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Article

VULNERABILITY AND SOCIAL JUSTICE

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I. INTRODUCTION

What, if anything, does the designation of “social” add to the ideal of justice?¹ The phrase “social justice” is a rallying cry in progressive circles, perhaps because justice unmodified seemingly fails to convey the magnitude of the underlying demand for change.² However, the meaning of the term is not particularly clear, nor is it used in a consistent manner.³

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¹ There are also questions about how the concept of the social relates to other justice designations, such as economic justice, environmental justice, racial justice, and gender justice. See *What Is Social Justice?*, PACHAMAMA ALLIANCE, <https://www.pachamama.org/social-justice/what-is-social-justice> [<http://perma.cc/V5EC-3J49>]. Is it the amalgamation of those perspectives on justice or a separate one? These other designations focus on specific groups or issues, while the term social implies a concern with the whole of society and its structures. The *Oxford Living Dictionary* defines social as “relating to society or its organization.” *Social*, OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/social> [<http://perma.cc/SC4G-LNDL>].

² According to the Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United States of America, “The United States has the highest rate of income inequality among Western countries.” U.N. Human Rights Council Secretariat, *Report of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America*, ¶ 5, U.N. Doc. A/HRC/38/33/Add. 1 (May 4, 2018). The report states, “About 40 million live in poverty, 18.5 million in extreme poverty, and 5.3 million live in Third World conditions of absolute poverty. It has the highest youth poverty rate in the Organization for Economic Cooperation and Development (OECD), and the highest infant mortality rates among comparable OECD States.” *Id.* ¶ 4. Moreover, in the words of the *New York Times*: “769 million people lived on less than \$1.90 a day in 2013, and 3.2 million live in the United States, while 3.3 million in other high-income countries.” Angus Eaton, *The U.S. Can No Longer Hide from Its Deep Poverty Problem*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/opinion/poverty-united-states.html> [<http://perma.cc/U9AL-6QFT>].

³ For example, Bruce Ackerman, in his book *Social Justice and the Liberal State*, does not seem to have a clear definition of social justice, even as the title of his book positions it as a central concept. See BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (2018). Like many others, he seemingly jumbles together ideas about fair distribution of resources, preferred neutrality of the state, disparate power relations, resort to rationality, and the need for education, among other determinants of justice in expressing its social form. *Id.* The concept of social justice is often used to refer to economic justice for individuals or groups, to talk about environmental issues, or to highlight the need for redistribution of resources and opportunity. For a general overview of the term, see LORETTA CAPEHEART & DRAGAN MILOVANOVIC, *SOCIAL JUSTICE: THEORIES, ISSUES, AND MOVEMENTS* (2007).

This Article briefly considers the origins of the term social justice and its evolution beside our understandings of human rights and liberalism, which are two other significant justice categories. After this reflection on the contemporary meaning of social justice, I suggest that vulnerability theory, which seeks to replace the rational man of liberal legal thought with the vulnerable subject, should be used to define the contours of the term. Recognition of fundamental, universal, and perpetual human vulnerability reveals the fallacies inherent in the ideals of autonomy, independence, and individual responsibility that have supplanted an appreciation of the social. I suggest that we need to develop a robust language of state or collective responsibility, one that recognizes that social justice is realized through the legal creation and maintenance of just social institutions and relationships.

A vulnerability approach is not centered on specific individuals or groups or on human and civil rights. It is not a substitute term for weakness or disadvantage, nor is it just another way to indicate impermissible discrimination.⁴ Rather, addressing human vulnerability calls into focus what we share as human beings, what we should expect of the laws and the underlying social structures, and relationships that organize society and affect the lives of everyone within society.⁵ These institutions and relationships also reflect our values and norms and define the expectations for all individuals in their interactions with each other, as well as define legitimate expectations for the state and those who govern it.⁶ While it does not prescribe a specific form of state organization, vulnerability theory does call for a state that is responsive to universal human needs and for the reorganization of many existing structures, which are currently based on a conception of legal order that unduly valorizes individual liberty and choice and ignores the realities of human dependency and vulnerability.

⁴ Vulnerability theory supplements antidiscrimination approaches in that it is not initially concerned with exclusion and inequality but on the nature of the institutions, their functions, and the relationships contained within them. These arrangements apply to everyone in society. See, e.g., Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1, 18–19 (2008) [hereinafter Fineman, *Anchoring Equality*] (expounding that vulnerability theory supplements antidiscrimination approaches).

⁵ See *id.*

⁶ See Martha Fineman, *The Vulnerable Subject and the Responsive State*, 60 *EMORY L.J.* 251, 255–56 (2010) [hereinafter Fineman, *Responsive State*].

II. THE TRANSFORMATION OF SOCIAL JUSTICE: INSTITUTIONS, IDEAS, AND THE LAW

Historically, social justice was thought to have emancipatory potential.⁷ The term was used as a rallying cry by progressive thinkers and activists, who understood it to be a call for “the fair and compassionate *distribution* of the fruits of economic growth,” particularly for the working class.⁸ A 2006 report by the UN Department of Economic and Social Affairs (“UN Report”), “Social Justice in an Open World,” situates the origins of the term in the advance of industrial and urban capitalism, which was consolidated during the years after the Second World War and the advent of social democracies: “Unlike justice in the broad sense, social justice is a relatively recent concept, born of the struggles surrounding the industrial revolution and the advent of socialist (and later, in some parts of the world, social democratic and Christian democratic) views on the organization of society.”⁹ In the wake of the Industrial Revolution, the expansion of large-scale production and growth of markets as the mode of production and distribution increased the availability of goods and services.¹⁰ While this made our collective lives easier and more comfortable, it also resulted in skewed advantages – with material affluence for some but poverty, exclusion, and deprivation for others.¹¹ Karl Polanyi¹² referred to this era’s social and political dislocations as “The Great Transformation” and described how the extension of market dynamics and logic frayed the social fabric.¹³ In the

⁷ It has also been a contested concept, characterized by specific historical and ideological contexts. See W. B. GALLIE, *ESSENTIALLY CONTESTED CONCEPTS* 56, 167–98 (1955), *PhilPapers*. For an analysis of the origins of social justice, see SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* 12 (Harvard Univ. Press 2018).

⁸ It was the initial distribution of economic gains associated with increased productivity that concerned early social justice advocates. Thiers was not an argument for *redistribution* but for just original distribution. See U.N. SECRETARIAT DEPARTMENT OF ECONOMICS AND SOCIAL AFFAIRS, *SOCIAL JUSTICE IN AN OPEN WORLD: THE ROLE OF THE UNITED NATIONS 7* (2006) [hereinafter *SOCIAL JUSTICE REPORT*].

⁹ *Id.* at 2.

¹⁰ See HENRY HELLER, *THE BIRTH OF CAPITALISM* 176 (2011).

¹¹ For a general view of the social problems in the U.S. caused by industrialization, see WALTER LIPPMANN, *DRIFT AND MASTERY: AN ATTEMPT TO DIAGNOSE THE CURRENT UNREST* (Univ. Wis. Press 2015) (1914). For a classic analysis of industrial capitalism effects, see KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* (Pluto Press 2008) (1848).

¹² See generally KARL POLANYI, *THE GREAT TRANSFORMATION* 42 (Beacon Press, 2d ed. 2001) (1944).

¹³ He also noted the ways in which key elements of society, such as labor and natural resources, were transformed into commodities to be bought and sold. “The Industrial Revolution was merely the beginning of a revolution as extreme and radical as ever inflamed the minds of sectarians, but the new creed was utterly materialistic and believed that all

context of such societal disruption, social justice, in the words of the UN Report, was “a revolutionary slogan embodying the ideals of progress and fraternity.”¹⁴

A. *Social Justice Success*

In the United States, social justice ideas were eventually implemented at a federal level through strategies such as progressive income tax, antitrust legislation, and workplace regulations.¹⁵ Progressive politics led to policies aimed at the fair distribution of public goods and services, the development of the idea of citizenship, social rights, and the welfare state, as well as the propulsion of reforms regarding education and employment.¹⁶

Significantly, the principle that social justice should be accomplished by *social* means was important to the reformers. Franklin Delano Roosevelt’s “Second Bill of Rights”¹⁷ was a social justice document in which he outlined a vision of “social citizenship” (a fair deal), and it was governmental authority that was posited as ensuring that everyone would be guaranteed protection from the harshness of the market.¹⁸ Importantly,

human problems could be resolved given an unlimited amount of material commodities.” *Id.* at 42.

¹⁴ SOCIAL JUSTICE REPORT, *supra* note 8, at 12.

¹⁵ By the first decades of the twentieth century and under President Wilson’s government, the Federal Reserve and Federal Trade Commission were created, and the Clayton Antitrust Act was promoted. There was also a push toward the first graduated federal income tax. See generally JACOB S. HACKER & PAUL PIERSON, *AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER* (2016).

¹⁶ See J. M. Wedemeyer & Percy Moore, *The American Welfare System*, 54 CAL. L. REV. 326 (1966) (showing the implementation of social justice ideas). See also KAREN TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972* (2016) (providing an updated and detailed history of welfare programs).

¹⁷ For a detailed account of the history of this speech and its relation with social rights and justice, see MOYN, *supra* note 7, at 68–88.

¹⁸ In FDR’s words:

As our Nation has grown in size and stature, however—as our industrial economy expanded—these political rights proved inadequate to assure us equality in the pursuit of happiness. We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. “Necessitous men are not free men.” People who are hungry and out of a job are the stuff of which dictatorships are made. In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all regardless of station, race, or creed.

President Franklin D. Roosevelt, State of the Union Message to Congress, (Jan. 11, 1944), <http://www.presidency.ucsb.edu/ws/index.php?pid=16518> [<https://perma.cc/E7UK-VWM5>]. Note that freedom here is perceived as contingent on economic security, not on the

attainment of a fair deal was not designated to be only, or even primarily, an individual responsibility. An active and progressive state and its public agencies were deemed the legitimate sources for robust and coherent distributive policies.¹⁹ Among the specific entitlements enumerated were the right to: (1) work; (2) decent pay; (3) have a decent home; (4) adequate medical care; and (5) protection from the economic calamities arising from sickness, accident, and unemployment in old age or resulting from economic dislocations.²⁰

While FDR's social justice ideals were only partially realized, the basic principle that government should intervene to provide some level of economic and social protection to those who needed it, in the face of economic dislocation and disruption, did become institutionalized during that era.²¹ Recognition and acceptance of the need for an active social welfare role for government was broadly accepted until the 1970s, when the Reagan era seeded and nurtured widespread suspicions about the evils of "big government."²²

Today, we again face the kind of widespread inequality and consolidation of wealth that occurred in the wake of the Industrial Revolution.²³ However, there is little evidence that a collectivist approach to social justice would be viable in today's political world, and this is the

mere provision of opportunity. This is very different today. See discussion *infra* Section II.B.2 (exploring the work of Philippe Van Parijs).

¹⁹ See President Roosevelt, *supra* note 18.

²⁰ See *id.*

²¹ Importantly, social justice was not defined by or limited to what have become the "traditional" protected categories, such as race, gender, or disability. Rather, the category was based on the status of citizenship or on a social identity such as worker or head of household. In that way, it was a more inclusive claim, one not grounded in discrimination.

²² The U.S. developed a "liberal" welfare state model that minimizes de-commodification effects, contains the realm of social rights, and erects an order of stratification that blends relative equality of poverty among state-welfare recipients, market differentiated welfare among the majorities, and a class-political dualism between the two. See GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 27 (1990). For a detailed history of the welfare state in the U.S., see TANI, *supra* note 16, at 26. However, the rhetoric over government changed after the seventies. After Carter had won the presidency promising a government "as good as its people," Reagan ran for president on an anti-government program: "government was the people's antagonist, the limiter of their limitlessness." DANIEL T. RODGERS, *THE AGE OF FRACTURE* 35 (2012). See also William Schneider, *The New Shape of American Politics*, *THE ATLANTIC* (1987), <https://www.theatlantic.com/past/docs/politics/polibig/schnnew.htm> [<https://perma.cc/UE2M-9AJ7>] (describing the decline in the acceptance of a need for an active social welfare in the seventies).

²³ In fact, it is now commonplace to state that we are living a new Gilded Age, especially after Piketty's pathbreaking book on inequality. See, e.g., THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014). See also David Singh Grewal, *The Laws of Capitalism*, 128 *HARV. L. REV.* 626, 632-33 (2014) (comparing the current economic climate to the economic climate during the Industrial Revolution).

case on both the conservative and the liberal sides of the political spectrum.²⁴ In fact, the commitment to a collective or social assessment of justice has been profoundly undermined in our increasingly individualistic society.²⁵ We are much more likely to have a particular and fragmented – rather than a collective – sense of justice.

B. *Social Justice Decline*

As the UN Report noted, the meanings of terms change over time in relation to shifting political, economic, and social circumstances, and indeed the concept of social justice has lost much of its social focus. In recent years there has been a discernable trend in international discourse toward the attenuation not only of the concept of social justice but also of the related concepts of social development and social policy. The social sphere has in many respects been marginalized.²⁶

Social justice is now likely to be associated with specific individuals or groups and concerned with discrimination, exclusion, and economic inequality. In assessing the reasons for the decline of the social, the UN Report specifically pointed to the eroding effects of an individually focused human rights agenda that emphasizes formal equality and celebrates individual liberty and choice.²⁷

Interestingly, an individualized understanding of human rights also complicates the idea that the state can undertake positive action to effect something called social, or collective, justice. Instead, justice is now to be found in the protection of the individual from discrimination on the one hand and state overreach and interference on the other. Justice is no longer grounded in the creation of broad social welfare projects, unless they target the poor or disadvantaged or are directed at increasing business and entrepreneurial opportunities deemed likely to unleash economic growth and trickle down to communities.²⁸ In fact, individual

²⁴ Part of this was facilitated by the way that social justice movements were organized around group identities in the twentieth century following a series of successful mobilizations for civil rights. See Deborah Dinner, “Beyond Best Practices”: *Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059, 1060–61 (2017). I first expressed concern about an overreliance on antidiscrimination paradigm in Fineman, *Anchoring Equality*, *supra* note 4, at 2 (providing that a collectivist approach is not likely to happen).

²⁵ See, e.g., PATRICK J. DENEEN, *WHY LIBERALISM FAILED* (2018) (offering a compelling critique to liberalism and its foundation in individual self-expression and autonomy).

²⁶ SOCIAL JUSTICE REPORT, *supra* note 8, at 14.

²⁷ See *id.* at 54.

²⁸ See MOYN, *supra* note 7, at 173–211 (elaborating on the relationship between neoliberalism and targeted minimum policies); DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 64–65 (2007) (discussing the specific form of the neoliberal state). In the case of the individual or group, discrimination or profound disadvantage becomes the rationale for social policy, although the family is still seen as the primary social institution for

equality and liberty are all too often construed as barriers against state action, with such action seen as interfering with individual choices or autonomy.²⁹

1. Neoliberalism

Neoliberalism, another doctrine forged and polished in the twentieth century, reflects a complementary individualistic reorientation. Neoliberalism is perceived as occupying the opposite pole of the political spectrum from human rights, but it also has propelled the shift to an individual, rather than a collective, conception of justice.³⁰

Like its classic form, neoliberalism is a political-economic theory based on the principle that freedom, justice, and societal well-being are best guaranteed by a system that protects private property and freedom of contract and promotes open markets and free trade.³¹ However, unlike traditional liberalism, neoliberalism is *not* a system in which the state is restrained in the interest of individual liberty. Instead, the power of the state is unleashed to protect the market, which is envisioned as the necessary and appropriate mechanism for ensuring individual liberty and choice, as well as economic success and the reduction of poverty.³²

Unlike those for whom neoliberalism may be seen only as part of a conservative legal movement that began in the 1990s,³³ I argue that it is a radical theory in which the market—not progressive social welfare policy—provides the logic for ordering society and distributing its benefits and burdens. In much of neoliberal discourse, the market is positioned as inevitably opposed to, rather than being the beneficiary of,

dependency. For a corporation or business, its constructed role in the economic success for society is the justification for favorable policies and subsidies. Both corporations and businesses act as mediating economic institutions between the state and its citizens.

²⁹ See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCE* 18–19 (2004) (developing these ideas further and theorizing that individual equality and liberty work against the government’s agenda).

³⁰ See MOYN, *supra* note 7, at 173–211.

³¹ See WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION* 28 (2015).

³² See Dieter Plehwe, *The Origins of the Neoliberal Economic Development Discourse, in THE ROAD FROM MONT PELERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE* 238–40 (Philip Mirowski & Dieter Plehwe eds., 2015) (discussing the neoliberal economic development discourse). In the words of the *Social Justice Report*: “[T]he reasoning of the committed neoliberal is that removing the constraints imposed by Governments and archaic social structures will allow the release of long-suppressed initiative, ambition and productive energies, leading to increased opportunities for work and employment and, ipso facto, a reduction in poverty.” *SOCIAL JUSTICE REPORT, supra* note 8, at 69.

³³ See STEVEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 263 (2008).

the public authority of the state.³⁴ In actuality, the state plays a very active role in supporting the market and its institutions.³⁵ This restrained state reasoning also follows the widely accepted public/private distinction that is often drawn in political and public policy rhetoric.³⁶ Within the private sphere, the market is presumed to operate as the realm of freedom and *laissez-faire*, while the public arena is viewed as a realm in which regulation, hierarchy, and constraint may reluctantly be warranted.³⁷

However, the market, while understood to be free, is by no means seen as anarchistic in neoliberal thought. The market is perceived as having a specific, natural order, structured by individual actions undertaken, governed by self-interest, and disciplined by the mandates of a system of market competition.³⁸ In the words of perhaps its most influential proponent, Milton Friedman, “[N]eoliberalism proposes that it is *competition* that will lead the way.”³⁹ Note, however, that even Friedman conceded that there must be an active role for the state: “The state would police the system, [and] establish conditions favorable to

³⁴ See *id.* (remarking on the politics surrounding the movement).

³⁵ See HARVEY, *supra* note 28, at 64–65 (referring to the government’s role in the market).

³⁶ The private/public distinction is at the foundation of eighteenth-century liberal political theory. See generally JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 287 (Ian Shapiro ed., Yale Univ. Press 2003) (1689) (discussing the private/public distinction). As I have described previously:

[O]ne of the primary ordering mechanisms of the American social contract is the creation of categories such as public and private, into which social institutions, people, and problems are distributed with significant policy implications. In particular, the categories of public and private structure the relationships between the state and the market on one hand (the public category) and the state and the family on the other (the private category).

Martha Albertson Fineman, *The Social Foundations of Law*, 54 EMORY L.J. 201, 206–07 (2005). For a history of the distinction and its connection to legal thought, see Morton J. Horowitz, *The History of the Private/Public Distinction*, 130 U. PA. L. REV. 1423, 1423 (1982). As Horowitz explains, “The hostility to statutes expressed by nineteenth-century judges and legal thinkers reflected the view that state regulation of private relations was a dangerous and unnatural public intrusion into a system based on private rights.” *Id.* at 1426.

³⁷ See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 4 (Univ. Chi. Press 2011) (1960) (explaining government involvement in a free society).

³⁸ See, e.g., F.A. Hayek, *Competition as a Discovery Procedure*, Q. J. AUSTRIAN ECON., Fall 2002, at 9, 17–18 (discussing the microeconomic processes that aggregate and shape macroeconomic data).

³⁹ JAMIE PECK, *CONSTRUCTIONS OF NEOLIBERAL REASON* (2010). See also Milton Friedman, *Neo-Liberalism and its Prospects*, in *FROM THE COLLECTED WORKS OF MILTON FRIEDMAN* (Robert Leeson & Charles G. Palm eds., 2013) (1951), https://miltonfriedman.hoover.org/friedman_images/Collections/2016c21/Farmand_02_17_1951.pdf [<https://perma.cc/R3KW-A43Q>] (providing an elaboration on Friedman’s views of neoliberalism and competition).

competition . . . ”⁴⁰ The distinction between state and market functions that he draws here is interesting. The state is to serve as the handmaiden of the market, enshrining a market driven – not a *socially* driven – sense of justice, which is also relentlessly oriented toward the individual.⁴¹

To neoliberals, the separate consideration of social justice often is considered suspect, undertaken to interfere with the free market, and therefore harmful and unnecessary.⁴² In the blunt words of another of neoliberalism’s ideological architects, Friedrich Hayek, the term social is redundant in explaining justice “in a society of free men whose members are allowed to use their own knowledge for their own purposes.”⁴³ Justice is what a free society produces through the market and open competition.⁴⁴ He also indicated that the “greatest service” he could render would be to “make the speakers and writers among them thoroughly ashamed ever again to employ the term ‘social justice’.”⁴⁵ For Hayek, the term was a mirage and represented “the gravest threat to most other values of a free civilization.”⁴⁶

While Hayek was not successful in banishing the term, perhaps he would not object to the way social justice is currently understood, which I suggest is mostly in ways that are consistent with neoliberal objectives. To be fair, Hayek himself was not totally unsympathetic to what he might deem society’s losers. He even explicitly endorsed government action in providing some minimal level of welfare, particularly if it was geared toward making people fit for labor:

[T]here is no reason why in a society which has reached the general level of wealth which ours has attained the first kind of security should not be guaranteed to all without endangering general freedom. . . . [T]here can be no doubt that some minimum of food, shelter, and

⁴⁰ Friedman, *supra* note 39, at 3. I termed this a concession, but it may also be construed as a fundamental recognition of the crucial role that the state must play if any system is to function.

⁴¹ See *id.* at 4.

⁴² See *id.* (highlighting social implications on the market).

⁴³ 2 F. A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 96 (1976).

⁴⁴ See *id.* at 74 (exploring the significance of competition in the market and the achievements of the free market).

⁴⁵ *Id.* at 97 (emphasis added).

⁴⁶ *Id.* at 67.

clothing, sufficient to preserve health and the capacity to work, can be assured to everybody.⁴⁷

2. Progressive Liberal Individualism

Also relevant to understanding contemporary meanings of social justice is the fact that, over the course of the twentieth century, justice has become increasingly understood in economic terms.⁴⁸ The relationship between the individual economic well-being and the market has become central in defining the appropriate role of the state, and this is true even among progressives.⁴⁹

In exploring this development, I use the work of left-leaning philosopher Philippe Van Parijs—who is also a staunch proponent of a basic income guarantee.⁵⁰ Van Parijs recently elaborated on his understanding of social justice in which he placed the individual—not the social—as central.⁵¹ He begins with the caveat that “any defensible conceptions of social justice today must articulate the importance we

⁴⁷ F.A. HAYEK, ROAD TO SERFDOM 120 (1944). This labor-ready purpose for social welfare benefits reflects other neoliberal concepts, such as the language of “welfare dependency” and “moral hazard,” which played an important role in undermining the extension of welfare policies. *Id.* In fact, by the nineties, President Clinton declared that the era of big government was over and that “[t]oday, we are ending welfare as we know it” See Barbara Vobejda, *Clinton Signs Welfare Bill Amid Division*, WASH. POST (Aug. 23, 1996), <https://www.washingtonpost.com/wp-srv/politics/special/welfare/stories/wf082396.htm> [<https://perma.cc/2CY3-DFK7>]. For more information about the stereotypes and condemnations associated with welfare reform that took place in the mid-1990s, see Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274 (1991). For an analysis on the elderly and social security, see Martha Albertson Fineman, “Elderly” as Vulnerable: *Rethinking the Nature of Individual and Societal Responsibility*, 20 ELDER L.J. 71 (2012).

⁴⁸ See, e.g., discussion *infra* notes 50–72.

⁴⁹ Nancy Fraser explores this turn in critical thought in the context of second-wave feminism. See Nancy Fraser, *Feminism, Capitalism, and the Cunning of History: An Introduction* (Aug. 23, 2012), <https://halshs.archives-ouvertes.fr/halshs-00725055/document> [<https://perma.cc/8AJW-T9MX>] (observing how neoliberal policies affect the relationship between feminism and capitalist behavior). For a less scholarly (and roundly criticized) conservative commentator’s similar assessment, see Ross Douhat, *The Handmaids of Capitalism* (June 20, 2012), <https://www.nytimes.com/2018/06/20/opinion/feminism-capitalism.html> [<https://perma.cc/3H6L-FGMW>].

⁵⁰ See Philippe Van Parijs, *Social Justice and the Future of the Social Economy*, 86(2) ANNALS OF PUB. & COOP. ECON. (SPECIAL ISSUE) 191–97 (2015), available at <https://cdn.uclouvain.be/public/Exports%20reddot/etes/documents/2015.SocialEconomy.pdf> [<https://perma.cc/U7WB-36A3>]. As the quote above indicates, this progressive position was also shared to some extent by Hayek. As the reader will see in the following pages, there are other points of convergence between these two theorists.

⁵¹ See *id.* at 192 (advocating that personal responsibility is a driving force to social equality).

attach to equality, freedom and efficiency."⁵² These three concepts are further defined.

In regard to justice, Van Parijs continues with the assertion that any defensible conception of justice must be liberal and egalitarian, explaining that he means "*liberal* in the philosophical sense of professing equal respect for the diversity of the conceptions of the good life that are present in our pluralistic societies."⁵³ This conception of social justice is rooted in the economic and built around the individual. I do not mean to suggest that there is anything inherently wrong with concern for diversity or pluralism or, for that matter, with a goal of equal opportunity. I do, however, want to assert that such a focus is a theoretical and political problem when it totally eclipses the needs, functioning, and nature of society, and makes the individual the only relevant measure for justice. The realm of the social becomes blurred, if not completely dissolved, in what might better be described as individual economic justice.

In regard to defining equality, Van Parijs clearly explained that equality is *not* to be interpreted to mean equivalence in outcome, and this is true whether what is distributed is happiness, income, wealth, health, or power.⁵⁴ For him, inequalities in distribution can be justified in two ways.⁵⁵ First is the principle of personal responsibility under which inequalities do not violate an egalitarian mandate if they are byproducts of pursuit of individual actions, provided there is what he terms "*real freedom*."⁵⁶ This idea of real freedom is a central (and individually focused) theme in Van Parijs' work, although it is not fully explained. Sometimes he seems to indicate that real freedom equates with opportunity and is something to be fairly distributed: "Equality is not a matter of equalizing outcomes, it is a matter of equalizing opportunities, possibilities, real freedom."⁵⁷ One would assume that this distribution of opportunity as constituting real freedom would have something to do with state action, but it is not clear what that action is or what its objectives are.

However, it does seem clear that Van Parijs' conception of the state's proper role is a thin one and limited to the provision of opportunity, which one assumes means monitoring discrimination and exclusion. Presumably, any state interference with outcome would compromise this generalized access to real freedom, a conclusion buttressed by the

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *See id.* (endorsing that equality of opportunity rather than outcome is the path to egalitarianism with narrow exceptions).

⁵⁵ *See id.*

⁵⁶ *See* Van Parijs, *supra* note 50, at 192 ("Justice is about the fair distribution of possibilities, of opportunities, of capabilities, of the real freedom to do things.").

⁵⁷ *Id.*

articulation of his second principle, which is efficiency: “we should not try to equalize at all cost. . . . [J]ustice is not about strict equality even of possibilities, but rather about the sustainable maximization of the minimum—the *maximin*—about making the real freedom of those with least real freedom as great as sustainably possible.”⁵⁸ Van Parijs’ logic here exemplifies the ascendancy of the individual over the social conception of justice.

This perspective on social justice boils down to two propositions. First, society’s primary responsibility is to ensure sufficient opportunities for individuals to engage in productive economic activities of their own choice—in other words, social justice maximizes individual choice/liberty or “real freedom.” Second, if there is real freedom, then the just or equitable distribution of social benefits and rewards demands that distribution be achieved through the exercise of individual talent, initiative, and effort—in other words, end results are an individual responsibility. Fundamental social arrangements affecting the individual that are outside of the scope of access questions are not interrogated.⁵⁹

The valorization of the individual and its implications for the diminishment of the social are also evident when it comes to the idea of what constitutes a good life. Van Parijs rejects the idea of a socially determined, collectively enforced notion of justice, asserting that “[I]beral conceptions of justice in this sense are to be distinguished from pre-modern or traditional conceptions of justice which start from a specific conception of the good life . . . in order to determine what the just society is.”⁶⁰ He equates social justice with individual economic choice, specifying one significant aspect of real freedom to be the “freedom to consume.”⁶¹ He also valorizes the freedom to determine what one does with one’s life.⁶² No consideration of individual responsibility for the generation of collective or social goods is elaborated. Real freedom thus

⁵⁸ *Id.*

⁵⁹ This is a restatement of the meritocracy principle, which assumes the fundamental justness of societal organization. For example, Title VII of the Civil Rights Laws are structured to provide access to social institutions but not to assess the structure or organization of the workplace beyond its relevance to the discrimination paradigm. Structure is left to other areas of law, such as employment and labor law, as well as business and corporate law, which are not generally thought of as social justice arenas. I first approached this phenomenon in *The Vulnerable Subject: Anchoring Equality in the Human Condition*. See Fineman, *Anchoring Equality*, *supra* note 4.

⁶⁰ Van Parijs, *supra* note 50, at 192.

⁶¹ *Id.* at 193 (offering that real freedom is the freedom to determine income and how that income is spent).

⁶² See *id.* (highlighting freedom through employment and spending choices).

translates into a call for allowing an individual to maximize his or her economic potential and social position as he or she defines it.⁶³

Van Parijs positions the individual as a free-floating agent, not someone inevitably contained within or constrained by society (once society has provided the required opportunity or real freedom) or by personal history and experience.⁶⁴ The state is not viewed as generally responsible for the direct provision of goods and services (except, perhaps, in creating a nominal safety net), nor should it intervene in the interest of equities in outcome.⁶⁵ The state is responsible, however, for ensuring the proper functioning of markets (and, thus, providing equal opportunity or real freedom).⁶⁶ Ironically, this progressive individualism perspective on social justice reaches the same conclusion as neoliberalism—the market is the social institution through which individuals will gain freedom.⁶⁷ It follows that the laws necessary to effect the social order advanced by this particular vision of justice are those that prohibit discrimination (a very weak notion of providing opportunity),⁶⁸ complemented by guarantees of political and civil rights recognizing individual dignity, autonomy, and responsibility.⁶⁹

⁶³ See *id.* (positing that real freedom is equality of opportunity for each person to accomplish his or her desires).

⁶⁴ See, e.g., *id.* at 192–93 (considering the individual’s role in the greater economy). This position is reminiscent of Hayek, although Van Parijs asserts that he is defining social justice, while Hayek rejects the term. Compare HAYEK, *supra* note 43 (calling the social aspect of social justice redundant), with Van Parijs, *supra* note 50, at 192 (defining social justice as “real freedom for all, or a liberal egalitarian conception of justice that is both responsibility-sensitive and efficiency-sensitive”).

⁶⁵ See Van Parijs, *supra* note 50, at 192.

⁶⁶ See *id.* at 193 (defining the state’s role in developing a healthy market economy).

⁶⁷ Compare Van Parijs, *supra* note 50, at 195 (concluding that public subsidies or favorable tax statuses may be justifiable because they are efficient tools in the social economy), with David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROB. 1, 2 (2014) (describing the convergent evolution of market-based theories of individual freedoms).

⁶⁸ The state monitors the point of entry into the economic sphere but not how that sphere ultimately performs. See, e.g., Dinner, *supra* note 24 at 1063 (proposing that employment-discrimination law is indicative of a more efficient labor market).

⁶⁹ See *id.* at 1068 (positing values espoused by Title VII). Public policy also reflects this orientation, with cities and states bidding for businesses to relocate so as to provide employment opportunities, often at the expense of public programs such as education when heavy subsidies are used as incentives. For instance, the latest notorious competition between cities was for Amazon headquarters, offering millions in tax breaks and public investment for the promise of creating jobs. See M.J., *How America’s Cities are Competing for Amazon’s Headquarters*, ECONOMIST (Dec. 5, 2017), <https://www.economist.com/the-economist-explains/2017/12/05/how-americas-cities-are-competing-for-amazons-headquarters> [<https://perma.cc/7M3N-6J8T>] (describing the attempts by cities to lure Amazon into establishing a new headquarters in their respective cities).

Moral or fairness arguments for policies aimed at redistribution based on broader conceptions of justice are easily disposed of under the logical constructs advanced by Van Parijs (and Hayek, for that matter) using two argumentative tactics. First, his adoption of a notion of relativism, or cultural pluralism, emphasizes individual choice and renders social justice a matter of individual definition.⁷⁰ This maneuver also locates the ultimate responsibility with the individual, who must choose what is best for him, as well as determining how to achieve it.⁷¹ Second, his appeal to economic efficiency positions cost-benefit analysis as the ultimate standard for defining public policies.⁷² For those of us who see social justice as inevitably inefficient sometimes, this move to market principles is perverse.

Social justice advocates need a new vocabulary—one that will set forth a logic of *social* justice that recovers the notion of a collectively determined and realized public good that both defines state or governmental responsibility and takes into account ends as well as means.⁷³ This rhetoric should not only complement but also transcend individual interest.⁷⁴ In this project, the concepts of human vulnerability and resilience, as well a recognition that we are all inevitably dependent on various social institutions and relationships over the life course, are of vital importance. The realities of human vulnerability and dependency reveal the fallacy in the conceptions of individual liberty and autonomy that lie at the heart of neoliberalism.

III. SOCIAL JUSTICE, VULNERABILITY THEORY, AND LAW

Law is both inherently a social endeavor and a primary instrument of accomplishing social justice. Laws establish and regulate duties, obligations, rights, and privileges applicable to all members of a society, as well as define their relationships with each other and with the state and its institutions. Politicians and philosophers can and do differ when it comes to theories of governance, but there should be a shared recognition

⁷⁰ See Van Parijs, *supra* note 50, at 195 (aligning self-exploitation with social needs).

⁷¹ I use the masculine pronoun here to emphasize that this way of thinking is built around a rational political subject, which was modeled on a particular, limited notion of citizenship. See Martha Albertson Fineman, *Vulnerability Theory and the Role of Government*, 26 YALE J.L. & FEMINISM 1, 19 (2014). See also *infra* note 79 (elaborating on the political subject and use of the masculine pronoun).

⁷² See Van Parijs, *supra* note 50, at 192 (framing Van Parijs' economic efficiency argument).

⁷³ See Duncan Kennedy, Special Supplement, *The Social Justice Element in Legal Education in the United States*, 1 HARV. UNBOUND J. LEGAL LEFT 93, 93 (2005) (discussing the application of a wider vocabulary to the term "social justice").

⁷⁴ See *id.* at 96–97 (defining the need to reconcile the individual interest through the greater social lens).

of what it means to be human. Laws are drawn with a created legal subject in mind, an imagined ordinary being, who is the abstract subject of law.⁷⁵ Our ideas about what it means to be human and how the state or collective should be constructed influence how we shape legal relationships and social institutions, as well as inform what we consider to be justice within those arrangements and institutions.⁷⁶ This dialectical relationship between the empirical and the ideal is a starting point to apprehend the law, not as a mere reflection of society but as constitutive of the material forces that guide its own reproduction.⁷⁷

Our contemporary legal subject is posited as an autonomous and independent being whose primary demand is for liberty or freedom from state interference.⁷⁸ He claims a right to autonomy to govern his own life, while at the same time asserts his freedom from responding to the needs of others who should equally be independent and self-sufficient.⁷⁹ This enlightenment vision of legal and political subjectivity has given us legal concepts such as the “reasonable man” and formed the basis for the

⁷⁵ See *The Ordinary Prudent Man*, BALLENTINE’S LAW DICTIONARY (3d ed. 1969) (defining the abstract man to whom judicial norms are applied). Defining this is a matter of selecting what are essential human qualities, which can then be used to set expectations and aspirations attainable under a rule of law.

⁷⁶ See, e.g., HANNAH FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (1972) (explaining how the methods of social theorists differ from natural scientists and the importance of acknowledging the network of concepts).

⁷⁷ In this endeavor I am indebted to the framework provided by Merton’s “theories of middle range,” in the sense that they are “intermediate to general theories of social systems which are too remote from particular classes of social behavior, organization, and change to account for what is observed and to those detailed orderly descriptions of particulars that are not generalized at all.” Robert K. Merton, *On Sociological Theories of the Middle Range* (1949), in *ON THEORETICAL SOCIOLOGY: FIVE ESSAYS, OLD AND NEW* 39, 39 (1967).

⁷⁸ See generally Fineman, *Responsive State*, *supra* note 6, at 5.

⁷⁹ I intentionally use the male pronoun here because the political subject that governs our current institutional imagination is based on a limited notion of the human experience, one that reflects the understanding of the male, white, property-owning or tax-paying, certain age and/or religion, and free framer of the U.S. Constitution. See Martha Albertson Fineman, *Vulnerability Theory and the Role of Government*, 26 *YALE J.L. & FEMINISM* 1, 19 (2014). Over the course of the nineteenth and twentieth centuries, certain qualifiers were removed and political legal subjectivity formally grew to encompass previously excluded groups. *Id.* at 6. However, this eighteenth-century legal subject continues to influence the modern legal subject. *Id.* He retains many of the secondary characteristics that formed perceptions of the needs and political sensibilities of an eighteenth-century male citizen sheltered by institutions such as the patriarchal family and the privileges of a master-servant mentality. *Id.* at 19. See also Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 *B.U. L. REV.* 1713, 1752–53 (2012) [hereinafter Fineman, *Beyond Identities*] (elaborating on the universal legal subject and framing the “‘vulnerable subject’ as the appropriate legal and political subject”).

rational, self-interested agent in economic theory.⁸⁰ The liberal legal subject embodies an ideal of abstract equality or fundamental sameness in which any differences among men are deemed to be legally or politically insignificant.

This liberal legal subject is a fully functioning adult—in charge and capable of making choices. Unrestrained by the state, he will be rewarded according to his particular talents and individual efforts. His social relations are defined by concepts such as consent and supported by legal doctrines such as contract and property.⁸¹ The attainment of liberal economic roles—such as job creator, entrepreneur, taxpayer, and, of course, consumer—define the aspirations and determine the values for this legal subject. The messy aspects of what it means to be human, particularly the physical realities of vulnerability and dependency, may be viewed as a problem, but they are strictly considered to be an individual, not societal, problem and thus a personal, not public, responsibility.⁸²

Vulnerability theory challenges this limited and inaccurate vision of legal subjectivity. It suggests that a legal subject that is primarily defined by vulnerability and need, rather than exclusively by rationality and liberty, more fully reflects the human condition.⁸³ As such, it has the power to disrupt the logic of personal responsibility and individual liberty built on the liberal stereotype of an independent and autonomous individual. Recognition of human vulnerability mandates that the neoliberal legal subject be replaced with the vulnerable legal subject, even as a responsive state is substituted for the restrained state of liberal imagination.⁸⁴

⁸⁰ This liberal legal subject is based in the Lockean notion on equality of the same inalienable natural rights. See Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1414–15 n.27 (2001) (comparing and contrasting theories of social organization and how social institutions interact with individuals and the market). See also *supra* note 79 (discussing the features of the political subject envisioned by current institutions). This is also the basis for law and economics theories that came to dominate in the late twentieth century, commonly associated with the economic philosophy of the Chicago School. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977); DANIEL T. RODGERS, *AGE OF FRACTURE* 41–76 (2011) (regarding the influence of the law and economics movement in the U.S.); *FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY* (Martha Albertson Fineman & Terence Dougherty eds., 2005) [hereinafter *FEMINISM CONFRONTS HOMO ECONOMICUS*] (providing a critique from feminist scholarship).

⁸¹ Fineman, *Contract and Care*, *supra* note 80, at 1414–15 n.27, 1420 (discussing the liberal legal subject and his construct of social relations).

⁸² See discussion *infra* Parts III.A, III.B.

⁸³ See Martha Albertson Fineman, *Vulnerability and Inevitable Inequality*, 4 OSLO L. REV. 133, 149 (2017).

⁸⁴ See *id.* at 134 (elaborating that the human condition is more fully reflected by vulnerability and need). See also Martha Albertson Fineman, *Equality and Difference – The*

The rethinking of legal subjectivity and state responsibility is an important social justice project. When we place the vulnerable subject at the center of our theorizing, it becomes clear that there is a collective, or social, injury that inevitably arises from a state unresponsive to the universal and constant human condition of vulnerability and dependency.⁸⁵ The injury arises from profound negligence or disregard on the part of the state to attend to human vulnerability in creating its institutions and defining the social relationships that will govern society.⁸⁶ It is also a legal project that will bring all areas of law, not just those focused on civil rights, under social justice scrutiny.

A. Vulnerability Theory

Vulnerability theory began by asking a fundamental question: What does it mean to be human?⁸⁷ In answering this question, we must define the essential aspects of human beings – those characteristics, experiences, or situations that are universal and define the human condition.⁸⁸ The

Restrained State, 66 ALA. L. REV. 609, 614, 626 (2015) [hereinafter Fineman, *Equality and Difference*] (discussing how vulnerability theory seeks to further the vulnerable subject and restrained state).

⁸⁵ See Fineman, *Responsive State*, *supra* note 6, at 255–56 (expanding and using vulnerability theory in the state is an important step that positions everyone as humans). See also Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 12 (Martha Albertson Fineman & Anna Grear eds., 2013) [hereinafter Fineman, *Law and Politics*] (enhancing the placement of the vulnerable subject at the center of the state to create a more responsive state).

⁸⁶ See Fineman, *Responsive State*, *supra* note 6, at 255–56 (elaborating on the social injury involved with the vulnerable subject and society).

⁸⁷ See Fineman, *Beyond Identities*, *supra* note 79, at 1769 (noting that the first step in the vulnerability framework is to ask this same question). Vulnerability theory draws a distinction between what is the essence of the human condition (which reflects the biological and developmental realities of our bodies) and how we understand human nature (which is largely a product of history, geography, and culture, or in other words, it varies over time and place and is socially produced). *Id.*

⁸⁸ See *id.* Vulnerability theory posits vulnerability as universal and constant but also recognizes that there are differences among individuals. Horizontal differences are observed if we take a slice of society at any given time and note the differences in embodiment, such as race, gender, ability, and other differences. There are also differences in social standing and status. These differences do not alter the fundamental vulnerability that marks all bodies but have certainly served to provoke profound social advantage or disadvantage. Thus, these differences have been the main subject of antidiscrimination and inclusion laws. An additional set of differences may be thought of as vertical – occurring within each individual over the course of life as we move from infancy to elderly. These differences are not well addressed in law and theory. Typically, children and some elderly or disabled individuals are clustered into “vulnerable populations” and stigmatized as either in need of protection or lacking capacity, creating a “special” legal identity for those within the group. Other “vulnerable populations,” such as youth at risk, may be subjected to discipline or

answer to this question in vulnerability theory is, of course, vulnerability, which arises because we are embodied beings.⁸⁹ Our bodies are inevitably and constantly susceptible to changes—both positive and negative, developmental and episodic—over the course of life, and this has implications for our social well-being as well.⁹⁰ Note that human vulnerability is *not* set forth as a normative concept. It is descriptive, representing empirical observations.

Human beings constantly experience change over time, which includes not only the possibility of bodily harm, injury, or decline, but also may have positive and generative aspects. For example, change also leads to increased strength, growth, wisdom, and maturity over the life course, which can provoke creativity and result in fulfillment and satisfaction. The reality of our susceptibility to bodily change over time is also the impetus for creating relationships of care and caring that are shaped by joy, love, tenderness, and compassion.

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

B. *Embedded Implications of Human Vulnerability*⁹¹

Ultimately, of more significance to the development of the theory than the description of human vulnerability is a second theoretical question, one that has normative implications: If to be human is to be universally and constantly vulnerable, how should this recognition inform the structure and operation of our society and its institutions?⁹² To answer this question, it is necessary to reflect initially upon the whole idea of

punishment. This Article will not explore the reconciliation of the universal vulnerable subject with what I have called the “paradox” of particularity, but those interested in this aspect should see Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 TEMP. POL. & CIV. RTS. L. REV. 307, 315–20 (2014).

⁸⁹ See Fineman, *Vulnerability and Inevitable Inequality*, *supra* note 83, at 133–34, 142 (expanding on embodied human beings being vulnerable as the basis for vulnerability theory).

⁹⁰ See Fineman, *Beyond Identities*, *supra* note 79, at 1752–53 (elaborating on internal and external life events that can positively or negatively influence our vulnerability).

⁹¹ I view both vulnerability and dependence as universal, reflecting the shared human condition that mandates that we are, of necessity, social beings. These terms do not designate individuals as aberrant and deficient but, quite the contrary, exemplify the human condition.

⁹² See Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13, 18 (2000) [hereinafter, Fineman, *Cracking the Foundational Myths*] (explaining how human vulnerability is met by the collective dependency).

society. Margaret Thatcher, in a 1987 interview in *Women's Own Magazine*, famously proclaimed there was no such thing as society:

They are casting their problems at society. And, you know, there's no such thing as society. There are individual men and women and there are families. And no government can do anything except through people, and people must look after themselves first. It is our duty to look after ourselves and then, also, to look after our neighbours.⁹³

She was making a political, not a sociological, statement reflecting her view on state responsibility (or lack thereof). However, the idea of society and how it functions in critical theory are not always obvious, and it is important to explicitly reveal the assumptions that are made. We know societies are not all the same, but they may nonetheless have universal shared characteristics. First, any society has to be intergenerational if it is going to perpetuate itself. Every society needs a means of organizing itself and establishing the rules that will guide individual interactions with each other, as well as establishing the appropriate relationship between the individual and the state. Second, every society must, of necessity, devise social institutions and relationships that respond to the realities of the human condition, which means responding to human vulnerability and dependency.⁹⁴

These two assertions about society are at the heart of vulnerability theory. The social institutions and relationships that a society forms must not only transcend the specific interests of particular individuals and groups but also have concern for the intergenerational needs of society. This societal perspective defines a preeminent social justice challenge. Vulnerability theory teaches us that human beings are all inevitably embedded within the social—located throughout our lives in particular systems of social organization. The social nature of those institutions and relationships form the basis for state, or collective, responsibility. This responsibility cannot initially or primarily be understood only in terms of individual well-being. Social justice responsibility must be intergenerational and directed to the systems of institutions and relationships developed by a society to maintain general human well-

⁹³ *Margaret Thatcher: A Life in Quotes*, THE GUARDIAN (Apr. 8, 2013), <https://www.theguardian.com/politics/2013/apr/08/margaret-thatcher-quotes> [<https://perma.cc/V5CG-LYD4>].

⁹⁴ As we have seen, contemporary politics has dictated the market and its institutions as the mechanism to provide for human needs, as well as preserving individual liberty. See discussion *supra* Section II.B.2.

being and flourishing.⁹⁵ We cannot adequately assess what is just on an individual or group basis without considering the justice of the fundamental social order. The societal problems of general organization and order must define state responsibility in the first instance.

In defining this collective responsibility, the collective reality of human vulnerability and the physical and social dependency that it inevitably generates must be of central concern. In particular, the social implications of dependency are vitally important in defining state responsibility.⁹⁶ Dependency is most evident when we are infants and children, but while we may be more or less reliant on care at any given stage, dependency is present in some form and to some degree throughout our lives.⁹⁷

C. *Inevitable and Derivative Dependency*

There are two related types of dependency relevant to vulnerability theory: inevitable dependency and derivative dependency.⁹⁸ Inevitable dependence arises from the body.⁹⁹ As embodied beings, we are inevitably dependent on physical and emotional care from others.¹⁰⁰ This form of dependency is physical and developmental and for that reason can be thought of as episodic.¹⁰¹ We are dependent on care when we are infants or children because without care we would not survive. While this

⁹⁵ See Fineman, *Cracking the Foundational Myths*, *supra* note 92, at 19 (describing the importance of caring for the young and ill through aggregate caretaking). Distortions within the system, such as impermissible discrimination, can be addressed after the general functioning is determined to be just.

⁹⁶ See Fineman, *Contract and Care*, *supra* note 80, at 1436–37 (asserting that individuals are dependent on the state, which makes the state responsible in a variety of ways).

⁹⁷ Dependency is the realization or actualization of human vulnerability and can come in economic, physical, psychological, or other institutional forms. See Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2182 (1995) (explaining how some members of society openly exhibit dependency). Dependency has typically been used as a highly stigmatized term, particularly in the context of welfare reform. See *id.* at 2193–94. 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. See *id.* at 2209 (exploring single and divorced mothers and their dependency on the state). However, a single mother who attained that status through divorce could look to her ex-husband for resources, remaining dependent on him rather than the state. See *id.* Nonetheless, the gendered social roles and expectations within the family affected the way women were seen and received in society independent of their own family situation or motherhood status. See *id.* (noting that single and divorced mothers had to sacrifice their careers if they wished to fulfil their cultural obligations).

⁹⁸ See FINEMAN, *supra* note 29, at 34–37 (discussing the two types of dependency).

⁹⁹ See Fineman, *Cracking the Foundational Myths*, *supra* note 92, at 18 (identifying the origin of inevitable dependence).

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

form of dependency may lessen or change as we reach physical and emotional maturity, many, if not most, of us will also be dependent on care from others when we are elderly, become ill, or experience some form of disability.

The inevitable dependency of the infant generates a different social form of dependency for those who undertake the essential task of caretaking. The term “derivative dependency” captures the simple, but often overlooked, fact that those who care for others are then rendered reliant or dependent on access to sufficient material, institutional, and physical resources in order to accomplish that care successfully.

Unlike the inevitable form of dependency, derivative dependency in the care context is not universally experienced.¹⁰² Caretaking is not a universal experience but has commonly been assigned to social institutions like the family, which are structured through history, ideology, and culture.¹⁰³ In the United States, the idea of public responsibility for children is not only weak but also under attack.¹⁰⁴ The construct of the family is the way we have privatized both inevitable and derivative dependency, and arguments for universal and extensive social supports—such as childcare, paid parental leave, or other social subsidies—are typically dismissed or ignored.¹⁰⁵ Nonetheless, this

¹⁰² See *id.* at 21.

¹⁰³ From a vulnerability approach, caretaking is seen as part of a developmental stage in the life span of an embodied vulnerable subject. *Id.* at 18. Caretaking is a stage reflecting the emotional and reproductive possibilities of embodiment, along with other experiences, and is the natural expression of the need for intimacy and family that all humans share. *Id.* at 22. In fact, undertaking caretaking is one way human beings may respond to the evolving need for physical and emotional connection inherent over the life span. *Id.* While we might call caretaking a “choice,” it involves a process that is essential for the reproduction of society. *Id.* In our society, both inevitable and derivative dependency are located primarily within the institution of the family, although neither the state nor the market (the corporation) could function today without the caretaking work provided by the family. *Id.*

¹⁰⁴ See Jacey Fortin, ‘Access to Literacy’ Is Not a Constitutional Right, N.Y. TIMES (July 4, 2018), <https://www.nytimes.com/2018/07/04/education/detroit-public-schools-education.html> [<http://perma.cc/C4SA-5SMB>].

¹⁰⁵ The legal literature on accommodation in the workplace is instructive. See ELINOR BURKETT, *THE BABY BOON* 183 (2000) (arguing that childless workers are stigmatized and exploited in order to accommodate parents in the workplace). For a discussion of Burkett's book, see Andrew Hacker, *The Case Against Kids*, N.Y. REV. BOOKS (Nov. 30, 2000), <https://www.nybooks.com/articles/2000/11/30/the-case-against-kids/> [<http://perma.cc/Z454-SXJL>]. See also 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*, 76 CHL-KENT L. REV. 1753, 1784–85 (2001) (claiming that state support may involve inadequate monitoring functions); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 204–05 (2001) (holding that state support of caretakers would reinforce the maternalization of women and the reproduction of capitalist society through the commodification of child-rearing and that it would be unfair to taxpayers who have no children); Amy L. Wax, *Rethinking Welfare Rights: Reciprocity*

recognition of derivative dependency reveals something about the necessity of social organization in the face of dependency. But necessity does not mean conformity.

As we know, there are significant differences across cultures and history in how social organization and institutions arise in response to vulnerability and dependency. There are also significant differences in the degree to which responsibility is considered to be individual or collective, private or public. Those differences reflect political ideology and differences in values and norms used to allocate responsibility between individuals, the state, and state institutions.

Even when there is significant agreement about the basic political values within society at any given time, political positions in regard to generalities such as equality, autonomy, liberty, and justice can diverge as different factions emphasizing the values or norms they prefer.¹⁰⁶ Nonetheless, the choices underlying those laws raise important normative questions about justice and conclusions about how things should be properly structured. In resolving these normative questions, we must be confident of the underlying empirical realities upon which our normative choices rely. This is why, unlike liberal theory, vulnerability theory asserts that in resolving these normative issues of state responsibility, human vulnerability and dependence must be fundamental.¹⁰⁷

D. *Social Institutions and Resilience*

Understanding vulnerability as inevitably arising from our embodiment and inescapably necessitating the creation of social institutions should make it clear that there is no position of either invulnerability or independence. Fortunately, however, there is resilience. Resilience is centrally important in a vulnerability analysis. Resilience is not a naturally occurring and variable characteristic of an individual, nor is it achieved only by individual accomplishment and effort.¹⁰⁸ Resilience is a product of social relationships and institutions. Human beings are not born resilient. Resilience is produced over time

Norms, Reactive Attitudes, and the Political Economy of Welfare Reform, 63 L. & CONTEMP. PROBS. 257, 262 (2000) (defending a constitutional recognition of state welfare accommodations subject to individual responsibility).

¹⁰⁶ In the United States, autonomy and independence have been emphasized over equality. See generally FINEMAN, *supra* note 29.

¹⁰⁷ See Fineman, *Cracking the Foundational Myths*, *supra* note 92, at 18–19.

¹⁰⁸ See Fineman, *Vulnerability and Inevitable Inequality*, *supra* note 83, at 146–47 (regarding resilience as something obtained over the course of a lifetime and not something a person is born with).

through social structures and societal conditions that individuals may be unable to control.¹⁰⁹

Resilience is found in the material, cultural, social, and existential resources that allow individuals to respond to their vulnerability (and dependencies).¹¹⁰ Resilience is measured by an individual's ability to survive or recover from harm or setbacks that inevitably occur over the life course. Resilience has positive manifestations as well. Resilient individuals can form relationships, undertake transactions, take advantage of opportunities, or take risks in life, confident that if they fail the challenge or meet unexpected obstacles, they are likely to have the means and ability to recover. In other words, resilience allows us to respond to life—not only to survive but also to thrive within the circumstances in which we find ourselves.

1. Resources of Resilience

Institutions are the mechanisms for individuals to accrue the resources they need to have resilience. The fact that a vulnerability analysis brings the life course into focus is also important. Resilience-conferring institutions operate both simultaneously and sequentially in society. That they are sequential is significant because it illuminates how failure to gain resources or resilience successfully in one stage can fundamentally affect the ability of an individual to succeed in another. An inadequate education will impair the ability to secure employment and accumulate material goods, which will also affect well-being later in the life course, in the context of health, family formation, and prospects in old age. The movement into a new stage depends on successful accomplishment of the tasks set in the earlier stage, and it may be difficult to recover if that does not happen.¹¹¹

¹⁰⁹ See Fineman, *Law and Politics*, *supra* note 85, at 24 (stating that resilience “is produced over time within social structures and under societal conditions over which individuals may have little control”). See also SYNESTHETIC LEGALITIES: SENSORY DIMENSIONS OF LAW AND JURISPRUDENCE 91 (Sarah Marusek ed., Routledge 2017) (citing Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 TEMP. POL. & CIV. RTS. L. REV. 307, 320 (2014) (noting that resilience is “accumulated over the course of our lifetimes within social structures or institutions over which individuals may have little control”).

¹¹⁰ See, e.g., Martha Albertson Fineman, *The Limits of Equality: Vulnerability and Inevitable Inequality*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 73, 86 n.39 (Robin West & Cynthia Grant Bowman eds.) (expanding on the list of assets identified in PEADAR KIRBY, *VULNERABILITY AND VIOLENCE: THE IMPACT OF GLOBALIZATION* (2006), and developed in Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008)).

¹¹¹ See Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights Over Children's Interests*, 46 U. BALT. L. REV. 57, 83 (2016).

The fact that institutions operate simultaneously is also significant when thinking about resilience. The family, the market, the financial and educational systems, and other social structures are the intersecting institutions through which we accumulate the material, cultural, social, and existential resources that give us resilience as individuals.¹¹² Therefore, resilience gained through one institutional or relational arrangement can offset or mitigate disadvantages in others (and vice versa). For instance, a strong family compensates for weak education, whereas a violent or abusive family undermines advantages of strong education.¹¹³

2. Social Institutions and Resilience

While it may not be explicitly focused on the vulnerability of human beings, the current political order is not dismissive of the need for social institutions.¹¹⁴ Policy pronouncements, legislative histories, party platforms, and political rhetoric have routinely recognized and celebrated the important position and function of institutions and institutional roles in society.¹¹⁵ Economic or market institutions are acclaimed as producing the economic well-being of society, with the individuals controlling them cast as wealth and job creators—entrepreneurs paving the path for economic growth and prosperity for the entire nation.¹¹⁶ The family is praised for its role in raising the next generation of citizens and caring for those at the end of life. Parents are lauded for their self-sacrificing actions, and the self-sufficient (marital) family is valorized as both a moral and an

¹¹² See *supra* note 110 and accompanying text (developing the list of resources that facilitate resilience).

¹¹³ See Fineman, *Anchoring Equality*, *supra* note 4, at 15–16.

¹¹⁴ Liberal political rhetoric reflects a greater recognition that government assistance is necessary to provide basic needs like health care and education than its more conservative counterpart. However, both guard and preserve the public/private divide.

¹¹⁵ See JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* (2011) (talking about the relationship of political institutions to inequality and wealth concentration); DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* (2012) (showing the relevance of political and economic institutions for development).

¹¹⁶ Particularly in modern capitalist societies (*i.e.*, market-oriented economies), private corporations are the main actors in deciding what, when, and how much is produced and also serve as our main employers and taxpayers. In the words of Lindblom, they are a kind of “public officials” considering that “jobs, prices, production, growth, the standard of living and the economic security of everyone *all rest in their hands*.” See CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD’S POLITICAL-ECONOMIC SYSTEMS* 172 (1977) (emphasis added).

economic ideal, uniquely qualified to attend to dependency and the needs of family members.¹¹⁷

The political and policy perception is that these institutions (among others) have a central and essential role in organizing and reproducing society, as well as providing for individuals, which serves as the rationale for protecting them from state interference.¹¹⁸ While this perception that institutions are necessary is correct, we must modify the current political dogma that places these institutions within a “private sphere,” distinguishing them from a public arena in which state action and responsibility are the norms. The failure to recognize the public purpose of these institutions (and the corresponding public responsibility for them) is not only misguided but also detrimental to the functioning of society and the welfare of many individuals within it.

That these constructed entities are deemed “private” institutions, even though we enact laws to facilitate their creation, determine their shape, terms, and responsibilities, and ease their functioning, is a paradox.¹¹⁹ They are creatures of law, brought into being by doctrines set out in corporate, family, property, employment, tax, trade, welfare, and other laws. The law determines the nature of the relationships between

¹¹⁷ See Fineman, *Contract and Care*, *supra* note 80, at 1405–06 n.10 (highlighting the family as the “quintessentially ‘private’ institution—the sphere that is theoretically protected from intervention by the state,” but “paradoxically, it is also a heavily regulated entity, with the state (through law) defining what is the core family connection and who may attain it under what circumstances”). I have discussed the invisibility of dependence within the family and the need for a collective responsibility toward care. See generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL CONTRACT, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

¹¹⁸ See generally Janet Halley, *What is Family Law?: A Genealogy Part I*, 23 *YALE J.L. & HUMAN.* 1, 1–6 (2013); Janet Halley, *What is Family Law?: A Genealogy Part II*, 23 *YALE J.L. & HUMAN.* 189, 189–95 (2013).

¹¹⁹ Robert Dahl observed that “without the protection of a dense network of laws enforced by public governments, the largest American corporation could not exist for a day.” GAR ALPEROVITZ & LEW DALY, *UNJUST DESERTS: HOW THE RICH ARE TAKING OUR COMMON INHERITANCE* 138 (2008) (quoting ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* 183–85 (1982)). Dahl also noted that the view of economic institutions as “private” is an “ill fit” for their “social and public” nature. *Id.* at 139. See also FEMINISM CONFRONTS HOMO ECONOMICUS, *supra* note 80, at 190 n.3 (“The characterization of the market in this public-private scheme is interesting. It is cast as public vis-à-vis the family but private vis-à-vis the state, seeming to gain the advantage of each category. In this regard, it is interesting that when the comparison is one of market versus family, the ‘private’ sphere of the family is subject to heavy public regulation, mostly because it retains aspects of status and is not governed by contract. In contrast, the ‘public’ arena of the marketplace is governed by bodies of designated ‘private’ law such as contract. These contrary characterizations have ideological nuances.”).

individuals within these essential social institutions, such as parent/child, employer/employee, shareholder/consumer, and so on.¹²⁰

Creating social institutions and relationships also involves defining the relationship between the state, the institutions it creates in law, and the individual. Laws and legal principles form or constrain the ongoing scope of state responsibility for social institutions once they have been created.¹²¹ In the United States, the idea of ongoing state responsibility is viewed as an exception when it comes to social institutions, particularly the market or family. For example, in the business arena the notion of the “free market” and the “efficiency” inherent in competition consistently are raised as barriers to state regulation and oversight.¹²² We have fashioned doctrines of “family privacy” and “parental rights” that deter government participation in significant and consequential decisions affecting the present and future well-being of children.¹²³ This default position of the “private” ordering system for essential societal institutions must be adjusted by recognizing the necessity of ongoing public monitoring of and oversight for these institutions. This oversight and advocacy for needed adjustments should be the primary focuses of social justice scholarship.

The law, by shaping essential social institutions and the relationships within them, dictates the basic organization of society – allocating power and privilege, as well as determining the means for individual and societal

¹²⁰ For this reason, these are examples of the laws that should be consistently and rigorously examined with principles of social justice in mind. See Fineman, *Anchoring Equality*, *supra* note 4, at 6–7. Vulnerability theory refers to these relationships as social identities. *Id.* at 15–16. They express societal expectations that govern the interaction and consequences within institutions. *Id.*; Jonathan W. Fineman, *A Vulnerability Approach to Private Ordering Employment*, in *VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK* 13, 26 (Martha Albertson Fineman & Jonathan W. Fineman eds., 2018) [hereinafter *Private Ordering Employment*]. It is also important to see how social identities may intersect in unjust ways. For example, how does the social role defined for the employee conflict with that defined for the parent? Note that this is not a traditional identity-based analysis. It is not the gender of the employee that is relevant but the societal task associated with the social role (caretaker versus employee).

¹²¹ See generally Mark Chinen, *Complexity Theory and the Horizontal and Vertical Dimensions of State Responsibility*, 25 *EUR. J. INT’L L.* 703, 704 (2014) (providing that the state is the proper subject of legal responsibility).

¹²² Politicians use arguments of liberty, equality, and contract in drafting the legal terms and consequences of employment as primarily of private concern. See *Private Ordering Employment*, *supra* note 121. The same principles are used to support the organization of corporate relationships so as to thwart regulations and oversight.

¹²³ One example of how a vulnerability analysis might address this is found in Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights Over Children’s Interests*, 46 *U. BALT. L. REV.* 57, 83 (2016) (arguing that parental rights and family privacy present an obstacle to the state bearing an educational responsibility).

well-being.¹²⁴ Both individuals and society ultimately are dependent on the successful and fair operation of society's institutions. The relationship between the individual and society is symbiotic and mutually dependent. As indicated previously, the concept of derivative dependence is important here.¹²⁵ If we are to fulfill the social roles we occupy within society, we must be able to rely on its institutions. If society is to flourish, it must rely on the success of the institutions and individuals who comprise it.¹²⁶ Individual and collective reliance on social relationships and institutions mandate that the state monitor these essential social arrangements and make adjustments when they are not operating equitably. This includes those institutions that are now classified as private, as well as those deemed public.¹²⁷ At most, social institutions can only be considered to be quasi-private.

IV. CONCLUSION

Vulnerability theory, built around the recognition of our shared vulnerability and dependence, illuminates why we need to first consider general legal institutions and relationships in determining social justice. By placing the vulnerable subject at the center of its inquiry, vulnerability theory requires that critical inquiry begin with a consideration of how society structures its institutions and relationships through law and policy. In urging us to do this before looking at how specific individuals or groups are faring within those social arrangements, the theory seeks to define and apply a legislative or administrative set of decision-making ethics, rather than setting forth a cluster of individual rights to entitlements.¹²⁸ Vulnerability theory is more focused on establishing the parameters of state responsibility for societal intuitions and relationships than it is on setting the limits of state intervention.

In taking this approach to state responsibility, vulnerability theory expands our notion of what constitutes an injury of constitutional significance to include the gross neglect or willful disregard of circumstances of profound deprivation and unmet needs on the part of

¹²⁴ See Fineman, *Equality and Difference*, *supra* note 84, at 652 (describing the relationship between states and institutions).

¹²⁵ See Fineman, *Cracking the Foundational Myths*, *supra* note 92, at 20.

¹²⁶ See *id.* at 26.

¹²⁷ See *id.* at 15 (noting the division of world and law into public and private sectors).

¹²⁸ This does not mean that an antidiscrimination analysis is not appropriate. It is merely an argument about inclusiveness and positioning. If one begins by defining a problem as one of discrimination, the resolution is inclusion of the excluded individual or group. The general nature and functioning of the social institution and relationships contained within it may then be neglected or ignored in the employment context. See Dinner, *supra* note 24.

some citizens.¹²⁹ If social institutions and relationships are formed to respond to human vulnerability and dependency, then human vulnerability and dependency should form the foundation of our social compact. This societal perspective is very different from that found in traditional social contract theory in defining state responsibility. Traditional social contract concepts are based on the idea that rational and autonomous individuals consent to cede some of their naturally endowed liberty to the (restrained) state in exchange for mutual protection in a Hobbesian world.¹³⁰ By contrast, vulnerability theory recognizes state responsibility as located within the human needs naturally arising from our universal vulnerability and dependency. State responsibility—as initially manifested in the first-order creation of social organization and rules—must continue to monitor and reform those institutions if they are going to succeed consistent with principles of social justice.

Importantly, a vulnerability approach to social justice recognizes that the relationship between the individual and the society is synergetic. As the section on institutions and resilience demonstrated, social institutions operate in integrated and sequential ways within society, and individual success depends on the successful integration and operation of those institutions. In its consideration of the role of social institutions in producing resilience, the theory also illuminates the ultimate corresponding dependence of society on the collective successes of those individuals. Just as no individual can successfully stand apart from the state and its institutions, the destiny of the state ultimately relies on the actions of the individuals within it. A social justice paradigm should encompass the whole—not just individual—parts of society. This integrated approach may require that, in some circumstances, specific interests or individual desires must be adjusted to accommodate social well-being. But this should be a process of balancing, not ignoring the respective positions of everyone involved in any situation.

Law is a primary way in which we order society and structure its synergetic relationships. It provides the rules governing individuals in their interactions with each other but also defines the relationship between the individual and the state—including the state's responsibility to the individual and the individual's responsibility to the state. Policies and

¹²⁹ See Fineman, *Responsive State*, *supra* note 6, at 254–55 (explaining that the United States provides no constitutional guarantee for basic social goods).

¹³⁰ The fact that some individuals will succeed and even thrive in this type of Hobbesian world is not surprising. They do so by exploiting and dominating others, including governing structures. See, e.g., Henrik Sætra, *The State of No Nature – Thomas Hobbes and the Natural World*, J. INT'L SCI. PUBL'NS: ECOLOGY & SAFETY, June 2014, at 177, 184, 187 (discussing whether a Hobbesian society will care for or exploit resources and later arguing that “a state not built to be secure, can fall at any time”).

laws must construct and sustain an adequately responsive state – one that is grounded in vulnerability, addresses the range of dependencies inherent over the life course, and is attentive to all stages of development and forms of need. Following that path is the route to the realization of a robust and comprehensive sense of social justice.

