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BEYOND EQUALITY AND DISCRIMINATION[†]

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ABSTRACT

The societal frame of the “economically disadvantaged” is rooted in a distinction between a conceptual status of equality and the actuality of discrimination and disadvantage. This paradigm provides the governing logic for both criticism and justification of the status quo. This Article questions whether and to what extent this equality/antidiscrimination logic has lost its effectiveness as a critical tool and what, if anything, should be the foundation of the rationale that supplements or even replaces it.

I. INTRODUCTION

The theme of this Article for the *SMU Law Review Forum* focuses us on the challenges faced by the “economically disadvantaged” in the past decade and in the future. This framing is rooted in a distinction between that conceptual status of equality and the actuality of discrimination and disadvantage. This is the lens through which contemporary legal culture tends to assess the nature and effect of existing laws and determines the necessary direction of reform. As such, this paradigm provides the governing logic for both criticism and justification of the status quo. It is rooted in an understanding of the significance of the human being and a belief in their fundamental parity under law that also asserts the inherent value of individual liberty and autonomy, and thus is skeptical of state intervention into the “private” sphere of life.

I believe that one of the most significant questions for the twenty-first century for those concerned with “the disadvantaged” has to be whether and to what extent this equality/antidiscrimination logic has lost its effectiveness as a critical tool and what, if anything, should be the foundation of the rationale that supplements or even replaces it. To raise questions about the current dominant paradigm is not to argue that equality and antidiscrimination are not important or necessary concepts. Equality and antidiscrimination were unarguably essential

[†] Portions of this Article are based on a previous piece by the author. See Martha Albertson Fineman, *Vulnerability and Social Justice*, 53 VAL. U. L. REV. 341 (2019). [Ed.’s Note].

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steps in the evolution of a just society. Prior to the mid-twentieth century, formal rules, as well as functioning norms, were built on assertions of fundamental differences among groups defined by gender, race, and other characteristics. These distinctive group categories also established a world of hierarchical, legalized identities in which some were susceptible to different, often demeaning treatment. However, with the formal distinctions now removed and equal access the norm,¹ it becomes apparent that the problems in society often transcend discrimination and exclusion from social institutions. Indeed, there may be substantial problems with those institutions and their organization not revealed by the jurisprudential logic that flows from an equality/antidiscrimination paradigm, which may place obstacles on the ability to remedy (or even address) existing inequalities.²

An equality model or nondiscrimination mandate certainly remains the appropriate response in many instances: one person, one vote, and equal pay for equal work are areas where equality seems clearly suitable. However, equality is less helpful—and may even be an unjust measure—when applied in situations of inescapable or inevitable inequality where differing levels of authority and power are appropriate, such as in defining the legal relationship between parent and child or employer and employee. Such relationships have historically been relegated to the “private” sphere of life—whether family or market—away from state regulation.

When explicitly addressed, situations of inevitable inequality are typically handled in law and policy either by imposing a fabricated equivalence between the individuals or by declaring that an equality mandate does not apply because the individuals to be compared are positioned differently.³ An example of the imposition of fictitious equality in response to inevitable inequality is evident in situations involving parties who occupy obviously unequal bargaining positions, like the contract that is fabricated in the employment context.⁴ The distinction in the legal treatment of children as compared with adults also exemplifies a differently positioned resolution for unequal legal treatment. In both instances, state responsibility for ensuring equitable treatment for differently positioned

1. This argument is developed more fully in Martha Albertson Fineman, *Vulnerability and Inevitable Inequality*, 4 OSLO L. REV. 133 (2017).

2. This is reflected in the difficulties with affirmative action and other “remedial” plans that propose unequal treatment in order to address existing inequalities. See Martha Albertson Fineman, *Equality and Difference – The Restrained State*, 66 ALA. L. REV. 609, 626 (2014).

3. Moreover, equality implies a comparison that leads to the problematic question: Equal to whom? In the case of women, are male norms and standards the appropriate measure? Such an assimilationist approach to equality presumes socially and culturally imposed roles—obligations and burdens are similar or equal in nature as regards women and men. If this is not the case, equal treatment will often result in further consolidation of existing, unequal power relationships, effectively reinforcing the very gender system that feminists oppose. In addition, the idea of “choice” may suggest to some that existing inequalities show not a failure of equality per se but are simply the result of different life choices freely made by “autonomous” men and women. If women choose to devote more time to family and relationships, rather than investing their energies in the labor market, the resulting gender disparities are merely the neutral result of differing choices made by equally autonomous and free adults. See generally *id.*

4. These are typically contracts of adhesion or involve corporate entities and individuals in a situation with a predictable inequality of knowledge, bargaining power, and access to legal resources.

individuals is minimized or obscured within the overriding framework of equality.⁵

II. RETHINKING THE PARADIGM—VULNERABILITY THEORY

Law is both inherently a social endeavor and a primary instrument of accomplishing social justice. Laws establish and regulate duties, obligations, rights, and privileges applicable to all members of a society, as well as define relationships with each other and with the state and its institutions. Politicians and philosophers addressing the role and function of law can and do differ when it comes to theories of governance, but there should be a shared recognition of the significance of our understanding of what it means to be human. Laws are drawn with a created legal subject in mind—an imagined ordinary being who is the abstract subject of law.⁶ Our ideas about what it means to be human and how the state or collective should be constructed influence how we shape legal relationships and social institutions, as well as inform what we consider to be justice within those arrangements and institutions.⁷ This dialectical relationship between the empirical and the ideal is a starting point to apprehend the law not as mere reflection of society but as constitutive of the material forces which guide its own reproduction.⁸

Our contemporary legal subject is posited as an autonomous and independent being whose primary demand is for liberty or freedom from state interference.⁹ He claims a right to autonomy to govern his own life while at the same time asserting his freedom from responding to the needs of others, who should be equally independent and self-sufficient.¹⁰ This Enlightenment vision of legal and

5. On reflection, it becomes apparent that many, if not most, social or institutional relationships are relationships of inherent inequality. See Fineman, *Vulnerability and Inevitable Inequality*, *supra* note 1, at 134–35.

6. Defining this is a matter of selecting what are essential human qualities, which can then be used to set expectations and aspirations attainable under a rule of law.

7. See, e.g., HANNAH FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION 2* (1967) (explaining how the method of social theorists differs from natural scientists and the importance of acknowledging the network of concepts).

8. In this endeavor, I am indebted to the framework provided by Merton's "theories of the middle range," in the sense that they are "intermediate to general theories of social systems which are too remote from particular classes of social behavior, organization and change to account for what is observed and to those detailed orderly descriptions of particulars that are not generalized at all." ROBERT K. MERTON, *On Sociological Theories of the Middle Range*, in *ON THEORETICAL SOCIOLOGY: FIVE ESSAYS, OLD AND NEW* 39, 39 (1967).

9. See generally Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1 (2008) [hereinafter Fineman, *Anchoring Equality*].

10. I intentionally use the male pronoun here because the political subject that governs our current institutional imagination is based on a limited notion of the human experience—one that reflects the understanding of the male, white, property-owning or tax-paying, of a certain age and/or religion and free framer of the U.S. Constitution. Over the course of the nineteenth and twentieth centuries, certain qualifiers were removed, and political legal subjectivity formally grew to encompass previously excluded groups. However, this eighteenth-century legal subject continues to influence the modern legal subject. "He" retains many of the secondary characteristics that formed perceptions of the needs and political sensibilities of an eighteenth-century male citizen sheltered by institutions such as the patriarchal family and the privileges of a master-servant mentality. See generally Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 *B.U. L. REV.* 1713 (2012).

political subjectivity has given us legal concepts such as the “reasonable man” and also forms the basis for the rational, self-interested agent in economic theory.¹¹ The liberal legal subject embodies an ideal of abstract equality or fundamental sameness where any differences among men are deemed to be legally or politically insignificant.

This liberal legal subject is a fully functioning adult in charge and capable of making choices. Unrestrained by the state, he will be rewarded according to his particular talents and individual efforts. His social relations are defined by concepts, such as consent, and supported by legal doctrines, such as contract and property.¹² The attainment of liberal economic roles, such as job creator, entrepreneur, taxpayer, and (of course) consumer, defines the aspirations and determines the values for this legal subject. The messy aspects of what it means to be human, particularly the physical realities of vulnerability and dependency, may be viewed as a problem, but they are strictly considered to be an individual, not a societal, problem. Thus, such problems are deemed a personal, rather than public, responsibility.¹³

“Vulnerability theory” challenges this limited and inaccurate vision of legal subjectivity. It suggests that a legal subject that is primarily defined by vulnerability and need, rather than exclusively by rationality and liberty, more fully reflects the human condition. As such, vulnerability theory has the power to disrupt the logic of personal responsibility and individual liberty built on the liberal stereotype of an independent and autonomous individual. Recognition of human vulnerability mandates that the neoliberal legal subject be replaced with the vulnerable legal subject, even as a responsive state is substituted for the restrained state of liberal imagination.¹⁴

The rethinking of legal subjectivity and state responsibility is an important social justice project. When we place the vulnerable subject at the center of our theorizing, it becomes clear that there is a collective or social injury that inevitably arises from a state unresponsive to the universal and constant human condition of vulnerability and dependency.¹⁵ The injury arises from profound negligence or disregard on the part of the state to attend to human vulnerability in creating its

11. This liberal legal subject is based in the Lockean notion on equality of the same inalienable natural rights. See Fineman, *Anchoring Equality*, *supra* note 9, at 2–3. This is also the basis for law and economics theories that came to dominate in the late twentieth century and is commonly associated with the economic philosophy of the “Chicago School.” See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (9th ed. 2014). For the influence of the law and economics movement in the United States, see DANIEL T. RODGERS, *AGE OF FRACTURE* 41–76 (2011). For a critique from feminist scholarship, see FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, & SOCIETY (Martha Albertson Fineman & Terence Dougherty eds., 2005).

12. Martha Albertson Fineman, *Contract and Care*, 76 CHI-KENT L. REV. 1403, 1419–21 (2001).

13. See *id.* at 1405–06.

14. Fineman, *Equality and Difference*, *supra* note 2, at 626; Fineman, *Vulnerability and Inevitable Inequality*, *supra* note 1, at 149.

15. Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, in *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* 13, 21 (Martha Albertson Fineman & Anna Greer eds., 2013); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 266–69 (2010).

institutions and defining the social relationships that will govern society.¹⁶ Vulnerability theory is also a legal project that will bring all areas of law, not just those focused on civil rights, under social-justice scrutiny.

A. WHAT DOES IT MEAN TO BE HUMAN?

Vulnerability theory began by asking a fundamental question: What does it mean to be human?¹⁷ In answering this question, we must identify the essential aspects of human beings—those characteristics, experiences, or situations that are universal and define the human condition.¹⁸ The answer to this question in vulnerability theory is, of course, vulnerability. Vulnerability is located in the fact that we are embodied beings. Our bodies are inevitably and constantly susceptible to changes—both positive and negative, developmental, and episodic over the life course, and this has implications for our social well-being as well.¹⁹ Note that human vulnerability is not set forth as a normative concept. It is descriptive, representing irrefutably empirical observations about the nature and substance of the embodied human experience.

As embodied beings, humans constantly experience changes over time, which include not only the possibility of bodily harm, injury, or decline but may also be positive and generative. For example, developmental changes for an individual can lead to increased strength, growth, wisdom, and maturity, as well as provoking creativity and relationships of fulfillment and satisfaction. On a societal level, the reality of our susceptibility to bodily change over time necessitates the creation of relationships of care and caring upon which we are dependent²⁰ as infants and

16. Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, *supra* note 15, at 20–21.

17. See *id.* at 21. Vulnerability theory draws a distinction between what is the essence of the human condition (which reflects the biological and developmental realities of our bodies) and how we understand human nature (which is largely a product of history, geography, and culture—in other words, it varies over time and place and is socially produced).

18. Vulnerability theory posits vulnerability as universal and constant but also recognizes that there are differences among individuals. “Horizontal” differences are observed if we take a slice of society at any given time and note the differences in embodiment, such as race, gender, ability, and other differences. There are also differences in social standing and status. These differences do not alter the fundamental vulnerability that marks all bodies but have certainly served to provoke profound social advantage or disadvantage. Thus, horizontal differences have been the main subject of antidiscrimination and inclusion laws. An additional set of differences may be thought of as “vertical”—occurring within each individual over the life course as we move from infant to elderly. These differences are not well-addressed in law and theory. Typically, children and some elderly or disabled individuals are clustered into “vulnerable populations” and stigmatized as either in need of protection or lacking capacity, creating a “special” legal identity for those within the group. Other “vulnerable populations,” such as at-risk youth, may be subjected to discipline or punishment. This Article will not explore the reconciliation of the universal vulnerable subject with what I have called the “paradox” of particularity, but those interested in this aspect should see Fineman, *Equality and Difference*, *supra* note 2, and Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 TEMP. POL. & CIV. RTS. L. REV. 307 (2014).

19. See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, in TRANSCENDING BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY 161, 166–70 (Martha Albertson Fineman ed., 2011).

20. I view both vulnerability and dependence as universal, reflecting the shared human condition that mandates that, of necessity, we are social beings. These terms do not designate individuals as aberrant and deficient but, quite the contrary, exemplify the human condition.

children, as well as the social institutions and relationships upon which we are inevitably enmeshed as adults.²¹

While vulnerability theory begins with vulnerability, it does not end there. In fact, it is the implications of human vulnerability that are the most significant part of the theory for legal and political thought. Because we are embodied creatures, we are also dependent on social institutions and relationships throughout the life course.

B. INSTITUTIONAL IMPLICATIONS OF HUMAN VULNERABILITY

Ultimately, of more significance to the development of the theory than the description of human vulnerability is a second theoretical question, one that has normative implications: If to be human is to be universally and constantly vulnerable, how should this recognition inform the structure and operation of our society and its institutions? To answer this question, it is necessary to reflect initially upon the whole idea of society, its purpose, and its justification. Reflecting a dawning neoliberal perspective, Margaret Thatcher, in a 1987 interview in *Women's Own Magazine*, famously proclaimed there was no such thing as society:

They are casting their problems at society. And, you know, there's no such thing as society. There are individual men and women and there are families. And no government can do anything except through people, and people must look after themselves first. It is our duty to look after ourselves and then, also, to look after our neighbours.²²

Clearly, she was making a political, not a sociological, statement reflecting her view on state responsibility (or lack thereof). However, the idea of society and how it functions in critical theory is not always obvious, and it is important to explicitly reveal the assumptions that are made. We know societies are not all the same, but they may nonetheless have universal, shared characteristics. What are they? Obviously, any society has to be intergenerational if it is going to perpetuate itself. Every society needs a means of organizing itself and establishing the rules that will guide individual interactions with each other, as well as establishing the appropriate relationship between the individual and the state. In addition, every society must, of necessity, devise social institutions and relationships that respond to the realities of the human condition, which means responding to human vulnerability and dependency.²³

These two assertions about society are at the heart of vulnerability theory. The social institutions and relationships that a society forms must transcend not only the specific interests of particular individuals and groups but must also have

21. The point is that although the institutions and relationships upon which we depend change over time—from family to educational and employment systems, for example—the reality of our social dependency is constant.

22. *Margaret Thatcher: A Life in Quotes*, GUARDIAN (Apr. 8, 2013, 8:38 AM), <https://www.theguardian.com/politics/2013/apr/08/margaret-thatcher-quotes> [<https://perma.cc/7P7S-Z7W7>].

23. As we have seen, contemporary politics has dictated the market and its institutions as the mechanism to provide for human needs, as well as preserving individual liberty. See *infra* Section II.C.

concern for the intergenerational needs of society. This societal perspective defines a preeminent social justice challenge. Vulnerability theory teaches us that human beings are all inevitably embedded within the social—located throughout our lives in particular systems of social organization. The social nature of those institutions and relationships form the basis for state or collective responsibility. This responsibility cannot initially or primarily be understood only in terms of individual well-being. Social justice responsibility must be intergenerational and directed to the systems of institutions and relationships developed by a society to maintain general human well-being and flourishing.²⁴ We cannot adequately assess what is just on an individual or group basis without considering the justice of the fundamental social order. The societal problems of general organization and order must define state responsibility in the first instance.

In defining this collective responsibility, the collective reality of human vulnerability and the physical and social dependency that it inevitably generates must be of central concern. In particular, the social implications of dependency are vitally important in defining state responsibility.²⁵ Dependency is most evident when we are infants and children, but while we may be more or less dependent at any given stage, it is present in some form and to some degree throughout our lives.²⁶

C. SOCIAL INSTITUTIONS AND RESILIENCE

Understanding vulnerability as inevitably arising from our embodiment and inescapably necessitating the creation of social institutions should make it clear that there is no position of either invulnerability or independence. Fortunately, however, there is resilience. Resilience is centrally important in a vulnerability analysis. Resilience is not a naturally occurring and variable characteristic of individuals. Nor is it achieved only by individual accomplishment and effort. Rather, resilience is a product of social relationships and institutions. Human beings are not born resilient. Instead, resilience is produced over time, within social structures, and under societal conditions over which individuals may have little or no control.²⁷

Resilience is found in the material, cultural, social, and existential resources that allow individuals to respond to their vulnerability (and dependencies).²⁸

24. Distortions within the system, such as impermissible discrimination, can be addressed after the general functioning is determined to be justice.

25. Dependency is the realization or actualization of human vulnerability and can come in economic, physical, psychological, or other institutional forms. Dependency has typically been used as a highly stigmatized term, particularly in the context of “welfare reform.” Dependency and the idea of cycles of intergenerational dependency were used to justify draconian cuts to an already meager safety net for poor women and their children in the United States. However, single mothers who attained that status through divorce could look to their ex-husbands for resources, remaining dependent on him rather than the state. Nonetheless, the gendered social roles and expectations within the family affected the way women were seen and received in society, independent of their own family situation or motherhood status. See Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2204–06 (1995).

26. See *id.* at 2200–01.

27. See Fineman, *The Vulnerable Subject and the Responsive State*, *supra* note 15, at 269–73.

28. The list of resources is an expansion on the list of assets developed in Fineman, *Anchoring*

Resilience is measured by an individual's ability to survive or recover from harm or setbacks that inevitably occur over the life course. Resilience has positive manifestations as well. Resilient individuals can form relationships, undertake transactions, take advantage of opportunities, or take risks in life—confident that if they fail the challenge or meet unexpected obstacles, they are likely to have the means and ability to recover. In other words, resilience allows us to respond to life—not only to survive but also to thrive within the circumstances in which we find ourselves.

Institutions are the mechanisms whereby individuals can accrue the resources they need to have resilience. The fact that a vulnerability analysis brings the life course into focus is also important. Resilience-conferring institutions operate both simultaneously and sequentially in society. That they are sequential is significant because it illuminates how failing to gain resources or resilience successfully in one stage can fundamentally affect the ability of an individual to succeed in another. An inadequate education will impair the ability to secure employment and accumulate material goods, which will also affect things later in life, like health, family formation, and prospects in old age. The movement into a new phase depends on successful accomplishment of the tasks set in the earlier stage, and it may be difficult to recover if that does not happen.²⁹

The fact that institutions operate simultaneously is also significant when thinking about resilience. The family, the market, the financial and educational systems, and so on are the intersecting institutions where we accumulate the material, cultural, social, and existential resources that give us resilience as individuals. Therefore, resilience gained through one institutional or relational arrangement can offset or mitigate disadvantages in others (and vice versa). For instance, strong family compensates for weak education, while violent or abusive family undermines advantages of strong education.³⁰

While it may not be explicitly focused on the vulnerability of human beings, the current political order is not dismissive of the need for social institutions.³¹ Policy pronouncements, legislative histories, party platforms, and political rhetoric have routinely recognized and celebrated the important position and function of institutions and institutional roles in society.³² Economic or market

Equality, *supra* note 9, at 13–15, based on the four types of assets identified in PEADAR KIRBY, *VULNERABILITY AND VIOLENCE: THE IMPACT OF GLOBALISATION* (2006). In discussing resilience, Kirby builds on earlier definitions that understood resilience as “enabling units such as individuals, households, communities and nations to withstand internal and external shocks.” Fineman, *Anchoring Equality*, *supra* note 9, at 13 n.34 (internal quotation marks omitted) (quoting KIRBY, *supra*, at 55).

29. See Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights over Children's Interests*, 46 U. BALT. L. REV. 57, 83–88 (2016).

30. See Fineman, *Anchoring Equality*, *supra* note 9, at 15–16.

31. Liberal political rhetoric reflects a greater recognition that governmental assistance is necessary when it comes to provision of basic needs like health care and education than its more conservative counterparts. However, both guard and preserve the public-private divide.

32. See generally DARON ACEMOGLU & JAMES ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* (2012) (showing the relevance of political and economic institutions for development); JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* (2011) (exploring the relationship of political institutions to inequality and wealth concentration).

institutions are lauded as producing the economic well-being of society, and the individuals controlling them are cast as wealth and job creators—entrepreneurs paving the path for economic growth and prosperity for the entire nation.³³ The family is praised for its role in raising the next generation of citizens and caring for those at the end of life. Parents are lauded for their self-sacrificing actions, and the self-sufficient (marital) family is valorized as both a moral and an economic ideal, uniquely qualified to attend to dependency and the needs of its members.³⁴

The political and policy perception is that these institutions, among others, have a central and essential role in organizing and reproducing society, as well as providing for individuals—which serves as the rationale for protecting them from state interference.³⁵ Obviously, this perception that institutions are necessary is correct. However, we must modify the current political dogma that places these institutions within a “private sphere,” distinguishing them from a public arena in which state action and responsibility are the norms. The failure to recognize the public purpose of these institutions (and the corresponding public responsibility for them) is not only misguided but also detrimental to the functioning of society and the welfare of many individuals within it.

That these constructed entities are deemed “private” institutions—even though we enact laws to facilitate their creation; determine their shape, terms, and responsibilities; and ease their functioning—is a paradox.³⁶ They are creatures of

33. Particularly in modern capitalist societies, i.e., market-oriented economies, private corporations are the main actors in deciding what, when, and how much economic well-being is produced and also are our main employers and taxpayers. In the words of Lindblom, they are a kind of “public official[.]” considering that “jobs, prices, production, growth, the standard of living, and the economic security of everyone *all rest in their hands*.” CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD’S POLITICAL ECONOMIC SYSTEMS* 172 (1977) (emphasis added).

34. The family is the quintessentially “private” institution—the sphere that is theoretically protected from intervention by the state. However, paradoxically, it is also a heavily regulated entity, with the state (through law) defining what the core family connection is and who may attain it under what circumstances. The state also defines the consequences of family relationship and controls the exit as well as the entrance into those relationships. I have discussed the invisibility of dependence within the family and the need for a collective responsibility towards care in MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL CONTRACT AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

35. See generally Janet Halley, *What is Family Law?: A Genealogy Part I*, 23 *YALE J.L. & HUMAN.* 1, 1–6 (2011) (providing an overview of the development of “family law exceptionalism”); Janet Halley, *What is Family Law?: A Genealogy Part II*, 23 *YALE J.L. & HUMAN.* 189, 189–95 (2011) (arguing that family law fundamentally differs from the “market” and its laws).

36. Robert Dahl observed that “without the protection of a dense network of laws enforced by public governments, the largest American corporation could not exist for a day.” GAR ALPEROVITZ & LEW DALY, *UNJUST DESERTS: HOW THE RICH ARE TAKING OUR COMMON INHERITANCE* 138 (2008) (internal quotation marks omitted) (quoting ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL* 184 (1982)). Dahl also noted that the view of economic institutions as “private” is an “ill fit” for their “social and public” nature. *Id.* at 139 (quoting DAHL, *supra*, at 185); see also Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 *AM. U. J. GENDER SOC. POL’Y & L.* 13, 15 n.5 (2000) (“The characterization of the market in this public/private scheme is interesting. It is cast as public vis-à-vis the family, but private vis-à-vis the state, seeming to gain the advantage of each category. In this regard, it is interesting to note that when the comparison is of market versus family, the ‘private’ sphere of the family is subject to heavy public regulation, mostly because it retains aspects of ‘status’ and is not governed by contract. In contrast, the ‘public’ arena of the marketplace is governed by bodies of designated ‘private’ law, such as contract. These contrary characterizations have ideological nuances.”).

law, brought into being by doctrines set out in corporate, family, property, corporate, employment, tax, trade, welfare, and other laws. The law determines the nature of the relationships between individuals within these essential social institutions, such as parent-child, employer-employee, shareholder-consumer, and so on.³⁷

Creation of social institutions and relationships also involves defining the relationship between the state, the institutions it creates in law, and the individual. Laws and legal principles form or constrain the ongoing scope of state responsibility for social institutions once they have been created. In the United States, the idea of ongoing state responsibility is viewed as an exception when it comes to social institutions, particularly the market or family. For example, in the business arena, the notions of the “free market” and the “efficiency” inherent in competition are raised consistently as barriers to state regulation and oversight.³⁸ We have fashioned doctrines of “family privacy” and “parental rights” that deter government participation in significant and consequential decisions affecting the present and future well-being of children.³⁹ This default position of the “private” ordering system for essential societal institutions must be adjusted by recognizing the necessity of ongoing public monitoring of and oversight for these institutions. This oversight and advocacy for needed adjustments should be primary focuses of social justice scholarship.

By shaping essential social institutions and the relationships within them, the law dictates the basic organization of society, allocating power and privilege as well as determining the means for individual and societal well-being. Both individuals and society are ultimately dependent on the successful and fair operation of society’s institutions. The relationship between the individual and society is symbiotic and mutually dependent. As indicated in the preceding section, the concept of derivative dependence is important here. If we are to fulfill the social roles we occupy within society, we must be able to rely on its institutions. If society is to flourish, it must rely on the success of the institutions and individuals who comprise it. Individual and collective reliance on social relationships and institutions mandate that the state monitor these essential social arrangements and make adjustments when they are not operating equitably. This includes those

37. For this reason, these are examples of laws that should be consistently and rigorously examined with principles of social justice in mind. Vulnerability theory refers to these relationships as social identities. They express societal expectations that govern the interaction and consequences within institutions. See generally Jonathan Fineman, *A Vulnerability Approach to Private Ordering Employment*, in *VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK* 13 (Martha Albertson Fineman & Jonathan W. Fineman eds., 2018) (for employment context). It is also important to see how social identities may intersect in unjust ways. For example, how does the social role defined for the employee conflict with that defined for the parent? Note that this is not a traditional identity-based analysis. It is not the gender of the employee that is relevant, but the societal task associated with the social role (caretaker versus employee).

38. Politicians use arguments of liberty, equality, and contract in drafting the legal terms and consequences of employment as primarily of private concern. See *id.* at 14–15. The same principles are used to support the organization of corporate relationships so as to thwart regulations and oversight.

39. One example of how a vulnerability analysis might address this is found in Fineman & Shepherd, *supra* note 29, at 57.

institutions that are now classified as private, as well as those deemed public.⁴⁰ At most, social institutions can only be considered to be quasi-private.

III. CONCLUSION

Vulnerability theory, built around our shared vulnerability and dependence, illuminates why we first need to consider general legal institutions and relationships in determining social justice. By placing the vulnerable subject at the center of its inquiry, vulnerability theory requires critical inquiry beginning with a consideration of how society generally structures its institutions and relationships through law and policy. In urging us to do this before looking at how specific individuals or groups fare within those social arrangements, the theory seeks to define and apply a legislative or administrative set of decision-making ethics rather than setting forth a cluster of individual rights to entitlements.⁴¹ Vulnerability theory is more focused on establishing the parameters of state responsibility for societal intuitions and relationships than it is on setting the limits of state intervention.

In taking this approach to state responsibility, vulnerability theory expands our notion of what constitutes an injury of constitutional significance to include the gross neglect or willful disregard of circumstances of profound deprivation and unmet need on the part of some citizens.⁴² If social institutions and relationships are formed to respond to human vulnerability and dependency, then human vulnerability and dependence should form the foundation of our social compact. This societal perspective is very different from that found in traditional social contract theory in defining state responsibility. Traditional social contract concepts are based on the idea that rational and autonomous individuals consent to cede some of their naturally endowed liberty to the (restrained) state in exchange for mutual protection in a Hobbesian world.⁴³ By contrast, vulnerability theory recognizes state responsibility as arising from the human needs organically rooted in universal vulnerability and dependency. State responsibility, initially manifested in the creation of social organization and rules, must continue to monitor and reform those institutions if they are going to succeed consistent with principles of social justice.

Importantly, a vulnerability approach to social justice recognizes that the relationship between the individual and the society is synergetic and, thus, ongoing. Resilience-conferring institutions operate in integrated and sequential ways within society, and individual success depends on the successful integration and operation of those institutions. The role of social institutions for the

40. See generally Fineman, *Cracking the Foundational Myths*, *supra* note 36.

41. This does not mean that an antidiscrimination analysis is not ever appropriate. It is merely an argument about inclusiveness and positioning in critical thought. If one begins by defining a problem as one limited to discrimination, the resolution is inclusion of the excluded individual or group. The general nature and functioning of the social institution and relationships contained within it may then be neglected or ignored. See Deborah Dinner, *Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059, 1106-07 (2017) (employment context).

42. See Fineman, *The Vulnerable Subject and the Responsive State*, *supra* note 15, at 274 n.77.

43. The fact that some individuals will succeed and even thrive in this type of Hobbesian world is not surprising; they do so by exploiting and dominating others, including governing structures.

individual also suggests a corresponding societal dependence on the collective successes of those individuals. Just as no individual can successfully stand apart from the state and its institutions, the destiny of the state ultimately relies on the actions of the individuals who constitute it. The reproduction of a just society requires that law and policy construct and sustain an adequately responsive state—one that is grounded in vulnerability theory, addresses the range of dependencies inherent over the life course, and is attentive to all stages of development and forms of need of the vulnerable subject.