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## ***THE VULNERABLE SUBJECT AND THE RESPONSIVE STATE***

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## Abstract

Since there is also no U.S. constitutional guarantee to basic social goods, such as housing, education, or health care, the anti-discrimination, sameness-of-treatment approach to equality prevalent in the United States is particularly problematic. The discourse of human rights that supports claims to such goods in European and other countries does not exist in America. We have not ratified many of the international agreements, including those associated with economic rights, as well as CEDAW and CRC. The courts are little help. In fact, attempts to apply human rights ideals internally—to American practices and laws—have been met with resistance, if not outright rejection. Several Justices of the Supreme Court decried references to human rights principles used to bolster arguments about constitutionality under American precedent to be the application of “foreign fads” when (superior) American constitutional provisions should prevail.

My development of the concept of vulnerability and the idea of a vulnerable subject began as a stealthily disguised human rights discourse, fashioned for an American audience. The concept has evolved from those early articulations, and I now think it has some significant differences as an approach, particularly in that a focus on vulnerability is decidedly focused on exploring the nature of the *human* part, rather than the *rights* part, of the human rights trope. Importantly, consideration of vulnerability brings societal institutions, in addition to the state and individual, into the discussion and under scrutiny. Vulnerability is posited as the characteristic that positions us in relation to each other as human beings and also suggests a relationship of responsibility between state and individual. The nature of human vulnerability forms the basis for a claim that the state must be more responsive to that vulnerability and do better at ensuring the “All-American” promise of equality of opportunity.

I. Introduction

Equal protection law under the United States Constitution requires that in order to be treated equally, individuals must be treated the same. This sameness-of-treatment version of equality ignores contexts, as well as differences in circumstances and abilities on the part of those whose treatment is compared. Most perplexing is the way in which the equal protection doctrine ignores existing inequalities of circumstances and presumes an equivalence of position, and possibilities. Such a narrow approach to equality cannot be employed to combat the growing inequality in wealth, position, and power that we have experienced in the United States over the past few decades.<sup>1</sup>

Profound inequalities are tolerated—even justified—by reference to individual responsibility and the workings of an asserted meritocracy within a free market. The state is not mandated to respond to those inequalities, nor

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<sup>1</sup> The gap between the richest and poorest in the United States drastically increased from the late 1970s until hitting a peak in 1993 and then decreasing slightly. RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL* 235 fig.16.2 (Bloomsbury Press 2010) (2009). Since 2000, however, the gap has seen a fairly consistent increase. *Id.* These levels are much higher than the country has seen for generations prior. *Id.* at 234. Currently, the incomes of the richest 20% are almost 9 times greater than the poorest individuals' incomes. *Id.* at 17 fig.2.1. From 1992 to 2007, the richest 10% of the population in the United States had roughly 30% of the income. UNITED NATIONS DEV. PROGRAMME, *HUMAN DEVELOPMENT REPORT 2009*, at 195 tbl.m (2009).

does it have to establish mechanisms to ensure more equitable distributions of either social goods or responsibilities between individuals, groups, and institutions.<sup>2</sup> Quite the opposite: in the United States, the state is restrained from interference in the name of individual liberty, autonomy, and paramount principles such as freedom of contract.<sup>3</sup>

Of course, in response to social movements and political pressure, American law does recognize that distortions and disruptions can exist even in systems deemed to be based on market and merit alone.<sup>4</sup> The distortions recognized in our system are organized around discrimination historically found to be impermissible if based on certain individual or group

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<sup>2</sup> In contrast, the United Kingdom recently passed the Equality Act, which requires public decisionmakers to have “due regard” for the need to advance equality of opportunity. Sandra Fredman, *Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage onto the Equality Agenda*, 2010 EUR. HUM. RTS. L. REV. 290, 295 (Eng.) (quoting Equality Act 2010, c. 15, § 149(1)).

<sup>3</sup> See, e.g., *Lyng v. Int’l Union*, 485 U.S. 360, 371 (1988) (holding that a law removing those participating in labor strikes from the food stamp program did not violate the Equal Protection Clause of the Fifth Amendment because it “is rationally related to the legitimate governmental objective of avoiding undue favoritism to one side or the other in private labor disputes”).

<sup>4</sup> Passed in response to the Civil Rights Movement in the 1960s, the Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601–3619 (2006)), which prohibited discrimination in the sale or rental of housing, is an example of the United States recognizing a need to interfere in the market and private contract making. See 42 U.S.C. § 3604 (2006) (“[I]t shall be unlawful—(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”).

characteristics.<sup>5</sup> Because identities have been the focus of major civil rights struggles in American society, characteristics, such as gender, race, and religion, define which groups are those primarily protected by our equality laws.<sup>6</sup> Note that it is not discrimination in general that is prohibited, only discrimination based on those designated distinguishing characteristics.

A person can be fired from employment on a whim, for any reason whatsoever, or be denied housing or access to goods and services so long as it is not the result of discrimination based on something like race or gender.<sup>7</sup>

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<sup>5</sup> Originally, the Fair Housing Act prohibited only discrimination based on race, color, religion, and national origin. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81. Amendments in 1974 added sex, Pub. L. No. 93-383, 88 Stat. 729 (1974), and familial status was added in 1988, Pub. L. No. 100-430, 102 Stat. 1622 (1988).

<sup>6</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973) (finding that wealth discrimination is not a basis for invoking strict scrutiny in an equal protection analysis because it does not have the “traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process”). In contrast, the Canadian Human Rights Panel in 2000 recommended the inclusion of “social condition” as a ground of discrimination because they recognized poverty as beyond the control of people for long periods of their lives and as associated with “ongoing disadvantage.” Fredman, *supra* note 2, at 294 (citing CANADIAN HUMAN RIGHTS ACT REVIEW PANEL, PROMOTING EQUALITY: A NEW VISION 106–13 (2000), available at [dsp-psd.pwgsc.gc.ca/Collection/J2-168-2000E.pdf](http://dsp-psd.pwgsc.gc.ca/Collection/J2-168-2000E.pdf)).

<sup>7</sup> See Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345 (2008), for a particularly succinct explanation of this situation. See, e.g., *Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146, 2149 (2008) (holding that a public employee could not bring “a claim under the Equal Protection Clause by alleging that she was arbitrarily treated differently from other similarly

This approach to inequality has set up a perverse dynamic that often results in pitting one protected group against another, dividing those who may otherwise be allies in a struggle for a more just society, as well as generating a politics of resentment and backlash on the part of those who perceive they are not within groups favored by this approach to equal protection.<sup>8</sup> An additional perverse consequence of the current grievance process arises from the required elements of a legal claim for discrimination. In order to gain legal protection, claimants must establish a history of proven discrimination against the group with which they identify. Therefore, as a group identity-based construct, inequality is only confronted after it has accumulated a sufficiently lengthy history, and groups are pressured to exclude or include people in order to protect a narrative of long-standing discrimination.<sup>9</sup>

This focus on individual and group characteristics and not on the distribution of wealth, power, opportunity, or social goods has affected the

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situated employees, with no assertion that the different treatment was based on the employee's membership in any particular class").

<sup>8</sup> White citizens, for example, have raised claims of reverse discrimination, positing that equal protection disadvantages them. *See, e.g., Does Affirmative Action Punish Whites? Courts See a Growing Number of Reverse Discrimination Cases*, MSNBC.COM, Apr. 28, 2009, <http://www.msnbc.msn.com/id/30462129/>.

<sup>9</sup> *See, e.g., See also* Roy L. Brooks & Kirsten Widner, *In Defense of the Black/White Binary: Reclaiming a Tradition of Civil Rights Scholarship*, 12 BERKELEY J. AFR.-AM. L. & POL'Y 107 ("Critics argue that, as a result of the Black/White paradigm, antidiscrimination laws and antidiscrimination efforts more broadly do not always respond to racial harms Asian Americans, Latinas/os, and Native peoples experience") (citing Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1310 (2005)).

organization of interest groups in the United States, as well as the course of legal protection. Legal and political battles revolve around the question of whether a specific group seeking protection can be determined to constitute a discrete and insular minority that has historically been discriminated against, thus allowing an analogy to those groups currently protected based on classification such as race, gender, or ethnicity. This is what is now unfolding with lesbians and gay men, who are fighting to enter existing societal institutions, such as marriage or the military using claims of impermissible discrimination based on animus.<sup>10</sup> Interest groups under existing equal protection doctrine have to be organized around identity categories, fighting to be included as a protected class.<sup>11</sup>

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<sup>10</sup> See *Witt v. Dep't of the Air Force*, 527 F.3d 806, 823 (9th Cir. 2008) (Canby, J., concurring in part and dissenting in part) (“[T]he right to engage in homosexual relationships and related private sexual conduct is a personal right of a high constitutional order, and . . . the ‘Don’t Ask, Don’t Tell’ statute so penalizes that relationship and conduct that it must be subjected to strict scrutiny.”); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (finding that “evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect” in response to plaintiff’s argument that Proposition 8 violated the Equal Protection Clause by discriminating based on sex and sexual orientation).

<sup>11</sup> In criticizing contemporary equality thinking in the United States, I am not suggesting that discrimination based on race or gender is no longer a problem and should not be addressed by law. I focus on the insufficiency of identity-focused equality to place in context my argument that we must not stop with the incorporation of antidiscrimination measures, but also move beyond them to a more robust ideal of equality. Certainly one lamentable consequence of this equal protection doctrine is that it predominantly protects against de jure discrimination (where laws facially

From my perspective, one of the most troubling aspects of the identity approach to equality is that it narrowly focuses equality claims and takes only a limited view of what should constitute governmental responsibility in regard to social justice issues. In fact, nestled safely within the rhetoric of individual responsibility and autonomy, discrimination doctrine enshrines the notions that America provides for real equal access and opportunity and that discrimination is the discoverable and correctable exception to an otherwise just and fair system.

This approach to equality is particularly problematic since in the United States there is no constitutional guarantee to basic social goods, such as housing, education, or health care.<sup>12</sup> The discourse of human rights that supports claims to such goods in European and other countries does not exist in America. We have not ratified many of the international agreements,

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disadvantage a protected class), rather than reaching situations of de facto discrimination. Another objection is that entrenched and privileged interests are the ones that benefit when political and legal organization around identity can effectively be manipulated to displace or eclipse concern for the welfare of all members of American society. In fact, it seems that arguments about treatment based on race or gender have become proxies in academic, political, and popular media discussions, displacing exploration of inequalities that transcend those categories, such as poverty or lack of access to meaningful work. They also reflect an underdeveloped sense of collective responsibility in a political system that fails to ensure basic social goods that Europeans take for granted.

<sup>12</sup> See, e.g., Plyler v. Doe, 457 U.S. 202, 221 (1982) (finding that education is not a fundamental right); Alicia Ely Yamin, *The Right to Health Under International Law and Its Relevance to the United States*, 95 AM. J. PUB. HEALTH 1156, 1157 (2005) (“The United States is also the only industrialized country that does not . . . [have] some kind of legal recognition of a right to care.”).



including those associated with economic rights,<sup>13</sup> as well as CEDAW<sup>14</sup> and CRC.<sup>15</sup> The courts are little help. In fact, attempts to apply human rights ideals internally—to American practices and laws—have been met with resistance, if not outright rejection. Several Justices of the Supreme Court decried references to human rights principles used to bolster arguments about constitutionality under American precedent to be the application of “foreign fads” when (superior) American constitutional provisions should prevail.<sup>16</sup>

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<sup>13</sup> See Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (1978) (signed but never ratified by the United States); International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by the United States but with five reservations, five understandings, and four declarations that rendered it largely meaningless in the United States, including reserving the right to subject children to the death penalty); International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (signed but never ratified by the United States).

<sup>14</sup> Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 19 I.L.M. 33 (1980); 1249 U.N.T.S. 13.

<sup>15</sup> Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 28 I.L.M. 1456 (1980); 1577 U.N.T.S. 13.

<sup>16</sup> See *Roper v. Simmons*, 543 U.S. 551, 624 (U.S. 2005) (Scalia, J., dissenting) (“[T]he basic premise of the Court’s argument--that American law should conform to the laws of the rest of the world--ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law--including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself.”); *Lawrence v. Texas* 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (“The Court’s discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since ‘this Court . . . should not impose foreign moods, fads, or fashions on Americans.’” (second alteration in original) (quoting *Foster v. Florida*, 537 U.S. 990, 990 n. (2002) (Thomas, J., concurring in denial of certiorari)); *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) (“The

My development of the concept of vulnerability and the idea of a vulnerable subject began as a stealthily disguised human rights discourse, fashioned for an American audience. The concept has evolved from those early articulations, and I now think it has some significant differences as an approach, particularly in that a focus on vulnerability is decidedly focused on exploring the nature of the *human* part, rather than the *rights* part, of the human rights trope. Importantly, consideration of vulnerability brings societal institutions, in addition to the state and individual, into the discussion and under scrutiny. Vulnerability is posited as the characteristic that positions us in relation to each other as human beings and also suggests a relationship of responsibility between state and individual. 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. Additionally, those institutions are themselves vulnerable to a variety of internal and external corruptions and disruptions and this realization is the basis for the further claim that these institutions must be actively monitored by the state in processes that are both transparent and inclusive.

## II. Equality or Autonomy

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plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries . . . is totally inappropriate as a means of establishing the fundamental beliefs of this Nation. That 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world. We must never forget that it is a Constitution for the United States of America that we are expounding." (citation omitted)).

As the last Part suggests, one way to understand the vulnerability approach is to see it as an articulation of a duty for the state to actively assume broad societal responsibility in regard to ensuring equality for citizens and others to whom it owes some obligation.<sup>17</sup> *Equality* is an elusive term, susceptible to many nuances in definition.<sup>18</sup> In this essay I explore how the concept of vulnerability can help us better understand how to actually realize that often glorified American commitment to equality of opportunity and access.<sup>19</sup> My

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<sup>17</sup> I do not want to engage in a debate about the limits of the notions of citizenship here. Certainly noncitizens should be afforded equality on the same terms as citizens if they are residents of the state or long-term visitors or have some other connection that would make placing state responsibility for them and their situation appropriate.

<sup>18</sup> There is a strong tendency in the history of this country to push back against unequal privilege. In revolutionary America, the Constitutionals used the idea of equality to push back “against any sort of privilege that stood apart from the equal rights of the people.” GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 83, 401 (1998). The first constitutions of Virginia, Pennsylvania, Vermont, and North Carolina contained provisions against unequal privilege: “That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services,” N.C. CONST. of 1776, art. III; VA. CONST. of 1776, § 4; “[T]hat government is . . . not for the particular emolument or advantage of any single man, family or set of men, who are a part only of that community . . . ,” PA. CONST. of 1776, art. V; VT. CONST. of 1777, art. VI.

<sup>19</sup> The grand idea of equality of opportunity continues to be a rallying cry in this country. Now-President Obama, in his keynote address at the Democratic National Convention in 2004 called for a “slight change” in government priorities that would “make sure that every child in America has a decent shot at life, and that the doors of opportunity remain open to all.” President Barack Obama, Keynote Address at the Democratic National Convention (July 27, 2004) (transcript available at

ultimate assertion is that true equality of opportunity carries with it the obligation on the state to ensure access to the societal institutions that distribute social goods, such as wealth, health, employment, or security is generally open to all and that the opportunities these institutions provide are evenly distributed so that no person or groups of persons are unduly privileged while others are disadvantaged to the extent that they can be said to have few or no opportunities.<sup>20</sup> This is not a call for equality of result or outcome. It does not ignore or deny that there are differences in individual ability or initiative or that individuals have responsibility for themselves and their circumstances. Rather, it is a claim that the provision of opportunity for many Americans has been severely compromised in recent decades and it is about time we do something about that betrayal of one of our foundational promises.<sup>21</sup> Far from having equal opportunity, many individuals are caught in

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<http://www.americanrhetoric.com/speeches/convention2004/barackobama2004dnc.htm>).

<sup>20</sup> The way we implement this state obligation currently is through an antidiscrimination paradigm. This Essay's fundamental premise is that that approach is insufficient and actually has led to greater inequalities of access and opportunity. Some more positive state action is required.

<sup>21</sup> Despite the United States' provisions against discrimination, it ranks just below Singapore as one of the most unequal countries out of the rich industrialized nations. WILKINSON & PICKETT, *supra* note 1, at 17 fig.2.1. Social mobility was also limited. Data from the 1980s and 1990s show that about 36% of children who are born into the bottom fifth of wealth distribution will remain in that class as adults. *Id.* at 160. Studies of fathers' incomes when their sons were born and then their sons' incomes at age 30 show that social mobility has declined rapidly since the 1980s. *Id.* at 159–61. The *Human Development Report 2009* from the United Nations shows that the ratio of

systems of disadvantage that are almost impossible to transcend. Increasingly, government is unresponsive to those who are disadvantaged, blaming individuals for their situation and ignoring the inequities woven into the systems in which we all are mired.<sup>22</sup>

Of course, a guarantee of “equality,” however defined, is only one aspect of what defines the relationship of reciprocity between state and individual. Particularly in America, the aspiration of equality for all has been balanced against the competing and often conflicting ideal of individual autonomy or liberty.<sup>23</sup> In this balancing, the responsibility of the state toward the individual

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income or expenditure of the richest 10% to the poorest 10% in the U.S. was 15.9 from 1992–2007, more than 6 points higher than the ratio in Canada, Ireland, Netherlands, France, and Switzerland, and 9 points higher than Norway, Sweden, Finland, Austria, and Germany. UNITED NATIONS DEV. PROGRAMME, *supra* note 1, at 195 tbl.m. It is also 2 points higher than the United Kingdom. *Id.*

<sup>22</sup> See, e.g., Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (effecting a major reform in welfare by imposing work requirements on recipients and limiting the amount of time any person can receive assistance). In signing the bill, President Clinton stated, “The new bill restores America’s basic bargain of providing opportunity and demanding, in return, responsibility,” highlighting America’s commitment to equal opportunity that must be taken advantage of by individual autonomy while not addressing more systemic inequalities. President Bill Clinton, Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange with Reporters (Aug. 22, 1996), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON 1996, at 1326 (1998).

<sup>23</sup> In early American history, equality and liberty were consistently linked. Virginia’s first state constitution, one of the earliest state constitutions, began with the declaration, “[t]hat all men are by nature equally free and independent, and have certain inherent rights . . . .” VA. CONST. OF 1776, § 1. Samuel Adams argued that all

is defined and the meaning, implications, and relative position of these concepts can and has changed over time.<sup>24</sup> A state whose primary obligation is to guarantee autonomy is less interventionist than one that privileges equality in assessing what state action is warranted. Not surprisingly, different

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colonists were entitled to “[j]ust and true liberty, equal and impartial liberty.” Samuel Adams, *The Rights of the Colonists: Report of the Committee of Correspondence to the Boston Town Meeting, Nov. 20, 1772*, reprinted in 7 OLD SOUTH LEAFLETS 417 (No. 173). According to Gordon S. Wood, author of *The Creation of the American Republic 1776–1787*, “No phrase except ‘liberty’ was invoked more often by the Revolutionaries than ‘the public good.’” WOOD, *supra* note 18, at 55.

Wilkinson and Pickett, authors of *The Spirit Level*, argue that the American commitment to both equality and liberty was shattered during the Cold War, when “the state-owned economics of Eastern Europe and the Soviet Union seemed to show . . . that greater equality could only be gained at the expense of freedom.” WILKINSON & PICKETT, *supra* note 1, at 256.

<sup>24</sup> Early in American political history, dependency—one antonym for autonomy—was understood very differently than it is today. The label of dependent was applied to a broad class of persons and formed the basis for exclusion from political rights (voting), as well as providing justification for second-class citizenship more generally. It is well known that dependency was used to position of women and children, but it also was the term applied to men who were mere wage earners and had no significant property or capital accumulation. Dependency was the status of having to rely on others for your livelihood—working for wages. On the evolving nature of the political meaning of dependency, see Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS: J. WOMEN CULTURE & SOC’Y 309, 315–16 (1994) (describing how working-class men came to be considered independent). Of course today we consider the wage earner, who has morphed into the “taxpayer,” to be the exemplar of the independent citizen. The point is that meanings behind potent political terms can change and such terms may periodically need to be deconstructed and the assumptions behind them explored.

aspirations and expectations for state and individual inform different ideological and political positions on the relative importance of equality and autonomy.<sup>25</sup> In recent years in America the possibilities for a robust and expansive vision of equality seem to have eroded, worn away by the ascendancy of a narrow and impoverished understanding of autonomy.<sup>26</sup> In fact, autonomy from state regulation, control, or interference is posited as essential to the realization of individual liberty and freedom of action, even as that freedom has resulted in a diminishing of options and autonomy for many as our society has become more and more unequal.

As a norm against which to measure individuals, autonomy is also ascendant. Autonomy is defined in terms of expectations of self-sufficiency

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<sup>25</sup> The new Tea Party movement, for example, rallied around a position of limited government and minimized government spending. In a May 2010 poll conducted by the University of Washington Institute for the Study of Ethnicity, Race & Sexuality, 74% of the Tea Party “True Believers” (those who strongly agree with the Tea Party) agreed with the statement “[W]hile equal opportunity for blacks and minorities to succeed is important, it’s not really the government’s job to guarantee it.” Matt Barreto & Christopher Parker, *May 2010 Washington Poll*, WASH. POLL, [http://www.washingtonpoll.org/results/June1\\_teaparty.pdf](http://www.washingtonpoll.org/results/June1_teaparty.pdf) (last visited Sept. 10, 2010).

<sup>26</sup> MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* 10 (2004). The importance of the idea of independence to the construction of an autonomous and equal individual may be traced to the fact that the very existence of the United States begins with a document entitled “The Declaration of Independence.” While it is a declaration of freedom for a fledging nation, it nonetheless sets forth as a “natural” principle that every individual is endowed with inalienable rights, such as the right to life, liberty, and the pursuit of happiness. *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

and independence for the individual. There is little or no room for an affirmative reconciliation of this understanding of individual autonomy with concepts such as dependency or vulnerability. Perhaps this is why those who must resort to certain forms of state assistance are asked to surrender their autonomy (and privacy) and are stigmatized as dependent and failures.<sup>27</sup>

This understanding of autonomy places any suggestions for governmental programs designed to enhance social welfare or provide remedial action to disadvantaged groups on a path of direct conflict with the policy of restraint and nonintervention that autonomy demands. On a political level, autonomy restrains the state from acting in any way that can be characterized as either a constraint on freedom of action or some form of wealth or power redistribution.<sup>28</sup> This restraint significantly impedes the ability of politicians to enact or implement almost any progressive political proposal, particularly those that can be demonized as inefficient governmental regulation or unwarranted and demoralizing state intervention into the private sphere.<sup>29</sup> The rhetoric of autonomy mandates the state stay out of the way. Its role is primarily that of facilitating private competitiveness in an asserted meritocracy

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<sup>27</sup> It is only certain types of state support that is stigmatized. In fact, it is hard to think of any situation where someone can act without having, or having had in the past, substantial support and subsidy from the state and its institution. See FINEMAN, *supra* note 26, at 49–54.

<sup>28</sup> There is resistance on this basis to many social welfare programs, from public assistance or welfare, to healthcare and affirmative action programs.

<sup>29</sup> I think this explains why there has been so much discussion about who constitutes the “deserving” as contrasted with the undeserving poor.



that, it is promised, will duly reward individual initiative and talent if only left free to do so.<sup>30</sup> Our privileging of autonomy demands a default position in which there is freedom from constraining rules and regulations. In such a system, success and failure can be understood solely as the result of individual actions and not involving a failure of governmental response.

If we begin a political analysis from this perspective, which privileges autonomy above other goals and considers actions occurring within a confined timeline, our assessment of equality of opportunity will be focused only on the present interactions, motivations, and characteristics of individuals. A great deal can be hidden or overlooked if these individual relations are all we include in our evaluation of a system of equal opportunity and access, including the systemic and historic inequalities lurking in the status quo.<sup>31</sup>

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<sup>30</sup> As noted above in Part II, state responsibility might extend to eliminating certain forms of discrimination against certain classes of persons based on group characteristics. This elimination of discrimination is seen as an impermissible distortion of the free market system and thus as justifying state intervention and a permissible imposition on individual freedom to otherwise act without constraint. Discrimination, if proven, can be addressed and remedied through the state processes, after which the system can revert to its idealized free market, non-intervention stance.

<sup>31</sup> Affirmative action cases have amply demonstrated the limitation of this conception of equality at addressing historical and institutional inequality. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 712 (2007) (holding that a Seattle school district’s plan “to address the effects of racially identifiable housing patterns on school assignments” was unconstitutional because Seattle never had legally segregated schools); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 498–99 (1989) (holding that a regulation that required at least 30% of the money from city construction contracts go to minority-owned business enterprises was unconstitutional, despite the fact that only 0.67% of the city’s construction contracts

If, however, we were to start our discussions of what is the proper relationship between state and individual with the primary objective being that of ensuring and enhancing a meaningful equality of opportunity and access, we may see a need for a more active and responsive state. This would not mean that autonomy was cast aside, but rather that we realize that as desirable as autonomy is as an aspiration, it cannot be attained without an underlying provision of substantial assistance, subsidy, and support from society and its institutions, which give individuals the resources they need to create options and make choices.

Autonomy is not an inherent human characteristic, but must be cultivated by a society that pays attention to the needs of its members, the operation of its institutions, and the implications of human fragility and vulnerability. A commitment to equality should not be seen as diminishing the possibilities for autonomy. In fact if we desire a society in which a great number of individuals can exercise autonomy, not only those who have been historically privileged, society must be built on a foundation of equality. Nor should autonomy be confused with isolation, or separation from society. Part of the reciprocity inherent in being a member of society is that everyone has a role to play in

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had been awarded to minority businesses in the past five years in a city that was 50% black, because the city could not point to precise examples of discrimination in contract awards and the lack of minority participation could be attributed to other factors, “such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record”).

ensuring the greater good.<sup>32</sup> Lack of involvement or rejection of responsibility for the needs of others in that society should not be an option. Because we are part of and benefit from society, we must be attentive to responsibilities that extend beyond satisfying one's own personal and family needs. Autonomy understood through a lens of equality would carry social and reciprocal duties to others; it would not be confused with selfishness, self-absorption and egocentric attention to only one's own circumstances.<sup>33</sup>

It is also true that state responsibility to the individual in regard to autonomy does not require that there be unfettered or endless choices for those few members who have reaped the benefits of society and its institutions. It should not be the case that the only limitation to accumulation of opportunities

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<sup>32</sup> See, e.g., Christopher Beem, *Work, Parenthood, and the Idea of Reciprocity in American Social Policy*, FOCUS, Spring–Summer 2006, at 18, 18 (defining “fair reciprocity” as a principle that “holds that each citizen who willingly shares in the social product has an obligation to make a relevantly proportional productive contribution to the community in return . . . . In rough, intuitive terms: in a context of otherwise sufficiently fair economic arrangements, everyone should do their bit” (alteration in original) (internal quotation mark omitted) (quoting STUART WHITE, THE CIVIC MINIMUM 18 (2003))).

<sup>33</sup> Studies examined in *The Spirit Level* suggest that higher inequality decreases levels of trust in a society, and less trusting members of society are less willing to donate time and money to helping others. WILKINSON & PICKETT, *supra* note 1, at 54–57. Levels of trust in the U.S. have dropped from 60% in the 1960s to 40% in 2004. *Id.* at 54. As an interesting anecdotal example, Josh Lauer suggests that the recent obsession in the United States with Sport Utility Vehicles demonstrates “an admiration for rugged individualism and the importance of shutting oneself off from contact with others . . . .” *Id.* at 57–58 (citing Josh Lauer, *Driven to Extremes: Fear of Crime and the Rise of the Sport Utility Vehicle in the United States*, 1 CRIME MEDIA CULTURE 149 (2005)).

and rewards is an individual's capacities and resources. The society should be able to define what normative and legal limitations will apply to both methods and modes of individual accumulation. On the other hand, if autonomy is understood consistent with prioritizing equality, that would seem to require that society also provide some threshold of opportunity for everyone. The task would be for the state to exercise its authority to ensure that access and opportunities existed that would provide some minimal, viable number of worthwhile options from which an individual can choose, thus realizing their autonomy.

Of course, "equality" and "autonomy" are abstractions. Their amorphous, overarching, and imprecise natures mean that both terms can be used by those holding disparate positions on governmental responsibility. My point is that neither equality nor autonomy can be understood in isolation from each other and it seems that one will be emphasized or privileged in society at the expense of the other. So our equality, which is formal and focused on sameness of treatment, brackets off vulnerability and dependency in order to be able to assume away the resulting disadvantages and burdens they place on individuals' ability to generate options and, thereby, their ability to exercise autonomy. Achieving some viable mechanisms of equal opportunity and access would demand more from the state in terms of rules and regulations restricting the unfettered autonomy of some, as well as a more just reallocation of some existing benefits and burdens within society.

While I recognize the symbolic appeal of the claims for both autonomy and equality and the desire to obscure any potential conflict, as well as the nature of the relation between them, I argue that we must reverse the positioning of equality as the dependant value in American politics, one that is shaped through the dominant lens of autonomy. The perpetuation of such a hierarchy has reduced the positive possibilities of a more substantive equality to a mere individual entitlement to be treated the same as everyone else, regardless of differences in material, social, historical, or other resources.

Unless confronted with the challenges presented by vulnerability and dependency, equality is a rather hollow standard, safeguarding only the right to strive for self-sufficiency and independence to abstract individuals shorn of limiting human characteristics and potentially debilitating social and historical inequities. Our subservient sense of equality cannot assess contexts and conditions. Nor can it be used as a leveling notion, employed to even up the playing field giving some more substantive content to the guarantees of access and opportunity.

We should ask ourselves what distortions result from focusing societal objective through a lens of autonomy, as well as assess whose interests are served by the current balance that privileges autonomy over a more substantive equality frame.

### III. Dependency and Vulnerability

In the Western liberal tradition, we have built our notions of what constitutes equality, as well as the appropriate relationship between state,

institutional, and individual responsibility, around the construct of a political subject who is fully capable and functioning and therefore able to act with autonomy.<sup>34</sup> Our primary metaphor for looking at social and institutional relationships (outside of the family) is that of contract. Society is conceptualized as constituted through a social contract.<sup>35</sup> Individual transactions and interactions with the state and its institutions, are posited to involve autonomous and independent actors in processes of negotiation, bargaining, and consent. Competence is assumed and differences in power, circumstances, or actual ability are ignored. Thus constructed, this “liberal subject” is at the heart of political and legal thought.<sup>36</sup>

This Essay raises an important question: if our bodily fragility, material needs, and the possibility of messy dependency they signify cannot be ignored in life, how can they be absent in our theories about equality, society, politics,

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<sup>34</sup> See, e.g., Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105; Michelle A. Travis, *The PDA's Causation Effect: Observations of an Unreasonable Woman*, 21 YALE J.L. & FEMINISM 51, 57–59 (discussing court precedent prior to the Pregnancy Discrimination Act that did not impose any responsibility on employers because the courts viewed pregnancy as merely a choice made by the female volitional actor).

<sup>35</sup> The conception of government as a social contract was especially prevalent during the founding of the United States. See WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 218–22 (Rita Kimber & Robert Kimber trans., Univ. of N.C. Press 1980) (1973).

<sup>36</sup> See FINEMAN, *supra* note 26, at 224–27, for a discussion of the misplaced reliance on the liberal subject.

and law?<sup>37</sup> Recognition of human dependency and vulnerability should present the traditional political and legal theorist with a dilemma.

Unfortunately, dependency is not part of many approaches to theory in politics or law. Instead, a structure and set of social orderings have been constructed in which the family has been designed the primary societal institution responsible for dependency.<sup>38</sup> The family is the mechanism by which we privatize, and thus hide dependency and its implications.<sup>39</sup> This allows simplistic assertions of the attainability, as well as the superiority, of individual independence and self-sufficiency, which are spun out in an ideology of autonomy and personal responsibility that bears little relationship to the human condition.<sup>40</sup>

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<sup>37</sup> See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 12 (2008).

<sup>38</sup> See generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (arguing that discussions of the family must include the concepts of dependency and caregiving).

<sup>39</sup> See FINEMAN, *supra* note 26, at 57–59; Fineman, *supra* note 37, at 11.

<sup>40</sup> Notions of what constitutes the “private,” as contrasted with the “public,” contribute to the vitality of this ideology by placing the family conceptually outside of state intervention or regulation absent extraordinary abuses or major failings on the part of individual families. Of course, the “private” family is a myth comparable to that of individual autonomy. See generally FINEMAN, *supra* note 26 (postulating that the idea of autonomy in American society is a constructed myth). The legal family is both constructed and dissolved by law and legal processes. Through law, the state privileges certain social entities as family and gives them both subsidies and protections not afforded to other entities. The family is also conceived as having unique bonds of affiliation and responsibility to members that place intra-family relationships on a unique level, thus furthering the perception that it is a private space ideally free of state intervention.

This obfuscatory approach to dependency and vulnerability has to be confronted and contested. In *The Autonomy Myth: A Theory of Dependency*, I argued against a simplistic approach to dependency and the stigmatization that often accompanies it, particularly in political discourse.<sup>41</sup> We need a more complex and nuanced understanding of what is now encompassed by the single term *dependency*. In one most basic form, dependency should be thought of as unavoidable and inevitable; it is developmental and biological in nature. All of us are dependent on others for care and provision as infants, and many will become dependent as we age, are taken ill, or become disabled. This form of dependency is the type which generally is viewed sympathetically and sparks our charitable impulses, as well as government programs. In policy terms, inevitably dependent persons are the “deserving poor” in terms of social welfare programs.<sup>42</sup>

There is a second form of dependency that needs to be discussed in relation to, but separate from, inevitable dependency, however.<sup>43</sup> This form of

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<sup>41</sup> FINEMAN, *supra* note 26.

<sup>42</sup> The reforms to Aid to Families with Dependent Children undertaken in 1996 were less sympathetic to children and more punitive toward their mostly single mothers. “Personal responsibility” rhetoric and a belief in marriage and work were thought to be what was needed to end the “cycle of dependency” that made subsequent generations welfare recipients. The reform was entitled the Temporary Assistance for Needy Families. See, e.g., *Poverty & Out-Of-Wedlock Births, Before the H. Comm. on Ways and Means* (March 12, 1996) (testimony of Tim Hutchinson), 1996 WL 163896 (F.D.C.H.) (“instead of lifting people out of poverty and despair we have developed a cycle of dependency that is now entering its third generation . . . welfare reform legislation must also include strong work requirements. We must restore to individuals the dignity of work.”).

<sup>43</sup> There are actually many different, though sometimes related, forms of dependency, such as economic, psychological, or emotional dependency. I limit my discussion to



dependency is much less obvious, but when it is noticed it is often stigmatized and condemned. I labeled this form of dependency “derivative” to reflect the very simple but often overlooked fact that those who cared for inevitable dependants were themselves dependent on resources in order to accomplish that care. This form of dependency is *neither* inevitable, *nor* is it universally experienced. Rather, it is socially imposed through our construction of institutions such as the family, with roles and relationships traditionally defined and differentiated along gendered line. Hence, we find an historic difference in expectations and aspirations attached to dichotomous pairings within the family, such as husband or wife, father or mother, and son or daughter.<sup>44</sup> It has proven difficult to gain true gender equality given this set of institutional arrangement and the persistence of traditional family relationships.<sup>45</sup>

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inevitable and derivative dependency inherent in the care work that takes place in the family and is essential to the reproduction of society and its institutions. As I have argued elsewhere, it is family care labor that produces the workers, citizens, soldiers, students, teachers, etc., that populate society. See FINEMAN, *supra* note 26, at 47-4931-40

<sup>44</sup> Martha Albertson Fineman, *Evolving Images of Gender and Equality: A Feminist Journey*, 43 NEW ENG. L. REV. 437, 447 (2009).

<sup>45</sup> Motherhood deepens the already-existing wage gap between men and women because women who are mothers make less than women who are not. For example, a study of women who began working in the 1970s showed a 3% penalty per child and 5-7% penalty for two or more children, while another study of women who began working in the 1980s showed a penalty of 7% per child. Sarah Avellar & Pamela J. Smock, *Has the Price of Motherhood Declined Over Time? A Cross-Cohort Comparison of the Motherhood Wage Penalty*, 65 J. MARRIAGE & FAM. 597, 598

I argued for a more collective and institutionally shared notion approach to dependency: a reallocation of primary responsibility for dependency that would place some obligation on other societal institutions to share in the burdens of dependency, particularly those associated with the market and the state.<sup>46</sup> This reallocation of responsibility seemed particularly appropriate, since both state and market institutions reaped the benefits that care work produced in the form of the reproduction and regeneration of society.<sup>47</sup>

While many commentators recognized the strength of the arguments I made, others were less convinced that dependency was centrally relevant to larger questions of liberal social policy and law. Because what I called inevitable dependency is understood as episodic and as shifting in degree over the lifetime of an individual, many mainstream political and social theorists can and often do conveniently ignore it in spinning out their theories about justice, efficiency, or liberty. In their hands, this form of dependency, if acknowledged at all, is merely a stage that the liberal subject has long ago transcended or left behind and is, therefore, of no pressing theoretical interest as they develop their grand theoretical explorations in legal and political theory and can be left to those of us who focus on more mundane and uninteresting

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(2003); *see also* Jane Waldfogel, *The Effect of Children on Women's Wages*, 62 AM. SOC. REV. 209, 216 (1997) (finding a 4 % penalty for one child and a 12 % penalty for two or more children).

<sup>46</sup> *See* FINEMAN, *supra* note 26, at 31–49.

<sup>47</sup> *See id.*

things, such as the family.<sup>48</sup> As for derivative dependency, that is conveniently dismissed by reference to the liberal contractarian construction of individual “choice” and the norm of personal responsibility.<sup>49</sup> Those who take up the caretaking role have chosen to do so and should not then complain about their situation or expect others to subsidize their choices.

In addition, the division between the public and the private has real tenacity for theorists. In spite of decades of critical commentary showing the distinctions do not hold up, prominent American theorists continue to deal with dependency by relegating the burden of caretaking to the family, which is conceptualized as located within a zone of privacy, beyond the scope of state

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<sup>48</sup> This reaction reflects the traditional division between public and private that has allowed many mainstream scholars to elude difficult and potentially disruptive issues in their theorizing. *See, e.g.*, Martha Albertson Fineman, *Contract, Marriage and Background Rules*, in *ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY* 183, 183-84 (Brian Bix ed., 1998) (discussing Professor Jules Coleman’s failure to integrate the family into his theories); BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE*, 7-11 (discussing the difficulties theorists and others have in addressing children’s rights and the tendency to view them as limited to the family arena); Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provisions of the Violence Against Women Act after Lopez*, 96 *COLUM. L. REV.* 1876, 1898-99 (1996) (quoting Ann Althouse, *Federalism, Untamed*, 47 *VAND. L. REV.* 1207, 1210 (1994)) (explaining federal judge’s reluctance to hear family issues as motivated by their belief that family matters are “insignificant docket-clutter beneath the dignity of the federal judge”).

<sup>49</sup> *See, e.g.*, Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, in *FEMINIST AND QUEER LEGAL THEORY* 29, 31–35 (Martha Albertson Fineman et al. eds., 2009).

concern absent extraordinary family failures, such as abuse or neglect.<sup>50</sup> Thus largely rendered invisible within the family, dependency can be comfortably privatized and mistakenly assumed to be adequately managed for the vast majority of people. To confront that misconception, I have turned to the concept of vulnerability and the idea of the “vulnerable subject,” which I find more theoretically powerful than dependency in arguing for a more substantive vision of equality.<sup>51</sup>

#### IV. Vulnerability as the Human Condition

The use of the designation *vulnerable* to set aside some groups considered disadvantaged within the larger society often also results in their stigmatization. The term *vulnerable population* has an air of victimhood, deprivation, dependency, or pathology attached to it.<sup>52</sup> By contrast, my work has developed the concept of vulnerable detached from specific subgroups,

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<sup>50</sup> See, e.g., Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981) (differentiating inequality based on choices as permissible inequality).

<sup>51</sup> Fineman, *supra* note 37, at 17–18 (explaining that such an approach allows us “to celebrate the progress toward racial, ethnic, and gender equality that has been made under the anti-discrimination model” while still questioning if the system has given advantages to certain individuals). The structural focus of the vulnerability analysis also brings institutions under scrutiny.

<sup>52</sup> See, e.g., Fineman, *supra* note 37, at 8 nn.19–21; *Who Are Vulnerable Populations?*, CENTER FOR VULNERABLE POPULATIONS RES., <http://www.nursing.ucla.edu/orgs/cvpr/who-are-vulnerable.html> (last visited Sept. 10, 2010) (“The term ‘vulnerable populations,’ refers to social groups with increased relative risk (i.e. exposure to risk factors) or susceptibility to health-related problems. . . . VPs are often discriminated against, marginalized and disenfranchised from mainstream society . . .”).

using it to define the very meaning of what it means to be human.<sup>53</sup> Further, this basic premise of a universal vulnerable subject forms the foundation for the assertion that human vulnerability must be at the heart of our ideas of social and state responsibility.<sup>54</sup> In addition to this concept of universal vulnerability, several other theoretical characteristics further development of the concept of vulnerability.

The second premise in defining vulnerability is that of constancy. Human vulnerability arises from our embodiment, which carries with it the imminent or ever present possibility of harm, injury, and misfortune. Bodily harms can take a variety of forms and range from those that are mildly annoying to those that are catastrophically devastating and permanent in nature. Bodily harm can result accidentally or be caused by intentional actions.<sup>55</sup> Bodily harm can result from the unleashing of forces of nature, from the mere passage of time, or from the fact that we humans exist in a world full

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<sup>53</sup> The concept of vulnerability can act as a heuristic device, forcing us to examine hidden assumptions and biases folded into legal, social, and cultural practices. See Fineman, *supra* note 37, at 8, 12 (describing vulnerability as a “universal, inevitable” condition of humanity, that recognizes that the human condition includes a range of abilities over the span of a lifetime).

<sup>54</sup> See *generally* FINEMAN, *supra* note 26.

<sup>55</sup> It is important to recognize a range of vulnerabilities. Some manifestations of vulnerability are clearly beyond individual or even societal control, while others can be cast as “self-induced.” The liberal subject, constructed in terms of individual autonomy, self-sufficiency, and personal responsibility, does not distinguish among vulnerabilities, suggesting that individuals bear primary responsibility for their situation and circumstances, regardless of their nature or cause.

of often unpredictable material realities.<sup>56</sup> While we can attempt to lessen risk or act to mitigate possible manifestations of our vulnerability, the possibility of harm cannot be eliminated.

It is also true that many harms are beyond individual or even human control. The process of aging and death, for example, are clear internal, biological processes that show the limitations of human ability to avoid the ultimate consequences of our embodiment. There are also external threats to our bodily well-being that are difficult to eliminate or even substantially decrease. We may suffer or succumb to diseases that are random or the result of pandemics or other biologically-based catastrophes. In addition to viruses and bacteria, our bodies are also vulnerable to environmental forces, such as weather systems that produce floods or droughts accompanied by famine or fire. These are “natural” disasters, certainly beyond our individual control to prevent. More directly humanly manufactured disruptions in our environment, such as pollution or chemical spills may also cause us harm.

In addition to describing the biological and constant nature, as well as the possible internal and external causes of harms related to human vulnerability, it is important to realize that vulnerability is complex and can manifest itself in multiple forms. Our bodily vulnerability is compounded by the possibility that should we succumb to illness or injury there may be accompanying harm to or disruption of existing employment, economic, or family relationships. These harms are not located in the body itself, but in the

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<sup>56</sup> See Fineman, *The Vulnerable Subject*, *supra* note 36, at 9.

interruption or destruction of institutional or social relationships. This form of harm can be as catastrophic to an individual as the bodily variety and also illustrates how human beings are dependent upon societal institutions.

Economic and institutional harms can accumulate in a vulnerable individual life, compounding the situation and experience of vulnerability and resulting in greater harm. There may also be a basis for recognition of accumulated harm in regard to social groupings. Economic and institutional harms suffered by individuals also affect their families. Disparities and disruptions and the burdens they generate can be transferred from one generation to another.<sup>57</sup> In addition to creating disadvantaged families, negative economic and institutional harms may cluster around members of a socially or culturally determined grouping who share certain societal positions or have suffered discrimination based on constructed categories used to differentiate classes of persons, such as race, gender, ethnicity, or religious

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<sup>57</sup> From 1993 to 1995, only 29.5% of low-income families exited low-income status each year. John Schmitt & Ben Zipperer, *Is the United States a Good Model for Reducing Social Exclusion in Europe?*, 37 INT'L J. HEALTH SERVICES 15, 41 (2007). This was the lowest level of mobility among rich industrialized nations, such as the UK and Canada. *Id.* at 41 tbl.11. In an inter-generational mobility analysis, Canada, Finland, Germany, and Sweden had substantially greater economic mobility than the United States. *Id.* at 42. These studies indicate that it would take, on average, more than three generations for descendants of a poor family to close the income gap with an average family. *Id.* at 44. The U.S. does little to ameliorate child poverty. It ranked 25th out of the 26 rich countries report data in the UNICEF child poverty measures because other rich countries reduce their child poverty rates by 10 to 15 percentage points through social support systems, such as income supports, family allowances, and day care. Barbara Bennett Woodhouse, *Race, Culture, Class, and Crisis in Child Welfare: Theory into Practice*, 81 ST. JOHN'S L. REV. 519, 521-22 (2007) (citing UNICEF, Innocenti Report Card 6, *Child Poverty in Perspective: An Overview of Child Well-Being in Rich Countries* 4, 20 (2005), available at <http://www.unicef-irc.org/publications/pdf/repcard6e.pdf>).

affiliation. Society and its institutions can address these harms through law and policy that positions vulnerability as the organizing principle and seeks to alleviate these implications.

This last point brings me to a final and somewhat paradoxical point about vulnerability: while human vulnerability is universal, constant, and complex, it is also particular. While all human beings stand in a position of constant vulnerability, we are individually positioned differently. We have different forms of embodiment, and also are differently situated within webs of economic and institutional relationships. As a result, our vulnerabilities range in magnitude and potential at the individual level. Vulnerability, therefore, is both universal and particular; it is experienced uniquely by each of us. Important in regard to this particularity point is the fact that our individual experience of vulnerability varies according to the quality and quantity of resources we possess or can command. While society cannot eradicate our vulnerability, it can and does mediate, compensate, and lessen our vulnerability through programs, institutions, and structures.<sup>58</sup> Therefore, a vulnerability analysis must consider both individual position and institutional relationships.

#### V. Societal Institutions and the Provision of Assets and Resources

Significantly, the counterpoint to vulnerability is *not* invulnerability, for that is impossible to achieve, but rather the *resilience* that comes from

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<sup>58</sup> In addition to specific programs that address bodily vulnerability, such as health care, programs that create a more equal society help mitigate vulnerability at all levels of society. See WILKINSON & PICKETT, *supra* note 1, at 81, 84 (suggesting that more equal societies have lower levels of health problems, including heart disease and mental illnesses, at all levels of society, not just among the impoverished).



having some means with which to address and confront misfortune. The final component of a vulnerability analysis focuses attention on the institutions that can give us resilience in relation to our human vulnerability.

This connection between resilience and institutions in the first instance suggests a corresponding connection between those institutions and the state. Surely the reality of our universal fragility has played some role in the design and construction of our societal institutions. If that is so, then the reality of our vulnerability should also be a significant part of the measure of the effectiveness and the justice of the operation of those institutions, suggesting a responsibility for the state to ensure meaningful equality of opportunity and access.

Societal institutions are theorized as having grown up around vulnerability.<sup>59</sup> They are seen as interlocking and overlapping, creating layered possibilities of opportunities and support, but also containing gaps and potential pitfalls.<sup>60</sup> These institutions collectively form systems that play an important role in lessening, ameliorating, and compensating for vulnerability. Together and independently they provide us with resources in the form of advantages or coping mechanisms that cushion us when we are facing misfortune, disaster, and violence. Cumulatively these assets provide individuals with resilience in the face of our shared vulnerability.<sup>61</sup> There are

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<sup>59</sup> Fineman, *supra* note 37, at 12–13.

<sup>60</sup> *Id.*

<sup>61</sup> Urie Brofenbrenner's ecological child development model, for example, examines systems and assets that influence the child. BARBARA BENNETT

at least five different types of resources or assets that societal organizations and institutions can provide: physical, human, social, ecological or environmental, and existential.<sup>62</sup>

Physical resources are the physical goods or material things that determine our present quality of life, such as housing, food, entertainment, and means of transportation. Physical resources also can provide us with the means for accumulating additional resources when they take the form of savings and investments.<sup>63</sup> Certainly tax and inheritance laws impact the distribution of physical assets and are part of this system, but so are banking rules and regulations and credit and monetary policies.<sup>64</sup>

Like physical assets, human resources affect material well-being. They are those goods that contribute to the development of a human being, allowing

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WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE, 21-23.

<sup>62</sup> The list of resources is an expansion on the list of assets developed in *The Vulnerable Subject* based on the four types of assets identified in Peadar Kirby's *Vulnerability and Violence*: physical, human, social, and environmental. See Fineman, *supra* note 37, at 13–14 & nn.34–36 (citing PEADAR KIRBY, VULNERABILITY AND VIOLENCE (2006)).

<sup>63</sup> Physical assets are the things we own or command.

<sup>64</sup> Government subsidies and contracts also help determine how and to whom wealth is distributed. The twentieth century has seen “huge levels of government support for industry and technology in research grants, subsidies, wartime expenditures, and policy commitments.” KEVIN PHILLIPS, WEALTH AND DEMOCRACY 243 (2002). In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, for example, the government gave spectrum worth \$40–\$100 billion to television broadcasters for nothing more than a vague promise to provide public service programming. *Id.* at 248. While many corporations may advocate a laissez-faire economy, the truth is that few American fortunes have not been helped by government favoritism. *Id.* at 204.

participation in the market and making possible the accumulation of material resources that help bolster individuals' resilience in the face of vulnerability. These resources are often referred to in terms of "human capital."<sup>65</sup> Human abilities and experience initially are primarily developed through systems that provide education, training, knowledge, and experience. Accumulation of a degree of human capital is essential in gaining access to employment systems, which themselves can provide further resources.

Social assets or resources are provided by less tangible, not so easily quantifiable relationships. These include social networks from which we gain support and strength.<sup>66</sup> The family is a major institution providing social resources, particularly for the young or others in need of care. Social assets are conferred through other associations, such as political parties or labor or trade unions, in which individuals bolster their resilience by joining together to address vulnerabilities generated by the market. In recent decades, a sense of community organized around identity characteristics, such as race, ethnicity, and gender, has constituted powerful networks of affiliation and belonging.

Ecological resources can be conferred through our position in relation to the physical or natural environments in which we find ourselves. We live in an environment and are dependent on things like clean air and water. We

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<sup>65</sup> See MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE* 70, 164 (2006) (arguing that social justice is best achieved by a "capabilities"-based approach, an approach that allows society and individuals to decide what is or is not a valuable life).

<sup>66</sup> Social support and networks have been linked with rates of cardiovascular disease and with recovery from heart attacks. WILKINSON & PICKETT, *supra* note 1, at 76. One experiment showed that people with friends were less likely to catch cold. *Id.*

experience the environment in immediate and cosmic senses. The state of our neighborhood park is important, but so too are Arctic ice flows or floods in Pakistan. A variety of external factors and physical actions can alter the environments in which we live and have profound influence over our needs and well-being.<sup>67</sup> The natural environment has become something to be monitored and regulated thorough legislation and the creation of agencies and commissions making efforts to protect natural resources from further deterioration.<sup>68</sup>

Existentialresources are provided by systems of belief or aesthetics, such as religion, culture, or art, perhaps even politics.<sup>69</sup> These systems can help us to understand our place within the world and allow us to see meaning and beauty in our existence. Many of the institutions providing existential

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<sup>67</sup> See, e.g., David Pace, *More Blacks Live with Pollution*, ASSOCIATED PRESS, Dec. 13, 2005, available at <http://hosted.ap.org/specials/interactives/archive/pollution/part1.html> (“Air pollution ‘works with many other factors, genetics and environment, to heighten one’s risk of developing asthma and chronic lung disease . . . . Evidence suggests that not only do people get hospitalized but they die at higher rates in areas with significant air pollution.’” (quoting Dr. John Brofman, Director of Respiratory Intensive Care at MacNeal Hospital)).

<sup>68</sup> The Environmental Protection Agency (EPA), for example, was created in 1970 to monitor the environment by writing and enforcing regulations. Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1970) (reprinted as amended in 42 U.S.C. § 4321 (2006)).

<sup>69</sup> *Existential* may be defined as: “In the context of existentialism, involved in or vital to the shaping of an individual’s self-chosen mode of existence and moral stance with respect to the rest of the world.” MICROSOFT ENCARTA COLLEGE DICTIONARY 501 (Kathy Rooney et al. eds., 2001).

assets are labeled “private,” but governments also subsidize religious and cultural entities through tax policy and more direct means.<sup>70</sup>

There is a link between these various types of resources and state responsibility. Many of the institutions providing resources that give us resilience can only be brought into legal existence through state mechanisms.<sup>71</sup> Entities such as corporations, schools, workplaces, families, or churches are legitimated and given a status that confers on them benefits and protections by law.<sup>72</sup> Their very content and meaning is defined through state processes. The dissolution of many of these entities is also accomplished only through state processes. To the extent that these legally constituted institutions distribute significant social goods, they should be monitored by the state. State involvement in the creation and maintenance of these institutions requires that the state be vigilant in ensuring that the distribution of such assets is accomplished with attention to public values, including equality or justice, or objectives beyond private or profit motivation. Instead, what we find in the United States is that within these various asset-conferring systems individuals

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<sup>70</sup> See, e.g., 26 U.S.C. § 501(c)(3) (2006) (granting churches and other religious organizations tax exempt status).

<sup>71</sup> Robert Dahl, Yale professor, 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 138 (2008) (quoting ROBERT DAHL, DILEMMAS OF PLURALIST DEMOCRACY 183–85 (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 (same).

<sup>72</sup> Legal documents such as charters, documents of incorporation, licenses, or permits come to mind.

are often positioned differently from one another. Specifically, some are privileged by the structure and operation of these institutions, while others are relatively disadvantaged and left to cope with their shared vulnerability on an individual level.<sup>73</sup> The responsibility to overcome existing systemic inequalities is an individual, not a state responsibility.

Of course, societal institutions can ameliorate or complicate our vulnerability, but they should also be understood as vulnerable entities in and of themselves. We know that societal institutions are not foolproof shelters, even in the short term. They may fail in the wake of market fluctuations, changing international policies, institutional and political compromises, or

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<sup>73</sup> Studies in the 1990s and 2000 showed that blacks and poor people were far more likely to live near hazardous waste disposal sites or other major pollution sources, such as power plants and industrial parks. Pace, *supra* note 67. A study based on 2000 Census data showed that in nineteen states, blacks were more than twice as likely to live in areas where air pollution posed the greatest health danger. *Id.* The Bush administration, however, adhering to a very formal sense of equality, stated that the EPA's mission was not to alleviate pollution among specific racial and income groups but rather "to get at those folks to make sure that they are going to be breathing clean air, and that's regardless of their race, creed or color." *Id.* (quoting Marcus Peacock, then-Deputy EPA Administrator) (internal quotation mark omitted) In 2003, the EPA's Inspector General reported that the agency had not integrated environmental equality concerns into its daily operations, and in 2005 the GAO reported that the EPA had not considered equality in developing rules for the Clean Air Act between 2000 and 2004. *Id.* See also Marlen E. Koro, Shivanthi Anandan, & Jennifer J. Quinlan, *Microbial Quality of Food Available to Populations of Differing Socioeconomic Status*, 38 AMERICAN JOURNAL OF PREVENTATIVE MEDICINE 478, 478 (2010) (citations omitted) ("Public health research focusing on diet quality has demonstrated that low-SES populations have less access to high-quality (i.e., nutritious) produce, lean meat, and low-fat dairy products.").

human prejudices.<sup>74</sup> Even the most established institutions viewed over time are potentially unstable and susceptible to challenges from both internal and external forces. Further, this institutional vulnerability is almost always obscured and those in control of institutions have a powerful interest in disclaiming the appearance of any vulnerability.<sup>75</sup> Riddled with their own vulnerabilities, society's institutions cannot eradicate, and often operate to exacerbate, our individual vulnerability.

One implication of recognizing institutional vulnerability should be acceptance of the need for monitoring, evaluating, updating, and reforming our societal institutions when necessary. These processes should be undertaken consistent with the mandate of equality of access and opportunity and the obligation of the state to act with equal regard for the vulnerability of all. Further, the introduction of societal institutions into the discussion of human vulnerability has the significant effect of supplementing attention to the individual subject. It does so by placing him or her in social or institutional

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<sup>74</sup> See, e.g., David I. Walker, Commentary, *The Social Insurance Crisis and the Problem of Collective Saving: A Commentary on Shaviro's Reckless Disregard*, 45 B.C. L. REV. 1347, 1348–49 (2004) (discussing the unsustainable nature of social security as a result of increased longevity, escalating healthcare costs, and the impending retirement of the baby boomers); Nick Timiraos & James R. Hagerty, *No Exit in Sight for U.S. As Fannie, Freddie Flail*, WALL ST. J., Feb. 9, 2010, at A1 (explaining that Freddie Mac and Fannie Mae suffered great losses as a result of the housing bust beginning in 2006 and continue to struggle).

<sup>75</sup> See, e.g., David Cho, *Banks 'Too Big to Fail' Have Grown Even Bigger; Behemoths Born of the Bailout Reduce Consumer Choice, Tempt Corporate Moral Hazard*, WASH. POST, Aug. 28, 2009, at A01 (discussing the tens of billions of dollars put into big banks by federal government when the credit crisis put them in danger).

context, thus bringing in historic and existing inequalities and the need for a state responsive to those inequalities.

## VI. Conclusions—The Need for a More Responsive State

It must be made clear that the choice is *not* one between an active state on one hand versus an inactive state on the other. Rather, the choice is whether or not the state is going to act to fulfill a well-defined responsibility to implement a comprehensive and just equality regime that ensures access and opportunity for all consistent with a realistic conception of the human subject. Our present insistence that the state need be constrained underestimates or even ignores the many ways in which the state—through law—shapes institutions from their inception to their dissolution and the ways in which those institutions produce and replicate inequalities. We must show how these institutions operate to produce systems of privilege. To this end, it is imperative to recognize that no one is an autonomous, independent individual.

We all benefit from society and its institutions, but some are relatively advantaged and privileged in their relationships, while others are disadvantaged. Under a vulnerability analysis the inquiry would be into the organization, operation, and outcomes of the institutions and structures through which societal resources are channeled. The state is constituted for the general and “common benefit,” not for a select few.<sup>76</sup> Under a vulnerability analysis

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<sup>76</sup> The United States was formed on the idea that government was created for the common benefit and the promise that all individuals had a right to receive benefits from it. Many of the constitutions created at the time of the revolution explicitly mention “common benefit” or “common good” as the goal of government. The



the state has an obligation not to tolerate a system that unduly privileges any group of citizens over others. It has a responsibility to structure conditions in which individuals can aspire to meaningfully realize their individual capabilities as fully as possible.

While several prevailing American myths currently impede the establishment of a state more responsive to the vulnerable subject, the challenge is to think beyond current ideological constraints and consider the possibility of an active state in non-authoritarian terms. This theoretical task of reconceptualizing the role of the state requires that we imagine responsive structures whereby state involvement actually empowers a vulnerable subject by addressing existing inequalities of circumstances that result from undue privilege or institutional advantage. State mechanisms that ensured a more equitable access to institutional assets by adjusting unjust distribution of privilege and opportunity across society would also contribute to a more robust democracy and greater public participation.<sup>77</sup>

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constitutions of Virginia, Vermont, and Pennsylvania, for example, state, “That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community.” PA. CONST. of 1776, art. V; VT. CONST. of 1777, ch. 1, art. VI; VA. CONST. of 1776 § 3.

<sup>77</sup> A focus on the state and its institutions, as well as privilege and disadvantage, would certainly change the nature of the legal inquiry in the United States. It would move courts beyond only assessing whether individuals or groups with designated characteristics have been subjected to animus and discrimination. The vulnerability paradigm calls on courts to also be receptive to claims that look beyond identity, but assess the distribution of assets and the possibilities of resilience that suggest structural disadvantage and/or privilege. Under a vulnerability approach, the task is

It is important to conclude with the observation that a vulnerability approach does *not* mean that different treatment, even the conferral of privilege or advantage, is never warranted. It does mean that if the state confers or tolerates institutional conferral of privilege or advantage, there is an affirmative obligation on the state and its institutions to offer explanations for the disparate circumstances. Privileging should be both transparent and justified. This type of process would certainly change political discourse and the terms under which legislators and legislation are judged. Vulnerability analysis is an attempt to articulate a more self-conscious and aware egalitarian political culture; one that more robustly adheres to the all-American promise of equality of opportunity and equal access to the American dream. It is those aspirations for substantive equality for the vulnerable subject that should form the ultimate ideals against which the state and its societal institutions and their actions are judged.

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not to explore the intent behind the actions of individual employees, educators, landlords, and so on. Individual intention is not the issue, nor is discrimination. Because the shared, universal nature of vulnerability draws the whole of society—not just a defined minority—under scrutiny, the vulnerability approach might be deemed a “post-identity” analysis of what sort of protection society owes its members. By recognizing that privilege and disadvantage migrate across identity categories, we are forced to focus not only on individuals, but also on institutions—the structures and arrangements that can almost invisibly produce or exacerbate existing inequality.