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# UNIVERSALITY, VULNERABILITY, AND COLLECTIVE RESPONSIBILITY

Martha Albertson Fineman

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### Résumé de l'article

La théorie de la vulnérabilité telle que développée dans l'Initiative sur la vulnérabilité et la condition humaine (*Vulnerability and Human Condition Initiative*) est une alternative à un paradigme fondé sur les droits ou le contrat social pour réfléchir aux concepts fondateurs de la responsabilité de l'État. Une prémisse fondamentale de la théorie est que les individus et les groupes actuellement décrits comme des « populations vulnérables » ne doivent pas être qualifiés de vulnérables ni être séquestrés dans des catégories discrètes aux fins de la loi et de la politique. Ce plaidoyer en faveur de leur inclusion dans un tout plus large ne consiste pas à nier l'existence d'une discrimination, d'un préjudice et d'un désavantage relatif résultant de toutes sortes de circonstances et de situations. Cela ne signifie pas non plus que des cas particuliers de préjudice ne devraient pas être traités par une action appropriée de l'État. C'est plutôt un argument selon lequel la « vulnérabilité » est le mauvais concept à utiliser pour définir et isoler ces groupes, ou tout autre groupe spécifique, de l'ensemble de l'humanité. La vulnérabilité humaine est universelle et constante, inhérente à la condition humaine. Reconnaisant les mandats théoriques de l'acceptation de l'universel, la théorie de la vulnérabilité présente un « sujet vulnérable » comme le seul objet approprié du droit et de la politique. Ce sujet juridique inclusif et universel incorpore les réalités du corps ontologique et sa dépendance à vie aux institutions et aux relations sociales en construisant une théorie essentielle (non facultative ou consensuelle) de la cohésion et de la réciprocité sociales dans laquelle l'État (ou le système de gouvernement) a la responsabilité de veiller à ce que ces institutions et relations sociales vitales fonctionnent correctement.

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# UNIVERSALITY, VULNERABILITY, AND COLLECTIVE RESPONSIBILITY

MARTHA ALBERTSON FINEMAN

EMORY UNIVERSITY

## ABSTRACT:

Vulnerability theory as developed in the Vulnerability and Human Condition Initiative is an alternative to a rights-based or social contract paradigm for thinking about foundation concepts of state responsibility. One fundamental premise of the theory is that the individuals and groups currently described as “vulnerable populations” should not be labelled vulnerable, nor should they be sequestered in discreet categories for the purposes of law and policy. This plea for their inclusion in a larger whole is not to deny that discrimination, harm, and relative disadvantage arising from all sorts of circumstances and situations exist. Nor is it to suggest that particular instances of harm should not be addressed by appropriate state action. Rather, it is an argument that “vulnerability” is the wrong concept to use to define and isolate these groups, or any other specific group, from the whole of humanity. Human vulnerability is universal and constant, inherent in the human condition. Recognizing the theoretical mandates of accepting the universal, vulnerability theory presents a “vulnerable subject” as the only appropriate object of law and policy. This inclusive, universal legal subject incorporates the realities of the ontological body and its life-long dependence on social institutions and relationships, building a theory of essential (not voluntarily or consensual) social cohesion and reciprocity in which the state (or governing system) has the responsibility to see that these vital social institutions and relationships operate justly.

## RÉSUMÉ :

La théorie de la vulnérabilité telle que développée dans l'Initiative sur la vulnérabilité et la condition humaine (*Vulnerability and Human Condition Initiative*) est une alternative à un paradigme fondé sur les droits ou le contrat social pour réfléchir aux concepts fondateurs de la responsabilité de l'État. Une prémisses fondamentale de la théorie est que les individus et les groupes actuellement décrits comme des « populations vulnérables » ne doivent pas être qualifiés de vulnérables ni être séquestrés dans des catégories discrètes aux fins de la loi et de la politique. Ce plaidoyer en faveur de leur inclusion dans un tout plus large ne consiste pas à nier l'existence d'une discrimination, d'un préjudice et d'un désavantage relatif résultant de toutes sortes de circonstances et de situations. Cela ne signifie pas non plus que des cas particuliers de préjudice ne devraient pas être traités par une action appropriée de l'État. C'est plutôt un argument selon lequel la « vulnérabilité » est le mauvais concept à utiliser pour définir et isoler ces groupes, ou tout autre groupe spécifique, de l'ensemble de l'humanité. La vulnérabilité humaine est universelle et constante, inhérente à la condition humaine. Reconnaisant les mandats théoriques de l'acceptation de l'universel, la théorie de la vulnérabilité présente un « sujet vulnérable » comme le seul objet approprié du droit et de la politique. Ce sujet juridique inclusif et universel incorpore les réalités du corps ontologique et sa dépendance à vie aux institutions et aux relations sociales en construisant une théorie essentielle (non facultative ou consensuelle) de la cohésion et de la réciprocité sociales dans laquelle l'État (ou le système de gouvernement) a la responsabilité de veiller à ce que ces institutions et relations sociales vitales fonctionnent correctement.

## 1. INTRODUCTION

The pandemic has shaken some of the long-standing assumptions underlying political complacency on the part of many people. This is particularly the case in the context of social-welfare policy in the United States, as well as in some other neoliberal democracies. While this public health crisis has many dimensions, of primary interest to vulnerability theory is the shift taking place in the way in which people view the appropriate role of government. In a recent FOX News Channel poll, US voters who indicated government should “lend them a hand” rather than “leave them alone,” rose from 37 percent in 2012 (it was 39 percent in 2016 when Donald Trump was elected US president) to 57 percent.<sup>1</sup> I expect that as the implications of the pandemic become even more manifest in the next months, the percentage will continue to climb. US citizens are learning what it means to have an intentionally ineffective state, ideologically reluctant to enact the mandates necessary to meet the demands of a public-health crisis that otherwise spins out of control.

Americans are not alone in underestimating both the necessity of law and its ubiquity, failing to recognize laws’ actual influence in their everyday lives (even when there is no pandemic). Most individuals take for granted the social institutions and relationships upon which they rely, institutions and relationships that form the background stability necessary for a functioning society. The United States is actually less institutionally stable in this regard than many of its peers. It has never had as robust a welfare state or as comprehensive and as supportive institutional structures as have its democratic political kin. The consequential shallowness of the ways in which we have designed and operationalized our social relationships and structures has rendered the United States more susceptible to the paralyzing effects of institutional failure or collapse. Over the past decades, the institutions that should have formed a foundation for security in health have been robbed of resources and denied political support under a political rhetoric privileging “efficiency,” in which privatization and personal responsibility are exulted and reified. State or collective action correspondingly has been vilified, undermined, and maligned in a rhetoric glorifying individual liberty, independence, self-sufficiency, and autonomy.

Vulnerability theory presents a different paradigm for thinking about the nature of the state and its social institutions and relationships, as well as a basis for defining state or collective responsibility, one that also moves us beyond the focus of either a human-rights analysis or a paradigm centred on equality and discrimination. Vulnerability theory is institutionally, rather than individually, focused. It begins by exploring the justification or legitimation for the existence of the state (or system of governance), rather than asserting the inherent value or worth of the individual.

Importantly, vulnerability theory is a legal/political theory in that it centres on the role and function of law and the institutions it constructs and maintains as the mechanism of state authority. Viewing law as central to the reproduction of soci-

ety, vulnerability theory concedes the inevitability of law, as well as some form of governing authority, while also appreciating the potential of the state as a unique mechanism for the construction of a just society. While it is a critical theory, the recognition of the necessity for and inevitability of governance and law and the positive potential this represents distinguishes vulnerability theory from other “progressive” approaches that seem unable to move far beyond a focus on an oversimplistic notion of an abusive or punitive state.

## 2. LAW AND THE “IMAGINED ORDINARY” SUBJECT OF LAW

Law is a system of rules applicable to all and is fundamental to organizing human society. Laws both form the compulsory systems that govern the relationships we have with each other and define the relationship between the governing system and those who are governed. Law establishes and reflects generally shared principles, norms, and values.

Significantly, laws apply to everyone, whether we express that principle by maxims such as “rule of law,” sayings such as “no one is above the law,” or doctrines like “equal protection.” This principle of universality is central to law’s legitimacy and acceptance, as well as to claims of justice and fairness.

The comprehensive, all-encompassing nature of law mandates the construction of a universal legal subject, an imagined ordinary being around whom law and policy are crafted. This being is the human subject of law. Since the effectiveness, appropriateness, and justness of specific laws ultimately will be judged by how well they reflect and address the lived reality of real human beings, the authenticity and integrity of this invented being is crucial. As a result, defining this imagined ordinary human being—the subject of law—represents a fundamental challenge for legal and political theory.<sup>2</sup>

Vulnerability theory approaches this definitional task by positing two fundamental and related questions:

[1] “What does it mean to be human?”

[2] “Given our understanding of what it means to be human, what institutions, relationships, and rules are required for the construction of a just society?”

The first question is a descriptive or empirical question and in asking it we begin to define the legal subject. The second question is a normative or political question, asking for reflection on what is necessary to build a just and responsive state. This second question also falls within the domain of law. Law is the mechanism by which we construct and through which we maintain our social institutions and relationships.

In response to the first question—what does it mean to be human?—a vulnerability theorist would respond as follows, “To be human is to be vulnerable.” Vulnerability constitutes *the* human condition; human beings are universally, consistently, and constantly vulnerable. This understanding of vulnerability as universal is *not* where most discussions begin, however. In fact, vulnerability is often inserted as a substitute for weak, disadvantaged, discriminated against, helpless, marginalized, or oppressed.

### 3. VULNERABILITY

Most contemporary uses of the term *vulnerability* refer to a possibility of injury or harm arising due to the limitations or inherent deficits of our physical bodies. Human beings are deemed naturally defenceless in many circumstances, capable of being wounded or harmed. This is perhaps the most common understanding of vulnerability today. A variation of the body-as-deficient perspective views the body as vulnerable to corruption. Individual bodies may be degraded and weakened as the result of fate or chance. Others may be corrupted through individual choices or the assumption of risks. Vulnerability viewed as the possibility of bodily corruption introduces a mind/body split, along with the idea of individual choice.

In both of these instances, vulnerability theoretically applies to every human body. Significantly, however, the bodily manifestations of vulnerability are conceptualized as only specific possibilities—individual, intermittent, perhaps avoidable, a fall from grace. This suggests that human beings may have greater or lesser degrees of vulnerability, be more or less or only intermittently vulnerable, or perhaps even avoid the harmful consequences of vulnerability. The idea of vulnerability as the episodic potential impairment of individual bodies is rejected by vulnerability theory, which defines it as universal and constant. I come back to this distinction below.

However, there is a more problematic use of vulnerability, one not so easily rehabilitated for theoretical purposes. This second use of the term highlights certain demographic differences in bodies, associating them with distinct social, economic, or political disadvantages. Vulnerability in this category is plural and “contingent.” It is theorized not as universal, but as designated, individual, subjective, and mutable. It is frequently the product of social forces and biases and is often unjustly imposed.

This idea of distinct or special vulnerabilities is common in professional discourses, such as law and public health, where there are frequent references to specific “vulnerable populations.” Sometimes these populations are perceived as lacking in ability, capacity, or character. Quite often they are stigmatized as a result.

One conventional designation of vulnerable populations references select physical or mental health conditions. In this group are age-related groupings (the elderly or children) and also those deemed “disabled.” Other proclaimed distinct vulnerabilities are deemed situational or status related; some people or groups have been negatively affected by circumstances, including refugees, the poor, and the incarcerated. In addition, victims of prohibited discrimination or intentional mistreatment resulting in diminished economic, political, or social opportunities are often labelled as belonging to a vulnerable population. The designation is also applied to victims of destructive environmental forces, be these natural or contrived. The position of these “populations” as “vulnerable” is the basis for arguing that they deserve special legal and political consideration, some reparations for the diminished social, political, economic, or legal position they innocently occupy.

### 3.1. Vulnerability Theory

The fundamental realization of vulnerability theory is that the individuals and groups described as “vulnerable populations” should *not* be labelled vulnerable, nor should they be sequestered in discreet categories for the purposes of law and policy. This plea for their inclusion in a larger whole is *not* to deny that discrimination, harm, and relative disadvantage arising from all sorts of circumstances and situations exist. Nor is it to suggest that particular instances of harm should not be addressed by appropriate state action. Rather, it is an argument that “vulnerability” is the wrong concept to use to define and isolate these groups, or any other specific group, from the whole of humanity. Human vulnerability is universal and constant, inherent in the human condition.

The injuries should not be the occasion for separating the injured from others, but for recognizing the general, shared fragility of human wellbeing. The specific harms from targeted exclusion and marginalization justify distinct responses, which are appropriately guided by generally applicable remedial principles, including equal protection. Individual or group damages may be appropriate; so may affirmative action, emergency relief, or injunctions. However, the desire to remedy these specific harms should not obscure the recognition of the possibility of a different, more communal type of harm, one not necessarily linked to intentional or direct actions by others, nor aimed at a particular group in society.<sup>3</sup> Nor should the desire to remedy specific group harm eclipse the search for a coherent theoretical vision of state or collective responsibility for injuries that reach beyond discrimination and disaster. In other words, vulnerability theory argues that it is important to develop a universal social-justice project that reaches beyond specific oppressions and marginalization, one that considers state responsibility for injury or harm conceived as general and structural, not only individual or group based.<sup>4</sup>

To explain this further, I’ll return to the question of what it means to be human. Recall that there are two related concepts that are fundamental to understanding vulnerability as inherent in the human condition:



[1] We are *embodied* beings.

[2] The realities of the body necessitate that human beings will be *embedded* in social relationships and institutions throughout the life course.

The body as a theoretical concept must be understood as existing prior to the political, the ethical, or the moral. While the body is the basis for social arrangements, it does not dictate their specific forms.<sup>5</sup> The shape and form of social arrangements are not consistent across history, culture, geography, and so forth. Particular social institutions and relationships within societies have been constructed in a multiplicity of ways in response to a variety of historic and contemporary forces.

By contrast, the body in vulnerability theory is an ontological or anthropological concept, a fundamental reality, consistent over time, place, and space. Vulnerability is intrinsic to the body, actually indistinguishable from the body, and, therefore, an element of the ontological. Note that I am using “ontological” not to assert the existence of God or some supernatural creator or to refer to some inherent, abstract, endowed quality bestowed on the individual, such as “dignity.” Rather, I am arguing instrumentally for acceptance of a manifest logic of collective responsibility. This is an argument for a radical “ethics of care” as the foundation for governance, an argument that recognizes that human vulnerability provides the primary legitimating justification for the coercive ordering of human relationships and endeavors through law.<sup>6</sup> Under this logic, the failure to respond to social discord, injustice, or inequality would constitute a harm demanding governmental action and redress.

### 3.2. The Ontological Body

The body requires that we be communal and political beings. The body necessitates the creation of social units, be they called families, communities, civil society, nations, or international organizations. This unavoidable and indispensable social embeddedness is the foundation for an alternative to Western, liberal social-contract theory exemplified in the work of John Rawls, which is based on ideals of rationality and consent.<sup>7</sup> In other words, vulnerability theory is a theory of essential (not voluntary or consensual) social cohesion and reciprocity. It is based on the recognition and acceptance of human beings’ inevitable dependence on social relationships and institutions and the collective responsibility for those relationships and institutions that dependence entails.

When the current configuration of liberal legal theory does make a concession to the idea of social dependency, it does so in the context of the contingent categories discussed above, considering certain differences across society as requiring special or exceptional legal treatment due to the inappropriate actions of others or to understandable calamities. It is not the general human condition that gives rise to state responsibility to act, but the presence of a victim or sympa-

thetic supplicant. This notion of remedial responsibility is where most legal, political, and theoretical attention has been centred: state responsiveness to the individual is defined and therefore confined by reference to equality, impermissible discrimination, and unique disadvantage. This differentiation among individuals is not the foundation for a comprehensive or coherent theory of state responsibility, but one limited by a fragmented legal subject in which vulnerability is viewed as exceptional. In addition, this approach implicitly sets up a binary, with “invulnerability” as the preferred and attainable status, also serving as the measure for those aspiring to full legal subjectivity.

Currently, the universal or ontological body is a largely neglected site of serious inquiry. As a result, the realities of the ontological body have largely been disregarded, which has had profound implications for our perception of justice, as well as deterred the development of a theory of collective or social responsibility. A limited view of the human condition has had consequences for defining the theoretical connection between the individual and the state. In vulnerability-theory terms, the impoverished notion of what it means to be human that underlies contemporary political and legal theory tolerates only a limited, constrained vision of appropriate state responsibility, encompassing only part of the lifespan and only some individuals when they are able to claim specific injury or harm. The rest are left to a largely privatized society, within a restrained state.

### *3.2.1. Embodiment, difference, and change*

While the ontological body is universal, vulnerability theory must also account for undeniable differences among bodies. However, in ontological terms the relevant differences for vulnerability theory are those that are found within, not among, bodies—differences associated with developmental changes in the ontological body. The concept of the ontological body is and must be comprehensive, encompassing all possible variations in the body. It is theoretically important that it also be understood as cohesive and integrated, not fragmented into distinct entities. This means it is as important to incorporate different developmental stages into our construction of the ontological body as it is to include variations in capacity, physicality, ability, and so forth. The ontological body changes over time, inevitably evolving and declining.

The ontological body’s inescapable susceptibility to change is the core of our vulnerability:

Our bodies are inevitably and constantly susceptible to changes—both positive and negative, developmental, and episodic over the life course, and this has implications for our social well-being as well.<sup>8</sup>

This susceptibility to change applies to every human body and encompasses, but is not confined to, the possibility of harm or injury, of being wounded.



It is important to emphasize the bodily processes involving positive changes. Unlike the typical uses of vulnerability noted in section 2, which focused only on one moment in time in making comparisons across individuals, vulnerability theory adopts a life-course perspective, which inevitably also highlights positive developmental changes inherent in the ontological body's intellectual, emotional, and physical evolution over time. So, while it is true that negative changes can arise from the passage of time or from events such as illness or accident or from environmental harms, it is important to realize that changes to the ontological body are both negative and positive.<sup>9</sup>

Significantly, from a public policy perspective, positive changes can be encouraged and negative changes deterred. Some specific changes may be predictable, such as those often associated with aging, which also provides the occasion (responsibility) for policy and program development. While some changes may be difficult to foresee and external to individual control, they can still be anticipated and addressed with forecasting and informed strategy.<sup>10</sup>

### 3.2.2. *The Embedded Body*

The most important insight of vulnerability theory is that we need to recognize a new legal subject, one that is more reflective of the realities inherent in the human condition. Prevailing legal, as well as political, theory ignores or contradicts the implications of vulnerability and, in doing so, only very narrowly defines the interests and legitimate province of the state. Law is not alone. The liberty-seeking reasonable man in law is also the rational actor in economics, the autonomous consenting being in ethics, and the competent rights holder, capable of pursuing and protecting his interests. These subjects as currently hypothesized are typically not concerned with dependency and vulnerability, but defined by abstract references to independence, self-sufficiency, liberty, and autonomy.

These subjects of theory are taken out of social relationships, which are the structures both in which we experience vulnerability and upon which we depend for the resources to ameliorate it. They are radically individualized entities, abandoned to legal tools and devices such as consent, contract, independence, self-sufficiency, self-reliance, and rights, which are woefully inadequate to address the inescapable and lifelong dependence on society and its institutions that our vulnerability produces. In particular, the realities of the ontological body are neglected in theories in which the state is considered appropriately restrained and limited and social institutions and relationships are deemed a "private," rather than a collective responsibility. The abdication of state responsibility attending this designation of "private" also can create a decisive social harm. Such harm could be labelled "profound neglect" or "callous indifference," but abandonment of the implications of the ontological body goes beyond mere inattention. It is a violation of the very rationale for the existence of governance and law, a rejection of the principles that legitimate constituting the state in the first instance.

Recall here the second question that vulnerability theory asks us to consider—what are the legal, institutional implications of our understanding of what it means to be human? What is the purpose of, the rationale for the state? This brings us to the concept of dependency and its relationship to state responsibility and constitutional legitimacy.

### 3.3 Dependency

In vulnerability theory, dependency is not a variation or example of vulnerability but the unavoidable manifestation of it. The fundamental reality is that the physical and developmental realities of our bodies render us inescapably dependent on social relationships and institutions. These relationships and structures provide the resources that cumulatively give us the ability to adapt, adjust, survive, even thrive, given our vulnerability. In vulnerability theory we call this ability “resilience.”

Importantly, no one is born resilient. Rather, resilience is acquired over time, within social institutions and relationships. Therefore, dependency on institutions and relationships is not deviant or exceptional. Like vulnerability, dependency is inherent to the human condition. However, it is important to distinguish between dependency and vulnerability. They are often confused but are different in important ways that underscore why it is imperative not to theoretically confuse the body (embodiment) and the social or institutional (embeddedness) it necessitates. Understanding the relationship between the two requires us to leave behind the universality of vulnerability and consider the particularity of dependence.

Vulnerability is universal and constant, located in the body. Dependency, while constant, also varies and fluctuates over time and in terms of the need for connection to specific social institutions and relationships. For example, because we are embodied beings, we are inevitably dependent on care from within social institutions and on relationships to provide that care—we are inevitably dependent. This is most evident in infancy, where the family is the social institution primarily responsible for our care. Families and caretakers are dependent on arrangements in the workplace and on the welfare state, but also on the healthcare system, financial industry, the market, the employment system, and so on. In other words, there are two related sites from which to assess dependence: the individual and the institutional (which includes the derivative dependency that may be associated with social identities<sup>11</sup>).

From the perspective of the inevitably dependent individual—the one initially needing care—the birth family recedes, and other institutions typically become more prominent later in life when the need for care arises only occasionally, such as when we are injured, ill, or disabled. In other words, individual dependence on specific institutional arrangements, like the family, can be thought of as episodic, alterable, and circumstantial. However, it is important to recognize and

theoretically address the reality that dependency on some set of social institutions and relationships is inevitable and ongoing for everyone throughout life.

Vulnerability theory urges that the individual always be placed within institutional contexts as we advocate law and policy. In addition, we must recognize that these institutions are complex, and their relationship with each other symbiotic. In order to effectively provide resilience, they must be designed to work together. The family and the educational system will determine the success in later encounters with the employment and political systems, all of which will have implications for the ability to form one's own family, as well as for well-being in retirement and old age. Social institutions ideally operate both simultaneously and sequentially to produce resilience over the life course.

#### 4. CONCLUSION

Vulnerability theory begins by presenting the vulnerable subject as the only appropriate object of law and policy. A vulnerable legal subject incorporates the realities of the ontological body and its life-long dependence on social institutions and relationships into a theory of essential (not voluntarily or consensual) social cohesion and reciprocity in which the state (or governing system) has the responsibility to see that these vital social institutions and relationships operate justly.

Vulnerability theory rejects the fragmenting of the ontological body into various populations, an all-too-common practice that has significant public health and political implications. While the official responses to the pandemic did not only focus on specific populations and targeted the population as a whole, it became clear that specific populations raised specific concerns. Official bodies often emphasized those particularized concerns specifically, after giving the universal guidelines. This reference to distinct vulnerable populations, differentiating some individuals from others, was evident in the very first official responses to the coronavirus pandemic. An emphasis on specific populations (for example, the elderly) can distort analysis of the real extent and nature of the threat that the virus presented, which can also narrowly direct policy. Ironically, even as the cumulative totals of assorted "vulnerable populations" expanded from the elderly to those with underlying conditions to members of racial and ethnic minorities and approached the totality of the national population, those individuals left out of a vulnerable-population designation may feel free to ignore recommendations for distancing, masking, and so on.<sup>12</sup> Rather than seeing themselves as part of a vulnerable humanity, the danger is that some individuals considered themselves distinctly differently vulnerable, or perhaps even invulnerable.<sup>13</sup>

Accepting vulnerability and asking the question of what the realities of the body mean for how we must structure social institutions and relationships so that they operate justly recognizes not only the indispensability of institutions, but also the necessity or inevitability of the need for authority over them to achieve that end. That authority (and the responsibility it entails) is held by the governing entity

given the power of legitimate coercion (the “state” in vulnerability theory). It is important to highlight the fact that this governing entity is always active, always acting through law, even though some would vigorously deny this in an effort to curtail and diminish the scope of ultimate state responsibility for the status quo.

Law inevitably shapes and directs the form and consequences of social institutions, such as those that constitute the family, the market, and financial, healthcare, and other systems, besides defining the nature and shape of the relationships within them.<sup>14</sup> Even if law is not actively engaged at any particular point in time, its past engagement affects the present and its present “inaction” reflects a preference or, perhaps, an active negation of the responsibility to act.

We should be asking, in whose interests do these intuitions and relationships as currently constituted act? And, if we want a more just society, we must also ask, in whose interests should they act? We need rules and structures that are responsive to the social implications of ontological vulnerability—to a vulnerable legal subject. What values and objectives should inform those rules and structures? These questions are brought to the fore when we apply a vulnerability analysis.

## NOTES

- <sup>1</sup> Beacon Research and Shaw & Company Research, Fox News Poll. Fox News (Aug. 13, 2020). [static.foxnews.com/foxnews.com/co...](https://static.foxnews.com/foxnews.com/content/uploads/2020/08/13/Fox-News-Poll-2020-08-13.pdf) (last accessed Aug 21, 2020).
- <sup>2</sup> I recognize that there are exceptions to a designated primary legal subject as legal subjectivity is currently constructed. For example, children are typically set aside as an exception (and a vulnerable population). As a result, they are assigned an incomplete or diminished legal subjectivity, which is justified by their deemed inferior capabilities and capacities. The creation of this “special” legal subjectivity impacts our idea of the extent and nature of state responsibility to children, but also has implications for the way in which the dominant legal subject can plausibly be constructed as an independent and autonomous rights holder. Only when the “exceptions” are marginalized or ignored can what remains be considered to represent the whole. By contrast, vulnerability theory imagines a unified, comprehensive legal subject, incorporating all variations in human development, as well as capacities, characteristics, and abilities. See section 3.
- <sup>3</sup> Vulnerability theory is not a supplement to an antidiscrimination/equality approach. Rather, it is a conceptually distinct perspective that begins by focusing on institutions and structures. It does not preclude exploration of disparate impacts or discrimination, but it asks different questions that suggest a more universal and inclusive approach to social justice than would gender, racial, economic, or other modified notions of justice founded on a discrimination paradigm. Vulnerability theory does not deny discrimination occurs or that it should be remedied. However, it does recognize that inclusion (the remedy for discrimination) in a fundamentally unjust institution, while it may provide some minimal benefit (by equalizing access) to the individual, does little to further the goal of social justice. Social justice may require institutional or structural reform.
- <sup>4</sup> The unaddressed harms are those that arise when the state ignores the implications of the universal or ontological body—its vulnerability—in creating and maintaining social institutions and relationships. We could call this state abdication of its responsibility “profound neglect” or “malignant indifference,” but it represents a violation of the duty to maintain institutions responsive to human vulnerability, which forms the theoretical justification for the state’s very existence.
- <sup>5</sup> Although the institutional form is not consistent across time and space, there are some universal societal functions that must be performed in reproducing any society: a social unit to care for the young, ill, and disabled, for example. In addition, most societies will devise distribution systems (including market, economic, and labour units), health and welfare systems, value systems, dispute-resolution systems, penal systems, exchange systems, and so on.
- <sup>6</sup> Feminist ethics-of-care theories are based on individual relationships of care and do not extend to defining a general collective ethic on a societal or governmental level. They are also contextual, based on establishing caring relationships. By contrast, vulnerability theory centres on the institutional, not the individual, and the corresponding responsibility to care is the governmental obligation to care for everyone subject to the structures and mechanisms of governance. This obligation forms the foundation of governmental legitimacy.
- <sup>7</sup> In vulnerability theory, John Rawls’s heuristic of a “veil of ignorance” used to support the idea of a social contract is nonsensical. In the first instance, it is unduly focused on the individual and a corresponding commitment to rationality and objectivity. This creates a perspective that is doomed to generate far too narrow a sense of justice. Further, the premise that it is possible to ignore personal circumstances in defining justice is hardly desirable, even if it could be achieved. In order to approach justice, an appreciation of the complexity, interrelationship, and range of vital tasks necessary to accomplish the reproduction of society is essential. In particular, it is essential that in ordering society we recognize the inevitability of dependency on social arrangements across the life cycle for everyone. The idea of centring the individual that is inherent to constructs such as consent and contract minimizes the collective emphasis of vulnerability theory. Vulnerability theory focuses on imagining and imple-

menting the “responsive state,” a state in which the foundation for its legitimacy is tied to its unique ability (and therefore, responsibility) to respond to human vulnerability. By the same logic, Rawls’s principles of liberty and equality of opportunity (without unduly infringing on liberty), in spite of differences, are not only incompatible with each other, but inconsistent with a collective sense of social justice in which social relationships and positions are often necessarily and appropriately unequal.

- <sup>8</sup> Martha Albertson Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition,” in Martha Fineman (eds.), *Transcending Boundaries of Law: Generations of Feminism and Legal Theory* 161, pp. 166–170.
- <sup>9</sup> Significantly, the capacity to learn is an aspect of vulnerability. In fact, recognition of the change inherent in a vulnerability analysis is the necessary condition of learning. An “invulnerable” subject is unaffected (or an unchanging self)—the economic man or social-contracting figure set forth in economic theory or in Rawls’s social contract. The invulnerable subject projects a self that predates and survives entry into society, while the vulnerable subject is seen as the basis for the construction of that society and its institutions.
- <sup>10</sup> Importantly, in vulnerability theory the legal subject is not broken down into life stages, such as the elder or the child, which then define both the legal subject’s status and the nature and correspondingly differing levels of state responsiveness. The universal vulnerable legal subject is not based on particular characteristics of a specific individual or group. Rather, the legal subject is an abstract composite, ideally encompassing all possible variations in the body over time, including all manifestations of reliance on social institutions and relationships that humans can experience. It recognizes the inevitability of social dependence that vulnerability entails over the life course. See subsection 3.3 below.
- <sup>11</sup> Social identities are identities based not on individual characteristics, such as gender or race, but on social functions and duties, structured by laws, such as those that form and regulate the family, employment, the corporation, or health and educational systems. The idea of social identities introduces the theoretical notion of “inevitable inequality” (such as the inequality that is designed into complementary social identities and often considered desirable as well as inevitable given the different social roles each complementary identity occupies). For example, consider the obviously unequal complementary relationship of parent/child. However, inevitable, even desirable, inequality also describes relationships such as teacher/student, employer/employee, shareholder/consumer, doctor/patient, and so on). Addressing this concept fully is not possible in the number of pages allocated here but can be explored in various other publications: see generally Jonathan Fineman, “A Vulnerability Approach to Private Ordering Employment,” in Martha Albertson Fineman and Jonathan W. Fineman (eds.), *Vulnerability and the Legal Organization of Work*, Routledge, 2017 (for the employment context).
- <sup>12</sup> The basis for measuring harm was also a failure of the public health system. Death statistics were the primary unit of measurement for assessing “harm” due to the virus. Even as nonlethal physical and mental effects, some of them quite severe and with life-long implications, came to be understood, it was the daily death count that dominated assessments of progress (of lack thereof).
- <sup>13</sup> This effect is currently evident in some discussions about opening schools for in-person education in the United States. Not only are children (in the absence of evidence) considered less vulnerable, they are as a group considered separable and independent from the society in which they live. Their risk is assessed as though the only issue were their participation in education as individuals, not as members of interrelated social systems from which they could not be isolated or exempt.
- <sup>14</sup> Here I am thinking of social relationships like parent/child, employer/employee, shareholder/consumer, and so forth. See note 7, *infra*.



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