

# Chapter 1

## Equality, Autonomy, and the Vulnerable Subject in Law and Politics

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### Introduction<sup>1</sup>

My development of the concept of vulnerability and the idea of a vulnerable subject began as a stealthily disguised human rights discourse, fashioned for an American audience. The concept has evolved from those early articulations and I now think it has some significant strength as an independent universal approach to justice, one that focuses on exploring the nature of the human, rather than the rights, part of the human rights trope. Vulnerability is inherent in the human condition and inevitably descriptive of the institutions we build in response to that vulnerability, including the state. Therefore, while the focus of this chapter is the United States, the points made are relevant for any system that seeks justice, particularly those that address discrimination as a primary cause of social, economic, and political inequalities and systems in which individual liberty or autonomy is seen as a paramount virtue and privileged over equality.

The chapter begins with a discussion of the limitations of equality as it is understood in the United States as formal in nature, filtered through a robust conception of autonomy or liberty to mean little more than a mandate for sameness of treatment. I set out an alternative vision for justice by developing the concepts of vulnerability and resilience and articulating an argument for a responsive state—a state built around the recognition of the vulnerable subject. Vulnerability is posited in this argument as the characteristic that positions us in relation to each other as human beings, as well as forming the basis for a claim that the state must be more responsive to that vulnerability.

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1 This chapter is based on three of my articles: “The Vulnerable Subject,” 20 *Yale Journal of Law and Feminism* 1 (2008); “The Vulnerable Subject and the Responsive State,” 60 *Emory Law Journal* 251 (2010); and “Beyond Identities: The Limits of an Anti-discrimination Approach to Equality,” 92 *Boston University Law Review* 1713 (2012).

## **Equal Protection of Law**

Equal protection law under the United States Constitution requires that, in order to be treated equally, individuals must be treated the same. This sameness of treatment version of equality positions discrimination as the major impediment to achieving equality. Its methodology is comparative: A person or group of persons asserts that they are inappropriately being treated differently from another person or group of persons and that person or group is legally indistinguishable from them. However, this comparison ignores most contexts, as well as differences in circumstances and abilities on the part of those whose treatment is compared. While differences may come into the discussion as a defense, since some distinctions can operate as a justification for different or discriminatory treatment, basically an equivalence of position and possibilities are presumed. Such a narrow approach to equality is ineffective in combating the forces that have resulted in the growing inequality in wealth, position, and power experienced in the United States over the past few decades.

Profound inequalities are tolerated—even justified—by reference to “individual responsibility” and warnings about the addictive dependency of social welfare provisions. The state is not mandated to respond to those inequalities, nor does it have to establish mechanisms to ensure more equitable distributions of either social goods or responsibilities between individuals, groups, and institutions. Quite the opposite: The state is restrained from intervening to readjust relationships or reorder responsibilities between and among individuals, groups, and institutions. State interference with an assumed meritocracy and a market constructed as “free” would be in violation of the principles of individual liberty and autonomy and an encroachment on freedom of contract.

Of course, the state has intervened in response to social movements and political pressures at certain points in American history. During the mid-twentieth-century major civil rights struggles in American society led to interpretations of the Constitution and the development of equal protection legislation that offered special, heightened judicial scrutiny to distinctions drawn along the lines of some personal characteristics or social categories, such as race, gender, and ethnicity. However, it was not discrimination in general that was prohibited, only discrimination directed at a few groups within society who were able to successfully mobilize the political and legal systems and press for inclusion and protection. A person who cannot claim membership in one of the favored identity groups is relatively unprotected under a review standard that asks only if the legislation or classification is “arbitrary.” In the United States, a person can be fired from employment on a whim, for any reason whatsoever,<sup>2</sup> or be denied housing or access to goods and services, as long as the dismissal or denial is not the result of prohibited identity-based discrimination.

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2 The exception would be if he or she had statutory tenure or a contract that specified the terms and length of employment.

It is not surprising that an approach to inequality that protects only some has generated a politics of resentment and backlash on the part of those who fall outside of the protected groupings. Ironically, it doesn't always work to the benefit of those who are favored either. Discrimination cases are hard to win and those that are successful are overturned on appeal at a rate higher than other cases (Fineman 2013).

In addition, one protected group can be perversely pitted against another in a zero-sum political game resulting in harmful or compromised policies. The focus on equality as antidiscrimination divides those who may otherwise be allies in a struggle for a more just society by casting them as competitors in a struggle over just whose oppression should count.<sup>3</sup> Legal and political battles revolve around the question of whether a specific group seeking protection can be determined to constitute a "discrete and insular minority" and whether they can show a lengthy history of exclusion and animus thus allowing an analogy to groups historically protected. This is what is now unfolding with lesbians and gay men who are fighting for marriage equality by arguing that their exclusion from the institution is discrimination based on animus. In doing so, they reference the miscegenation statutes that prohibited interracial marriage until they were struck down in the 1960s as violating equal protection by the Supreme Court. This analogy has generated substantial resentment and resistance on the part of some religious African American groups and others who do not place marriage equality on the same scale as the civil rights struggles over racial oppression. Such resentment is the troubling legacy of our narrow identity-based antidiscrimination approach to equality. Few groups are protected and those who are may not want to see that protection diluted by what they view as lesser claims to the civil rights mantle.

From my perspective, however, the most troubling aspects of organizing equality discourse around identity characteristics is that it distorts our understanding of a variety of social problems and takes only a limited view of what should constitute governmental responsibility in regard to social justice issues. Identity categories have become proxies for problems such as poverty or the failure of public educational systems. The focus only on certain groups in regard to these problems

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3 In being critical of contemporary equality thinking in the United States, I am not suggesting that discrimination based on race or gender is no longer a problem and should not be addressed by law. I focus on the insufficiency of identity-focused equality to place in context my argument that we must not stop with the incorporation of antidiscrimination measures, but also move beyond them to a more robust ideal of equality. Certainly, one lamentable consequence of this equal protection doctrine is that it predominantly protects against de jure discrimination (where laws facially disadvantage a protected class), rather than reaching situations of de facto discrimination. Another objection is that entrenched and privileged interests are the ones that benefit when political and legal organization around identity can effectively be manipulated to displace or eclipse concern for the welfare of all members of American society.

obscures the institutional, social, and cultural forces that distribute privilege and disadvantage in systems that transcend identity categories.

In fact, nestled safely within the rhetoric of “individual responsibility” and “autonomy,” discrimination doctrine enshrines the notions that America generally provides for an equality of access and opportunity. Impermissible discrimination is cast as the discoverable and correctable exception to an otherwise just and fair system in which individuals are at liberty to compete on equal terms.

What then happens to those who fail in this system? Typically, they have been herded together by sociologists, political scientists, public health practitioners, pundits, and others who study them as members of designated “vulnerable populations.” The political and legal response to such populations is surveillance and regulation. The response can be punitive and stigmatizing, as it is with prisoners, youth deemed “at risk,” or single mothers in need of welfare assistance. It can also be paternalistic and stigmatizing, as are the responses to those deemed “deserving,” such as the elderly, children, or individuals with disabilities. What these “populations” have in common is that they are stigmatized. Their perceived vulnerability marks them as lesser, imperfect, and deviant, and places them somehow outside of the protection of the social contract as it is applied to others (Fineman 2012).

Interestingly, sometimes protected identity groups end up being labeled as a vulnerable population. For example, the Urban Institute Health Policy Center defines “vulnerable populations” as “groups that are not well integrated into the health care system” and continues: “Commonly cited examples of vulnerable populations include racial and ethnic minorities, the rural and urban poor, undocumented immigrants, and people with disabilities or multiple chronic conditions.”

The conception that the label of vulnerability belongs only to certain groups or “populations” is not only misleading and inaccurate, it is also pernicious. In the first place, clustering individuals into what is conceptualized as a cohesive population based on one or two shared characteristics masks significant differences among individuals and this is true whether those characteristics are identity based (such as race or gender) or status based (such as poor or immigrant). In addition, asserting that a group has significant differences from the general population obscures the similarities between members of the group and members of the larger society. Such groupings are both over- and under-inclusive.

However, perhaps the most insidious effect of segmenting society and designating only some as constituting vulnerable subpopulations is that such a designation suggests that some of us are not vulnerable. Those who stand outside of the constructed vulnerability populations are thus fabricated as invulnerable. Anyone who has ever tended a child, responded to an accident or emergency, experienced a natural disaster, been the victim of a crime, fell ill or been injured, or experienced many other routine life experiences of vulnerability knows there is no such thing as invulnerability. Yet, American political and legal culture continues to perpetuate this fiction through its adherence to an ideology of individual autonomy and self-sufficiency in which the state is restrained.

## **Defining the Political–Legal Subject**

The Western legal tradition is built on liberal notions of the political and legal subject, in which the appropriate relationships among the state, societal institutions, and individuals are constructed in the shadow of individual liberty or autonomy. The liberal political and legal subject thus defined has the attributes necessary to function fully and independently. This liberal subject is a competent social actor capable of playing multiple and concurrent adult (formerly all-male) societal roles: the employee, the employer, the spouse, the parent, the consumer, the manufacturer, the citizen, the taxpayer, and so on. This liberal subject informs our economic, legal, and political principles. It is indispensable to the prevailing complementary ideologies of personal responsibility and the noninterventionist or restrained state.

Our primary metaphor for examining social and institutional relationships (outside of the family) is that of contract. Society is constituted through a social contract, and autonomous and independent individuals interact with the state and its institutions, as well as with each other, through processes of negotiation, bargaining, and consent. Society is conceived as a collection of self-interested individuals, each of whom has the capacity to manipulate and manage their independently acquired and overlapping resources. Importantly, rather than being dependent on or asserting entitlement to the provision of socioeconomic goods by the state, the liberal subject demands only the autonomy that will enable him to provide for himself and his family. His demand for liberty is refined as the freedom to make choices, the right to contract. Significantly, this demand for liberty on the part of the individual effectively operates as a restraint on the state, which is deterred from interference with individual liberty, even for the purpose of ensuring greater social equality.

The image of the human being encapsulated in the liberal subject is reductive and fails to reflect the complicated nature of the human condition. A vulnerability analysis asks us (and our economists, philosophers and politicians) to embrace a more complex reality by bringing human dependency and vulnerability back into the center of the inquiry into what it means to be human. A vulnerability approach replaces the liberal subject with the “vulnerable subject.” The vulnerable subject is the embodiment of the realization that vulnerability is a universal and constant aspect of the human condition. Dependency and vulnerability are not deviant, but natural and inevitable.

### *Dependency*

Dependency is not a characteristic typically associated with the liberal subject. If visible in liberal discourse, dependency is stigmatized. The preferred accommodation for dependency is to hide it within the private family. This family is the mechanism by which we privatize dependency and insulate policy and political discussions from having to grapple seriously with its significant

societal implications. Burying dependency within the family is necessary to the construction of simplistic solutions to widespread poverty and inequality that rely on individual responsibility and assume both the desirability and the availability of a position of independence and self-sufficiency for individual and family alike, an ideology of autonomy that bears little relationship to the human condition.<sup>4</sup>

In *The Autonomy Myth: A Theory of Dependency*, I argued against such a simplistic approach to dependency and the stigmatization that often accompanies it, particularly in political discourse. Suggesting that we need a more complex and nuanced understanding of what is now encompassed by the single term “dependency,” I noted that, in one form, dependency is inevitable; it is developmental and biological in nature. All of us are dependent on others as infants and many will become dependent as we age, are taken ill, or become disabled.

But recognizing the inevitability of biological or developmental dependency does not exhaust the term. Indeed, there is a second form of dependency that needs to be discussed in relation to, but separate from, inevitable dependency.<sup>5</sup> I labeled this form of dependency “derivative” to reflect the very simple—but often overlooked—fact that those who care for inevitable dependents are themselves dependent on resources in order to accomplish that care successfully. This form of dependency is not inevitable, nor is it universally experienced. Rather, derivative dependency is socially imposed through our construction of institutions such as the family, with roles and relationships traditionally defined and differentiated along gendered lines. Hence, we find an historic difference in expectations and aspirations attached to dichotomous pairings within the family, such as husband or wife, father or mother, and son or daughter. It has proven difficult to progress toward gender equality given this set of institutional arrangements and the persistence of traditional family relationships.

I argued for a more collective and institutionally shared approach to dependency—a reallocation of primary responsibility for dependency that would place some obligation on other societal institutions to share in the burdens of dependency, particularly those associated with the market and the state. This

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4 Notions of what constitutes the “private,” as contrasted with the “public,” contribute to the vitality of this ideology by placing the family conceptually outside of state intervention or regulation barring extraordinary abuses or major failings on the part of individual families. Of course, the “private” family is a myth comparable to that of individual autonomy. The legal family is both constructed and dissolved by law and legal processes. The state through law privileges certain social entities as family and gives them both subsidy and protections not afforded to other entities. The family is also conceived as having unique bonds of affiliation and responsibility to members that place intra-family relationships on a “unique” level, thus furthering the perception that it is a private space ideally free of state intervention.

5 There are actually many different, though sometimes related, forms of dependency, such as economic, psychological, or emotional dependency. I limit my discussion to inevitable and derivative dependency inherent in the care work that takes place in the family and is essential to the reproduction of society and its institutions.

reallocation of responsibility seemed particularly appropriate since both state and market institutions reaped the benefits that care work produced in the form of the reproduction and regeneration of society.

While many commentators recognized the strength of the arguments I made, others were less convinced that dependency was centrally relevant to larger questions of liberal social policy and law. Because what I called inevitable dependency is understood as episodic and as shifting in degree over the lifetime of an individual, many mainstream political and social theorists can and often do conveniently ignore it in spinning out their theories about justice, efficiency, or liberty. In their hands, this form of dependency, if acknowledged at all, is merely a stage that the liberal subject has long ago transcended or left behind, and is, therefore, of no pressing theoretical interest as they develop their grand theoretical explorations in legal and political theory—it can be left to those of us who focus on more mundane and uninteresting things, such as the family.<sup>6</sup> As for derivative dependency, that is conveniently dismissed by reference to the liberal contractarian construction of individual “choice.” Those who take up the caretaking role have chosen to do so and should not then complain about their situation or expect others to subsidize their choices.

In addition, the division between the public and the private has real tenacity for traditional legal theorists. In spite of decades of critical commentary showing the distinctions do not hold up, prominent American scholars continue to deal with dependency by relegating the burden of caretaking to the family, which is conceptualized as located within a zone of privacy, beyond the scope of state concern barring extraordinary family failures such as abuse or neglect. Thus largely rendered invisible within the family, dependency can be comfortably and mistakenly assumed to be adequately managed for the vast majority of people. To confront that misconception, I built on the insights of my earlier work and developed the concept of vulnerability and the idea of the “vulnerable subject.” This construct supports an argument for a “responsive state”—a state that recognizes that it and the institutions it brings into being through law are the means and mechanisms whereby individuals accumulate the resilience or resources that they need to confront the social, material, and practical implications of vulnerability. As such, a responsive state also recognizes that it has a responsibility to monitor the activities of its institutions to ensure that they function in an appropriate, egalitarian manner. This progression from vulnerability to state responsiveness incorporates the realities of human dependency. However, since it is not only universal, but also constant, vulnerability proves more theoretically powerful than the idea of dependency in arguing for a more just society.

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6 This reaction reflects the traditional division between public and private that has allowed many mainstream scholars to elude difficult and potentially disruptive issues in their theorizing.



*Vulnerability*

Vulnerability on one level can be thought of as an heuristic device, forcing us to examine hidden assumptions and biases folded into legal, social, and cultural practices. Vulnerability is universal. Detached from specific subgroups or populations, placed at the core of our understanding of what it means to be human, vulnerability can form the foundation upon which to build ideas about appropriate social and state responsibility for all. In addition to its universality, there are several other characteristics that define the concept of vulnerability as I am using it.

A second integral feature of vulnerability is its constancy. Human vulnerability arises in the first place from our embodiment, which carries with it the imminent or ever-present possibility of harm, injury, and misfortune. Bodily harms can take a variety of forms and range from those that are mildly annoying to those that are catastrophically devastating and permanent in nature. Bodily harm can result accidentally or be caused by intentional actions.<sup>7</sup> Bodily harm can result from the unleashing of forces of nature, from the mere passage of time, or from the fact that we humans just exist in a world full of often unpredictable material realities (Fineman 2008: 9). While we can attempt to lessen risk or act to mitigate possible manifestations of our vulnerability, the possibility of harm cannot be eliminated.

Significantly, many forms of harm are beyond individual, or even human, control. The process of aging and death, for example, are clear internal, biological processes that show the limitations of human control over the consequences of our embodiment, which is constantly and universally vulnerable. There are external threats to our bodily well-being that are difficult to eliminate or even substantially decrease. We may suffer or succumb to disease, epidemics, resistant viruses, or other biologically based catastrophes. Our bodies are also vulnerable to external forces in our physical environment: We can be injured by errant weather systems that produce floods, droughts with famine, and fires. These are “natural” disasters, certainly beyond our individual control to prevent. More directly humanly manufactured disruptions in our environment, such as pollution or chemical spills, may also cause us harm.

In addition to describing the biological and constant nature of human vulnerability, as well as the possible internal and external causes of harms, it is important to realize that vulnerability is complex and can manifest itself in multiple forms. Our bodily vulnerability is compounded by the possibility that, should we succumb to illness or injury, there may be accompanying economic and institutional harms and disruption of existing social, economic, or family

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7 It is important to recognize a range of vulnerabilities. Some manifestations of vulnerability are clearly beyond individual or even societal control, while others can be cast as “self-induced.” The liberal subject, constructed in terms of individual autonomy, self-sufficiency, and personal responsibility, does not distinguish between vulnerabilities, suggesting that individuals bear primary responsibility for their vulnerabilities, regardless of their nature.



relationships. These harms are not located in the body, but can be catastrophic to the individual nonetheless, and illustrate how we all are also vulnerable to and dependent upon the vagaries of societal institutions.

It is also important to recognize that, in addition to the ways in which economic and institutional harms can accumulate in a vulnerable individual life, there may also be a basis for recognition of harm to social groupings based on shared characteristics. While the quality or nature of economic and institutional harms may not be different assessed from an individual perspective, there may be statistically relevant distinctions in a quantitative sense, both on an individual and a group basis. For example, economic and institutional harms suffered by individuals can also affect their families when the burdens they generate are transferred from one generation to another. Further, negative economic and institutional harms may cluster around members of a socially or culturally determined grouping who share certain societal positions or have suffered discrimination based on constructed categories used to differentiate one class of persons from another, such as race, gender, ethnicity, or religious affiliation.

### *Universality and Particularity*

The recognition that vulnerability varies across individual experiences reveals a final and somewhat paradoxical point about vulnerability: While it must initially be understood as universal and constant when considering the general human condition, vulnerability must be simultaneously understood as particular, varied, and unique on the individual level. Two forms of individual difference are relevant. The first form of difference is physical: mental, intellectual, and other variations in human embodiment. The second is social and constructed, resulting from the fact that individuals are situated within overlapping and complex webs of economic and institutional relationships.

*Differences in embodiment* The variations in human embodiment are not socially neutral, and historically reactions to some of these variations have led to the creation of hierarchies, discrimination, and even violence. Individuals who have certain characteristics have been subordinated and excluded from many of the benefits of society; often because their differences are thought to indicate that they are dangerous, or are interpreted as inadequacy, inferiority, or weakness. These differences or variations are also the basis for segregation of some individuals into a “vulnerable population” category.

One appropriate legal response to this type of bias and/or exclusion is to improve and strengthen existing antidiscrimination measures, perhaps building complementary affirmative action and social welfare provisions to make up for past discrimination and reduce the probability of future disadvantage.

An equally important response to this category of embodied difference, however, is to recognize that individual experience of vulnerability varies according to the quality and quantity of resources we possess or can command. This shifts the focus

to the second form of difference—that we are all differently situated within webs of economic, social, cultural, and institutional relationships. While society and its institutions cannot eradicate our vulnerability, it can and does mediate, compensate, and lessen our vulnerability through programs, institutions, and structures.

*Status and institutional differences in resilience* Differences are produced as a result of an individual's experiences within societal institutions and relationships over the life course. These differences structure options and create or impede opportunities. This focus of a vulnerability analysis is particularly significant because addressing this form of difference brings societal institutions into conversation with the vulnerable subject. This shifts our critical focus to the operation of societal institutions, including the state. This provides a much needed counterweight to the current assignment of dependence and vulnerability as solely a personal responsibility.

Societal institutions are theorized as having grown up around vulnerability. 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.

The societal institutions we create should be seen as functioning in interlocking and overlapping ways, creating layered possibilities of opportunities and support, but also in configurations containing gaps and potential pitfalls. These institutions collectively form systems that can play an important role in lessening, ameliorating, and compensating for individual vulnerability, providing us with the resilience or resources with which to respond in specific times of crisis or opportunity.

Together and independently, these societal institutions provide us with “assets”—reservoirs of capabilities, advantages, or coping mechanisms that cushion us when we are facing misfortune, disaster, and violence, as well as constituting the resources that we will need if we are to take risks and avail ourselves of opportunities as they arise. Significantly, the counterpoint to vulnerability is not invulnerability, for that is impossible to achieve, but the resilience that comes from having some means with which to address and confront misfortune and opportunity. Our resources are accumulated and dissipated over the course of a lifetime in the processes of making decisions and responding and reacting to circumstances and situations as they arise. In times of both crisis and opportunity our accumulated resources define what are our realistic options—resources limit or enhance our individual ability to exercise autonomy or liberty, thus defining the scope and nature of our agency.

There are at least five different types of assets or resources that societal organizations and institutions can provide: physical assets, human assets, social assets, ecological or environmental assets, and existential assets. Physical assets are physical or material goods that determine our present economic quality of life and provide the material basis for accumulation of additional sustainable resources in the form of savings and investments. Certainly, tax and inheritance

laws impact the distribution of physical assets and are part of this system, but so also are banking rules and regulations and credit policies.

Like physical assets, human assets also affect material well-being. Defined as “innate or developed abilities to make the most of a given situation,” human assets provide on an individual level for the accumulation of human capital or “capabilities.” They are dependent on our general health and on education systems. Human assets are also provided in employment systems. They are those goods that contribute to the development of a human being, allowing participation in the market and making possible the accumulation of material resources that help bolster individuals’ resilience in the face of vulnerability.

Social assets are networks of relationships from which we gain support and strength. The family is a major institution providing social assets, particularly for the young. Social assets are conferred through other associations, such as political collectives in which individuals bolster their resilience by joining together to address vulnerabilities generated by the market. These collectives historically included trade unions and political parties. In recent decades, a sense of community organized around identity characteristics, such as race, ethnicity, and gender, has constituted powerful networks of affiliation and belonging.

Ecological assets can be conferred through our position in relation to the physical or natural environments in which we find ourselves. We live in the context of external factors and sets of physical conditions that interact with us and profoundly influence our needs, as well as shaping the circumstances of our well-being. The natural environment has been greatly altered and affected by human activity and institutions, only some of which is beneficial, and laws, regulations, and agencies have grown up around efforts to protect natural resources from further deterioration.

Existential resources are provided by systems of belief or aesthetics, such as religion, culture, or art. These resources can help us to understand our place within the world and allow us to see meaning and beauty in our existence. Governmental policies subsidize religious and cultural entities through tax policy and by more direct means.

Our experiences with asset-conferring institutions are often concurrent and interactive, but also can be sequential. For example, the relationships between the educational system and the employment and social security system are sequential. Collectively, they provide for the accumulation of resources, creating assets for use in the present and preserving possibilities and opportunities for the future.

Significantly, the failure of one system in a sequence, such as a failure to receive an adequate education, affects future prospects. Often, it is impossible to fully compensate for such failures given that the systems further down the line are constructed in reliance on the individual having successfully fulfilled the earlier steps. Someone who misses out on education typically will have fewer options and opportunities in the workplace, which will make for a more precarious retirement and fewer savings.

On the other hand, and also important, is the fact that sometimes privileges conferred in one concurrent system can compensate for, or even cancel out, disadvantages encountered in others. For example, a good early start in regard to education, such as that provided by Head Start, may trump poverty as a predictor of success later in school. This may be particularly likely when it is coupled with the advantages a social or relational system, such as a supportive family and progressive social network, can provide.

In sum, society's institutions interact in ways that actually produce (or fail to produce) social, political, and economic resilience. They can confer privilege or disadvantage, and an initial privilege or disadvantage may determine if an individual is able to benefit from other systems fully. Because this is true, the impact of privileges and disadvantages is cumulative and may have significant and more profound effects than the isolated gains or losses associated with any single indicator would suggest.

Resilience is not something we are born with. It is produced over time within social structures and under societal conditions over which individuals may have little control. This fact alone demonstrates that individual failure or success must be understood in terms broader than just individual responsibility. Success and failure are socially structured and intricately dependent on an individual's interactions within the institutions and political structures society has constructed. And this fact of primary and inevitable dependence on societal institutions is true whether those institutions are deemed public or private or are labeled as "family," "market," or "state" entities.

## **The Responsive State**

How should our understanding of human vulnerability and the role of institutions in building resilience inform our notion of what constitutes a just and responsive state? The neoliberal restrained state ideology, which asserts that the state should privilege liberty in the form of autonomy for the individual and freedom for the market, ignores the significance of the fact that the state actually creates not only institutions as legitimate entities, but also the conditions under which they operate, all of which profoundly shape individual circumstances and experiences. Powerful, resource-giving institutions such as the family, corporations, schools, and financial institutions are constructs of the state. It is the legitimating authority of law and the regulatory machinery of the state that creates institutions such as marriage, defines the family, and mandates the corporate form. The state brings these entities into existence as legitimate institutions. The law both assigns content to and enforces the consequences of these institutions, most specifically through direct control over their formation and dissolution, but also through oversight and regulation. State mechanisms enforce "private" agreements (contracts) and provide security and structure. In fact, the state's regulation of the formation and dissolution of institutions is one of the primary ways it constitutes itself as an

entity and establishes and expresses its monopoly over the legitimate means of coercion. The interrelationship between state and institution should make it clear that the choice is not one between an active or interventionist state on the one hand and an inactive or restrained state on the other. The state is always at least a residual actor in the formation and functioning of society and should accept some responsibility in regard to the effects and operation of those institutions it brings into being and helps to maintain.

If societal institutions are both vitally important to individuals and to society and also inextricably entangled with the state, their flaws, barriers, gaps, and potential pitfalls should be monitored and their operations adjusted when they are functioning in ways harmful to individuals and society. The values that should be applied in making such judgments and adjustments must be democratic and publicly oriented, reflecting norms of equality and open access and shared opportunity. This focus on the state's relationship to institutions might prompt us to reconceptualize the nature and scope of both individual and state responsibility.

In developing the vulnerability approach, I have come to see that one way of looking at the relationship between institutions and the state is to see that the state is actually responding to the vulnerability of its institutions. The vulnerability of corporate or business institutions to startup or ongoing production or operating costs is routinely evoked to justify subsidies, whether they take the form of tax policies, direct transfers, and investment, or are delivered through facilitating access to mechanisms of state authority, such as law or utilization infrastructures, and the convenience of having access to a publicly educated workforce. But these forms of responses to market vulnerability do not provoke calls for restraints on the state by the adherents of small government. Rather, the calls are to have the state adopt a policy of benign neglect with regard to the monitoring and regulation of the marketplace, while at the same time remaining active in giving subsidy and support.

One might appropriately ask: Is this duality of response reasonable? The answer most certainly would be "no" if we consider a different form of corporate vulnerability—the vulnerability to manipulation, misbehavior, and corruption that results from demands that the corporation produce hefty profits for shareholders and massive salaries for CEOs. The vulnerability of the corporation created by the fact that it is primarily a profit-driven entity actually provides a compelling argument for a much more attentive and responsive state than we currently have. Wasn't the lack of such a state a significant factor behind the practices that led to the Great Recession of 2008? Also compelling in the case for a more responsive state is the unavoidable realization that when corporations act primarily with a profit motive they can both intensify their own precariousness and generate hazards for society.

In regard to the last point, consider how the state responded to the increasingly vulnerable position of certain big businesses caused by the failing market during the recession. Their heightened vulnerability was met with loans to the auto industry and bailouts for the financial industry. At the same time, the heightened vulnerability of the individual mortgage holder created in the wake of the same

crisis was ignored—his plight assigned to the realm of individual responsibility and the pleas for governmental aid deflected with cries of “moral hazard.”

In other words, in recent history the state has blatantly played favorites, choosing vulnerable institutions over vulnerable individuals. This underscores the important recognition that the state itself is vulnerable and can be and has been abusive, overreaching, and authoritative. Like its institutions, the state is vulnerable to capture, corruption, and misdirection. Sometimes the misdirection comes from the outside, such as when powerful entrenched interests hijack even the most egalitarian impulses for their own purposes. Often state abuse is the result of flaws or weaknesses in the design or operation of state structures and practices. This is what we see currently in the corrupted legislative culture which actually provides incentives for repressive tactics, distortions of the truth, and democracy-frustrating partisanship.

But the fact remains that we need the state—we cannot do without it and the law, structures, and resources it provides. Further, it is important to remember that, although we may talk about “the state,” it is not a monolith. The state is actually as a cluster of relationships, entities, and agencies reflecting and shaping public norms and values through law and policy. Those relationships include the relationship between citizen and state, as well as between state and institutions. In a responsive state, individuals realize that we, too, are part of the state. We do not—cannot—stand outside of the state and we have a responsibility to participate—to be vigilant in seeing that the state is working effectively and in an egalitarian manner.

## **Conclusion**

Orienting the state to be responsive to the Vulnerable Subject would require dedication to a different set of values than those that informed the state built on an image of the Liberal Subject. Vulnerability’s values would be more egalitarian and collective in nature, preferring connection and interdependence rather than autonomy and independence in both political and personal visions.

A responsive state would have to address the distortions that have arisen as a result of privileging liberty over equality and advantaging some in society at the expense of others. This would necessitate looking at existing structures of privilege, as well as at entrenched disadvantage. Institutions that serve to allocate society’s resources unequally to the benefit of the few must be monitored and reformed. Politicians will tell us that this is an impossible task, when what they really mean is that it would place them in an uncomfortable position, particularly with those who are privileged.

It is important to conclude with the observation that a vulnerability approach does not mean that different treatment, even the conferral of privilege or advantage, is never warranted. It does mean that, where the state confers or tolerates institutional conferral of privilege or advantage, there is an affirmative obligation

for there to be justifications for the disparate circumstances. Such privileging must be both transparent and explained. This type of process would certainly change political discourse and the terms under which legislators and legislation are judged.

Vulnerability analysis can be thought of as defining what constitutes ethical legislative behavior. It is an attempt to articulate a more self-conscious and aware egalitarian political culture; one that more robustly adheres to the all-American promise of equality of opportunity and equal access to the American Dream. It is those aspirations for substantive equality for the vulnerable subject that should form the ultimate ideals against which the state and its societal institutions and their actions are judged.