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POOR SUPPORT / RICH SUPPORT: (RE)VIEWING THE AMERICAN SOCIAL WELFARE STATE

by

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ABSTRACT

Since at least the 1970s a variety of scholars have redefined the U.S. social welfare state to include not only traditional benefit programs (for example, Food Stamps and Social Security) but also a variety of tax benefits that are “hidden” or “submerged” forms of “welfare for the wealthy.” Including these benefits in the overall picture of U.S. social welfare provision reveals a system that is both larger in size than popularly believed and that, in addition to providing some support for the poor, distributes significant benefits regressively to households with substantial wealth. Although a variety of scholars and policy analysts have described these outcomes, scholars have yet to focus on the ways in which structural inequality is written directly into the means of administration of U.S. social welfare programs. This Article is the first to turn to those questions and to systematically demonstrate that those who are economically (and disproportionately racially) disadvantaged are offered a social welfare state that is meager, punitive, and tremendously risky for those who receive its benefits. But for those with economic privilege, the

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story is quite different. Families and individuals with significant economic privilege benefit disproportionately from a whole host of cash and near-cash benefits that are neither meager nor punitive. In fact, in contrast to benefits for the poor, benefits for the rich function as nearly invisible entitlements. As one moves from benefits for the poor towards benefits for the rich, the administrative structures shift along this progression, becoming less and less punitive and risky and more and more like invisible entitlements. Although as a formal matter the rich, like the poor, have no right to economic support in the constitutional sense, American social welfare policy moves the rich remarkably close to a right to economic support, leaving the poor far behind. This Article reveals these vast structural inequalities and concludes by calling not only, as others have, for an increase in and more progressive distribution of social welfare dollars but also, for the first time, for reforms that would address the structural inequalities at the heart of the U.S. social welfare state and that would render it more successful at supporting the autonomy and resilience of all of its beneficiaries.

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INTRODUCTION

Picture two families receiving housing benefits from the federal government. The families are identically structured (two parents, three kids), but one is poor and one is rich. The first family has waited years on a waiting list to get the benefit and has had to share extensive personal information about the family and its history in the application process. Once in receipt of the benefit, the family members find themselves subject to a myriad of rules, police and administrative inspections of their home, and nearly constant harassment by public and private actors, all stemming from receipt of the benefit. They risk exposure to child protective and criminal justice interventions in their family and can easily suffer the consequences of that exposure. The second family also receives a housing subsidy, but the experience is quite different. This family fills out a form once a year and receives a yearly payment. There is no waiting list and nothing else happens. For that family, the scrutiny and risks faced by the first family are unthinkable. This is the state of U.S. social welfare provision. Both the poor and the rich receive extensive social welfare benefits, but the poor suffer scrutiny and punishment while the rich experience benefits that are almost invisible. And

in fact, as one moves from benefits for the poor to benefits for the rich, one can trace a linear progression from highly invasive and punitive administrative systems to systems that function as near entitlements.

Since at least the 1970s a variety of scholars have sought to redefine the U.S. social welfare state to include not only traditional benefit programs (for example, welfare and Social Security) but also a variety of tax benefits that are “hidden”¹ or “submerged”² forms of “Welfare for the Wealthy.”³ Including these benefits in the overall picture of U.S. social welfare provision reveals a system that is both larger in size than popularly believed and that, in addition to providing some support for the poor, distributes significant benefits regressively to households with substantial wealth. Although a variety of scholars and policy analysts have described these policy outcomes, scholars have yet to focus on the ways in which structural inequality is written directly into the means of administration of U.S. social welfare programs. This Article is the first to turn to those questions and to systematically demonstrate that those who are economically (and disproportionately racially) disadvantaged are offered (or perhaps it is better to say subject to) a social welfare state that is meager, punitive, and tremendously risky for those who receive its benefits. But for those with economic privilege, the story is quite different. Families and individuals with significant economic privilege benefit disproportionately from a whole host of cash and near-cash benefits that are neither meager nor punitive. In fact, in contrast to benefits for the poor, benefits for the rich function as nearly invisible entitlements. As one moves from benefits for the poor towards benefits for the rich, the administrative structures become less and less punitive and risky and more and more like invisible entitlements. Although as a formal matter the rich, like the poor, have no right to economic support in the constitutional sense, American social welfare policy moves the rich remarkably close to a right to economic support, leaving the poor far behind.

Before going further, it is important to be very clear about this Article’s purpose. Its purpose is neither to derogate the provision of social welfare support nor to argue for its abolishment. In contrast, this Article joins and supports crucial calls for the establishment of what Martha Fineman has termed a responsive state.⁴ To this end, the Article reveals vast structural

1. CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES* 3 (1997).

2. SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* 16–17 (2011).

3. CHRISTOPHER G. FARICY, *WELFARE FOR THE WEALTHY: PARTIES, SOCIAL SPENDING, AND INEQUALITY IN THE UNITED STATES* (2015).

4. *See, e.g.*, MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES,*

inequalities in the means of administration of public benefits and argues that, if we are to reach the responsive state that so many now call for, we need first to understand these administrative inequalities and then to institute a truly progressive social welfare state. This welfare state would be not only larger and more progressively distributed but would also be administered to support rather than subordinate those at the bottom of the income scale.

The Article proceeds as follows. Part I provides a brief theoretical grounding for the Article, locating it within academic conversations about the way in which inequality is structured in contemporary forms of governance. Part II joins a growing literature redefining the contours of social welfare provision to include three analytically and programmatically distinct parts: poverty-based support, social insurance, and tax policies that function as social welfare spending. This literature reveals the social welfare state as one that is much larger than usually described and that targets inequality much less effectively than one might assume. Part III builds on that foundation and presents the central contribution of this Article: not only does the U.S. welfare state fail to meaningfully address income inequality and poverty but it significantly exacerbates it through the means of administration. In a phenomenon I have previously termed hyperregulation, in poverty-focused benefits the “mechanisms of social support are targeted, by race, class, gender and place, to exert punitive social control over [disproportionately] poor, African-American women, their families and their communities.”⁵ These mechanisms stand in sharp contrast to the mechanisms of those benefits that flow to those with economic privilege. Focusing on benefits administration targeting the bottom, the middle, and the top of the income scale, this Part traces the move from hyperregulation to near entitlement that characterizes benefits administration across class. The discussion of housing support provides examples at the bottom (such as Section 8) and the top (interest on

GOVERNMENT, AND AMERICA’S POLITICAL IDEALS (2010); MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition* 20 *YALE J.L. & FEMINISM* 1 (2008) [hereinafter Fineman, *Anchoring Equality*]; Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 *EMORY L.J.* 251, 257 (2010) [hereinafter Fineman, *Responsive State*].

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

home mortgages and other housing-related tax benefits) whereas support for dependent children from means-tested benefits, like welfare to the Earned Income Tax Credit (EITC) to the Child Tax Credit (CTC), provides a view of administration from the bottom to the middle of the income scale. Finally, Part IV returns to the theoretical grounding for this Article and argues that, in order to build a responsive state, the United States must not only enlarge and more progressively distribute welfare benefits, but it must also structure benefits at the bottom far more like benefits at the top: as programs that enhance the autonomy of benefit recipients.

I. STRUCTURING INEQUALITY: A BRIEF THEORETICAL CONTEXT

A central task of critical scholarship is to investigate and describe the ways that the state is active in its role in perpetuating and at times exacerbating the vast economic inequality that characterizes American society. Thus, this body of scholarship identifies ways that the state is active in creating and exacerbating inequality, subordinating those at the bottom and structuring and reinforcing the privileges of select market and family actors at the top. Turning the inquiry toward the structures (rather than the actors) helps us move past notions of intentional discrimination and toward a way to unmask systems that privilege some and subordinate others.

The work of Loïc Wacquant in many ways epitomizes those who critique the state as actively promoting structures that subordinate. In *Punishing the Poor*, Wacquant argues that current governance systems are characterized by what he describes as two arms of the state—welfare services on the one hand and criminal justice administration on the other.⁶ Wacquant describes these arms as working in tandem to control those on the bottom of the labor market. Focusing in particular here on welfare and its relationship to the criminal justice administration, Wacquant argues that,

[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

6. LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009).

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.⁷

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 current economic order.⁸ In his terms, “workfare” and “prisonfare” are inextricably linked.⁹ In addition, in both welfare and criminal justice, there is no question that the subject of control is raced, both actually and as a matter of symbolic ordering.¹⁰

While these systems may or may not be operated by actors who express or even intend to function in discriminatory ways, in many ways, questions of intentionality miss the point of the analysis. The question is not whether the actors imbedded within these systems, or even those who participate in their design, mean to discriminate. They may well and likely in

7. WACQUANT, *supra* note 6, at 14. This passage implicitly references the earlier work of Francis Fox Piven and Richard Cloward; for a discussion of Wacquant’s work in relationship to Piven and Cloward, see Bach, *supra* note 5, at 334–35.

8. Wacquant genders the two systems (penal and social welfare) female and male, respectively. WACQUANT, *supra* note 6, 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 wide-ranging discussion of the implications of this trend, see Kimberlé Crenshaw, *Overpoliced and Underprotected: Women, Race and Criminalization*, 9 UCLA J. SCHOLARLY PERSP. 23 (2013). As described by Crenshaw, “[m]ore 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).

9. WACQUANT, *supra* note 6, at 79.

10. For one of the most salient discussion of race and criminal justice, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLORBLINDNESS* (2010), which shows that the criminal justice system and its associated civil-feeder and post-incarceration classification systems strip black communities of their freedom and of fundamental citizenship privileges and recreate, in Alexander’s phrase, a New Jim Crow.

many circumstances do, but here the inquiry is different. If the administrative systems result in discriminatory effects, privileging some and subordinating others, what are the mechanisms by which structural discrimination is effectuated? In the words of Dorothy Roberts, this analysis helps “elucidate how state mechanisms of surveillance and punishment work to penalize the most marginalized . . . in our society while blaming them for their own disadvantaged positions. This systemic intersection naturalizes social inequality and obscures the need for social change.”¹¹ These mechanisms can be understood as part and parcel of what I have previously called the *hyperregulatory state*—a set of mechanisms of social support that “are targeted, by race, class, gender, and place, to exert punitive social control over [disproportionately] poor, African-American women, their families, and their communities.”¹²

In addition, scholars have persuasively argued that the structures of current domestic social welfare policy (and governance more broadly) do not only function to subordinate. They also privilege. As Martha McClusky explains, “neoliberalism embraces a racialized, genderized, and class-biased vision of social equity and community solidarity that favors the interests of the most privileged members of society.”¹³ Crucially, the state favors those interests not only by undermining the interests of those who are not favored but by actively enabling the interests of privileged actors. And it does so through the seemingly neutral concepts, in the case McClusky describes, of efficiency and moral hazard. McClusky unmasks the central efficiency arguments of neoliberalism by asking a crucial question: efficient for whom? McClusky admonishes supporters of the welfare state to stop ceding intellectual ground:

[D]efenders of welfare should challenge the double standard underlying the neoliberal double bind, and the hierarchical vision of citizenship it both obscures and promotes. This double standard identifies some people’s interests in increasing their share of the pie as part of an efficient and naturalized market that benefits the public, while others’ interests in increasing their share of the pie are instead labeled redistributive, and therefore potentially harmful to the public well-being.¹⁴

11. Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1476 (2012).

12. See Bach, *supra* note 5, at 318–19.

13. Martha McClusky, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State* 78 IND. L.J. 783, 785 (2003).

14. *Id.* at 806.

As McClusky demonstrates, the idea that the provision of social welfare to the poor is “inefficient” and results in “moral hazard” is entirely dependent on whose interests are centered. So for example, if the central good being promoted is participation in the low-wage labor market, then the provision of welfare is inefficient. Welfare is both inefficient and creates a moral hazard by enabling and perhaps incentivizing recipients to stay out of the market. But if one redefines the social goal as promoting a society in which jobs provide a living wage, welfare starts to look different. In that frame, by providing economic support, welfare is efficient and creates a moral benefit by strengthening the bargaining position of poor workers and incentivizing employers to provide a living wage. Turning to another example, that of tax cuts, McClusky draws a contrast between the societal approbation for welfare on the one hand and the support for tax cuts for the wealthy on the other. For McClusky, these are ultimately moral rather than economic judgments. “By identifying welfare recipients’ gains as inefficient moral hazard and tax cuts for the wealthy as promoting an efficient market, [scholars] implicitly [affirm] a citizenship vision in which the poor have subordinate moral status.”¹⁵

So in this view, one should actively challenge these seemingly neutral concepts and look carefully at how particular state mechanisms function to privilege and subordinate interests. McClusky’s analysis also suggests that, rather than continuing to look solely at state structures that function to subordinate (thus Wacquant’s focus on the right and left arm of the state and my own focus on the mechanisms of the Hyperregulatory State), we also need to look at the structures that elevate or sustain privilege. It is to that task that Parts II and III turn.

II. THE U.S. SOCIAL WELFARE SYSTEM: A LARGE AND TRIFURCATED SYSTEM THAT FAILS MEANINGFULLY TO ADDRESS INCOME INEQUALITY

In popular culture, the benefits we collectively think about when we think about “welfare” are means-tested and heavily stigmatized. Programs like Temporary Assistance to Needy Families, (formerly AFDC), Supplemental Nutrition Assistance (formerly Food Stamps), public housing, and Section 8 dominate the national conversation about poverty and social welfare provision.¹⁶ However, these benefits are hardly the only kinds of programs we

15. *Id.* at 832. In this passage McClusky is specifically critiquing the work of Anthony Giddens as an example of the limitations of various communitarian visions of citizenship. For the purposes of brevity, I have changed the quotation to refer to “scholars.”

16. The tenure and dominance of this cultural obsession is perhaps best

have. They are, in fact, one of three distinct categories of public social welfare provision that comprise the publicly provided, U.S. social welfare state. The three, for the purposes of this Article are (1) means-tested, non-tax based benefits that individuals only receive if they fall below a particular income threshold, (2) social insurance benefits for retirees, their spouses and dependents, and for some disabled individuals, and (3) benefits that flow from what Suzanne Mettler has termed the “submerged state”—benefits like tax expenditures, students loans, and parts of Medicare, that flow largely invisibly to individuals and families through the tax code and other support programs.¹⁷

highlighted by the continued state legislative and popular culture focus on TANF. TANF is, at this point, one of the smallest federal social welfare programs, see *infra* Part III.B.4.a. Nevertheless, it is a major focus of state legislative proposals. Take, for example, state initiatives to drug test TANF applicants. Numerous studies have revealed that these programs are both costly and ineffective. For example, during the period in which Florida implemented suspicionless drug testing, only 2.67% of applicants who agreed to the drug test tested positive for controlled substances. *Lebron v. Sec’y of Fla. Dep’t of Children & Families*, 772 F.3d 1352, 1367 (2014). Similarly, in a recent test run in Michigan, no recipients tested positive. Ryan Felton, *Michigan’s Drug-Testing Welfare Program Has Yielded Zero Positive Results So Far*, GUARDIAN (June 21, 2016), <https://www.theguardian.com/us-news/2016/jun/21/michigan-welfare-drug-testing-program>. According to one report, in 2015 ten states spent \$850,909.25 on these programs, yielding only 321 positive drug tests. Bryce Covert & Josh Israel, *Drug Testing Welfare Recipients Is a Popular New Policy That Cost States Millions. Here Are the Results*, THINKPROGRESS (Feb. 19, 2016), <https://thinkprogress.org/drug-testing-welfare-recipients-is-a-popular-new-policy-that-cost-states-millions-here-are-the-cf829257ade0#.vbdlvic54>. In addition, numerous appellate courts have ruled that these programs violate the Constitution. See, e.g., *Lebron*, 772 F.3d at 1377; *Marchwinski v. Howard*, 60 F. App’x 601 (6th Cir. 2003) (affirming the decision of the District Court, which ruled the program unconstitutional). Despite these facts, in recent years in each legislative session, multiple states have introduced legislation requiring drug testing of welfare recipients with 28 proposals in 2012; 29 in 2012; 18 in 2014; 18 in 2015; and 17 in 2016. *Drug Testing for Welfare Recipients and Public Assistance*, NAT’L CONF. ST. LEGISLATURES (Mar. 27, 2017), www.ncsl.org/research/human-services/drug-testing-and-public-assistance.aspx.

17. This trifurcation of benefits programs represents a shift in the literature. Traditionally, when talking about social welfare programs, scholars talked about bifurcation between means-tested benefits and social insurance. Work of scholars like Michael Katz (see citations *infra* note 18) and Theda Skocpol (e.g., *SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE* (1995)) are characteristic. However, beginning at least with the work of Christopher Howard, *supra* note 1, scholars turned their attention to what Suzanne Mettler calls the submerged state. METTLER, *supra* note 2. As discussed in more detail below, these

Although the history of U.S. social welfare programs has been well told elsewhere,¹⁸ to understand the parameters of social support, it is important to begin with a little bit of that history. Although one can trace earlier roots,¹⁹ the structure of two parts of the current U.S. social welfare state originated primarily from a set of bargains struck during the New Deal. During this period, public social welfare spending was, in effect, split into two parts. On one side was social insurance for those who had, proverbially, paid into the system and on the other side were means-tested benefits for those in poverty.²⁰ This split was originally epitomized, during the New Deal, by the establishment of Old-Age Insurance on the one hand, and Aid to Dependent Children (ADC) on the other. At the start, ADC was conceptualized and implemented as a small program designed to meet the needs of white widows whereas Old-Age Insurance was designed to meet the needs of white male retirees. These two systems, means-tested benefits and social insurance, both grew significantly over time to encompass both many more programs and higher overall expenditures.

categories are imperfect in a variety of ways. For example, some means-tested benefits, like the EITC, are means-tested but share many administrative characteristics of submerged state programs. Similarly, while social insurance benefits are a significant form of economic assistance flowing to the middle, the lower middle and the bottom also benefit from programs within the submerged state. In addition, for ease of analysis, these categories leave out some significant income transfer programs, including unemployment and worker's compensation. Despite these overlaps and imperfections, the three categories do serve to describe the overall nature and trends within the publicly provided U.S. social welfare state, in particular in the inclusion of previously excluded submerged state benefits. Notice too that this analysis is limited to programs funded directly by the state. Other analysts reasonably suggest that this limitation significantly undercounts American social provision. For example, according to the Organisation for Economic Cooperation and Development (OECD), the U.S. social welfare state includes not only all these publicly provided benefit systems but also private social welfare provision in the form, primarily, of health and retirement benefits. *See infra* notes 67–83 and accompanying text.

18. For seminal work on the history of American welfare policy in the period before welfare reform in the 1990s, see, for example, LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935* (1994); MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A HISTORY OF WELFARE IN AMERICA* (1986) [hereinafter KATZ, *SHADOW OF THE POORHOUSE*]; MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* (2001) [hereinafter KATZ, *PRICE OF CITIZENSHIP*].

19. *See, e.g.*, KATZ, *SHADOW OF THE POORHOUSE*, *supra* note 18.

20. GORDON, *supra* note 18, at 253–54; KATZ, *PRICE OF CITIZENSHIP*, *supra* note 18, at 4–5.

A. Tax Policy and the Submerged State

Although means-tested benefits and social insurance are the most visible forms of cash and near-cash assistance, the United States also dispenses significant financial assistance to individuals and families through other means. These benefits have been described by Suzanne Mettler as benefits within the “Submerged State.”²¹ Mettler contrasts visible benefits, which include both social insurance and means-tested benefits, with other significant benefits that are structured to be significantly less visible.²² According to Mettler, “[t]he ‘submerged state’ includes a conglomeration of federal policies that function by providing incentives, subsidies, or payment to private organizations or households to encourage or reimburse them for conducting activities deemed to serve a public purpose.”²³

Chief among the programs of the submerged state, and central to the analysis of social welfare provision in this Article, are tax provisions that simultaneously reduce tax collection and meet social welfare objectives. Often referred to as tax expenditures, these provisions are tax rules that are similar in nature to social welfare spending programs in that they provide a financial benefit and are designed to “promote some socially desirable objective.”²⁴

21. METTLER, *supra* note 2, at 4.

22. See also Marjorie E. Kornhauser, *Cognitive Theory and the Delivery of Welfare Benefits*, 40 LOY. U. CHI. L.J. 253, 272 (2009) (“[P]lacing general welfare (child tax credits, home mortgage deductions, and education credits) within the tax system frames them so positively that they all but disappear from consciousness.”).

23. METTLER, *supra* note 2, at 4.

24. CHRISTOPHER HOWARD, *THE WELFARE STATE NOBODY KNOWS: DEBUNKING MYTHS ABOUT U.S. SOCIAL POLICY* 16 (2007). Tax expenditures are defined not only by their social welfare objectives but by the fact that they “depart from the normal tax system.” *Id.* More technically, the Joint Committee on Taxation, which produces an annual report on federal tax expenditures for the House Committee on Way and Means and the Senate Committee, defines tax expenditures as “Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability.” STAFF OF THE JOINT COMM. ON TAX’N, 113TH CONG., JCX-97-14, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2014–2018, at 2 (Joint Comm. Print 2014). According to Nancy Knauer, “[a]s a theoretical construct, tax expenditure analysis is now widely accepted, although commentators have continuously questioned the appropriate way to distinguish tax expenditures from the more structural components of the income tax.” Nancy J. Knauer, *Critical Tax Policy: A Pathway to Reform?*, 9 NW. J.L. & SOC. POL’Y 206, 216–17 (2014) (citations omitted). Despite the broad acceptance and adoption of the concept of tax expenditures through federal law and the widespread use of the concept by organizations like the

The idea that certain tax provisions (known colloquially as tax breaks) are better understood as a veiled form of social spending is traditionally attributed in the legal literature to Stanley Surrey, who in 1970 published an article in the *Harvard Law Review* entitled *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*.²⁵ In that article Surrey demonstrated that the tax code at the time was replete with “income tax incentives” designed to “achieve various social and economic objectives . . . similar in nature to those served by direct governmental expenditures or loan programs.”²⁶ In the wake of Surrey’s work, in 1974 Congress adopted provisions to account annually for these expenditures. As explained by Nancy J. Knauer,

The Congressional Budget and Impoundment Control Act of 1974 adopted Surrey's tax expenditure concept and required the creation of a tax expenditure budget to accompany the regular direct-spending budget. Organized by budget function, the tax expenditure budget is designed to both give policymakers important distributional information, as well as to make them more accountable for the indirect spending that they authorize through the tax code.²⁷

Congressional Budget Office, the Joint Committee on Taxation, and the Tax Policy Center, there continue to be significant questions about what tax provisions to include. These questions are complicated but generally center around what to define as the “normal tax system” and what constitutes a “departure.” Nevertheless, as explained by scholars associated with the Tax Policy Center, “there are numerous provisions in the tax code that represent disguised spending under any reasonable definition and would not be part of any broadly based, normative tax system.” ERIC J. TODER, BENJAMIN H. HARRIS & KATHERINE LIM, DISTRIBUTIONAL EFFECTS OF TAX EXPENDITURES 3 (2009), <http://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/411922-Distributional-Effects-of-Tax-Expenditures.PDF>. This Article relies on analysis from the Congressional Budget Office, the Tax Policy Center, and the Joint Committee on Taxation for discussion of what constitutes a tax expenditure, the value of particular tax expenditures, and the distributional impact of those provisions.

25. 83 HARV. L. REV. 705 (1970) [hereinafter Surrey, *Tax Incentives*]. Surrey also published other works on this topic including STANLEY SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES (1973). For a discussion of the origin of the concept of tax expenditures before Surrey, see HOWARD, *supra* note 1, at 5–6.

26. Surrey, *Tax Incentives*, *supra* note 25, at 705–06.

27. Knauer, *supra* note 24, at 216–17.

Although Surreys' original work focused on making evident the existence of and questioning the appropriateness of using tax law tools to accomplish social welfare objectives, since that time scholars in other fields have increasingly focused on the political and distributive effects of these tax provisions and their effect on social welfare provision overall.²⁸ For example, in *The Hidden Welfare State*, Christopher Howard sought to bring public attention to these "hidden" benefits and their differences from more traditional forms of social welfare provision. In distinguishing his work from the work of tax scholars Howard argued that,

[those] authors discuss tax expenditures in the context of tax policy and budgetary reform, not social policy. They are interested in the way in which tax expenditures affect decisions about raising revenue and appropriating funds. They are not interested in investigating how tax expenditures change our understanding of the American social welfare state. . . [and] they seldom explore the *politics* of individual tax expenditures.²⁹

Howard's work turned to these questions and demonstrated several effects of including tax expenditures on the overall nature of the U.S. social welfare state. For the purposes of this Article, two of his conclusions are crucial. First, "[p]erhaps the most striking finding is how much larger the entire American welfare state looks after including tax expenditures. The hidden welfare state is almost half the size of the visible welfare state"³⁰ Second, "once tax expenditures are included . . . the notion that benefits flow mainly to the poor becomes . . . [hard] . . . to sustain."³¹ This Article joins and builds upon Howard's work in conceptualizing and evaluating these tax tools

28. Despite the lack of focus in Surrey's work on distributive impact, he did in fact note these effects. For example, in listing what he termed "asserted defects of tax incentives," Surrey noted that "tax incentives are inequitable: They are worth more to the high income taxpayer than the low income taxpayer, [and] they do not benefit those who are outside the tax system because their incomes are too low . . . or they are exempt from tax." Surrey, *Tax Incentives*, *supra* note 25, at 719.

29. HOWARD, *supra* note 1, at 7. Howard was writing in 1996. Since that time, several tax law scholars have turned more directly to these social welfare issues. See, e.g., Kornhauser, *supra* note 22, at 261-64; Susannah Camic Tahk, *The Tax War on Poverty*, 56 ARIZ. L. REV. 791 (2014); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 978 (2004).

30. HOWARD, *supra* note 1, at 17.

31. *Id.*

not in the frame of tax policy or theory but as a part of the overall U.S. social welfare system.

Turning to the provisions themselves, prime examples include the exemption of employer-provided health insurance from taxable income and the home mortgage interest deduction (HMID). Although in popular discourse these tax provisions are not viewed as social support because they simply allow people to keep “their own money,” at least since Surrey’s work, the federal government and the Organisation for Economic Cooperation and Development (OECD) have acknowledged that these are in fact a form of spending. As Howard explains:

[W]ith tax expenditures, the government is essentially collecting what taxpayers would owe under a “pure” tax system and simultaneously cutting some taxpayers a check for behaving in certain desired ways, such as buying a home. In a pure system, everyone with the same income would pay the same amount of income tax. In the real world, people with the same income often do not pay the same tax, because some are able to take advantage of tax expenditures while others are not.³²

For an example of how this works, take the HMID. Picture two families who have the same income coming in from work, live in identical houses of identical values, and whose tax returns, investments, and finances are identical but for one difference: Family *A* owns their house outright and Family *B* has a mortgage on which they pay interest every month. In a “pure” tax system the tax bills of the two families would be identical—that is, *X* percent of their identical incomes. With the HMID, however, Family *B* gets to deduct their mortgage interest from their income before the tax is assessed.³³ So at the end of the day, despite their identical incomes, identical finances, identically-valued homes, and identical tax brackets, the family paying mortgage interest pays a lower tax bill because less of that family’s income is subject to taxation. From a budgetary perspective, the tax the government does not collect is an expenditure no different than Temporary Assistance to Needy Families (TANF), a public housing subsidy, or a Social Security check.³⁴

32. *Id.*

33. For this example to work, one would also have to assume that it is financially beneficial for Family *B* to itemize deductions rather than claim the standard deduction.

34. The mere fact that the tax bills of these two hypothetical families are different is not, in and of itself, what makes the HMID a tax expenditure. For more

These tax provisions also clearly mirror other spending programs in their intended effect. As explained by the Congressional Budget Office, “[b]oth tax expenditures and spending programs provide financial assistance for particular activities, entities, or groups of people. Through that assistance, tax expenditures and spending programs alter people’s behavior, change the allocation of resources in the economy, and transfer income among households.”³⁵ One might, of course, argue that tax expenditures differ significantly from programs like TANF in important ways that make them “not welfare.” In popular discourse, this argument generally centers around the negative connotations associated with the term welfare and boils down to an assertion that the deduction has merit because it promotes home ownership while the TANF payment lacks merit because it encourages dependency. At base, however, statements like these are nothing more than value judgments about what we consider to be good (home ownership) and bad (handouts).³⁶ One could just as easily argue that the HMID is bad in that its primary function is to artificially inflate housing prices and encourage people to buy houses they cannot actually afford and thus overinvest in real estate to the detriment of investing in ways that would potentially yield greater social benefits.³⁷ One could argue that the TANF payment is good in that it promotes human flourishing and incentivizes employers to pay a living wage.³⁸

detail on the technical definition of a tax expenditure, see *supra* note 24 and accompanying text.

35. CONG. BUDGET OFFICE, THE DISTRIBUTION OF MAJOR TAX EXPENDITURES IN THE INDIVIDUAL INCOME TAX SYSTEM 8 (2013).

36. Despite the fact that it is clear that, as a matter of budgetary cost, tax expenditures and spending programs are functionally identical, there is no question that they read politically quite differently. Interestingly, studies consistently demonstrate far more public support for programs when they are characterized as tax breaks rather than as spending programs. For a detailed and interesting discussion of these studies, see Tahk, *supra* note 29, at 823, noting that “[t]he second key factor that advantages the tax war on poverty over the nontax war on poverty is that public opinion views tax-embedded programs more favorably than their nontax counterparts. Several recent studies have documented that voters are more likely to favor a social policy enacted through the tax code than a social policy that is not.”

37. See, e.g., CONG. BUDGET OFFICE, *supra* note 35, at 7 (“[T]ax expenditures may lead to an inefficient allocation of economic resources by encouraging more consumption of goods and services receiving preferential treatment . . . [f]or example . . . investing too much in housing and too little elsewhere relative to what they would do if all investments were treated equally.”).

38. One could also argue, more credibly and less politically, that tax expenditures like the HMID are not cash benefits analogous to Section 8 or TANF because it is not entirely clear that the taxpayer who claims the deduction, credit,

The history of these tax provisions also departs from the New Deal-based narrative of U.S. social welfare history. Unlike means-tested benefits and social insurance, tax expenditures and many other submerged state benefits find their statutory origins both before and after those programs. For example, the deductions for charitable contributions, home mortgage interest, employer pensions, and state and local property taxes all date to the 1910s and 1920s.³⁹ These programs grew slowly and fairly invisibly over the next few decades. As Mettler describes, with the backlash against the visible forms of social spending in the later decades of the twentieth century, submerged state benefits increasingly became the policy tool of choice.⁴⁰ Submerged state benefits are particularly popular among politically conservative politicians because “they enable them to deliver goods and services to core constituencies while neither creating vast new spending programs nor enlarging the federal bureaucracy”⁴¹ Tax expenditures have in fact become a very significant

deferral, or exclusion is the financial beneficiary of the tax provision. For example, one could argue that the individual who benefits from the HMID is actually the home seller, who can raise the sale price of the home because the buyer has more to spend on the house as a result of the HMID. Similarly, one could argue that the elimination of the HMID would ultimately deflate housing prices, thus netting out the benefit to buyer or seller. While these arguments are certainly true, similar complexities apply to poverty-based support. For example, a Section 8 subsidy, while benefitting the tenant in the sense that the tenant can more easily rent a particular rental unit and in the sense that it is given in the name of the tenant, the subsidy is actually paid to the owner of the rental property. Not only does the owner receive the cash benefit, but the existence of Section 8 certainly affects the rental value of the property. Elimination of the benefit could, as in the case of the HMID, deflate or inflate property values depending on local market conditions. Similarly, benefits like Supplemental Nutrition Assistance (SNAP, formerly Food Stamps), although clearly benefitting the direct recipient, also benefits both food producers and sellers. They also arguably benefit low-wage-paying employers, who are able to set wages even lower as a result of the ability of benefit holders to live with and accept lower wages because part of their food costs are met through SNAP. Because of the complexity and largely unknown nature of these effects, this Article does not include these arguments in its analysis, instead naming the benefit as a cash provision to the taxpayer or named benefit recipient and largely (although not entirely) assuming the face value of the particular program as a measure of the value. Throughout the Article, sources are provided to provide background on assumptions and calculations.

39. METTLER, *supra* note 2, at 16–17. For an in-depth discussion of the origins and development of the HMID as well as of employer pensions, the EITC, and the targeted jobs tax credit, see HOWARD, *supra* note 1, at 43–174.

40. METTLER, *supra* note 2, at 17.

41. *Id.* For an interesting and in-depth study of the use of tax expenditures by Democrats and Republicans and their effect on income inequality, see FARICY,

portion of federal spending. As Christopher Faricy describes, “tax expenditures averaged 9 percent of total U.S spending in the 1980s, 14.6% in the 1990s, and increased to 27% in the 2000s.”⁴²

B. *The Size and Impact of Social Welfare Provision*

Perceptions about and characterizations of the extent of public U.S. social welfare spending tend to depend strongly on one’s political persuasion. On the right, spending is represented as extensive, unjustified, and unsustainable. For example, in April 2012, Robert Rector testified before Congress on behalf of the Heritage Foundation. Rector highlighted what the foundation estimated to be \$927 billion in annual spending on means-tested benefits at that time.⁴³ Those on the left highlight different statistics and facts. They note the meager percentage of gross domestic product spent on social welfare in the United States as compared to other nations, the high levels of income inequality compared to other nations, and the very high percentage of individuals who live in poverty in the United States.⁴⁴

Generally speaking, neither analysis is wrong, although they clearly differ both in the moral and democratic values they espouse as well as the facts they emphasize. What each does, however, is leave out crucial facts. Even if we are limiting the analysis to public social welfare spending,⁴⁵ the

supra note 3.

42. *Id.* at 106.

43. *Strengthening the Safety Net: Hearing Before the H. Comm. on the Budget*, 112th Cong. 26–36 (2012) [hereinafter *Rector Hearing Statement*] (statement of Robert Rector, Senior Research Fellow, Heritage Foundation).

44. See, e.g., Anne Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez Faire Markets in the Minimal State*, 77 L. & CONTEMP. PROBS. 25, 38 (2014) (“[W]elfare programs in the United States provide only minimal and grudging resources for family life. Indeed, the ‘welfare state’ is nearly a misnomer here: although the term provides a convenient shorthand for a gaggle of federal and state programs, it is too grandiose to describe the minimal and patchwork protections enacted by the United States.”).

45. One gets a very different picture of these international comparisons if one includes not only tax expenditures, as are included here, but also private spending for social welfare ends. For an interesting example of this type of analysis, see Kimberly L. Morgan, *America’s Misguided Approach to Social Welfare: How the Country Could Get More for Less*, FOREIGN AFF. (Dec. 3, 2012), www.foreignaffairs.com/articles/united-states/2012-12-03/americas-misguided-approach-social-welfare (explaining that, as calculated by the OECD, “[n]et social expenditure also includes private spending, whether mandated by the government (such as requirements that employers pay for sick leave) or voluntary (such as employer-provided pensions in

lack of completeness rests, at least in part, on the failure to include social welfare spending through the tax code and other forms of less visible state subsidy within these accountings.⁴⁶ What becomes eminently clear, however, is that although spending is high, benefit programs embedded within the tax code often distribute funds upward, boosting income inequality and doing nothing to address poverty.⁴⁷

Discussed below is a rough estimate of public, federal expenditures in each of the three social welfare categories described above. Before proceeding to the figures though, it is important to be clear about what programs are being included in this analysis. In general, across each of these categories, this analysis includes federal programs that provide either cash, near-cash, or significant non-cash but direct support to individuals or families. So for means-tested benefits, I include all significant spending programs that provide direct assistance for income support, food, housing, health, and childcare. For social insurance, I include Social Security retirement, Social Security disability, and Medicare; and for tax expenditures, I include the ten largest tax expenditures claimed on personal (as opposed to business) returns, all of which function as cash transfers to the households that receive them.⁴⁸ There is no question that one could quibble about what programs to include or not.⁴⁹ But despite these potential disagreements, the

the United States). As the scholars Jacob Hacker and Jennifer Klein have shown, the United States' reliance on voluntary private welfare is unique. Most adults in the United States receive benefits through their workplaces that include health insurance, pensions, dependent-care tax exclusions, and the like. This kind of private spending makes up nearly 40 percent of all U.S. social spending, compared with under 20 percent in the United Kingdom and about eight percent in France and Sweden.”).

46. For an in-depth look at these misperceptions and their origins, see HOWARD, *supra* note 24, which includes a prime example of how these accountings tend to be presented. Again, it is important to note that, by providing this information, this Article does not seek to support an argument that the United States should spend less on social support. To the contrary, there are tremendously good reasons to suggest that it is a primary responsibility to use the power of the state to ensure that the basic needs of its citizens are met. What this Article does support, however, are calls to surface and to address the distribution and structural inequalities across class embedded in our social welfare programs.

47. See *infra* Part III.B.3–4.

48. See *infra* note 53 for the list of these ten expenditures.

49. For example, analysts at the OECD exclude the HMID from their category of “Tax Breaks for a Social Purpose” because it fails to meet their definition of a program for social welfare ends. See *infra* notes 74–76 and accompanying text. Scholars and analysts focused on American tax policy more specifically, however, include that particular program. See, e.g., CONG. BUDGET OFFICE, *supra* note 35, at 1;

basic points outlined here about size and distribution remain true.

As to spending on the majority means-tested cash and near-cash benefits, in 2014 the U.S. government spent approximately \$529 billion on the largest cash and near-cash benefit programs for housing, food, cash assistance, medical care, and childcare.⁵⁰ For social insurance the United States spent approximately \$1.39 trillion (\$545 billion on Medicare and \$845 billion on Old-Age and Survivors Insurance (OASI) and Social Security disability).⁵¹ Finally in 2013,⁵² the United States provided more than \$900 billion to

ERIC TODER & DANIEL BANEMAN, TAX POLICY CTR., DISTRIBUTIONAL EFFECTS OF INDIVIDUAL INCOME TAX EXPENDITURES: AN UPDATE 17–18 (2012).

50. OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2016 ANALYTICAL PERSPECTIVES OF THE U.S. GOVERNMENT tbl.25-12 (2015), <https://www.gpo.gov/fdsys/pkg/BUDGET-2016-PER/pdf/BUDGET-2016-PER-9-6-2.pdf> [hereinafter Table 25-12] (table for “Baseline Net Budget Authority By Function, Category, and Program”). This figure includes 2014 outlays (all in billions) for Medicaid (\$301,472); the Children’s Health Insurance Program (\$9,314); Supplemental Nutrition Assistance (\$76,230); the Supplemental Food Program for Women, Infants, and Children (\$6,265); state child nutrition programs (\$19,481); federally funded housing programs (\$43,020); TANF (\$16,887); Supplemental Security Income (\$54,012); the Childcare and Development Block Grant (\$2,226). *Id.* Not included in this number are transfer programs focusing on education and training, energy assistance, Veterans’ benefits, programs funded to provide services to low-income individuals and communities, and some smaller mean-tested programs. Also excluded, to prevent double counting, are means-tested tax expenditures, the two most significant of which are the EITC (\$60,087) and the CTC (\$21,490). These two benefits are excluded here but included in the figures detailing the value of income transfers through tax expenditures. These figures differ from those offered by Robert Rector for several reasons. *Rector Hearing Statement, supra* note 43. In addition to relying on 2011 instead of 2014 data, the most significant difference between that accounting and the one included in this Article is the inclusion of state funds. Under Rector’s analysis the total federal expenditures are \$717.1 billion rather than \$927 billion. *Id.* at 35. In addition Rector’s accounting included many services, as opposed to cash or cash-equivalent, programs. For example, Rector includes funding for social services, job training, community economic development, and certain education programs, and I did not. *Id.* at 27, 31.

51. Table 25-12, *supra* note 50.

52. For this calculation, despite the obvious downside of using 2013 rather than 2014 data, I have chosen to use these figures because of complications involved in calculating the value of tax expenditures. While one can calculate outlays for direct spending programs simply by adding budget items, the calculation of tax expenditures is far more complicated. This is due to a variety of important factors. First, although one can calculate the revenue lost through a particular tax provision, this figure only represents the revenue that the state would gain if the particular provision was repealed and there were no other effects. It therefore does not account for behavioral and market

individuals and families through the ten largest tax expenditures.⁵³ This figure included approximately two-thirds of spending through tax expenditures and totaled approximately 5.7% of gross domestic product.⁵⁴ Clearly, inclusion of tax expenditures in the category of social welfare spending significantly affects the size of the U.S. social welfare state.⁵⁵

Although all three categories are fairly considered social welfare programs, they benefit very different groups in society. The majority of means-tested benefits go to those in poverty. Social insurance goes to nearly all, with distribution being overall progressive, distributing more to those on the lower end of the income spectrum.⁵⁶ In contrast tax expenditures flow primarily to those in the top quintiles of the economic distribution.

changes that might result. So for example, it does not contemplate the housing market effects on a repeal of the HMID, although presumably its repeal would potentially lower market prices and/or lower the amount that a particular family spends on a home. In addition, as explained by the Congressional Budget Office, “the estimated magnitude of a collection of tax expenditures may differ from the sum of the estimated magnitudes of the separate expenditures because of the interactions that arise among expenditures.” CONG. BUDGET OFFICE, *supra* note 35, at 10. Finally, estimations “are measured relative to a comprehensive income tax system. If tax expenditures were evaluated relative to an alternative tax system . . . some of the 10 major tax expenditures [included in the CBO report] would not be considered tax expenditures.” *Id.*

53. *Id.* at 1. The ten tax expenditures included in this analysis were exclusions for employer-sponsored health insurance, net pension contributions and earnings, capital gains on assets transferred at death, and a portion of Social Security and railroad retirement benefits; deductions for some taxes paid to state and local governments, mortgage interest payment, and charitable contributions; and two tax credits: the EITC and the childcare tax credit. *Id.* In thinking about the value of tax expenditures, it is important to note the difficulties in these calculations. *See supra* note 52.

54. *Id.* For another view of the relative size of tax expenditures, consider that, according to Nancy J. Knauer, “in 2011, the total amount of the personal income tax expenditures exceeded the defense budget.” Knauer, *supra* note 24, at 216–17 (citations omitted).

55. Although it is not the focus of this Article, there is no question that inclusion of tax expenditures, as well as the inclusion of the impact of both taxation of some benefits and taxation of consumer goods, also significantly impacts the generally held perception that U.S. social welfare spending lags behind spending elsewhere. Although it is still true that, overall, spending does lag behind, the differentials are not quite as drastic as commonly perceived. For an in-depth analysis of these issues, see HOWARD, *supra* note 24, at 13–26.

56. *See infra* Part II.B.2.

1. Means-Tested Benefits for Households in Poverty.

As to means-tested benefits, clearly these benefits flow to those of very limited economic means. In general these programs have an income cap that limits eligibility to those at or below the cap, and some but not all programs also bar receipt of benefits based on the financial resources (savings, homes, cars) of the applicant. Income caps are, in general, pegged to benefit levels, to some percentage of the poverty line (e.g., 100% or 130% of poverty), or to some percentage of the area median income. So for example, eligibility for TANF is defined by the state. In a state like Tennessee, this means that a family of four is not eligible for cash assistance if their gross monthly income is over \$2,240.⁵⁷ Supplemental Nutrition Assistance (SNAP, formerly Food Stamps) is an example of a major program tied closely to the poverty level. To be eligible for SNAP a family cannot have gross income exceeding 130% of poverty. So for a family of four, their gross monthly income cannot exceed \$2,663 per month.⁵⁸ Eligibility for the major public housing programs is determined a little differently. Depending on the program, a household might be eligible for assistance if household income is less than 80% or 50% of the area's median income (AMI), although in several of these programs in effect few units or subsidies flow to those above 50% of AMI.⁵⁹ To give some sense of numbers again, in Tennessee in 2015 for a family of four, 50% of AMI is \$28,050 in annual income.⁶⁰ Without belaboring the point, it is clear that these benefits flow to those of extremely limited means.⁶¹

2. Social Insurance for Retirees and Some Disabled Individuals

As detailed above, the two primary social insurance benefits are OASI and Medicare.⁶² Unlike the two other categories of benefits, in terms of class

57. *Tennessee Families First*, BENEFITS.GOV, <https://www.benefits.gov/benefits/benefit-details/1678> (last visited Apr. 22, 2017).

58. *Supplemental Nutrition Assistance Program Eligibility*, USDA FOOD & NUTRITION SERV., <https://www.fns.usda.gov/snap/eligibility> (last visited Mar. 9, 2017).

59. 42 U.S.C. § 1437a(b)(1)-(2) (Westlaw 2017); 24 C.F.R. § 5.603 (2017).

60. *FY 2015 State Income Limits*, U.S. DEP'T OF HOUSING & URB. DEV., http://www.huduser.org/portal/datasets/il/il15/State_Incomelimits_Report.pdf (last visited Apr. 22, 2017).

61. *Table F-1. Income Limits for Each Fifth and Top 5 Percent of Families*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-families.html> (last visited Apr. 22, 2017).

62. In addition, the U.S. Social Security Administration provides assistance

distribution, Social Security and Medicare are closer to universal benefits⁶³ for individuals who are categorically eligible, in the sense that they are received by a far larger part of the population. For example, according to the Social Security Administration, just shy of nine out of ten Americans over 65 receive a Social Security payment.⁶⁴ This does not, however, mean that benefits are evenly distributed across class. In fact, overall, social insurance benefits are distributed progressively, with lower income families receiving more than they put into the system while higher income families receive less than they put in.⁶⁵

3. Tax Expenditures for the Top

While a small percentage of the provisions that the Congressional Budget Office deems tax expenditures benefit those in lower income quintiles, the vast majority benefit the richest—those in the top 20% and 5% of earners. For the ten largest tax expenditures in 2013, which again totaled over \$900 billion or 5.6% of GDP, “more than half of the combined benefits . . . accrue to households in the highest income quintile . . . with 17% going to households in the top 1 percent of the population.”⁶⁶

The implication of these facts bear repeating. Quite simply, many tax provisions constitute public benefits programs, the total size of which exceeds the value of all means-tested cash and cash-equivalent benefits. These programs benefit disproportionately the very wealthy in the United States. So

to the spouses and children of retirees as well as to disabled individuals with a significant work history. See *Frequently Asked Questions: Spouses, Children, Survivors*, SOC. SECURITY ADMIN., <https://faq.ssa.gov/link/portal/34011/34019/ArticleFolder/419/Spouses-Children-Survivors> (last visited Apr. 22, 2017); *Frequently Asked Questions: Disability*, SOC. SECURITY ADMIN., <https://faq.ssa.gov/link/portal/34011/34019/ArticleFolder/417/Disability> (last visited Apr. 22, 2017).

63. As a general matter, because the two programs are programmatically linked, recipients of Social Security also receive Medicare. *Understanding Supplemental Security Income SSI and Other Government Programs—2016 Edition*, SOC. SECURITY ADMIN., <https://www.ssa.gov/ssi/text-other-ussi.htm> (last visited Mar. 9, 2017).

64. *Fact Sheet, Social Security*, SOC. SECURITY ADMIN., <https://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf> (last visited Apr. 22, 2017).

65. FARICY, *supra* note 3, at 185 (“Kelly [] found that Social Security alone reduces income inequality by 6.9% and Medicare, by itself, reduced income inequality by 3.6%.”) (citing NATHAN J. KELLY, *THE POLITICS OF INCOME INEQUALITY IN THE UNITED STATES* (2009)).

66. CONG. BUDGET OFFICE, *supra* note 35, at 1.

it is profoundly misleading to say that the United States has a meager social welfare state. Instead, it is quite large. What it is not, however, is one that is targeted primarily to benefit those in poverty or even those on the lower end of the socio-economic scale. Instead, vast portions of the U.S. social welfare state benefit those in the middle and those at the top.

C. The Distribution of Social Welfare Benefits and the Effect on Income Inequality

Although one can parse the question of distributive impact of U.S. social welfare provision in a variety of ways, one of the most persuasive and comprehensive analyses comes from the OECD. In an effort to provide meaningful cross-country comparison of social welfare spending, researchers at the OECD developed the Social Expenditure Database (SOCX). This database stores data on social expenditures across multiple categories for OECD countries.⁶⁷

Relying on SOCX data, Adema, Fron, and Ladique sought to determine social welfare spending across the OECD as a percentage of gross domestic product (GDP). They then analyzed the comparative effect on income inequality of that spending.⁶⁸ In terms of spending as a percentage of GDP, the paper includes three categories of spending: public expenditures, taxation effects, and private expenditures for social welfare ends. Focusing on the first category, public expenditures include public spending in nine social welfare categories: old age, survivors, health, family, active labor market programs, unemployment, housing, and other social policy areas.⁶⁹ For the United States these categories include a wide variety of what this Article terms cash and near-cash benefits as well as spending on other programs serving

67. *Social Expenditures Database*, OECD.ORG, www.oecd.org/els/social/expenditure (last visited Mar. 9, 2017).

68. Willem Adema, Pauline Fron & Maxime Ladaique, *How Much Do OECD Countries Spend on Social Protection and How Redistributive Are Their Tax/Benefit Systems?*, 67 INT'L SOC. SECURITY REV. 10 (2014).

69. OECD SOCIAL EXPENDITURE DATABASE (SOCX), SOCIAL EXPENDITURE UPDATE: SOCIAL SPENDING IS FALLING IN SOME COUNTRIES, BUT IN MANY OTHERS IT REMAINS AT HISTORICALLY HIGH LEVELS 2 (2014). See also W. Adema, P. Fron & M. Ladaique, *Is the European Welfare State Really More Expensive?: Indicators on Social Spending, 1980-2012; and a Manual to the OECD Social Expenditure Database (SOCX)*, (OECD Soc., Emp't & Migration Working Papers, No. 124, 2011), <http://dx.doi.org/10.1787/5kg2d2d4pbf0-en>. Note that these categories are much broader than the cash and cash-equivalent benefits focused on in this Article.

social welfare ends.⁷⁰

In the second category are Tax Breaks with a Social Purpose (TBSP) and other tax effects. Although other tax effects such as taxation of benefits and indirect taxation on consumption can have a significant effect on social welfare spending in other countries, those effects are less significant in the United States.⁷¹ In contrast, in the United States, TBSPs play a large role in comparison to other OECD countries.⁷² TBSPs are defined as “those reductions, exemptions, deductions or postponements of taxes, which: (a) perform the same policy function as transfer payments which, if they existed, would be classified as social expenditures; or (b) are aimed at stimulating private provision of benefits”⁷³ Although the definitions of tax expenditures and TBSPs do vary,⁷⁴ with one exception,⁷⁵ the tax expenditures

70. For example, in contrast to the calculations above, the SOCX includes U.S. expenditures on child welfare administration and training within the category of family benefits. For a detailed discussion of the programs included in these categories, see *Country Note: Database on Social Expenditures: United States*, OECD SOC. POL’Y DIV., http://stats.oecd.org/Index.aspx?datasetcode=SOCX_AGG (last visited Mar. 9, 2017).

71. Adema, et al., *supra* note 68, at 9.

72. *Id.* at 11.

73. *Id.*

74. While, as described above, a tax expenditure is defined at its core as a departure from the normal tax system, TBSPs do not reference nor are they defined in relationship to any conception of a normal tax base. Instead, they are defined by their structure (a reduction, exemption, deduction, or deferral) and their social purpose.

75. Researchers at the OECD chose not to include the U.S. HMID in the category of TBSP for housing. *Id.* at 92. The reason for this decision, according to Willem Adema, was that

[i]t was decided to consider rent subsidies as social, as well as residential support for the elderly, disabled and other population groups (as recorded under Old-age, Incapacity-related benefits, etc. . . .). Mortgage relief for low-income households has some similarities with such programs, but it is unclear up to what level of income, or what level of property value, such support should be considered social (and possible thresholds will differ across countries). For these reasons, mortgage relief and capital subsidies towards construction of housing are not considered in SOCX.

Email from Willem Adema to author (June 3, 2016) (on file with author). While the OECD made the choice to exclude the HMID, other researchers and policy analysts, and particularly those focused on U.S. policy, include it. *See supra* note 49.

discussed in this Article also fall within the TBSP category.⁷⁶

As suggested above, TBSPs have a significant effect on the overall size of U.S. social welfare spending. One can see this most clearly when looking at social welfare spending as a percentage of GDP. While in 2009 U.S. gross public expenditures on social welfare ends amounted to 19.1% of GDP, when taking into account tax effects, and most importantly TBSPs, that figure rose to 20.3% of GDP, or slightly higher than the average spending for the OECD 29.⁷⁷

This increase in spending, however, does not mean an increase in addressing either poverty or economic inequality. Because TBSPs tend to benefit the wealthy far more than the poor, the overall effect of social spending on income inequality is far less significant than in the same OECD countries. Adema, Fron, and Ladique rely on SOCX data to demonstrate the overall effect of social welfare policy on inequality. This analysis takes into consideration “the overall level of the tax burden, the degree of progressivity in tax systems, the degree of targeting within social programmes, and the level of social expenditure”⁷⁸ in the nations they analyze. In the United States, public benefits represent 12.6% of net household income; only 21.9% of those transfers go to the lowest quintile resulting in 2.8% of gross benefits accruing to the bottom quintile.⁷⁹ Further, when taking into account public social welfare benefit and TBSPs as well as other tax effects, these programs have a less redistributive effect (24%) in the United States than they do in the OECD overall (35%).⁸⁰

In the end, taking into consideration the broadest range of programs,

76. The OECD SOCX also includes and tabulates private spending on social welfare ends. For example, in the United States it would include private spending on health insurance (and not just the TBSP that support such spending) as social welfare spending. For more information on this analysis and its significance, see *supra* note 45. Full analysis, however, is beyond the scope of this Article.

77. Adema et al., *supra* note 68, at 15. Note that the estimate of TBSPs as a percentage of GDP here (just over 2%) varies from the estimate provided *supra* by the Congressional Budget Office (5.4%). Cf. CONG. BUDGET OFFICE, *supra* note 35, at 4. This results from the inclusion, by Adema, Fron, and Ladaique, in this particular analysis, of only one of three categories of TBSPs. The researchers include TBSPs similar to cash benefits but exclude TBSPs that stimulate the use of private social benefits as well as tax breaks for pensions, which the SOCX estimates only very generally due to difficulties in calculation. Adema, et al., *supra* note 68, at 11–13. The exclusion of those categories, in particular the support for pensions and employer-provided health insurance, significantly lowers the overall percentage of TBSPs in these calculations.

78. Adema, et al., *supra* note 68, at 16.

79. *Id.* at 18 tbl.2.

80. *Id.*

including publicly supported private provision and taking into consideration the net impact of progressive taxation rates, the overall U.S. social welfare provision remain progressive, but due to the use of TBSPs, which benefit the wealthy more than the poor, the system overall is less progressive than in other OECD countries. These economic analyses do not, however, focus on the striking differences in the means of administration of benefit provision across class. It is to this topic that Part III turns.

III. ADMINISTRATIVE INEQUALITIES: FROM HYPERREGULATION TO ENTITLEMENTS

As detailed above, the United States provides extensive support to individuals across the income spectrum. This Part turns to five different programs that vary significantly in the class quintiles they benefit and argues that the means of administration varies significantly, moving from highly stigmatizing, hyperregulatory structures at the bottom to programs that are the functional equivalent of nearly invisible entitlements at the top. Given the social welfare ends that all these programs purport to serve, Part IV argues that these structural inequalities are tremendously difficult to justify and that these administrative inequalities must be a focus for reform.

A. Providing Benefits Across Class: Focusing on Housing and Income Support

As one moves from the bottom to the top of the income scale, the administrative structures shift from what I have previously described as hyperregulatory to structures that function remarkably similarly to entitlements from an administrative, budgetary, and statutory perspective. On the top and bottom of the income scale are two sets of benefits that provide support for housing. At the top are the HMID and real estate tax deduction, two tax expenditures that provide more than twice the housing support given to the poor and go disproportionately to those in the top quintiles of the income distribution. In sharp contrast, at the bottom of the scale are public housing and TANF benefits that go to those at the very bottom and that, from an administrative perspective, could not be more different than the housing benefits for the rich. In the middle are two other tax expenditures, the EITC, which benefits those in the first and second quintiles, and the CTC, which benefits those in the broad middle of the income spectrum. To lay the framework for these arguments, this Part begins with a description of the five benefit programs at issue. It then proceeds, in subsection B, to a discussion of the contrasts in regulatory structures.

1. *Housing Benefits: A Study in Distributive and Size Contrasts*

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

The federal government provides direct housing assistance to those in poverty through a number of programs. The three largest are the Housing Choice Voucher program (commonly referred to as Section 8), Public Housing, and Project-Based Section 8. Together they supply over 90% of federally subsidized housing units to those below, at, or slightly above the poverty line.⁸¹

As noted above, the federal government also provides substantial assistance for housing through the tax system. There are two principal tax provisions that subsidize housing directly. First, homeowners who pay interest on their mortgages are able to deduct those expenses from their taxable income through the HMID. Second, homeowners who pay state and local property tax are also able to deduct that expense. The effect is to significantly lower the effective tax rate for those households.⁸²

While it is clear that the federal government spends significant sums on housing, what is perhaps surprising is the comparative size of these programs. For FY 2015 the HMID cost approximately \$74 billion and the state and local property tax deduction cost \$34 billion,⁸³ for a total of \$108 billion in tax expenditures for housing. In contrast, in 2015, together the Housing Choice Voucher Program, Public Housing, and Project-Based Section 8 cost a total of approximately \$43 billion.⁸⁴ So the bottom line is that spending for housing-related tax provisions outstrips spending for poverty-focused housing support by well over 100%.

81. *Fact Sheet: Federal Rental Assistance*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 30, 2017), <http://www.cbpp.org/files/4-13-11hou-US.pdf>.

82. *See infra* Part III.B.3.

83. STAFF OF THE JOINT COMM. ON TAX'N, 112TH CONG., JCS-1-12, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2011–2015, at 32–46 (Joint Comm. Print 2012) (Table 1).

84. Table 25-12, *supra* note 50.

2. *Income Support for Households with Dependents: Distribution to the Bottom, the Middle, and the Upper Middle Class*

As is the case for housing support, the United States provides significant support, in the form of direct cash transfers, to households with dependent children. The three primary federal programs providing this support are TANF, the EITC,⁸⁵ and the CTC.

TANF is the federal cash assistance program that arose from the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).⁸⁶ TANF provides benefits only to extremely poor households, those well below the federal poverty level and at the low end of the first income quintile. While TANF is targeted at very low-income households, the program's success at reaching poor households with dependent children has consistently declined over the last twenty years. This is most clearly evidenced by what Legal Momentum has termed the TANF Misery Index.⁸⁷ The index measures the sum of the percentage of households with children under 18 in poverty served by TANF and the difference between the poverty level for a family of three and the median state TANF eligibility level for the same family with no income.⁸⁸ Their data are telling. In 2012 TANF failed to serve 74% of households with children under 18 in poverty.⁸⁹ In addition, state TANF

85. Technically, the EITC is not exclusively given to households with dependent children. Households without dependent children can receive a comparatively small EITC benefit. I.R.C. § 32(b). Nevertheless, the program remains primarily focused on households with dependent children.

86. Pub. L. 104-193, 110 Stat. 2105 (1996).

87. Tim Casey, *A TANF Misery Index*, LEGAL MOMENTUM: THE WOMEN'S LEGAL DEFENSE AND EDUCATION FUND (Apr. 9, 2013), <http://www.legalmomentum.org/resources/tanf-misery-index>.

88. Tim Casey, *The TANF Misery Index Climbed to a Record High in 2012*, LEGAL MOMENTUM: THE WOMEN'S LEGAL DEFENSE AND EDUCATION FUND (Feb. 2014), <http://www.legalmomentum.org/resources/tanf-misery-index-2014-update>. Since the Misery Index measures the sum of two percentages, its maximum total is 200. To give an example, the Misery Index would be zero in a state in which eligibility for TANF was set at the poverty level and benefits were provided to all eligible families. In contrast it would be 200 in a state with no TANF program since 100% of those in poverty would not receive the benefit and the maximum benefit amount would, by definition be zero, resulting in a 100% difference between the poverty level and the maximum benefit amount. There is no state that reaches either one of these extremes. The state with the lowest index in 2012 was Maine (at 106) and the highest was Mississippi (at 182). *Id.*

89. *Id.* at tbl.1.

eligibility cut-offs were, on average, 73% below the poverty level.⁹⁰ In 2012, the poverty level for a household of three was \$19,090 in annual gross income.⁹¹ So to get TANF, on average a household of three could have only \$5,154 in annual income and only 26% of those very poor households actually received these benefits. These figures contrast significantly with those in 1996, although those figures too reveal a program with eligibility levels far below the poverty line. In that year, only 28% of those in poverty did not receive TANF, and TANF income cut-offs were set at 66% of the poverty line.⁹²

Compared to TANF, which serves a small percentage of the very poor, the EITC is far larger and serves primarily those in the first two income quintiles. For tax year 2015, the amount of federal EITC paid was approximately \$67 billion and went primarily to the first and second quintiles.⁹³ For example, in 2012, 51% of EITC benefits went to those in first quintile and 29% went to those in the second quintile.⁹⁴ To understand this distribution, one must understand a little bit about the purpose and structure of that program. The EITC is a tax credit that can function both to reduce ultimate tax liability and, in some cases, to provide a benefit in excess of the tax liability.⁹⁵ Because low-income households with dependent children often have little to no tax liability, the fact that the EITC provides payments even when there is no remaining tax liability is crucial, resulting in significant benefits that would not accrue to poor families were it structured differently. The EITC is also restricted to households with income from work.⁹⁶ Thus, by definition it does not provide any benefits to those in poverty who have not and/or cannot obtain work.

The EITC also phases out to zero gradually as adjusted gross income rises. For example, in 2017 a single parent household with three or more dependent children will not receive the EITC if household income exceeds

90. *Id.*

91. Annual Update of the HHS Poverty Guidelines, 77 Fed. Reg. 4034, 4035 (2012).

92. Casey, *supra* note 88, at 2.

93. *About EITC*, EITC CENTRAL, <https://www.eitc.irs.gov/EITC-Central/abouteitc> (last updated Apr. 11, 2017).

94. CONG. BUDGET OFFICE, *supra* note 35, at 15. In addition, 12% of EITC benefits went to the third quintile, 6% to the fourth, and 3% to the highest quintile. *Id.*

95. I.R.C. § 32.

96. The relevant statutory provision, I.R.C. § 32, provides the credit for those with “earned income.” Earned income includes all taxable income and wages received from working as well as a limited number of disability benefits received prior to retirement age. *What Is Earned Income?*, IRS.GOV (Dec. 16, 2016), <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/earned-income>.

\$48,340 (for a married couple filing jointly with three or more dependent children, the limit is \$53,930).⁹⁷ These maximums are misleading, however, because households at that income level receive very low benefits. EITC benefits begin to “phase-out” or reduce when adjusted income reaches far lower levels. So for example, for a single parent household with three or more children, the family will receive the maximum credit (in 2017 \$6,318) when earned income is at least \$14,040 and adjusted gross income is less than \$18,340 annually.⁹⁸ With higher adjusted income, between \$18,340 and \$48,340, the amount of the EITC diminishes, or phases out, going to zero above the cap.⁹⁹ Thus the EITC provides the most benefits to those lower income households.

As a matter of overall spending, the CTC is smaller than the EITC. For 2015 the total value of the CTC was \$57.3 billion.¹⁰⁰ For most families in receipt of the credit, the CTC provides a credit of \$1,000 per child, and, unlike the EITC,¹⁰¹ there is no maximum number of children for whom taxpayers can take the credit. While the CTC does play some role in alleviating poverty, in general it is targeted more strongly at the lower middle and middle of the income spectrum. For example, for 2013 the Congressional Budget Office estimates that 22% of the credit went to the lowest quintile, 29% went to the second, 26% went to the third, 12% went to the fourth, and only 3% went to the top quintile.¹⁰² This distribution is due to a variety of factors. As an initial matter, the CTC is not available to the poorest households. Those with less than \$3,000 in earned income are ineligible.¹⁰³ In addition, unlike the EITC, the CTC is only partially refundable and under a complex formula.¹⁰⁴ Its

97. I.R.C. § 32; Rev. Proc. 2016–55, 2016–45 I.R.B. 707.

98. Rev. Proc. 2016–55, 2016–45 I.R.B. 707.

99. *Id.* For married filing jointly, the phase-out starts at \$23,930 and ends at \$23,930. *Id.*

100. JOINT COMM. ON TAX’N, *supra* note 24, at 30.

101. The EITC provides the highest benefits to households with three or more children. There is no additional benefit for households with more than three children. I.R.C. § 32(b)(1).

102. CONG. BUDGET OFFICE, *supra* note 35, at 15.

103. I.R.C. § 24(d)(1)(B)(i).

104. I.R.C. § 24(d). The formula operates by increasing a taxpayer’s refundable credits by the lesser of (1) the maximum CTC that would be allowed if limitations on refundability did not apply (but taking into account the phase-outs for modified adjusted gross income) or (2) the amount of additional nonrefundable credits (not taking into account the CTC) that would be allowed if the limitation generally applicable to nonrefundable credits and tied to regular tax liability were increased by the greater of (a) “15 percent of so much of the taxpayer’s earned income . . . as exceeds \$3,000,” or (b) if the taxpayer has three or more qualifying children, the excess of the

distribution to higher quintiles is also due to the phase-outs and caps that contrast significantly with those for the EITC. The CTC program does not begin to phase out until a married couple's modified adjusted gross income reaches \$110,000¹⁰⁵ per year and does not reach the cap until the same couple's modified adjusted gross income is \$130,000, if the couple has one child.¹⁰⁶

In short, these benefit programs (housing-related tax deductions, the CTC, the EITC, Section 8, and TANF) represent five distinct programs that span the class spectrum from the very poor to the very wealthy. Having established this continuum, this Part now turns to the varying mechanisms of administration that characterize these programs, beginning with the study in contrasts epitomized by the housing benefits.

B. Examining Benefits Across Class: Moving from Distributive to Structural Questions

A central claim of this Article is that social welfare provision promotes inequality not only, as discussed in Part II, by regressively distributing significant benefits through the tax code but also, importantly, through regulatory and administrative structures. The programs manifest differences along a variety of axes. For example, there are stark differences in the means of congressional authorization and refunding; the resources provided to policing programmatic error; the nature of application processes; the extent and nature of behavioral controls embedded in the program; and finally, the extent of mandated personal data disclosure and data-sharing between benefits agencies and more punitive systems, and the risks these data sharing arrangements cause for recipients' families. As one moves from benefits at the bottom to benefits at the top, one sees these mechanisms shift from what I have previously called *hyperregulatory* to administrative structures that function nearly invisibly and as entitlements. The example of housing support provides perhaps the starkest example of these administrative contrasts.

taxpayer's Social Security taxes minus the taxpayer's EITC. *Id.* Because of the phase-outs tied to income, the partial refundability will be of greatest benefit to low and lower middle income households.

105. I.R.C. § 24(b)(2)(A).

106. I.R.C. § 24(b)(1). More technically, the credit is reduced by \$50 for every \$1,000 (or fraction thereof) over the threshold; thus, with one child (\$1000 credit), the phase-out would be complete at \$130,000 for married filing jointly status. *Id.*

I. Administrative Mechanisms at the Bottom: Public Housing and the Housing Choice Voucher Program

As discussed in Part III.A, the federal government funds several large public housing programs that provide housing to low-income families. Very briefly, the public housing program provides federally funded and locally managed housing to families that meet application criteria.¹⁰⁷ The housing choice voucher program, commonly referred to as Section 8, functions differently. In that program, a voucher is issued to the eligible recipient and then that recipient uses it to rent private housing.¹⁰⁸ The two largest programs, public housing and the Housing Choice Voucher program, however, bear striking administrative similarities.¹⁰⁹ They were both created through federal legislation (public housing in 1937¹¹⁰ and Section 8 in 1974¹¹¹) and are subject to annual appropriations in the congressional budget process. In addition, while vital, these programs fail to meet the needs of the majority of needy households. Each year the U.S. Department of Housing and Urban Development delivers a “Worst Case Housing Needs” report to Congress, detailing the number of households annually who are “very low-income renters who do not receive government housing assistance and who paid more than one-half of their income for rent, lived in severely inadequate conditions, or both.”¹¹² In 2013, 7.72 million households met that definition.¹¹³ HUD attributes the problem in part to the shortage of affordable housing units. As they explained, “only 65 affordable units are available per 100 very low-income renters, and only 39 units are available per 100 extremely low-income renters.”¹¹⁴

In addition, in both programs, application and recertification processes are extensive and conducted in person at local housing agencies.

107. HUD’s *Public Housing Program*, U.S. DEP’T OF HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/topics/rental_assistance/phprog (last visited Apr. 22, 2017).

108. *Id.*

109. Project-based Section 8 provides another very significant source of housing for low-income households. For ease of analysis, this section talks only about public housing and the Housing Choice Voucher program, but project-based Section 8 manifests similar administrative features.

110. Housing Act of 1937, Pub. L. 75-412, 50 Stat. 888.

111. Housing and Community Development Act of 1974, Pub. L. 93-383, 88 Stat. 633.

112. U.S. DEP’T OF HOUSING & URBAN DEV., OFFICE OF POLICY DEV. & RESEARCH, *WORST CASE HOUSING NEEDS: 2015 REPORT TO CONGRESS* iii (2015).

113. *Id.*

114. *Id.* at 11.

Under federal regulations, local public housing agencies can deny and/or terminate assistance on a wide variety of grounds. A household can be denied assistance if, among other grounds, they violate “family obligations,” if they have been evicted from federally assisted housing during the past five years, for owing rent to another public housing agency,¹¹⁵ or for variety of drug- and crime-related reasons.¹¹⁶ They must be denied on a variety of drug- and alcohol-related bases, including a determination that a household member “is currently engaging in the illegal use of a drug.”¹¹⁷ They can lose their voucher under a similarly broad array of circumstances.¹¹⁸

Families can lose their housing or their voucher not only for their own conduct but for the conduct of household members and guests. The ability to evict entire households based on the conduct of its members or guests stems from the one-strike policy, put in place under President Clinton. Under that policy, families residing in public housing can be evicted upon proof that a member of the household or a guest of that household has engaged in criminal activity. The full import of the one-strike policy, which allows evictions regardless of the knowledge or control of the head of household as to the conduct, was solidified in the Supreme Court’s decision in *Department of Housing and Urban Development v. Rucker*.¹¹⁹ Pearlie Rucker, the named plaintiff in the suit, was being evicted under 42 U.S. Code section 1437d(1)(6), which requires that every public housing lease contain a provision stating, “that any . . . drug-related criminal activity on or off [public housing] premises, engaged in by a member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of the tenancy.” The facts leading to her eviction involved an allegation that her mentally disabled daughter was found three blocks from Rucker’s apartment with cocaine and a crack cocaine pipe.¹²⁰ Rucker had no knowledge of these acts nor could she control her daughter’s conduct.¹²¹ Nevertheless the Supreme Court held that 42 U.S. Code section 1437d(1)(6) “unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related criminal activity of household member and guests whether or not the tenant knew, or should have known, about the activity.”¹²²

Not only do these programs collect a tremendous amount of

115. 24 C.F.R. § 982.552(c) (2017).

116. 24 C.F.R. § 982.553(a)(2)(ii) (2017).

117. *Id.*

118. 24 C.F.R. § 982.553(b)(1)(i)(a) (2017).

119. 535 U.S. 125 (2002).

120. *Id.* at 128.

121. *Id.*

122. *Id.* at 130.

information about families and possess ample grounds to deny or terminate assistance, but in a phenomenon I have previously described as *regulatory intersectionality*, the Section 8 voucher program is characterized by mechanisms that allow “information that is deemed to indicate non-compliant and/or deviant conduct [to travel] from the original social welfare system into other even more punitive systems.”¹²³ As is often typical of means-tested programs,¹²⁴ the regulatory framework for both public housing and project-based Section 8 contemplates extensive data-sharing between those public and private entities administering the support and other more punitive government agencies. Many of these data-sharing arrangements arise from the above-described focus on barring families with criminal histories from receiving subsidies and evicting families whose members are accused of criminal activity from public housing.

Regulatory intersectionality generally begins with the ability of a social welfare agency to collect and share data about benefit applicants and recipients. When one applies for Section 8 or public housing, the applicant fills out an application and turns it in to the local public housing agency. Applicants must provide information about income, members of the household, immigration status, and “any other information that the [public housing agency] or HUD determines is necessary in the administration of the program.”¹²⁵ HUD regulations make clear that public housing agencies have free access to criminal justice data. Under 24 Code of Federal Regulations section 5.903, all public housing applicants must sign a consent form allowing law enforcement agencies to release and public housing authorities to use criminal conviction records. Public housing agencies are authorized “to obtain criminal conviction records from a law enforcement agency [and may use such records] to screen applicants for admission to covered housing programs and for lease enforcement or eviction of families”¹²⁶ In addition to these provisions, applicants can be asked to allow access to a wide variety of records pertaining to the household. For example, in Knoxville, Tennessee, as a part of the application process for public housing and for Section 8, applicants must sign a waiver allowing the local agency to access:

- (a) employment or unemployment records (other than salary and wage information which is subject to separate authorization); (b) social security records; (c) Department of

123. Bach, *supra* note 5, at 337.

124. For additional examples of regulatory intersectionality, see Bach, *supra* note 5.

125. 24 C.F.R. § 982.551(b)(1) (2017).

126. 24 C.F.R. § 5.903 (2017).

Human Services records; (d) utility records; (e) police and sheriff's department records; (f) Veteran's administration records; (g) juvenile and circuit court records; (h) homeless shelter records; (i) child care provider records; (k) social worker records; (l) parole officer records; (m) drug treatment center records; (n) records from any landlord and all other records of any description or nature whatsoever from any agency or source which related to the undersigned or to any minor child of the undersigned and which Knoxville's Community Development Corporation determines are necessary to permit it to determine to initial or continuing eligibility of the undersigned to receive benefits or the grant or denial of a federal preference under any public housing or Section 8 housing program or the level of benefits available to the undersigned under such program.¹²⁷

In addition to these formal rules, it is clear that there is a substantial informal overlay ensuring that criminal justice and other data about public housing tenants is regularly shared with local housing agencies. For example, Kristin Henning, Wendy J. Kaplan, and Davis Rossman have unearthed a good deal of evidence that public housing agencies are receiving and acting on information concerning purportedly confidential juvenile delinquency proceedings records.¹²⁸ In my own jurisdiction, Knoxville, Tennessee, not only does the standard waiver form that applicants sign allow the agency to access juvenile records, but an interagency partnership, which includes the Juvenile Court, the local police, local schools and the local housing authority, all regularly share data about certain children who have been adjudicated delinquent, leading at times to evictions of the families of these children.¹²⁹ This data sharing is of course taking place in the context of the well-documented over-policing of poor communities of color.

While Project-Based Section 8 is administered quite differently from

127. Knoxville's Community Development Corporation, Authorization to Release Records and Information, Dec. 2012 (previously available at http://www.kcdc.org/Libraries/Housing_Forms/Moderate_Rehabilitation_Application_Form.sflb.ashx (last visited February 6, 2016)) (information on file with author).

128. Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should School and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520 (2004); Wendy J. Kaplan & David Rossman, *Called "Out" at Home: The One Strike Eviction Policy and Juvenile Court*, 3 DUKE F.L. & SOC. CHANGE 109 (2011).

129. Memorandum of Understanding, Shocap Procedure, July 15, 2008 (on file with author).

public housing, when it comes to the policing of households and data access, there are striking similarities. For example, 24 Code of Federal Regulations section 5.903 requires applicants for those programs to sign the same consent form as a condition of residing in project-based Section 8 building. While under the regulations property owners cannot receive conviction records directly from law enforcement agencies, they can request them of their local public housing agency, and, if the information reveals information relevant to acceptance or termination, the public housing agency can then share the data with the private owner.¹³⁰ These legal and extra-legal mechanisms are a clear example of regulatory intersectionality. One story, recently highlighted by scholar Priscilla Ocen and described in the next section, gives a clear picture of how data collection, increased scrutiny, and regulatory intersections are wielded to subordinate poor communities of color.

2. *Regulatory Intersectionality in Action: Section 8 on the Outskirts of Los Angeles*

In a recent article, Professor Ocen described the targeting of Section 8 Housing Choice Voucher program recipients in three California suburban communities.¹³¹ From her analysis, it is clear that, despite the purported transportability of the voucher, Section 8 recipients are easily targeted by communities seeking to stigmatize and exclude them. It is also clear that this targeting was facilitated through data sharing and was accomplished through an astoundingly aggressive campaign by multiple punitive agencies in the communities she analyzes.

The story Ocen tells arose initially from depreciating housing values in three white suburban communities in California: two (Palmdale and Lancaster) outside of Los Angeles, and one (Antioch) outside of San Francisco. As housing prices depreciated, rents went down and properties that previously would not have been accessible for households in receipt of Section 8 started to fall within their price range.¹³² The response of these predominantly white communities was swift and hostile. Ocen argues convincingly that what happened in these three communities represents a resurgence, in a new form, of racially restrictive covenants.¹³³ Like the incarceration patterns described in Michelle Alexander's *The New Jim*

130. 24 CFR § 5.903 (2017).

131. Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540 (2012).

132. *Id.* at 1571.

133. *Id.* at 1572–81.

Crow,¹³⁴ this is old subordination in new clothes.

In Lancaster, Palmdale, and Antioch, resistance to voucher holders was clearly about both race and poverty. While these communities were previously demographically fairly homogeneously white, the voucher holders were predominantly African American.¹³⁵ The communities, in the words of Lancaster's mayor went to "war."¹³⁶ In Antioch, for example, the initial response was private, through the formation of "United Citizens for Better Neighborhoods . . .—an Antioch-based group created 'to combat problems associated with Section 8 rentals.'"¹³⁷ In response to this private activism, the Antioch Police Department formed a specialized unit, the "Community Action Team," the explicit purpose of which was to monitor and police Section 8 households.¹³⁸ This regulatory structure was mirrored in Lancaster and Palmdale. Lancaster established its *Lancaster Community Appreciation Project* (LAN-CAP) police team to target multi-family rental properties, and Palmdale created *Partners Against Crime*.¹³⁹ In a remarkable example of regulatory intersectionality, in all three communities, it was the explicit purpose of these police units to monitor families not only for criminal activity (the traditional purpose of policing) but also to monitor them on issues related to subsidy eligibility. For example, "a substantial portion of LAN-CAP officers' time was . . . devoted to conducting 'compliance checks' on Section 8 tenants and encouraging landlords and managers to police their Section 8 tenants."¹⁴⁰

The utter conflation of regulatory functions (policing, child protection, and social welfare benefit compliance) that took place is astounding. "At least on some occasions the sweeps of Section 8 homes in Lancaster and Palmdale involve[d] not only Sheriff's deputies, but also the Department of Children and Family Services, the Probation Department, and Code Enforcement officials."¹⁴¹ Officials regularly used aggressive police tactics in these raids, appearing with multiple heavily armed officers, drawing

134. ALEXANDER, *supra* note 10.

135. Ocen, *supra* note 131, at 1571–72.

136. Complaint at ¶ 8, *Community Action League v. City of Lancaster*, No. CV 11-4817 ODW (C.D. Cal. Jun. 7, 2011), ECF No. 1.

137. PUB. ADVOCATES INC., *POLICING LOW-INCOME AFRICAN-AMERICAN FAMILIES IN ANTIOCH: RACIAL DISPARITIES IN "COMMUNITY ACTION TEAM" PRACTICES 10* (2007) (quoting website then maintained by United Citizens for Better Neighborhoods).

138. *Id.* at 12.

139. *Community Action League*, Complaint at ¶ 32.

140. *Id.*

141. *Id.* at ¶ 38.

guns, and putting household members in handcuffs.

The key to these efforts, in the view of the predominantly white leaders of these communities, was accessing information about voucher holders and trying to force termination of subsidies by the local housing agencies. Both communities worked closely with the relevant local housing authority to accomplish these ends. For several years, Lancaster and Palmdale paid the housing authority “to hire additional investigators to work with the local sheriff’s office and focus on eliminating purported Section 8 fraud.”¹⁴² Although at various points the local housing agencies chose not to comply with requests for information, in all three communities the local housing authorities periodically complied with requests to disclose the identity and address of voucher holders, took referrals for voucher termination from the local police, and terminated vouchers based on evidence provided by local officials.¹⁴³

The overlapping “policing” of subsidy recipients had the intended effect. “[In one year alone in LAN-CAP] over 1,500 arrests were made—three times the normal apprehension rate. They have trained over 300 property owners and managers on how to spot potential problems and have performed over 200 Section 8 compliance checks.”¹⁴⁴ Voucher terminations were referred to the local housing authority at astonishingly high rates, and vouchers were often terminated. Landlords willing to rent to voucher holders were successfully targeted, and officials succeeded in creating a climate to extreme fear for those who remained. At every step along the way the negative impact was experienced disproportionately by African American voucher holders.¹⁴⁵

3. *Administration at the Top: The Home Mortgage Interest Deduction and the Local Property Tax Deduction*

As Suzanne Mettler describes the submerged state, its mechanisms are so invisible that many individuals receive benefits without being aware of the support.¹⁴⁶ Indeed the regulatory mechanisms of housing-related tax deductions and poverty-focused housing support are so dissimilar that it is almost difficult to make the comparison. There is no special application process for these deductions nor any in-person appointment. One fills out a supplementary form as a part of the tax return, and the mortgagee provides

142. *Id.* at ¶ 9.

143. *See id.* at ¶¶ 9, 79, 82.

144. *Id.* at ¶ 32 (alteration in original; quoting website no longer available for January 2007, City of Lancaster).

145. PUB. ADVOCATES INC., *supra* note 137, at 2.

146. METTLER, *supra* note 2, at 37–39.

documentation as to the interest paid by the homeowner. When the Internal Revenue Service (IRS) receives a return claiming the HMID, the IRS is able to compare the amount claimed in the return to the information reported by the mortgagee(s).¹⁴⁷ For the deduction for state and local property taxes, although home mortgage companies generally collect real property taxes through escrow and report the amount paid to the homeowner,¹⁴⁸ various challenges prevent a data-matching system as robust as that available for HMID.¹⁴⁹ Of course, the IRS can audit taxpayers regarding either or both the HMID and their property tax deductions, which may lead to fines.

Even with this possibility, it is clear there is nothing that even begins to match the information-gathering, multi-systemic targeting, surveillance, and punishment systems described above. And in fact, such a set of mechanisms is, I would argue, culturally unimaginable. Imagine, for example, the uproar if the juvenile court records of children whose parents claimed the HMID were pulled by local police and were then used to justify inspections of the home and denial of the deduction. Imagine a high-income taxpayer losing his or her home as a result of drug use by a child. Imagine that tax returns demanded detail about substance use and criminal records for everyone who lives in your home, and then the IRS sent inspectors to high-income homes to verify occupancy. Imagine further that, if it appeared that there was an unauthorized person, that high-income taxpayers would lose the HMID. Imagine police sweeps and task forces targeting deduction recipients. I would argue that all of this is nothing short of unimaginable. The mechanisms of the submerged state share none of the mechanisms of monitoring, regulation, and punishment that so dominate the hyperregulatory state.

There is no waiting list nor is there any discretion about what

147. Internal Rev. Serv. Form 1098, Copy A (2017), <https://www.irs.gov/pub/irs-pdf/f1098.pdf>.

148. Form 1098 does not require reporting of real estate taxes paid. *See* Internal Rev. Serv., Instructions to Form 1098, at 6 (2017), <https://www.irs.gov/pub/irs-prior/i1098--2017.pdf> (“Box 11 . . . Enter any other item you wish to report to the payer, such as real estate taxes . . .”). It appears lenders may report this information to the taxpayer but not report it to the IRS. The 2016 Instructions to Form 1098 made this explicit. Internal Rev. Serv., Instructions to Form 1098, at 4 (2016), <https://www.irs.gov/pub/irs-prior/i1098--2016.pdf> (“You do not have to report to the IRS any information provided in this box [for real estate taxes].”).

149. U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO THE JOINT COMMITTEE ON TAXATION, REAL ESTATE TAX DEDUCTION: TAXPAYERS FACE CHALLENGES IN DETERMINING WHAT QUALIFIES; BETTER INFORMATION COULD IMPROVE COMPLIANCE 17–19 (May 2009), <http://www.gao.gov/assets/290/289580.pdf>.

households should get priority or receive the benefit. These tax breaks are also granted based on self-reporting and are questioned, if at all, through an audit or through “calculations on individuals returns that are then compared and confirmed with third parties.”¹⁵⁰

Also interesting to note, and a clear feature of benefits at the top, is that the HMID and the state and local property tax deduction are created and sustained through a far simpler, more secure, and less visible legislative process. As Christopher Faricy explains,

tax expenditures pass through fewer committees and face fewer legislative veto points than does spending passed through the appropriations process. Therefore, policymakers from both parties could favor tax expenditures since they are easier to pass through the legislature and once passed are more likely to become permanent fixtures of federal policy.¹⁵¹

These features of the tax provisions focused on in this Article contrast significantly with means-tested benefits and contribute to the comparatively smaller amount of public scrutiny and far greater cultural legitimacy they receive.

4. Administration from the Bottom to the Middle: Low and Middle Income Tax Benefits for Households with Dependent Children

While the administration of housing support provides a fairly extreme example of the differences in regulation for benefits at the bottom and benefits at the top, cash benefits for households with dependent children exhibit a more gradual progression from the bottom to the middle. While the TANF program shares many of the administrative characteristics of Section 8 and public housing, with its attendant manifestation of regulatory intersectionality and hyperregulation, the EITC and CTC move more gradually toward the administrative structure of the high-income housing subsidies, with the EITC sharing more characteristics similar to TANF, Section 8, and public housing, and the CTC functioning somewhere between the EITC and the HMID.

a. Support at the Bottom: Temporary Assistance to Needy Families. Like public housing and Section 8, the TANF program is characterized by a high degree of scrutiny, punitive rules, and extreme risk of exposure to additional

150. *Id.*

151. *Id.* at 100.

punishment as a condition of benefit receipt.¹⁵² As with the housing programs, applying for TANF involves a series of face-to-face appointments with various agency personnel. During the application process one must disclose a wide range of personal information¹⁵³ and subject oneself to extensive, information-verification procedures. Applicants do not receive the benefit merely on the criteria that they are income (and asset) eligible for the benefit. Instead, during the application process and beyond, they are subject to a wide range of non-income and non-asset-related criteria. Just to give a few examples, applicants are often drug-tested¹⁵⁴ and are often required to participate in pre-benefit-receipt work programs.¹⁵⁵

In addition, although as a general matter, families receive higher benefits when there are more children present in the household, in many jurisdictions, this is not the case. Many states currently have “child exclusion” or “family cap” policies. These policies exclude families from receiving additional assistance if their household size increases as the result of the birth of a child while the family is receiving benefits.¹⁵⁶

Not only is the TANF application process extremely burdensome and intrusive, but, as Kaaryn Gustafson has persuasively demonstrated, today

152. For an extensive discussion of the hyperregulatory mechanisms imbedded in TANF and manifested in the growing trend to include drug testing mandates as part of TANF or other welfare programs, see Bach, *supra* note 5.

153. Because of the structure of the program, application processes are governed by state and local law, regulation and procedure. For an example of an application form and the requirements for documentation, see *Temporary Assistance*, N.Y. ST. OFF. OF TEMPORARY & DISABILITY ASSISTANCE, <https://otda.ny.gov/programs/temporary-assistance/#apply> (last visited Apr. 22, 2017), and the corresponding benefits application form, New York State Application for Certain Benefits and Services (2016), <https://otda.ny.gov/programs/applications/2921.pdf>.

154. For an extensive discussion of drug testing and TANF, see Bach, *supra* note 5; Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, 19 WM. & MARY BILL RTS. J. 751 (2011).

155. In 2009, Mathematica Policy Research, Inc. conducted a study of TANF “diversion” practices across the nation. The term diversion refers to state policies that attempt to divert applicants from the program. According to that study, 39 states had an applicant work requirement. Twenty required applicants to complete job search or job readiness programs, and 19 required applicants to complete a work orientation and/or employment plan as part of the application process. MATHEMATICA POLICY RESEARCH, INC., A STUDY OF STATES’ TANF DIVERSION PROGRAMS: FINAL REPORT 5 (2008), https://www.acf.hhs.gov/sites/default/files/opre/tanf_diversion.pdf.

156. ERIKA HUBER ET AL., WELFARE RULES DATABOOK: STATE TANF POLICIES AS OF JULY 2014: OPRE REPORT 2015-81, at 238–39 (2015) (Table L10: Family Cap Policies, 1996–2014).

“[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.”¹⁵⁷ For example, take the use of biometric imaging technology. The 1996 welfare reform law “required states to institute fraud prevention programs.”¹⁵⁸ 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.¹⁵⁹ Even before these systems were in place, instances of welfare fraud in the form of double dipping were characterized more by infamous individual instances 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.¹⁶⁰ 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.”¹⁶¹ 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.”¹⁶²

In addition, as I have previously argued, applying for and participating in welfare exposes one to ever more severe potential consequences. Two examples make this point clearly. First, the increasingly prevalent requirement that welfare recipients subject themselves to drug testing as a condition of eligibility exposes them to punitive intervention by child welfare and criminal legal system interventions.¹⁶³ As one brief example, consider Florida’s drug-

157. GUSTAFSON, *supra* note 5, at 1.

158. *Id.* at 56.

159. *Id.* at 56–57.

160. 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 as much to deter as to detect fraud, there is also extensive evidence that it deters not fraud but applications from needy individuals. *Id.* at 56–57. 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, the program 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).

161. *Id.* at 57.

162. *Id.*

163. For an extensive discussion of the extent and nature of this example of

testing law. When implementing that law, the Florida Department of Children and Families instituted procedures that included the sharing of positive drug tests with the Florida Abuse Hotline.¹⁶⁴ 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. . . . [T]he 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.¹⁶⁵

Second, consider the prevalent use of mandatory home inspections, prime examples of which were the regulations and procedures at issue in *Sanchez v. City of San Diego*.¹⁶⁶ At issue in that case was the San Diego County’s “Project 100%.” The project was initiated in 1997 by the San Diego County District Attorney and required all welfare recipients to submit to a mandatory home inspection as a condition of eligibility.¹⁶⁷ As described by the Ninth Circuit, “Under Project 100%, all applicants receive a home visit from an investigator employed by the D.A.’s office. The visit includes a ‘walk through’ to gather eligibility information that is then turned over to eligibility technicians

regulatory intersectionality, see Bach, *supra* note 5.

164. 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 information on a failed test will be shared with the Florida Abuse Hotline “for review to initiate an assessment or an offer of services”).

165. *LeBron*, 820 F. Supp. 2d at 1280 (alterations in original) (citations omitted).

166. 464 F.3d 916 (9th Cir. 2006).

167. *Sanchez*, 464 F.3d at 918.

who compare that information with information supplied by the applicant.”¹⁶⁸

In addition, inspectors from Project 100% were authorized to prosecute individuals for welfare fraud and “d[id] make referrals for criminal investigation, for example, if they discover[ed] evidence of contraband, child abuse, or a subject with outstanding felony warrants.”¹⁶⁹ So not only have welfare agencies adopted the mechanisms and modalities of the criminal justice system in the policing of the application and retention of welfare benefits, but they are part and parcel of a system of intersecting regulatory systems that expose women and children to the risk of ever-increasing punishment in the child welfare and criminal law systems. Moreover, as I have laid out in previous scholarship, the punitive harms associated with these regulatory intersections are imposed disproportionately on African American women and their children.¹⁷⁰

b. Moving Slightly Up the Income Scale: The Earned Income Tax Credit. If one conceptualizes the benefits under discussion as on a continuum from hyperregulation to near-entitlement, the federal EITC stands above TANF, Section 8, and public housing, but still below the CTC and the housing-related tax credits. Distinguishing it from benefits at the bottom, many features of the other means-tested benefits are not present. One does not have to apply in person or supply significant personal information related to non-income, asset, or family composition issues. One also does not see the same kind of explicit data-sharing arrangements, nor does one see explicit risks of interventions by child protection or criminal law enforcement agencies. In addition, as noted above, tax benefits in general, and therefore the EITC in particular, bear certain administrative and funding characteristics that make them less punitive and also less vulnerable to political attack. As noted above, and as highlighted by David Weisbach and Jacob Nussim, unlike benefits focused on the bottom of the income scale, “tax expenditures do not require an annual appropriation (as agency programs do). Rather, they are like direct expenditures that are automatically appropriated absent some contrary congressional action.”¹⁷¹ This difference deprives opponents of a clear legislative target and makes it slightly more difficult to oppose retention and expansion of these benefits.

In addition, when one moves from the benefits discussed above to benefits embedded in the tax code, there is a quite radical shift in the way the various agencies conceptualize and pursue error. The very words used—“welfare fraud” versus “undercollection”—suggests this contrast, implying that those who receive TANF benefits for which they are ineligible are frauds

168. *Id.*

169. *Id.* at 918 n.3.

170. Bach, *supra* note 5.

171. Weisbach & Nussim, *supra* note 29.

or cheats while those who fail to pay taxes due are somehow less to blame. But the distinctions go far beyond words. In fact, as Weisbach and Nussim point out in their comparison of mechanisms for error detection and administration between the EITC and what was then called the Food Stamp Program (and is now SNAP), the differences boil down not to different rates of error but to how much each agency spends on benefits versus administration in order to accomplish these outcomes. In short, the Department of Agriculture, which administers SNAP, spends far more resources on administration than the IRS does on the EITC, leading to far lower overpayment rates.

To get a sense of these differences, consider that in 1998, it cost about \$4 billion or about 19% of all program costs to administer SNAP,¹⁷² and the program served about 8 million households. Although the IRS does not provide data by tax provision for administration, to get some sense of the contrast, in the same year the entire IRS budget was \$7.3 billion and the IRS served 122 million individuals and 5 million corporations.¹⁷³ Clearly, due to a variety of significant differences in administration, SNAP is far more expensive to administer than the entire tax system.¹⁷⁴

In large part as a result of the resources and agency focus on preventing ineligible households from receiving SNAP, the program has a very low erroneous payment rate, estimated to be about 3.42% in 2013.¹⁷⁵ In contrast, the EITC has a comparatively higher erroneous payment rate, about 24% in that year.¹⁷⁶ The Department of Housing and Urban Development, which administers public housing and Section 8 reports a similarly low improper payment rate of 4.3% in those programs.¹⁷⁷ This again brings back

172. In 1998 the program was actually called the Food Stamps Program. It changed names in 2008 to Supplemental Assistance to Needy Families or SNAP. For ease of analysis, I refer throughout this Article to the program as SNAP even when, in the years under consideration, it was known as Food Stamps. *A Short History of SNAP*, FOOD & NUTRITION SERV. U.S. DEP'T OF AGRIC., (Nov. 20. 2014), <http://www.fns.usda.gov/snap/short-history-snap>.

173. Janet Holtzblatt *Choosing Between Refundable Tax Credits and Spending Programs*, 93 PROC., ANN. CONF. ON TAX'N NAT'L TAX ASS'N 116, 121 (2000).

174. See also FARICY, *supra* note 3, at 103.

175. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-87R, IMPROPER PAYMENTS: INSPECTOR GENERAL REPORTING OF AGENCY COMPLIANCE UNDER THE IMPROPER PAYMENTS ELIMINATION AND RECOVERY ACT 14 (2014).

176. *Id.* Current EITC error rates are similar. See *Fraud*, EITC CENTRAL, <https://www.eitc.irs.gov/Tax-Preparer-Toolkit/faqs/fraud> (last updated Sept. 23, 2016) (“IRS estimates that between 21 percent to 26 percent of EITC claims are paid in error.”).

177. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 175, at 14.

McClusky's notion that these issues come down, in the end, to value judgments. The question is not whether we are willing as a society, to tolerate error. We clearly are. Instead, it is how we balance the kinds of errors we tolerate and the resources we spend to prevent the errors that raise the most concern. Clearly, as a society we view these questions very differently when it comes to more traditional poverty benefits than we do for benefits administered through the tax code.

Nevertheless, the EITC is significantly more punitive than other tax benefits and bears striking similarities to the administration of benefits like TANF. These contrasts and similarities bear out in three basic areas: the use of family caps and work requirements, the rate of audits, and the use of punitive sanctions. Equally striking are correlations between harsher policies and race, which echo the race politics of welfare, and consistent scholarly, congressional, and outside advocacy actions designed to attempt to push the EITC into the administrative mechanisms more characteristic of other means-tested benefits through a characterization of the EITC as "welfare."

i. The EITC: Family Caps and Work Requirements. Prior to 1996, a family's AFDC benefit was determined by, among other factors, the size of the household.¹⁷⁸ Each child in the household added a very small additional amount to the family's AFDC allotment. After 1996, with repeal of AFDC and enactment of TANF, states were no longer required to provide additional benefits when the household size increased.¹⁷⁹ Since that time, many states have implemented caps on budget size that do not rise upon the arrival of additional household members¹⁸⁰ Although the constitutionality of those

178. Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151, 152–53 (2006) (noting that under AFDC, "states were required to obtain waivers from the federal government to implement policies such as family caps because they violated the Social Security Act by incorporating eligibility criteria based on behavior").

179. *Id.* at 153–54 ("The final version of TANF . . . did not require states to implement caps, but instead, by remaining silent, allowed states to continue utilizing existing family cap policies or enact new caps without federal oversight."). In fact, states were not even required to have individual benefit programs. They were merely required, as a condition of receipt of federal TANF funds, to institute programs that met the overall purposes of the federal program. Despite this latitude in federal law, all states retained some kind of cash or cash-equivalent benefit program for households with dependent children.

180. *See supra* note 156 and accompanying text.

provisions was challenged on both federal and state constitutional grounds, those challenges failed and multiple states instituted these provisions.¹⁸¹

Another central feature of TANF that contrasted strongly with AFDC was its unrelenting emphasis on work. Although state and local programs had been experimenting with work programs before 1996, PRWORA instituted an aggressive national set of work requirements, requiring nearly every adult on welfare to engage in significant work activities and allowing states to mete out harsh penalties for the failure to comply with these requirements.¹⁸²

Like TANF, the federal EITC contains both a family cap and a work requirement. Although the EITC increases for households with between zero and three children, it is capped at that point. Like the TANF family cap,¹⁸³ the maximum benefit is provided to households with three “or more” children.¹⁸⁴ Also like welfare, the EITC contains a work requirement. One can only receive the EITC if one receives work income. Families receiving equivalent incomes from other sources, for example, Social Security disability, are not eligible for the benefit. As discussed below¹⁸⁵ and as noted by Dorothy Brown,¹⁸⁶ these

181. Smith, *supra* note 178, at 180–90.

182. 42 U.S.C. § 607 (Westlaw 2017) (last amended 2012); *see also* Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. 104-193, § 103(a)(1), 110 Stat. 2105, 2129 (1996).

183. There are some contrasts in the way these provisions work. A family cap generally functions slightly differently, capping benefits on children that enter the family while the household is in receipt of benefits:

Benefits to recipients who give birth to a child while receiving aid may or may not be affected by the addition of the child to the assistance unit. Traditionally, when a child is born to a member of an assistance unit, the benefit increases to meet the needs of the new child; however, many states have changed this policy. Family cap policies, as most states refer to them, prevent or limit an increase in a family’s benefit when another child is born. In these states, the benefit increase an assistance unit would otherwise receive for adding another member to the unit will be limited. Some states provide a percentage of the increase to the unit, while others provide no additional funds to the unit for the addition of a child.

HUBER ET AL., *supra* note 156, at 152; *see also id.* at 174–175, 238–39 (family cap tables).

184. I.R.C. § 32(b)(1); *2017 EITC Income Limits*, *supra* note 97.

185. *See infra* Part III.B.4.c.

186. Dorothy A. Brown, *The Tax Treatment of Children: Separate but Unequal*, 54 EMORY L.J. 755, 757–58 (2005).

features are not present in the CTC, a tax expenditure program that benefits slightly higher income families.

ii. *Error Rates, Audit Rates, and Sanctions.* There is no question that the EITC erroneous payment rate is significant, “with estimates ranging from the low to high 20% range”¹⁸⁷ of returns claiming the EITC.¹⁸⁸ There is also no question that the audit rates for the EITC are very high. As Susan Kamic Takh explains, “claiming the EITC doubles a taxpayer’s chances of an audit.”¹⁸⁹ In addition, in an era of declining resources for tax collection, both Congress and the IRS have repeatedly dedicated significant resources to EITC audits.

While these facts are clear, what is less clear is the rationale for dedicating IRS resources to these errors over potentially more significant sources of revenue collection. For example, as Nina Olsen, the National Taxpayer Advocate, points out, the EITC error rate pales in comparison to the error in other portions of the tax code. Citing IRS data, she notes that, “EITC overclaims account for just seven percent of gross individual income tax compliance, while business income underreported by individuals accounts for \$51.9%”, or \$122 billion in lost revenue.¹⁹⁰ In light of such data, it is fair to suggest that the dedication of IRS resources to the EITC, over other sources of error, is a waste of IRS resources. The U.S. Government Accountability Office has noted that the focus on the EITC is misplaced given the far larger sources of revenue potentially available if audit and collection resources were focused on other sources of error.¹⁹¹ For example, in contrast to the 20% error rate for the EITC, “studies estimate that cash basis self-employed persons report only 11% to 19% of their income, and that all self-employed taxpayers underreport income by 57%, representing more than 27% of the most recent

187. Francine J. Lipman, *Access to Tax Justice*, 40 PEPP. L. REV. 1173, 1196 (2012–2013).

188. *Id.*

189. Takh, *supra* note 29, at 844–45 (citing Michelle Lyon Drumbl).

190. *The National Taxpayer Advocate’s 2014 Annual Report to Congress: Hearing Before the Subcomm. on Gov’t Operations, H. Comm. on Oversight and Gov’t Reform*, 114th Cong. 25 & n.83 (2015) (written statement of Nina E. Olson, National Taxpayer Advocate).

191. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-151, TAX GAP: IRS COULD SIGNIFICANTLY INCREASE REVENUES BY BETTER TARGETING ENFORCEMENT RESOURCES 8 (2012) (“[E]xams (both correspondence and field) of taxpayers with positive incomes of at least \$200,000 produced significantly more direct revenue per dollar of cost than exams of lower income taxpayers.”).

estimates of the tax gap.”¹⁹² Finally, pursuing tax errors by higher income households also yields significantly higher revenues. As Francine Lipman points out, “[w]hile less than one-quarter as many examinations were conducted of tax returns with income from \$200,000 to \$1 million, those examinations generated more tax revenue than examinations of EITC filers.”¹⁹³

The EITC is also characterized by severe sanctions. Taxpayers who fraudulently claim the EITC cannot receive EITC benefits for ten years.¹⁹⁴ A claim made with “reckless or intentional disregard of rules” results in a two-year ban.¹⁹⁵ Sanctions like this are virtually unheard of in the tax code, although beginning in 2016 parallel sanctions apply to the CTC.¹⁹⁶ In fact, “[t]here are no analogous sanctions applicable to other improper positions taken on federal income tax returns.”¹⁹⁷

c. Moving to the Middle: The Child Tax Credit. For the question of administration at issue in this section, the CTC functions on the continuum between the EITC and the HMID. As is the case for the HMID, one fills out a

192. Lipman, *supra* note 187, at 1193–94.

193. *Id.* at 1195.

194. I.R.C. § 32(k)(1)(B)(i). A similar rule was added to the CTC by the Protecting Americans from Tax Hikes Act of 2015 (PATH Act), Pub. L. No. 114-113, Div. Q, § 208(a)(1), 129 Stat. 3040, 3083 (codified at I.R.C. § 24(g)).

195. I.R.C. § 32(k)(1)(B)(ii). A parallel rule was added to the CTC for taxable years beginning in 2016. I.R.C. § 24(g); PATH Act, § 208(c).

196. PATH Act, § 208(a)–(c).

197. Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. Rev. 1867, 1894 (2005) (“There are no analogous sanctions applicable to other improper positions taken on federal income tax returns. If an underpayment of income tax is due to negligence or to a ‘substantial understatement’ of tax liability on a return, the taxpayer is generally subject to a penalty equal to 20 percent of the underpayment. Even if an underpayment is due to fraud, the penalty is only 75 percent of the underpayment. Aside from the special EITC sanctions, an improper claim of a deduction, credit, or exclusion on one year’s return never makes a taxpayer ineligible to claim the same tax benefit in a later year. No matter how culpable a taxpayer was in wrongfully claiming a charitable deduction or a dependency exemption in one year, the taxpayer is not foreclosed from claiming the deduction or the exemption in a future year in which the taxpayer satisfies the substantive requirements. The draconian EITC sanctions, and the absence of any similar sanctions for improper income tax return positions not involving the EITC, suggest that Congress considers overpayments of the EITC to be much worse than underpayments of income tax.”); *see also* Lipman, *supra* note 187, at 1196 (quoting Zelenak).

fairly simple IRS form and receives the credit based on the assertions on that form.¹⁹⁸ Unlike the EITC, there is no work requirement, no cap on the number of children on behalf of whom filers can receive the benefit, and no unusually high audit rates associated with the benefit. On the other hand, as of 2016, the imposition of two or ten year bans for “reckless or intentional disregard of rules or regulations” or “fraud,” respectively, previously found only for the EITC, apply to the CTC as well.¹⁹⁹ In this sense, the CTC, a benefit targeted toward and received by those largely in the middle of the income spectrum, functions as a matter of administration somewhere between the EITC and the HMID.

5. Race, Welfare, the EITC, and the CTC

In an article that contrasts the administration of the EITC with the CTC, Dorothy Brown argues that the comparatively harsher sanctions and audit rates between the EITC and the CTC can only be explained by the perceived race of EITC recipients.²⁰⁰ While the IRS’s failure to collect data on the race of taxpayers makes it nearly impossible to conclusively study the racial impact of particular tax policies,²⁰¹ Brown makes a strong case that the association of the EITC with “welfare” is code for race and provides a justification for the comparatively harsher policies described above.²⁰²

There is no question that, despite the lack of any significant period of time in which more African Americans than whites received either AFDC or TANF, both programs are strongly associated with African Americans. Throughout the 1980s and 1990s, the image of the “welfare queen” dominated public discourse around AFDC and ultimately became the symbolic force justifying the elimination of the program. Still today the image of the welfare queen continues to powerfully stigmatize poor, African American women.²⁰³

198. I.R.C. § 24; Internal Rev. Serv., Schedule 8812 (Form 1040A or 1040) (2016), <https://www.irs.gov/pub/irs-pdf/fl040s8.pdf>.

199. See *supra* notes 194–196 and accompanying text.

200. Brown, *supra* note 186, at 757 (“This Article seeks to uncover why there is a need for two tax credits which benefit children differently and concludes that the only plausible explanation is related to race.”).

201. Knauer, *supra* note 24, at 210.

202. Brown, *supra* note 186, at 801–39.

203. For an important discussion of these issues in the context of welfare and beyond to other poverty issues, see Ann Cammett, *Deadbeat Dads and Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233 (2014); Ann Cammett, *Welfare Queens Redux: Criminalizing Black Mothers in the Age of Neoliberalism*, 25 S. CAL. INTERDISC. L.J. 363 (2016).

More recently, the EITC has come under sustained attack with the same racially charged images. For example, in the Heritage Foundation's 2015 Budget Book, Robert Rector described the EITC as "the nation's largest means-tested cash welfare program" and refers to the portion of the EITC paid in excess of a household's tax liability as "simply a cash welfare grant."²⁰⁴ Similarly, Ernest Istook, President of Americans for Less Regulation, in a 2015 article in the *Washington Times*, highlighted the EITC error rate and decried the lack of congressional focus on the issue. He does so by explicitly invoking Ronald Reagan's push against "welfare cheats": "Inexcusably, there is no major push within Congress or the White House to fix this. Ronald Reagan successfully ran for president by decrying the 'welfare cheats.' Now the problem is far more massive, yet gets ignored."²⁰⁵

If should now be clear, however, that structurally the payment Istook is referring to is no different, from a budgetary perspective, than a CTC or the HMID. The labeling of it as "welfare" and the clear invocation of race politics in these arguments is nothing more than an attempt to sustain structural inequities between those who deserve benefits (taxpayers) and those that don't (poor people). As McClusky suggests, these are, at base, nothing more than value judgments.²⁰⁶

IV. STRUCTURING EQUALITY: A PATH TOWARD REFORM

Dorothy Roberts has written extensively on the devastation wrought upon poor African American families by various government systems: the child welfare,²⁰⁷ the social welfare, and the criminal justice systems.²⁰⁸ In the face of this devastation, she makes an argument about the nature of a right to privacy, a right clearly central to sustaining autonomy. Roberts argues that, in order to "protect the dignity and autonomy of the poor and oppressed," poor women need a right to privacy that not only offers protection from incursion (the classic negative rights request of liberalism) but also affirmative

204. *The Budget Book: 106 Ways to Reduce the Size & Scope of Government*, #93 *Reduce Fraud in the Earned Income Tax Credit*, HERITAGE FOUND., <http://budgetbook.heritage.org/income-security/reduce-fraud-earned-income-tax-credit/> (last visited Apr. 23, 2017).

205. Ernest Istook, *Needed: Watchdogs over Waste, Misguided Payments*, WASH. TIMES (Apr. 8, 2015) <http://www.washingtontimes.com/news/2015/apr/8/ernest-istook-earned-income-tax-credits-massive-fr/>.

206. McClusky, *supra* note 13.

207. DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 13–14 (2002).

208. *See* Roberts, *supra* note 11.

support.²⁰⁹ As she frames it, it is not enough to “merely [ensure] the individual’s ‘right to be let alone.’”²¹⁰ A better notion of privacy, Roberts argues, “includes not only the negative proscription against government coercion, but also the affirmative duty of government to protect the individual’s personhood from degradation and to facilitate the processes of choice and self-determination.”²¹¹

Although, as I have previously argued,²¹² the work of Roberts and Martha Fineman differ in many respects, their work comes together on the idea of autonomy-enhancing support.²¹³ Dramatically upending classic liberal theory, Fineman argues that, in place of the traditional autonomous subject, we need to think of the human subject as inherently vulnerable, inherently in need.²¹⁴ We may be more or less so at different moments in life, but each of us has needs that we cannot meet alone. Vulnerability theory, in Fineman’s analysis, is certainly descriptive, but it is not merely descriptive. Instead it forms the basis of a claim that state institutions must provide support:

[C]onsideration of vulnerability brings societal institutions, in addition to the state and individual, into the discussion and under scrutiny The nature of human vulnerability forms the basis for a claim that the state must be more responsive to that vulnerability. It fulfills that responsibility primarily through the establishment and support of societal institutions.²¹⁵

For Fineman, this theory does hard work. If the “primary objective [were] ensuring and enhancing a meaningful equality of opportunity and access, we may see a need for a more active and responsive state.”²¹⁶ This envisioned state would not “simply protect citizens’ individual rights from

209. *Id.* at 1478.

210. *Id.*

211. *Id.* at 1479.

212. Wendy A. Bach, *Flourishing Rights*, 113 MICH. L. REV. 1061, 1077–79 (2015).

213. For a more extensive discussion of these issues, including not only an extensive discussion of Fineman’s theory but also of the important work of Maxine Eichner, see Bach, *supra* note 5.

214. Fineman, *Anchoring Equality*, *supra* note 4; Fineman, *Responsive State*, *supra* note 4.

215. Fineman, *Responsive State*, *supra* note 4, at 255–56.

216. *Id.* at 260.

violation by others.”²¹⁷ Instead, it would “actively support the expanded list of liberal goods by creating institutions that facilitate caretaking and human development.”²¹⁸ 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.”²¹⁹ Like Roberts’s call for a notion of personhood that includes the right to support that “facilitate[s] the processes of choice and self-determination,”²²⁰ Fineman’s theory demands autonomy-enhancing support.

To move toward an autonomy-enhancing state, though, as scholars like Wacquant and McClusky suggest, one first must understand how structural institutions facilitate both subordination and privilege.²²¹ At the specific site of public benefits provision, this Article has sought to trace these structural inequalities. At this stage, several points should be clear. The U.S. social welfare state is more extensive than popular discourse might suggest, largely as a result of certain tax provisions that benefit those with substantial wealth. Further, the U.S. social welfare state does less than other comparable nations to address income inequality. But structural support of inequality in the U.S. social welfare system goes beyond these size and distributive issues. As this Article has demonstrated, inequality is also significantly exacerbated through the means of administration. Benefits at the bottom are dominated by hyperregulation, and benefits at the top function as nearly invisible entitlements. These two parts of the social welfare state, while making up significant pieces of one whole, could not look more different. And, as a result, they could not be experienced more differently by their beneficiaries. Through both distribution and structural administrative inequalities, the U.S. social welfare state both sustains privilege and subordinates those at the bottom.

To move toward an autonomy-enhancing state that provides meaningful equality of opportunity at the site of social welfare provision, one has to address both the distributive and the structural issues at play. As to distribution, this Article joins the calls of other scholars and policy analysts who envision both an increase in overall spending and a far more progressive distribution of U.S. social welfare dollars. To take the example of the tax provisions discussed above, this would entail seriously questioning the existence of these provisions. It would also involve confronting head on the overall effect of social welfare provision on income inequality. As argued

217. EICHNER, *supra* note 4.

218. *Id.*

219. Fineman, *Responsive State*, *supra* note 4, at 260.

220. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 309 (2d Vintage Books ed. 2017).

221. See McClusky, *supra* note 13; Wacquant, *supra* notes 5–6.

above, if the goal is addressing income inequality and creating equality of opportunity, we must both increase and redirect resources in a far more progressive direction. Addressing this distributive question is a central part of achieving a responsive state.

As to the structural issues, although there is no question that many of the policy provisions that this Article has characterized as benefits for the wealthy are ripe for reconsideration and possible elimination, examining their structure through the lens of an autonomy-enhancing state yields important insights. Suzanne Mettler's work gives us a window into how these programs function to support the autonomy of their recipients. Mettler performed a survey to gain insight into how individuals viewed receipt of assistance under these programs. Although respondents in her surveys readily acknowledged their use of tax provisions like the HMID or the CTC as well as other benefits, at the same time, they largely responded that they did not receive government assistance.²²² The programs were, in this sense, "submerged" or invisible to their recipients as support. Recipients clearly felt entitled to tax code support. And the administrative mechanisms of these programs support that notion of entitlement. Programs for the wealthy are as unintrusive as possible, and the focus of administration appears to be not on ferreting out fraud but instead on ensuring benefits for the greatest number of eligible recipients.²²³ In contrast, benefits for the poor are clearly viewed, by recipients and by the greater culture, as what Mettler called "government assistance" or more colloquially as a "handout" or "welfare," with all the cultural stigma and hyperregulatory administrative mechanisms that those terms invoke and demand.

To address these structural issues, we need to seriously consider importing the administrative mechanisms for getting benefits to the top into the programs focused on those lower on the income scale. To give just a sense of the necessary reforms, this would involve radically simplifying application procedures and requirements and eliminating stigmatizing and hyperregulatory features. As is the case for programs like the HMID and the CTC, eligibility factors would be limited to far fewer factors: principally income eligibility and, when necessary, family composition. As is the case for the tax benefits discussed herein, applications would be submitted in the ways most convenient to recipients, and benefits would be received upon sworn eligibility. Error detection processes would move from pre-application processes to processes more consistent with auditing. As is the case for the EITC (to some extent) and the CTC, the focus of error detection would shift dramatically. Resources would be focused far more strongly on eliminating

222. METTLER, *supra* note 2, at 41–46.

223. *See supra* Part III.B.3.

non-receipt for eligible families rather than on detecting and eliminating receipt by non-eligible families. Although there is good reason to provide work as well as other supports to those in poverty,²²⁴ the linking of work programs and employment, as well as other behavioral requirements such as the passing of drug tests and the linking of service provision to government benefits, would be eliminated. Eliminated too would be all the administrative structures that lead to enhanced risk. Building significant privacy protection into the programs that address both formal and informal data-sharing practices would take place. As a result of these reforms, recipients would ultimately experience these benefits as nearly-invisible, autonomy-enhancing supports. They would perhaps not even realize that they were receiving assistance at all.

Conclusion

This Article began with what I characterized as an unthinkable, and now more fully developed, scenario: a wealthy family receiving the HMID subject to the administrative structures that dominated the Section 8 program in Lancaster and Palmdale. In closing I want to conjure the converse, perhaps even more culturally unthinkable scenario: a Section 8 recipient subject only to the administrative structures of the HMID. If one accepts the premises at the heart of this Article—that a dollar of social welfare provision is a dollar of social welfare provision regardless of who receives that benefit and that social welfare policy must be designed to support the autonomy of recipients—then there is little to justify the structural differences described in this Article. And this is precisely the point: if we are to have a responsive state that supports individuals in ways that enhance their autonomy and enables them to achieve substantive equality, we have to not only get more support to those in poverty but we must provide that support in way that enhances, rather than undermines, the autonomy of those in need.

224. For a discussion of the kind of support that might yield significant positive results for poor communities, see for example, Wendy A. Bach, *What if Your Child Were The Next One in the Door: Reimagining the Social Safety Net for Children, Families and Communities*, in *A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM* (Nancy Dowd ed., 2016) (discussing the work of the Harlem Children's Zone as a promising model for positive reform). See also CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 165–67 (2014) (discussing the promising results of the Nurse-Family Partnership—a voluntary, health and well-being focused program for pregnant and new mothers).