

Can the Supportive State be Non-intrusive?

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Date : March 24, 2015

Wendy A. Bach, [*The Hyperregulatory State: Women, Race, Poverty, and Support*](#), 25 **Yale J.L. & Feminism** 317 (2014).

Two truths that feminists hold to be self-evident are: (1) that this society requires a more pro-active, supportive state that recognizes the fact of dependency and assumes some responsibility for the needs that dependency creates; and (2) that when the state intervenes in the lives of poor, minority women, it discriminates against and penalizes those most in need of its support. Advocates of each proposition generally also adhere to the other as if the two propositions were completely compatible: Those making the case for a supportive state adopt as a principal goal the reduction of society's profound inequalities,¹ while critics of the state's discriminatory intrusions into the lives of the poor take for granted the necessity for state interventions to address dependency.²

Wendy Bach's article advances both propositions sympathetically—so sympathetically that the reader initially might understand the article to be primarily a celebration of the convergences in feminist insight. But read on. The work is, above all else, a caution. The case for a supportive state is a powerful one, she argues; yet current institutional realities mean that state-sponsored programs typically make women more vulnerable, not less. This is not inevitable, she argues, but to avoid it, reformers need to pay more attention to the specificity of the mechanisms the state employs. Otherwise, Bach argues, calls for a more supportive state may yield measures making it easier for middle-class women to work and raise children, but they won't dismantle the punitive mechanisms that so acutely affect poor women and minorities. (P. 329).

Most of Bach's article is aimed at deepening our understanding of the institutional realities of poor women's lives. In furtherance of this goal, Bach identifies a phenomenon she calls "regulatory intersectionality," which refers to the interlocking nature of state's social welfare apparatus and its criminal justice process. These systems, she argues, act in concert. "[I]nformation that is deemed to indicate non-compliant and/or deviant conduct travels from the original social welfare system into other even more punitive systems," where it functions "to impose ever-heightening penalties on the families that seek assistance." (P. 337). The result is a network of hyperregulation that is highly targeted by class, race, and place.³

The examples Bach uses to establish the phenomenon of regulatory intersectionality are familiar ones—mandatory drug testing of pregnant women and referrals of women who test positive to the criminal justice system; child protection interventions that systematically penalize minority families for their poverty; and welfare conditions (including more drug testing) that invade the privacy rights and security of these same families. In each of these regulatory areas, she argues, the problem is not simply that a state committed to the principles of free market economics, autonomy and self-reliance wrong-headedly ignores dependency and vulnerability, but also that the state's interventions typically expose women to "more and more . . . punishment and social control." (P. 368).

Is it too much to expect a state to be both supportive *and* non-intrusive? Bach concludes that it is possible, and that if privileged women put themselves in the shoes of the poorest, most vulnerable women, it would be "not so difficult after all" to imagine what form that support should take. (P.

379). This imagining leads to Bach to favor programs that are more universal in scope, like the Earned Income Tax Credit, as well as “more privacy protections and higher bars on surveillance and monitoring,” “higher walls between support system and punishment systems,” and “significant caution in the face of calls for coordination and collaboration.” (P. 376).

Bach’s article is an important heads-up to family law reformers who view a more supportive state as the route to greater equity for women and families. Indeed, the challenge Bach poses is so daunting that it is not clear that the solutions she herself offers are sufficiently robust to address it. What this article reminds us, however, is that without greater sensitivity to the damage a “supportive state” can wreak, efforts in the name of the supportive state may end up doing more harm than good.

1. See, e.g., Martha Fineman, *The Autonomy Myth: A Theory of Dependency* (2004); Maxine Eichner, *The Supportive State: Families, Government and American’s Political Ideals* (2010); Clare Huntington, *Failure to Flourish: How Law Undermines Family Relationships* (2014).
2. See, e.g., Dorothy Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers’ Decision About Work At Home and in the Marketplace*, 44 Santa Clara L. Rev. 1029 (2004); *Shattered Bonds: The Color of Child Welfare* (2002); Kaaryn Gustafson, *Cheating Welfare: Public Assistance and the Criminalization of Poverty* (2011); Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (2009).
3. Bach at 335-6, quoting Frank Rudy Cooper, *Hyper-Incarceration as a Multidimensional Attack: Replying to Angela Harris Through the Wire*, 37 Wash. U. J.L. & Pol’y 67, 68-69 (2011).

Cite as: Katharine Bartlett, *Can the Supportive State be Non-intrusive?*, JOTWELL (March 24, 2015) (reviewing Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 **Yale J.L. & Feminism** 317 (2014)), <https://family.jotwell.com/can-the-supportive-state-be-non-intrusive/>.