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WHAT CAN WE LEARN FROM VULNERABILITY THEORY?

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Abstract

Martha Albertson Fineman frames philosophies of justice, freedom, equality, and human nature alongside original insights about the role of vulnerability and institutions in people's lives to argue for increased government intervention. The conglomeration of these ideas form vulnerability theory, an emerging legal theory providing a loose framework for evaluating and creating public policy. The following article can be broken down into two parts. The first part defines vulnerability theory by identifying, evaluating, and discussing the interaction among the five major components of vulnerability theory: the rejection of the liberal subject in favor of a vulnerable subject, the universality and constancy of vulnerability, the role institutions play in mitigating vulnerability, the movement from formal equality to substantive equality, and the call for increased government intervention. The second part evaluates Nina Kohn's criticism of vulnerability theory to help determine three important insights, or features, of the theory. First, with some slight adjusting, it helps establish a new, more desirable "post-identity approach" as a goal for public policy; second, it provides a compelling narrative for expanding the role of government; and third, it directs policymakers' attention toward a potentially promising new method for achieving a more substantive equality.

Keywords: Vulnerability Theory, Vulnerability, Public Policy, Law

I. Introduction

On December 22, 2017, President Donald Trump signed the Tax Cuts and Jobs Act. Speaker of the House Paul Ryan praised the act: “Today is about how much better things can be: More jobs, fairer taxes, and bigger paychecks.”¹ President Trump joined in on the excitement: “. . . [I]t set off a tidal wave of good news that continues to grow every single day. Before the ink was dry, companies were announcing thousands and thousands of new jobs and enormous investments to their worker.”² Others, such as Senator Elizabeth Warren, saw the passage of the bill in a different light: “I’m telling you, today, given the evidence, given what this tax bill looks like, that is an insult to working families across America.”³ The difference in opinion is caused by fundamentally different conceptions of justice, freedom, equality, and human nature. These abstract philosophical foundations have immediate, large-scale implications for society because these views are applied in the creation and passing of impactful laws. The abstract becomes tangible. The ideas become reality.

In the spirit of making an impact through ideas, Martha Albertson Fineman has created an abstract approach to law and public policy called “vulnerability theory.”⁴ This emerging legal theory draws from philosophies of justice, equality, and human nature to argue for a larger, more active government. Vulnerability theory has value as an overarching framework for creating and evaluating public policy. In the following paper, I will argue vulnerability theory helps establish a

¹ Speaker Paul Ryan, Press Release, *Speaker Ryan’s Floor Remarks on the Tax Cuts and Jobs Act* (2017), available at <https://www.speaker.gov/press-release/speaker-ryans-floor-remarks-tax-cuts-and-jobs-act>.

² President Donald Trump, Speech in Blue Ash, Ohio, *Remarks by President Trump on Tax Reform* (2018), available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-tax-reform-3/>.

³ Judy Woodruff interviewing Elizabeth Warren, *Sen. Elizabeth Warren: GOP tax plan is giveaway to giant corporations, not middle class*, PBS News Hour (2017)

Transcripts from an interview on PBS News Hour with Judy Woodruff

⁴ Martha Albertson Fineman is the Robert W. Woodruff Professor of Law at Emory Law School. She founded and directs both the Vulnerability and the Human Condition Initiative and the Feminism and Legal Theory Project.

new, more desirable “post-identity approach” as a goal for public policy; provides a compelling narrative for expanding the role of government; and directs policymakers’ attention toward institutions, a potentially promising new method for achieving a more substantive equality.

To accomplish this task, I will divide the paper into two primary sections:

1. Give a comprehensive overview of vulnerability theory, emphasizing its weaknesses and strengths in the discussion. The definition will be structured into five components and will establish vulnerability theory as a compelling narrative and illustrate its promising institutional focus.
2. Use Nina Kohn’s critique of vulnerability theory to discuss the theory’s limitations in terms of its lack of specificity, violations of autonomy, and inconsistency in its applicability. Through this discussion, the value and limitations of the post-identity approach will be outlined.

II. Vulnerability Theory – Explained

Vulnerability theory is an emerging legal theory that argues for a larger, more active state. Fineman paints a picture of humans as universally and constantly vulnerable, heavily impacted by societal institutions giving (or not) them the resources allowing them to fend for themselves.⁵ From this insight, the theory argues the government should change the unit of analysis used in policymaking from a traditional liberal subject to a deeply dependent vulnerable subject, and the government should strive to achieve a more substantive equality through a more responsive state.⁶

⁵ See generally Martha Albertson Fineman, *Fineman on Vulnerability and Law*, New Legal Realism Conversations (2015), available at: <https://newlegalrealism.wordpress.com/2015/11/30/fineman-on-vulnerability-and-law/>. [hereinafter Fineman, *On Vulnerability and Law*] This blog post is the best way to gain a loose grasp of vulnerability theory. The post, however, is far from all-encompassing.

⁶ *Id.*

To gain an understanding of the power and practicality of vulnerability theory – or lack thereof – is no small feat. To help the readers gain a comprehensive understanding of the subject, the explanation of vulnerability theory has been divided into five components. The first four components are central claims of vulnerability theory: the rejection of the liberal subject in favor of a vulnerable subject, the universality and constancy of vulnerability, the role institutions can play in mitigating vulnerability, and a movement from formal equality to substantive equality. The final component outlines the logical conclusion of these four claims – that the state should play a larger and more active role in our lives.

These components sometimes build off one another and support one another. Do not, therefore, see these claims in silos or in some logical order (except the final component), but rather consider how they interact in ways to collectively argue for a more responsive state. The interactions among the five components will be indicated as they occur in the following five sections.

A. Rejection of the Liberal Subject

Vulnerability theory rejects the more traditional and common liberal subject in favor of a vulnerable subject. Liberalism, the guiding philosophy behind the liberal subject, has a long, rich history in the United States.⁷ The impression John Locke left on the Founding Fathers has lasted two and a half centuries.⁸ So many of the social and political philosophers praised today – John Locke, Adam Smith, Jean-Jacque Rousseau, Immanuel Kant, John Stuart Mill, Robert Nozick,

⁷ See Louis Hartz, *The Liberal Tradition in America* (1955). In this classic political science book, Louis Hartz, a 1956 American Political Science Association's Woodrow Wilson Prize winner, explores the role liberalism has played in the history of the United States. Hartz argues that a primary reason communism and fascism did not take root in America is the pervasiveness of John Locke's liberal philosophy in American politics. Hartz sees the history of American politics as remarkably narrow, with the primary political parties well within the Lockean liberal tradition.

⁸ *Id.*

John Rawls – are entrenched in the liberal tradition. This liberalism, importantly, is different from the Liberalism used in American politics today. On the American political spectrum, Liberalism is associated with the Democratic Party and pitted against Conservatism and the Republican Party. Despite the clear differences in platforms, both Liberalism and Conservatism derive much of their conclusions from the baseline political philosophy of liberalism and remain almost entirely consistent with liberalism.⁹ Vulnerability theory does not address the Liberalism associated with the American political spectrum; instead, vulnerability theory is concerned with the liberal subject, or a particular set of assumptions placed on the individual that flow from the broader political philosophy of liberalism.

Liberalism comes in many different forms. Egalitarian Liberalism and Libertarian Liberalism hold the same starting assumptions identified in the following definition of liberalism but arrive at distinctly different conclusions.¹⁰ Liberalism, as it will be used in this paper, will refer in the broadest sense to encompass both ideologies. Borrowing from Michael Sandel and Martha Nussbaum, liberalism, at its core, is the claim that our society consists of a group of distinctly separate individuals, each individual deriving equal worth from his/her power to make choices in

⁹ *Id.* Liberals and Conservatives on the American political spectrum tend to place tremendous value in individual choice. The value of individual choice in American politics can perhaps best be displayed in the two parties' stance regarding health care. Conservatives hated the Liberal-supported Affordable Care Act (ACA) in part because of the individual mandate, a component of the law that coerced individuals into buying some type of healthcare coverage or face a fine. But the ACA retained about as much choice as possible when compared to some of the alternative systems of healthcare found in Europe. See generally Cass Sunstein and Richard Thaler, *Nudge: Improving Decisions about Health, Wealth and Happiness*, (2008). Sunstein and Thaler work hard to find creative ways to implement societally beneficial policies that maintain people's beloved choice. If liberalism were less dominant in American politics, their argument would be far less important.

¹⁰ See Michael Sandel, *Democracy's Discontent*, 11 (1996) [hereinafter, Sandel, *Democracy*]

his/her attempt to achieve his/her goals in life.¹¹ The law, it follows, should treat people accordingly.¹²

Vulnerability theory does not, however, launch its attack against the liberalism defined by Sandel and Nussbaum.¹³ While some central claims of vulnerability theory closely echo classic critiques of liberalism – such as the feminist critique¹⁴ or the “sociological objection”¹⁵ –

¹¹ See Martha Nussbaum, *The Feminist Critique of Liberalism*, The Lindley Lecture (1997) at 4. [hereinafter Nussbaum, *Feminist Critique*] Nussbaum suggests that for individuals, “the power of moral choice within them” is what gives them equal worth. To Nussbaum, this seemingly uncontroversial claim is the core of liberalism. See also Sandel, *Democracy*, *supra* note 10 at 3-13. See also Michael Sandel, *Liberalism and the Limits of Justice*, 1 (1982). Sandel dedicates many pages breaking down liberalism in different ways, but the core of the idea remains the same and is echoed in the definition above.

¹² But what kind of law flows from these starting assumptions? Exactly. See Sandel, *Democracy*, *supra* note 10 at 11. Egalitarian liberals use liberalism to argue for increased government intervention, arguing that the government must give people a minimum level of support so that people can have the capacity to make genuine choices and the realistic means to pursue their own conception of the good life. Libertarian liberals, on the other hand, believe that there should be very limited government intervention because any kind of intervention strips away people’s ability to make choices and pursue their own ends. The starting assumption of liberalism, therefore, should not suggest a specific type of public policy. Liberalism can be used to advocate for pretty much anything.

¹³ See generally Martha Albertson Fineman, *The Autonomy Myth* (2004) [hereinafter Fineman, *Autonomy Myth*]. In this 300-page book, the word “liberalism” cannot be found (at least not in the index). While Fineman does address the likes of Rawls, Nozick, and Locke, she does so for only several pages. There is no attempt to break down liberalism; Fineman is simply trying to break down our natural notions of autonomy. Our belief in autonomy may be a result of liberalism, but that does not mean Fineman rejects liberalism. See also Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *Yale J.L. & Feminism* 19 (2008) [hereinafter Fineman, *Vulnerable Subject*]. Fineman acknowledges that some may be concerned that “attacks on the liberal subject destabilize liberalism itself.” However, she believes this concern is ultimately unfounded.

¹⁴ See Nussbaum, *Feminist Critique*, *supra* note 11, at 5-6. Nussbaum defends liberalism from three common critiques of feminism. The critiques are:

Feminists have made three salient charges against this liberal tradition as a philosophy that might be used to promote women's goals. They have charged, first, that it is too “individualistic”: that its focus on the dignity and worth of the individual slights and unfairly subordinates the value to be attached to community and to collective social entities such as families, groups, and classes. They have charged, second, that its ideal of equality is too abstract and formal, that it errs through lack of immersion in the concrete realities of power in different social situations. Finally, they have charged that liberalism errs through its focus on reason, unfairly slighting the role we should give to emotion and care in the moral and political life.

Vulnerability theory’s critique of the liberal subject seems to fall squarely in the realm of the first and second feminist critique Nussbaum identified. Vulnerability theory ultimately argues, much like the first critique, for public policy based on social relationships instead of separate individuals – a view Nussbaum argues fails in that it “is unlikely that liberal ends will be effectively served by collectivist means.” Nussbaum goes on to accept many of the feminist critiques, but she argues that these critiques can be accommodated for within liberalism (i.e. liberalism can learn from the critiques). Fineman’s critique should be seen in the same way Nussbaum sees the feminist critiques.

¹⁵ See Sandel, *Democracy*, *supra* note 10, at 11-13. The sociological objection, as described by Sandel, argues that a truly independent self cannot exist because we are so heavily influenced by our surroundings from birth. There is

vulnerability theory focuses exclusively on one common conclusion or assumption that stems from liberalism – American individualism.¹⁶ Individualism is the belief that individuals are distinctly separate, autonomous components of society who are capable and ultimately responsible, through rational choice, of determining and controlling the direction of their lives.¹⁷ Liberalism, as defined in the prior paragraph, is different than American individualism because liberalism, while emphasizing the importance of individuals and their power of choice, does not assume individual choices determine the course of people’s lives. The liberal subject, then, is not the subject perceived by all conceptions of liberalism, but rather a subject perceived by the conceptions of liberalism that support the assumptions of American individualism.

The alternative to this individualistic conception of human nature, the vulnerable subject, is driven by two primary insights: the presence of universal and constant vulnerability and the large role institutions play in our lives.¹⁸ The vulnerable subject does not have the power to dictate

no “self” that can be found because we are unable to fully shake the imprint of our conditioning. People are social by their very nature. It does not make sense to conceive of an independent, agency-filled subject once it is acknowledged that these subjects are not independent. While the sociological objection uses the term “conditioning” to describe the external forces that eliminate selfhood, vulnerability theory uses the term “institutions” to describe these external forces. In both critiques, the idea that individuals are independent is questioned by claiming individuals are products of their surroundings. Vulnerability theory, however, differs in that it does not suggest the impact institutions play on people’s lives eliminates the possibility of an independent self. The third component in the definition of vulnerability theory, Section II-C: *The Role of Institutions in Our Lives*, further discusses the idea of independent selves who are still shaped by institutions.

¹⁶ See Fineman, *Autonomy Myth*, *supra* note 13, at 9. Autonomy, while in some ways is seen interchangeably with individualism, is defined here as a lack of dependence. This lack of dependence implies individuals are not impacted significantly by outside forces, and therefore individuals are responsible for the outcome of their lives. Fineman suggests that this human nature assumption results in policies and laws (e.g. Bill of Rights) based on negative liberty (i.e. “freedom from”). See also Fineman, *Vulnerable Subject*, *supra* note 13 at 26. Fineman suggests the liberal subject is a combination of autonomy, personal responsibility, and self-sufficiency. These ideas, collectively, are synonymous with individualism as defined above.

¹⁷ *Id.*; See also M Neil Browne and Mary Allison Smith, *Mobbing in the Workplace: The Latest Illustration of Pervasive Individualism in American Law*, 12 Em. Rts. & Emp. Pol’y J. 131 (2008). Browne and Smith stress the importance of self-reliance to the idea of individualism. They argue that Canadian individualism and American individualism both place a heavy emphasis on becoming “self-reliant;” the key difference being that American individualism, unlike Canadian individualism, actually believes that most people are genuinely self-reliant.

¹⁸ See Fineman, *On Vulnerability and Law*, *supra* note 5.

the course of his/her life through independent choices. The course of people's lives is determined by the assets, capacities, or resilience gained through a complex set of interactions with societal institutions.¹⁹ To borrow from Elizabeth Anderson, people do not have access to functioning by simply being born; autonomy is achieved once people have access to a desirable level of functioning.²⁰ In other words, the set of assumptions attached to the liberal subject are in certain ways realistic, but they are achieved only through the support of institutions. The following two sections – the *Universality and Constancy of Vulnerability* and *The Role of Institutions in Our Lives* – will further illustrate vulnerability theory's new legal subject, the vulnerable subject.

B. Universality and Constancy of Vulnerability

Different academic fields see the nature of vulnerability in different ways. The literature about the environment uses the concept of vulnerability to determine which aspects of an environmental system are susceptible to harm and how much harm is likely to be incurred.²¹ A vulnerability framework has emerged in the information technology (IT) field to identify weaknesses in security systems.²² Consumer vulnerability is used to identify transactions or markets in which consumers are particularly harmed by asymmetric information.²³ These three fields use the concept of vulnerability to identify areas, systems, or groups of people that are

¹⁹ *Id.*

²⁰ Elizabeth Anderson, *What is the Point of Equality?*, 109 *Ethics* 287-337 (1999), at 318.

²¹ See Ira Feldman and Joshua Kahan, *Preparing for the Day After Tomorrow: Frameworks for Climate Change Adaptation*, Sustainable Development Law and Policy (2007); see also B.L. Turner II, et. al., *A framework for vulnerability analysis in sustainability science*, PNAS (2003); see also W Neil Adger, *Vulnerability*, Global Environmental Change (2006).

²² See Robert Boyce, *Vulnerability Assessments: The Pro-active Steps to Secure Your Organization*, SANS institute, (2001); see also *Vulnerability Assessment*, Techopedia; see also Xiuzhen Chen et. al, *An OVAL-based active vulnerability assessment system for enterprise computer networks*, Inf Syst Front (2008).

²³ See Ryan Patrone, *Linking Past and Present: Assessing the Stability of Post-Title VII Derivative Markets*, NYU Journal of Law & Business (2016); see also Lisbet Berg, *Consumer Vulnerability: Are Older People more Vulnerable as Consumers than Others?*, International Journal of Consumer Studies (2015); see also Kuan-Pin Chiang and Anita Jackson, *Consumer Vulnerability in the Context of Direct-to-Consumer Prescription Drug*, International Journal of Healthcare Management (2012).

especially, or uniquely, vulnerable. Vulnerability theory, however, sees vulnerability more broadly: vulnerability is universal and constant.

Fineman makes the claim that vulnerability is universal, “. . . [I]nherent in the human condition.”²⁴ Unlike the conceptions of vulnerability in other fields, vulnerability is not reserved for special groups. Everyone is vulnerable. For example, consumers lack the information necessary, on their own, to prevent them from consuming a harmful product.²⁵ Consumers cannot possibly know the names and functions of the ingredients in the food they buy, the chemical compounds in the medicine they take, and the meaning of the fine print in their mortgage. Some people may be more equipped than others to understand the reality of these transactions, but even the experts are still vulnerable to a certain extent. Vulnerability is not only experienced universally, vulnerability is experienced constantly. People cannot escape vulnerability; they are vulnerable from birth until death because people are unavoidably embedded in a variety of dependencies.²⁶ Events beyond human control could harm all of us, and in some instances – such as a natural disaster, disease, or economic collapse – there is nothing we can do to completely eliminate our susceptibility to harm.

The universality and constancy of vulnerability is important for two related reasons. First, establishing a shared vulnerability among everyone in a population is rhetorically and logically effective at arguing for a larger role for the state – the goal of vulnerability theory. In the words of Frank Rudy Cooper: “. . . [S]ince we cannot escape our inevitable dependency, we might as well band together to fight for a strong state.”²⁷ The second reason the universality and constancy of

²⁴ See Fineman, *Vulnerable Subject*, *supra* note 13, at 1.

²⁵ *Id.* at 24

²⁶ See Fineman, *On Vulnerability and Law*, *supra* note 5.

²⁷ See Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N.C.L. Rev. 1339 (2015), at 1371 [hereinafter, Cooper, *Always Already Suspect*]. Cooper, a Law Professor at Suffolk University, revises

vulnerability is important is because the claim that all people are vulnerable and dependent upon relationships and institutions lies in contradiction to the individualistic conception of the liberal subject.²⁸ Vulnerability theory aims to move away from the liberal subject toward the vulnerable subject, and the universality and constancy of vulnerability helps the theory get there. In other words, universal and constant vulnerability are essential characteristics of the vulnerable subject – the subject at the center of vulnerability theory. This latter point supports the former point because moving toward the vulnerable subject suggests government intervention is more necessary and reasonable. Of course, the mere acceptance of the universal and constant nature of vulnerability does not require government action, but the claim helps move us a bit closer to that conclusion.

The conception of vulnerability that has been discussed thus far, however, is not complete. Even if vulnerability is universal, surely everyone does not experience vulnerability in the same way (or to the same extent). The investor who diversifies his/her portfolio surely is not equally vulnerable to the investor with all his/her money in the housing market. In the language of vulnerability theory, the person with the diversified portfolio is not less vulnerable, but rather more resilient.²⁹ Resilience is synonymous with capacity. The person with the diversified portfolio is, by the language of vulnerability theory, equally vulnerable as the person with their money in the housing market. The person with the diversified portfolio, however, is more equipped, or has more capacity, to overcome the vulnerability. Is “more resilient” essentially the same as “less vulnerable?” Yes. But distinguishing between resilience and vulnerability helps vulnerability

vulnerability theory to avoid its potential to advocate for racial profiling. Through this revision, he more broadly evaluates vulnerability theory. In this specific case, he is advocating for the utility of recognizing the constancy of the vulnerability experienced by everyone.

²⁸ If we are universally and constantly vulnerable, our rational decisions are less likely to dictate the course of our lives. As established in the prior component, we know that Fineman and vulnerability theory reject individualism as an accurate depiction of people’s lives.

²⁹ See Fineman, *Vulnerable Subject*, *supra* note 13, at 14-15. Fineman is careful to distinguish between vulnerability and resilience so that she can establish vulnerability as a universal.

theory stress the idea that vulnerability is inevitable and shared. In other words, no one is immune from vulnerability. And as stated earlier, establishing a shared, universal vulnerability helps Fineman argue that the government must do more to build resilience.

Resilience, the capacity to overcome or resist vulnerability, is built and destroyed through societal institutions. The following component argues that institutions play an overwhelmingly important role in our lives, and it is these institutions to which we must turn to address the universality and constancy of vulnerability.

C. The Role of Institutions in our Lives

Most people in the developed world entered the world in a hospital. Our early years are spent with our family. Many of us soon joined a daycare, and ultimately, we all entered school. Following high school, many of us chose to move on to college. And those of us who chose not to go to college likely entered the workforce. After forty to fifty years working, we enter retirement – a world where pensions, social security, and nursing homes are commonplace. And throughout this entire journey, we act as consumers and citizens, buying the food, shelter, and material goods needed to live our lives and acting within the law to avoid imprisonment.

The hospital of our birth is regulated by the state to ensure our safety during a dangerous time.³⁰ Our family structure is secured, legitimized, and sometimes made easier by the state through variety of laws and regulations.³¹ Daycares must follow a whole host of laws to establish

³⁰ See US Department of Health & Human Services, available at: <https://www.hhs.gov/regulations/index.html> for an expansive list of laws regulating hospitals. If you are looking for specifics, the Health Insurance Portability and Accountability Act (HIPPA) of 1996 is one place to start.

³¹ The family is legitimized by marriage and child custody laws. The family is regulated in custody battles and cases of child abuse and neglect. The institution of family is made easier because of child tax breaks and generous marital deductions. See Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 387 Utah L. Rev. (1993). Fineman is concerned about family law becoming outdated, hurting women and their children. Her argument illustrates how even the institution of the family, traditionally seen as a private

legitimacy.³² Schools, of course, are established, run, and regulated by state governments. Universities are also established, run, and regulated by state governments.³³ Our pay, working conditions, and place of work are regulated by many different state and federal laws.³⁴ A set of laws regulate pensions,³⁵ the federal government created and runs the Social Security System, and much like hospitals, nursing homes are subject to heavy regulation.³⁶ As consumers throughout this life, we are protected, or left to fend for ourselves, by the state. As citizens, we must act within the confines of the law (established by the state) or face punishment from courts (established by the state) and be sent to prison (established by the state).

Our lives are inescapably and relentlessly intertwined with state institutions. While the specific example above is relatively confined to middle and upper-class experiences in the developed world, everyone is deeply dependent and intertwined with institutions of some kind.³⁷

institution, is deeply impacted by laws and regulations. See also Daniella Cutas and Sarah Chan, *Families – Beyond the Nuclear Ideal*, Bloomsbury (2012), at 1. The argument aligns closely with Fineman’s argument, claiming that the law: “determines whose private life is more, or less, scrutinized; who can be a parent and what sorts of organization of private and family life are encouraged, tolerated or even allowed at all; which associations will be supported, both socially and materially; and so on.” See also Patricia Strach and Kathleen S. Sullivan, *What the Institution of Family Tells Us about Governance*, 64 *Political Research Quarterly* 94-106 (2011), at 95. Strach and Sullivan argue the family is a critical legal institution less private than traditionally conceived, claiming family plays an “important role in achieving public policy aims.” Collectively, these three sources help illustrate the importance of government in creating, perpetuating, and using family structure. These sources suggest the family may not rest exclusively in the private sphere.

³² Licenses and regulation of child care are handled at the state level. In Pennsylvania, for example, a member of their Department of Human Services will inspect the facility at least once every twelve months. PA Code § 20.31 (2008).

³³ If you are saying “but what about my private university?” you should consider how frequently the students at these universities are participants in various federal financial aid programs. The state may not have created all universities, but the state plays an important role in all universities’ existence.

³⁴ The Occupational Safety and Health Administration (OSHA) has jurisdiction over everyone. Additionally, federal and state minimum wage laws are unavoidable. Plus, the National Labor Relations Act (NLRA) gave workers collective bargaining rights.

³⁵ The Employee Retirement Income Security Act of 1974 (ERISA) helps vulnerable employees avoid exploitation through a misuse of their retirement funds.

³⁶ The Nursing Home Reform Act (NHRA) of 1987 was passed to help curtail abuse.

³⁷ State created, enforced, and/or legitimized institutions such as family, education and economic structure, however locally organized, are unavoidable. In this sense, one cannot go through life without interacting with a substantial number of institutions that are somehow connected to the government.

These institutions give people the capacity to overcome vulnerability.³⁸ Rereading the last two paragraphs, one should begin to question whether the rational, liberal subject should be the starting assumption in the creation of laws given how prevalent external institutions are in our lives. Agency becomes less realistic after accepting how frequently people are impacted by external forces. And even those people who achieve agency seem to have accomplished the feat through societal institutions. We, people, are deeply vulnerable, reliant upon institutions for our survival. These state-enforced institutions give us the capacity to make decisions, find happiness, flourish, and live meaningful lives.

Perhaps the most critical point of vulnerability theory is that institutions are responsible for building resilience. While we are all vulnerable, our differences lie in our changing, unequal levels of resilience.³⁹ This institutional role in building resilience is not a claim unique to vulnerability theory. Fineman makes this claim with the help of Peadar Kirby and his work with resilience.⁴⁰ Kirby identifies three qualities of resilience, or assets, that institutions build in people: physical, human, and social.⁴¹ Kirby's work helps illustrate just how impactful institutions are in people's lives. Schools, healthcare, and family all build different types of resilience in different ways. In vulnerability theory, the line between public and private institutions is heavily blurred (notice the use of "family" as an institution).⁴² People are heavily intertwined and dependent upon institutions, and it is through these institutions that people gain autonomy.

Taking one small step further, we begin to see the role the state plays in producing inequality. The state creates inequality because the state is responsible for dispersing the assets

³⁸ See Fineman, *Vulnerable Subject*, *supra* note 13, at 13.

³⁹ *Id.*

⁴⁰ See Peadar Kirby, *Vulnerability and Violence* (2006).

⁴¹ See Fineman, *Vulnerable Subject*, *supra* note 13 at 13-14 in reference to *Id.*

⁴² For a discussion about the public nature of the institution of the family see *supra* note 31.

that leave some rich and resilient and some poor and unequipped to live a life of vulnerability. Moving away from the liberal subject – a perspective that suggests individual choices are the cause of inequality – and stepping into the vulnerable subject – a perspective that suggests the state is the cause of inequality – is remarkably powerful. The state can and should address this unjust distribution of assets through the very institutions that are causing the injustices.⁴³ Vulnerability theory justifies the call for increased government intervention through a rejection of the traditional liberal subject and a new conception of equality.

In response to the call for increased government intervention, libertarians could argue that the government should scale back substantially because the government is causing the inequality. While a full-fledged, detailed response to this libertarian objection is beyond the scope of this paper, the more immediate response of vulnerability theory is relatively clear. Scaling back the government substantially is undesirable because the conception of liberty that society should shoot for requires assets and capabilities that must be built through institutions. The liberal subject is a myth, and genuine autonomy cannot be achieved on a semi-equal scale in a world without an active government.⁴⁴ The libertarian objection, therefore, seems to fall short.

From the vulnerability theory perspective, institutions are the source of inequality and the solution to reducing inequality is through more – not less – government. This perspective, however, seems a bit incomplete, as readers are still left wondering exactly how far institutions should go to correct injustices. Vulnerability theory responds to this concern by arguing the government must ensure a more just distribution of assets through its institutions. The fourth component of vulnerability theory, the movement from a formal to a more substantive equality,

⁴³ *Id.*

⁴⁴ The conceptions of liberty and equality that stem from vulnerability theory and the vulnerable subject are discussed at length in the following component: *Substantive vs. Formal Equality*.

helps us determine what just institutions look like by establishing a goal, albeit a still somewhat ambiguous one, for public policy.

D. Substantive vs. Formal Equality

Liberalism made the radical claim that all humans are of equal worth.⁴⁵ The Founding Fathers embraced the claim, using the Declaration of Independence to express one of the sentiments of liberalism: “All men are created equal.” The Bill of Rights echoed many of these sentiments as well, advocating for equal treatment of speech and religion. And while the actions of American leaders proved to be deeply hypocritical to these legendary documents for at least two centuries, the America of today has finally begun, at least to some extent, to formally accept liberalism’s radical claim. The formal acceptance of this version of equality, however, does not go far enough. From a vulnerability theory perspective, equal treatment is profoundly different from equal opportunity.

To gain a better understanding of the sense of equality that vulnerability theory embraces, we must first understand the sense of equality vulnerability theory is rejecting. Vulnerability theory is rejecting the formal, equal treatment style of equality popular in America and our Founding Father’s version of liberalism.⁴⁶ Formal equality is the application of laws to all persons equally, leaving each individual free to fully exercise their rights.⁴⁷ This sense of equality embraces a

⁴⁵ See Nussbaum, *Feminist Critique*, *supra* note 11 at 4.

⁴⁶ See Hartz, *supra* note 7 for an extensive discussion about the influence of Lockean liberalism on the Founding Fathers. This version of liberalism paints humans as free, rational, and fundamentally good beings who have the God-given right to be free. It should not come as a surprise that the liberalism that emerged from a revolution had a strong tinge of anti-government sentiment. This book suggests many elements of this Lockean liberalism are still influential today.

⁴⁷ See U.S. Const. amend. XIV, § 1. Section 1 of the Equal Protection Clause states:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

negative conception of liberty and rests on the assumption of American individualism.⁴⁸ From a negative liberty perspective, genuine liberty is achieved when there are no formal barriers or constraints on individuals.⁴⁹ I have negative liberty when no person, government, or institution is preventing me from going to a hockey game. If someone locks me to a chair, the ice arena refuses to let me in, or the government prevents the game from happening, my negative liberty has been violated. From an American individualistic perspective, so long as people are formally treated equal, equal opportunity is achieved because everyone is given the same theoretical set of choices, and it is through these choices that people dictate the course of their lives. From these two starting assumptions, formal equality is both equal treatment and equal opportunity. Justice is being served when the government restrains from restricting individual liberty. As established in the first three components, however, vulnerability theory rejects the liberal subject in favor of a vulnerable subject.⁵⁰ Vulnerability theory's conception of equal opportunity, therefore, is much different from the more popular conception of equality found in the United States today.

Vulnerability theory drives “. . . [T]oward a more substantive vision of equality.”⁵¹ A more substantive equality would go beyond the equal right to choose. Substantive equality embraces a positive conception of liberty and rests on the assumption that institutions, or external factors

How does this law protect the vulnerable? It prevents states from actively creating laws that discriminate against citizens. For example, the XIV Amendment helped strike down school segregation laws. See also *Brown v. Board of Education*, 347 U.S. 483 (1954). This landmark case shows an example of the XIV Amendment being used to achieve greater equality. The amendment could be effectively used because specific state laws actively segregated schools. See also Martha Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. Rev. 1713 (2012) [hereinafter Fineman, *Beyond Identities*]. Fineman argues that the US Constitution's current conception of equality, driven by the Bill of Rights and the Equal Protection Clause, is embarrassing and dated. Other countries guarantee rights to social and economic goods while the US Constitution is focused exclusively on treating people equally and making sure laws do not treat certain protected groups unfairly.

⁴⁸ See Fineman, *Vulnerable Subject*, *supra* note 13, at 2.

⁴⁹ See Ian Carter, *Positive and Negative Liberty*, Stanford Encyclopedia of Philosophy (2016).

⁵⁰ See Fineman, *Vulnerable Subject*, *supra* note 13.

⁵¹ *Id.* at 1.

beyond our control, are the driving force behind the course of people's lives.⁵² From a positive liberty perspective, people are free when they have the genuine capacity to dictate the course of their lives.⁵³ I have positive liberty if there are no external barriers preventing me from going to the hockey game, and I additionally must have the ability to get to the ice arena and the money to buy a ticket. Merely treating everyone the same is not a genuine freedom because some people are not capable of leading a meaningful life on their own, particularly if they have faced any sort of adversity.⁵⁴ From an anti-individualistic (i.e. external factors have a large impact on the course of our lives) perspective, formal equality is not desirable because eliminating constraints and giving people choices does not address their vulnerability to institutions. A more substantive equality would take the insights of vulnerability theory, strive for a more positive liberty, and reject individualism to achieve a more genuine sense of equality.⁵⁵ Fineman argues that the United States Constitution does not go far enough to be used as a model for equality.⁵⁶ From the vulnerability theory perspective, the refusal to grant positive rights, such as the right to shelter, is indicative of an inadequate understanding of the role vulnerability and institutional dependency play in our lives.⁵⁷ The United States cannot achieve equality by allowing the institutions they create to behave

⁵² *Id.* Using "driving force," I am suggesting that institutions shape people's lives. This point is argued in the prior component of this article and in almost all of the articles about vulnerability theory.

⁵³ See Carter, *supra* note 49.

⁵⁴ See Janet Currie and Erdal Tekin, *Does Child Abuse Cause Crime?*, National Bureau of Economic Research Working Paper No. 12171 (2006). Currie and Tekin found a clear link between child abuse and the likelihood of committing a crime in the future. Proponents of formal equality would theoretically be far less likely to support public policy raising the taxes on a wealthy segment of the population to fund programs for the abused children. Proponents of substantive equality are quicker to recognize that institutions beyond our control have huge consequences on the course of our lives, and to achieve equality, we need the government achieve a more genuine equality because a completely hands-off approach results in undesirable situations, such as letting abused children fend for themselves when they reach adulthood.

⁵⁵ See Fineman, *Beyond Identities*, *supra* note 47,47 at 1744-1745. Fineman points to South Africa, Canada, and the International Covenant on Economic, Social and Cultural Rights (ICESR) as models for a new conception of equality. Some of their rights include the right to work in a safe environment and the right to food and shelter.

⁵⁶ *Id.*

⁵⁷ *Id.* As has been stressed several times, if we accept that individuals are deeply embedded in a variety of institutions that shape the direction of their lives, a "hands-off" conception of equality becomes far less desirable.

unjustly while refusing to intervene in the name of negative liberty. Instead, the state should take responsibility for its institutions and ensure that people are being given a more genuine equal opportunity.

One important way to see the difference between formal and substantive equality is to understand how clear the difference is between the perceptions of the value of “equal opportunity” from the two competing conceptions of equality and liberty. From the American individualistic and formal equality perspective, equal opportunity is synonymous with equal treatment. From a vulnerability theory perspective, however, equal opportunity must account for factors beyond an individual’s control and advocate for more positive rights.⁵⁸ The vulnerability theory approach to equal opportunity would advocate for a more substantive equality, an equality that understands the role institutions play in our lives and gives people the more equal capacity to achieve their goals.

E. A More Responsive State

The goal of vulnerability theory, in the simplest terms possible, is to argue for a more responsive state. Resting on the values of fairness, a more genuine equal opportunity, and a positive conception of liberty, vulnerability theory puts forth a powerful argument in favor of increased government intervention. In summary, the four components (i.e. reasons) lead to a call for more government intervention (i.e. the conclusion) because:

- Individuals do not have the agency that American individualism assumes. In turn we must reject this liberal subject in favor of a vulnerable subject. Borrowing from the insights in the following two components, we know this vulnerable subject is universally and constantly vulnerable and deeply embedded in, and reliant upon,

⁵⁸ *Id.*

institutions. The vulnerable subjects need help, choices left weak by the crushing, all-powerful, complex institutional framework that shapes their lives.

- Vulnerability is universal and constant. We live our lives in a state of never ending, unavoidable vulnerability. Fortunately, we share our vulnerability with everyone, and collectively, we (the state) have established a set of institutions to build our collective resilience to be more equipped to handle vulnerability.
- The institutions in question – health care, criminal law, schools, family, and more – are all reinforced, given legitimacy, established, benefitted, regulated, and/or funded by the state. These institutions give us the resources (i.e. resilience) to live our lives in the face of unceasing vulnerability. The role of the state in these institutions suggests the state is responsible for their behavior; if institutions dispense assets unjustly, institutions have an obligation to correct this injustice. This last point is critical, as the causation of injustice goes from “individual choices and natural randomness” to “the state’s unjust distribution of resources.”
- After reframing the subject by which we base our public policy, our conception of equality begins to change. The power of choice and autonomy weakened, equal treatment and formal equality are left less desirable. Moving forward, our policy should aim for a more substantive, equal opportunity-based sense of equality rooted in positive liberty and a rejection of American individualism. The goal of our institutions should not follow the sense of equality established in the US Constitution but should borrow from more positive rights found in constitutions abroad.

“Okay, I agree. The state should do more to help its vulnerable subjects and strive for a more substantive version of equality. But how exactly should the state intervene? And to what extent?” Vulnerability theory provides loose guidelines to answer these questions. The power in the theory probably lies more in the argument for why the state should intervene as it does in the argument for how the state should intervene.

To go beyond equal protection, vulnerability theory suggests that policy address the institutions that dispense different levels of assets or resilience.⁵⁹ To achieve equality, the government must change the institutions that create inequality.⁶⁰ For example, the institution of the family was dispersing assets to traditional heterosexual couples while withholding assets to same-sex couples. Vulnerability theory would advocate for a change in law to correct this injustice.⁶¹ Vulnerability theory sees all institutions, including the family, as being connected to the government in certain ways.⁶² From this commonality among the institutions, Fineman argues that some institutions can correct the injustices of others.⁶³ Institutions are this collective, critically important body that must be closely and actively monitored to achieve equality. For example, the substantial inequality produced through the institution of the family can be reduced through a strong education system. Or the inequality women traditionally experience within the family can be partially offset through stronger maternity leave policies or the addition of paternity leave into the institution of capitalism. Institutions – government-backed and asset-conferring – become the focus and mechanism by which policymakers should see and rectify inequality in society.

⁵⁹ See Fineman, *Vulnerable Subject*, *supra* note 13, at 16-17

⁶⁰ *Id.*

⁶¹ See Fineman, *Vulnerable Subject*, *supra* note 13, at 22-23.

⁶² *Id.* at 5.

⁶³ *Id.* at 12-15.

The focus on institutions to combat inequality lies in contrast to the more common focus on individual identities. Vulnerability theory is a post-identity approach.⁶⁴ Fineman argues that race-based, identity-focused policies are undesirable because there are always exceptions, such as successful people from traditionally disadvantaged groups and unsuccessful people from traditionally advantaged groups.⁶⁵ She argues: “. . . [D]isadvantage is produced independent of racial and gender biases in many-but of course not all-instances.”⁶⁶ In response, the focus should shift toward the ways in which institutions disperse assets to different groups and individuals. In this respect, Fineman is more interested in targeting important institutional relationships – parent/child, consumer/producer, financial adviser/client – to combat inequality.⁶⁷ This focus will lead to a more effective way to reach a more substantive equality because these institutions are creating the inequality.

At this point, readers may be left hungry for more. Vulnerability theory will be further expanded upon in the following section by using Nina Kohn’s critique of vulnerability theory as a guide to considering its common concerns and limitations.

III. Why does Vulnerability Theory Matter?

Thus far, vulnerability theory has been established as, at the very least, an interesting frame of reference, or perspective, for creating and evaluating public policy. In this sense, vulnerability theory has utility. Yet the specifics of the utility, or the takeaways, must still be identified.⁶⁸ Some

⁶⁴ *Id* at 17-18.

⁶⁵ *Id* at 16-17. “Just as privilege is not tethered to identity neither is disadvantage.”

⁶⁶ *Id* at 17.

⁶⁷ See Fineman, *Vulnerability and Law*, *supra* note 5.

⁶⁸ “Takeaways” is synonymous with “valuable” or “utility.” These takeaways are determined by evaluating their utility in evaluating or creating public policy, their ability to stand up to criticism, their effectiveness at advocating for increased government intervention, and their uniqueness.

of these takeaways will be pulled from the prior discussion of the five components, but others will be identified with the help of the major criticisms of vulnerability theory. The following section will identify the limitations and some of the valuable aspects of vulnerability theory by considering the effectiveness of several critiques.

This section proceeds in two parts. The first part evaluates three criticisms of vulnerability theory: lack of specificity, violation of autonomy, and inconsistency in its application. The second part outlines the three important takeaways from vulnerability theory in terms of its ability to answer the simple but important question of why vulnerability theory matters.

a. Is Vulnerability Theory Practical? An Evaluation of a Criticism

Vulnerability theory has been applied in different levels of detail by various scholars, including Fineman herself, to argue for more regulation of employers,⁶⁹ the legalization of same-sex marriage,⁷⁰ the legalization of polygamous marriages,⁷¹ and increased protection for the elderly.⁷² The multiple applications of vulnerability theory suggest it is practical and applicable, but the major criticisms of vulnerability theory disagree.

Nina Kohn criticizes vulnerability theory by arguing that Fineman's application of vulnerability theory shows vulnerability theory's lack of specificity, violation of autonomy, and inevitable inconsistency.⁷³ While Kohn's critiques point out some valid flaws, her claim that

⁶⁹ See Jonathan Fineman, *The Vulnerable Subject at Work: A New Perspective on the Employment At-Will Debate*, 43 Sw. L. Rev. 275 (2013). See also Lisa Rodgers, *Labor Law, Vulnerability and the Regulation of Precarious Work* (2016).

⁷⁰ See Fineman, *Vulnerable Subject*, *supra* note 13, at 22-23.

⁷¹ See Stu Marvel, *The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage*, 64 Emory L.J. 2047 (2015)

⁷² See Martha Fineman, "Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 20 ELDER L.J. 71, 84 (2012) [hereinafter Fineman, Elderly].

⁷³ See Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 Yale J.L. & Feminism 1 (2014) [hereinafter Kohn, *Vulnerability Theory*] for a critique of this application.

“Fineman's theory of vulnerability does not work as a prescriptive tool”⁷⁴ does not hold. Vulnerability theory should not be thrown aside; instead, different aspects of vulnerability theory should be emphasized and used to help policymakers achieve better public policy.

i. Specificity

Nina Kohn uses Fineman’s application of vulnerability theory to old-age policy to argue that vulnerability theory has limited practical use. Specifically, she argues: “Vulnerability theory provides little guidance as to how to prioritize among vulnerable subjects when allocating limited financial resources and political capital.”⁷⁵ Kohn attempts to bring vulnerability theory into the real world. Pointing out the inevitable problem of limited resources, Kohn rightly suggests that governments are unlikely to have the resources necessary to meet vulnerability theory’s goal of achieving full-fledged substantive equality, or genuine equal opportunity. Because of the limited resources, the government must prioritize certain issues. But vulnerability theory explicitly goes against targeting specific vulnerable groups, and it is primarily because of this lack of ability to prioritize, Kohn argues, that vulnerability fails in regard to its specificity.

Proponents of vulnerability theory, however, would argue that the theory can prioritize in a different way. Because vulnerability theory stresses the importance of institutions, not populations, the theory would prioritize the institutions that confer assets in the most unjust manner instead of the populations who are most vulnerable. While this method of prioritization is not explicitly outlined in the theory, the institutional focus suggests this response is the direction vulnerability theory would turn. Vulnerability theory cannot prioritize the distribution of limited

⁷⁴ *Id* at 23.

⁷⁵ See Kohn, *Vulnerability Theory*, *supra* note 73, at 13.

resources among populations, but the theory can prioritize the distribution of resources by focusing on specific institutional relationships.

The problem with this general response, however, is that the government cannot simply target the institutions that confer assets in the most unjust manner because some of these institutions lie outside of the government's scope. The family, for example, may not be the untouchable private institution as it is sometimes asserted,⁷⁶ but the government can only interfere so much. On its own, this general problem is not a big deal, as the government can respond by turning to other institutions to correct these injustices. Theoretically, a vulnerability theory lens would identify an unjust distribution of assets being conferred through one institution – such as social skills being conferred by the family – and then turn to other institutions to correct this injustice – such as the education system. But vulnerability theory does not answer which alternative institutions should correct the injustices. We must assume vulnerability theory would turn to the institutions thought to be most capable of correcting the injustice.

But on further thought, the government should consider more than effectiveness in its consideration of public policy. An implementation of major policy should weigh the additional factors of how efficiently government resources are being used and the extent to which autonomy is being violated. For example, in the specific context of social skills being unjustly conferred by families, vulnerability theory does not provide the parameters to decide between an extremely effective but extremely expensive program and a somewhat effective but far less expensive program. Vulnerability theory is also unable to help determine whether an effective program that violates autonomy is more desirable than a slightly less effective program that preserves slightly

⁷⁶ For a discussion about the public nature of the institution of the family, see *supra* note 31.

more autonomy. There are simply no criteria outlined in vulnerability theory to guide a decision among these important factors.

This critique of specificity, however, is unfair. Kohn may have effectively pointed out a limitation in applying the theory, but all theories have limitations. What is perhaps the most highly praised theory of justice in the last century, the work of John Rawls, does not provide an adequate answer as to whether justice is best pursued through socialism or capitalism.⁷⁷ Theories are simply not meant to answer every question. At a certain point, theories leave policymakers to their own devices, and vulnerability theory is no different. While it is important to understand the limitations of a theory, a theory should not be dismissed merely because it has limitations. And despite its limitations, vulnerability theory still provides a concrete framework that gives policymakers guidance to help them write and advocate for more just public policy. But the “more just” public policy is not “more just” from all perspectives. Nina Kohn, in her second major criticism of vulnerability theory, suggests the laws advocated for by vulnerability theory are undesirably paternalistic.

ii. Violation of Autonomy

Kohn argues Fineman’s application of vulnerability theory to old-age policy shows the theory’s tendency to be too paternalistic.⁷⁸ This paternalism objection, however, deserves little attention because of vulnerability theory’s explicit rejection of the liberal subject. If the liberal subject is rejected, free choice becomes substantially less important because choice no longer carries so much weight in dictating people’s lives. Another reason the paternalistic objection does

⁷⁷ See David E. Schweickart, *Should Rawls be a Socialist? A Comparison of his Ideal Capitalism with Worker-Controlled Socialism*, 5 *Social Theory and Practice* 1-27 (1978).

⁷⁸ See Kohn, *Vulnerability Theory*, *supra* note 73.

not hold is because vulnerable subjects need paternalistic policies to build resilience and capacity. From the vulnerability theory perspective, paternalistic policies do not reduce autonomy by restricting choice, but rather enhance autonomy by building capacity. The disagreement between Kohn and Fineman is deep, resting on different conception of human nature and liberty. Further discussion of these different perspectives can be found in the first part of the paper. While Kohn's critiques of specificity and autonomy do not gain much traction, her critique of inconsistency, with some help of a critique by Frank Rudy Cooper, bring to light the most important challenges to the applicability of vulnerability theory.

iii. Inconsistency

Vulnerability theory's inconsistency is pointed out by Kohn in her evaluation of Fineman's application of vulnerability theory to public policy for the elderly.⁷⁹ Kohn illustrates how despite criticizing the idea of labeling special groups as vulnerable, Fineman identifies the elderly as vulnerable subjects.⁸⁰ Fineman suggests that policies can and should use age as a threshold for reducing the vulnerability of older adults.⁸¹ Using vulnerability theory to advocate for policy targeting special groups of people goes directly against a central claim of vulnerability theory.⁸² Specifically, vulnerability theory claims that laws should focus on institutions rather than vulnerable populations.⁸³ Regarding formal equality and specially targeted groups, Fineman claims:

In this regard, identity categories are both over- and under-inclusive. The groups that traditional equal protection analyses recognize include some individuals who are relatively privileged notwithstanding their membership in these identity groups. Indeed, while race or gender may complicate and compound disadvantage, individual successes abound

⁷⁹ See *Id* for the evaluation of Fineman's application of vulnerability theory. See Fineman, *Elderly*, *supra* note 72 for Fineman's application of vulnerability theory.

⁸⁰ See Fineman, *Elderly*, *supra* note 72 at 119.

⁸¹ *Id* at 124

⁸² See section II-D for a discussion about formal versus substantive equality.

⁸³ See Fineman, *Vulnerable Subject*, *supra* note 13 at 16-17.

across these and other categories that the Equal Protection Clause demarcates. These individual successes create both theoretical and empirical pitfalls: Successful individuals who belong to a designated suspect class can undermine the coherence and dilute the strength of critical analyses based on asserted bias against the same identity group. At the same time, identity categories are too narrow. Poverty, denial of dignity, and deprivation of basic social goods are "lack-of-opportunity categories" that the current framework of identity groups does not recognize; such disadvantage transcends group boundaries.⁸⁴

Fineman's critique of formal equality should apply to age-based policy as well, but her policy proposals, Kohn argues, do not echo this sentiment. If Fineman herself advocates for policy blatantly inconsistent with vulnerability theory, surely the inconsistency is somewhat inevitable. Or at the very least, vulnerability theory seems to contain inconsistencies when applied to certain kinds of issues.

Kohn's critique of vulnerability theory's inconsistency, however, is misleading. While it is true Fineman advocates for age-based policy, Fineman's support for this age-based policy seems to be a compromise, directed narrowly to the Canadian Commission, the focus of the article, in response to what she considered to be too heavy of a focus on autonomy.⁸⁵ Fineman is concerned older populations will not get protection; therefore, Fineman advocates for age-based policy because, for lack of better terms, it is better than nothing. Importantly, Fineman immediately follows her age-based proposal by acknowledging the proposal's departure from vulnerability theory:

Of course, a response sensitive to the vulnerability approach would suggest that these kinds of provisions to safeguard those vulnerable to exploitation be more broadly drawn to reflect the fact that many people in society find themselves in such a position with respect to financial matters.⁸⁶

⁸⁴ *Id* at 4

⁸⁵ See Fineman, *Elderly*, *supra* note 72 at 123.

⁸⁶ *Id* at 124

It is explicitly clear: the age-based policy Fineman advocates for is not representative of vulnerability theory. Fineman knows it is not representative of vulnerability theory and proposes an alternative way to shape the policy. A vulnerability theory approach, then, would advocate for a law that allows the cancellation of exploitative financial transactions for all people. The policies Fineman advocates for in the two small paragraphs Kohn targets can easily be applied more broadly. Kohn's critique of vulnerability theory's inconsistency, therefore, is not valid.⁸⁷

Kohn's critique of inconsistency may not be particularly useful or fair, but her criticism sheds light on an important issue. Fineman advocates for a post-identity approach, but she throws this approach out the window in her application of law to old-age policy. This behavior suggests that the post-identity approach may not be a practical solution to the problem of over and under-inclusivity that always accompanies the identity-based approaches to policy.⁸⁸ To recap, the post-identity approach advocates for the elimination of "vulnerable populations" from the policy conversation. To gain more substantive equality, vulnerability theory argues, policy must go "beyond identities" and address the root of the problem at the institutional level. For example, universities often dedicate specific kinds of resources for first-generation college students. The post-identity approach would hesitate to support resources pegged to specific populations, such as first-generation college students. Instead, universities could make the resources available to students on a case by case basis depending on whether they were deprived of certain assets or some resilience growing up. This latter approach would more directly target the problem – that people attend college with disparity of social assets given to them by their families.

⁸⁷ Of course, just because the specific application of vulnerability theory that Kohn chose to evaluate does not contain inconsistencies does not mean vulnerability theory does not contain inconsistencies. But given the broad nature of vulnerability theory, it seems unlikely that there is a theoretical inconsistency because it is quite easy for an application of the theory to remain within a broad scope.

⁸⁸ See Fineman, *Beyond Identities*, *supra* note 47.

There are two potential problems, however, to this post-identity approach. The first problem is the government (or university) does not have the time to evaluate every single person to determine exactly how institutions have built resilience in each one of them. Pegging specific populations to a program or policy serves a heuristic to help groups of people who need it. Yes, the use of this heuristic will not be perfect, and there will inevitably be some people left out and other people getting assets who don't deserve it, but maybe the lack of perfection is worth it to save resources. It is often just not plausible to evaluate everyone. The second problem with the post-identity approach is that specific population might have genuinely unique experiences that call for their identity to be incorporated into the policies. Cooper makes this point, arguing that black people's experience with police brutality is unique, and therefore it would be irresponsible to move "beyond identity."⁸⁹ The post-identity approach might ignore the reality of the social landscape, causing policy to become less effective at achieving substantive equality. These two problems – lack of practicality and the potential for identity to be fundamentally important to an issue – carry substantial weight. Moving forward, policymakers must consider these points when trying to use the post-identity approach.

Fortunately, the post-identity approach can incorporate the criticisms and still be used in a practical manner. The criticisms can be incorporated into the theory with the asking of one simple question: "as policy moves away from targeting specific populations toward a post-identity approach, is the policy sacrificing government resources or ignoring experiences unique to specific populations?" After considering these points, policymakers can conduct a brief cost-benefit

⁸⁹ See Cooper, *Always Already Suspect*, *supra* note 27.

analysis before making the decision. This method should prevent the post-identity approach from being used in a deeply undesirable way.

b. How is Vulnerability Theory Valuable?

The following three takeaways represent the most powerful, important, and useful aspects of vulnerability theory. These insights are important for their own unique reason, but they all stand up to criticism and contain some kind of practical benefit, as illuminated in the prior paper. While the benefits of vulnerability theory certainly cannot be confined to the following three takeaways, these three points represent the most essential insights found in the prior discussion:

1. The post-identity approach serves as a valuable goal for public policy, but this approach should not be pursued in every context. Sometimes, targeting specific populations is the better route to equality, but ultimately, the post-identity approach should be the goal in achieving more substantive equality.
2. The overall narrative vulnerability theory creates – that people are all vulnerable, and we create institutions to help build our resilience to combat our vulnerability – is a unique, rhetorically effective way to advocate for the government increasing its involvement to help society achieve a more substantive equality.
3. The idea that institutions are the source of inequality is rhetorically and substantively effective. While it is well beyond the scope of this paper to consider whether the institutional focus more effectively achieves substantive equality, the new approach seems quite promising and should be explored.

IV. Conclusion

Fineman rejects the liberal subject in favor of a vulnerable subject. People, she argues, are universally vulnerable, inextricably embedded in institutional relationships from birth until death. These institutions give people the capacity to achieve autonomy in a life of vulnerability, but unfortunately, the institutions do not always confer assets, capacities, or resilience equally. It follows that the government, through institutions, is the source of inequality. Therefore, the government must respond by more actively pursuing equality through its institutions. The equality pursued, however, must be a more substantive equality, a conception of equality found outside of the United States but rarely within. From these core components, policymakers can glean three major insights: a cautious post-identity approach, a new vulnerability narrative to guide their thoughts, and a new focus – institutions – for policy in the future.

As Paul Ryan, Donald Trump, and Elizabeth Warren consider policy surrounding the next major issue in Congress, they have a new legal theory to guide their thoughts. While it is almost laughable to suggest policymakers would use a theory to guide policy in such a direct manner, it is realistic to think the ideas in this theory – particularly the move toward a post-identity approach, the narrative of universal vulnerability being overcome through institutions building resilience, and the focus on institutions for public policy – could have an indirect, long-term impact on the general conversation. Vulnerability theory can make an impact through public policy.