

“ELDERLY” AS VULNERABLE: RETHINKING THE NATURE OF INDIVIDUAL AND SOCIETAL RESPONSIBILITY

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The vulnerability of our embodied beings and the messy dependency that often comes in the wake of physical or psychological needs cannot be ignored throughout any individual life and must be central to theories about what constitutes a just and responsive state. The concept of vulnerability reflects the fact that we all are born, live, and die within a fragile materiality that renders all of us constantly susceptible to destructive external forces and internal disintegration.

Vulnerability should not be equated with harm any more than age inevitably means loss of capacity. Properly understood, vulnerability is generative and presents opportunities for innovation and growth, as well as creativity and fulfillment. Human beings are vulnerable because as embodied and vulnerable beings, we experience feelings such as love, respect, curiosity, amusement, and desire that make us reach out to others, form relationships, and build institutions. Both the negative and the positive possibilities inherent in vulnerability recognize the inescapable interrelationship and interdependence that mark human existence.

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The state and the societal institutions vulnerability brings into existence through law collectively play an important role in creating opportunities and options for addressing human vulnerability. Together and independently institutional systems, such as those of education, finance, and health, provide resources or assets that give individuals resilience in the face of our shared vulnerability. A responsive state must ensure that its institutions provide meaningful access and opportunity to accumulate resources across the life-course and be vigilant that some individuals or groups of individuals are not unduly privileged or disadvantaged.

I. “Elderly” as an Identity

In 1935 the United States adopted a Social Security system that encompassed several social welfare and social insurance programs for those deemed unable to work to support themselves, including the “elderly.”¹ Comparatively, economic relief for this group came late to the United States. In the 1880s, Germany enacted health, accident, and old-age legislation, and other European countries developed similar programs quickly thereafter: Denmark in 1891, Belgium in 1900, New Zealand in 1898, Austria in 1906, France in 1910, Australia in 1908, the United Kingdom in 1908, and Sweden in 1913.² The American program was the result of substantial agitation and political organization on behalf of the elderly who had suffered greatly during the Great Depression.³ Although there were and are great similarities in old-age policies developed across these

1. The term “Social Security” refers to the federal Old-Age, Survivors, and Disability Insurance (OASDI) program. LAWRENCE A. FROLIK & RICHARD L. KAPLAN, *ELDER LAW IN A NUTSHELL* 283 (West ed., 5th ed. 1995). Both the original Act (1935) and its current version as amended encompass several social welfare and social insurance programs. BLACK’S LAW DICTIONARY 1517 (9th ed. 2009). It is primarily funded on a pay as you go basis, with dedicated payroll taxes, FROLIK & KAPLAN, *supra*, at 282, called Federal Insurance Contributions Act tax (FICA). 35 AM. JUR. 2D *Federal Tax Enforcement* § 527 (2012). The main part of the program is sometimes abbreviated OASDI, as previously noted, or RSDI (Retirement, Survivors, and Disability Insurance). Daniel L. Sköler, *The Status and Protection of Social Security Benefits in Bankruptcy Cases*, 67 AM. BANKR. L.J. 585, 591 (1993). In everyday usage, however, the term refers to benefits for retirement, disability, survivorship, and death. The focus in this essay is on those benefits associated with the transitions of aging.

2. SOC. SEC. ADMIN., OFFICE OF RET. & DISABILITY POLICY, No. 13-11801, *SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD: EUROPE* (2010) (Ger., 112; Den., 77; Belg., 46; Austria, 34; Fr., 101; U.K., 314; Swed., 295); SOC. SEC. ADMIN., OFFICE OF RET. & DISABILITY POLICY, No. 13-11802, *SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD: ASIA AND THE PACIFIC* (2010) (Austl., 32; N.Z., 144).

3. Michael R. Wilson, Note, *The Policymaker’s Handbook to Entitlement Reform: A New Approach to Saving Our Seniors*, 18 *ELDER L.J.* 159, 162–63 (2010); see also JAMES H. SCHULZ & ROBERT H. BINSTOCK, *AGING NATION: THE ECONOMICS AND POLITICS OF GROWING OLDER IN AMERICA* 50–53 (2006).

nations, consistent and significant differences in the quality and scope of programs also have been noted, with the United States ranking in the bottom of the comparison.⁴

At the time that the 1935 legislation was enacted, elderly persons (age sixty-five and older) encompassed the poorest demographic group in the United States,⁵ but subsequent increases in benefits and the provision of Medicare have resulted in the poverty rate for the elderly falling below that of other age groups.⁶ Today, traditional measurements of poverty assess the elderly at only a nine percent poverty rate as compared to adults eighteen to sixty-four years old (fourteen percent) and children (twenty-two percent).⁷ Recent reconsideration of how to measure poverty levels altered those rates considerably, because researchers have taken into account factors like medical expenses and benefits such as food stamps. Researchers using the alternative measures have recalculated the poverty rates at fourteen percent for the elderly, thirteen percent for adults between the ages of eighteen and sixty-four, and fifteen percent for children.⁸ The drop in child poverty is the result of taking into account the range of social welfare programs that target children, while the increase for the elderly is partly explained by their higher medical costs.⁹ This recent reconsideration also suggests that governmental provision of services and programs, such as housing and food stamps, can be just as important as the direct provision of economic benefits to individuals and families.

Social Security provides a significant percentage of financial support for many Americans: thirty-nine percent of income for all el-

4. See generally William A. Glaser, *How Other Countries Do It*, HEALTH PAC ONLINE, <http://www.healthpaonline.net/rekindling/Articles/Glasser.htm> (last visited May 16, 2012). Schulz and Binstock also note that in addition to benefits specifically provided to the elderly, most other advanced countries provide generous national health insurance, housing supplements, and more in the way of home health services. SCHULZ & BINSTOCK, *supra* note 3, at 149. American attachment to individualism and resistance to a solidarity or social welfare model is often offered as the explanation for the differences. MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 8–9 (2004) [hereinafter *THE AUTONOMY MYTH*]; see also Robert B. Hudson, *Contemporary Challenges to Age-Based Public Policy*, in *THE NEW POLITICS OF OLD AGE POLICY* 3, 3–5 (Robert B. Hudson ed., 2d ed. 2005).

5. Wilson, *supra* note 3, at 163.

6. *A Different Portrait of Poverty*, N.Y. TIMES, Nov. 3, 2011, <http://www.nytimes.com/interactive/2011/11/04/us/different-portrait-of-poverty.html>.

7. *Id.*

8. *Id.*

9. *Id.*

derly,¹⁰ and forty-nine percent of income for elderly women.¹¹ The gender implications mark Social Security reform as warranting serious attention for those concerned with balancing family and work, and the toll that family caretaking has on ultimate wage and career successes, as well as growing income and wealth inequality more generally.¹²

Perhaps most significant for the current debates around the future of Social Security is the fact that the United States, unlike its peer nations, does not have a general universalized social welfare system. Our social welfare policy begins with an ideologically based premise that individuals are responsible for their own welfare and imposes expectations of self-sufficiency and independence on rich and poor, advantaged and disadvantaged alike.¹³ There is no general guarantee of housing or food, and until recently (and perhaps not for long) no right to health care, or access to jobs or higher education.¹⁴ Although old-age assistance is virtually universal, and eligibility is based on chronological age, other social welfare programs tend to be need-based and means-tested.¹⁵ Unlike the rest of society, the elderly have a baseline or floor of income security, which is complemented by access

10. *Social Security Basic Facts*, SOC. SEC. ADMIN. (May 15, 2012), <http://www.ssa.gov/pressoffice/basicfact.htm> ("Social Security benefits represent about 39% of the income of the elderly.").

11. *Social Security Is Important to Women*, SOC. SEC. ADMIN. (Jan. 2012), <http://www.ssa.gov/pressoffice/factsheets/women.htm> ("In 2010, for unmarried women—including widows—age 65 and older, Social Security comprises 49 percent of their total income. In contrast, Social Security benefits comprise only 37 percent of unmarried elderly men's income and only 32 percent of elderly couples' income.").

12. The potential effects of various Social Security reform plans on women have been well documented. See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-98-42, SOCIAL SECURITY REFORM: IMPLICATIONS FOR WOMEN'S RETIREMENT INCOME (1997), available at <http://www.gpo.gov/fdsys/pkg/GAO-REPORTS-HEHS-98-42/pdf/GAOREPORTS-HEHS-98-42.pdf>; THE NAT'L ECON. COUNCIL INTERAGENCY WORKING GROUP ON SOC. SEC., SOC. SEC. ADMIN., WOMEN AND RETIREMENT SECURITY (Oct. 27, 1998), available at <http://www.ssa.gov/history/pdf/sswomen.pdf>.

13. See THE AUTONOMY MYTH 25–26.

14. Alicia Ely Yamin, *The Right to Health Under International Law and Its Relevance to the United States*, 95 AM. J. PUB. HEALTH 1156, 1157 (2005) ("The United States is also the only industrialized country that does not . . . [have] some kind of legal recognition of a right to care."); see also Eleanor D. Kinney & Brian Alexander Clark, *Provisions for Health and Health Care in the Constitutions of the Countries of the World*, 37 CORNELL INT'L L.J. 285, 354 (2004).

15. See David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 646 (2004) ("The largest and more controversial means-tested programs—food stamps, Medicaid, Supplemental Security Income (SSI), and the former AFDC program—all include significant reciprocal obligations on claimants that go far beyond anything plausibly required to administer the programs.").

to health care through Medicare and/or Medicaid.¹⁶ Within the United States, the elderly are thus privileged with regard to eligibility standards and access to wage support programs.¹⁷

Importantly, because old-age assistance was not means-tested, the New Deal old-age provision has been largely provided without the stigmatization of dependency that so facily attached to poverty programs over the past several decades.¹⁸ The accusations of deviancy and pathology that were leveled at poor single mothers and their families during the decade leading up to the welfare reforms of 1996 have not yet been applied to the elderly.¹⁹ This does not mean that there are no accusations associated with old-age assistance, however. Political legitimacy for the Social Security system was and continues to be based on both negative and positive assumptions applied to the elderly as a group.

The negative and positive assumptions associated with Social Security and the elderly are wide-ranging and diverse. The negative assumptions revolve around capacity and capability, with images of the elderly as inevitably in “need” due to assumed physical and mental limitations that make employment unlikely and poverty therefore

16. For more on the role and impact of Medicare and Medicaid on dealing with elderly poverty and providing income security for elderly, see Diane Rowland & Barbara Lyons, *Medicare, Medicaid, and the Elderly Poor*, 18 HEALTH CARE FIN. REV. 61 (Winter 1996), available at <http://www.socialsecurity.gov/history/pdf/RowlandandLyons.pdf>.

17. One result of this difference in policy for the provision of social welfare benefits between the general population and those who are elderly is that there is a greater allocation of social welfare resources to the elderly in the aggregate.

18. Eric Foner, *Expert Report of Eric Foner*, 5 MICH. J. RACE & L. 311, 327 (1999) (“The Social Security Act, the centerpiece of the New Deal ‘welfare state,’ encompassed a series of programs with divergent structures and target populations. The most generous—old-age pensions and unemployment insurance—provided aid automatically and without the stigma of dependency. By linking benefits to taxes paid by eligible wage workers, these programs identified assistance as a right rather than charity. But the exclusion of agricultural, domestic, and casual laborers left uncovered the large majority of the employed black population.”).

19. For more information about the stereotypes and condemnations associated with welfare reform that took place in the mid-1990s, see Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274 (1991). By contrast, Schulz and Binstock assert that Social Security gives people a sense of reliability, independence in old age, and preserves their dignity by giving them “an option of financing old age without having to go to their children for help or, alternatively, not having to go through a degrading welfare eligibility process.” SCHULZ & BINSTOCK, *supra* note 3, at 61.

probable.²⁰ The positive assumptions cast Social Security and Medicare benefits as deserved, flowing from the “contributions” the elderly have made throughout their lifetime. Social Security has historically been viewed as a form of social insurance, and the assertion was that having engaged in paid labor and contributed to Social Security over many years meant that the benefits were earned.²¹ Both sets of assumptions have been undermined by changes in national fortune and demographics, as well as shifting attitudes about the deserving nature of the elderly.

Assumptions about the lack of employment and susceptibility to illness or disability specifically for the elderly as a group have been challenged by a variety of factors.²² Improved health, long life expectancy, and more flexible employment practices reversed the earlier retirement trend of the 1980s for a significant number of workers.²³ Today, more Americans are working into old age, a development that

20. John B. Williamson & Diane M. Watts-Roy, *Framing the Generational Equity Debate*, in *THE GENERATIONAL EQUITY DEBATE* 3, 8 (John B. Williamson et al. eds., 1999).

21. Patricia E. Dilley, *The Evolution of Entitlement: Retirement Income and the Problem of Integrating Private Pensions and Social Security*, 30 *LOY. L.A. L. REV.* 1063, 1192–93 (1997) (“The perception of who was deserving—that is, who had ‘earned’ a right to income that would prevent poverty in old-age—gradually broadened from needy and disabled veterans to aged veterans to those who had worked for at least a substantial part of a lifetime.”).

22. According to Slava Lubomudrov’s research of legislative attitudes of the elderly, “legislators who voiced negative stereotypes [about elderly] were more likely to speak and vote against recommendations to reduce or freeze Social Security benefits and vice versa.” Slava Lubomudrov, *Congressional Perceptions of the Elderly: The Use of Stereotypes in the Legislative Process*, 27 *GERONTOLOGIST* 77, 80 (1987). Such negative stereotypes, Lubomudrov points out, include stereotypes about elderly as being “poor,” “in poor health,” “inadequate employees,” and “mentally slower,” among others. *Id.* at 79 tbl.2.

23. The Editor’s Desk, *More Seniors Working Full Time*, *BUREAU OF LAB. STAT.* (Aug. 6, 2008), <http://www.bls.gov/opub/ted/2008/aug/wk1/art03.htm>. Between 1995 and 2007 the number of full-time older workers nearly doubled. *Id.* Consequently, full-timer workers now make up the majority of older workers. *Id.* According to Herz:

Reductions in the number of ad hoc increases granted by employers; erosion of retirees’ annuities due to inflation, coupled with longer life expectancies and improved health; and increases in the share of retirees taking unplanned retirements may all have played a part in the increase in the work activity of early retirees [of men aged 50 or older].

Diane E. Herz, *Work After Early Retirement: An Increasing Trend Among Men*, 118 *MONTHLY LAB. REV.* 13, 17 (1995).

was facilitated by changing laws.²⁴ The Age Discrimination in Employment Act of 1967 originally prohibited discrimination against those workers forty to sixty-five years of age.²⁵ It was followed by revisions in 1978 that raised the upper age limit to seventy,²⁶ which was further revised by removal of any upper limit in 1986.²⁷

Other changes to existing laws provide the elderly impetus to work well into their later years. For example, the desire for many of the elderly to work past retirement age was facilitated by changes to Social Security, such as the elimination of a reduction in benefits if an individual recipient continued to work.²⁸ The name of that legislation—The Senior Citizens' Freedom to Work Act—reflected the reality that many individuals were not ready to leave the workforce in their mid-sixties.²⁹

Not all of the elderly welcome options for longer participation in the paid workforce, of course. Improvements in the position of some older persons, however, have been the basis for reconsideration of the need of the elderly as a group. For example, there have been changes in the eligibility age for retirement.³⁰ In addition, general economic conditions have led to longer workforce participation. The Great Recession of 2008 provided a powerful incentive for many to stay in the workforce.³¹ Losses in the value of home equity and retirement funds

24. See generally Joseph F. Quinn, *Has the Early Retirement Trend Reversed?* (May 20, 1999) (manuscript), <http://fmwww.bc.edu/EC-P/WP424.pdf> (analyzing the trend).

25. See Alison M. Donahue, *Ramifications of St. Mary's Honor Center v. Hicks: The Third Circuit's Revival of the "Pretext-Only" Standard at Summary Judgment*, 41 VILL. L. REV. 1287, 1289–91 n.3 (1996).

26. *Id.*

27. *Id.*

28. See generally Joseph Quinn et al., *TIAA-CREF INST., EARLY RETIREMENT: THE DAWN OF A NEW ERA?* 3–6 (2011), http://www.tiaa-cref.org/ucm/groups/content/@ap_ucm_p_inst/documents/document/tiaa02030420.pdf.

29. Upon signing the Senior Citizens' Freedom to Work Act, President Bill Clinton made the following remarks: "Today, one in four Americans between 65 and 69 has at least a part-time job. Eighty percent of the baby boomers say they intend to keep working past age 65." President William J. Clinton, *Remarks on Signing the Senior Citizens' Freedom to Work Act of 2000* (Apr. 7, 2000), available at <http://www.presidency.ucsb.edu/ws/?pid=58346#axzz1oICF52yE>.

30. Andrew G. Biggs, *Raise the Early Retirement Age*, L.A. TIMES, Nov. 9, 2010, <http://articles.latimes.com/2010/nov/09/opinion/la-oe-biggs-social-security-20101109>.

31. See Susan Bisom-Rapp et al., *Decent Work, Older Workers and Vulnerability in the Economic Recession: A Comparative Study of Australia, the United Kingdom, and the United States*, 15 EMP. RTS. & EMP. POL'Y J. 43, 94 (2011). Despite a significant drop in the number of younger workers between December 2007 and May 2010, "there was minor variation during the relevant time period in the employment-to-

made the possibility of retirement remote for many.³² Thus, in a variety of ways, the relationship between old age and the ability to work has changed. Unfortunately, not all of the negative assumptions about diminished capacity have disappeared.³³

The idea that Social Security is a form of social insurance with benefits earned and thus deserved has also been called into question. Not only are recipients charged with receiving more in benefits than they paid into the system, but the younger workers who are seen as supplying the funds for those benefits are viewed as unlikely to reap the same rewards when they retire.³⁴ In response to these perceptions, recent debates about Social Security include various suggestions for privatization and means testing.³⁵ These debates have set up a generational divide, and both popular media and political discourse create a dichotomy between “young-specific” and “old-specific” benefits and interests.³⁶

population ratios of workers fifty-five and over, these older workers ended in May 2010 with the same employment rate they had in December 2007. *Id.*; see also PAUL TAYLOR ET AL., PEW RESEARCH CTR., AMERICA'S CHANGING WORKFORCE: RECESSION TURNS A GRAYING OFFICE GRAYER 1-2 (2009), <http://www.pewsocialtrends.org/files/2010/10/americas-changing-workforce.pdf>.

32. TAYLOR ET AL., *supra* note 31, at 2; see also Kevin J. Sigler, *Retiring During Challenging Times: Adjustments and Sacrifices*, 26 J. COMPENSATION & BENEFITS 30 (2010).

33. Sara C. Mills, *Perpetuating Ageism Via Adoption Standards and Practices*, 26 WIS. J.L. GENDER & SOC'Y 69, 71-72 (2011).

34. SCHULZ & BINSTOCK, *supra* note 3, at 61.

35. See, e.g., Stephanie Samuel, *Gingrich: Young Workers Should Be Able to Opt Out of Social Security*, CHRISTIAN POST, Nov. 22, 2011, <http://www.christianpost.com/news/gingrich-young-workers-should-be-able-to-opt-out-of-social-security-62749/>.

36. Fernando M. Torres-Gil & Valentile Villa, *Social Policy and the Elderly*, in HANDBOOK OF SOCIAL POLICY 367, 375 (James Midgley & Michelle Livermore eds., 2009). Torres-Gil and Villa describe attitudes about the aging as evolving and changing over time. *Id.*

They note in regard to discussion about the elderly that there was a transition from a “young aging” period to what they designate as the “modern aging” period. *Id.* “The young aging period (pre-1930) reflected much of human history: older persons, with some exceptions, did not expect or receive age-based support,” while the “modern aging” period witnessed “a dramatic growth and acceptance of age-based social policies.” *Id.* They assert that the 1990s heralded a “new aging period,” during which “public opinion began to show discernible changes toward older persons, their entitlements, and their use of political clout.” *Id.* Perhaps this latest transition can trace its rhetorical roots to the debates about reforming Aid to Families with Dependent Children (AFDC), the primary program for poor families. In 1996 AFDC was changed from an entitlement program to Temporary Assistance for Needy Families (TANF) under a barrage of rhetorical appeals to the virtues of “personal responsibility” and condemning “welfare dependency.” James Midgley, *The Definition of Social Policy*, in HANDBOOK OF SOCIAL POLICY, *su-*

The retirement of the baby boom generation is of particular concern, and the very size of this cohort has generated alarm and recast the terms of debate.³⁷ In particular, there are accusations that this generation is a threat to the larger society's well-being because it is unfairly commandeering current and future assets. The retirement of the boomers will cause a significant amount of economic and social problems for the next generation.³⁸ The image of the elderly has devolved from those who have contributed, and thus are deserving, to those who are greedy and destructive.

II. Shifting Identities

Comedian Albert Brooks captures and capitalizes on the image of the elderly as destructive to society in his dystopian fantasy, *Twenty Thirty: The Real Story of What Happens to America*. In a *New York Times* interview, Brooks explains the setting for his story:

The good news is that cancer has been cured; the bad news is that this and other innovations have prolonged people's lives to untenable lengths, draining the resources of a broke and broken United States, and polarizing relations between the young and the old, and between the merely old and the superannuated. With the economy and the American dream in shambles, a huge earthquake hits Los Angeles,³⁹ testing the administration of the country's first Jewish president.

pra, at 12. Interestingly, the same rhetorical labels are now being applied in the attempt to undermine elderly entitlement.

37. See, e.g., Rob Reuteman, *Will Baby-Boomers Bankrupt Social Security?*, CNBC, Feb. 8, 2010, http://www.cnbc.com/id/34941334/Will_Baby_Boomers_Bankrupt_Social_Security; see also *Debt Commissioners: Baby Boomers Will Crush Social Security, Medicare*, FOX NEWS, Nov. 14, 2010, <http://www.foxnews.com/politics/2010/11/14/debt-commissioners-baby-boomers-crush-social-security-medicare/#ixzz1jkmHxV9K>; Stephen Ohlemacher, *Layoffs, Baby Boomers Strain Social Security Disability*, BOSTON.COM, Aug. 22, 2011, http://articles.boston.com/2011-08-22/news/29915434_1_disability-program-disability-system-social-security-disability.

38. Robert J. Samuelson, *On Medicare and Social Security, Be Unfair to the Boomers*, NEWSWEEK, Dec. 27, 2010, <http://www.thedailybeast.com/newsweek/2010/12/27/on-medicare-and-social-security-be-unfair-to-the-boomers.html> ("But not making cuts [in elderly benefits] would also be unfair to younger generations and the nation's future. We have a fairness dilemma: Having avoided these problems for decades, we must now be unfair to someone. To admit this is to demolish the moral case for leaving baby boomers alone. Baby boomers . . . and their promised benefits are the problem. If they're off-limits, the problem is being evaded.")

39. Dave Itzkoff, *A Comedian Laughs All the Way to Dystopia*, N.Y. TIMES, May 4, 2011, <http://www.nytimes.com/2011/05/04/books/albert-brooks-the-novelist-relishes-his-worries-in-2030.html>.

Brooks, who is identified in the article as a member of the baby boom generation, continued, "I'm part of the generation that has been taking without consequence since they were born . . . I wanted the new toy just like any other kid . . . I bet even Gandhi, at 8 years old, wanted a train."⁴⁰

It seems others are taking the message of *Twenty Thirty* a bit more seriously. In her *New York Times* book review of *Twenty Thirty*, Janet Maslin describes the book as "an extrapolation of present-day America into the not-so-distant future . . . informed by the author's surprisingly *serious attention to reality*. Unlike the fantasy writer who foresees a gee-whiz future full of alluring gimmicks, Mr. Brooks has dreamed up *escapism about problems we cannot escape*."⁴¹ Although there are other catastrophes featured in this tale of future woes, the primary and foundational dilemma is the elderly, or, more accurately, the debt that has been amassed in caring for them because they are living longer. As Maslin defines the problem in her review, "[d]ebt is the era's overriding issue on both the personal and the political levels, because the cancer-free elderly have stopped dying on schedule. The young bitterly resent the old, and the old have good reason to be fearful."⁴²

Both the Brooks book and the review by Maslin reflect narratives being crafted about the problems presented by the elderly in contemporary American political discussions, a narrative that draws a connection between expenditures on the elderly and national debt and decline. Although unfortunately cancer has yet to be cured, life expectancy has increased, particularly for those over the age of eighty-five.⁴³ Moreover, the ongoing economic recession, coupled with an in-

40. *Id.*

41. Janet Maslin, *A Wry Eye on Problems of the Future*, N.Y. TIMES, May 2, 2011, <http://www.nytimes.com/2011/05/02/books/albert-brookss-2030-his-first-novel-review.html> (emphasis added).

42. *Id.* Other imagined disasters include a 9.1 earthquake that hits the Pacific Rim and the decline of the dollar as the world's reserve currency. *Id.*

43. According to the life tables on the Center for Disease Control and Prevention's (CDC) website, life expectancy for individuals at age eighty-five in the United States was 6.5 percent in 2007, *United States Life Tables, 2007*, NAT'L VITAL STATISTICS REP. (U.S. Department of Health and Human Services/Centers for Disease Control and Prevention), Sept. 28, 2011, at 2; 6.4 percent in 2006, *United States Life Tables, 2006*, NAT'L VITAL STATISTICS REP. (U.S. Department of Health and Human Services/Centers for Disease Control and Prevention), June 28, 2010, at 2; 4.7 percent in 1966, *Life Tables*, VITAL STATISTICS U.S., 1966 (U.S. Department of Health, Education, and Welfare/Public Health Service/National Center for Health Statistics), 1996 at 5-7; and 4.31 percent in 1939-1941, *United States Life Tables and*

crease in the number of aging baby boomers and dwindling Social Security and Medicare reserves, have generated dire predictions of national bankruptcy and drastic suggestions for curtailment and containment of programs benefiting the elderly.⁴⁴

Politicians blithely draw lines between generations in discussing the perceived national debt crisis and assert that Social Security and Medicare are unsustainable.⁴⁵ That rhetoric conceptually alienates those designated as elderly from other adults and children and suggests that the “entitlement” to social welfare benefits in old age is harmful to younger cohorts and even destructive to the well-being of the nation.⁴⁶ At least one conservative commentator, Ross Douthat, has framed the harm as having ethnic or racial dimensions and implications:

Historically, the most successful welfare states (think Scandinavia) have depended on ethnic solidarity to sustain their tax-and-transfer programs. But the working-age America of the future will be far more diverse than the retired cohort it’s laboring to support. Asking a population that’s increasingly brown and beige to accept punishing tax rates while white seniors receive roughly \$3 in Medicare benefits for every dollar they paid in (the projected ratio in the 2030s) promises⁴⁷ to polarize the country along racial as well as generational lines.

Actuarial Tables 1939–1941, U.S. PUB. HEALTH SERVICE (Federal Security Agency/National Office of Vital Statistics), 1947, at 27. The complete archive of life tables on CDC’s website can be found at: *Life Tables*, CENTER FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/products/life_tables.htm (last visited May 16, 2012).

44. See, e.g., Martin Feldstein, *Privatizing Social Security: The \$10 Trillion Opportunity*, CATO INSTITUTE (Jan. 31, 1997), <http://www.cato.org/pubs/ssps/ssp7.html> (“Our current Social Security system is acting as a drag on economic growth in two important ways . . . [p]rivatizing Social Security, transforming it from an unfunded pay-as-you-go system to a system of mandatory private savings accounts, would solve both of those problems and increase economic growth.”).

45. See, e.g., Corbett B. Daly, *Rick Perry Says Social Security is a “Ponzi Scheme” and a “Monstrous Lie,”* CBSNEWS, Aug. 29, 2011, http://www.cbsnews.com/8301-503544_162-20098635-503544.html.

46. See *President Bush’s State of the Union Address*, N.Y. TIMES, Feb. 3, 2005, <http://www.nytimes.com/2005/02/03/politics/03btext.html?pagewanted=2> (“The system, however, on its current path, is headed toward bankruptcy. . . . For younger workers, the Social Security system has serious problems that will grow worse with time . . . So here is the result: Thirteen years from now, in 2018, Social Security will be paying out more than it takes in. And every year afterward will bring a new shortfall, bigger than the year before.”).

47. Ross Douthat, *The Middle-Class Tax Trap*, N.Y. TIMES, Apr. 17, 2011, <http://www.nytimes.com/2011/04/18/opinion/18douthat.html>. A critic of such rhetoric pointed out in a letter to the Editor of the *New York Times*:

Ross Douthat seems to suggest that Representative Paul D. Ryan’s budget plan would actually benefit middle-class working families

Douthat sets out an even more dire future for America should drastic changes not be made and even positions the elderly as a threat to the American Dream:

[A]sking the elderly to pay more for their health care, as Paul Ryan proposes to do, would transform the American social contract, and cause no small amount of pain. But . . . the alternative path could lead to a different country as well—a more stagnant and balkanized society, in which our promise to the elderly crowds out the fundamental promise of America itself.⁴⁸

Most politicians sharing this view, while conceding that the current elderly will need continued resources, assume that the future elderly can be ensconced within an individualized system of privatized insurance in which they will assume greater personal responsibility for their economic and physical well-being. There are a lot of assumptions rolled into this emerging narrative that need to be separately examined and critiqued.

Further complicating the rhetorical thicket surrounding the idea of contribution is the fact that Social Security and Medicare are entitlement programs, and lately the whole idea of “entitlement” has been cast as somehow un-American and perverse by some politicians.⁴⁹ For

and racial minorities by imposing greater health care costs on the elderly, who are predominantly white. But every projection of the likely effects of the G.O.P. budget plan on various income and racial groups shows that the big winners would be the very wealthy, who are overwhelmingly white and who would see their tax burden drop considerably.

Alan I. Abramowitz, Letter to the Editor, *Deficit Cutting: Who Bears the Burden?*, N.Y. TIMES, Apr. 24, 2011.

48. Douthat, *supra* note 47.

49. This is reflected in political proposals and statements by presidential candidates made in 2011 and 2012. According to *Factbox* many in the initial field of Republican candidates supported either raising the retirement age or (to some degree) privatizing Social Security. Karen Brooks & Lauren Kelper, *Factbox: Social Security Positions of Republican Candidates*, REUTERS, Sept. 26, 2011, available at <http://www.reuters.com/article/2011/09/26/us-campaign-socialsecurity-idU5TRE78P5V520110926>. Rick Perry referred to Social Security as a “Ponzi scheme” and said that “he wants to protect Social Security benefits for retirees and those nearing retirement. But he would like to start talking about how to make the system financially sustainable without forcing younger workers to pay into a system that would not be there for them later.” *Id.* Mitt Romney “has said Social Security for the elderly and poor is an ‘essential’ program and would have to be part of a long-term solution to the budget deficit. He has previously supported a plan that would let younger workers put some of their Social Security taxes into private, individual accounts.” *Id.* This may indicate that he is lumping together the poor and the elderly in a means-tested approach to old age security. He does “support a small increase in the retirement age—now 65 for full benefits but gradually rising to 67—and slowing down inflation rates on payments to higher-income recipients.” *Id.*

example, Mitt Romney campaigning for the 2012 Republican presidential nomination in New Hampshire opined that “[o]nce we thought ‘entitlement’ meant that Americans were entitled to the privilege of trying to succeed in the greatest country in the world. . . . But today the new entitlement battle is over the size of the check you get from Washington.”⁵⁰ This statement echoes the language of an op-ed Romney wrote in *USA Today*, in which he described the 2012 election as a battle between partisans of entitlement and partisans of opportunity:⁵¹

Will the United States be an Entitlement Society or an Opportunity Society? In an Entitlement Society, government provides every citizen the same or similar rewards, regardless of education, effort and willingness to innovate, pioneer or take risk. In an Opportunity Society, free people living under a limited government choose whether or not to pursue education, engage in hard work, and pursue the passion of their ideas and dreams.⁵² If they succeed, they merit the rewards they are able to enjoy.

Aside from the perverse characterization of entitlement programs, this statement shows Romney’s confusion over what constitutes an entitlement. Far from signifying radical government-forced egalitarian redistribution of wealth affecting every citizen, an entitlement merely designates a specific category of benefits for which Congress has “legally obligate[d] the United States to make payments to any person who meets the eligibility requirements established in the statute that creates the entitlement.”⁵³

50. Thomas B. Edsall, *The Anti-Entitlement Strategy*, N.Y. TIMES, Dec. 25, 2011, <http://campaignstops.blogs.nytimes.com/2011/12/25/the-anti-entitlement-strategy/>.

51. Mitt Romney, *Romney: What Kind of Society Does America Want?*, USA TODAY, Dec. 19, 2011, <http://www.usatoday.com/news/opinion/forum/story/2011-12-19/romney-us-economy-entitlements/52076252/1>.

52. *Id.*

53.

Congress occasionally legislates in such a manner as to restrict its own subsequent funding options. An example . . . is entitlement legislation not contingent upon the availability of appropriations. A well known example here is social security benefits. Where legislation creates, or authorizes the administrative creation of, binding legal obligations without regard to the availability of appropriations, a funding shortfall may delay actual payment but does not authorize the administering agency to alter or reduce the “entitlement.”

U.S. GOV’T ACCOUNTABILITY OFFICE., GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 3-49 (2004), available at <http://www.gao.gov/special.pubs/d04261sp.pdf>; KATHLEEN S. SWENDIMAN & THOMAS NICOLA, CRS REP. FOR CONGRESS, RL 32822, SOCIAL SECURITY REFORM: LEGAL ANALYSIS OF SOCIAL SECURITY BENEFIT ENTITLEMENT ISSUES 7 (2005); see 42 U.S.C. §§ 402(a), 423(i)

III. Identifying Vulnerability

The political and popular culture depictions of the generations as distinct social groupings at war with each other reflect a certain understanding of the individual, as well as the appropriate organization of society and the concurrent responsibilities of the individual, the family, and the state and its institutions. In particular, statements from politicians like Romney reflect the extreme individualism attached to the political subject that increasingly is part of our national discourse about responsibility.⁵⁴ The rhetoric of the Republican Party in 2012 strikes the balance between liberty and equality, heavily in favor of liberty, with any potential social inequalities assigned to the realm of individual responsibility.⁵⁵ This balancing favoring liberty over equality effectively operates as a restraint on the state at the same time that it professes to confer “agency” by recognizing the individual as the primary and autonomous actor—the “liberal subject.”

Instead of social rights, we have liberty and autonomy: the right to make choices, the right to contract. This principle informs our economic, legal, and political theories and is indispensable to the rhetoric of personal responsibility that pervades current discussions about entitlement reform. The image of the autonomous liberal subject has also profoundly shaped society’s responses to revelations of dependency or need. Those who are not seen as sufficiently autonomous and independent actors are herded together in designated “vulnerable populations” and are susceptible to monitoring, discipline, and supervision.⁵⁶ This designation is used for individuals and groups in

(2006) (stating that every individual who meets the eligibility requirements set forth therein “shall be entitled” to an old age benefit and disability benefit, respectively).

54. See *supra* text accompanying notes 63–65.

55. Thomas B. Edsall, *Let’s Not Talk About Inequality*, N.Y. TIMES, Dec. 12, 2011, <http://campaignstops.blogs.nytimes.com/2011/12/12/lets-not-talk-about-inequality>; see THE AUTONOMY MYTH, *supra* note 4, at 18–20.

56. See, e.g., *Vulnerable Populations*, HEALTH POLICY CENTER AT THE URBAN INSTITUTE, http://www.urban.org/health_policy/vulnerable_populations/index.cfm (last visited Apr. 5, 2012) (“Vulnerable populations are groups that are not well integrated into the health care system because of ethnic, cultural, economic, geographic, or health characteristics.”); see also *Vulnerable Populations*, FLA. DEP’T HEALTH, <http://www.doh.state.fl.us/demo/bpr/VulnerablePopulations.html> (last visited Apr. 5, 2012) (“At risk or vulnerable populations are often defined as groups whose unique needs may not be fully integrated into planning for disaster response. [Such as] . . . those who are physically or mentally disabled, blind, deaf, hard-of-hearing, cognitively impaired, or mobility challenged. . . . those who are non-English (or not fluent) speakers, geographically or culturally isolated, medically or chemically dependent, homeless, frail elderly and children.”).

several categories based on judgmental assumptions about the choices they have made in the past or are deemed able to make for themselves in the future.

If someone is very young, profoundly ill or disabled, or very old, we may not be comfortable demanding they conform to the mandates of self-sufficiency and independence. They are perceived as needing protection, and paternalism guides society's response—which is to withhold agency, as is the case with children, or take away agency based on assumptions about lack of capacity, as we do with many of the elderly.

On the other hand, when someone is deemed a societal failure as the result of "choices" they have made, it is a different story.⁵⁷ Poor single mothers, those who are unemployed and did not graduate from high school, those who were forced into default because they consented to terms in technically legal but morally indefensible contracts with aggressive financial institutions, and those who engaged in other risky or foolish behavior are seen as in need of discipline. We are concerned with the "moral hazard" implications should their bad choices be "rewarded" with societal support. Perhaps the elderly are slipping (or being pushed) into this category as the assumptions that they are generally poor, ill, and disabled are undermined by demographics and the idea that they have paid for benefits now received by past payroll deductions is belied by statistics such as those quoted by Douthat.⁵⁸

The third group determined to be a vulnerable population includes those deemed deviant and dangerous, such as prisoners or so-called "youth-at-risk" who engage in aggressive anti-social behavior. This group is determined to need even more discipline and control. They are often separated out from society in facilities, segregated and punished for their choices and behavior.

This targeted group approach to the idea of vulnerability ignores its universality and inappropriately constructs relationships of difference and distance between individuals and groups within society.⁵⁹

57. For many people in this category choices are severely limited since they typically have few options from among which to choose due to poverty, lack of skills, or other factors.

58. See Douthat, *supra* note 47.

59. Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 266–67 (2010) [hereinafter *The Vulnerable Subject and the Responsive State*] ("[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 designation of vulnerable (inferior) populations reinforces and valorizes the ideal liberal subject, who is positioned as the polar opposite of the vulnerable population. This liberal subject is thus constructed as invulnerable, or at least differently vulnerable, and represents the desirable and achievable ideals of autonomy, independence, and self-sufficiency.⁶⁰

Additionally pernicious are the ways in which vulnerable populations are placed in opposition to and in competition with each other when it comes to the relatively scant resources specifically set aside for social welfare payments in our very wealthy nation. Certainly we see this where the elderly and children are cast in an intergenerational conflict, but it is also apparent when food stamp programs or health care programs for children are cut due to demands made in other programs that benefit the poor, such as Head Start or Medicaid.

The concept of a “vulnerable population” is typically applied to those who are dependent in some regard, such as children or individuals with disabilities. There is certainly confusion between the terms, although dependency may even be more stigmatized than vulnerability. It should not be. As embodied beings, we are all constantly vulnerable to events that might render us dependent. In mainstream usage, dependency is typically dismissed as pathological failure on the part of an individual or family. I have argued for a more complex and nuanced understanding of what is now encompassed by the single term “dependency.”⁶¹

Like vulnerability, dependency is universal: all of us have been dependent as infants and many will in the future become dependent on others for resources, care, and support. I am not talking about the idea of interdependence here, but about a physical or developmental aspect of the human condition. This form of dependence I have labeled “inevitable.”⁶² All of us were dependent as children and many will become so as we age, fall ill, or become disabled. This biological

Further, this basic premise of a universal vulnerable subject forms the foundation for the assertion that human vulnerability must be at the heart of our ideas of social and state responsibility.”); see Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8, 11 (2008) [hereinafter *Anchoring Equality in the Human Condition*].

60. See *Anchoring Equality in the Human Condition*, *supra* note 59, at 10–11.

61. Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 18 (1999) [hereinafter *Cracking the Foundational Myths*].

62. *Id.*

or developmental dependency is often thought of as the basis for denying agency or decision making autonomy to an individual and therefore is profoundly stigmatizing for adults and the basis for denying them, as well as children more generally, of certain liberties or rights. This embodied dependency has been assumed to attach to the elderly as a group, although many within that category are physically and mentally able.

Dependency can also be “derivative” in form, in that accommodations are necessary to facilitate certain social arrangements. The simple insight here is that those who care for inevitable dependents need resources to successfully undertake that care. Caretakers must rely both on other beings and societal institutions for support and accommodation. Derivative dependency is not inevitable but is socially assigned as the responsibility of the private family. This private ordering of dependency is necessary to the construction of an autonomous liberal subject who dominates the public sphere.⁶³

The primary reason dependency and vulnerability carry such stigma is the dominance of the liberal subject narrative that perpetuates the myth that independence, self-sufficiency, and autonomy are all achievable and desirable. Although our desire to deny the inevitability of human dependency and vulnerability does not and cannot obliterate the vulnerable from human experience, it has resulted in the stigmatization of that which should be understood as natural statuses and positions. The creation of individual stigma has profound implications for both the scope and nature of social policy and the ability of individuals to address their biological, spiritual, economic, and social needs.

The political subject must be developed in a more inclusive manner to reflect aspects of the human condition that are currently ignored or vilified in our debates about policy and law shaped by au-

63. THE AUTONOMY MYTH, *supra* note 4, at 36–37. If families or individuals fail to attend to dependency, this becomes a public problem or crisis and any support that is forthcoming is minimal, means-tested, and condemned. *Id.* at 37. Privatizing dependency means that the family is deemed the primary source of the resources needed to attend to dependency (resources can be material or take the form of personal sacrifice, accommodation to the needs of others, and assuming the burdens of nurturing). Within the typical family, the sacrifice, accommodation, and nurturing are undertaken by women in their roles as wives, mothers, daughters, and so on, resulting in furthering economic and career inequalities. *Id.* at 37–39. Meanwhile, the state and its institutions that benefit from care work done in the private family are not compelled to accommodate or compensate caretakers and caretaking in any general way. *See id.* at 37, 57–70.

tonomy and independence. Of particular concern should be the way in which the idealized stereotype of the liberal subject reflects only one of a range of developmental stages that an actual human individual passes through in the course of a “normal” lifespan. When this construct of the liberal subject is the measure against which everyone will be judged, many will be found wanting and deemed deviant. The unrepresentative nature of the stereotype means it cannot legitimately be used as the foundation for the development of legal and social policy addressing the human condition in its entirety.

It is time to insist that our politicians and policy makers recognize that the characterizations attributed to the liberal subject—autonomy, independence, and self-sufficiency—do not describe a political subject representative of the human condition. At best, they present an incomplete and oversimplified vision of the “virtues” a vigorously functioning and fully engaged adult would possess.⁶⁴ Every actual adult human being, no matter how strong and independent he or she may seem, is both presently and has been in the past reliant on others and on social institutions. The idea of a universal “vulnerable subject” to replace the universal liberal subject will raise new issues, pose different questions, and open up new avenues for critical and theoretical exploration.⁶⁵

64. *The Vulnerable Subject and the Responsive State*, *supra* note 59, at 259.

Our primary metaphor for looking at social and institutional relationships (outside of the family) is that of contract. Society is conceptualized as constituted through a social contract. Individual transactions and interactions with the state and its institutions are posited to involve autonomous and independent actors in processes of negotiation, bargaining, and consent. Competence is assumed and differences in power, circumstances, or actual ability are ignored. Thus constructed, this “liberal subject” is at the heart of political and legal thought.

Id. at 262–63. Stereotypes attributed to the liberal subject can be both positive and negative. I contend that, at least from a feminist perspective, the liberal subject combines both negative characteristics (detached and self-interested) and positive (competent and responsible). *Id.*

65. THE AUTONOMY MYTH, *supra* note 4, at 7–31. There have been many critiques of the liberal subject, most particularly focused on the characteristic of autonomy. *Id.* Feminist critics, specifically in bringing dependency and care work into discussion, have offered a model of interdependence in which the liberal subject is enmeshed in a web of relationships and perceived as dependent upon them. *Id.* at 37–39. In this regard, feminists have scrutinized and criticized the ways in which dominant theory and popular politics idealize notions of independence, autonomy, and self-sufficiency that are empirically unrealistic and unrealizable. *See id.*

A. The Elderly as Vulnerable Subjects

The idea of the vulnerable subject is anchored in the fact that we all are born, live, and die within a fragile materiality that renders all of us constantly susceptible to destructive external forces and internal disintegration. What significance should the reality of vulnerability and dependency have politically, socially, culturally, and legally as we construct expectations and aspirations for ourselves as individuals, as members of society, and as institutional actors who both generate and consume the wide range of resources produced within and by society and its institutions? The vulnerability of our embodied beings and the messy dependency that often comes in the wake of physical or psychological needs cannot be ignored throughout any individual life and must be central to our theories about what constitutes a just and responsive state.

As the discussion of vulnerable populations indicates, the use of the term “vulnerable” is not new in discussions about older adults. What is surprising is the degree to which the stigma associated with that designation has complicated the ability of policy makers to adequately address the situation of the elderly as either constantly vulnerable or occasionally dependent.⁶⁶ American society may be distinctively individualistic and resistant to general or universal social welfare measures, but the specter of the autonomous liberal subject also hovers over and significantly shapes policy making in much more socially progressive societies.

For example, the Interim Report of the Law Commission of Ontario struggles with the negative meaning attached to vulnerability as it has been applied to the elderly in its report on adopting an anti-ageist and principled way to consider laws affecting older adults.⁶⁷ The Commission appears to be very attentive to stigma, marginalization, and stereotyping based on its comments on the terminology it selects. For example, noting that there is no generally accepted term used to refer to persons who are “older,” the Commission rejects “seniors” as a general term because of its relationship to government classifications, and finds the term “elderly” problematic both because of possible confusion with the use of elders in regard to Aboriginal El-

66. *Anchoring Equality in the Human Condition*, *supra* note 59, at 18. See *infra* text accompanying notes 83–99.

67. LAW COMM'N OF ONT., *THE LAW AS IT AFFECTS OLDER ADULTS: DEVELOPING AN ANTI-AGEIST APPROACH* 56–59 (2011).

ders and because it “has connotations of frailty and dependence that may reinforce stereotypes.”⁶⁸ The Commission settles on the terms “older adults” and “older persons” because those terms have become increasingly popular and because they “emphasize the relative nature of aging and avoid the negative connotations associated with some other terms.”⁶⁹

Interestingly, the Commission is deeply ambivalent about the value of the term “vulnerable,” even as it is engaged in a process struggling with legal implications of the very real possibility of dependency or loss of capacity in the lives of older adults.⁷⁰ The Commission’s misgivings about vulnerability are reasonable given the stigma with which the term has been laden, but it is surprising that concern with autonomy for the elderly diverted the Commission from engaging in a more realistic consideration of how vulnerability has shaped and continues to shape the experiences of the elderly. The approach taken by the Commission suggests that it may have believed it would somehow be ageist or inappropriate to confront the implications of universal human vulnerability generally or to recognize that some subset of aging adults are already, or are increasingly likely to become, dependent on others for care or protection. Unfortunately, denial of human vulnerability and the possibility of dependency will not eliminate the experience of either in individual lives, and policies not engaging with their implications likely will be inadequate or ineffective.

1. ADDRESSING DIFFERENCES BETWEEN OLDER ADULTS AND OTHER AGE GROUPS

Appropriately, the Commission deems the “starting point of an anti-ageist approach” to be the recognition of older adults as a group that “may in some respects have different needs and experiences than younger persons.”⁷¹ The Commission also concedes that “older adults are an extremely diverse group [that] spans several decades, and older persons as a group incorporate all of the diversity of the population at

68. *Id.* at 20–21.

69. *Id.* at 20.

70. *Id.* at 56–57.

71. *Id.* at 23 (asserting similarities for the elderly and difference from younger adults).

large.”⁷² Further, the Commission notes that “differences tend to be magnified rather than minimized over the life-course.”⁷³ In the end, the goal seems to be to minimize the differences between older adults and others, taking an age-neutral approach and rejecting generalizations as potentially stigmatizing.

In its discussion of vulnerability, the Commission notes that “older age has often been used as a proxy . . . for other qualities—often forms of disadvantage”⁷⁴ The Commission then states that this tendency “is connected to a fairly widely-held perception of older adults as being, as a group, in some way ‘vulnerable,’ at heightened risk of a variety of negative outcomes”⁷⁵ This tendency is disapproved in the Report, but there is also the implicit recognition that dependency for at least some of the elderly is possible. Thus, we are told that the move away from “the simple use of age as a marker for disadvantage” has been accompanied by “efforts to identify subgroups within the broader umbrella of ‘older adults’ who are ‘frail’ or ‘vulnerable,’ and therefore in need of additional attention and protection through law and policy.”⁷⁶ The Commission uses the term “vulnerability” here, but it is really dependency that is referenced because its concern is with economic or social disadvantage and bodily frailty.⁷⁷ The tactic taken in this encounter is an attempt to avoid stigmatizing all older adults by segregating some—the disadvantaged or frail. It is not clear how the “need for additional protection” will operate as a sorting device on the individual and practical level.⁷⁸

The Report emphasizes two themes in regard to vulnerability: the threat to the autonomy of older adults posed by paternalism and the belief that vulnerability connotes weakness.

72. *Id.* (acknowledging difference within the elderly and similarities with other age groups).

73. *Id.*

74. *Id.* at 56. With regard to vulnerability and aging and the implications of sameness and difference: aging does not bring a different set or quality of vulnerabilities, just different probabilities that an individual will experience certain harms, injuries, or needs and not have the resources or ability to respond to those needs without assistance. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 57.

78. One possibility is that this group of older adults will be collapsed into the category of “disabled,” but I am not sure what this would accomplish either on the practical or symbolic level.

B. Paternalism

The reluctance to engage with vulnerability is prompted by the fact that the Commission sees the term as having a “freighted status in the law.”⁷⁹ The concept (as the Commission defines it)⁸⁰ is seen as having broad implications for elder law given “recurrent policy tensions in the area . . . between promoting the autonomy of older adults and protecting their safety and security”⁸¹ Interestingly, protection is not necessarily constructed as a positive response, and protective laws are used as an example of the assumption made about the “weakness, frailty, and dependence of older adults,” many of whom are “active, healthy, and engaged.”⁸² The contrast of these clusters of negative and positive terms raises some questions about the muddle we see when categories are mixed—what about those who are weak, but engaged; those who are dependent, but active and so on. The problem is that the discussion of vulnerability and autonomy both in the Report and in general policy and political discussions is framed as an all-or-nothing situation, while people’s lives are much more complex and nuanced, a framing that reflects the tenacity of the image of the autonomous liberal subject.

Particularly disturbing from the perspective of advocates of social welfare programs is the way in which promoting autonomy is cast as at odds with the provision of safety and security for the elderly. Not 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.

79. LAW COMM’N OF ONT., *supra* note 67, at 57.

80. The Report uses the Merriam-Webster Dictionary definition “1) Capable of being wounded; susceptible to wounds 2) open to attack.” *Id.* It then states that “[a] person who is ‘vulnerable’ is therefore at higher risk for some kind of injury or harm.” *Id.* Interestingly, the Report also states that the “concept of vulnerability may suggest some kind of heightened obligation on the part of others to prevent or address potential harms, or some entitlement to additional protections.” *Id.* This idea of a heightened obligation is what the vulnerability theory would cast as the basis for the claim that we need a more responsive state.

81. *Id.*

82. *Id.* Protectionism seems to confer both political and symbolic (or esteem) injuries on the elderly, in that it undermines the idea that older persons have agency and capacity and views them as in need of protection. *See id.* at 57–58.

The nature of the concern with promoting autonomy seems to arise because past actions deemed “paternalistic” have been undertaken to protect the elderly.⁸³ In particular, the Commission notes that concern with using the concept of vulnerability “is strengthened by the tendency of discussions regarding older adults and vulnerability to focus on the area of legal capacity and decision making, to the point where vulnerability and the lack of legal decisional capacity are frequently used as interchangeable concepts.”⁸⁴ The risk is “that vulnerability may be seen as *inherent* to the status of being an older person, rather than something that has roots in the life-courses and environments of some older persons” and “can be used to justify heavy-handed and paternalistic intervention” in the lives of older adults.⁸⁵

83. Interestingly, reflecting the individualistic and autonomous conception of the liberal subject, paternalism is defined as “a style of government or management, or an approach to personal relationships, in which the desire to help, advise, and protect may neglect individual choice and personal responsibility.” MICROSOFT ENCARTA COLLEGE DICTIONARY 1064 (2001).

84. LAW COMM’N OF ONT., *supra* note 67, at 57–58. Here, the anticipated injury is the denial of autonomy. *Id.* The Commission seems incapable of recognizing that individuals are vulnerable, but can also exercise agency. The Vanguard Project listed four main arguments against use of the term “vulnerability”:

- (1) [i]t is vague, imprecise, and overbroad: under the right conditions, any person may be vulnerable; (2) [i]t masks paternalism, and is used to justify otherwise unwarranted intervention; (3) it defines a person based on assumptions associated with a perceived disability or medical diagnosis; and (4) [i]t renders factors external to the adult an intrinsic part of an adult’s individual identity.

THE BC ADULT ABUSE/NEGLECT PREVENTION COLLABORATIVE, VULNERABLE ADULTS AND CAPABILITY ISSUES IN BC: PROVINCIAL STRATEGY DOCUMENT 14 (2009) [hereinafter THE VANGUARD PROJECT]. The Vanguard Project includes a 1997 definition by the Scottish Law Commission that replaced the dictionary definition of vulnerability from “capable of being wounded, liable to injury, or hurt feeling: open to successful attack: capable of being persuaded or tempted . . .” to:

A vulnerable adult should be defined . . . as an adult who is unable to safeguard his or her personal welfare, property, or financial affairs, and is: (a) in need of care and attention arising out of age or infirmity, or (b) suffering from illness or mental disorder, or (c) substantially handicapped by any disability.

Id. The Vanguard Project, seeing the use of such terms continuing, “moved to reconceptualize the meaning of the terms.” *Id.* at 15. They did so because they recognized that “[t]he notion of vulnerability captures more than the adult who has been abused or neglected. It highlights a potential, promoting the possibility of prevention rather than simply reacting.” *Id.* My reconceptualization is broader than this and is undertaken because it is a way to move beyond the situation of an individual. As part of the human condition, vulnerability provides the basis for the claim that the state must be more responsive to the circumstances and situation of its citizens. *See infra* notes 91–97.

85. LAW COMM’N OF ONT., *supra* note 67, at 58 (emphasis in original).

The Commission does not consider if and how it might be possible to take realistic safety and security concerns in regard to older adults and shape them as autonomy-enhancing measures. If 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 that do not condemn, but can protect. Capacity, for example, might be seen as existing on a spectrum, not as an absolute attribute. Perhaps the notion of gradated autonomy adopted in the Convention on the Rights of the Child might prove a workable model for calibrating concepts like autonomy to individual capabilities, rather than treating it in an either/or dichotomous fashion.⁸⁶ We could think in terms of “partners,” not “guardians,” for the elderly in need of some monitoring. 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 touching on financial circumstances and situations.

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 include imposition of fines. Perhaps we need a new tort of financial exploitation or criminal penalties for elder fraud. The main focus of such measures is on the character or actions of the outsider, not the incapacities of the elderly.

Of course, a response sensitive to the vulnerability approach would suggest that these kinds of provisions to safeguard those vulnerable to exploitation be more broadly drawn to reflect the fact that many people in society find themselves in such a position with respect to financial matters. Considering how financial institutions and actors are relatively privileged in comparison to the average consumer, regardless of his or her age, would eliminate the stigma associated with

86. I realize that this analogy will be criticized as patronizing by some, but I am not equating the elderly with children, only asserting that it would make sense to look at how issues of capacity and agency are addressed across the life-course and over different developmental stages. Focusing only on the last stage of life ignores the continuity in an individual's life as well as the similarities in experiences across age cohorts.

the separation of the elderly out from the rest of the society and also reflect the reality that many people who are not elderly are nonetheless at risk of overreaching and thus vulnerable when dealing with sophisticated financial institutions. This generalized approach would also address the law and economics criticism that such protections would only work to economically isolate the elderly, since banks and others would stop dealing with them. If protective legislation were general in form and fashioned on the universal vulnerable subject, the only option for an entity seeking to avoid such regulation would be to go out of business, since everyone would be covered by the same rules.

This point is not made by the Commission, and I fear that in trying to avoid the purported stigma associated with vulnerability and minimizing the possibility of dependency, the Report borders on abdicating responsibility to protect the security and safety of older adults in order to preserve some abstract sense of autonomy. However we understand the concept of society and collective responsibility, the construction of sound social policy and law must be built upon a foundation that recognizes the centrality of both vulnerability and dependency to the human condition.

C. Vulnerability = Weakness

Paradoxically, because it equates vulnerability with weakness and weakness as an unacceptable designation for the elderly as a group, the Commission devotes an entire sub-section to vulnerability,⁸⁷ but it does not grapple with the positive possibilities of the concept or consider how age-neutrality could be achieved by realizing that vulnerability is universal and constant across the life-course. An excerpt from Professor Margaret Hall is used to lay out the vulnerability as weakness perspective:

Resistance to the idea of vulnerability as key to a conceptually coherent category of “law and aging” is strong, and rooted in the ideas that vulnerability = weakness and resistance to the presumption that age = loss of capacity. The fear is that legal theory focusing on personal vulnerability increases *social* vulnerability, the more significant source of harm, to the extent that it reinforces ageist presumptions of weakness and incapacity. Legal protec-

87. Section D is titled “‘Vulnerability’, Inequality, Risk, and Older Adults” and sub-section 1 is labeled “Is ‘Vulnerability’ a Useful Concept for the Law as it Affects Older Adults?”. LAW COMM’N OF ONT., *supra* note 67, at 56–57.

tion for the truly incapable, of whatever age, exists; and beyond that, older adults should be treated in law and otherwise like any other adult persons.⁸⁸

Of course, vulnerability need not be equated with weakness any more than age inevitably means loss of capacity.⁸⁹ Sometimes, and perhaps even ultimately, our vulnerability results in weakness, or physical or emotional decline. But properly understood in the context of the human condition, vulnerability is also generative. Importantly, our vulnerability presents opportunities for innovation and growth, creativity, and fulfillment. It makes us reach out to others, form relationships, and build institutions. Human beings are vulnerable because as embodied beings we have physical and emotional needs for love, respect, challenge, amusement, and desire. This vulnerability can bring positive or negative results, but certainly it can be embraced, not ignored, by people wanting to remove stigma from a designated group. In fact, recognizing this generative and positive aspect of vulnerability might bring into sharper focus the experiences of isolation and exclusion that many of the elderly face and suggest arguments to use to lessen the barriers to participation that they encounter. For example, adult activity centers or specialized transportation are not just icing on the cake, but essential programs for society to provide when it understands how our universal vulnerability makes necessary human contact and relationships.

Even if one were to accept that vulnerability equals weakness, as Professor Hall sets out, is not weakness (or the potential to become weak) universally true for human beings at some points and in some aspects over the life-course? It seems likely that there was some confusion on the part of both Professor Hall and the Commission between the concepts of vulnerability and dependency. Vulnerability is constant and inherent in our embodiment. By contrast, dependency is episodic and largely developmental in terms of it being a universal status.⁹⁰ Surely the need for care from others when one is very young

88. *Id.* at 58 (emphasis in original) (footnote omitted).

89. Weakness is defined alternatively as "lacking strength" or "deficient in physical vigor." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1338 (Frederick C. Mish et al. eds., 10th ed. 1993).

90. As I have earlier defined the term, dependency is deemed "inevitable" when applied to biological or developmental stages of life, and "derivative" when considering the social arrangements inherent in caretaking. *Cracking the Foundational Myths*, *supra* note 61, at 18, 20. The theoretical insight is that caretakers need resources to undertake care for children, the ill, the elderly, and so on, and are thus derivatively dependent. *Id.* at 20. Society is structured in such a way as to make

or incapacitated in some way due to advanced age, disability, or illness should not be viewed as a weakness.

As noted earlier in this Article, dependency in this regard is also universal—inevitable when we are young and possible as we age or become ill or disabled. Why should dependency be stigmatized as weakness, which connotes an individual failing or lack of character? Although it is unclear what is gained by a refusal to recognize the undeniable reality of dependency, certainly much may be lost in terms of the ultimate coherence and effectiveness of social policy when it is fashioned blind to the implications for individuals of the realities of the human condition.

The Commission does bring into its discussion some of my work, what it calls a “reconceptualization of vulnerability, detached from specific subgroups . . . focused on vulnerability as at the heart of the human condition . . . and suggest[ing] a relationship of responsibility between the state and the individual.”⁹¹

While all human beings stand in a position of constant vulnerability, we are individually positioned differently. We have different forms of embodiment, and also are differently situated within webs of economic and institutional relationships. As a result, our vulnerabilities range in magnitude and potential at the individual level. Vulnerability, therefore, is both universal and particular; it is experienced uniquely by each of us. Important in regard to this particular[] point is the fact that our individual experience of vulnerability varies according to the quality and quantity of resources we possess or can command. While society cannot eradicate our vulnerability, it can and does mediate, compensate, and lessen our vulnerability through programs, institutions, and structures. Therefore, a vulnerability analysis must consider both individual position and institutional relationships.⁹²

The Commission initially concedes that this shift in focus to state and institutional roles in addressing vulnerability “may be helpful,” but quickly notes that it is also important “to acknowledge that state and institutional responses to perceived vulnerability on the part of older adults have, in some cases, been paternalistic, coercive and counter-productive, . . . and may exacerbate rather than reduce risk.”⁹³ The

the private family the primary source of those resources, resulting in great inequalities, including leaving other societal institutions that benefited from carework to evade responsibility to accommodate or compensate caretakers in any way. See THE AUTONOMY MYTH, *supra* note 4, at 57–70.

91. LAW COMM’N OF ONT., *supra* note 67, at 58 (citing *The Vulnerable Subject and the Responsive State*, *supra* note 59, at 267).

92. *Id.* (footnote omitted).

93. *Id.* at 59.

failure of the Commission (and Professor Hall) to engage with the reality that all human beings are likely to experience some forms of weakness and need over the course of their lives in an effort to confront an inappropriate stereotype about the potential weakness of the elderly unfortunately works to undermine the argument that society must respond to those situations on an individual level.

Interestingly, the Commission does not wholly reject the possibility of the state and institutions having a role in responding to vulnerability (now reconceptualized);⁹⁴ rather, its concern seems to be that the responses take a form that will be welcomed by and advantageous to older adults.⁹⁵ A vulnerability analysis leads to a discussion of the nature of a responsive state and draws connections between the vulnerable subject and the state and its institutions. Indeed, one way to think about the formation of society is to posit that it is human vulnerability that brings individuals into families; families into communities; and communities into societies, nation states, and international organizations—all entities engaged in building the collective institutions with which to confront our shared and individual vulnerability.⁹⁶ Human beings are dependent not only on each other but also on the institutions and political structures they build.

Significantly, it is through institutions that we gain access to resources with which to confront, ameliorate, satisfy, and address our vulnerability. Resources can come in material, social, or economic forms, including human capital, education, wealth, and group identification, as well as relationships in entities such as the familial and other institutional arrangements.⁹⁷ Resources are accumulated and

94. See *id.* at 58 (citing *The Vulnerable Subject and the Responsive State*, *supra* note 59, at 268–69).

95. See *id.* at 58–59.

96. This notion of formation of social foundations touches on John Locke's characterization of development of familial and social bonds. According to Locke, an urge towards self-preservation, "necessity, convenience, and inclination" vested into humankind by God led him to form a society. Gordon J. Schochet, *The Family and the Origins of the State in Locke's Political Philosophy*, in JOHN LOCKE: PROBLEMS AND PERSPECTIVES: A COLLECTION OF NEW ESSAYS 81, 87 (John W. Yolton, ed. 1969). In this sense, "the first Society was between Man and Wife . . ." to which children were thereafter added. *Id.* The familial society mentioned by Locke, however, existed in the "pre-political" state of nature. *Id.* at 88–89. Thereafter, however, "a certain element of necessity" (that could "hardly . . . be avoided") caused the "transformation" of these pre-political societies to political societies and the government. *Id.* at 89.

97. I have identified at least five different types of resources or assets that societal organizations and institutions can provide: physical, human, social, ecological or environmental, and existential. See also PEADAR KIRBY, VULNERABILITY AND

dissipated over time in the process of living, making decisions, and investing. At times of crisis or opportunity, our accumulated resources can limit or enhance our "autonomy," because they define our realistic options. The institutions and political structures that allocate these resources to individuals should operate to affect the collective interest in equality of access and opportunity, but this can only be accomplished if they are designed consistent with the realities of human dependency and vulnerability.

Perhaps the most significant aspect of making vulnerability central to discussions about responsibility and policy is that attention is necessarily called to the individual's location within webs of social, economic, political, and institutional relationships that structure opportunities and options. This institutional focus supplements atten-

VIOLENCE: THE IMPACT OF GLOBALISATION 55–56 (2006). Physical resources are the physical goods or material things that determine our present quality of life, such as housing, food, entertainment, and means of transportation. Physical resources also can provide us with the means for accumulating additional resources when they take 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 are banking rules and regulations and credit and monetary policies. Human resources also affect material well-being. 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. These resources are often referred to in terms of "human capital," primarily developed through systems that provide education, training, knowledge, and experience. Accumulation of a degree of human capital is essential in gaining access to employment systems, which themselves can provide further resources. Social assets or resources are provided by less tangible, not so easily quantifiable relationships. These include social networks from which we gain support and strength. The family is a major institution providing social resources. So too are other associations, such as political parties or labor and trade unions in which individuals bolster their resilience by joining together to address vulnerabilities generated by the market. 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 resources can be conferred through our position in relation to the physical or natural environments in which we find ourselves. We live in an environment and are dependent on things like clean air and water. We experience the environment in immediate and cosmic senses. The state of our neighborhood park is important, but so too are Arctic ice flows or floods in Pakistan. A variety of external factors and physical actions can alter the environments in which we live and have profound influence over our needs and well-being. Existential resources are provided by systems of belief or aesthetics, such as religion, culture, or art, perhaps even politics. These systems can help us to understand our place within the world and allow us to see meaning and beauty in our existence. In discussing resilience, Kirby builds on earlier definitions that understood resilience as "enabling units such as individuals, households, communities and nations to withstand internal and external shocks." *Id.* at 55 (quoting U. N. ECON. COMM'N FOR LATIN AM. & THE CARIBBEAN, TOWARDS A SOCIAL VULNERABILITY INDEX IN THE CARIBBEAN 25 (2003)).

tion to the individual subject, placing him or her in societal contexts. In fact, a particular strength of a vulnerability analysis is its institutional focus that blurs the line between public and private which is so prevalent in current conceptions of society. It is important to recognize that the public and the private are merely constructs and that institutions always affect, and are affected by, other institutions, as well as by the individuals who must organize their lives across a range of different institutions.

In contrast to a vulnerability approach, in the world of the autonomous liberal subject, with a strong anti-interventionist norm, constructs deemed “private”—as contrasted with “public,” such as the family—are positioned as the repositories for human dependency. Privatization of dependency masks it, along with the other implications of human vulnerability and allows us to indulge in fantasies of independence, self-sufficiency, and autonomous agency. In an autonomous liberal subject analysis, if individuals or their private institutions fail, it is perceived as reflecting their weakness and incapacity, because the divide between public and private leaves them outside of general public or state responsibility—they occur in a separate sphere.⁹⁸

The Commission does not explore these or other possibilities presented by a reconceptualized vulnerability approach, however.⁹⁹ Rather, it “leaves open the question of whether the concept of vulnerability remains a valid and useful one for the law as it affects older adults, despite the fact that inappropriate responses to vulnerability have been employed in the past, or whether new concepts and approaches are necessary.”¹⁰⁰

98. I previously have commented on the facile manipulation of the ideas of the public and the private in regard to curtailing active regulation and state intervention, calling attention to the fact that the corporation is chameleon-like—a “shape-shifter” that is public when juxtaposed with the private family, but private when the issue is regulation by the state. See Martha Albertson Fineman, *Feminist Legal Theory*, 13 J. GEND., SOC. POLICY & L. 13, 22 (2005).

99. The Report does return to the idea of a responsive state in a sub-section titled “Responding to Risk and Inequality Among Older Adults.” See *supra* text accompanying notes 137–141.

100. LAW COMM’N OF ONT., *supra* note 67, at 59.

IV. Recognizing the Need for a Responsive State

The Interim Report of the Law Commission of Ontario suggests two concepts or approaches that are deemed preferable to vulnerability when looking at the law as it affects older adults: “equality rights analysis” and “concepts of risk.”¹⁰¹ Interestingly, neither of these concepts is new and each of them has its own conceptual and rhetorical baggage.

A. Equality Rights Analysis

It is clear from the Report that the Commission prefers the rhetoric of equality to that of vulnerability, referring to it as having the benefit of being “a positive approach.”¹⁰²

[An equality approach] focuses on the ultimate purpose of interventions that target older adults or some older adults: increasing equality . . . it concentrates attention on moving towards a positive outcome, rather than simply aiming to minimize a negative. Such a focus positions older adults as rights-bearers, rather than passive and fragile subjects of others’ interventions. In contrast to concepts of vulnerability, it does not have an inherent tendency to privilege concerns about the security of older adults over the preservation of independence and autonomy.¹⁰³

Ironically, the development of the idea of a vulnerable subject was largely prompted by dissatisfaction with the equality approach and the limited ability of equality theory (at least as developed under the equal protection clause of the United States Constitution) to address the persistent and growing structural and political inequalities in American society.¹⁰⁴

In spite of its initial radical potential, equality as a United States constitutional concept is understood narrowly, as the requirement of sameness of treatment or a mandate against some forms of discrimination.¹⁰⁵ Paradoxically, the equality mandate does not apply equally

101. *Id.* at 59–63.

102. *Id.* at 60.

103. *Id.*

104. See *The Vulnerable Subject and the Responsive State*, *supra* note 59, at 251–56.

105. Interestingly, in this catalogue, as well as in the law, class is absent as a suspect classification. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973) (rejecting the application of strict scrutiny to an education policy allegedly discriminating against students on the basis of class). Class bias would bring economic arrangements into question and, for that reason, would be incompatible with a formal equality analysis that ignores disparate underlying circumstances and economic inequality. *Id.* at 55.

to everyone; only some classifications or categories of persons receive heightened protection.¹⁰⁶

Formal equality also leaves undisturbed—and may even serve to validate—existing institutional arrangements that privilege some and disadvantage others in American society. Formal equality does not challenge existing allocation of resources and power.¹⁰⁷ Unless there is some distortion introduced by impermissible bias (discrimination), the state should not intervene or interfere with either the free market or the private individual or family.¹⁰⁸ In the United States, an equality approach operates as both under- and over-inclusive; although it might be used to successfully address some forms of disadvantage, it fails to protect against others. The use of identity characteristics,¹⁰⁹ rather than socioeconomic status or assessment of relative privilege and disadvantage, has meant that American conceptions of equality are inadequate to address the growing disparities in social well-being in American society.¹¹⁰ Yet, the “sameness of treatment” version of equality remains dominant in the United States, blocking more sub-

106. Julie Chi-hye Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295, 299 (2007) (“The unique American history of eradicating race-based slavery and the unintended consequences of this history explain these distinctive features of U.S. antidiscrimination law.”). Our understanding of equality and equal protection has been profoundly shaped by their twentieth century roots as a tool to end slavery and fight blatant forms of racial discrimination. *Id.* at 335. The history of equality into protected classifications, therefore, both defines legal identities for some and also organizes it into political interest groups based on race, ethnicity, gender, and other identity characteristics. *Id.* at 337.

107. *Anchoring Equality in the Human Condition*, *supra* note 59, at 36–37 (analyzing the economic and social inequalities that persist despite the use of the formal equality model).

108. I have referred to this as the principle of autonomy or liberty being the primary frame through which we approach equality. *The Vulnerable Subject and the Responsive State*, *supra* note 59, at 256–62.

109. I have described this as identity categories operating (both over- and under-inclusively) as “proxies” for persistent problems such as poverty and lack of opportunity. *See id.*

110. A 2011 report by The United States Census Bureau has led to the following findings: “Real median household income declined between 2009 and 2010. The poverty rate increased between 2009 and 2010. The number of people without health insurance increased between 2009 and 2010, while the 2010 uninsured rate was not statistically different from the 2009 uninsured rate.” CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010 1 (Sept. 2011), available at <http://www.census.gov/prod/2011pubs/p60-239.pdf>. The Congressional Budget Office has also recently found that “between 1979 and 2007, income grew 275 percent for the top 1 percent of households but only 18 percent for the bottom 20 percent.” *Trends in Distribution of Household Income Between 1979 and 2007*, CONG. BUDGET OFF. (Oct. 25, 2011), <http://www.cbo.gov/doc.cfm?index=12485>.

stantive or result-oriented versions of equality that could take into account past circumstances and future obligations and consider things like need and disadvantage.

The Commission is careful to state that it “is clear . . . that ‘equality’ does not equal sameness: it is not a matter of ‘treating likes alike.’ People are different, and those differences can matter.”¹¹¹ Just what it means by equality is not clear, however: “[i]t is difficult to define what we mean by ‘equality,’ as is evidenced by the very complex jurisprudence under section 15 of the *Charter*.”¹¹² It is true that Canada has taken a much more inclusive approach to anti-discrimination and inequality than has the United States. The Canadian Human Rights Panel in 2000 recommended the inclusion of “social condition” as a ground of discrimination, recognizing both that poverty was beyond the control of some people and that poverty was associated with “ongoing disadvantage.”¹¹³

Significantly, even if not limited to its formal version, an equality approach is fundamentally a process of comparison in which it is necessary to have at least two points of reference to pose against each other. Assessing equality typically involves dividing a perceived whole into differentiated parts based on the identification of some (ultimately legally insignificant) characteristic and comparing them to see if they have been treated equally or the same. The determination of equality or impermissible discrimination is made by juxtaposing one group with another. Those who fall outside of the protected category may be discriminated against with impunity in areas such as employment or housing. In a system with a more substantive equality doctrine in place, a more inclusive process might involve the development of an ideal baseline or general right standard against which to measure the situation of a specific individual or group. But it may be as likely that the autonomous liberal subject will emerge here as the measure, as he or she has in so many other contexts. The fact that one

111. LAW COMM’N OF ONT., *supra* note 67, at 59.

112. *Id.*

113. Sandra Fredman, *Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage onto the Equality Agenda*, 2010 EUR. HUM. RTS. L. REV. 290, 294 (Eng.) (citing CAN. HUMAN RIGHTS ACT REVIEW PANEL, PROMOTING EQUALITY: A NEW VISION 106–13 (2000), available at <http://dsp-psd.pwgsc.gc.ca/Collection/J2-168-2000E.pdf>). Other countries are grappling with similar ideas, and the United Kingdom recently passed an Equality Act, which requires public decision makers to have “due regard” for the need to advance equality of opportunity. *Id.* at 294–95 (quoting Equality Act 2010, c. 15, § 149(1) (Eng.)).

pole for comparison is developed in the abstract does not lessen either the comparative nature of the process or the problems with comparisons.

The slipperiness of an equality approach is evident in the Report. The Commission approves of the approach because equality is “the ultimate purpose of interventions,”¹¹⁴ but does not tell us how or to whom the elderly are to be made equal or what the standard for measurement is to be, raising questions about how to assess any specific program or law. Should the goal be that older adults have an equal *opportunity* to end up in the same *position* (and is positioning to be understood economically, politically, or in terms of future opportunity) as their younger counterparts? Are there some generalizable age-specific needs or differences that might make this difficult to accomplish? If so, should those differences be addressed in policy and how? What if addressing (accommodating) differences suggests that unequal measure should be undertaken (affirmative action) and would such protective measures inevitably be viewed as inappropriately paternalistic by those prioritizing liberty, autonomy, and individual choice?

Perhaps we should think of equality more basically, and older adults as a group should be assured some substantial level of material and economic resources beyond what is provided to the rest of society because the playing field gets less level with age and many may not be able to compete on an equal basis. Should we create a floor below which the elderly should not fall, because they are statistically nearer the end of their lives and have less time and, perhaps, ability to earn additional resources? Of course, these speculations raise questions about why, if equality is the goal, age should be privileged in this way and, if age is so privileged, who is going to pay for the privileging, perhaps just circling back into another iteration of intergenerational conflict.

Using equality as both the conceptual jumping off point and the specific measure for assessing laws concerning older adults is further complicated because the existence of differences within the category of older adults. Those differences, although they seldom come to the fore in the Report, must bedevil the Commission with its concern for stigma and stereotype. How should an equality approach treat signif-

114. LAW COMM'N OF ONT., *supra* note 67, at 60.

icant differences? It is clear that some older adults are not only vulnerable in the sense that I use the term, but injured or harmed, perhaps dependent and lacking the ability to care for themselves and/or the capacity to make appropriate decisions.¹¹⁵

B. Differences and Risk

Early in the Report, the Commission suggested that the variations or differences in the position of older adults reflected the “accumulated effects of their life-courses, social structures, or marginalization and stereotyping”¹¹⁶ and differences are certainly in need of both explanation and consideration. Not all older adults are in the same position, particularly with regard to the need for state protection or provision. Unfortunately, and at the expense of conceptual coherence, the Commission resorts to the concept of “heightened risk” as a way to resolve the problems with differences among and equality for the elderly.¹¹⁷ It thus draws a line through the category of older adult and creates a new subcategory based on assessment of “heightened risk.”¹¹⁸ Older adults with the appropriate degree of capacity would be grouped with younger healthy, active adults on one side of the equality line, while those at risk are clustered on the other, presumably abandoned to state paternalism. The Report focuses on indicators of “heightened risk” as a “flexible alternative to the use of ‘vulnerability’ as a label to identify older adults who need additional supports or protections”¹¹⁹

It is interesting that the Commission rejects vulnerability because it is stigmatized and stereotypical, but picks up the equally problematic and freighted term “at-risk,” which has the added disadvantage of being a specific and individualistic inquiry. This is particularly puzzling, since reconceptualizing vulnerability could offer a broadly based concept with which to reimagine societal and institutional responsibility, complementing individual responsibility across the life-course. Typically, the concept of risk is much more narrowly focused in terms of specific aspects of harm or injury that can be identified,

115. *See id.* at 56–59.

116. *Id.* at 23.

117. *Id.* at 60–61.

118. *Id.* at 60 (noting some older adults may hold a reduced or increased risk for negative outcomes when compared to other older adults).

119. *Id.* at 60.

foreseen, predicted, and managed by individuals or societies. Risk calls to mind terms like management, avoidance, prevention, and such institutional configurations as insurance, underwriting, and moral hazard. It is difficult to see how the term can avoid (in the Commission's words) being understood as meaning only a heightened risk of a variety of negative outcomes, thus justifying paternalism and protection.¹²⁰

But paternalism and protection are not the only possible implications of using at-risk as the terminology to describe the position of older adults. Recent literature on risk shows how ideas about risk as the basis for public and social policy have evolved. The implications of its use are moving from positive to negative with a focus on the individual, rather than the institutional, and with the objective of structuring preventive or avoidance behaviors. Tom Baker and Jonathan Simon point out in their introductory chapter to the book *Embracing Risk* that industrialized countries throughout most of the twentieth century socialized or spread more risks.¹²¹ This positive development occurred in both the "public" and the "private" spheres.¹²² On the private side was a tremendous growth in new insurance industries, covering things like health, tort liability, and private pensions, as well as steady growth of old insurance forms, such as life and property.¹²³ On the public side, dramatic new social insurance schemes were created, beginning for the United States with the creation of the Social Security system in 1935.¹²⁴

Baker and Simon also described how this collective approach is losing favor on both the private and public levels, with concerns on the part of economists and politicians about how risk spreading affects individual decisions. There is also alarm at the growth of public and private insurance systems.¹²⁵ As a result, risk is being shifted to individuals in the private system in moves such as employers replacing defined benefit pensions with those that are based on defined contributions, along with trends toward larger deductibles in more tradi-

120. This was one of the charges against using vulnerability. *Id.* at 57–58.

121. TOM BAKER & JONATHAN SIMON, *EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY* 3 (2002).

122. *Id.* at 4.

123. *Id.*

124. *Id.* Although their focus is on the United States, they assert that the United States is not "unique" in showing these trends. *Id.*

125. *Id.*

tional private insurance schemes.¹²⁶ In the public arena, the authors point to the recent and reoccurring attempts to “reform” Social Security by privatizing it and setting up individual retirement accounts, thus shifting the risk of market instability to individuals rather than the government or collective bodies.¹²⁷ They further argue that the current thinking is that some risk is actually good for people and that too much protection can give incentives to engage in more risky and harmful behavior.¹²⁸

The concept of “moral hazard” is particularly relevant to these ideas of risk and the overabundance of insurance. Moral hazard is an economic concept that describes a theory about the effect of insurance—or indemnity more generally—on an individual’s incentive to be careful and avoid losses.¹²⁹ Insurance, it is proposed, can both reduce care to avoid injury and the will to manage the costs involved in recovering from loss.¹³⁰

There is another line of literature that is problematic with regard to the use of risk in conjunction with the elderly. According to Kitty te Riele, “Common policy interpretations of youth ‘at risk’ [in the Australian context] tend to construct ‘risk’ either as an individual attribute or as a condition of particular groups of young people.”¹³¹ As a result, “the dominant conceptualization of youth ‘at risk’ draws attention to what is wrong with [the problematic group of] youth, rather than to what may be wrong with schooling.”¹³² In other words, risk is a stigmatizing term in much the same way that vulnerability is when it is applied to populations. The assessment of risk in regard to particular groups seems to limit or redirect the inquiry to an individual or subgroup within a larger category, whose behavior or attitudes are identified as causing a perceived risk (to that individual or subgroup or to the category as a whole), rather than being directed at the fail-

126. *Id.* at 4–5.

127. *Id.* at 5 (describing the 2000 presidential election candidate’s stances on Social Security retirement benefit plans).

128. *Id.* at 10.

129. *Id.* at 15. This idea of insurance structuring incentives and negatively affecting risk behavior led to the Affordable Care Act, which adopts a moral hazard perspective in provisions constructing the “responsibility to be as healthy as you can.” See Tom Baker, *The New American Health Care System: Reform, Revolution, or Missed Opportunity?*, 159 U. PA. L. R. 1577, 1577, 1605–1606 (2011).

130. *Id.*

131. Kitty te Riele, *Youth ‘at Risk’: Further Marginalizing the Marginalized?*, 21 J. EDUC. POL’Y 129, 136 (2006).

132. *Id.* at 129.

ures of institutional arrangements that are supposedly designed to serve the entire category of persons.

This tendency to individualize, and thus stigmatize, using the concept of risk is not removed by the discussion of risk in the Report, which asserts that the use of heightened risk “accommodates a recognition of the societal factors that may lead to negative outcomes, and reduces the stigma for individuals who are identified in this way.”¹³³ Accommodating recognition is not the same as treating societal factors as a focal point. The Commission concedes that individual attributes remain central, even if the idea of heightened risk “focuses attention not only on the attributes of the individual but also on factors in an individual’s immediate or broader environment.”¹³⁴ The heightened risk approach may have some potential to make individual factors less relevant, but it does not strike the balance between the individual and the environment, nor does it define the interrelationship between individual choice and action and environmental conditions. Thus, a heightened risk approach also has significant potential to become another extension of an individual responsibility to manage, prevent, contain, or insure against future harms.

The Commission tries to side-step this possibility:

While there are individual elements to risk, risk must also be seen in its broader social context. An individual’s family and other relationships, living environments, or income sources and levels may either increase or decrease risk levels, depending on their quality and extent. . . . Therefore, while laws, programs and policies must recognize the capacities and individuality of older adults, this recognition must be balanced by the provision of additional supports for those older adults who are particularly disadvantaged or at risk in order to ensure that the law promotes dignity,¹³⁵ autonomy, participation and security for all older adults.

The broader social contexts identified in the Report as affecting risk assessment, such as the formation of relationships and the accumulation of wealth, may be understood not only as current contexts, but also as the results of individual efforts and choices and, thus, falling under the mandate of individual responsibility.¹³⁶

133. LAW COMM’N OF ONT., *supra* note 67, at 60.

134. *Id.*

135. *Id.* at 61, 3. Attention to this point underscores the danger of an at-risk analysis for factoring in life-course developments. On the individual level, this could lead to blaming individuals for failure to make certain choices or accumulate resources for retirement, etc.

136. LAW COMM’N OF ONT., *supra* note 67, at 61–62.

Of course, undeniably, individual behavior can and does affect our experience of vulnerability, thus the concept of vulnerability is also susceptible to a stigmatizing individualization. A vulnerability analysis, however, broadens the focus on an institutional component well beyond that of a risk approach, which emphasizes prevention and insurance for situations of potential crisis or loss. Vulnerability places the individual entirely within societal contexts by developing the relationships between vulnerability and resilience and societal institutions and resources.

Interestingly, after setting out its risk approach the Commission proceeds to adopt aspects of the vulnerability analysis. In a section entitled “Responding to Risk and Inequality Among Older Adults,”¹³⁷ the Commission considers how to tailor responses to risk. It asserts that the role of governments in addressing vulnerability “is not to achieve invulnerability—an impossible task—but to increase resilience, which [is defined] as ‘having some means with which to address and confront misfortune.’”¹³⁸ The Commission continues to quote from an early article on the vulnerability thesis:

[I]nstitutions collectively form systems that play an important role in lessening, ameliorating, and compensating for vulnerability. Together and independently they provide us with resources in the form of advantages or coping mechanisms that cushion us when we are facing misfortune, disaster, and violence. Cumulatively these assets provide individuals with resilience in the face of our shared vulnerability.¹³⁹

The Report summarizes the next step in the vulnerability analysis by observing that assets or resources “may take five forms: physical, human, social, ecological or environmental, and existential.”¹⁴⁰ Although uneasy with the implications of universal vulnerability, the Commission appreciates the strength of its corresponding companion concept—resilience. The Report even concludes that a “focus on increasing resilience, through the provision of resources, provides an alternative to one of the more common responses to risk among older adults—increasing control over and decreasing choices for older adults.”¹⁴¹

137. *Id.* at 63.

138. *Id.* at 64.

139. *Id.*

140. *Id.*

141. *Id.*

Note that the concept of resilience goes well beyond ideas of management, prevention, or insurance, all of which attend the concept of risk and also implicitly rejects the idea of moral hazard. Resilience is found in the resources we have built up over our lifetimes through participation in society and its institutions. The accumulation of resources, such as education or job training, creates opportunities and options that make the idea of individual autonomy or agency meaningful. Resilience is not a characteristic that one is born with in some degree but is generated over time and in response to the multiplicity of challenges and opportunities inherent in living as a vulnerable being: encountering situations and circumstances that are unpredictable, perhaps unforeseen, and which may be uncontrollable by either individual behavior or societal intervention.

V. Conclusion

I wish the Canadian Commission had more fully explored a vulnerability approach to the challenges facing older adults. As is the case in all too many analyses of social issues, the specter of the one-dimensional liberal subject seemed to work on an unreflective level to anchor attention on autonomy. Exploring the implications of viewing the political subject as vulnerable would have compelled taking a more comprehensive and encompassing approach to end-of-life issues, one that included a life-course perspective. This would mean not positioning old age as a separate designation or category of human existence but recognizing it as one end of the continuum that represents the life-course of the vulnerable subject. The elderly, like everyone else, are situated beings who live with the ever-present possibility of changing needs and circumstances in their individual and collective lives. We all are also accumulative and consuming beings and will have different qualities and quantities of resources with which to meet the challenges and opportunities of life. When society considers how to confront the problems associated with the end of life, we cannot focus only on the situation of individuals who are already among the elderly, but must also take into account those younger individuals who will age into the category eventually, as well as those who may experience dependency and need care even though they are young.

A vulnerability approach is an integrated approach to society, not one of either separate spheres or competing generations. It is this

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vision that should guide the development of political and institutional ethics and practices. Most significantly, a vulnerability approach does not close down the idea of a responsive state in favor of an unrealistic notion of individual responsibility. In breaking down the conceptual barriers that accompany thinking of the generations separately, and potentially at odds with each other, it becomes possible to reconsider how society should realistically and fairly apportion responsibility for human vulnerability and dependency across the life-course among the individual, the family, and the state and its institutions.

