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Rights, Resilience, and Responsibility

Martha Albertson Fineman

RIGHTS, RESILIENCE, AND RESPONSIBILITY

Martha Albertson Fineman[*]

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INTRODUCTION

Michael J. Perry and I were offered positions as Robert W. Woodruff Professors of Law the same year. The promise of his presence as a colleague was an important factor in making my decision to come to Emory. When I heard of his plans to retire, I was prompted to look back over our years together on the faculty, wondering how either the Law School or I would fare without Michael's presence. He has been an exemplary colleague from an institutional perspective, a source of steady guidance in matters of policy and practice, as well as a major contributor to Emory's scholarly reputation. As an individual colleague, Michael has been the source of ideas and inspiration, as well as friendship and support. He takes the time to learn about and engage with issues and areas of concern or interest to others and often sends comments, links to relevant news items, and scholarly papers addressing those interests.

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I was relieved to learn that while his institutional activity may be reduced, Michael fully intends to continue to enthusiastically pursue his scholarly interests after retirement. Recently, he suggested that the two of us convene and co-edit papers from a conference on constructing an ethical or moral approach to state responsibility, to be held in the fall of 2022. This conference will explore and contrast his approach to international human rights principles with my fairly recently developed vulnerability analysis, which presents an alternative to both a rights-based approach to and a social contract paradigm for thinking about state responsibility.

With the prospect of this planned joint endeavor in mind, I was delighted to be offered an opportunity to comment on Michael's recent work for this special edition of the *Emory Law Journal*. This Essay can be considered a first step in setting the stage for this future collaboration. I begin in Part I by describing Michael's approach to human rights as set forth in his latest manuscript. I also present a brief description of vulnerability theory, which is based on the recognition of dependency as inherent to the human condition, necessitating reliance on social institutions and relationships through which we build the resilience allowing us to persevere—even thrive—in the face of our vulnerability.[1] The conclusion introduces some areas for consideration in the

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[1] The purpose of this Essay is not to fully explore vulnerability theory but to set out ways in which its emphasis on the limitations of the physical, developmental body might suggest different questions, concerns, and sets of collective responsibility than does a human rights approach. For those interested in learning more about vulnerability theory, see generally Martha Albertson Fineman, *Universality, Vulnerability, and Collective Responsibility*, LES ATELIERS DE L'ÉTHIQUE / ETHICS F., Winter 2021, at 103 [hereinafter Fineman, *Universality, Vulnerability, and Collective Responsibility*]; Martha Albertson Fineman, *Beyond Equality and Discrimination*, 73 SMU L. REV. F. 51 (2020); Martha Albertson Fineman, *Vulnerability and Social Justice*, 53 VAL. U. L. REV. 341 (2019) [hereinafter Fineman, *Vulnerability and Social Justice*]; Martha Albertson Fineman, *Vulnerability and Inevitable Inequality*, 4 OSLO L. REV. 133 (2017) [hereinafter Fineman, *Vulnerability and Inevitable Inequality*]; Martha Albertson Fineman, *Equality and Difference–The Restrained State*, 66 ALA. L. REV. 609 (2015); Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 TEMP. POL. & C.R. L. REV. 307 (2014); Martha Albertson Fineman, *"Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*, 20 ELDER L.J. 71 (2012); Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713 (2012) [hereinafter Fineman, *Beyond Identities*]; Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2011) [hereinafter Fineman, *The Vulnerable Subject and the Responsive State*]; Martha Albertson Fineman, *Evolving Images of Gender and Equality: A Feminist Journey*, 43 NEW ENG. L. REV. 437 (2009); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008) [hereinafter Fineman, *Anchoring Equality*]; Martha Albertson Fineman, *Reasoning from the Body: Universal Vulnerability and Social Justice*, in A JURISPRUDENCE OF THE BODY 17 (Chris Dietz et al. eds., 2020) [hereinafter Fineman, *Reasoning from the Body*]; Martha Albertson Fineman, *The Limits of Equality: Vulnerability and Inevitable Inequality*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 73 (Robin West & Cynthia Grant Bowman eds., 2019) [hereinafter Fineman, *The Limits of Equality*]; Martha Albertson Fineman, *Injury in the Unresponsive State: Writing the Vulnerable Subject into Neo-Liberal Legal Culture*, in INJURY AND INJUSTICE: THE CULTURAL POLITICS OF HARM AND REDRESS 50 (Anne Bloom et al. eds., 2018).

planned conference, comparing a human rights approach to that of vulnerability theory as ways to understand and argue for social justice.

I.   THE MORALITY OF HUMAN RIGHTS

Michael's most recent work-in-progress, *Interrogating the Morality of Human Rights*,[2] addresses both international human rights and American constitutional jurisprudence, two areas of law in which he has had a major impact. This latest addition is certain to add to his stellar reputation as a scholar. The manuscript is not a compendium of his academic work, nor does it merely summarize his approach to the many issues he has considered over his career. He does not aspire to—nor does he—resolve all the controversies and contestations that might be raised regarding a rights-based mode of analysis. Instead, he offers an elegant, coherent, and comprehensive argument for appreciating existing international human rights doctrine and dicta as representing a moral code to guide governmental actions and individual lives.[3] He sets out the following in the Introduction:

> My aim in this book is to clarify and interrogate the morality of human rights, by which I mean the *morality embodied in* the Universal Declaration of Human Rights and/or in one or more of the several international human rights treaties that have entered into force in the period since the adoption of the Universal Declaration, in 1948, by the UN General Assembly. That morality . . . is mainly but not exclusively a political morality.[4]

I have italicized the words "embodied in," which sets out the aim of the book. Significantly, these words indicate that the conception of morality that Michael is exploring and advocating for is one that is expressly articulated in or extrapolated from various human rights documents. As so defined (and confined), his exploration of morality can be seen as mainly descriptive: morality is bound to texts in ways a more wide-ranging and abstract search for a normative understanding of the term would not be.

This "embodied in" (or textually directed) conception of morality also shapes my response to the manuscript. There is a significant, but often

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[2]   Michael Perry, Interrogating the Morality of Human Rights (Dec. 5, 2021) (unpublished manuscript) (on file with author).

[3]   *See id.* at 2.

[4]   *Id.* (emphasis added) (citation omitted). The manuscript distinguishes between the morality of human rights and the law of human rights, although it also addresses U.S. constitutional law when it is deemed to overlap with international human rights principles. *Id.* Morality in the context of this discussion is also defined as "mainly, although not exclusively a political morality." *Id.*

overlooked, difference between considering morality as a "descriptive" task and reflecting on the "normative" content or unbounded possibilities of the concept.[5] This distinction suggests different methods and modes of analysis, distinguishing projects of concrete or textual assessment from those undertaken in a more abstract or ambiguous manner. In addition, both the basic questions initially raised, as well as the burden of persuasion, may be decidedly different for an author choosing to address morality in its descriptive rather than its normative sense in making an argument. The preliminary inquiry becomes more about what "is" (which is largely an empirical, text-based analysis) than what "ought" to be (which is more contextual and potentially value- or bias-determined).[6]

Of course, morality in its descriptive sense does not totally avoid the conceptual problems associated with the normative approach. Those problems are just displaced, often deflected onto those individuals or institutions that have made preliminary normative choices in forming their version of a moral code. If it is determined that those individuals or institutions are legitimate and their authority is accepted, an author need only explain, explore, and interpret the text consistent with those initial choices and revelations.

In *Interrogating the Morality of Human Rights*, Michael considers the normative aspect of morality as resolved in the United Nations' process of drafting the various Human Rights Declarations and Conventions that form the texts for analysis.[7] The implicit argument is that these documents should be accepted as a collectively constructed normative judgement on what constitutes

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[5]   The Stanford Encyclopedia of Philosophy states that morality is used in two distinct ways: (1) "descriptively to refer to certain codes of conduct put forward by a society or group . . . or accepted by an individual for her own behavior," or (2) "normatively to refer to a code of conduct that, given specified conditions, would be put forward by all rational people." *The Definition of Morality*, THE STAN. ENCYC. OF PHIL., https://plato.stanford.edu/entries/morality-definition/ (Sept. 8, 2020). The society or group constituting the human rights community has codified their understanding of moral behavior in the Universal Declaration of Human Rights and the other documents referred to in this manuscript, which form the texts constituting the basis of Michael's analysis of morality. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter Universal Declaration].

Even after reading Michael's elegant manuscript, I remain skeptical about the ability of contemporary human rights doctrine to serve as a platform for a moral paradigm suitable for the emerging problems of the twenty-first century. For that reason, I think the normative debate about morality must be engaged. It is in this arena that the difficult questions will arise when comparing rights with vulnerability: What are the "specified conditions" that must be central in constructing a normative sense of morality? The last part of this Essay sets forth some of these questions. *See infra* Part V.

[6]   This is not to suggest that various interpretations of a text are not possible, but the words (and possibly the history) do act to constrain the plausible number of interpretations. Values, virtues, and aspirations, by contrast, can be as varied as the individuals entering the debates.

[7]   *See* Perry, *supra* note 2, ch. 1, at 1, 5–6.

morality.[8] They present coherent, internally consistent standards for assessing moral action. These principles, produced through negotiations and deliberations, also can be represented as a universal judgment—transcending national, cultural, temporal, and political boundaries. With the normative judgement resolved, the descriptive project is then to state the implications and limitations of the morality so inscribed and to interpret the applicability of the texts to situations and circumstances not explicitly resolved.

II.   DIFFERENCE AND THE UNIVERSAL

Difficult questions have been raised about imposing unitary or universal moral or ethical standards given the diversity that exists across human beings, as well as the myriad of cultures and political arrangements that have been constructed across time and space.[9] Michael does not ignore these difficulties. However, consistent with the manuscript's descriptive task, those issues are (at least implicitly) resolved by reference to the process that generated the human rights' canon.[10]

A.   Sources of the Universal

As briefly noted above, in *Interrogating the Morality of Human Rights*, the process of producing the Universal Declaration of Human Rights and other human rights documents serves to both articulate and justify a universal vision.[11] The manuscript dutifully considers other sources for determining what unites us across our real and contrived differences in place, politics, position, and privilege. For example, the theistic or religious and natural law explanations, which rely on some transcendent source of rights, is fleetingly discussed.[12] However, it is the secular language of the Universal Declaration of Human

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[8]   *See id.* at 5–6.

[9]   For example, one of the basic issues for a universal theory is identifying a common human characteristic that will support a claim of general applicability (the conferral of "rights" within a human rights paradigm) to all individuals and most human endeavors. *See generally* MORAL UNIVERSALISM AND PLURALISM: NOMOS XLIX (Henry S. Richardson & Melissa S. Williams eds., 2008) (exploring such difficulties). The difficulty is with the idea that rights or ethics apply regardless of differences due to demographics like race, gender, religion, or culture. The search for universality is challenged by the very value modern jurisprudence places on diversity. The search is for ways in which universalist principles can ethically and logically coexist with these particularities of difference.

[10]   *See* Perry, *supra* note 2, ch. 1, at 5–6.

[11]   *See supra* Part I.

[12]   *See* Perry, *supra* note 2, ch. 2, at 2–6.

Rights that Michael looks to in order to answer the question of what can and should unite us across our differences.[13]

In an interesting way, this adherence to a descriptive, rather than a normative, sense of morality assists in legitimating the claim for the universality in the human rights paradigm. The claim is not based on the nature of the rights identified, but on the communal or universal scope of the political agreement or consent that produced and affirms these rights.[14] The United Nations have come together to resolve the question of morality (at least for contemporary audiences), setting forth a consensus generated with integrity through a process that has been both inclusive and democratic.

This reliance on the political and the procedural for legitimation is consistent with the way Michael generally understands the implications and consequences of a human rights approach. He argues that rights as conceived in the U.N. documents are rules of conduct that specifically direct governments to either do or not do something for human beings.[15] The implications for individuals are not forgotten but are not the principal focus. This is evident when Michael states that although the morality of human rights is not only a political morality, it is "mainly" so.[16] Political is used here in a narrow, institutional sense—morality is political in nature (or primarily so) when it is designed to apply to governmental bodies.[17] The term indicates who (or what) is deemed to be appropriately bound by this moral code, which is a very different question from the more nebulous inquiry into what types of action (or inaction) may or may not have political consequences or whether they are produced by politics or have political implications.

B. What Is Universal?

Establishing that there is a legitimating process for a descriptive project, Michael's next task is to identify the fundamental principles or concepts chosen to capture the essence of morality. Surprisingly, for someone who adopts a descriptive or textual analysis, Michael does not rely on the express language of Preamble or Article I of the Universal Declaration of Human Rights, both of which identify the "inherent dignity" from which the "equal and inalienable

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[13]   *See id.* ch. 1, at 2, 7.

[14]   *See id.* at 1–2.

[15]   *Id.* at 2–3. Considering human rights as the product of governmental processes supports the idea that a consensus among governments provides a basis for universal application.

[16]   *Id.* at 6.

[17]   This public or collective sense of political morality also will ultimately influence how the morality or appropriateness of individual actions and sensibilities will be understood in society.

rights of all members of the human family" derive as the unifying ideal.[18] Instead, he ultimately rests on the concept of a "spirit of brotherhood" as articulating the moral spirit of the human rights documents.[19]

This is not only an interesting choice but it also may be a strategically significant one. There is a recognized difficulty in defining a generally agreed upon definition of dignity. Michael considers and finds inadequate dictionary definitions of the term and also rejects the theistic answers that have been offered to resolve the question of exactly what exemplifies human dignity.[20] He sees (a gender-inclusive sense of) brotherhood as suggesting a more easily understood and thus more productive and positive direction.[21] Brotherhood as a metaphor exemplifies the connection that naturally exists among people who belong to the same family (the brotherhood of man) and as a result are united in an all-inclusive creative force shaped by nonerotic universal love.[22]

In this manuscript, agape (exemplified by brotherly love) is identified as the unifying moral "sensibility" or sensitivity.[23] It is defined as the force that guides human activity motivated and inspired by the need to do what we, as human beings, can do to make a better world not only for ourselves, but also for others.[24] This sense of morality is not only (or even primarily) ascribed to us as individuals but rather expresses the ultimate project of humanity, a project that must also serve as the foundation for human rights.[25] With this understanding of morality as encapsulated within the spirit of brotherhood, human rights is cast

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[18]   Universal Declaration, *supra* note 5, pmbl.; *see also id.* art. I ("All human beings are born free and equal in dignity and rights.").

[19]   Perry, *supra* note 2, ch. 2, at 6–7, 11–12; *see also* Universal Declaration, *supra* note 5, art. 1 (using the term).

[20]   *See* Perry, *supra* note 2, ch. 2, at 2–7.

[21]   *See id.* at 6–7; Universal Declaration, *supra* note 5, art. 1 ("All human beings are born free and equal in dignity and rights.").

[22]   *See* Perry, *supra* note 2, ch. 2, at 15. The concept of agape that informs this sense of brotherhood is often referred to as Christian, but Michael intends to employ it as a secular concept. He does not say so, but it could be viewed as an evolutionary imperative—the need to make the world (our environment) conducive to human flourishing or risk decline and possible extinction. I would like to see further development of Michael's idea of a secular version of a universal love or an "agapalistic" ideal as the foundation of human rights. *See id.* at 15–18.

[23]   *See* Perry, *supra* note 2, ch. 2, at 15.

[24]   *See id.*

[25]   Significantly, it is also not a project that describes an existing universal characteristic ascribed to the individual as a characteristic, such as dignity. Instead, it is an aspirational collective human project, presumably independent of any specific individual actions or intention, defined by the principles embedded in the documents (and consensus) under review—to act in the spirit of brotherhood. This may also avoid Brian Leiter's critique that there can be no universal right to equality because human beings are not equally situated. *See id.* at 9. Michael suggests an equal treatment mandate is not based on equal characteristics but is a project of humanity, one that is not limited to individuals with or without specific features or traits. *See id.*

as a secular and very human, rather than a theistic or divine, project.[26] It also suggests that morality extends beyond the individual to encompass a structural or governmental mandate, one that is both altruistic and society-preserving. Unfortunately, the language of rights tends to dilute the sense of the social in favor of the individual when it comes to what constitutes foundational principles in the human rights discourse.

C. Equality and Freedom

Michael identifies a "right to moral equality" and a "right to moral freedom" as the foundational rights in his human rights moral vision.[27] He also finds a version of both concepts mirrored in the United States Constitution. Moral equality is reflected in the Equal Protection guarantee, while moral freedom is paralleled by the right to privacy.[28]

As Michael recognizes, neither of these foundational human rights is absolute. The moral right to equality, for example, does not mean that everyone must be treated the same. He specifically notes that children are not entitled to vote and that a moral sense of equality does not require that food stamps be provided for the affluent.[29] Moral freedom is also qualified. While it may generally protect the individual from governmental imposition of restrictive regulations or rules punishing thought, conscience, or religious belief, some minimally restrictive, carefully tailored rules are permitted if they are necessary to protect the public.[30] However, the emphasis is clearly on preserving and protecting individual prerogatives.

Michael uses the balance of the manuscript to explore the application of these fundamental moral rights in the context of three contentious issues: (1) capital punishment, (2) same-sex marriage, and (3) abortion.[31] In each of these areas, the state is setting the terms or conditions that will govern the "rights" of the individual—to life, to access to a significant social institution, or to determine whether or not to proceed with a pregnancy undeterred by governmental edicts.

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[26]   *See id.* at 3, 17–18.
[27]   Perry, *supra* note 2, intro., at 3.
[28]   *Id.* It is interesting that the moral right to freedom is expressed in terms of privacy, rather than liberty. Privacy as a constitutional concept is consistently under attack by strict, textual constitutional scholars, while liberty is very much a part of the foundational documents in the United States. *See id.* ch. 4, at 21–23.
[29]   Perry, *supra* note 2, ch. 3, at 7–8.
[30]   *Id.* ch. 4, at 9–11.
[31]   *See id.* chs. 5–7.

Chapter 8 considers who decides if human rights apply, which touches upon the role and limitations of the judiciary in a human rights regime.[32] Chapter 9 addresses poverty as a human rights issue,[33] while Chapter 10 considers the ways in which extreme economic inequality and global warming are often seen as overreaching the rights paradigm or as examples of rights inflation.[34] Michael's task in this manuscript is not to resolve these persistent and difficult social policy issues but to explore how an analysis formed from the morality of human rights and undertaken in the spirit of brotherhood might guide such decision-making.

III.   WHAT IS WRONG WITH RIGHTS?

My concern about the progressive tendency to resort to human rights is not with the values, objectives, or conclusions that such an analysis might reach. Rather, it is with the questions that are left unanswered—or even unasked. Like any good scholarship, *Interrogating the Morality of Human Rights* provokes thoughts about where one's own work fits within the scholarly vision presented. Michael's resolution of what factors should determine the role of the state regarding the three pressing moral issues considered in the manuscript does not conflict with those I would have reached. Nor do I disagree with the considerations he deems relevant in evaluating poverty or climate change. However, it is not only the conclusion that matters—process and procedure are also worthy of principled consideration. In addition, an important part of any theoretical inquiry lies in the initial framing of the foundational questions to be addressed. The answers to such questions often determine the logic of any subsequent inquiries.

I began this Essay by focusing on descriptive morality as the conceptual boundary for Michael's manuscript[35] because it clarifies how my vulnerability approach differs from a morality of human rights paradigm. Michael and I are both interested in developing a robust conception of social justice and exploring the ways in which the law can assist in realizing it. However, the focus of our inquiries is different, as is our reliance on and faith in the concept of rights to broaden the understanding of state responsibility. I have long been skeptical of the ability of a rights-based analysis to deliver a comprehensive and universal vision of justice. I have also been exploring the concepts of vulnerability and

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[32]   *See id.* ch. 8.
[33]   *See id.* ch. 9.
[34]   *See id.* ch. 10.
[35]   *See supra* Part II.

dependency to imagine an alternative set of principles for articulating an expansive, universal conception of state responsibility.[36]

A. Constructing the Collective

Both a human rights and a vulnerability approach are concerned with the rules governing human beings and the societies in which they live. However, a rights-based approach is grounded in liberal legal and political theory, whereas the individual of theoretical concern is the venerated holder of rights, ideally autonomous, independent, and cherishing his individual liberty.[37] In contrast, vulnerability theory views this particular construct of the individual as ideological and "empirically indefensible" when assessing the appropriate relationship between the individual and society.[38] A vulnerability analysis argues that a concern with rights focuses on the individual as an entitled and independent actor and consequently tends to "obscure[] the continuous and basic role the state plays in society as a whole, as well as the ways in which it defines the lives of all individuals within it."[39]

The whole idea of individual rights tends to assume an ideally restrained or necessarily aloof state that may provide some basic essential services but is fundamentally uninvolved in orchestrating the mundane aspects of individual lives. The idea of individual rights, understood in its "negative" sense, serves as a check on the development of an overly active state.[40] Of course, the idea of human rights can also be used to make positive claims for economic or social benefits against the state. However, broadly constructed positive rights claims are historically viewed as exceptional, in need of justification, disfavored, and, if recognized, are often in practice under- or unenforceable.[41]

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[36]   *See, e.g.*, Fineman, *Vulnerability and Social Justice*, *supra* note 1, at 342, 367–69.

[37]   *See* Fineman, *Reasoning from the Body*, *supra* note 1, at 19.

[38]   *Id.* In a vulnerability analysis, rights-based arguments are seen as often ignoring or minimizing the complexity of the human condition, which means the paradigm is not reliably and justly responsive to actual human needs. *See id.* There is also a general problem with the individualistic nature of rights as a concept. The idea of individual rights (whether for children or adults) reflects the conceptual flaws characteristic of the traditional, limited notions of the legal subject, with its commitment to individual autonomy, liberty, independence, and agency. A rights-based model assumes the individual as a legal subject can be conceived outside of social institutions and relationships. This leads to ultimately positioning the individual so conceived as perpetually in danger from an abusive and antagonistic state, a view that has affected how those on both the left and the right of the political spectrum view the potential for state action. *See* Fineman, *Vulnerability and Social Justice*, *supra* note 1, at 342.

[39]   Fineman, *Reasoning from the Body*, *supra* note 1, at 26.

[40]   *See* ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 121–31 (1970).

[41]   *See* Jorge M. Farinacci-Fernós, *Looking Beyond the Negative-Positive Rights Distinction: Analyzing Constitutional Rights According to their Nature, Effect, and Reach*, 41 HASTINGS INT'L & COMP. L. REV. 31, 31–34 (2018). Some scholars feel that "socioeconomic rights are not really constitutional rights." *Id.* at 40. For

In traditional liberal thought, state or collective action is posited as theoretically antagonistic and inherently problematic for venerated individual liberty.[42] The characteristics of the individual subject at the center of law and policy (the "rights holder") are such that they minimize the need for and ultimately pathologize the possibility of individual reliance on the collective (in either its social or governmental form). This is particularly true if such reliance could result in the encroachment of another individual's rights (such as to liberty or property).

This liberal legal subject, cast as independent, autonomous, and liberty-seeking, leaves the body behind.[43] The human being at the center of law is thus perceived outside of social relationships, which are the structures both in which we experience vulnerability and upon which we depend for the resources to ameliorate such vulnerability. This legal subject is a radically individualized entity, abandoned to legal tools and devices such as consent, contract, independence, self-sufficiency, self-reliance, and rights, which are woefully inadequate to address the inescapable and lifelong dependence on society and its institutions that our vulnerability produces.[44] As a result, a rights-based analysis operates in a manner that, at least initially, is resistant to state-initiated or propelled redistributions of economic or political power or privilege in favor of individualized remedies.

By contrast, vulnerability theory views a robust and active state as essential to both the well-being of the individual and the reproduction of society.[45] Vulnerability theory concedes the inevitability of law, as well as some form of governing authority, while also appreciating the potential of the state as a unique mechanism for the construction of a just society.[46] Additionally, the theory

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example, Farinacci-Fernós stated the following:

> Though many countries have included welfare rights or obligations in their constitutions, no democratic country has placed social and economic rights on precisely the same legal footing as the familiar civil and political liberties. While I may disagree with the current universality of this affirmation, since I believe that some democratic countries have given some socioeconomic rights the same legal footing [sic] their civil and political counterparts, [Mary Ann] Glendon's point is highly relevant as to the generalized problem of under-enforcement that results in undervaluation of socioeconomic rights.

Id. (emphasis omitted) (citation omitted).

[42]   *See* Fineman, *The Vulnerable Subject and the Responsive State*, *supra note* 1, at 258; Fineman, *Reasoning of the Body*, *supra note* 1, at 19.

[43]   *See* Fineman, *Reasoning from the Body*, *supra note* 1, at 19.

[44]   *See* Fineman, *The Vulnerable Subject and the Responsive State*, *supra note* 1, at 262–64.

[45]   Fineman, *Vulnerability and Social Justice*, *supra note* 1, at 342, 366–69.

[46]   *See* Fineman, *The Vulnerable Subject and the Responsive State*, *supra* note 1, at 255–56, 263–64.

recognizes that the argument about the role of the state is not whether it should have greater (or lesser) involvement, but rather the justness of the myriad ways in which the state is currently (and always) acting in creating society through the creation and maintenance of the social institutions and relationships in which we all live our day-to-day lives. While it is a critical theory, vulnerability theory is distinguished from other "'progressive' approaches that seem unable to move far beyond a focus on an oversimplistic notion of an abusive or punitive state" in that it recognizes the necessity for and the inevitability of governance and law, as well as the positive potential this represents.[47]

B. Foundational Questions and First Principles

Ironically, I initially thought of vulnerability theory as presenting a stealth approach to human rights—one designed with an individualistic American audience in mind.[48] I have come to realize that characterization was both inaccurate and misleading. Vulnerability theory grew out of my earlier work on dependency[49] and as a result it has always focused more on understanding the "human" rather than the "rights" facet of the trope. The implications of this distinction between rights and the human have become even more evident over time as the theory has developed.

Significantly, when the focus is on rights, the foundational question is very different than that which is posed by an inquiry into what it means to be human. In *Interrogating the Morality of Human Rights*, Michael sets forth his basic inquiry in the first few pages of the first chapter: "What is a human right?"[50] Consistent with his textual approach, he directs further inquiry by asking, "[W]hat does the term 'human right' mean [] in the context of discourse about such rights?"[51] In contrast, vulnerability theory begins by asking the question, "What does it mean to be human?"[52]

The difference between the initial focus of each approach influences which subsequent questions are developed and evolve, as well as determining which values, objectives, and remedies are considered primary to defining a just society. Of particular significance is the way the choice between a focus on the meaning of rights versus the human will differently shape the task of defining

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[47] Fineman, *Universality, Vulnerability, and Collective Responsibility*, *supra* note 1, at 105.

[48] *Id.* at 255.

[49] *See* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004).

[50] Perry, *supra* note 2, ch. 1, at 1–2.

[51] *Id.* at 2.

[52] Fineman, *Vulnerability and Social Justice*, *supra* note 1, at 357.

the individual's relationship to the state or collective, as well as the perception of the role of law and governance in a just society. The nature and logic of the inquiry into what constitutes justice will differ depending on whether our initial focus is on the nature of rights or the nature of the human condition.

Both the vulnerability theory's fundamental question of what it means to be human and Michael's inquiry into what constitutes a human right are descriptive, or empirical, questions—they rely on something in existence. However, instead of looking to existing documents or relying on established jurisprudential conclusions to find an answer, vulnerability theory undertakes to define the essence of the inherent human condition.[53] This search is for what might be labeled a "first principle"—the shared characteristic of humanness that cannot be further reduced or refined, one that is present over time and space.[54]

The fundamental reality of the human condition is our "embodiment."[55] We are, in essence, corporeal beings, vulnerable or susceptible to changes in both our physical and social well-being over the life course.[56] Vulnerability theory thus begins with the fragile materiality of the body, not with rights or assertions or assumptions about rationality, choice, or assumed preferences for liberty and autonomy. The body here is understood as an anthropological or ontological concept—a universal construct that precedes law, morality, politics, or economics. It is essentially finite, mutable, and inevitably dependent.[57]

IV. REASONING FROM THE BODY: THE SUBJECTS AND OBJECT[IVE]S OF LAW

Beginning with the body means confronting in our theory and practice the realities of the body and its resulting vulnerability or susceptibility to change

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[53] *See id.* at 356, 357 n.87. I describe vulnerability theory's foundational question as empirical or descriptive, but it is also qualitatively different from that which Michael undertakes. He describes the moral position as determined in various U.N. documents—a textual analysis into what is described as a human right. *See* Perry, *supra* note 2, ch. 1, at 1–2, 5. In contrast, defining the essence of what it means to be human is a material, empirical inquiry relying on the experiential and intuitive. One basic way to distinguish our inquiries is to realize that while the texts he describes are human rights documents, a vulnerability analysis ultimately uses the body as its fundamental text.

[54] *See First Principle*, DICTIONARY.COM, https://www.dictionary.com/browse/first-principle (last visited Apr. 29, 2022) ("[A]ny axiom, law, or abstraction assumed and regarded as representing the highest possible degree of generalization"); Fineman, *Universality, Vulnerability, and Collective Responsibility*, *supra* note 1, at 106 ("To be human is to be vulnerable.").

[55] *See* Fineman, *Vulnerability and Inevitable Inequality*, *supra* note 1, at 142.

[56] *Id.*

[57] *See* Fineman, *Vulnerability and Social Justice*, *supra* note 1, at 358.

over time in both its physical and social status.[58] Universal and fundamental, vulnerability defines the human condition.[59] It is not a characteristic of only some individuals or groups, nor does it differ in quality or degree from one individual or group to another (although it is often portrayed in that manner).[60] We are all always vulnerable, as there is no position of invulnerability."[61] What is variable among individuals are the amount and quality of the resources or resilience each has with which to adapt, adjust, compensate, and ameliorate universal vulnerability. This should be central to our theories of justice and the politics of allocating individual and collective responsibility.

Importantly, beginning our theoretical inquiry with the body shifts the focus of analysis away from categories of demographic difference and assessments of the position of some groupings of individuals. Instead, the initial focus is on the designated social purposes of the contrived institutions and relationships that have been established to provide essential resources or assets of resilience to individuals and well-being to society.

The veracities of our bodies necessitate that we live in these social or institutional contexts throughout life; they provide us with the resilience necessary not only to survive but also to thrive in the face of our vulnerability.[62]

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[58] *Id.* The changes in bodily well-being can be negative, resulting from traumatic external sources, such as accidents or natural or contrived disasters. Negative changes are also the result of illness or bodily decline. Fineman, *Vulnerability and Inevitable Inequality*, *supra* note 1, at 142. However, changes are often positive in nature: the result of taking advantage of socially structured opportunities, such as in medicine or technology, but also prompted by services and resources provided in the social networks and systems in which we live. Positive changes also can arise as the body matures, developing greater capacity for intellectual, emotional, and creative endeavors. *See* Fineman, *Vulnerability and Social Justice*, *supra* note 1, at 358. Some changes are predictable and even preventable. Others, while not preventable, can prompt ameliorative social policy and programs. However, some changes are beyond either individual or social control.

[59] *See* Fineman, *Anchoring Equality*, *supra* note 1, at 1. When I refer to the human condition, I am indicating a universal human characteristic—an empirical reality that shapes human circumstances and experiences and exists across time and space, as well as within cultures and throughout history. In contrast, referring to "human nature" has normative implications: it is a term often applied to the propensities or proclivities of human beings to act in certain ways that can and do vary over time and within societies. Both the tendency toward and the socially acceptable nature of responses to the human condition vary and are shaped by things like culture, history, and the interpretations of individual and group experiences. *See* Fineman, *Vulnerability and Social Justice*, *supra* note 1, at 357 n.87. Human nature is a societal conclusion about what is natural or to be anticipated—society's consensus on the inevitability of specific responses to the human condition.

[60] "Vulnerability" is a widely used term. Colloquially, the use of the term "vulnerable" designates an individual or group as disadvantaged, discriminated against, subordinated, weak, or in need of special protection. Vulnerability theory gives an alternative, specific, and precise meaning to the term "vulnerability," defining it as a term of art. As such, "vulnerability" is positioned as a foundational concept upon which the other components of the theory rely.

[61] Fineman, *Vulnerability and Inevitable Inequality*, *supra* note 1, at 142.

[62] *See* Fineman, *Vulnerability and Social Justice*, *supra* note 1, at 362–63.

Because we are embodied beings, we are inevitably "embedded" within these social institutions and structures—we are dependent on them.[63] Under vulnerability theory, the nature, limits, and needs of the body are seen as both the origin of and justification for society and its institutions.[64] The material and developmental limitations of the body necessitate the formation of responsive structures—families, communities, governing systems, and organizations of service, care, and protection.

Significantly, individual dependence on social institutions is constant but the nature of that dependence varies and fluctuates over time in response to the circumstances or developmental stage in which we are located. We depend on different institutions and relationships over time, depending on changes in situation and circumstance. For example, we are completely dependent on comprehensive care from others as infants.[65] However, the birth family recedes and other institutions typically become more prominent later in an individual's life, when the need for care arises only occasionally (such as when we are ill or injured). Our dependence is more centered on extrafamilial social organizations, such as those comprising the educational, community, employment, and financial systems.

In thinking about the individual within lifelong institutional contexts, it is important to realize that social arrangements encompassed within the family, healthcare, and employment/market systems operate "simultaneously and sequentially."[66] A weakness in one system can be compensated by a strength in another. A strong family can help minimize the impact of a less-than-sterling educational system.[67] However, it is also true that successful acquisition of resources in one stage, such as education in childhood, profoundly affects the possibility of success in subsequent social stages, such as in the university or employment.[68]

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[63]   *Id.* at 358–60.
[64]   This articulation of the justification for law and governance is related to, but more comprehensive than, feminist ethics-of-care theories, which are based on individual relationships of care and do not extend to defining a general collective ethic on a societal or governmental level. They are also contextual, based on establishing caring relationships. In contrast, vulnerability theory centers on the institution, not the individual, and the corresponding responsibility of care is the governmental obligation to care for everyone subject to the structures and mechanisms of governance. This obligation forms the foundation of governmental legitimacy. *See* Fineman, *Vulnerability and Inevitable Inequality*, *supra* note 1, at 134.
[65]   *See* Fineman, *Vulnerability and Social Justice*, *supra* note 1, at 360–61.
[66]   Fineman, *Vulnerability and Inevitable Inequality*, *supra* note 1, at 147.
[67]   Fineman, *Vulnerability and Social Justice*, *supra* note 1, at 364.
[68]   *See* Fineman, *Vulnerability and Inevitable Inequality*, *supra* note 1, at 147.

While individual dependence on any specific institutional arrangements can be thought of as episodic, alterable, and circumstantial, it is essential to recognize and theoretically address the reality that dependency on some set of social institutions and relationships—be they the market, financial and employments systems, or educational and health care institutions—is inevitable and ongoing for everyone throughout life.[69] This understanding of the nature and extent of human dependence on social institutions and relationships is crucial to grasping vulnerability theory as an alternative to both a human rights and a social contract paradigm for thinking about responsibility and the nature of social justice.[70] The resilience-conferring social institutions and relationships in which we live our lives are constructed and maintained by the law and are essential instruments of either attaining or frustrating social justice in society.[71] They are creatures of the state and therefore the state has the responsibility to construct, monitor, regulate, and maintain them in a just manner.[72]

A "robust" sense of social justice and collective or societal responsibility must be built upon the fundamental recognition, acceptance, and appreciation of human vulnerability and dependence.[73] An embodied, inherently socially embedded subject should be at the center of our theories. An embodied vulnerable subject should replace not only the independent actor adorned with ability, agency, and assurance that constitutes the holder of rights but also the "reasonable man" of law, the artificial and inapt "rational" man of economics, and the contracting man of political theory.[74] This vulnerable theoretical subject allows us to incorporate complex needs and relationships inherent to the human condition into how we think about the role of government and the nature of both individual and collective responsibility in ways its liberal, autonomous, and independent cousin does not.

V. NOT EQUALITY, BUT DEPENDENCE; NOT FREEDOM, BUT RESPONSIBILITY

As Michael indicates in Chapters 9 and 10, the project of defining a moral vision for a twenty-first century overwhelmed with global warming, pandemics, poverty, and mounting economic and political inequality is existentially

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[69] *See id.* at 134.
[70] *See* Fineman, *Vulnerability and Social Justice, supra* note 1, at 342.
[71] *See id.*
[72] *See id.* at 366–67.
[73] *See id.* at 367–69.
[74] *See id.* at 355–56.

compelling.[75] I anticipate that developing this vision will be the focus of our upcoming workshop and I am hopeful that the sense of morality we ultimately build will be comprehensive and inclusive. To me, this means it must be based not upon abstract rights but upon the actualities of the human condition: responsive to our universal vulnerability and the resulting dependence on social institutions and relationships that it entails.

The family is a compelling metaphor for the development of a moral sensibility responsive to the needs of others. However, I would suggest that the relevant image of family connection is not the tie of brotherhood. The sibling relationship is a generational bond between those who are of equal status and assumed independent capabilities, even if related. When considering the social implications of vulnerability and dependency, the appropriate family connection should clearly incorporate the moral responsibility or obligation inherent to the situation of asymmetric need and capacity. This is a bond not of equality but of empathy and compassion; it is a bond that recognizes and validates the reality of inherent dependency that constitutes the circumstances in which we live our day-to-day lives.[76]

A. Beyond Individual Rights to Collective Societal Responsibility

One of the significant issues I hope to consider in our future workshop contrasting vulnerability theory with human rights is that of the extent and nature of state responsibility. To consider how responsibility might be allocated between the individual and the state, we must also consider questions regarding state (or government) authority: How is it constituted and how does it manifest itself? What exactly is the role of the state and how does it shape our notions of individual responsibility?

Vulnerability theory appreciates and advocates for the democratic state as a uniquely positioned mechanism for the construction of a just and inclusive society.[77] This is *not* an argument that the state functions in that way, merely that it has more potential for doing so than do the alternatives. This potential has been impaired and frustrated by an impoverished notion of equality and liberty, which tolerates only a limited, constrained vision of the state. The resulting

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[75]   *See* Perry, *supra* note 2, chs. 9–10.

[76]   The familial image of the parental (whether paternal or maternal) caretaker might come to mind in this context. Unfortunately, those familial images have been tarnished by negative associations with the concept of "paternalism," a response considered politically inappropriate as inconsistent with liberal illusions of individual independence and invulnerability.

[77]   *See* Fineman, *Beyond Identities*, *supra* note 1, at 1763.

diminished notion of state responsibility has left societal well-being to the hapless individual or displaced onto a largely privatized set of unrepresentative and unregulated societal institutions.[78] Vulnerability theory challenges this impaired vision, drawing on the potential of law to craft a concept of social or inclusive justice built around an "ethics of care."[79]

Viewing societal institutions and relationships as central to the reproduction of society, vulnerability theory concedes not only the inevitability but also the desirability of some form of governing authority that is manifested through law. Vulnerability theory posits that, given the innate human condition of vulnerability and dependency, not only is there ample justification for the state (or system of governance) but also a vigorous and responsive state is essential to individual and collective well-being.[80] Beyond the necessity of governance and law, the theory also recognizes the positive potential that governing systems have to respond to and improve the human condition. The theory appreciates and builds upon the potential of the state as a unique mechanism for the construction of a just society, thus distinguishing it from other "progressive" approaches that seem unable to move beyond an oversimplistic notion of an inevitably abusive or punitive state.[81]

B. Dependence Beyond (and Before) Equality

The limitations of equality as a model for social transformation is the second issue we must address in a future workshop. Equality serves well as a measure for action when unwarranted discrimination is the issue; "one person, one vote" or "equal pay for equal work" are sound principles, as is the general requirement of equal protection.[82] However, not all situations of inequality are situations of inappropriate discrimination. What is needed in some circumstances cannot be resolved by anti-discrimination measures but by the imposition or allocation of unequal measures of social responsibility or resources.[83]

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[78]   *See* Fineman, *Universality, Vulnerability, and Collective Responsibility*, *supra* note 1, at 109.

[79]   *Id.* at 108; *see* Fineman, *Vulnerability and Social Justice*, *supra* note 1, at 367–69; Fineman, *The Limits of Equality*, *supra* note 1, at 82, 89–90.

[80]   *See* Fineman, *Vulnerability and Social Justice*, *supra* note 1, at 367–68.

[81]   *See* Fineman, *Anchoring Equality*, *supra* note 1, at 1–2. Vulnerability theory recognizes that the state can be corrupted, compromised, and co-opted, and may be abusive and intrusive. *See id.* at 18. These are tendencies that are shared by any system of rules and coercion. The state, at least if it is a democratic entity, is susceptible to correction and monitoring by those it must rely upon for its legitimacy and perpetuation (citizens). In contrast, if the state is absent or impaired, the power void will be filled by the rules and regulations developed by private entities, such as multinational corporations, insurance companies, or weaponized individuals or groups with autocratic tendencies.

[82]   *See* Fineman, *Vulnerability and Inevitable Inequality*, *supra* note 1, at 135.

[83]   *See id.* at 134–38.

For example, many of the reciprocal arrangements found within our societal institutions are inherently unequal relationships.[84] They incorporate different, complementary roles and functions, defined by legally or culturally imposed obligations, expectations, responsibilities, and benefits. These unequal social identities are initially "shaped by and conform to the ways" the institutions in which they are located have been defined.[85] For example, the parent/child relationship is shaped by the role of the family within society. Parents are socially and legally responsible for the support and welfare of their children and these responsibilities are "[complemented] by the legal doctrines of parental rights and family privacy."[86]

The parent/child relationship is perhaps the most "straightforward" example of a situation in which there is a need for conferral of unequal levels of authority and expectations.[87] However, the same sort of reciprocal but unequal relationship also defines other paired social identities. For example, professional relationships—such as those between a doctor and patient, or an attorney and client—are situations of "underlying inequality in knowledge, resources, and access to institutional structures that warrant an asymmetric allocation of responsibility."[88] The same is true of other paired social relations with differing requirements reflecting differences in skill, ability, and responsibility. Indeed, "[i]nequality in position, need, and context is also the reality when it comes to intergenerational equalities inherent in considering things like environmental practice and policies, for example."[89]

Specifically, such relationships "are situations of 'inevitable' or 'necessary' inequality from a theoretical perspective in which the social responsibilities and functions are complementary, but different."[90] These unequal social identities are not "natural and inevitable" in form and consequences, although they may correspond to "natural human impulses and emotions."[91] "As legal or social relationships, they are constructed by policy choices in which the state, through law, confers not only responsibility but also power and privilege."[92]

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84   *See* Fineman, *Reasoning from the Body*, *supra* note 1, at 30.
85   *Id.*
86   *Id.*
87   *Id.*
88   *Id.*
89   *Id.*
90   *Id.*
91   *Id.*
92   *Id.*

Although these "inherently unequal social relationships or identities represent major areas of life, historically they have conceptually been relegated to the 'private' sphere—whether it be designated 'family' or 'market' and wrongfully perceived as presumptively outside of state action and regulation."[93] Recognizing "the perpetually active role of the state in the construction and maintenance of these identities and the institutions in which they are located demands a robust response from critical theorists focused on institutional design and the allocation of privilege and benefits."[94]

CONCLUSION: FUTURE CONSIDERATIONS

The morality inquiry Michael and I will undertake in our workshop on human rights and vulnerability theory will encompass the historical question of how and why existing social relationships and institutions have been fashioned.[95] It should also examine the contemporary justifications for the existing organization of these social institutions and relationships—for the allocation of unequal privilege and advantage within any given relationship. Further, it should seek to answer the following questions: From both an empirical and a theoretical perspective, are the political and rhetorical justifications historically offered in support of these social arrangements justified by the actual (as compared with the theoretical or ideological) contemporary functioning of these institutions and relationships? How can we better structure these essential social relationships of inevitable inequality given current realities so that they operate more justly and fairly and provide more in the way of public benefits? This is not an inquiry into what rights the individual may possess but a question about the nature and extent of collective or social responsibility. This is also not an inquiry resolved by a simplistic resort to the mantras of either freedom or equality.

I look forward to the consideration (if not the resolution) of these and many more important issues of fundamental social justice. I am confident that both the human rights and the vulnerability paradigms will have a role to play in our workshop and more generally as we confront the challenges emerging in the twenty-first century. I am equally confident that the significant contributions to both human rights theory and constitutional jurisprudence that my dear

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[93]   *Id.* These "private" areas are also locations where it is difficult for norms, such as those imposed by a human rights analysis, to reach. Human rights are primarily recognized as directing governmental actions and entities.

[94]   *Id.*

[95]   Here, I am collapsing the morality question into the justice inquiry: Are these institutions justly organized and operational? This is a societal level inquiry, not an individual one.

colleague Michael J. Perry has already made will be an important part of those considerations.