into a child welfare database known as the Florida Safe Families Network. . . . A referral is then prepared . . . so that ‘other appropriate response to the referral in the particular county of residence of the applicant’ may be taken. . . . The statute governing the Florida Abuse Hotline authorizes the disclosure of records from the abuse hotline to ‘[c]riminal justice agencies of appropriate jurisdiction,’ as well as ‘[t]he state attorney of the judicial circuit in which the child resides or in which the alleged abuse or neglect occurred.’ Law enforcement officials may access the Florida Safe Families Network and make such use of the data as they see fit. 235

The Missouri statute is explicit and, unlike any of the other statutes, mandates reporting not only for those who test positive for drugs but for all those who refuse to take a drug test. The statute provides that “[c]ase workers [who have knowledge that an applicant has either failed or refused a drug test] . . . shall be required to report or cause a report to be made to the children’s division . . . for suspected child abuse as a result of drug abuse.” 236

4. Disproportionality

As noted above, in contrast to the health settings, there are no studies looking specifically at the question of whether welfare drug testing policies are administered in ways that vary by the race of the welfare recipient or that negatively and disproportionately impact African-American clients of the

233. FLA. STAT. ANN. §414.0652 (West 2011).
234. Complaint at 10, Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011) (No. 6:11 Civ. 01473) (stating that applicants are required to sign a “Drug Testing Information Acknowledgement and Consent Release” which includes, among other provisions, that applicants consent that “[i]nformation on a failed test will be shared with the Florida Abuse Hotline for review to initiate an assessment or an offer of services.”).
236. MO. ANN. STATE §208.027(2) (West 2011).
system. There is, however, a good deal of information to merit worry that these policies will, like the drug testing policies in the healthcare setting, have these impacts. A few bodies of research justify this concern.

First, as to the question of disproportionate impact in the initial general welfare system, researchers have looked at the impact of punitive welfare policies by race and have concluded that punitive policies are targeted disproportionately at clients of color. In addition, for those programs that involve the use of discretion, it is quite clear, as it was in the healthcare setting, that the existence of discretion correlates with disproportionate targeting of poor African-American women. Moving beyond the initial welfare setting and to the intersections that arise from reporting out, we do know as a general matter that African-American children are referred to child welfare agencies in numbers far outweighing their percentage of the population. Once there, as Dorothy Roberts and others have compellingly described, African-American families suffer outcomes far worse than their white counterparts. Similarly, many scholars, including Wacquant and Alexander, have demonstrated that the criminal justice system impacts, and is in fact targeted at, communities of color in general and at the African-American community in particular. Given all this data and the fact that the statutory and regulatory framework of welfare drug testing is structurally very similar to the structure in the health care setting, there is good reason to assume that the use of drug testing in welfare programs will also result in disproportionate punishment of African-American families.

IV. REGULATORY INTERSECTIONALITY, HYPERREGULATION AND THE SUPPORTIVE STATE: IMPLICATIONS AND THEORIZING A PATH

At this point, several arguments should be clear. First, as described in Part III, the mechanisms of regulatory intersectionality are strongly present in the social support programs available to poor communities in the United States. The result of this is a state that exacts an enormous punitive toll for seeking support. Second, as suggested in Part II, the mechanisms of regulatory intersectionality contribute to what is here described as the hyperregulatory state. This means that programs of the social safety net are targeted, by race, class, place, and gender, to control and subordinate low-income communities in general and low-income communities of color in particular. In both examples

238. See supra note 89.
239. See supra notes 89-93 and accompanying text.
240. See supra note 94 and accompanying text.
laid out in Part II, punitive consequences were clearly meted out disproportionately to poor African-American women.241

If these arguments are true, if the state is not merely non-responsive but is instead characterized by the specific phenomena of regulatory intersectionality and the broader mechanisms of hyperregulation, then this analysis has significant implications for theorizing a road to a supportive state. Returning to the crucial task of theorizing and building an autonomy-enhancing, supportive state, what should be clear initially is that we have a very long and complicated road ahead. We have, in short, many assumptions to challenge and much to dismantle before we can begin to build. While the primary purpose of this article is to describe the functioning of regulatory intersectionality in detail and frame that specific phenomena in the broader frame of hyperregulation, what follows below is a brief discussion of some of the lived and theoretical implications, a more detailed analysis of the relationship between vulnerability, regulatory intersectionality, and hyperregulation, some more practical strategies that might hold promise and a cautionary note about the current emphasis within social welfare policy on collaboration. Necessarily at this point, what follows raises more questions than it answers.

A. Hyperregulation, Vulnerability, Need, and Trust

Perhaps the most important way to start is by drawing out the lived implications of the phenomena described above. Given the pervasiveness of hyperregulatory structures in poor communities, one need not speculate much in order to understand why many poor women view America’s safety net with enormous distrust. It is no secret, in poor communities in the United States, that seeking support involves extraordinary risk. Listening to the voices of women interviewed by Dorothy Roberts in her study of the child welfare system is a strong reminder of this distrust. As part of her study, Roberts interviewed an African-American woman from Chicago who described her own needs and the punitive role of child welfare agencies in her community. In the woman’s words, one can recognize both a profound need and well-founded distrust of those who would offer “welfare” to her children:

[T]he advertisement [for the child abuse hotline], it just says abuse. If you being abused, this is the number you call, this is the only way you gonna get help. It doesn’t say if I’m in need of counseling, or if... my

241. It is important to note that the question of whether the targeting of these mechanisms is intentional or not is largely irrelevant too. The argument here is that these many hyperregulatory mechanisms (criminalization, deprivations of basic privacy, regulatory intersectionality and many more) operate, by race, gender, class and socioeconomic status, to exert social control and to subordinate particular poor communities.
children don’t have shoes, if I just can’t provide groceries even though I may have seven kids, but I only get a hundred something dollars food stamps. And my work check only goes to bills. I can’t feed eight of us all off a hundred something dollar food stamps. . . . I don’t want to lose my children, so I’m not going to call [Department of Children and Family Services] for help because I only see them take away children. 242

Given how the mechanisms of regulatory intersectionality function to exact ever-escalating punishments on women who seek support, this woman’s words are unsurprising.

As to the implications for theory, it is helpful to return to Fineman’s concept of vulnerability (or Eichner’s concept of dependency), which maintains, at its heart, that we are all vulnerable (or dependent) and that any theory of the state needs to proceed from this assumption. 243 In light of what is described above, though, it is both profoundly true and yet insufficient to describe women faced with these circumstances as vulnerable. These particular women certainly enter the social welfare state in a state of vulnerability, but once they enter, the mechanisms of the state are structured to render them more and more vulnerable, and more and more exposed to punishment and social control. In the examples described above, women who enter those systems and are deemed deviant or noncompliant, are punished within the social welfare program. The women seeking prenatal care are stripped of their rights to privacy and confidentiality and deterred from accessing essential health care. 244 Women seeking welfare face not only the clear violation of privacy involved in submitting to a urine-based drug test, but they also face denial, reduction, or termination of the already meager aid offered by the program. 245 But the system is not punitive only in the sense of imposing punishment as a price of support. Instead, the above analysis reveals these systems as hyperregulatory in the sense that Wacquant describes. 246 These social support structures, characterized by regulatory intersectionality, are structured to exact ever-escalating consequences for the woman’s deviant conduct. They are also hyperregulatory in the sense that they are targeted toward specific communities. They exact these ever-escalating punitive consequences disproportionately on poor African-American women and poor African-American communities. Being enmeshed in these intersecting systems is thus the price of seeking support. A woman or family entering these systems is

243. See supra notes 10-12 and accompanying text.
244. See supra Subsection III(A)(2).
245. See supra notes 210-215 and accompanying text.
246. See supra notes 72-76 and accompanying text.
certainly vulnerable and in need before seeking assistance from the state. While seeking support may meet some very important need in the short term (one for which women are clearly willing to pay an extraordinary potential cost), it runs the substantial risk of rendering her more, rather than less, vulnerable. She is, once she seeks support, vulnerable not only because we all are and because meeting one's needs while living in poverty is extraordinarily difficult, but she is vulnerable to escalating punishment by the state.

Moreover, as is the case for many of the hyperregulatory mechanisms described by scholars such as Wacquant, Roberts, Bridges, and Alexander, these mechanisms are part and parcel of larger mechanisms of social control that operate in poor communities. This ultimately results in distinctions by economic status, by race, by gender, and often by place, in how the state operates. Centering the experiences of those subject to these hyperregulatory institutions creates a set of challenges for building a road toward the supportive state.

B. (Re)envisioning an Autonomy Enhancing Supportive State

There is no question that we need a more responsive and supportive state. As Peter Edelman’s work reminds us, it is important to exercise care as we condemn current support programs. We need to preserve what we have, restructure it to be better, and build upon it. Welfare, food stamps, Medicaid, public housing and other vital programs provide much less than we need, and, as has been argued here, are in many cases part and parcel of the creation of a hyperregulatory state. But at the same time they are tremendously important. We certainly need those programs to be restructured, but it would be beyond foolish to suggest that the appropriate response to the problems described in this article is to dismantle those programs. We need instead to look critically at the structures and administration of these programs. Beyond that, we need a state that offers significantly more support to families across the economic spectrum and that does so in ways that support rather than undermine the ability of families and communities to meet their needs and their goals. When Eichner and Roberts call for a set of supportive programs in a newly envisioned child welfare system that offer significant assistance to families all along the way rather than intervening only when there is a crisis (and then only to punish), they are calling for more and better support. The question posed by

247. See, e.g., PETER EDELMAN, SO RICH, SO POOR: WHY IT'S SO HARD TO END POVERTY IN AMERICA 7-23 (2012) (briefly retelling the history of social support since the Great Depression and arguing that in historical perspective, the current safety net, although profoundly inadequate, has strong elements and provides significant support).

248. In the conclusion of SHATTERED BONDS, Roberts provides a compelling vision of a newly structured child welfare system. Although she calls for changes well beyond this, an essential piece involves shifting the emphasis to family support and preservation. As she describes it, “Federal and state
this article is not whether we need such a supportive or responsive state. We clearly do. Instead it asks how we might re-envision both the support programs we already have and the ones we need in order to enhance the autonomy of families in poverty.

1. An Autonomy-Supporting State: Abandoning Both Violations of Privacy and Structures of Punishment

On a theoretical level, in order to build a responsive state, we must significantly expand our collective notion of what constitutes and enables the exercise of autonomy. As explained in Part I, this involves abandoning the flawed notion of an autonomous subject and replacing it with a conception of the vulnerable or dependent subject. This would give rise to a state that would be compelled to provide the material conditions necessary for people to exercise a much more robust version of autonomy. Focusing on vulnerability or dependency could also lead, in Fineman’s vision, to far more substantive equality.249 One mechanism to ensure this level of autonomy-enhancing
governments already spend more than $10 billion annually on the child welfare system. But most of the money goes to maintaining children in out-of-home care. Centering the system’s services on family support and preservation would be a matter of shifting these funds from their current destructive purpose.” ROBERTS, SHATTERED BONDS, supra note 80, at 269. Eichner provides similar vision of how we might restructure that system: “In contrast to the existing system... the government would funnel its resources first and foremost into ensuring that existing families have the social support to provide for children’s well being.” EICHNER, supra note 2, at 119.

249. See supra note 32 and accompanying text. For a strong endorsement of the strength of these claims to counter the subdivision within the legal structures that target poor African-American communities, see Kaaryn Gustafson, Degradation Ceremonies and the Criminalization of Low Income Women, 3 U.C. IRVINE L. REV (2013) (forthcoming) (arguing that “[t]he simple rhetorical transition from using the terms “the poor” to “the vulnerable” may help shift and soften some of the disgust now aimed at the poor... [A]ddressing economic vulnerability requires a material commitment to making sure that grim failures of structural economic risk are not borne disproportionately by the most vulnerable members of society, namely low-income women of color and their children. The existence of deep poverty in the United States is not a sign of widespread behavioral failures by individuals; it is an expression of political will. Deep poverty can be willed away by divesting government monies from policies that criminalize the poor and investing monies in basic subsistence.”). If in fact, the state is compelled, through this restructured notion of autonomy, to provide the support we collectively need to realize a more robust vision of self-determination, this could give rise to a quite radical restructuring of social and economic institutions. One need only recall the discussion above of today’s vast income disparities and the atrociously inadequate material failure of the current safety net to meet the needs of those in poverty to see that a supportive state on these terms would require significant economic and political change. June Carbone has recently suggested that Eichner’s work leads almost inevitably to these consequences. In a recent review of Eichner’s book, Carbone suggested that, while Eichner herself does not conclude that her vision would require a significant restructuring of structural economic inequality, fully realizing the theory would require such a restructuring. June Carbone, Book Review, The Supportive State: Families, Government, and America’s Political Ideals, 11 PERSP. ON POL. 241, 242 (2013) (“If we assume, for example, as a growing body of evidence indicates, that greater inequality itself harms family stability, would liberal theory compel adoption of more egalitarian policies even at the expense of greater economic ‘inefficiency’? Does the state have an obligation to address class-based differences in fertility in order to compel greater equality? Must it champion stronger families even if higher taxes or greater regulation limit the autonomy of the wealthy? If greater inequality is inevitably a threat to the family, does that make it intrinsically incompatible with justice for that reason alone?”).
support lies, as Roberts argues, in a much more robust conception of privacy. As Roberts 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.”250 Indeed a better notion of privacy “includes not only the negative proscription against government coercion, but also the affirmative duty of government to protection the individual’s personhood from degradation and to facilitate the processes of choice and self-determination.”251

But the importance of regulatory intersectionality suggests that in addition to privacy from intrusion and an affirmative duty of support, one also needs safety from punishment. To understand how this might function it is helpful to briefly examine the phenomena of privacy intrusions and escalating punishment in turn.

As to privacy, Khiara Bridges argues that social support programs like PCAP are so fundamentally imbued with structures that assume no privacy that, in our current socio-political and legal environment, it is more accurate to say that poor families have no privacy rights to begin with.252 This is certainly born out in her careful analysis as well as in the examples above. Although the focus of this article has been on the mechanisms of escalating punishment rather than on the privacy deprivations inherent in these programs, there is no question that these examples also confirm Bridges’ characterization of social support.

The focus on the regulatory mechanisms that lead to ever-escalating punishment suggests a separate and additional price. Poor women seeking support not only suffer extraordinary deprivations of privacy, but those deprivations of privacy lead to the gathering (and negative characterization) of information, which then in turn leads to additional punishment. Kaaryn Gustafson’s extensive work on the criminalization of welfare253 lays bare many of the mechanisms that are in place to exact this punitive toll. The mechanisms of enhanced punishment and disproportionate impact of regulatory intersectionality described above provide further information about precisely how the state administers itself to facilitate enhanced punishment.

To return to the examples in Section III, the cost a poor woman pays for support is not only the devastating cost of losing control of her home, her body, and her personal information. She also submits, as a price of support, to serious

250. Roberts, Punishing Drug Addicts, supra note 80, at 1478.
251. Id. at 1479.
252. Bridges, supra note 56, at 173. Bridges argues from her example that class controls who has rights and that the poor simply fall on the wrong side of the dividing line. Id. One could easily point to the mechanisms and outcomes in this article and come to the same conclusion. In her discussion, Bridges turns to the viability of the rights frameworks suggested by Roberts, Eichner, and Fineman, among others, which Bridges characterizes as “rights to” as opposed to “rights against.” Id. at 174. In discussing the viability of these rights, she raises the disturbing possibility that “[t]here is a danger that the poor would, in spite of a revolutionary reformulation of rights, find themselves in the same predicament in which they now find themselves: possessing ‘rights’ without substance, meaning or effect.” Id. This prospect is similarly raised by the mechanisms described in this article.
253. See supra notes 60-66 and accompanying text.
risk of punishment. To put it differently, while it should be true, as the Supreme Court noted in Ferguson, that "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent," for poor, disproportionately African-American women, this is an assumption that does not comport with reality. Given how mechanisms of regulatory intersectionality actually function, it is far more reasonable for a poor, African-American woman to assume both that she has no privacy and that the cost of seeking prenatal or childbirth care may well be the investigation of her family, the loss of her children, and her possible prosecution and incarceration. And this is true for her even though her higher-income white counterpart, who is just as likely to have used drugs during her pregnancy, is far less likely to face these escalating penalties. An applicant for welfare faces similar risks and may pay a similar price.

To rewrite this formula, then, is to abandon the structural mechanisms not only of deprivations of privacy, but those mechanisms that facilitate escalating punishment. To the extent that the phenomena of regulatory intersectionality facilitates hyperregulation—the targeting by race, class, gender and place of particular people so as to exert social control on those people—we must dismantle it and build something better in its place. Below are some practical suggestions about how we might think about getting there.

C. Some Steps on the Path Forward

As briefly detailed in Part II, in the 1930s the United States made a decision to bifurcate its programs of social support. One system was put in place for those who are not poor and another was put in place for those who are poor and "deserving." As a matter of law and systems, this allows us to administer these two categories of assistance in profoundly different ways. So even though it seems evident that a middle-class family receiving Social Security retirement benefits or Medicare would never tolerate the price of support imposed for poor families, this poses no administrative problem. The two systems are simply run tremendously differently.

To the extent this is true, one answer to the question of how to move forward lies both in shifting to more universal benefit systems, or short of that, to benefits that are quasi-universal as described below. If the move to more universal or quasi-universal benefit systems is not politically feasible, moving forward can also involve restructuring poverty-targeted programs in four ways: erecting more privacy protections and higher bars on surveillance and

255. See supra notes 181-188.
256. See supra notes 47-50 and accompanying text.
monitoring in the first place, enforcing and creating new privacy protections within systems once information is collected, building higher walls between support systems and punishment systems, and finally exercising significant caution in the face of calls for coordination and collaboration.

1. Towards Universal Benefits and Universally Employed Structures (But Carefully) 257

As noted in Part II of this article, 258 the institutions of the social welfare state in the United States have, since at least the New Deal, been bifurcated, with one set of programs - Social Security, Medicare and the like - going to one group of people and another set - Welfare, Medicaid, Food Stamps (now the Supplemental Nutrition Assistance Program or SNAP) and the like - going to the poor. Although it has not been a focus of this article, other scholars have documented the ways in which these poverty-focused programs have been characterized by behavioral controls and racialized tropes. They have also extensively documented the ways in which, as legal barriers to receipt fell in the late 1960s and early 1970s and the rolls grew to include significant numbers of African-American families, an extraordinary backlash took place. This backlash wielded racial tropes (the most powerful among them was the welfare queen) to radically restructure and gut virtually all of what remained of what was Aid to Families With Dependent Children. Even today, as the "new" welfare program, Temporary Assistance to Needy Families, is almost entirely in shambles, provides less and less, and serves fewer and fewer of those in need, 259 it remains the continued target of significant punitive legislative and popular attack. One need only look at the trend toward welfare drug testing in the face of both data demonstrating the fiscal and policy failures and the consistent judicial disapproval of these programs to understand the continued

257. Eichner's vision of the Supportive State impacts a wide range of policy areas. Very roughly speaking realizing a supportive state would entail revisions of both how the market operates and the creation of programs and institutions to address vulnerability and dependency needs. In the first category, the supportive state would include policies regulating the market: "upper limit[s] on mandatory working hours, ... paid time off for caretaking, [prohibitions on the firing of] parents of young children ... for refusing to work overtime, and ... flexible hours [requirements]." EICHNER, supra note 2, at 65. On the programmatic and institutional side the supportive state would include the provision of, for example, universal health care, subsidized high quality childcare and pre school education and high quality public schools. The analysis in this paper focuses exclusively on the programmatic and institutional support mechanisms of the supportive state.

258. See supra notes 47-50 and accompanying text.

259. Nationally, the effectiveness of Temporary Assistance to Needy Families ("TANF") in serving and meeting the financial assistance needs of those in poverty has fallen precipitously. For example, in 1996, TANF provided some measure of assistance to 72% if families in poverty. in 2011, that number had plummeted to the point where TANF served only 27% of families in poverty. TANF also pays significantly less to those families. In 1996, TANF provided families with 35% of the funds necessary to raise that family to the federal poverty measure whereas by 2011, that number had fallen to 28%. A TANF Misery Index, LEGAL MOMENTUM 1 (Apr. 9, 2013), http://www.legalmomentum.org/our-work/women-and-poverty/a-tanf-misery-index.pdf.
political value of supporting anti-welfare legislation to building political capital.\textsuperscript{260} Although welfare arguably continues to be the object of the most political scorn, nearly every program that provides obvious and direct support exclusively to those in poverty is easily and continuously attacked on the same basis and with the same hateful tools.

It is certainly true, given this atrocious history and continued political attacks, that programs that seem and/or are more universal have considerably more promise for garnering political support. Ideally it would be far better for the supportive state overall if we had universal benefits: for example, universal health care and universal caregiver subsidies. There is no shortage of models for such programs and, as many have noted, European countries provide many good examples of what universal support might look like. Having said that, however, proposing universal benefits in the American context faces perhaps insurmountable political barriers. Given recent history, more politically promising examples come in the form of benefits that, while targeted toward those in poverty, are structured through mechanisms and systems that serve those who are also not low income. Benefits like these have recently and productively been described by Suzanne Mettler as part of a “submerged state,” the benefits of which provide significant financial support and, crucially, are not readily visible either to those who receive them or as a supportive program of the state.\textsuperscript{261} Recent prominent examples of success in this area come in the form of the Earned Income Tax Credit (EITC). The EITC is submerged within a regulatory institution and regulatory framework that administers programs that serve those not in poverty.

The EITC is administered by the Internal Revenue Service, and, as is the case for other tax benefits, is granted largely based on self-reporting.\textsuperscript{262} The EITC has been lauded as one of the most effective anti-poverty policies in recent years.\textsuperscript{263} Although it has not been without its detractors, there is no question that the EITC is tremendously effective in transferring income into the

\textsuperscript{260} On the trend to implement welfare drug-testing, see supra notes 199-206 and accompanying text. On the issues of the constitutionality of these statutes, see supra note 199.

\textsuperscript{261} SUZANNE METTLER, THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLITICS UNDERMINE AMERICAN DEMOCRACY 4 (2011). Mettler argues that the invisible nature of many of the benefits received by the non-poor in America, principle examples of which are tax code benefits such as the home mortgage deduction, are not visible in political discourse. Mettler makes the argument, quite persuasively that this invisibility, when contrasted with the highly visible nature of poverty programs, enables the sustaining, in the American political conversation, of an image that the non-poor do not depend on the government. Mettler argues that it is essential for the health of American democracy to make those programs visible, to in effect emerge the submerged state. While I absolutely agree with this point, I am using Mettler here slightly differently — to suggest that submerged benefits, precisely because of their comparative invisibility, have and likely will continue to garner more political support that visible programs.

\textsuperscript{262} Dennis J. Ventry Jr., Welfare by Any Other Name: Tax Transfers and the EITC, 56 AM. U. L. REV. 1261, 1264 (2007).

\textsuperscript{263} See, e.g., Chuck Marr, Jimmy Charite & Chye-Ching Huang, Earned Income, CTR. ON BUDGET 1 (Apr. 9, 2013), http://www.cppb.org/files/6-26-12tax.pdf.
hands of low-income working families and lifting them out of poverty. In 2011, for example, the combined effect of the EITC and the Child Care Tax Credit “lifted 9.4 million people, including 4.9 million children above the Census Bureau new research Supplemental Poverty Measure.”264 For the purposes of this analysis, what is interesting is the administrative structure surrounding the EITC. Like any other personal tax benefit, eligibility for the credit is established through self-reporting on a taxpayer’s income tax forms. This system of administration is a far cry from programs like TANF or the PCAP program described by Khiara Bridges, both of which involve significant intrusions and data collection well beyond what is required to establish financial eligibility for the programs.

Although benefits that are embedded within regulatory agencies, and programs that serve a more universal population are less visible and therefore less subject to the overt political attacks suffered by programs associated with “welfare,” even in these more universal regulatory settings, there are plenty of reasons to worry about the continued targeting of those in poverty. A couple of examples suggest this conclusion. First, one might recall that the laws regulating health care, the privacy of medical information, and the use of child welfare and criminal justice administration that were highlighted in Part III’s discussion of pregnant women seeking health care do not in fact differ explicitly by race or income status. We have no law, nor could we given the state of our constitutional jurisprudence, that calls for the clear disparities in administration of these laws when it comes to poor black women and their children. And yet the evidence of disproportionate punitive impact is quite clear.265 Similarly, although the EITC is embedded within the tax code, it is clear that the IRS focuses a disproportionate portion of its auditing resources on low-income taxpayers.266 These disparities suggest that, even in programs regulated by arms of the regulatory state that impact larger proportions of the population, one must remain vigilant that the poor in general, and poor communities of color in particular, are not subject to more scrutiny and regulation within those agencies.

264. Id. at 9. The Supplemental Poverty Measure was promulgated in 2010 to provide a more accurate measure of poverty. Like the official poverty measure it sets a an annual income threshold below which a family is defined as poor. But it is seen as more accurate primarily because of its inclusion of the effect of tax credits and governments benefits, its inclusion of work related and medical expenses, its recalculations of the poverty income threshold and its inclusion of geographic variation in the cost of living. Kathleen Short, The Research Supplemental Poverty Measure: 2011, U. S. DEP’T OF COMMERCE (Nov. 2011), https://www.census.gov/hhes/povmeas/methodology/supplemental/research/Short_ResearchSPM2011.pdf.

265. See supra Subsection III(A)(6).

266. See Leslie Book, The IRS’s EITC Compliance Regime: Taxpayers Caught in the Net, 81 OR. L. REV. 351, 374 (2002); Ventry, supra note 261, at 1273-74.
2. Restructuring Poverty Programs and Building New Ones

Though calls for universal benefits and/or significantly increased low-income benefits administered by agencies like the IRS might well address some of the concerns raised in this article, the heart of the critique falls on what remains of programs designed explicitly to serve those in poverty. It also falls by implication on initiatives, essential to a robust supportive or responsive state, to provide significantly more support to poor families. Addressing the twofold harm described above (privacy deprivation and punishment) involves four steps: erecting more privacy protections and higher bars on surveillance and monitoring in the first place; enforcing and creating new privacy protections within systems once information is collected; building higher walls between support systems and punishment systems; and finally, exercising significant caution in the face of calls for coordination and collaboration.

i. Protecting Informational Privacy and Respecting Family Autonomy

In the support programs discussed in this article, women are forced, as a condition of either applying for the benefit (in the case of welfare) or seeking the service (in the case of health care) to part with vital information that, in other settings and for other people, would be considered private. Although the demand for and collection of this information is clearly a harm in and of itself, what is important here is that the information (and negative interpretation of the information) leads to the punishment. The decision, embedded within formal and informal legal and regulatory structures described above, to seek a drug test leads to additional intervention, questioning, and information acquisition. Doctors, nurses, and social workers intervene and question, collecting information that ultimately results in punitive actions against the family by the child protection and criminal justice agencies.\(^{267}\) One need only recall the sources for facts underlying the child abuse prosecutions and the findings of Flavin and Paltrow to recall that health care providers, social workers, and child protection staff provide much of the information to justify punishing these families.

What if, instead, programs were restructured to protect the informational privacy of the women involved? What if it were the woman herself who chose whether she would submit to drug tests and additional interviews? What if the contents of her medical records were in fact confidential and there were a very high and enforceable bar against disclosure? What if we significantly shifted

\(^{267}\) Bridges's work on the PCAP program provides another compelling example of the ways in which extensive information gathering is imbedded within the legal framework and regulatory systems of poverty programs. See Bridges, supra note 56.
program eligibility rules and administrative structures to require the gathering of only minimal information and respected the rights of families to keep their homes, their bodies, and, in the vast majority of circumstances, the choices they make about how to parent, private?

These proposals almost inevitably lead to calls of caution concerning the welfare of children, and it is certainly true that we continue to need mechanisms to intervene in cases of abuse and neglect. But before concluding that we cannot take the legal and regulatory finger towards intervention off the scale and rebalance it to lean much more strongly toward informational privacy, it is important to remember that, for families who are not poor, this is already the case. For communities that are not in poverty we apparently assume as a society that having laws against child abuse and neglect and the ability to prosecute child abuse is enough to protect children. It is only in those programs that actually (welfare) or as a matter of practice (health care in poor communities) serve and target poor, disproportionately African-American communities that we have put our legal and regulatory mechanism on the scale toward monitoring, information gathering, information-sharing and escalating punishment. To rebalance the state toward autonomy is to address this class and race disparity.

ii. Enforcing Existing Privacy Protections and Choosing to Incorporate New Ones

To begin to move toward this rebalancing, it is important to note that much of the information transmission described in this article happened in contravention of the law. For example, as noted in Part III, despite significant variations in state law, some of which would have clearly banned some or all reporting, in one of the studies discussed above, health care providers told researchers that they reported virtually every substance exposed newborn. In other cases, there are clear policy choices involved. Although some of the welfare drug testing legislation calls for reporting to child protective agencies, some of them are in fact far more protective. While the data on drug testing in the health care setting suggests that these privacy protections are likely to provide little actual protection, it is worth noting that some privacy protections exist. To the extent this is the case, research, systemic advocacy, and individual representation efforts designed to expose and punish violation of these protections would represent a small positive step. In addition, as proposals to impose drug testing on recipients of public benefits programs on the state and federal level continue to be presented, for those jurisdictions where they cannot be entirely defeated, it is worth devoting advocacy resources to pushing for

268. For an example of slightly more protective statutes in Georgia and Tennessee, see supra notes 226 and 231 and accompanying text.
strong privacy protections. Finally for those who provide legal services to the poor, it is also worth paying careful attention to privacy protections within the systems that impact their client's lives. To the extent that we can enforce existing protections and create new ones, this might represent small progress in addressing the harms described in this article.

iii. Building High Walls Between Support and Punishment

In the examples of regulatory intersectionality above, information travels with extraordinary ease from the support setting to more punitive settings. To address this, much higher walls are in order. If we are to restructure poverty-focused support programs to support the autonomy of poor families, we need to erect much higher walls between programs that are designed to support families and programs that are explicitly punitive. If the child welfare system is reimagined, as the supportive or responsive state would call for, to focus far more resources on support of families over intervention, removal and foster care, this would need to include a very strong separation between those parts of the state that support and the parts of the state that can impose punishment. Similarly, the extraordinary administrative presence of policing and prosecution in support programs needs to be eliminated. In the vast majority of circumstances those who purport to offer support: people like teachers, social workers, doctors, nurses, and non-profit staff simply should not regularly be sharing information with police and prosecutors. It should be the extraordinary rather than the expected case that these actors end up as witnesses for the prosecution. Lest we conclude that this is impossible, it is important to recall, as this article suggested at the start, that systems of support that look like this already exist. For those who are not poor, this is precisely how support functions in their communities.

iv. Exercising Significant Caution in Settings Involving Collaboration and Coordination

The analysis has important implications for the persistent calls for and use of collaboration and coordination among social service programs. Seemingly everywhere one looks in the social service, child welfare, and juvenile justice worlds, there are extensive calls for coordination and co-location of services. These programs generally include extensive provisions for and mechanisms to facilitate data-sharing among agencies. While there is no doubt that, in certain circumstances, these efforts to coordinate and co-locate yield benefits for clients of those systems, the data in this article suggests that we should exercise significant caution. In thinking about whether to engage in collaboration, we might ask, from the perspective of regulatory intersectionality, what punitive outcomes might result from the collaboration. Does the collaboration require
data-sharing with agencies that have the statutory power to remove children and/or to use information to support prosecutions of children and families? Will the clients be primarily poor families of color? If so, what safeguards exist to ensure that these punitive outcomes will not disproportionately impact families of color? What safeguards and protections exist for families to protect their privacy and to ensure that the information they share does not end up facilitating their punishment? Do clients have rights, embedded within the program, to choose only some services and to set the terms of service in a way that enhances rather than compromises their autonomy? These and other questions are essential if we are to engage in these projects in a way that guards against the disturbing outcomes described in this paper.

CONCLUSION

Moving from today's hyperregulatory state to an autonomy-enhancing supportive state is an enormous and daunting task to which scholars and activists must devote their considerable energies and talents. By re-centering the question of how to realize this goal on the lived institutional structures of today's domestic social welfare state, this paper has attempted to give a sense of the challenges ahead, to suggest some necessary steps in this path, and to suggest areas for future research and activism. In conclusion, I would like to return, for a moment, to where this paper began. Imagine again that you are a person in need of support. You have plans, dreams and hopes for yourself, for your family, and for your children, but it is difficult to realize all of this on your own. You need help. Depending on who you are, where you are, and what your life has brought so far, the support you need might vary significantly from the support that others need to realize their own dreams and goals. If the state provided that support, what form would it take? What risks should you have to take, in terms of the safety of yourself and your family, in order to get that support? How best might the state assist you in realizing your goals? If we can each answer those questions for ourselves, perhaps at least the task of envisioning a supportive state is not so difficult after all.