

Vulnerability and Inevitable Inequality

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ABSTRACT

The abstract legal subject of liberal Western democracies fails to reflect the fundamental reality of the human condition, which is vulnerability. While it is universal and constant, vulnerability is manifested differently in individuals, often resulting in significant differences in position and circumstance. In spite of such differences, political theory positions equality as the foundation for law and policy, and privileges autonomy, independence and self-sufficiency. This article traces the origins and development of a critical legal theory that brings human vulnerability to the fore in assessing individual and state responsibility and redefining the parameters of social justice. The theory arose in the context of struggling with the limitations of equality in situations I will refer to as examples of ‘inescapable’ inequality. Some paired social relationships, such as parent/child or employer/employee are inherently, even desirably, unequal relationships. In recognition of that fact, the law creates different levels of responsibility, accepting disparate levels of authority, privilege and power. Those laws, and the norms and rules they reflect, must carefully define the limits of those relationships, while also being attentive to how the social institutions in which they exist and operate (i.e. the family and the marketplace) are structured and functioning.

Keywords

Social justice, equality, vulnerability, resilience, state responsibility

I. INTRODUCTION

My work over the past several decades has grappled with the limitations of equality. This struggle has resulted in the development of a legal paradigm that brings vulnerability and dependency, as well as social institutions and relationships, together into an analysis of state responsibility. This analysis goes well beyond concern with formal equality and impermissible discrimination.

What follows is an account of the development of a theory based on human vulnerability in which the state is theorised as the legitimate governing entity and is tasked with a responsibility to establish and monitor social institutions and relationships that facilitate the acquisition of individual and social resilience. The theory is based on a descriptive account of the human condition as one of universal and continuous vulnerability. The Anglo-American liberal legal imagination often obscures or overlooks this reality.¹ The potential normative implications of the theory are found in the assertion that state policy and law should be responsive to human vulnerability. However, the call for a responsive state does not dictate the form responses should take, only that they reflect the reality of human vulnerability. Thus, this approach to law and policy allows for the adaptation of solutions appropriate to differing legal structures and political cultures.

Vulnerability theory provides a template with which to refocus critical attention, raising new questions and challenging established assumptions about individual and state responsibility and the role of law, as well as allowing us to address social relationships of inevitable inequality. In this regard, vulnerability theory goes beyond the normative claim for equality, be it formal or substantive in nature, to suggest that we interrogate what may be just and appropriate mechanisms to structure the terms and practices of inequality.

In considering human vulnerability it is significant that, as embodied beings, individual humans find themselves dependent upon, and embedded within, social relationships and institutions throughout the life-course. While the institutions and relationships upon which any individual relies will vary over time and in response to changes in embodiment and social contexts, the fact that we require some set of social relationships and institutional structure remains constant. A vulnerability approach argues that the state must be responsive to the realities of human vulnerability and its corollary, social dependency, as well as to situations reflecting inherent or necessary inequality, when it initially establishes or sets up mechanisms to monitor these relationships and institutions.

Understanding human vulnerability suggests that equality, as it tends to be used to measure the treatment of individuals or groups, is a limiting aspiration when it comes to social justice. Equality typically is measured by comparing the circumstances of those individuals considered equals.² This approach inevitably generates suspicion of unequal or differential treatment absent past discrimination or present stereotyping, particularly if

1. However, I believe that vulnerability theory has the potential to go beyond the Anglo-American frontier. The influence of neoliberalism as a mercantilist *process* of social relations as well as a form of *rationality* capable of extending to all fields of existence, also has relevance within the European and Latin American contexts. See Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso Books 2014); Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Zone Books 2015).
2. This includes those who are not socially or economically equal, but regarded as such under the law.

practised by the state.³ Even in its substantive form, assessments of equality focus on specific individuals and operate to consider and compare social positions or injuries at a particular point in time.⁴

An equality model or antidiscrimination mandate is certainly 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 historically have been relegated to the ‘private’ sphere of life, 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. 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.⁵ The distinction in the legal treatment of children as compared with adults also exemplifies the differently positioned resolution for unequal legal treatment. In both instances, state responsibility for ensuring equitable treatment for differently positioned individuals is minimised within the overriding framework of equality.

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 the 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 consolidating 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 labour market, the resulting gender disparities are merely the neutral result of differing choices made by equally autonomous and free adults.
4. Substantive equality is the subject of much debate. The conflicting opinions of Justices LeBel and Abella in *Quebec (Attorney General) v. A*, 2013 SCC 5, (2013) 1 SCR 61 interpreting section 15[1] of the Canadian Charter of Rights and Freedoms is an example of the nature of disagreement. Both justices agreed that the specified section guaranteed substantive rather than mere formal equality and was designed to protect human dignity. Justice LeBel insisted that a law was not discriminatory unless it involved a distinction based on an enumerated or analogous ground of discrimination or prejudice or the perpetuation of prejudice or stereotyping, even when it otherwise imposed a disadvantage on the plaintiff (note 7 at para 185). Justice Abella in the majority opinion rejected the view that prejudice or stereotyping are necessary elements, opting for a ‘flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant’ (note 7 at para 325). This disagreement reflects the tension between certainty and flexibility that creates ambiguity and incongruity in substantive equality jurisprudence. See generally Colleen Sheppard, *Inclusive Equality: The Relational Dimension of Systemic Discrimination in Canada* (McGill-Queen’s University Press 2010).
5. Contracts of adhesion or involving corporate entities and individuals where there is a predictable inequality of knowledge, bargaining power and access to legal resources.

1.1 Gender Equality in Context: Family

The series of legal events that initially shaped my critique of equality included the no-fault divorce ‘revolution’ and subsequent reforms of family law and the civil rights movement. These social movements created political pressure that led to the creation of non-discrimination legislation that (at least formally) mandated gender neutrality in the interest of gender equality in the workplace and other areas of public life. In both of these contexts, gender equality was presumed and legally imposed.⁶

My early scholarship focused on the family in late twentieth century America, which was at that time the site of substantial reform efforts.⁷ Arguments for marital property and joint custody reflected the idea that marriage should be seen as a partnership between equals, not as a hierarchical, gender-dependent union.⁸ The problem with the imposition of an equality paradigm in family law was that, as our most gendered institution, the functional family was riddled with inequalities. Women were certainly not equal when it came to work and their roles as wives and mothers further disadvantaged them in the market.⁹ This not only created an economic disadvantage, but also had negative implications within the family when decisions about residence or assumption of domestic responsibilities were at issue. Lower wages and fewer opportunities lessened the bargaining power of mothers when it came to family decisions, such as who should assume the burdens associated with caring for children. Economic realities directed the primary wage earner be freed to further develop his career or market skills in the interest of the family as a unit. It was not surprising

6. I use the term ‘non-discrimination’ here rather than ‘anti-discrimination’. The prefix ‘non’ is used for negation of something (denial or disapproval), while ‘anti’ means in opposition to something (taking an active stance against): *The Random House Dictionary of the English Language* (Stuart Berg Flexner & Leonore Crary Hauck eds., 2d ed. 1987) 1306. Although typically labeled as ‘anti-discrimination’, US equality law is not opposed to all discrimination. Rather, U.S. law only actively opposes some forms of discrimination explicitly targeting discrete individuals or groups and therefore may be more appropriately described with passive nomenclature.
7. Martha Albertson Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (The University of Chicago Press 1991); Martha L. Fineman, ‘The Politics of Custody and the Transformation of American Custody Decision Making’ (1989) 22 *U.C. Davis Law Review* 829; Martha L. Fineman, ‘Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking’ (1988) 101 *Harvard Law Review* 727; Martha L. Fineman, ‘Introduction to the Papers: The Origins and Purpose of the Feminism and Legal Theory Conference’ (1987) 3 *Wisconsin Women’s Law Journal* 1; Martha L. Fineman, ‘A Reply to David Chambers’ (1987) *Wisconsin Law Review* 165; Martha L. Fineman, ‘Illusive Equality: On Weitzman’s Divorce Revolution’ (1986) *American Bar Foundation Research Journal* 781; Martha L. Fineman, ‘Implementing Equality: Ideology, Contradiction and Social Change’ (1983) *Wisconsin Law Review* 789.
8. Fineman, *The Illusion of Equality* (n 7) 46. The partnership image gives rise to the idea of contribution, which is an equalising concept, but also an acknowledgement and acceptance of differences. Marital property sees property (narrowly defined) not in terms of who earns the money or owns the property, but as joint, presumably equally shared in spite of different material contributions to the acquisition of property made by husband and wife—wage earner and homemaker.
9. In my early work, I advocate for the recognition of difference and the meaning of a ‘gendered life’, in which differences are socially constructed rather than inherent to the person: Martha L. Fineman, ‘Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship’ (1990) 42 *Florida Law Review* 25, 44; Martha Albertson Fineman ‘Feminist Theory in Law: The Difference It Makes’ (1992) 2 *Columbia Journal of Gender and Law* 1, 2.

that women were overwhelmingly primary caretakers, and this was true whether they were employed or not.¹⁰

An additional family-centred inequality was associated with divorce. Just as during marriage, women typically assumed primary responsibility for children post-divorce.¹¹ Existing inequality in the market and within the family was compounded at divorce. Caretaking during marriage had led to reduced income potential and fewer job prospects for women, and divorce drastically cut the income available to the single-parent family. Children's need for care (both nurturing and material) does not diminish with divorce. On the contrary, it may increase or become more complicated to provide. At divorce, the primary wage earner takes (most of) his salary with him, and (likely) abandons any assistance with care he may have provided within the continuing, but now altered, family unit.¹² Divorce also does not cure a workplace culture hostile to those with caretaking responsibilities.

It seemed ironic that the remedy to existing gender inequality within both the family and workplace was deemed the imposition of a legal regime of equality that ignored the differences in social and economic positions between women and men.¹³ Reformers sought to 'free' ex-wives from the 'stigma' of alimony, which was seen as a patriarchal indicator of women's dependence on men. Conservatives concerned with welfare dependency and single motherhood compelled work or marriage as solutions to the poverty of single mothers. Under a gender-equality regime, women were to be responsible for their own economic futures, as well as equally responsible for their children's support. Men were expected to fulfill their economic responsibility to children through child support, but they also gained strategic legal advantages in the form of presumptions of joint custody and shared parenting models.

In contrast to prevailing reform efforts premised on formal equality in spite of less than equal outcomes, my early work suggested a 'substantive equality', or result-oriented system. Considering what the now single-mother, post-divorce family would need, I argued that that unit should be awarded more marital property (particularly the house) and some

10. This pattern generated a huge amount of scholarship during that time, including my own contributions; for example, the project published as 'Law Firms and Lawyers with Children: An Empirical Analysis of Family/Work Conflict' (1982) 34 *Stanford Law Review* 1263. See also Mary Jo Bane and others, 'Child Care Arrangements of Working Parents' (1979) *Monthly Labor Review* 50, 52-53. One study estimates that a mother staying out of the labour force until her child reached 14 would forego, on average, \$100,000 in earnings. Elizabeth Waldman and others, 'Working Mothers in the 1970's: A Look at the Statistics' (1979) *Monthly Labor Review* 39, 42.

11. This was true regardless of the form of custody award because even in 'joint custody' cases mothers typically do the bulk of the day-to-day daycare. Fineman (n 7) *The Illusion of Equality* 37.

12. There were also further inequalities imposed by the mandate of shared parenting, such as the requirement that custodial parents get permission to take the child out of state, even if the purpose of the move was to take a better job or move with a new spouse. These aspects of inequality resulting from equality-based divorce reforms are beyond the scope of this article, but the subject of much of my writing from the 1980s through 2004: see Fineman, *The Illusion of Equality* (n 7); Martha L. Fineman, 'Custody Determination at Divorce: The Limits of Social Science Research and the Fallacy of the Liberal Ideology of Equality' (1989) 3 *Canadian Journal of Women and the Law* 88, 110; Fineman 'Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking' (n 7); Fineman, 'Illusive Equality: On Weitzman's Divorce Revolution' (n 7).

13. This revealed the 'paradox of equality' as explained in Martha Albertson Fineman, 'Evolving images of gender and equality: a feminist journey' (2008-2009) 43 *New England Law Review* 437.

form of family support that recognised the limits caretaking placed on work and wages.¹⁴ I wanted unequal treatment in view of unequal needs created by an inequality in circumstances pre- and post-divorce, and suggested that this form of inequality would recognise the sacrifices and major contributions women made as mothers, as well as showing that society valued such work.¹⁵ It was not long before equal rights feminists and fathers' rights groups joined to condemn my suggestion, rejecting result-oriented divorce policy as violating the fundamental principles of gender equality.¹⁶

1.2 Equality in Context: Market and State

One problem with family law reform was that it was seemingly impossible for many people to separate the issue of gender equality from the question of the needs of the post-divorce family raising children. Divorce reform was argued as if it were part of a gender war, waged to define the status of men versus women; rules had to be equal or men and women would not be and the symbolic implications of law overtook practical considerations. Responding to this gender equality dilemma, I argued that we should look beyond the individuals within the family—and their genders—to the role that the family, as an institution, was serving in society.

Part of the criticism being made by legal feminists at that time was directed at the supposed line drawn between 'public' and 'private'.¹⁷ The family was the quintessential private institution, and the state represented the public, while the market, chameleon-like, drifted between private and public depending on which designation gave it the most freedom and flexibility. Erasing this line in the context of family law reform, I argued there was a social or collective responsibility for caretakers and their children.¹⁸ In the wake of divorce reform and the increased number of unmarried mothers, it was clear that the traditional marital (private) family was failing and could not reliably meet the economic and nurturing needs of its members. The solution was clearly to share the burden across society's institutions,

14. Fineman, *The Illusion of Equality* (n 7) 175-180.

15. Martha Albertson Fineman, 'Our Sacred Institution: The Ideal of the Family in American Law and Society' (1993) 2 *Utah Law Review* 387-406 (arguing that the no-fault reconstruction of the family narrative is the characterisation of marriage as a partnership between equals and a deviation from the nuclear family in that it is not a hierarchal model); Fineman, 'Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking' (n 7); Martha Albertson Fineman, *The Neutered Mother, the Sexual Contract and other Twentieth Century Tragedies* (Routledge 1995).

16. Fineman, *The Illusion of Equality* (n 7) 43. There were many strange implications of the gender-equality approach. For one thing, children were not part of the economic equation outside of child support. Consistent with the marriage as an equal partnership (or a partnership between equals), the marital property was to be divided between the partners to the marriage. When I suggested that the children be considered junior partners, I was ignored.

17. Martha Albertson Fineman, 'Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency' (2000) 8 *American University Journal of Gender, Social Policy & the Law* 13.

18. I argued against the construction of a discourse in which the socially and economically based deprivations that poor children and their mothers suffer are thereby transformed into deprivations attributable to and based upon their deviant family form. See Martha L. Fineman, 'Images of Mothers in Poverty Discourses' (1991) 2 *Duke Law Journal* 274.

an approach that seemed both just and justified. While the family was acknowledged as playing an important role in the reproduction of society, other social institutions—even when they directly benefitted from the work carried out by the family—were not seen as directly responsible for ensuring its success. I believed there needed to be a more equitable distribution of institutional responsibility for ensuring the provision of essential care principally delegated to the family in contemporary policy and law.

In making this argument for shared institutional responsibility, I introduced the related concepts of ‘inevitable’ and ‘derivative’ dependency.¹⁹ Beginning with the observation that human dependency was inevitable, I suggested that the dominant political language extolling self-sufficiency and independence was both unrealistic and inappropriate.²⁰ Dependency was a complex phenomenon. ‘Inevitable dependency’ described the needs for care associated with certain biological and developmental stages of life. Infants were inevitably dependent, as were many people as they aged or became ill or disabled. Yet, this form of dependency had been privatised by assigning it to the family. It had also been gendered within the family, falling on the shoulders of those who were assigned the social roles of wife and mother.²¹

The advent of the gender-equality movement had revealed contradictions and incompatibilities between the structure of the family and the workplace. The demands of the employment market conflicted with the needs of the family, preventing gender-equality from being implemented. It seemed clear that in order to achieve such change, other institutions would have to undergo complementary evolutions, incorporating new family expectations into their operations.²²

To effect such change, I suggested that inevitable dependency should be the concern of society generally, with responsibility shared across social institutions.²³ This responsibility could be fulfilled through accommodation and support for those who assumed the role of caretaker—the derivatively dependent. We all owe a debt to those who care for inevitable dependents and this debt must be paid through collective means; such a duty could not be discharged simply by being nice to your own mother. Making an analogy to mili-

19. Dependency typically was used as a highly stigmatised term at that time, 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 U.S.. However, single mothers who attained that status through divorce could look to their ex-husbands for resources, 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. Martha L.A. Fineman, ‘Masking Dependency: The Political Role of Family Rhetoric’ (1995) 81 *Virginia Law Review* 2181.

20. Martha Albertson Fineman, ‘Intimacy Outside of the Natural Family: The Limits of Privacy’ (1991) 23 *Connecticut Law Review* 955; see also Fineman, ‘Images of Mothers in Poverty’ (n 18); Fineman, ‘Our Sacred Institution’ (n 15).

21. I realised that the nuclear family functions on an ideological level in our society as the *repository of dependency*. Fineman, ‘Our Sacred Institution’ (n 15) 387. Interestingly, this argument had both structural (family in society) and equality or discrimination (women versus men) dimensions, although I didn’t perceive this at that time.

22. See Fineman, ‘Our Sacred Institution’ (n 15)

23. Fineman, ‘Cracking the Foundational Myths’ (n 17).

tary service, I argued that individual soldiers were assigned the responsibility of defending society, but they were also given the resources necessary to do that job, as well as being compensated economically.²⁴ Caretakers are also dependent on resources to accomplish their socially important and essential work. Those resources could not (and were not in all too many cases) supplied by the family. I argued that social responsibility must be more equitably spread across the societal institutions that benefited from care work, with the workplace in particular expanding to accommodate caretakers.

State responsibility should result in regulations designed to ensure such accommodation, as well as the provision of services like childcare centres or subsidies in order to ease the structural and economic burdens that inevitable dependency places on the caretaker and family. These arguments were motivated by an understanding of the family as a social institution that is not isolated, but rather, connected to and co-dependent upon other institutions that needed the future workers, citizens, entrepreneurs, and so on, that the family nurtured in its role in reproducing society.²⁵

The mainstream academic responses to my arguments about inevitable dependency were predictable. The situation of children was easily overlooked when it came to an assessment of equality and state responsibility. They were not equals. Their inevitable dependency differentiated them from the adults in the family, but it was a disadvantage everyone suffered and would outgrow. Children were the responsibility of the family and their interests could justly be subsumed within it. As for the ill and elderly, they had the personal responsibility to provide for themselves in old age through insurance and pension plans. If they had not, means-tested social welfare programs existed for those who had failed to live up to their personal responsibility to protect themselves.²⁶

I thought that the arguments about derivative dependency would be somewhat harder to deflect, but the prevalence of economic modeling for assessing just about any social institution and relationship facilitated its dismissal. Caretakers were free and equal individuals who had made a 'personal choice'. It was hardly society's responsibility to subsidise that choice. In the words of one commentator, if one person had a preference for a child, while another preferred a Porsche, why should society treat these choices differently?²⁷ These were merely individual decisions and neither preference deserved social subsidy. Thus, an emphasis on personal liberty and autonomy was combined with an assertion of equality or

24. Ibid 19.

25. Martha Albertson Fineman, *The Autonomy Myth. A Theory of Dependency* (The New Press 2004).

26. The classic statement of this argument generally is made by Wendy W. Williams in her article 'The Equality Crisis: Some Reflections on Culture, Courts, and Feminism' (1982) 7 *Women's Rights Law Reporter* 175. See too Peter E. Edelman, 'Promoting Family by Promoting Work: The Hole in Martha Fineman's Doughnut' (2000) *American University Journal of Gender, Social Policy & the Law* 85.

27. The 'Porsche Preference' argument states that if someone prefers a child, this preference should not be treated differently than any other choice (like the choice to own a Porsche). Society should not subsidise either preference. For recent advocacy of this idea see Greg Mankiw, 'Is community rating fair?' <http://gregmankiw.blogspot.com/2013/11/is-community-rating-fair.html> accessed 28 August 2017. But also, for a more sophisticated development of this line of reasoning, see Mary Ann Case, 'How High the Apple Pie – A Few Troubling Questions about Where, Why, and How the Burden of Care for Children Should Be Shifted' (2001) 76 *Chicago-Kent Law Review* 1753.

impartiality and used to argue against directing law and policy to address existing inequality.²⁸ Once again, arguments for a collective (or social) ideal of justice were beaten back by reference to the ideal of individual, not institutional, responsibility.

While it was not persuasive to the liberal, individual choice-oriented commentators, the development of the concept of derivative dependency in the family context was a theoretically important step in the evolution of vulnerability theory. It had moved my thinking beyond the individual and individual characteristics, such as gender, to focus on societal structures and the characteristics of social institutions and relationships. The advent of formal equality in family law did not mean that society's institutions of family and work were transformed. Those structures continued to subordinate, but no longer formally on the basis of gender. Structural disadvantage remained intact, a product of a reality in which society either does not place much value on caretaking as a social function and therefore need not accommodate it, or that society (or some segments of it) places so much value on caretaking that it should not be diminished by being quantified or monetised in social policy.

In other words, it is the nature of and significance given to the social task of caretaker that operates to disadvantage the individuals who occupy that role, not the gender of the caretaker. If men become caretakers, they also suffer economically and professionally. The market is structured so as to assume no responsibility for the reproduction of society. When the state concedes it has some responsibility, it is only to serve as a highly stigmatised backup when the family 'fails'. All caretakers, regardless of sex, will be subordinated by this structure and the ideology of family autonomy, independence and self-sufficiency that supports it. At that time, I realised that what I had been analysing as a gender problem was actually a societal problem that extends well beyond a gender equality frame. I ultimately understood that what was needed was an approach to social justice that challenged the liberal reliance on individual choice and the construct of the private family.

My current focus extends well beyond the family to include all social and institutional relationships and the justice problems they may reveal in contemporary society. In developing a vulnerability approach to the justice issue, I have been guided by the realisation that social problems need social or collective, not just individual, solutions. Developing a collective or social justice approach requires that we understand the nature of those who compose the collective. I thus begin with a descriptive or empirical understanding of what it means to be human. From that foundational premise, I develop a normative, or theoretical, perspective on the just allocation of responsibility for individual and societal well being. Such responsibility must be shared between the individual and the state and its institutions. At the same time, social problems also require a confrontation with, and response to, situations of inherent or inevitable inequality.

28. When women shed the patriarchal family status of wife and mother and became just half of the generic and gender-neutral partner and parent, they were relegated to the world of consent and contract where the illusion is that individuals can operate independent of society, culture and history.

2. VULNERABILITY THEORY

2.1 Reconstructing the Political Subject as the Vulnerable Subject in Law

Although it is often narrowly understood as merely ‘openness to physical or emotional harm’, vulnerability should be recognised as *the* primal human condition. As embodied beings, we are universally and individually constantly susceptible to change in our well being. Change can be positive or negative—we become ill and are injured or decline, but we also grow in abilities and develop new skills and relationships.²⁹ The term ‘vulnerable’, used to connote the continuous susceptibility to change in both our bodily and social well-being that all human beings experience, makes it clear that there is no position of invulnerability—no conclusive way to prevent or avoid change.

For the most part, human vulnerability has been ignored or marginalised in mainstream legal theory or political philosophy. Particularly in contemporary politics increasingly shaped by themes of austerity and purported threats from immigration, we see a growing fixation on personal responsibility, individual autonomy, self-sufficiency and independence, buoyed by an insistence that only a severely restrained state can be an economically responsible one. When the term vulnerability is used, it is typically (and inaccurately) attributed to only some individuals or groups, who are referred to as ‘vulnerable populations’. It is also used as a basis for comparison: some people are viewed as more or less vulnerable, or as differently or uniquely vulnerable. This perspective ignores the universality and constancy of vulnerability as I use the term and is merely another way of identifying bias, discrimination and social disadvantage rather than focusing on structural arrangements that affect everyone. In other words, it is another way to present an equal protection argument.

Human vulnerability has social, as well as physical and material consequences. On the most obvious level, our embodiment means that we are innately dependent on the provision of care by others when we are infants and often when we are ill, aged or disabled. It is human vulnerability that compels the creation of social relationships found in designated social institutions, such as the family, the market, the educational system and so on. The very formation of communities, associations, and even political entities and nation-states are responses to human vulnerability.³⁰ Social problems emerge when these social institutions and relationships are not functioning well.

Importantly, a vulnerability approach does not begin with discrimination or difference in legal treatment as the primary evil to be addressed. Rather, it begins with the assertion that we need to rethink this conception of the legal subject to make it more reflective of the actual human experience. It requires that we recognise the ways in which power and privilege are conferred through the operation of societal institutions, relationships and the creation of social identities, sometimes inequitably. Because law should recognise, respond to, and, perhaps, redirect unjustified inequality, the critical issue must be whether the balance of power struck by law was warranted.

29. I first develop the concept of vulnerability in my article ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law & Feminism* 1.

30. *Ibid.*

Social identities are manifested within institutions and do not manifestly reflect individual characteristics, such as race or sex. However, they do represent the allocation of power and privilege between occupants based on the social function of the institution and their social roles within it. Individuals occupy different social identities as they age and expand their interaction with different social institutions and relationships (from child to teenager to adult—from family to school to workplace). General idealised social identities, such as parent/child, employer/employee and shareholder/consumer are formed and operate as functional and ideological constructs, which tend to shape individual options. These linked, complementary social identities also may reflect an intrinsic inequality between their occupants, an inequality that is often not only justifiable, but also necessary.

Idealised identities are human constructions and, as such, they are not static. However, as archetypes they do reflect the historic values and priorities of society and tend to be relatively stable for extended periods of time. Proposed changes in, or widespread deviations from, these idealised identities can provoke social turmoil and backlash. So too, changes in individual status can give rise to insecurity and anger or frustration, as well as a sense of accomplishment or opportunity.

What vulnerability theory offers is a way of thinking about political subjectivity that recognises and incorporates differences and can attend to situations of inevitable inequality among legal subjects. In this regard, one advantage of vulnerability theory is that it can be applied in situations of inevitable or unresolvable inequality: it does not seek equality, but equity. A vulnerability analysis incorporates a life-course perspective while also reflecting the role of the social institutions and relationships in which our social identities are formed and enforced. It also defines a robust sense of state responsibility for social institutions and relationships.

2.2 Taking Account of Differences

The process of analysing the differences that arise from individual experience within social structures does not begin with the particular characteristics of the individual, but with the nature of social arrangements. The abstract and inevitably contested legal principles often referred to in human rights literature, such as equality, liberty and dignity, are not the measure for this inquiry, however. Nor does it rely on placing individuals into distinct but comparable categories for purposes of equal protection analysis (male/female, white/black etc.).

There are two relevant forms of individual difference in a vulnerability approach—those that arise because we are *embodied* beings and those that arise because we are social beings *embedded* in social institutions and relationships. Consideration of these two forms of difference will inevitably draw attention to distinct facets of social organisation and activities. These differences also require distinct legal and policy approaches, and suggest specific roles for the state to play regarding its responsibility for citizens.³¹

31. What I call the ‘vulnerability paradox’ relies on the importance of acknowledging differences while recognising that vulnerability is a fundamental and universal part of the human condition. Vulnerability must be understood as particular, varied and unique on the individual level. Impermissible bias and discrimination based

Embodied Differences

Perhaps the most evident of embodied differences are the physical variations exemplified in anti-discrimination laws. These represent the horizontal assessment of difference. These physical differences have a census quality, accessing variations and characteristics that exist in society at a given time. They tend to be constructed as static and are often distinguished doctrinally with terms such as ‘immutable. While discrimination laws address some of these differences, others, such as age and those associated with physical and mental ability, continue to serve as justification for differential treatment.

In addition to the bodily differences that are manifest across various members of society at any given time, are those differences that evolve within each individual body. These differences reflect the progressive biological and developmental stages within an individual human life. Individual bodies will mature and grow, as well as age and decline. We can think of these differences as occurring along a vertical and temporal dimension of analysis—within the individual over time.³²

These differences form the basis for classifying groups along developmental lines: as infants, children or the elderly. The law as it is currently fashioned does allow for differential treatment, or discrimination, based on these developmental differences.

Based on categorical assumptions about capabilities and competence, the law recognises ‘special’ treatment for some groups based on developmental difference. The law actually creates a modified legal subjectivity (a distinct legal identity) for those not neatly fitting within the ability boundaries defining the contemporary legal subject. As a result, as an individual passes through various developmental stages, their legal identifier changes: from child to adult, but also from adult to elderly or, sometimes, disabled. To the extent that shifting legal subjectivity also ignores or diminishes what is considered to be the appropriate level of state responsibility for individual well being, this is a problem. For example, the way that the law defines relationships within the family may result in parental privilege eclipsing or obscuring the state’s independent responsibility for the well being of the child. While the institutions and relationships will change, our understanding of state responsibility with regard to human vulnerability must be consistent across the life-course. Infancy and childhood should be understood as merely inevitable developmental stages in the life of the vulnerable subject, not as the occasion for the creation of distinct and diminished categories of state responsibility.

Perhaps not surprisingly, it is the vertical dimension of embodied difference that is of primary interest in a vulnerability analysis. The differences we each experience over time show the inevitability of human dependence on others and on society and its institutions.

on sexuality, race and gender differences should continue to be addressed in law and policy, and also recognise the ways in which differences can be the basis for community building and a source of strength and resilience for individuals. See Martha Albertson Fineman, ‘Vulnerability, Resilience, and LGBT Youth’ (2014) 23 *Temple Political & Civil Rights Law Review* 307.

32. Martha Albertson Fineman, ‘“Elderly” as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility’ (2012) 20 *Elder Law Journal* 71. In this paper, I argue against a conception of old age as a separate designation or category of human existence and for the restatement as simply ‘one end of the continuum that represents the life-course of the vulnerable subject’.

They also illuminate the inevitable nature of inequality in social relationships. Physical or emotional dependence on others is particularly evident in infancy and childhood, but is also often found with severe illness, disability and advanced age. This form of dependency I previously referred to as inevitable: it is universally experienced, an inherent characteristic in the human condition.

There are laws and norms that guide the unequal relationship between a caretaker and a dependent infant, for example. Law defines parental responsibility, but has also conferred a parallel parental right that can work to keep state surveillance at bay. Currently, there is a great deal of debate about the nature and extent of parental rights and the tension generated when the child is also positioned as a rights-holder.³³ Each state must respond to this tension as it negotiates the balance between parental privilege (rights) and the child's right to protection and provision from the state in its laws. It addresses this tension when it creates laws governing legal relationships such as the marital family or custodial parent. It is also responding when it defines parental responsibilities with regard to mandatory laws addressing children's education, health and discipline. The concept of family privacy attempts to draw a line between family and state responsibility in favour of the parent.³⁴

Embedded Differences

A consideration of the vulnerability that marks each of us, and does so throughout the life-course, should make it apparent that, of necessity, human beings are social beings. From the moment of birth until we die, we inevitably act, interact and react in relationships with others and within institutions. However, these social interactions necessitated by our shared vulnerability also produce differences among individuals. All infants are dependent on the care provided within an institutional arrangement, often designated as 'family'. However, there are differences among individual families with regard to the resources and abilities they bring to the social task of providing care.

Institutional differences affecting individual outcomes are also evident in the expanding sets of social relationships found in educational, employment, financial and other institutions upon which we must rely as we proceed through life. Predictably, every society is composed of individuals differently situated within webs of economic, social, cultural, and institutional relationships that profoundly affect our destinies and fortunes, structuring individual options and creating or impeding opportunities. The initial questions raised in a vulnerability perspective are structural: does the state monitor a given institution in a way that is responsive to human vulnerability? In other words, can the differences in treatment be justified?

33. In the U.S., this conflict is what led many conservative commentators to reject the CCRC. Martha Albertson Fineman and George Shepherd, 'Homeschooling: Choosing Parental Rights over Children's Interests' (2016) 46 *University of Baltimore Law Review* 57, 106.

34. While there may be differences between states, the fundamental questions of allocation of authority and responsibility for vulnerability and dependency are universal in nature.

3. INSTITUTIONS AND RESILIENCE

As previously explained, as vulnerable human beings we are all, and always, dependent upon societal structures and institutions, which provide us with the assets or resources that enable us to survive, and even thrive, within society. This institutional focus has the effect of supplementing attention to the individual subject by placing individuals within their social context.³⁵ Although nothing can completely mitigate our vulnerability, resilience is what provides an individual with the means and ability to recover from harm, setbacks and the misfortunes that affect our lives.

While a vulnerability analysis begins with a description of universal vulnerability, it is the particularity of the manifestations of vulnerability and the nature of resilience that are of ultimate interest. Resilience is the critical, yet incomplete, solution to our vulnerability. There are at least five different types of resources or assets that societal organisations and institutions can provide: physical, human, social, ecological or environmental, and existential.³⁶ Physical resources determine our present quality of life and include such things as housing, food, entertainment and means of transportation. Physical resources also provide for our future well being in the form of savings and investments. Human resources contribute to our individual development, allowing participation in the market, and the accumulation of material resources. Human resources are often referred to as ‘human capital’ and are primarily developed through systems that provide education, training, knowledge and experience.

Social resources give us a sense of belonging and community and are provided through the relationships we form within various institutions, including the family, social networks, political parties and labour or trade unions. In recent decades, identity characteristics, such as race, ethnicity and gender, have constituted powerful networks of affiliation within political and other institutions. By contrast, ecological resources are related to the positions we occupy in relation to the physical, built or natural environments in which we find ourselves. On the spiritual level, existential resources are provided by systems of belief or aesthetics, such as religion, culture or art and perhaps even politics. These belief systems can help us to understand our place within the world and allow us to see meaning and beauty in our existence.

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.³⁷ Importantly, resilience is not something we are born

35. Martha Albertson Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010) 60 *Emory Law Journal* 251.

36. The list of resources is an expansion on the list of assets developed in ‘The Vulnerable Subject’ (n 29) based on the four types of assets identified in Peadar Kirby’s *Vulnerability and Violence*: physical, human, social and environmental. Peadar Kirby, *Vulnerability and Violence. The Impact of Globalization* (Pluto Press 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.’

37. 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 and Lew Daly, *Unjust Deserts: How the Rich are Taking Our Common Inheritance* (New Press 2008) 138 (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: *ibid* 139.

with, but is accumulated over the course of our lifetimes within social structures and institutions over which individuals may have little, if any, control—whether these institutions are classified as public or private, or are called family, market, or state. Resilience is also cumulative. The degree of resilience an individual has is largely dependent on the quality and quantity of resources or assets that he or she has at their disposal or command. A resilient individual can take advantage of opportunities knowing that if they take a risk and the desired outcome fails to transpire, they have the capacity to recover.

While sometimes a lack of resilience can be deemed an individual failing, often it is a function of unequal access to certain societal structures or the result of unequal allocations of privilege and power within those structures.³⁸ Too often, we take those who are deemed to be failing and segregate them according to some characteristic or another, such as poverty, illness or age, and then classify them as ‘more vulnerable’ to harm or disadvantage. However, labeling some individuals and herding them into ‘populations’ defined as differently or particularly vulnerable (and therefore somehow inadequate) stigmatises those individuals.³⁹ This is so if the purpose of the designation of a vulnerable population is to protect (as it is with children/elderly) or to punish or control (as it is with at-risk youth/single mothers).

In a vulnerability analysis, the basis for distinguishing some individuals from better-positioned *but equally* vulnerable individuals in the first instance would revolve around questions of access to sufficient resources, with a deficit indicating they lacked the resilience that is necessary to address human vulnerability. Significantly, the initial emphasis here is on the distribution or allocation of resources and the structures within which they are produced. This suggests that the first question to be considered is whether institutional, not individual, functioning is inadequate. This inquiry shifts the focus to state and social responsibility because it recognises that a deficit in resources often reflects an institutional or societal failing more than an individual one.⁴⁰

The fact that a vulnerability analysis brings the life-course into focus is also important in thinking about resilience. Resilience-conferring institutions operate both simultaneously and sequentially in society. That they are sequential is significant. The failure of one system in this sequence to provide necessary resources, such as the failure to provide an adequate education, affects an individual’s future prospects in employment, building adult family relationships, aging and retirement. Given that institutions farther down the line are constructed in ways that are contingent on an individual’s successful gathering of necessary resources in earlier systems, it is often impossible to fully recover from, or compensate for, resource deprivation. Someone lacking a solid education typically will have fewer skills and fewer options and opportunities in the workplace, which will make supporting a family more difficult, and also likely mean a more precarious retirement as well as fewer savings to cushion them in the event of accident, injury or illness.

38. In fact, we all benefit from society and its institutions, but some are relatively advantaged and privileged in their relationships, while others are disadvantaged. See Fineman, *Responsive State* (n 35).

39. *Ibid.*

40. Martha Albertson Fineman, ‘Equality and Difference – The Restrained State’ (2015) 66 *Alabama Law Review* 609.

Moreover, sometimes privileges conferred in one system can compensate for or even cancel out disadvantages encountered in others. A solid, early start with regard to education, such as that provided by Head Start, an effective pre-school program, may trump poverty as a predictor of success later in school.⁴¹ This is particularly likely when coupled with the advantages that a social or relational system can provide, such as a supportive family and cohesive social network.

Society's institutions provide the assets or resources that give us resilience and in so doing actually produce—or fail to produce—social, political and economic opportunities. Access to these opportunities can confer privilege, while exclusion acts to disadvantage. Thus, individual failure should not be seen as merely the consequence of individual irresponsibility. It also is, perhaps primarily, the failure of society and its institutions.

4. CONCLUSION: THE NEED FOR A RESPONSIVE STATE

Recognition of the universality of vulnerability is theoretically important to the normative argument for a responsive state. It provides for both the critique and the suggested [re]construction of social and legal arrangements. The political and legal subject of law in the first instance is conceived of as a universal subject, an idealised ordinary being. The conceptualisation of this legal subject encompasses everyone in society: people are seen either as 'full' legal subjects, conforming to this ideal, or given a modified legal subjectivity based on their deviations from that legal subject. Fundamental principles of democracy require, at least in the abstract, that laws should be applied equally to those who are determined to be similarly situated, which underlies the slogan that we are a nation of laws, not men (*sic*), and that no man (*sic*) is above the law. A vulnerability approach does not dispute this basic principle, but argues that the characteristics of the legal subject that are universalised must be based on human vulnerability and, therefore, inclusive across both horizontal and vertical dimensions of difference.

When this democratic principle of equality was formed, the political subject was a limited or refined one: white, male, property-owning or tax-paying, of a certain age and/or religion and free. 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 modern legal subject has retained certain secondary characteristics that continue to centre on 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. The legal subject typically envisioned in policy and political arguments today assumes a distorted and inappropriate equality of position. It valorises the fully competent, capable individual adult, as well as liberty, self-sufficiency and autonomy.

41. Head Start is a federal program advocating school readiness for children from low-income families up to age five by providing nutrition, health and social services along with education and intellectual development services. About Head Start Services, Office of Head Start, <<https://www.acf.hhs.gov/ohs/about/head-start>> accessed 31 August 2017.

This prototype of the legal subject ignores vulnerability and dependency and is a radically individualistic mischaracterisation of what it means to be human. It must be confronted and contested. I believe the concept of the vulnerable legal subject has the power to disrupt the logic of individual choice and personal responsibility built on this liberal stereotype, and to facilitate the construction of an effective counter-discourse with which to confront neo-liberalism's fixation on personal responsibility and its insistence that only a severely restrained state can be a responsible one.⁴²

It does so by articulating a more inclusive and realistic legal subject—one that makes it clear that injury or injustice does inevitably arise when the state remains unresponsive to human vulnerability and dependency. This legal subject, who is both embodied and socially embedded, needs access to resources that will enable them to endure or prosper from change, even harm, throughout institutions and relationships across the life-course. A guarantee of equality is not enough for this legal subject. The responsive state must be one that recognises relationships or positions of inevitable inequality, as well as universal vulnerability and dependency acting as an instrument of social justice in both its law making and enforcement functions.

42. Fineman, 'Vulnerability, Resilience, and LGBT Youth' (n 31) 307.