Vulnerability Theory and the Role of Government

Nina A. Kohn†

ABSTRACT: In a political climate in which the role of government is actively being questioned, Martha Fineman's "vulnerability theory" is rapidly gaining momentum as a justification for expansive social welfare laws. Despite the growing body of literature applying vulnerability theory to a broad range of legal problems, scholars have yet to critically explore the theory's limitations. This article fills that void by analyzing the theory's utility and scope. It shows how examining vulnerability theory through the lens of old-age policy reveals the theory's limited prescriptive value and its tendency—as currently articulated—to promote unduly paternalistic policies. It then describes how vulnerability theory could be refined to provide greater respect for individual liberty and to enhance its value as a tool for defining the appropriate role of government. Finally, it argues that, although Fineman's theory of vulnerability does not indicate how to allocate resources among vulnerable individuals, vulnerability may nevertheless be a useful construct around which to design social policy.

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† David M. Levy Professor of Law, Syracuse University College of Law; J.D., Harvard Law School; A.B., Princeton University. The author thanks Jamie Abrams, Rakesh Anand, Ann Bartow, Keith Bybee, Angela Campbell, Evan Criddle, David Driesen, Rashmi Dyal-Chand, Cora True-Frost, Samantha Godwin, Lauryn Gouldin, Margaret Hall, Jeffrey Milder, Linda McClain, Mary Helen McNeal, Robin P. Malloy, Alexandra Natapoff, Mariela Olivares, Dave Owen, and Sarah Schindler for their helpful feedback on earlier drafts of this article, and Jill Cramer, Marissa Nossick, and Edward Thater for their research assistance. Previous versions of this article were presented as part of the University of California Los Angeles School of Law faculty colloquium series, the Loyola Law School faculty colloquium series, the Northeastern School of Law faculty colloquium series, the Gender, Law, & Policy Colloquium at Boston University, the American Association of Law Schools 2013 Annual Conference, and the Law and Society Association 2013 Annual Conference; the author also extends thanks to those who provided feedback as part of these events. Finally, the author also thanks Martha Fineman for meeting with the author to discuss vulnerability theory and many of the arguments raised herein.

I. INTRODUCTION

The government's role in allocating resources among the populace has long been a source of contention. Questions are raised not only about *how* the government redistributes resources, but also, more fundamentally, about the *extent* to which and even *whether* government should do so. The United States Supreme Court and mainstream political discourse have historically answered such questions by suggesting that the scope of the government's responsibility is limited: although the government may choose to redistribute resources through taxation and the creation of social welfare policies, the government is generally not obligated to do so.[1] Rather, the government's primary social welfare obligation is to protect individuals against wrongful discrimination and ensure that all individuals are treated alike in the eyes of the law.[2]

This "formal equality"[3] approach to understanding the role of government has been heavily criticized for failing to achieve substantive equality. The primary thrust of this critique has been that the formal equality approach fails to achieve substantive equality: when pre-existing advantages and

1. *See* Robin West, *Katrina, The Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127, 1129-30 (2006) (arguing that "no American court will discover and then impose" constitutionally protected welfare rights upon "recalcitrant" legislators and predicting that the U.S. Supreme Court's established position "that the Constitution contains at most a right to formal equality, with no substantive content . . . will likely hold constant no matter what the political leanings of the Court's personnel"). For a prominent and tragic application of this approach, see DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189 (1989) (finding that a state had no duty to protect a minor child from serious, known abuse).

2. Classic illustrations of the formal equality approach include *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 747 (2007) (prioritizing formal equality over substantive equality in a school integration case, as exemplified by Chief Justice's statement that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,") and *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (finding that discrimination on the basis of pregnancy did not constitute discrimination on the basis of gender but merely a distinction between "pregnant women and non-pregnant persons").

3. *See infra* notes 11-20 and accompanying text for a definition and discussion of "formal equality."

disadvantages of social groups differ, merely applying the same legal rules to those groups often produces unequal results.[4] Like treatment under the law therefore does not guarantee social equality.

Out of this debate, Martha Fineman's "vulnerability theory"[5] is emerging as an influential and powerful new critique of formal equality and as an alternative framework for understanding substantive equality.[6] It proposes that vulnerability is inherent to the human condition, and that governments therefore have a responsibility to respond affirmatively to that vulnerability by ensuring that all people have equal access to the societal institutions[7] that distribute resources. The theory thus provides an alternative basis for defining the role of government and a justification for expansive social welfare policies.

Vulnerability theory is rapidly gaining acceptance within the legal academy[8] as progressively-oriented scholars rush to apply the theory to a broad range of legal problems.[9] The theory is attractive not only because it helps

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4. *See, e.g.*, IRIS MARION YOUNG, JUSTICE & THE POLITICS OF DIFFERENCE, 156-191 (1990) (arguing that equality sometimes requires "different treatment for oppressed or disadvantaged groups and that "[t]o promote social justice . . . social policy should sometimes accord special treatment to groups"); *see also infra* note 20.

5. Fineman first articulated vulnerability theory in the *Yale Journal of Law & Feminism* in 2008. *See* Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 9-15 (2008) [hereinafter Fineman, *Anchoring Equality*].

6. *See, e.g.*, Fionnuala Ni Aolain, *Women, Vulnerability, and Humanitarian Emergencies*, 18 MICH. J. GENDER & L. 1, 4 (2011) (describing Fineman's work as "path-breaking"); Darren Rosenblum, *Unsex CEDAW, or What's Wrong with Women's Rights*, 20 COLUM. J. GENDER & L. 98, 140-141 (2011) (stating that Fineman's vulnerability theory "could potentially redefine an identity-driven construct to an inclusivity and fluidity that would reflect the reality of human identity"); Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513 (2008) (describing vulnerability theory as significantly advancing academic discourse about government responsibility by redefining the relationship between individuals and the state); Barbara Bennett Woodhouse, *A World Fit for Children is a World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability*, 46 HOUS. L. REV. 817, 853-54 (2009) (describing Fineman's work as "path-breaking" and declaring that "[r]ecognition of our common vulnerability allows us to overcome barriers of identity politics that currently divide us and impede reform"). *See also* Nancy E. Dowd, *The "F" Factor: Fineman as Method and Substance*, 59 EMORY L.J. 1191, 1191, 1201 (2010) (describing the "profound" substantive and methodological impact of Fineman's work, "her long tradition of . . . moving forward the dialogue of equality and justice," and declaring that "[it] is no exaggeration to say that no legal scholar of the family has gone untouched by Fineman's work").

7. Although Fineman does not explicitly define the term "societal institution," she has used the term to broadly refer to a wide variety of legally-recognized arrangements. *See generally* Martha A. Fineman, *Gender & Law: Feminist Legal Theory's Role in New Legal Realism*, 2005 WIS. L. REV. 405 (2005) (providing an extensive discussion of Fineman's view of the relationship between the "societal institution" of the family and other "societal institutions"); Martha A. Fineman, *Contract & Care*, 76 CHI.-KENT L. REV. 1403, 1412 (2001) (describing the family, the market, and the state as the primary societal institutions).

8. Indeed, at the 2013 meeting of the American Association of Law Schools, three separate sessions were devoted to the exploration of vulnerability.

9. *See, e.g.*, Helen Carr, *Housing the Vulnerable Subject: The English Context* 107, 122, *in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS (Martha Albertson Fineman & Anna Grear eds., Ashgate Pub. Co. 2013) (applying vulnerability theory to housing policy in the United Kingdom); Rachel Anne Fenton, *Assisted Reproductive Technology Provision and the Vulnerability Thesis: From the UK to the Global Market* 126, *in id.* (applying

explain the basis for broad social welfare policies, but also because it suggests that vulnerability can replace group identity (e.g., race, gender, poverty) as a basis for targeting social policy. At a time when legal scholars are increasingly questioning the law's use of identity-based criteria such as gender and race, in part because of greater appreciation for the impact of "intersectionality" (i.e., the way an individual's multiple identities interact to shape his or her experiences),[10] Fineman's claim of creating a "post-identity" approach is provocative and attractive.[11]

Despite an emerging body of literature applying vulnerability theory, the theory has just begun to be substantively critiqued by other scholars.[12] Moreover, to date, no scholars other than Fineman have attempted (at least in published form) to refine it. As a result, current applications of the theory tend to proceed in a manner that is less critical and less nuanced than might otherwise be possible.

This article attempts to fill that void by examining the theory's utility and limitations and then suggesting how the theory could be modified to enhance its value as an intellectual underpinning for social welfare law. Specifically, it argues that vulnerability theory provides a helpful framework for understanding social responsibility and the role of the state. However, it also shows how Fineman's own work applying vulnerability theory to old-age policy reveals the theory's limitations as a prescriptive tool and its tendency—at least as currently

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vulnerability theory to policy related to assisted reproductive technologies); Aolain, *supra* note 6 (applying vulnerability theory to international humanitarian emergencies); Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK U. L. REV. 1047 (2012) (applying vulnerability theory to understand fatherhood); Hila Keren, *Consenting Under Stress*, 64 HASTINGS L.J. 679 (2013) (applying vulnerability theory as part of a proposal as to how the law should treat consent given under stress); Rosenblum, *supra* note 6 (applying vulnerability theory to gender and identity discrimination); Satz, *supra* note 6 (applying vulnerability theory to disability law); Brenda V. Smith & Melissa C. Loomis, *After Dothard: Female Correctional Workers and the Challenge to Employment Law*, 8 FIU L. REV. 469 (2013) (applying vulnerability theory to critique employment protections for female correctional workers); Jason M. Solomon, *Civil Recourse as Social Equality*, 39 FLA. ST. U. L. REV. 243, 248-50 (2011) (applying vulnerability theory to tort law); Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 SETON HALL L. REV. 1, 64-65 (2013) (in a discussion of legal supports for grandparents who assume caretaking roles, applying vulnerability theory to argue that children and older adults' interests both converge and are in tension).

10. *Cf.* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (introducing intersectionality into the discourse of legal academia).

11. Fineman's theory of vulnerability represents a reaction against, and rejection of, the intersectionality approach to addressing the oversimplification of identity. For further discussion of this point, see *infra* notes 27-28 and accompanying text.

12. The most significant critiques to date can be found in a book co-edited by Fineman published in December 2013. *See generally* Sean Coyle, *Vulnerability and the Liberal Order*, *in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS (Martha Albertson Fineman & Anna Grear eds., Ashgate Pub. Co. 2013) (suggesting reasons to be concerned about the potentially authoritarian nature of the "responsive state" envisioned by Fineman); Morgan Cloud, *More than Utopia*, *in id.* at 77-94 (arguing, in part, that Fineman's theory of vulnerability undervalues the human desire for autonomy).

articulated—to promote excessively paternalistic laws and policies. Finally, it argues that, although Fineman's theory of vulnerability does not indicate how to allocate resources among vulnerable individuals, vulnerability may nevertheless be a viable basis for policy intervention.

The article proceeds with five major parts. Parts II and III describe vulnerability theory and its value to those designing social policy. Part IV discusses how Fineman's application of vulnerability theory to old-age policy reveals the underlying limitations of vulnerability theory, and raises serious concerns about its potential impact. Part V suggests how vulnerability theory could be refined in order to remedy its current tendency to promote unduly paternalistic laws, and to enhance its value as a framework for defining the role of government. Finally, Part VI explores how a vulnerability-based approach to social policy might serve as an alternative to an identity-based approach.

II. FINEMAN'S THEORY OF VULNERABILITY

The central thesis of Fineman's theory of vulnerability is that all human beings are vulnerable and prone to dependency (both chronic and episodic), and the state therefore has a corresponding obligation to reduce, ameliorate, and compensate for that vulnerability.[13] Implicit in Fineman's thesis is an assertion that it is neither just nor reasonable to expect that mere equal treatment will meet individuals' needs in a world in which no one is assured of avoiding injury, illness, or other adverse life events.

Fineman posits that in order to meet its obligation to respond to human vulnerability, the state must provide equal access to the "societal institutions,"[14] that distribute social goods such as healthcare, employment, and security.[15] In Fineman's telling, this obligation is consistent with the original purpose of the state: to respond to human vulnerability. She explains that:

> Our vulnerability and the need for connection and care it generates are what make us reach out and form society. It is the recognition and experience of human vulnerability that brings individuals into families, families into communities, and communities into societies, nation states, and international organizations.[16]

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13. *See* Fineman, *Anchoring Equality*, *supra* note 5, at 8-15 (articulating Fineman's vulnerability thesis).

14. *See supra*, note 7 (discussing what Fineman means by "societal institutions").

15. *See* Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 257 (2010) [hereinafter Fineman, *Vulnerable Subject*].

16. Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law & Politics*, *in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 13, 22 (Martha Albertson Fineman & Anna Grear eds., Ashgate Pub. Co. 2013).

Moreover, in Fineman's view, it is the state that has legitimized and given power to social institutions that increase resilience for some while undermining the resilience of others; thus the state must accept responsibility for the "effects and operation" of those institutions.[17]

Fineman has explicitly developed vulnerability theory as an alternative to theories of social justice and responsibility that focus on achieving formal equality (i.e., equality that results from sameness of treatment). The formal equality paradigm, as exemplified by the U.S. Supreme Court's interpretation of the Fourteenth Amendment's equal protection clause,[18] is well entrenched in the United States.[19] However, it has been the subject of substantial criticism because it fails to remedy vast discrepancies in wealth and other critical resources and thus accepts substantial, substantive inequality.[20] Indeed, like many other progressively-oriented or feminist scholars, Fineman finds a formal equality approach deficient because it cannot adequately address "gross and growing economic and material injustice" because it focuses on eliminating discrimination against historically disadvantaged groups rather than eliminating the inequalities to which those groups were subjected.[21] In addition, she argues that a formal equality approach fails to achieve meaningful social justice because it treats vulnerability as limited to special populations, which both obscures the fact that not all persons within protected populations are disadvantaged and mistakenly treats as invulnerable people who are not members of groups that are recognized as deserving special protection.[22] For

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17. *Id.* at 27.

18. *See infra* note 2 for prominent case examples of the Supreme Court's commitment to formal equality.

19. Some state courts have, however, been more expansive in their views of what equality demands. *See* Martha Albertson Fineman, *Beyond Identities: The Limits of an Anti-Discrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1724-30 (2012) [hereinafter Fineman, *Beyond Identities*] (distinguishing between Supreme Court and state court interpretations of equality and concluding that "[w]hile it seems clear that an inclusive and rigorous approach to equality has strong roots in American history at the state level, it has been pruned back in Supreme Court jurisprudence. At the federal level, only discrimination explicitly directed against certain groups in society is deemed deserving of meaningful judicial scrutiny.").

20. *See, e.g.*, Ruth Colker, *Reflections on Race: The Limits of Formal Equality*, 69 OHIO ST. L.J. 1089, 1113 (2008) (concluding, in the context of a discussion of racial equality, that "[w]hile formal equality notions may have assisted the Court in rejecting segregation in *Brown v. Board of Education*, it has outlived its usefulness as a vehicle to attain substantive equality"); Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1 (2011) (discussing the positive implications, especially for women, of moving from a formal equality approach to a substantive equality approach); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 630 (1990) ("The law's traditional approach to gender-related issues has . . . allowed broad mandates of formal equality to mask substantive inequality.").

21. Martha Albertson Fineman, *Vulnerability, Equality and the Human Condition*, *in* GENDER, SEXUALITIES AND LAW 52, 52-53 (Jackie Jones et al. eds., 2011) [hereinafter Fineman, *Vulnerability, Equality*].

22. *Id.* at 53.

example, distinctions based on gender are subject to heightened scrutiny under the Fourteenth Amendment of the U.S. Constitution because of women's historical disadvantage; [23] however, many women experience privilege relative to their male peers, and many men experience disadvantages relative to their female counterparts.[24]

Fineman sees vulnerability theory as capable of advancing substantive equality (i.e., equality that results when people are equally benefited or disadvantaged by a law or policy)[25] in a way that traditional approaches to equality cannot. She suggests that by focusing on the universal human condition, vulnerability theory makes salient the need to alter institutional arrangements that create privilege and perpetuate disadvantage. Fineman argues that, by contrast, the formal equality paradigm's focus on achieving same treatment leaves intact socially unequal distributions of wealth and power and thus does little to advance substantive equality.[26] She warns that, as a result, formal equality approaches may have the counterproductive effect of furthering inequality by validating and facilitating existing inequalities within a society.[27]

Fineman also describes vulnerability theory as advancing substantive equality in ways that identity-based approaches cannot. Indeed, Fineman's theory of vulnerability represents not only a rejection of arguments that "formal equality approaches" fail because they do not recognize group differences, but also a reaction against arguments that this failure is attributable to the over-simplification of identity.[28] Specifically, Fineman contends that the way to

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23. *See Frontiero v. Richardson*, 411 U.S. 677 (1973) (drawing on the historical discrimination against women in holding that gender-based classifications are subject to heightened scrutiny).

24. Fineman has made this point in the context of wage differences. *See* Fineman, *Vulnerability, Equality*, *supra* note 21, at 53.

25. It should be noted that there is no single conception of "substantive equality." *See* Michel Rosenfeld, *Substantive Equality & Equal Opportunity*, 74 CALIF. L. REV. 1687 (1986) (discussing competing conceptions of substantive equality). However, as a general matter, formal equality paradigms focus on equal treatment (and thus are sometimes referred to as "antidiscrimination" paradigms), whereas substantive equality paradigms focus on sameness of consequences. Thus, as a general matter substantive equality can be said to result when persons are able to equally benefit from the laws and policies of a state, whereas formal equality can be said to result when persons are equally treated by the laws and policies of a state. *Cf.* Patricia Hughes, *Recognizing Substantive Equality as a Foundational Constitutional Principle*, 22 DALHOUSIE L.J. 5, 7 n. 1 (1999) (defining substantive equality as "a form of equality which is satisfied only if policy or law is made meaningful for all members of society").

26. *See* Fineman, *Vulnerable Subject*, *supra* note 15, at 251. *See also generally* Fineman, *Beyond Identities*, *supra* note 19 (elaborating on Fineman's critique of the formal equality approach and further exploring her vision of vulnerability theory as an alternative paradigm).

27. Fineman, *Beyond Identities*, *supra* note 19, at 1738.

28. This is explicitly acknowledged in the forward to Fineman's 2013 edited volume examining vulnerability theory. *See* Martha Albertson Fineman & Anna Grear, *Introduction: Vulnerability as Heuristic—An Invitation to Future Exploration*, *in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 1, 2 (Martha Albertson Fineman & Anna Grear eds., Ashgate Pub. Co. 2013).

create legal structures that are sensitive to differing circumstances and positions is not "through intersectionality and multiplicities of identities, but . . . in exactly the opposite direction: away from the fragmentation of the legal subject to the creation of a vigorous universal conception."[29]

Because Fineman's underlying goal is to promote substantive equality and because she sees equality and autonomy as often being in tension with one another, Fineman posits that rules and regulations that restrict the autonomy of some within society are necessary in order for the state to meet its social welfare obligations.[30] Restrictions on autonomy, however, do not overly concern Fineman as she is deeply skeptical of the value of autonomy.[31] Indeed, in Fineman's recent discussion of the resources that contribute to material well-being, any reference to freedom, independence, or choice is notably missing.[32] This is despite the fact that Fineman includes a long list of types of resources that contribute to well-being, including social and existential resources.[33]

Most of Fineman's writing on vulnerability theory has discussed the theory at a relatively abstract level. In 2012, however, Fineman concretely applied the theory to a particular policy challenge in an article entitled *"Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility.*[34] In that article, Fineman explores the implications of vulnerability theory for older adults and, in particular, for the state's responsibility to older adults. She argues that older adults, like other members of society, are vulnerable subjects and that society has a responsibility to provide for their safety and security. She expresses concern that, in a mistaken effort to promote autonomy, the state and other institutions may do too little to protect older adults.[35] She then suggests a variety of highly paternalistic laws that she argues should be considered in order to protect the interests of older adults.[36] These proposed legal approaches range from voiding certain transactions entered into by older people to treating the legal capacity of older adults as less absolute than that of younger adults.[37] While Fineman recognizes value in extending such "protections" more

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29. *See* Martha Albertson Fineman, *Feminism, Masculinities, and Multiple Identities*, 13 NEV. L.J. 619, 636 (2013) [hereinafter, Fineman, *Feminism, Masculinities*].

30. *See* Fineman, *Vulnerable Subject*, *supra* note 15, at 261.

31. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY, 20-30 (2004) [hereinafter FINEMAN, AUTONOMY MYTH] (describing the way that American society thinks about the desirability and attainability of autonomy as impeding the way in which we think about equality); Martha A. Fineman, *"Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*, 20 ELDER L.J. 71, 84 (2012) [hereinafter, Fineman, *Elderly*] (also voicing such skepticism).

32. *See* Fineman, *Vulnerable Subject*, *supra* note 15, at 270-72.

33. *See id.* Arguably, liberty might be said to fall within the broader category of existential resources but Fineman does not identify it as doing so.

34. Fineman, *Elderly*, *supra* note 31.

35. *Id.* at 92-94, 100.

36. *Id.* at 94.

37. *Id.*

broadly,[38] she nevertheless reasons that, "[i]f there is a substantially increased probability that older persons may not be able to bargain, contract, and protect their interests as wisely or as well as those who are younger are presumed to, then why not have age-sensitive rules."[39]

The next two parts analyze Fineman's articulation of how she would apply vulnerability theory to old-age policy to tease apart the theory's underlying assumptions and uncover its limitations. Analyzing vulnerability theory through the lens of old-age policy is informative not only because it is a context in which Fineman has sought to concretely apply the theory. It is also appropriate because old age is a paradigmatic example of a human condition associated with vulnerability and, therefore, applying vulnerability theory to old-age policy is an effective mechanism for identifying the theory's capabilities and limitations. Thus, as the next two parts explore, not only can vulnerability theory inform old-age policy, but an understanding of old-age policy can inform and shape vulnerability theory.

III. THE INSTRUMENTAL VALUE OF VULNERABILITY THEORY

Vulnerability theory has the potential to support and further understanding of social policy in three primary ways. First, by articulating that vulnerability is a universal condition of the human race, the theory emphasizes both the importance of the state and the importance of the state's acceptance of responsibility for creating and supporting systems that promote resilience across the lifespan and across populations. In this way, it helps provide a justification for the adoption of laws that create and sustain important social welfare systems.[40] For example, it helps justify the existence of old-age entitlement programs such as Medicare and Social Security,[41] which provide older adults with a safety net that is essential when risks to health, safety, or financial well-being materialize.

Second, by detaching vulnerability from the notion of specific vulnerable groups and emphasizing the fact that all people are vulnerable and may experience dependency, [42] vulnerability theory may help society to reimagine

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38. *Id.* at 94-95.

39. *Id.* at 94. It is notable that Fineman does not limit her embrace of age-specific protections to situations in which older adults are statistically likely to *actually* be less able than younger adults; it is sufficient that older adults are less able that younger adults are *presumed* to be.

40. Fineman has repeatedly recognized this benefit in her own work.

41. Fineman highlights several of these attacks in her discussion of old-age policy. *See* Fineman, *Elderly*, *supra* note 31, at 108, 111 (discussing criticisms of, and political attacks on, the Social Security system and Medicare).

42. *See, e.g.*, Fineman, *Vulnerable Subject*, *supra* note 15, at 266 ("[M]y work has developed the concept of vulnerable detached from specific subgroups, using it to define the very meaning of what it means to be human[.]").

the term "vulnerability" and ultimately reduce the stigma associated with vulnerability.[43] As Fineman has explained, vulnerability "need not be equated with weakness any more than age inevitably means loss of capacity."[44]

Third, recognizing the universality of vulnerability encourages comprehensive approaches to addressing inequality and vulnerability, not simply piecemeal population-by-population interventions that fail to create fundamental change. This is important not only because it encourages more systemic reform, but also because policies that are applied across populations are less likely to be unreasonably paternalistic. That is, groups in power are less likely to create unreasonably paternalistic laws if those laws apply to them as well as to some sort of targeted other.[45]

Thus, despite Fineman's endorsement of radically paternalistic legal approaches to old-age policy, were society to acknowledge the vulnerability of the human condition more broadly as Fineman urges, it could actually encourage the adoption of less paternalistic laws and policies. As precedent, one might look to the impact that a similar focus on the universal risk of disability has had in the context of the disability rights movement. The disability rights movement, and especially the independent living movement that is encapsulated within it, has helped shift the provision of long-term care toward home and community-based care and away from the paternalistic, institutional care model that has historically characterized long-term care policy in the United States. One way it has advanced this policy shift is by increasing awareness of the long-term care needs of younger disabled adults—and a corresponding recognition of universal vulnerability to disability and the fact that people of any age may need long-term care if they are or become severely disabled.[46]

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43. It is thus fitting that Fineman chose old-age policy as the context in which to concretely apply vulnerability theory; to the extent that vulnerability theory reduces the stigma associated with vulnerability, it would be especially beneficial to older adults. Older adults experience significant vulnerability and are therefore especially harmed by the stigmatization of vulnerability. Thus, they are likely to disproportionately benefit from reduction in the stigma associated with vulnerability. In addition, older adults are particularly likely to gain from the emphasis on the universality of vulnerability because older people are often described as having distinct frailties and dependencies when, in fact, people of all ages are at risk for most of the disabling conditions associated with aging; older adults are simply at greater risk. The notion that dependency is triggered by age encourages ageism and promotes the social, physical, and legal segregation of older adults. For example, it creates an environment ripe for the adoption of paternalistic and rights-limiting laws that would be unlikely to be considered acceptable if applied to younger adults. *See* Section IV.B for a discussion of such statutes.

44. Fineman, *Elderly*, *supra* note 31, at 96.

45. While this seems, to the author, to be a fundamental contribution of the theory, it is not one on which Fineman herself has focused, unlike the first two benefits.

46. Similarly, recognizing the vulnerability of the human condition more broadly might promote "age neutrality in public policy" as Fineman suggests. *See* Fineman, *Elderly*, *supra* note 31, at 95. Whether or not this would ultimately be beneficial to older adults would likely depend, at least in part, on whether it was accompanied by a move toward a state that is more responsive to the needs of all people or whether it instead reflected a withdrawal of social supports currently targeted at older adults.

IV. THE LIMITATIONS OF VULNERABILITY THEORY

Although Fineman's application of vulnerability theory to older adults highlights the importance and value of the theory, it also reveals its limitations. Specifically, it reveals the theory's limited value as a prescriptive tool for choosing among policy options. It also reveals how the theory, as currently articulated, may promote unnecessarily paternalistic statutes and regulations.

A. Limited Prescriptive Value

A key insight of vulnerability theory is that vulnerability and dependency are universal and inherent to the human condition. Consistent with that insight, Fineman argues against a "targeted group approach to the idea of vulnerability" because it "ignores its universality and inappropriately constructs relationships of difference between individuals and groups within societies."[47] Indeed, Fineman has sharply criticized approaches to law reform that focus on the needs of specific groups of people, writing that reformers must move to a "beyond-identities vision" because doing so "will tend to direct critical attention to discrimination by and against individuals, not to the real or potential failures, distortion, or corruption of societal structures that affect everyone in society."[48]

However, when Fineman moves beyond a relatively abstract discussion of vulnerability theory to recommend specific laws, she adopts the very type of targeted group approach to addressing vulnerability that she has vigorously opposed. Specifically, when Fineman attempts to use vulnerability theory to argue for particular policies to protect older adults, she embraces an approach that singles out older adults for special "protections" on the basis of the perceived vulnerability of the group. She asks "why not" adopt age-sensitive rules for older adults.[49] She then goes on to suggest, by way of example, redefining the fiduciary duties of those who care for older adults, and perhaps others who interact with older adults (e.g., lawyers or bank officials).[50] Similarly, to address financial exploitation and "overreaching," she suggests special legal duties for financial actors who deal with the elderly as well as new torts and crimes for "elder fraud." [51] She reiterates her argument for age-specificity for such legal protections, indicating that they would be triggered by

47. *Id.* at 85.
48. Fineman, *Feminism, Masculinities*, *supra* note 29, at 639.
49. Fineman, *Elderly*, *supra* note 31, at 94.
50. *See id.*
51. *See id.*

the age of the older adult (i.e., group identity), not by his or her individual incapacities.[52]

In short, despite maintaining that targeted approaches to vulnerability are undesirable because they construct relationships of difference, Fineman advocates a host of new laws that would socially construct differences based on chronological age. Fineman does acknowledge that applying such laws "more broadly" (it is unclear whether she means to the entire population or not) would better reflect the universality of vulnerability.[53] Nevertheless, Fineman condones age-specific "protections." By doing so, she moves away from the post-identity and substantive equality approaches that she espouses, and toward the formalistic equality and identity-based approaches that she criticizes.

The juxtaposition of recognizing the universality of vulnerability and the danger of group-based approaches on one hand and promoting age-dependent protections on the other is perplexing. There are several possible reasons why one might adopt these seemingly inconsistent positions. One is that, in an eagerness to help older adults, there is a tendency to want to do *something* without adequately analyzing how to do the *right thing*. As explored in the next part, this type of thinking appears to be motivating many states to adopt the types of legal interventions that Fineman suggests.

Another possible explanation is that age-based categories are simply very appealing.[54] Policymakers and advocates frequently advocate age-based policies because age is seen as a proxy for a host of other harder-to-assess characteristics, because age-based classification systems are easy and relatively inexpensive to administer and apply, and because the use of such classifications is typically assumed to be beneficial—or at least benign—with regards to older adults.[55] Perhaps it is this appeal that causes Fineman not to consistently apply insights from her own general theory to the specific case of elder law.

A more fundamental explanation, however, is that the arguments put forth in *Elderly as Vulnerable* suggest that vulnerability theory is not equipped to suggest particular social welfare laws or policies. Despite the desirability of broad social welfare policies that provide all people with a decent standard of living and reasonable opportunities, at least in the current political climate, social welfare policies are virtually always both under-inclusive and over-

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52. *Id.* ("The main focus of such measures is on the character or the actions of the outsider, not on the incapacities of the elderly.").

53. *Id.*

54. *See, e.g.*, Arthur Meirson, Note, *Prosecuting Elder Abuse: Setting the Gold Standard in the Golden State*, 60 HASTINGS L.J. 431, 432 (2008) (arguing that "[b]ecause elder adults are a uniquely vulnerable population, they should be specially and broadly protected" by penal codes that "do not permit or require the alleged crime to turn on the 'the subjective experience of the elder victim'").

55. *See* Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213, 279 (2010) (discussing the appeal of chronological age as a proxy) [hereinafter Kohn, *Rethinking*].

inclusive.[56] Vulnerability theory provides little guidance as to how to prioritize among vulnerable subjects when allocating limited financial resources and political capital. Indeed, it makes such differentiation more problematic by emphasizing the universality of vulnerability.

Arguably, a policymaker wishing to allocate resources based on vulnerability could create some type of continuum of vulnerability, and resources could be prioritized based on levels of vulnerability. As articulated, however, vulnerability theory is anathema to this approach. Not only does Fineman emphasize the universality of vulnerability but, as a practical matter, unless each individual was subject to a personalized vulnerability assessment, a person's level of vulnerability would necessarily have to be determined based on his or her group identity. Prioritizing resources based on a person's level of vulnerability would thus not move "beyond identity," as Fineman urges, although it might prompt the creation of new, vulnerability-based identities.

This is not to say that vulnerability theory is without prescriptive value. It is a helpful framework for thinking about social structures and how to allocate responsibilities.[57] Vulnerability theory helps us understand why we might favor laws that provide broad-based social support and why we might be concerned about selectively allocating resources based on group identity. Vulnerability theory suggests that governments responding to the needs of their populations should do so by creating legal institutions and systems that increase resilience across populations. For example, rather than creating a new crime for "elder fraud" as Fineman suggests, vulnerability theory would support government efforts to address fraud by developing and supporting policies that target the conditions that promote such fraud—such as social isolation, limited financial literacy, under-regulation of commercial activities, under-enforcement of existing regulations on commercial activities, and lack of access to legal resources for victims of fraud. Similarly, recognizing that the risk of financial exploitation increases where the victim is dependent on the exploiter and thus subject to coercion or undue influence, vulnerability theory might suggest creating systems for funding caregiving that provide those in need of care with more meaningful options for that care.

In short, the inconsistency that surfaces in *Elderly as Vulnerable* is perhaps best explained not simply as an oversight or a result of the attractiveness of

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56. *Cf.* Duncan Kennedy, *Form & Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689-90 (1976) (discussing the inevitability of laws being both under- and over-inclusive because "[e]very rule involves a measure of imprecision vis-à-vis its purpose (this is definitional)").

57. *See, e.g.*, Satz, *supra* note 6 (drawing on vulnerability theory to argue in favor of moving beyond an anti-discrimination model for addressing the employment-related needs of persons with disabilities to a model that also recognizes a role for the government in providing material support to such persons).

age-based policy, but as a result of the theory being asked to do something it is simply not equipped to do.

B. Undue Paternalism

Fineman's application of vulnerability theory to the law as it affects older adults also reveals that using vulnerability theory as a guide for law reform can result in poor policy choices and, in particular, policy choices that unduly limit individuals' autonomy.

Fineman's discussion of vulnerability theory and its implications is strongly colored by her long-standing skepticism of the value of autonomy for individuals and families.[58] It is not that Fineman is opposed to autonomy per se, but rather that she questions its independent value. She posits that safety and security are prerequisites for the meaningful exercise of autonomy[59] and therefore safety and security should not be seen as in tension with autonomy.[60] As a result of treating autonomy as almost wholly dependent on safety and security, Fineman ends up describing vulnerability theory in a way that suggests to the reader that autonomy cannot be prioritized over (or even placed on equal footing with) safety and security. Thus, those seeking to apply a vulnerability theory approach to evaluate policy choices may come to believe that vulnerability theory does not favor policies that protect autonomy either for its own sake or on the grounds that autonomy is instrumental for supporting safety and security. In the same vein, those seeking to apply vulnerability theory are likely to conclude that it does not favor laws or policies that carefully balance tradeoffs between autonomy on the one hand and safety and security on the other. Rather, they are likely to conclude that it privileges laws and policies that maximize a narrow conception of safety and security.

The problem with such laws and policies is two-fold. First, they are likely to be at least partially counterproductive. While safety and security may support and facilitate autonomy, autonomy can also support and facilitate safety and security. Individuals are often in the best position to know what makes them safe and secure and in a better position than governments or other institutional actors to act quickly and efficiently in their own interest; thus, having the autonomy to act independently can itself be protective. In addition,

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58. *Cf.* FINEMAN, AUTONOMY MYTH, *supra* note 31, at xiii.

59. Fineman, *Elderly*, *supra* note 31, at 92 (expressing concern that social welfare advocates describe autonomy as at odds with safety and security because "[n]ot only is autonomy inappropriately prioritized in this comparison, safety and security are not conceptualized as necessary for its exercise. A vulnerability approach might well reveal the ways in which safety and security are prerequisites for the meaningful exercise of autonomy, not in conflict with it. Safety and security are necessary to have the ability to fully and freely exercise options and make choices.").

60. *Id.*

individuals' subjective feelings of control can enhance both their subjective sense of well-being and their objective physical and mental health. As is well-documented in the psychological literature, an individual's perceived sense of control over life events and over him- or herself can have a strong, positive effect on both physical and psychological well-being, even leading to increased longevity.[61] Perceived dependence on other persons, by contrast, is correlated with decreased psychological and physical well-being.[62]

The second problem with policies that prioritize this narrow conception of safety and security is that they ultimately undermine human dignity. Even those who personally agree with Fineman's argument that autonomy is overvalued should recognize that other people (indeed, most other people in the U.S.) believe that autonomy is valuable and that independence is something to which one should aspire.[63] When evaluating policies related to older adults, for example, it is important to recognize that older adults tend to place great priority on independence, even elevating it above safety and security.[64] Such beliefs may be socially constructed, as Fineman claims,[65] but they are still real and firmly held. Adopting laws to "protect" or otherwise help people without attempting to respect their value system is a form of disrespect and an affront to their human dignity. Using vulnerability theory to evaluate particular public policy choices is, therefore, likely to encourage laws that disrespect those whom they seek to protect.

The types of laws that Fineman advocates when applying vulnerability theory to old-age policy illustrate both of these problems. Fineman suggests that polities adopt "age-sensitive" protections, such as new crimes for "elder

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61. *See* Richard Schulz & Jutta Heckhausen, *Aging, Culture and Control: Setting a New Research Agenda*, 54.3 J. GERONTOLOGY: PSYCHOL. SCIENCES 139, 141-42 (1999) ("With the exception of a few studies that focus on unique and unusual circumstances . . . the overriding picture that emerges from this literature is that having control is good for one's health and not having it can be bad."); Ellen A. Skinner, *A Guide to Constructs of Control*, 71.3 J. PERSONALITY & SOC. PSYCHOL. 549, 549 (1996) (providing a literature review and concluding that "decades of research in sociology and psychology have demonstrated that a sense of control is a robust predictor of physical and mental well-being . . ."). These effects, moreover, appear to be robust across cultures. *See* Schulz & Heckhausen, *supra*, at 142 ("To the degree that cross-cultural data are available, this finding also appears valid across cultures.").

62. *See* Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1, 28-29 (2006) (discussing the literature on the association between perceived sense of control and well-being and perceived sense of dependence and well-being).

63. Fineman clearly recognizes that this is the case, describing the "autonomy myth" as one of America's "foundational myths." *See* FINEMAN, AUTONOMY MYTH, *supra* note 31, at 20-22. *See also* Cloud, *supra* note 12, at 93 (describing the drive for independence as universal in nature and critiquing vulnerability theory, and suggesting that, therefore, Fineman's suggestion that the state respond to the "vulnerable subject," and not the "liberal subject," is unlikely to appeal to American society).

64. The precise meaning attached to independence, however, is likely to be subjective. *See* Elena Portcolone, *The Myth of Independence for Older Americans Living Alone in the Bay Area of San Francisco*, 31 AGEING & SOC. 803 (2011) (in an ethnographic study, describing how older adults' conceptions of independence differ from one another).

65. *See* FINEMAN, AUTONOMY MYTH, *supra* note 31.

fraud."[66] In recent years, many states have enacted statutes creating a variety of such age-targeted protections that are similar to the "protective" policies that Fineman suggests. A review of the resulting laws sheds light on just how problematic the results can be.

Increasingly, for instance, states are adopting criminal statutes that facilitate prosecution of elder abuse by creating new crimes that either apply exclusively to situations where the "victim" is above a certain age, or which can be triggered by the victim being above a certain age.[67] Several states have criminalized certain types of consensual sexual relationships where the "victim" is elderly. For example, the state of Washington criminalizes sexual relations between disabled persons age sixty or older and anyone who provides them with paid transportation, regardless of whether the relationship is consensual.[68] Similarly, Vermont considers it a criminal act for anyone who works or volunteers at a caregiving facility or program to engage in sexual acts with any person whose ability to care for him- or herself is impaired due to "infirmities of aging."[69] Such statutes are consistent with, and ultimately perpetuate, stereotypes of older adults as asexual[70] and sexual activity of older

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66. Fineman, *Elderly*, *supra* note 31, at 94 ("Perhaps the notion of graduated autonomy adopted in the Convention on the Rights of the Child might provide a workable model for calibrating concepts like autonomy to individual capabilities, rather than treating it in an either/or dichotomous fashion. . . . Laws could define the 'fiduciary duties' of family members and others actually caring for the elderly, but perhaps also adopt rules suitable to be applied to lawyers, bank officials, and other actors necessarily implicated in transactions. . . . A complementary set of regulations could render transactions in which there was overreaching or exploitation null and void. A positive duty of fair dealing could be placed on creditors or other financial actors with whom the elderly deal, and the remedies for breaching that duty could go beyond mere cancelation of the transaction to the imposition of fines. Perhaps we need a new tort of financial exploitation or criminal penalties for elder fraud.").

67. *See* Nina A. Kohn, *Elder (In)Justice: A Critique of the Criminalization of Elder Abuse*, 49 AM. CRIM. L. REV. 1, 8-13 (2012) [hereinafter Kohn, *Elder (In)Justice*].

68. *See* WASH. REV. CODE § 9A.44.100(1)(f), § 9A.44.010(16) (2013) (criminalizing sexual conduct with a "frail elder or vulnerable adult" defined as "a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself"); WASH. REV. CODE §9A.44.100 (2013) (making it a felony for a paid transportation provider to knowingly cause a disabled person age sixty or older, other than his or her spouse, "to have sexual contact with him or her or another" even if the contact is consensual).

69. *See* VT. STAT. ANN. tit. 13, § 1379(a) (2012) ("A person who volunteers for or is paid by a caregiving facility or program shall not engage in any sexual activity with a vulnerable adult. . . . A person who violates this subsection shall be imprisoned for not more than two years or fined not more than $10,000.00, or both."); *id.* § 1375(8)(d) (defining a "vulnerable adult" as including "any person 18 years of age or older who . . . is impaired due to . . . infirmities of aging, or a physical, mental, or developmental disability that results in some impairment of the individual's ability to: (i) provide for his or her own care without assistance, including the provision of food, shelter, clothing, health care, supervision, or management of finances; or (ii) protect himself or herself from abuse, neglect, or exploitation"). Consent is only a defense if the caregiver is hired, supervised, and directed by the vulnerable adult. *Id.* § 1379(a).

70. *See* ERDMAN B. PALMORE, AGEISM: NEGATIVE AND POSITIVE 4, 21 (2d ed. 1999) (explaining that older adults are stereotyped as no longer engaging in sexual activity or having sexual desires, and that those who do are viewed as "morally perverse or at least abnormal"); BARBARA SHERMAN, SEX, INTIMACY AND AGED CARE 4-8 (1999) (discussing stereotypes about older adults' sexuality).

persons as abnormal or pathological.[71] Moreover, they create a mechanism by which the state can limit older adults' ability to relate freely to other people.

Similarly, states have created new crimes that prohibit certain types of financial transactions that would be considered lawful were it not for the "victim's" advanced age. For example, as part of their attack on the financial exploitation of older adults, a number of states have adopted statutes criminalizing "undue influence" of older adults. Such statutes enable prosecution of those regarded as having taken unfair advantage of an older adult without requiring the government to establish theft, coercion, fraud, diminished cognitive capacity, or other traditional grounds for finding that an agreement was not entered into freely.[72] Since these statutes typically do not specifically define "undue influence," the term's definition is likely to be imported from the testamentary context in which it was developed, a context in which the "unnaturalness" of a disposition is evidence of undue influence.[73] Thus, decisions as to whether to prosecute will likely turn on the perceived "naturalness" of the older adults' behavior, which cannot help but be influenced by the cultural background and biases of prosecutors.[74] This would not necessarily be a problem if the alleged "victim" had standing to object to prosecution and to the undoing of his or her agreements. However, because such statutes typically eliminate the need for victim testimony or participation in the prosecution process,[75] they create a mechanism for selectively undoing the transactions of older adults who allocate resources in a manner inconsistent with community norms or the expectations or values of prosecutors.[76] When

71. *See* SHERMAN, *supra* note 70, at 4 (discussing this stereotype).

72. For example, Illinois makes "financial exploitation of an elderly person (defined as anyone age 60 or older) or a person with a disability [by a person] in a position of trust or confidence with the elderly person" a crime, and allows the crime to be premised on "misappropriation of . . . assets or resources by undue influence." 720 ILL. COMP. STAT. ANN. 5 / 17-56(a), (c) (2013).

73. *See generally* Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245 (2010).

74. This would be consistent with how undue influence doctrine has historically functioned in the testamentary context. *See id.* at 246 (arguing that the doctrine of undue influence does not protect testamentary freedom but instead functions as "a means to keep inheritance within families, or at least within relationships fitting perceived social norms").

75. The focus on perpetrator behavior and not victim characteristics (e.g., diminished capacity) can eliminate the need for victim testimony and thus victim involvement. This is, in fact, one of the purported benefits of such statutes. *See* Deborah O'Connor, Margaret Isabel Hall & Martha Donnelly, *Assessing Capacity Within a Context of Abuse or Neglect*, 21 J. ELDER ABUSE & NEGLECT 156, 166 (2009) (discussing the benefits of this shift).

76. Part of the concern is that the state may become an unwitting participant in a family feud or inheritance battle. *See* Kohn, *Elder (In)justice*, *supra* note 67, at 26-27 ("[I]n many elder abuse cases, the initiator of contact with the criminal justice system has a personal interest in promoting prosecution, which may lead to self-serving and even bad faith reports of abuse. For example, beneficiaries of an older person's estate have a strong incentive to report suspected financial exploitation as dissipation of the older adults' assets can threaten their inheritances. Such beneficiaries also have an interest in reporting other forms of suspected abuse by someone with whom the older adult has a relationship, as a way of eliminating the possibility that the new individual will be included in a subsequent inheritance or other sharing of resources").

such statutes apply to all "victims" above a certain age, this includes undoing transactions of even fully cognitively capacitated older adults, as the vast majority of older adults are cognitively intact.[77]

These types of age-targeted criminal statutes may promote ageist attitudes, which is not only a problem in its own right but may be counterproductive given that ageism may be causally linked to elder abuse.[78] Such statutes also disempower older adults, potentially so much so that they not only re-victimize those who have been subjected to past abuse but also create a form of state-based oppression.[79] For example, statutes that facilitate the prosecution of elder abuse by making it possible to secure a conviction without any victim testimony, allow prosecutors to act without the participation of the victim and even over his or her objection. The result may be to further marginalize such elder abuse victims, and to contribute to their feelings of helplessness.[80]

Other age-specific protections create similar concerns. For example, most states now mandate that at least certain categories of people (e.g., doctors, lawyers, social workers, clergy, etc.) report suspected elder abuse to a governmental entity. Such reports are typically required despite the paucity of evidence of their benefit to older adults. Moreover, they typically require reporting regardless of whether the report would help or endanger the particular person who is the subject of it and regardless of the nature of the information to be disclosed.[81] Notions that older adults are vulnerable are at the heart of these statutory schemes, yet in only a subset of such laws is the requirement to report triggered by vulnerability itself.[82] Many instead use chronological age as a proxy for vulnerability,[83] much in the way Fineman suggests, or as one of two or more variables triggering a duty to report.[84] In yet other states, while age is

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77. This point is underscored by the fact that, contrary to common misunderstandings, dementia only affects a relatively small percentage of the elderly population. Less than five percent of people in their seventies, and only approximately a quarter of those in their eighties have dementia. Indeed, dementia is not even the norm for those in their nineties as it only affects slightly over a third of that age group. *See* B.L. Plassman et al., *Prevalence of Dementia in the United States: The Aging, Demographics, and Memory Study*, 29 NEUROEPIDEMIOLOGY 128 (2007), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2705925.

78. *See* PALMORE, *supra* note 70, at 138 (describing "stereotypes of the old as helpless, worthless, and repulsive" as encouraging elder abuse by encouraging "people to vent their frustrations on elders or to see them as vulnerable targets for exploitation").

79. *See generally* Kohn, *Elder (In)Justice*, *supra* note 67 (developing this argument and drawing on feminist critiques of mandatory arrest and prosecution policies in the domestic violence context to do so).

80. *Id.* at 22-23.

81. *See* Nina A. Kohn, *Outliving Civil Rights*, 86 WASH. U. L. REV. 1053 (2009) (providing an overview of mandatory elder abuse reporting laws in the U.S.) [hereinafter Kohn, *Outliving*].

82. *See, e.g.*, OKLA. STAT. ANN. tit. 43A §§ 10-103, 10-104 (West 2014) (defining "vulnerable adults," the category of persons about whom reports are mandated, in age-neutral terms).

83. *See, e.g.*, R.I. GEN. LAWS ANN. § 42-66-8 (West 2013); TEX. HUM. RES. CODE ANN. § 48.051 & § 48.002(a)(1) (West 2013).

84. *See, e.g.*, MO. REV. STAT. §§ 660.255 & 660.2505 (2013) (defining the category of persons about whom reports must be made to include any "person sixty years of age or older . . . who is unable

not itself a factor, "infirmities" or "impairments" associated with age can trigger reporting duties, although such conditions may have no impact on the subject's cognitive capacities or ability to engage in self-protective behavior.[85]

There is certainly value in mandating reports of elder abuse: the state is unlikely to be able to help victims if it is unaware of their plight. However, there are also real costs to mandatory elder abuse reporting laws. These include discouraging older adults and their caregivers from seeking help because they are concerned that a report will be made,[86] encouraging professionals to report suspected abuse even if they reasonably believe the report will put the believed victim in danger, and flooding social service agencies with complaints, thus forcing them to divert resources from intervention to investigation.[87] The costs also include undermining confidential relationships between older adults and would-be reporters, relationships in which there may be a significant privacy interest (one that may even rise to the level of a constitutionally protected interest).[88] The result may be not only infringing on privacy rights, but also restricting older adults' ability to interact freely with others—including people such as doctors, lawyers, and clergy members upon whom older adults rely for critically important services.

The costs of such schemes relative to their expected benefits increase significantly when the duty to report is triggered by chronological age (or factors directly tied to chronological age) as opposed to factors related to diminished cognitive capacity or other specific conditions that more directly undermine the ability to self-report. Elderly status (typically defined as age 65 or older) is a poor proxy for diminished cognitive capacity, and the burdens associated with mandatory reporting are far less justifiable where they affect older adults who are not suffering from diminished cognitive capacity.[89] This is because individuals whose cognitive capacity is intact are more likely to be

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to protect his or her own interests or adequately perform or obtain services which are necessary to meet his or her essential human needs").

85. *See, e.g.*, FLA. STAT. ANN. § 415.102(27) (West 2013) (defining a "vulnerable adult," the category of persons about whom reports are mandated, as including any adult "whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to . . . the infirmities of aging").

86. There are many reasons why an older adult might wish to avoid a report. In addition to concerns that a loved one may be prosecuted or otherwise penalized for the mistreatment, the older adult may worry that the report will have negative consequences for him- or herself. Such fears are not necessarily unfounded. When the state intervenes in an elder abuse case, imposition of guardianship on the victim and institutionalization of the victim are both common results. *See* Kohn, *Outliving*, *supra* note 81, at 1078-79.

87. *See id.* at 1065 (discussing the various critiques of mandatory elder abuse reporting laws).

88. *See id.* at 1067-90 (discussing the constitutional implications of such statutes).

89. Critics of mandatory reporting often reach this conclusion. *See, e.g.*, Jennifer Beth Glick, Note, *Protecting and Respecting Our Elders: Revising Mandatory Elder Abuse Reporting Statutes to Increase Efficacy and Preserve Autonomy*, 12 VA. J. SOC. POL'Y & L. 714 (2005) (arguing that, in the interest of preserving autonomy, reporting should only be required where the reporter has made an assessment that the subject of the report lacks mental capacity).

able to self-report, are more likely to be making a rational decision not to involve the government when they fail to report, and are less likely to benefit from the types of interventions the state is likely to be able to offer. Moreover, broadly applicable statutes may promote ageism by, at least implicitly, condoning stereotypes about older adults as helpless, frail, or unable to make decisions for themselves.

Thus, a look at current elder abuse legislation indicates that using age as a proxy for vulnerability, much as Fineman suggests, has led to the adoption of a wide variety of policies designed to protect older adults that unduly undermine their basic civil rights and human dignity.[90] To blithely suggest that polities adopt age-specific protections so long as there is a "substantially increased probability" that older adults may not perform at the level at which younger adults are "presumed to" perform[91] harkens back to the type of protectionist rhetoric that has historically been used as an excuse for limiting the freedoms of women and other vulnerable populations in a way that entrenched male power and existing social structures. More directly, it ignores the very real cost associated with age-based laws and policies—costs that might be avoided by employing alternative (and also potentially more efficacious) criteria for protection. These might include criteria based directly on vulnerability or on individual characteristics more closely linked to disabling conditions, such as dementia, that significantly affect the ability to engage in self-protective behavior.

In short, Fineman is understandably eager to avoid an anti-interventionist approach to addressing the needs of older adults.[92] However, her approach not only has the potential to promote the radical disempowerment of older adults but also is unnecessary to protect them. There is already a large and growing interventionist body of law aimed at protecting older adults (at least in the United States) that raises serious concerns. Thus, the important contemporary policy question for those interested in protecting older adults is not *whether* to intervene but *how* to intervene. As states decide how to address the needs of older adults, they should be considering both the benefits of potential

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90. Notably, the targeted "protections" that states currently offer may be just the tip of the iceberg. In addition to the continued expansion of rights-limiting laws in the context of elder abuse, there have been calls for limiting a broad range of rights to older adults because of their "vulnerability." For example, in 2004, a number of leading legal and medical scholars proposed conditioning the right to vote of nursing home residents on a capacity assessment based on concerns about older adults' vulnerability. *See* Jason H. Karlawish et al., *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons With Dementia*, 292 J. AM. MED. ASS'N 1345 (2004). A recent student note even proposed conditioning the right to marry on a capacity assessment after a certain age. *See* Ashley E. Rathbun, Comment, *Marrying into Financial Abuse: A Solution to Protect the Elderly in California*, 47 SAN DIEGO L. REV. 227, 232 (2010) (proposing that California require older adults who wish to wed to first obtain proof of mental capacity to marry from a physician or mental health professional).

91. Fineman, *Elderly*, *supra* note 31, at 94.

92. *Id.* at 100.

interventions and the costs of those interventions, with a view toward designing laws and policies that are sensitive to tradeoffs and that optimize the multiple interests of older adults.

Unfortunately, as this article has explored, an analysis of Fineman's application of vulnerability theory to the law as it affects older adults suggests that using vulnerability theory to assess potential policies would be of little help in this process. Vulnerability theory as currently articulated would focus attention on maximizing safety and security without adequately considering the impact of potential laws and policies on individual autonomy, or how a sense of autonomy may actually contribute to an individual's safety and security. This effect is particularly problematic in the context of evaluating laws that seek to protect individuals from entering into or maintaining personal relationships perceived to be unsavory, as is the case with many of the policies designed to protect older adults from abuse, neglect, and exploitation. This is because the autonomy being undermined is the autonomy of the person whom the state is trying to help; since undermining an individual's autonomy can harm that person in both tangible and intangible ways, the state's actions are prone to being at least partially counterproductive. Thus, vulnerability theory might be of greater prescriptive value if it distinguished between infringements on autonomy where the person whose autonomy is being sacrificed is the supposed beneficiary of the infringement and infringements on autonomy designed to benefit another.

V. A PROPOSAL TO REFINE VULNERABILITY THEORY

Having highlighted the limitations of vulnerability theory, the question is whether these limitations are inherent to the theory or whether they could be corrected or at least mitigated by refining the theory or its articulation. The first limitation identified in this article—that vulnerability theory cannot generally help policymakers decide how to allocate limited resources—is inherent in the theory. As discussed in Section IV.A, vulnerability theory does not explain how to prioritize among vulnerable subjects when allocating limited resources, and may actually make it harder to differentiate between competing needs because it emphasizes the universality of vulnerability. By contrast, the second limitation—that vulnerability theory encourages undue paternalism—is not inherent in the theory. Recognizing the universality of vulnerability and the state's corresponding responsibility for enhancing resilience across populations need not lead to excessive paternalism. Rather, the state can meaningfully respond to human vulnerability in many instances without devaluing or deprioritizing autonomy.

To see why this is the case, we must first separate the rhetoric of autonomy from autonomy itself. Fineman's skepticism about the value of autonomy stems

in large part from a concern about the state abdicating its responsibilities by failing to intervene to protect and enable its citizens while using the language of autonomy to defend this abdication. However, the fact that the language of autonomy can be used rhetorically to justify the avoidance of responsibilities does not mean that valuing autonomy is the cause of such abdication, nor does it mean that autonomy must be sacrificed to enhance resilience to vulnerability. Imagine, for example, that a state wishes to protect older adults from financial fraud. One way to do so might be to create a presumption that people over a certain age cannot give informed consent to certain transactions. This approach might well be effective but would significantly undermine older adults' freedom to enter into transactions. Alternatively, a state could try to achieve its objective by enforcing existing consumer protection laws or by expanding the statutory definitions of what constitutes fraud in general. Yet another option, as discussed in the previous part, would be to develop and support social policies that combat the conditions that promote fraud, such as social isolation and limited financial literacy. All three approaches would help address elder financial fraud, but the first would undermine individual liberty to a much greater degree than would the other approaches.

To reduce the likelihood that vulnerability theory will encourage unwarranted paternalism, it is important to differentiate between two justifications for constraining individual autonomy. Sometimes states infringe on the autonomy of one group of people for the benefit of another. For example, policymakers might undermine the autonomy of people whose behavior has negative externalities, or whose resources policymakers believe should be redistributed for the sake of social equality. Thus, we might talk of gun control as limiting the autonomy of gun owners for the benefit of potential victims of gun violence, or of progressive taxation as limiting the financial autonomy of the wealthy for the benefit of the poor. Other times, states infringe on individuals' autonomy in an effort to benefit those same individuals. For example, policymakers might use criminal statutes to try to protect individuals from the consequences of unsavory personal relationships, as is the case with many of the policies designed to protect older adults from abuse, neglect, and exploitation.

At its heart, Fineman's concern about privileging autonomy is a concern about privileging autonomy where doing so allows individuals to behave in ways that have negative externalities or perpetuate resource imbalances. The concern is that in the name of respecting autonomy, society has privileged behavior and resource allocations that entrench existing disadvantages and create formidable barriers to substantive equality. Respecting the liberty to engage in self-regarding behavior, even if that behavior is seen by others as harmful or misguided, does not pose a similar threat to substantive equality. Thus, the state can address human vulnerability while still respecting this latter

form of autonomy. Clarifying this distinction thus reduces the likelihood that vulnerability theory will be applied in a manner that encourages undue paternalism.

VI. TOWARD VULNERABILITY-BASED POLICY

As discussed above, Fineman's theory of vulnerability makes a case for expansive governmental responsibility for social welfare, but it fails as a prescriptive tool to identify how governments should respond to specific vulnerabilities. This limitation, however, does not mean that "vulnerability" as a concept cannot be used to shape very specific public policy interventions. To the contrary, vulnerability can be a viable characteristic upon which to base policy decisions. Indeed, the analysis of the limitations of Fineman's theory provided earlier in this article suggests how vulnerability-based approaches might successfully be implemented.

Fineman's theory of vulnerability does not work as a prescriptive tool because simply recognizing the universality of vulnerability does not indicate how to prioritize among vulnerable subjects when allocating limited resources or how to differentiate among vulnerable subjects when burdening liberties. To get beyond this limitation, policies cannot respond to vulnerability merely as a universal characteristic. Rather, if vulnerability is to be an effective and appropriate trigger for special protection or intervention, it must be defined in relation to the particular threat being addressed.

Under this approach, policies would target people based on their vulnerability to a particular threat or problem. This would be consistent with a conceptualization of vulnerability not as an innate quality of a person but rather as a result of a relationship between an individual and his or her environment. This conceptualization would thus be aligned with the modern understanding of disability as reflecting a relationship between an individual and his or her environment—an environment that may be disabling for the individual. It would also be consistent with a large body of literature exploring vulnerability to environment hazards, including natural disasters and global climate change. This literature has shown how individuals' vulnerability and resilience to such hazards varies based on an interaction between multiple social and geographic factors.[93]

To see how such an approach might function, suppose a state wishes to address the problem of financial exploitation. Simply recognizing that all persons are vulnerable to such exploitation—that is, are potential victims of

93. *Cf.* Susan Cutter et al., *Social Vulnerability to Environmental Hazards*, 84 SOC. SCI. Q. 242 (2003) (reviewing and categorizing the literature on human vulnerability to environmental hazards).

that exploitation—does not suggest how to target interventions to best address the problem. Instead, it is necessary to ask about the conditions, both internal to the individual and external to the individual, increase or decrease that vulnerability. For example, what factors make it more likely that individuals will be targeted for financial exploitation or unable to protect themselves against it? The law can then respond by trying to support conditions that increase individuals' resilience to financial exploitation or to ameliorate or counteract conditions that are associated with financial exploitation.

California has taken a step in this direction by creating, as part of its criminal code, a standard for what constitutes vulnerability in relation to the financial exploitation achieved through undue influence. In 2013, California amended its criminal code to clarify that financial exploitation achieved through "undue influence" of an elder or dependent adult is a crime.[94] The statute amending the code created a multi-factor approach to determining when undue influence has occurred that requires the court to consider, among other things, the "vulnerability" of the victim. It listed a host of factors that can be "evidence" of vulnerability including "incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency," and whether the influencer knew or should have known of the victim's vulnerability.[95] In so doing, it implicitly recognized that vulnerability is a result not simply of a medical or cognitive condition, but of the individual's environment and support system (or lack thereof).[96]

The 2013 California law thus shows how policymakers might use a standards-based approach to try to operationalize vulnerability as a basis for responding to social welfare concerns.[97] It is still too early to know how targeted and precise the application of this standard will be. Such a standards-based approach is, moreover, only one way policymakers might operationalize a vulnerability approach. Another would be to create a bright-line rule defining vulnerability with regard to a particular threat based on a constellation of factors. Nevertheless, the California law provides some insight into what a context-based approach to defining vulnerability could look like.

This type of multi-faceted approach to understanding vulnerability and using vulnerability as a trigger for intervention enables policymakers to move beyond identity-based policy much as Fineman seeks to do with her theory of

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94. CAL. WELF. & INST. CODE § 15610.70 (West 2013).

95. *See id.*

96. Thus, although the law itself is limited to situations where the victim can be classified as either an "elder" or a "dependent adult," it shows the law might look at vulnerability apart from such characteristics.

97. While the statute limits its coverage to elders and dependent adults, the author does not mean to suggest that that limitation is desirable. To the contrary, the multi-factor definition of vulnerability suggests that this approach could be applied to combat exploitation of adults of all abilities and ages.

vulnerability. It may also help reduce the types of undue paternalism to which identity-based approaches can fall victim. To see why this is the case, we may again look to old-age policy. As I have suggested elsewhere,[98] one explanation for the proliferation of the types of overly paternalistic policies critiqued in Section IV.B is that these policies only apply to older adults. This encourages policymakers, perhaps unconsciously, to draw on stereotypes and misguided notions of beneficence to support a degree of paternalism that would be unthinkable if applied to younger adults.

Another potentially significant benefit of targeting interventions based on vulnerability to the threat being addressed is that it may lead to interventions that are more closely tailored to their objectives. In the case of old-age policy, the use of age-based criteria tends to result in laws that are poorly tailored to their objectives, making the burden of such laws even more difficult to justify. Chronological age (outside the context of youth) is a poor proxy for need or vulnerability. This is because aging increases heterogeneity; as a generational cohort ages, it typically becomes more diverse.[99] Thus, old age is a poor predictor of need or ability,[100] especially when "old age" is defined broadly—such as beginning at 60 or 65, as is common in elder protection statutes. Only in very old age does chronological age become a plausible proxy for need or disability, and even then it is still a crude one. For example, old-age-based "protections" are often justified on the ground that older adults have diminished cognitive capacity. Yet less than five percent of people in their seventies, only about a quarter of those in their eighties, and just over a third of those age ninety and older have dementia. [101]

In short, although Fineman's theory of vulnerability theory cannot be used as a prescriptive tool, vulnerability may be a useful construct around which to structure social welfare policy. If policies are to successfully target individuals based on their vulnerability, however, it will be critical to move beyond stereotypes and presumptions about who is or who is not vulnerable to a

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98. *See* Kohn, *Outliving*, *supra* note 81, at 1114 (arguing that "there is particular risk that policies that selectively target older adults for rights limitations will do so in an unreasonable manner," because "[i]f older adults are seen as no longer engaged in the community or as no longer experiencing a valuable existence—as studies of ageist attitudes have shown to be the perception—limiting their liberties might be seen as largely harmless and inconsequential.").

99. *Cf.* Kenneth F. Ferraro, *The Evolution of Gerontology as a Scientific Field of Inquiry*, *in* GERONTOLOGY: PERSPECTIVES AND ISSUES 13, 13-33 (Janet M. Wilmoth & Kenneth F. Ferraro eds., 3d ed. 2007) (discussing gerontology's rejection of equating chronological age with disease and decrepitude, and explaining that the field currently understands that age is positively associated with heterogeneity in population).

100. Contrary to popular stereotype, only a small minority of older adults experience significant physical disability. Similarly, dementia is often treated as a normal part of aging, although it is, in fact, not part of the typical average person's aging experience. *See supra* note 77 and accompanying text.

101. Plassman, *supra* note 77.

particular problem to an evidence-based understanding of social needs and risks.[102]

VII. CONCLUSION

Political and financial conditions are ripe for reexamining the structure and propriety of laws that seek to promote social welfare and social justice. Martha Fineman's vulnerability theory, which is already inspiring a rich body of legal literature, is poised to play an important role in invigorating and informing such a reexamination. It provides a sharply contrasting alternative to the formal equality paradigm for understanding the role of the state, and it may help policymakers more fully imagine how society might be restructured in order to better meet the welfare needs of all people.

As this article has shown, however, scholars and policymakers must be careful not to overextend vulnerability theory. Although vulnerability theory can be useful in setting broad policy goals (e.g., ensuring that all people have adequate income or adequate healthcare), it is less helpful in choosing among particular policy interventions to achieve those goals. Specifically, this article's examination of Fineman's application of vulnerability theory to old-age policy reveals the limits of vulnerability theory as a tool to suggest or evaluate specific laws in a world with limited resources to allocate. When Fineman attempts to apply vulnerability theory to suggest particular legal approaches to addressing the needs of older adults, she therefore ends up recommending laws that contradict the basic tenets of her own theory. An analysis of Fineman's application of vulnerability theory to old-age policy also reveals how, as currently articulated, the theory tends to condone laws that infringe unreasonably on the rights and autonomy of those they seek to help, thus undermining substantive equality.

However, it is not enough simply to recognize the limitations of vulnerability theory. If vulnerability theory is to continue to advance legal thinking, scholars must now move beyond Fineman's original articulation of

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102. In thinking about how to use an empirically-grounded understanding of vulnerability to shape social welfare policy, it may be informative to examine how such approaches have been applied in the context of planning for environmental disasters. One approach has been to create an index for social vulnerability to such threats. *See, e.g.*, Susan Cutter et al., *Social Vulnerability to Environmental Hazards*, 84 SOC. SCI. Q. 242 (2003) (proposing a twelve-factor index of social vulnerability to environmental hazards); Daanish Mustafa et al., *Pinning down vulnerability: from narratives to numbers*, 35 DISASTERS 62 (2011) (creating an index of social vulnerability relative to environmental disasters and climate-related risk). Such indexes have then been used to suggest specific policy interventions. *See, e.g.*, José Manuel de Oliveira Mendes, *Social Vulnerability Indexes as Planning Tools: Beyond the Preparedness Paradigm*, 12 J. RISK RES. 43 (2009) (discussing how an understanding of social vulnerability in a region of Portugal could be used to shape a disaster planning policy in that region).

the theory to develop a more refined, nuanced model. As at least a first step, the utility of vulnerability theory as a tool for defining the appropriate role of government could be significantly enhanced by making the two refinements proposed in this article: (1) building into the theory an acknowledgment that it is not equipped to prescribe particular laws or policies, and (2) distinguishing between the autonomy to engage in self-regarding behavior and the autonomy to engage in other-regarding behavior. Both adjustments are necessary if vulnerability theory is to achieve its stated goal of furthering substantive equality.

Similarly, if vulnerability as a construct is to be used as a basis for policy intervention, it will be necessary to move beyond Fineman's theory of vulnerability, even as refined in the manner proposed in this article, to do so. If vulnerability is to be a useful criterion, it must not be treated as an innate quality of an individual but instead defined in relation to the particular concern that a policy seeks to address. Otherwise, vulnerability-based criteria will simply devolve into identity-based ones.