

Age, Equality, and Vulnerability

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This Article uses age as an entry point for examining how temporal and methodological issues in egalitarianism make substantive equality an unattractive goal for vulnerability theory. Instead, vulnerability theory should adopt a continuous doctrine of sufficiency, which is a better fit with vulnerability theory's underlying aims and rhetoric. Instead of evaluating what individuals have in relation to others, sufficiency refocuses the inquiry on whether we have enough throughout the lifecycle. In the context of vulnerability theory, enough should be defined as the capability to be resilient as guaranteed by the responsive state.

INTRODUCTION

Age is a unique and important socio-legal category.¹ It simultaneously serves as an involuntary numerical measure of one's time in existence and a rich symbol filled with social meaning.² Age's dual determinate and informative nature

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- 1 See Alexander A. Boni-Saenz, *Age, Time, and Discrimination*, 59 GA. L. REV. 845, 853–61 (2019) (noting age's unique characteristics and use in the law).
- 2 See Richard A. Settersen, Jr. & Bethany Godlewski, *Concepts and Theories of Age and Aging*, in HANDBOOK OF THEORIES OF AGING 9, 9–14 (Vern L. Bengtson & Richard A. Settersen, Jr. eds., 3d ed. 2016) (discussing the biological, chronological, psychological, and social dimensions of age).

makes it useful for assessing vulnerability and performing care-based decision-making. For instance, doctors use age to evaluate whether mammograms might be suggested to screen for breast cancer.³ Age is also legally significant. It is a ubiquitous legal marker that is used in ways large and small to address vulnerability in the population. For example, in the United States, various state maturity rules protect minors who may lack decisional capacity from making decisions that might bring them harm,⁴ while federal law protects older employees from discrimination they might face in the market.⁵ The universal importance of the aging process and the legal significance of age as a legal tool make it an ideal entry point for examining certain unresolved theoretical questions in vulnerability theory, as that theory embraces a universalist lifecourse approach and endeavors to be a lens for analyzing law reform.

The central claim of this Article is that vulnerability theory should abandon the pursuit of substantive equality. This may at first seem like an odd claim, as the theory has time and again emphasized substantive equality as its goal, in contrast to formal legal equality.⁶ But an examination of the temporal issues in egalitarianism reveals that multiple temporal forms of substantive equality, including lifetime and time-slice egalitarianism, are incompatible with vulnerability theory. Further, the seeds have already been sown for a rejection of equality's comparative method by vulnerability theory's own critiques of formal legal equality.

By its own terms, vulnerability theory would be better off adopting a continuous doctrine of sufficiency, which focuses not on what individuals have in relation to others, but on whether they have enough throughout the lifecourse. Enough — the sufficiency threshold — should be defined as the capability to be resilient as guaranteed by the responsive state. While adopting the doctrine of sufficiency raises additional questions or challenges

3 See Kevin C. Oeffinger et al., *Breast Cancer Screening for Women at Average Risk*, 314 J. AM. MED. ASSOC. 1599, 1599 (2015) (“Women with an average risk of breast cancer should undergo regular screening mammography starting at age 45 years. (Strong Recommendation)”).

4 See Boni-Saenz, *supra* note 1, at 854–55 (discussing the various maturity rules in both the public and private spheres).

5 See 29 U.S.C. §623 (2012) (“It shall be unlawful for an employer — (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age”).

6 See, e.g., Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1744–51 (2012) [hereinafter Fineman, *Beyond Identities*] (arguing for a substantive equality anchored in broad social and economic rights).

for vulnerability theory, they are likely less intractable than those presented by substantive equality.

Part I lays out the basic tenets of vulnerability theory and explores its relationship with equality and age. Part II argues that vulnerability theory and equality are in significant tension, particularly when one considers a central but often overlooked egalitarian concern (time) and corresponding socio-legal category (age). Part III offers a promising substitute for substantive equality that is a better match for the vulnerability theory: a continuous sufficiency standard focused on the capability to be resilient.

I. VULNERABILITY THEORY AND AGE

This Part provides the background for understanding vulnerability theory and its application to age, with particular reference to the works of Martha Fineman, its chief proponent. It first introduces the basic components of the theory, including its key concepts and critiques. Then it turns to the relationship between vulnerability theory and age.

A. Vulnerability Theory

The central thesis of vulnerability theory is that vulnerability is a “universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility.”⁷ Fineman conceptualizes vulnerability as a result of our embodied nature and the complex social and institutional context that we inhabit.⁸ Further, vulnerability itself is a multivalent concept. At one level, vulnerability is merely a facet of the human experience, so it simply must be accepted.⁹ At another level, vulnerability is clearly negative, as it has the potential to open us up to harm if we are not prepared for it.¹⁰ Finally, at yet another level, vulnerability is positive, as it is

7 Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1, 8 (2008) [hereinafter Fineman, *The Vulnerable Subject*].

8 *See id.* at 9–10.

9 *See id.* at 9 nn.24–25 (exploring inevitability and the relationship between vulnerability and dependency).

10 *See id.* at 9 (“Vulnerability initially should be understood as arising from our embodiment, which carries with it the ever-present possibility of harm, injury, and misfortune from mildly adverse to catastrophically devastating events, whether accidental, intentional, or otherwise.”).

the basis for social organization, bringing us together as we are better able to manage vulnerability through cooperation and mutual assistance than alone.¹¹

Armed with these insights, Fineman takes aim at the liberal subject in social and political theorizing. Central to many strains of Western thought, this liberal subject is characterized in the following way:

Our contemporary legal subject is posited as an autonomous and independent being whose primary demand is for liberty or freedom from state interference. He claims a right to autonomy to govern his own life, while at the same time asserts his freedom from responding to the needs of others who should equally be independent and self-sufficient. . . . This liberal legal subject is a fully functioning adult — in charge and capable of making choices. Unrestrained by the state, he will be rewarded according to his particular talents and individual efforts. His social relations are defined by concepts such as consent and supported by legal doctrines such as contract and property. The attainment of liberal economic roles — such as job creator, entrepreneur, taxpayer, and, of course, consumer — define the aspirations and determine the values for this legal subject.¹²

Fineman's primary critique of the liberal legal subject is that it simply does not reflect reality, as it is far removed from the real-life vulnerability and interdependence experienced by the human population.¹³ This is most obvious when one notes that the liberal subject never experiences the life stage of childhood, which is characterized by dependency.¹⁴ But the critique is not simply factual; it is also conceptual. The liberal subject narrows our focus to notions that naturally flow from him,¹⁵ such as autonomy, self-sufficiency,

11 See Fineman, *Beyond Identities*, *supra* note 6, at 1755 (“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.”).

12 Martha Albertson Fineman, *Vulnerability and Social Justice*, 53 VAL. U. L. REV. 341, 355–56 (2019) [hereinafter, Fineman, *Social Justice*].

13 See Fineman, *The Vulnerable Subject*, *supra* note 7, at 10–11.

14 See *id.* at 11–12.

15 See Fineman, *Social Justice*, *supra* note 12, at 355 n.79 (“I intentionally use the male pronoun here because the political subject that governs our current institutional imagination is based on a limited notion of the human experience, one that reflects the understanding of the male, white, property-owning or tax-paying, certain age and/or religion, and free framer of the U.S. Constitution.”).

and personal responsibility.¹⁶ In the legal realm, the liberal subject produces a valorization of formal legal equality.¹⁷

This valorization manifests in the United States as an antidiscrimination legal regime, enforced primarily by the courts through legal action by individuals.¹⁸ The main question in this antidiscrimination regime is what types of legal distinctions the courts should look more skeptically upon, applying strict scrutiny. These grounds have traditionally been understood as identity-based categories, such as race or sex.¹⁹ While Fineman acknowledges that the antidiscrimination regime has led to advances for individuals and groups that were subordinated by laws creating distinctions on the basis of identity characteristics, she also notes its several pernicious effects. First, it has left intact and perhaps justified a host of other substantive inequalities in society that are not addressed by the antidiscrimination norm.²⁰ For example, while a litigant might be able to attack legally a denial of housing or employment that is based on certain identity characteristics, she will not find this antidiscrimination regime helpful in addressing other social or material disadvantages that do not derive proximately from identity-based bias. Thus, to the extent that the antidiscrimination regime exhausts the legal remedies available, it can serve to naturalize any remaining inequalities that cannot be addressed by law. This leaves several of the individuals who are members of subordinated identity groups in a relatively poor position. Second, it has led to a politics of competition and backlash. Newly protected groups may threaten the status of other protected groups, and both will generate resentment from groups that are not protected at all.²¹

16 See Fineman, *The Vulnerable Subject*, *supra* note 7, at 10.

17 See *id.* at 2–4.

18 See Fineman, *Beyond Identities*, *supra* note 6, at 1725–30.

19 See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (“[W]e can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.”).

20 See Fineman, *Beyond Identities*, *supra* note 6, at 1752 (“If the primary objective is the eradication of inequality and discrimination, any measures designed to achieve this objective will be rendered less effective by the limited scope of our nondiscrimination inquiry.”).

21 See Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 *EMORY L.J.* 251, 253 (2010) [hereinafter Fineman, *The Responsive State*]. This approach to inequality has set up a perverse dynamic that often results in pitting one protected group against another, dividing those who may otherwise be allies in a struggle for a more just society, as well as generating a politics of

In the place of the liberal subject, Fineman offers the vulnerable subject as an alternative basis for social and political organization. This subject is characterized by her experience of chronic and episodic dependency across the lifecourse as well as her connectedness to others.²² Once one accepts the universal nature of vulnerability, one must also recognize the need for a “responsive state.”²³ By responsive state, Fineman means a state that is “grounded in vulnerability, addresses the range of dependencies inherent over the life course, and is attentive to all stages of development and forms of need.”²⁴ This “attentiveness” seems to imply an activist state that pursues more universalistic social policies to address universal vulnerabilities. Thus, while her theory starts with the vulnerable subject as a descriptive matter, its normative focus is on the political, economic, and social ordering of society. This is a noted difference from starting conceptually with the individual, or even with populations within society, which are considered as secondary to establishing whether the social order as a whole is just.²⁵

The primary focus of this responsive state is not to eliminate vulnerability, as that is not possible. Instead, it is to promote resilience. Fineman links this goal to substantive equality, which she frames as ensuring equality of opportunity and access to various types of resources.²⁶ While the nature of substantive equality is not defined with specificity, this framing suggests that Fineman has in mind distributive equality, or the embrace of distributive justice principles that “claim that individuals should have equal quantities of well-being or morally relevant factors that affect their life.”²⁷

Fineman’s more recent work has called into question whether substantive equality is indeed the end goal of vulnerability theory. Instead, she substitutes

resentment and backlash on the part of those who perceive they are not within groups favored by this approach to equal protection.

22 See Fineman, *The Vulnerable Subject*, *supra* note 7, at 11.

23 See *id.* at 19–22.

24 See Fineman, *Social Justice*, *supra* note 12, at 369.

25 See *id.* at 360 (“We cannot adequately assess what is just on an individual or group basis without considering the justice of the fundamental social order. The societal problems of general organization and order must define state responsibility in the first instance.”). This of course raises the question of how one might evaluate the justness of the fundamental social order without reference to how it affects individuals or groups within society.

26 Fineman, *The Vulnerable Subject*, *supra* note 7, at 13–14.

27 See IWAO HIROSE, *EGALITARIANISM* 1 (2015). See also Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 *UCLA L. REV.* 324, 351–53 (2018) (describing the various types of equality).

the concept of “equity.”²⁸ The traditional meaning of this term connotes a distribution according to merit or need,²⁹ or a series of courts dedicated to implementing fairness in the law.³⁰ While equity as understood by vulnerability theory will presumably be developed in further work, it is not entirely clear at the moment how the concept differs from substantive equality.³¹ Thus, this Article uses the two terms interchangeably.

B. Age

Vulnerability theory must contend with age, for a variety of reasons. First, the theory has explicitly adopted a lifecourse perspective as a way of demonstrating the universality of vulnerability.³² It is present not just in traditionally identified “vulnerable populations” such as children and the elderly, but it exists across the lifespan. Second, as a practical matter, the inevitable dependency that we all experience at various points in our lives can be a result of the aging process and may at times be strongly correlated with age.³³ These understandings are reflected in the law’s extensive use of age, which is due to age’s administrative

28 See Martha Albertson Fineman, *Vulnerability and Inevitable Inequality*, 4 OSLO L. REV. 133, 143 (2017) (“In this regard, one advantage of vulnerability theory is that it can be applied in situations of inevitable or unresolvable inequality: it does not seek equality, but equity.”).

29 See, e.g., ARISTOTLE, *THE NICOMACHEAN ETHICS* 76–78 (David Ross trans., J.L. Ackrill & J.O. Urmson eds., Oxford Univ. Press 1991) (1568) (discussing proportional equality in distributive justice).

30 See, e.g., Wesley Newcomb Hohfeld, *Relations Between Equity and Law*, 11 MICH. L. REV. 537, 549–50 (describing the various functions and maxims of equity).

31 While Fineman does not put it in terms of equity, one possibility is that her primary concern is with avoiding societal injury, with injury conceptualized as the state neglecting the situation of the vulnerable subject. See Martha Albertson Fineman, *Injury in the Unresponsive State: Writing the Vulnerable Subject into Neo-Liberal Legal Culture*, in *INJURY AND INJUSTICE: THE CULTURAL POLITICS OF HARM AND REDRESS* (Anne Bloom et al. eds., 2018). It remains to be seen whether this understanding of injury is meant as a version of resilience promotion, as the goal of equity itself, or as a third complementary aim of vulnerability theory.

32 See Martha Albertson Fineman, *Equality and Difference — The Restrained State*, 66 ALA. L. REV. 609, 617–18 (2015) [hereinafter Fineman, *Equality and Difference*] (“Fundamental to this reconstruction of the political subject are both the incorporation of a life-course perspective and engagement with the institutions and relationships in which social identities are formed and enforced.”).

33 See Fineman, *The Vulnerable Subject*, *supra* note 7, at 8 (“Children and the elderly are prototypical examples of more sympathetic vulnerable populations.”).

simplicity and the fact that it can serve as a reasonably reliable proxy for a variety of target variables or social concerns.³⁴

Vulnerability is a key target variable. The law heavily marks the transition from a vulnerable childhood to a more resilient adulthood through a variety of bright-line “age of” rules, where the age selected is being used as a proxy for the maturation of certain physical or mental capacities.³⁵ While maturity represents the presumed acquisition of the capacities to be a full citizen and private actor, age is also often used as a proxy for vulnerability due to the presumed loss of said capacities at an older age. Age is certainly correlated with declines in certain types of physical and mental functioning, but the picture is more complex than popular opinion might suggest, as aging is a highly individualized process.³⁶ That being said, the proxy becomes stronger when examining the population of the old-old, or those over the age of 85, who more generally experience the types of functional declines that are stereotypically associated with age.³⁷

The law in the United States recognizes age as a proxy for vulnerability that derives not only from internal capacities but also from external forces. For example, the labor market is a common site for age-based rules to address perceived vulnerability to market forces or demands. Child labor laws are

34 See Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 CAL. L. REV. 315, 318 (1998) (“[P]roxy discrimination is merely a tool used to identify a class of persons or things with a different identifying trait, the ‘target’”).

35 See Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 62 (2016) (“Childhood and adulthood are also socially and legally constructed statuses whose meanings have varied dramatically over time and across cultures.”).

36 See Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453, 468 (1997) (noting that “most current literature rejects the decline and failure paradigm of normal aging, concluding that both cognitive and physiological changes occur in varying degrees and at individuated rates”).

37 See Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213, 277 (2010) (“Chronological age, for example, is a more accurate predictor of physical and cognitive disabilities for the oldest of the old than it is for the young-old or old.”). See also Carol D. Austin & Marin B. Loeb, *Why Age Is Relevant*, in AGE OR NEED 263, 267 (Bernice Neugarten ed., 1982) (dividing the old into multiple categories as opposed to a homogenous group); See Judith G. Gonyea, *The Oldest Old and a Long-Lived Society: Challenges for Public Policy*, in THE NEW POLITICS OF OLD AGE POLICY 183, 193–94 (Robert B. Hudson ed., 2d ed. 2010) (discussing the oldest old).

meant to prevent the exploitation of children in the workplace.³⁸ Employment discrimination laws based on age protect those over 40 from adverse employment decisions, preventing firms from discarding older employees who are seen as too expensive.³⁹ The fact that the job market is not hospitable to older workers is often the justification for the use of age in the award of alimony upon divorce.⁴⁰ Further, Social Security Disability regulations employ age through various legal guidelines for administrative adjudicators (often called “the Grids”), which make it easier to qualify for benefits the older you are, even with the same level of impairment.⁴¹ This represents the understanding that older workers fare worse in obtaining new employment as they age, and thus that functional impairments will be more of a hindrance to this population when other sources of disadvantage are taken into account.⁴²

38 See Marie A. Failinger, *“Too Cheap Work for Anybody But Us”: Toward a Theory and Practice of Good Child Labor*, 35 RUTGERS L.J. 1035, 1067–68 (2004) (contrasting individual and structural reasons for child labor).

39 See Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 TEX. L. REV. 1813, 1815 (1996) (“The hands-tying perspective on the ADEA is grounded in a striking empirical regularity in the ADEA cases: older workers are often terminated or otherwise disfavored because they command higher wages than younger workers capable of performing the same job.”). Highly-paid older workers may not strike some as particularly sympathetic, but the termination from employment can have serious consequences. These individuals may be too old to find new employment due to discrimination and too young to qualify for age-based public assistance programs, not to mention the loss in social meaning and social networks they can experience due to the deprivation of employment.

40 See *Bailey v. Bailey*, 617 So. 2d 815, 817 (Fla. Dist. Ct. App. 1993).

In my own mind, the factor of age weighs more heavily in favor of permanent alimony when the spouse requesting permanent alimony is approaching fifty. We cannot ignore the present economic reality that, as they become older, people have a more difficult time reentering the job market or improving their economic station within the job market.

See also Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 486 (1996) (noting that “only three variables — the wife’s age, her health, and marital duration — were significantly correlated with the decision to award alimony for an unlimited time period”).

41 See 20 C.F.R. § Pt. 404, Subpt. P, App. 2 (the medical-vocational guidelines, which explicitly incorporate age in evaluating eligibility for benefits).

42 Robert E. Grey, *The Use of Medical Impairment, Functional Loss, and Vocational Factors to Determine Loss of Wage Earning Capacity Under the 2012 Guidelines for Permanent Impairment*, 63 SYRACUSE L. REV. 353, 373 (2013) (“It is generally

The multilayered relationship between age, vulnerability, and the law is likely what led Fineman to apply her theory to older adults early on. In *The “Elderly” As Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*,⁴³ Fineman critiques the focus on age as an identity category, noting that it serves to single out the elderly as a vulnerable population rather than to recognize that vulnerability is a universal phenomenon.⁴⁴ Examining the Law Commission of Ontario’s report on older adults, she points out how a concern with pursuing an “anti-ageist” methodology and a failure to recognize universal vulnerability prevent the Commission from realistically engaging with the lived experiences of vulnerable older adults.⁴⁵ She then turns to the responsive state to design institutions and policies that may address certain universal vulnerabilities — such as vulnerability to financial exploitation — that might also affect older adults, even if these institutions and policies might be seen as paternalistic.⁴⁶ For example, she suggests empowering the state to render transactions in which there is “overreaching or exploitation” null and void, imposing fines on those who take advantage of people who are vulnerable to financial exploitation, or creating new torts and criminal penalties for financial fraud.⁴⁷

Others have already critiqued Fineman’s application of vulnerability theory to older adults, claiming that it lacks prescriptive value and has the potential for undue paternalism.⁴⁸ That is not the focus of this Article. Instead, I would like

accepted that age has an impact on wage earning capacity and that older workers have fewer employment opportunities than younger workers. Thus, the same injury has a greater impact on wage earning capacity for an older worker than it does for a younger worker.”) (footnote omitted).

43 See Martha Albertson Fineman, “Elderly” as *Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*, 20 *ELDER L.J.* 71 (2012) [hereinafter Fineman, “Elderly” as *Vulnerable*]. She also later followed up with an article about LGBT youth, though that piece focused less on the role of age and more on the vulnerabilities of sexual minorities. See Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 *TEMP. POL. & C.R. L. REV.* 307 (2014).

44 See Fineman, “Elderly” as *Vulnerable*, *supra* note 43, at 79–83.

45 See *id.* at 89–91.

46 See *id.* at 94–95.

47 See *id.*

48 See Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 *YALE J.L. & FEMINISM* 1, 21 (2014) (“Vulnerability theory as currently articulated would focus attention on maximizing safety and security without adequately considering the impact of potential laws and policies on individual autonomy,

to use age as an entry point to explore some unresolved theoretical issues in vulnerability theory itself, particularly the theory's relationship with equality.

II. PROBLEMS WITH EQUALITY

This Part examines two interrelated problems that vulnerability theory has in its relationship with the concept of substantive equality or equity. First, the lifecourse perspective that vulnerability theory embraces creates some troubling implications for understanding equality in the context of age-group justice. Second, the comparative nature of the equality inquiry creates problems for the purported goal of vulnerability theory — substantive equality or equity — just as it does for formal legal equality.

A. Equality, Time, and Age

In discussions of philosophy and law, equality has been a flashpoint and a central ideal.⁴⁹ It figures as an important contender for the best rule for distributive justice, or the distribution of benefits and burdens over the population.⁵⁰ It also structures the debate over what the proper “currency” of distributive justice is, or what it is that we are seeking to distribute: resources, utility, capabilities, etc. This is also known as the “equality of what?” debate.⁵¹ Legal scholars have recognized and embraced equality as a legal norm as well, and much of their debate focuses on the tension between formal legal equality and substantive equality, particularly with respect to salient categories of identity such as race or sex that feature prominently in Equal Protection jurisprudence.⁵²

or how a sense of autonomy may actually contribute to an individual's safety and security.”).

49 See STUART WHITE, *EQUALITY 1* (2007) (“The demand for equality is central to modern politics. It has inspired many of the major political struggles of the past two centuries . . .”).

50 See Robert Hockett, *Putting Distribution First*, 18 *THEORETICAL INQUIRIES L.* 157, 165 (2017).

51 See Amartya Sen, *Capability and Well-Being*, in *THE PHILOSOPHY OF ECONOMICS: AN ANTHOLOGY* 270, 283 (Daniel M. Hausman ed., 3d ed. 2008) (discussing the different currencies of well-being).

52 See, e.g., Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281, 1287 (1991) (“Inequality is treating someone differently if one is the same, the same if one is different. Unquestioned is how difference is socially created or defined, who sets the point of reference for sameness, or the comparative empirical approach itself.”).

These debates have been productive and interesting, but relatively less attention has been paid to a central egalitarian concern (time) and corresponding socio-legal category (age). The first generation of political philosophers exclusively concerned with distributive justice operated using “grossly simplifying assumptions of a largely timeless world.”⁵³ What was missing was an analysis of equality and time, with the central question being the following: What should be the temporal unit of analysis for equality?⁵⁴ In other words, in judging whether a particular situation is just, do we assess whether that situation comports with equality based on a moment in time or over a longer time period?

Larry Temkin summarizes the three primary views in this debate: complete lives egalitarianism (where the complete life is the moral unit of concern), simultaneous segments egalitarianism (where simultaneous time-slice segments are the moral unit of concern), and corresponding segments egalitarianism (where corresponding time-slice segments — youth, middle age, old age, for example — of an individual’s life are the moral unit of concern, regardless of whether they are simultaneous with other individuals’ own time-slice segments).⁵⁵ The major philosophers who have considered the issue have accepted or assumed that the complete life of an individual is the morally relevant temporal unit.⁵⁶ This is the lifetime egalitarianism or complete lives approach. According to this view, there must be equality over the complete lifetimes of separate individuals.⁵⁷ At any given moment in time, there might

53 PETER LASLETT & JAMES FISHKIN, *JUSTICE BETWEEN AGE GROUPS AND GENERATIONS* 1 (1992).

54 Some philosophers have since taken up this question. *See, e.g.*, JULIANA BIDADANURE, *JUSTICE ACROSS AGES: TREATING YOUNG AND OLD AS EQUALS* (forthcoming 2019); LARRY TEMKIN, *INEQUALITY* 232–44 (1989) (discussing temporal issues in equality theory); Dennis McKerlie, *Equality and Time*, 99 *ETHICS* 475, 491 (1989) (advocating for a time-slice view of egalitarianism).

55 *See* TEMKIN, *supra* note 54, at 233–35.

56 *See, e.g.*, THOMAS NAGEL, *EQUALITY AND PARTIALITY* 69 (1991) (“Remember that the subject of an egalitarian principle is not the distribution of particular rewards to individuals at some time, but the prospective quality of their lives as a whole, from birth to death.”); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 *PHIL. & PUB. AFF.* 283, 304–05 (1981) (describing the goal as equality of resources across the lives of each person); JOHN RAWLS, *A THEORY OF JUSTICE* 78 (1971) (claiming that individuals behind the veil of ignorance would make decisions based on the long-term life prospects that they might face).

57 *See* JOHN BROOME, *WEIGHING LIVES* 117–39 (2004) (arguing for the separability of lives).

be inequalities between individuals, but these may be allowed, justified, or perhaps even required to ensure equality over lifetimes.⁵⁸

This lifetime view has a certain intuitive appeal, as we often consider our lives as having a “narrative unity,” with meaningful relationships between different temporal segments that make up our story.⁵⁹ Further, it embodies a compensation principle, or the notion that inequalities in one segment of a person’s life can be compensated for in another part of that person’s life.⁶⁰ For example, putting in hard work at law school could be worthwhile if it enhances one’s employment and earning prospects for the rest of one’s life.⁶¹

This highlights the lifetime view’s recognition of the importance of history, which enables some consideration of personal responsibility and choice as well.⁶² Many versions of egalitarianism prefer distributive equality between people except when inequalities are due to voluntary choices made by those people.⁶³ In other words, we might see as morally different the situations of

58 See NORMAN DANIELS, *AM I MY PARENTS’ KEEPER?: AN ESSAY ON JUSTICE BETWEEN THE YOUNG AND OLD* 83–95 (1988) (defending age rationing in healthcare and employment in situations of scarcity based on his Prudential Lifespan Account, a Rawlsian interpretation of the lifetime view). See also MATTHEW D. ADLER, *WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS* 430–42 (2011) (arguing for lifetime prioritarianism).

59 See HELEN SMALL, *THE LONG LIFE* 95 (2007) (“[N]arrative unity’ tends to be understood non-literally, and simplifyingly, as a matter of there being significant connections between the different temporal parts or stages of a story and by analogy a life.”).

60 See KASPER LIPPERT-RASMUSSEN, *LUCK EGALITARIANISM* 154 (2016) (arguing that the possibility of compensation is a benefit to the lifetime view); Dennis McKerlie, *Justice Between the Young and Old*, 30 *PHIL. & PUB. AFF.* 152, 154 (2002) (discussing the compensation principle).

61 See Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 *J. LEGAL STUD.* 249, 284 (2014) (finding that “a law degree is associated with an increase of approximately 84 percent in expected mean monthly earnings . . . , a 65 percent increase in mean hourly wages . . . , and reduced risk of unemployment or underemployment”).

62 See Paul Bou-Habib, *Distributive Justice, Dignity, and the Lifetime View*, 37 *SOC. THEORY & PRAC.* 285 (2011) (“It is widely accepted among theorists of justice that a person’s claims of distributive justice at a given moment in time should sometimes reflect her earlier exercises of responsibility.”).

63 See SHLOMI SEGALL, *WHY INEQUALITY MATTERS: LUCK EGALITARIANISM, ITS MEANING AND VALUE* 23–24 (2016) (defending equality as intrinsically valuable so long as inequalities derive only from the fault of one’s own actions); Larry Temkin, *Equality, Priority, and the Levelling Down Objection*, in *THE IDEAL OF EQUALITY* 126, 129 (Matthew Clayton & Andrew Williams eds., 2000) (“[Egalitarians]

two individuals who are equally destitute but who arrived at that condition through different means. One might be destitute through no fault of her own while another might have acted foolishly by profligately spending her considerable wealth. If we assess these two individuals solely at this point in time without reference to historical context, we might miss a relevant fact about their situations. For those who care about incorporating some notion of desert or responsibility into distributions (and not all egalitarians do),⁶⁴ lifetime egalitarianism allows a consideration of these relevant historical facts.⁶⁵

The U.S. Supreme Court seemed to accept, at least implicitly, the lifetime egalitarian view in its seminal case *Massachusetts Board of Retirement v. Murgia*, where it addressed the constitutional acceptability of age-based legal distinctions.⁶⁶ This case involved a Massachusetts state law that required mandatory retirement of police officers at age fifty.⁶⁷ Robert Murgia challenged the law, and there was no dispute that his “excellent physical and mental health still rendered him capable of performing the duties of a uniformed officer.”⁶⁸ While noting that the aged face discrimination, the Court declined to apply strict scrutiny to the class of police officers over fifty, saying that “even old age does not define a ‘discrete and insular’ group [citing *United States v. Carolene Products Co.*], in need of ‘extraordinary protection from the majoritarian political process.’” Instead, it marks a stage that each of us will reach if we live out our normal span.⁶⁹ If we each experience employment opportunities before a mandatory retirement age and then each experience

care about *undeserved, nonvoluntary*, inequalities, which they regard as bad, or objectionable, because unfair.”).

64 See, e.g., Samuel Scheffler, *What is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5, 17 (2003) (“[T]he luck-egalitarian position is open to doubt on a number of grounds. Perhaps the most obvious difficulty is that the degree of weight that the luck egalitarian places on the distinction between choices and circumstances seems, on its face, to be both philosophically dubious and morally implausible.”).

65 See DENNIS MCKERLIE, JUSTICE BETWEEN THE YOUNG AND THE OLD 31 (2013) (“So it seems that, to give proper weight to facts about choice and responsibility, we must be prepared in principle to consider the past and the future when assessing a present inequality.”).

66 *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976).

67 See *id.* at 308.

68 *Id.* at 311.

69 *Id.* at 313–14 (italics added). This holding was later reconfirmed in *Vance v. Bradley*, 440 U.S. 93 (1979) (mandatory retirement for foreign service officers at age 60 permissible under the Equal Protection Clause).

that mandatory retirement, the argument goes, it does not offend equality.⁷⁰ Over a complete life, police officers, in Massachusetts at least, will each have an equal level of employment opportunity.⁷¹

Vulnerability theory would likely view the entire exercise of determining whether age should be subject to rational basis review or strict scrutiny as a distraction from the promotion of social policies that promote resilience across the lifespan. But the *Murgia* case underscores the positive relationship between lifetime egalitarianism and vulnerability theory. They both share an emphasis on a lifecourse perspective. The former embraces an holistic analysis of the lifecourse as a way to ensure that there is substantive equality across the morally relevant temporal unit: lifetimes. The latter embraces the lifecourse perspective as it reveals that vulnerability is universal and not limited to certain populations or temporal segments of life. This insight, in turn, allows a pursuit of substantive equality or equity rather than a focus on identity categories and antidiscrimination law.

But does lifetime egalitarianism capture all of our intuitions with respect to age and time? The philosopher Dennis McKerlie has criticized an exclusive focus on lifetimes and has instead made the lonely case for the time-slice egalitarian view.⁷² This view holds that the relevant temporal unit of analysis is something shorter than entire lifetimes. Thus, egalitarians should be concerned about substantive inequalities that manifest in simultaneous slices of time. The time-slice approach to egalitarianism has failed to gather many adherents, as it not only lacks the benefits of the lifetime egalitarian approach but also has the problem that it is difficult to specify the size of the slice of time that might

70 In other work, I have explained why lifetime egalitarianism fails to serve as an adequate basis for statutory age-based antidiscrimination law, pointing to the need for an alternative or complementary non-comparative value foundation for that area of law. *See generally* Boni-Saenz, *supra* note 1.

71 While police officers are treated equally over their lifetimes under this scheme, one might object that police officers are treated unequally by this age-based rule when one compares them to members of other professional groups. This objection invokes lifetime egalitarianism, but the discrimination involved is based on profession rather than age. There may be justifiable reasons for treating police officers differently than other groups with respect to retirement, once one accepts the possibility of mandatory retirement.

72 *See* McKerlie, *supra* note 54, at 491:

I have argued that the most plausible time-relative view about equality will require equality in the simultaneous segments of different lives. Our lives are lived serially through time, and the simultaneous segments view responds to this fact by valuing equality in the simultaneous parts of lives rather than by merely requiring that lives should be equal when viewed timelessly as completed wholes.

be appropriate for egalitarian analysis. There does not appear to be a natural candidate for a span of time smaller than a lifetime that might be morally relevant — 1 hour, 1 month, 1 year, 1 decade?⁷³ As a practical matter, if we go too small, we ignore many of the contextual facts that might be relevant to assessing substantive equality. For example, if the relevant time slice were one hour, and it happens that one individual had to have a root canal treatment at that hour, we might be required to compensate her for the pain and cost of that procedure and ignore that others might go through the same experience the next hour.⁷⁴ If we go too large, we might lose the benefits of using a sub-lifetime measure, which is to capture inequalities at moments in time that might present themselves within a lifetime.⁷⁵

However, McKerlie has illuminated his view through powerful examples that demonstrate the undesirable consequences of the lifetime egalitarian view. Imagine a feudal society that contains two classes of individuals: aristocratic nobles and exploited serfs. Now say that everyone in one class changes places with everyone in the other class every ten years, providing for lifetime equality as between the groups.⁷⁶ Thus, for alternating decades, individuals would be denied the resources needed for resilience. Is this substantive equality or equity? The simple version of lifetime egalitarianism has the potential to justify vast sub-lifetime inequalities that actualize the harms of universal vulnerability. Can it really be the case that we can deny various social and legal entitlements to individuals so long as we deny them to all at the appropriate time? The idea that two injustices create justice seems odd at best.

An example that is both more realistic and more on point for the discussion of age comes from McKerlie's most recent work:

[I]magine that the same city block contains a condominium complex and a retirement home. The residents of the complex are middle aged, middle class, affluent, and happy. The retirement home is old,

73 See Juliana Bidadanure, *On Dennis McKerlie's Equality and Time*, 125 ETHICS 1174, 1177 (2015):

One problem is that [simultaneous segments egalitarianism] may seem to define the segments that matter (T1, T2, and T3) arbitrarily. In theory, we may always select smaller segments in which case defining the worse-off would become arbitrary. By contrast, complete lives egalitarians seem to have identified the least arbitrary segment to apply the value of equality to: the segment of a life. Complete lives may thus be thought as the par excellence time unit of distributive equality.

74 See McKerlie, *supra* note 54, at 483 (using the dentist example but not finding it damning).

75 See *id.*

76 See *id.* at 479.

overcrowded, and badly managed. Its residents receive medical care, but their situation offers them little dignity and little opportunity for anything approaching happiness.⁷⁷

This in fact may accurately portray the existence of many older individuals in the United States. Is this inequality not objectionable because we all know that those middle-aged, middle-class residents will experience misery themselves in the retirement home someday? Lifetime egalitarianism appears to permit these substantive inequalities or inequities, provided that their existence is stable through the lifetimes of different individuals in society. Through its implicit association with this view, so does vulnerability theory.

One potential way out of this dilemma is to shift our concern with equality toward social or relational equality, as opposed to distributive equality.⁷⁸ This incarnation of the equality norm maintains that equality is achieved in society when it lacks hierarchical relationships or power structures.⁷⁹ Thus, McKerlie's examples are morally concerning not for distributive reasons, but instead because they reflect morally undesirable hierarchy or power relationships. This sidesteps the temporal question presented by distributive equality because the analytical lens has been widened to groups or society as a whole, neither of which have lifetimes. This version of equality would likely be harmonious with vulnerability theory. However, because Fineman wishes to deal at least in part with issues of distribution in society, such a shift will not completely eliminate the temporal issues raised by equality for vulnerability theory.

B. Comparative Method

The age/time problem in equality theory is not the only challenge that vulnerability theory must contend with, even if it adopts a substantive version of the equality norm in the form of equity. Equality is a comparative concept, and thus it requires a comparison between individuals or groups.⁸⁰

77 MCKERLIE, *supra* note 65, at 6–7.

78 See Juliana Bidadanure, *Making Sense of Age Group Justice: A Time for Relational Equality?*, 15 POL. PHIL. & ECON. 234 (2016) (suggesting that relational equality is what gives McKerlie's examples normative force).

79 See Samuel Scheffler, *The Practice of Equality*, in SOCIAL EQUALITY: ON WHAT IT MEANS TO BE EQUALS 21, 21–22 (Carina Fourie et al. eds., 2015) (distinguishing between distributive equality and a relational or social view of equality).

80 See Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895, 900 (2016) (“According to the comparative conception of discrimination, we determine whether X has suffered wrongful discrimination by looking at the

Courts have focused on the “Who?” element of the comparison. In deciding antidiscrimination cases, many courts and legal commentators have tried to determine whether a comparator is required for a successful antidiscrimination claim and who the appropriate comparator might be.⁸¹ The problems with such an approach for formal legal equality are well-known, but as Fineman points out, the problems persist even for a substantive measure of equality:

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 pole for comparison is developed in the abstract does not lessen either the comparative nature of the process or the problems with comparisons.⁸²

While Fineman focuses on how the comparative method may allow the liberal autonomous subject to rear its ugly head, there are additional problems with it, at least with respect to the aims of vulnerability theory. Harry Frankfurt, a leading critic of equality, saw the principle as both distracting and alienating. Writing in the context of economic equality, he saw it as having these qualities because it focuses individuals on what others have or need, rather than on what is important in life more generally or on what our own interests or needs might be.⁸³ This critique sounds in the same register as vulnerability theory, which

treatment X has received . . . and comparing it to the treatment accorded to at least one other individual.”).

81 See *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (noting that “side-by-side comparisons” of black and white jurors would be relevant to ascertaining race discrimination in jury selection pursuant to a *Batson* challenge); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (noting that employee comparators would be helpful in establishing employer motive); Suzanne B. Goldberg, *Discrimination by Comparison*, 120 *YALE L.J.* 728, 748 (2011) (“Comparators become relevant to the analysis, then, because they help expose — whether in the single- or mixed-motive analysis — that “likes” have been treated in an “unlike” fashion and give rise to the inference that discrimination is the reason for that differentiation.”).

82 See Fineman, “*Elderly*” as *Vulnerable*, *supra* note 43, at 103–04.

83 HARRY FRANKFURT, *THE IMPORTANCE OF WHAT WE CARE ABOUT* 136 (1988):

A concern for economic equality, construed as desirable in itself, tends to divert a person’s attention away from endeavoring to discover — within his experience of himself and his life — what he himself really cares about and what will actually satisfy him, although this is the most basic and the most decisive task upon which an intelligent selection of economic goals

seeks to refocus discourse on what our shared human condition might be — our vulnerability — rather than on how we measure up to other categories of individuals, defined in some way by legal rules and identity characteristics.

Vulnerability theory's adherence to substantive equality or equity also highlights underdeveloped aspects of the theory captured by the following two questions: "What is substantive equality?" and "Equality of what?" In other words, what does substantive equality or equity mean, and what is it that we are trying to equalize or make equitable? These are crucial questions to answer, as they inform how we might design the institutions that would bring about the stated goal. At times, the ambitions of vulnerability theory seem to be quite broad. The end goal is substantive equality, as opposed to formal legal equality, and that is defined in terms of equality of opportunity or access, though not equality of outcome.⁸⁴ At other times, the goals of vulnerability theory seem more modest and focused on a different currency of justice. The main concern seems to be promotion of resilience in order to address the negative aspects of vulnerability. However, it is not clear whether it is resilience that must be equalized — whatever that might entail — or rather the list of assets or resources that one might need to be resilient: physical, human, social, ecological/environmental, and existential.⁸⁵ The answer to this breadth question will also answer the question whether vulnerability theory is intended as a partial or complete theory of justice.

Thus, vulnerability theory is left with an equality problem, composed of two parts. First, a lifetime egalitarian perspective focused on substantive equality is attractive for a variety of reasons, in that it transcends the limitations of formal legal equality, recognizes the importance of the lifecourse perspective, and meshes well with the rhetoric of vulnerability theory. However, it seemingly permits sub-lifetime inequalities that would not achieve the fundamental goal of vulnerability theory in promoting resilience across the lifecourse. Meanwhile, the main time-slice egalitarian alternative within the "equality and time" philosophical debate suffers from its own flaws.

The second problem is more fundamental. The comparative nature of equality discourse requires the selection of comparators in order to assess whether an outcome is just. This has the effect of creating the divisions and backlash seen in the context of formal legal equality. However, in the absence of a suitable real-life comparator, it also risks that an abstract liberal autonomous self

depends. Exaggerating the moral importance of economic equality is harmful, in other words, because it is alienating.

84 See Fineman, *The Responsive State*, *supra* note 21, at 256–57 (arguing that vulnerability helps to analyze how to achieve "the often-glorified American commitment to equality of opportunity and access").

85 See *id.* at 270–72 (describing the five types of resources).

will be the comparison point, even in the discourse of substantive equality. Further, if the theory were to continue to endorse substantive equality or equity, then there are several theoretical issues that must be clarified, including the currency of justice with which vulnerability theory is concerned as well as the precise contours of substantive equality or equity.

The next Part offers some thoughts on a way forward by sketching out a general outline of a different distributive justice approach for vulnerability theory that is likely a better fit.

III. SUFFICIENCY

If vulnerability theory should abandon substantive equality, what should replace this concept at the center of the theory? This Article offers the following possibility: sufficiency.⁸⁶ Stated simply, the doctrine of sufficiency posits that “what is important from the point of view of morality is not that everyone have the *same* but that each should have *enough*.”⁸⁷ This doctrine better answers the temporal questions raised by equality in the context of distributive justice and also meshes better with the underlying aims and rhetoric of vulnerability theory. However, it raises additional questions that vulnerability theory will have to answer, but they may be less intractable than those presented for the theory by equality.

A. Sufficiency, Time, and Age

Like equality, sufficiency can come in a couple of different temporal forms.⁸⁸ Complete lives sufficiency would evaluate whether an individual has had

86 At points, Fineman has seemed to contemplate the possibility of a sufficiency standard. See Fineman, “*Elderly*” as *Vulnerable*, *supra* note 43, at 104 (considering a more “basic” form of equality that provides the elderly with a floor of resources below which they should not fall).

87 FRANKFURT, *supra* note 83, at 134 (first italics omitted). In terms of distributive principles, sufficiency is often seen as being composed of two theses: “*Positive thesis*: priority is given to benefits to those below the sufficiency level over those above the sufficiency level. . . . *Negative thesis*: No priority is given to benefits to those above the sufficiency level.” See Paula Casal, *Why Sufficiency is Not Enough*, 117 *ETHICS* 296, 297–98 (2007). Similarly, Vulnerability Theory would likely remain agnostic as regards those who have “enough,” which I suggest should be defined as the capability to be resilient.

88 See MCKERLIE, *supra* note 65, at 55 n.2 (describing the different temporal forms of sufficientarianism).

enough in her entire life. This version of sufficiency has similar pernicious side effects to lifetime egalitarianism. Specifically, it would seemingly permit one to experience the negative aspects of vulnerability at a later age in life because one had already met the sufficiency threshold for one's life before that point. One way in which this argument has been advanced is to justify rationing of healthcare resources by age because those who are of a certain age have already had their "fair innings."⁸⁹ This version of sufficiency is a poor fit with vulnerability theory. First, it directly contradicts vulnerability theory's emphasis on universal vulnerability. There is little point to highlighting that vulnerability exists across the lifecourse if the state has no responsibility to assist those at the older end of it. Second, it only serves to exacerbate intergenerational conflicts, with different age groups fighting over societal resources. It is vulnerability theory's explicit objective to move beyond these types of identity-based battles.

Fortunately, there is a promising alternative in continuous sufficiency.⁹⁰ This version of sufficiency would require that each individual in society be accorded "enough" at all points in time, regardless of age. This comports with vulnerability theory's focus on universalism and a lifecourse perspective. Because the focus is on maintaining a floor of legal and social entitlements rather than a comparison of those entitlements with others in society, it avoids some of the problems of time-slice egalitarianism, which depends on temporally-constrained comparative evaluations that have the potential to ignore important context of the past or future. Thus, determining what is enough is not a comparative exercise, but it is a contextual one. What is enough will certainly be at least in part socially, culturally, and historically contingent, but it does not inherently require comparison to other individuals.⁹¹

89 See Alan Williams, *Intergenerational Equity: An Exploration of the 'Fair Innings' Argument*, 6 HEALTH ECON. 117, 129 (1997) (making this argument in the allocation of healthcare).

90 See Richard Wagland, *A Fair Innings or Complete Life: Another Attempt at an Egalitarian Justification of Ageism*, in JUSTICE FOR OLDER PEOPLE 161, 170 (Harry Lesser ed., 2012) (concluding that "an effective anti-ageist argument should appeal to the idea that there are certain synchronic interests that have equal moral value irrespective of the chronological age of the individual who holds them."); Axel Gosseries, *Qu'est-ce que le suffisantisme?*, 38 PHILOSOPHIQUES 465 (2011).

91 For example, we might endorse a list of universal and fundamental entitlements for everyone, but leave their specification and implementation to individual societies. See Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 FEMINIST ECON. 33, 42 (2003):

Because sufficiency is a noncomparative principle, it avoids the reappearance of the liberal subject through comparisons at all.⁹² This highlights the fact that the vulnerability and sufficiency concepts have similar origin stories, reacting as they did to versions of equality deemed unsatisfactory or pernicious in some way. While vulnerability theory was formulated as a counterpoint to formal legal equality, so too was sufficiency initially conceived of as an alternative to equality as a moral ideal.⁹³ Sufficiency's noncomparative character reveals a further advantage it has over equality. Instead of comparing individuals or groups against each other, the ideal of sufficiency forces us to examine the basic entitlements that the state should ensure for its citizens. This complements vulnerability theory's focus on the social arrangements that are needed to address the situation of the vulnerable subject, rather than on how individuals or groups fare.

B. The Sufficiency Threshold

While the doctrine of sufficiency has several advantages for vulnerability theory, it also raises certain questions as well. A primary definitional question is the following: how might we conceptualize the sufficiency threshold in vulnerability theory?

Here is an initial answer: the sufficiency threshold has been met when the social, political, and economic structure of society has facilitated sufficient resilience for the vulnerable subject. There are three things to note about this answer.

First, it focuses on the vulnerable subject but not on vulnerability per se. It would not make sense to tie the sufficiency threshold to vulnerability, just as it does not make sense to think of avoiding childhood or the aging process. The vulnerability associated with these life stages or processes is an inevitable aspect of our embodied existence. As such, one cannot lessen them, much less

[T]he items on the list ought to be specified in a somewhat abstract and general way, precisely in order to leave room for the activities of specifying and deliberating by citizens and their legislatures and courts that all democratic nations contain. Within certain parameters it is perfectly appropriate that different nations should do this somewhat differently, taking their histories and special circumstances into account.

92 See Joel Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297, 310–11 (1974) (distinguishing between comparative and noncomparative theories of justice).

93 See FRANKFURT, *supra* note 83, at 134 (“[Egalitarians] often urge that efforts to approach the egalitarian ideal should be accorded . . . a significant priority. In my opinion, this is a mistake.”).

eradicate them completely. Instead, the sufficiency threshold must be tied to resilience, a “critical but incomplete remedy for vulnerability.”⁹⁴

Second, this definition highlights a further specification needed from vulnerability theory. When the structures for the resilience of the vulnerable subject are in place, these allow the vulnerable subject to bounce back from a shock that she might have experienced. This, in turn, implies that there is some baseline level of welfare that society must provide, i.e., the place to which to bounce back. Vulnerability theory understandably focuses on the resilience component of that baseline, but there are other aspects that should be specified to be able to evaluate when society has provided the adequate conditions for resilience.

Third, the sufficiency threshold is tied to an evaluation of the social arrangements provided by the responsive state. This is the preferred discourse in Fineman’s conception of vulnerability theory, with its focus on the structural elements of society. These social arrangements, however, must eventually be evaluated with respect to how they impact individuals in society and how well they provide for the resilience to which those individuals must have access.

With this general definition of the sufficiency threshold in place, it is worth exploring further what resilience means in vulnerability theory. This foregrounds again the linked question of which currency of justice matters for vulnerability theory, this time refracted through a sufficiency lens.

Resilience is best understood in the sufficiency context as a capability, specifically the capability to be resilient.⁹⁵ Capabilities are the ability to achieve certain functionings, or the ability to do certain things or to achieve certain states of being.⁹⁶ They have significant advantages over other notable measures of well-being, such as resources, as they take into account that different individuals have different capacity to utilize resources and translate them into desirable outcomes.⁹⁷ For example, an older adult with disabilities

94 See Fineman, *Equality and Difference*, *supra* note 32, at 622 (“Resilience is the critical but incomplete remedy for vulnerability. Although nothing can completely mitigate vulnerability, resilience is what provides an individual with the means and ability to recover from harm, setbacks, and the misfortunes that affect her or his life.”).

95 See Catriona Mackenzie, *The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability*, in *VULNERABILITY: NEW ESSAYS IN ETHICS AND FEMINIST PHILOSOPHY* 33, 48–55 (Catriona Mackenzie et al. eds., 2014) (also suggesting that vulnerability theory explore the possibilities of sufficientarianism and capabilities theory).

96 See AMARTYA SEN, *INEQUALITY REEXAMINED* 39–44 (1985).

97 See *id.* at 31–39. See also MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 111–61 (2000) (describing the problems with preference

may require more resources than a young person without disabilities in order to be able to manage an external shock, such as illness. Further, they do not dictate outcomes, as what the individual does with her opportunities is up to her.⁹⁸ What is important is that the opportunity is available to achieve the relevant functionings. Fineman has provided a list of assets or resources that contribute to one having the capability of resilience, as noted above.⁹⁹ This is a useful start in determining what policies and laws the responsive state must pursue to achieve a sufficient level of resilience for the vulnerable subject.

There is one large and final question: How do we know when a society has achieved a structure that adequately provides the resources necessary for the capability to be resilient? This question is beyond the scope of this Article, but it is worth offering one possibility and noting its benefits and drawbacks.

One particular strain of sufficientarian thought may be attractive to and compatible with vulnerability theory. Roger Crisp has suggested that we can determine the sufficiency threshold by imagining when an impartial observer would feel compassion for the situation of an individual.¹⁰⁰ On the one hand, this dovetails nicely with the positive aspect of vulnerability as something that brings us together into relationships, communities, and societies. It is likely that our affective bonds and the virtue of compassion trigger us to feel for each other and to want to create communities of care to help address the negative aspects of our vulnerability.¹⁰¹ In addition, because Fineman's conceptualization of vulnerability theory readily accepts universalism and the abstraction of the vulnerable subject, it would not necessarily have problems integrating the abstract compassionate observer.

satisfaction as a measure of well-being).

98 See MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 171–73 (2006).

99 See *supra* text accompanying note 85.

100 See Roger Crisp, *Equality, Priority, and Compassion*, 113 *ETHICS* 745, 758 (2003).

The Compassion Principle: absolute priority is to be given to benefits to those below the threshold at which compassion enters. Below the threshold, benefiting people matters more the worse off those people are, the more of those people there are, and the greater the size of the benefit in question. Above the threshold, or in cases concerning only trivial benefits below the threshold, no priority is to be given.

101 See Lawrence Blum, *Compassion*, in *EXPLAINING EMOTIONS* 507, 509 (Amélie Rorty ed., 1980) (“Compassion is not a simple feeling-state but a complex emotional attitude toward another, characteristically involving imaginative dwelling on the condition of the other person, an active regard for his good, a view of him as a fellow human being, and emotional responses of a certain degree of intensity.”).

On the other hand, there are some drawbacks to this approach, both from the perspective of vulnerability theory and from those who might critique it. Crisp's approach is centered on a hypothetical dyad, one who may or may not have reached the sufficiency threshold and one who is observing that individual and feeling or not feeling compassion for her situation. This individual-level analysis strays from the society-level discourse that Fineman envisions for vulnerability theory. However, this method of establishing the sufficiency threshold may not be applicable on a society-wide level, as we do not typically think of society as the object of compassion. At the very least, this idea would have to be developed further by vulnerability theorists.

Even if it could be further developed, the impartial observer would certainly be subject to many of the same criticisms that have been leveled at similar conceptual constructs, such as Rawls's original position and the veil of ignorance. Specifically, such abstract subjects — liberal, vulnerable, or compassionate — portray at best an incomplete vision of what it means to be a human agent, most notably if we ignore the various categories of identity that inform our conceptions of self, choices, and relationships to others.¹⁰² However tricky these challenges might be, they are still likely to be less difficult than the temporal and methodological issues posed by egalitarianism, which strike at the core of vulnerability theory.

CONCLUSION

Martha Fineman has highlighted the importance of a particular aspect of the human condition — vulnerability — and a corresponding need to promote the capability for resilience. In addition, she has identified the various resources that might contribute to resilience and thus has created a blueprint for the design of the responsive state. This Article has suggested that she adopt a sufficiency standard to help guide the vulnerability project, as a consideration of age and age group justice shows that substantive equality poses a series of serious dilemmas for vulnerability theory. Whichever path vulnerability theory takes — toward equity or sufficiency — it will have to contend with further philosophical questions. The hope is that this Article has clarified the choices somewhat and opened up a potential new path.

102 See, e.g., Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 *POL. THEORY* 81, 90–91 (1984) (critiquing the idea of a moral “unencumbered self”).

