VULNERABILITY AS A CATEGORY OF HISTORICAL ANALYSIS: INITIAL THOUGHTS IN TRIBUTE TO MARTHA ALBERTSON FINEMAN

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INTRODUCTION

Take a closer look at a physical copy of Martha Albertson Fineman's recent book series and you will notice that the cover art is a print of one of Martha's own etchings.[1] The print shows two faces, one staring intently at the viewer and the other looking to the side. The faces are not isolated; rather, they are connected by intersecting and overlapping spherical lines. Trees and leaves encircle and, perhaps, protect the faces. For me, the emotions evoked by the etchings include curiosity, warmth, forthrightness, creativity, and an awareness of relationship to other people and to the environment. Martha possesses these qualities, as a scholar and colleague. As an artistic medium, furthermore, etchings draw viewers' attention to negative spaces as well as positive lines. This is the quality of Martha's scholarship that is, for me, most inspiring and generative. Martha has a knack for rendering visible the negative spaces—the dimensions of law and social life that others are missing.

Over the last decade, Professor Fineman has turned her attention to one such negative space: vulnerability in the human condition. In 2008, she published *The Vulnerable Subject: Anchoring Equality in the Human Condition*.[2] This essay, since cited by more than 150 law-review articles and countless book chapters, presented Fineman's critique of the limits of antidiscrimination law and argued that recognition of universal human vulnerability should serve as the ethical foundation for a more responsive state.[3] In the last decade, vulnerability theory has evolved considerably, but I will start my remarks with a brief overview of this landmark essay.

Fineman's piece starts with a familiar critique: that the formal conception of equality in U.S. antidiscrimination law—same treatment for similarly situated

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[1] VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK (Martha Albertson Fineman & Jonathan W. Fineman eds., 2018).

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

[3] *Id.*

individuals—has proved wholly inadequate either to challenge structures of subordination or to remedy socioeconomic inequality.[4] She draws attention to the way in which the rhetorical prominence of antidiscrimination, as our legal culture's dominant frame for justice and injustice, reinforces the perceived legitimacy of a restrained state. Putting a twist on our understanding of the public–private divide, she argues that the contemporary state has not withered. Rather, the state refrains from using its formidable coercive authority to guarantee substantive equality.[5]

The essay then proceeds to chart wholly new territory in legal scholarship: universal and constant human vulnerability. Of crucial importance, Fineman departs from the popular conception of vulnerability as signaling the "victimhood, deprivation, dependency, or pathology" of particular groups.[6] Rather, the essay advances the radical notion that vulnerability is a universal and constant aspect of the condition.[7] Vulnerability, she explains, "should be understood as arising from our embodiment," which carries with it the capacity for "harm, injury, and misfortune . . . whether accidental, intentional, or otherwise."[8] Vulnerability also stems from individuals' differential location in social, economic, and political institutions. For this reason, while vulnerability is universal, Fineman reasons, its manifestations in specific individuals' experiences are particular and varying.

In my own view, Fineman's thoughts about the simultaneous universality and particularity of vulnerability offer fruitful terrain for further scholarship. Scholars may explore the points of overlap and departure between Fineman's theory and critical-race and feminist theories. The latter view vulnerability as institutionally produced and, generally, challenge universalist theories as insufficiently attentive to the construction and deployment of power. It seems that these two approaches to vulnerability may be compatible—a view that should not be surprising given the long and profound role Fineman has played in the development of critical theory within the legal academy. Existential vulnerability, if understood as particular in its manifestation, may support theoretical insights into the institutional production of vulnerability. Fineman and critical theorists of vulnerability similarly highlight the ways in which both

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4 *Id.* at 4.
5 *Id.* at 5–6.
6 *Id.* at 8.
7 *Id.*
8 *Id.* at 9.

state and civic society institutions construct privilege and disadvantage.[9] Indeed, Fineman herself argues that it is not identity traits, themselves, that produce inequality. Rather, "systems of power and privilege . . . interact to produce webs of advantages and disadvantages."[10]

Fineman's project, however, is ultimately constructive rather than critical.[11] In keeping with her laudable pragmatism, Fineman's theory calls for a responsive state that promotes both human and institutional resilience. Vulnerability theory argues that the state has a responsibility to promote resilience by facilitating the just distribution of physical assets such as material resources, human assets such as education and health care, and social assets such as strong, functional families and communities.[12] For the purposes of this Essay, however, I will focus on the concept of human vulnerability rather than its cognate—resilience.

Even at this early stage, the reader might wonder: why does the author, whose primary intellectual identity lies within the field of legal history, find this particular piece of legal theory so compelling? Here is the answer: Fineman's theory is of considerable interest to legal historians because it is fundamentally concerned with how we should re-theorize law given the inevitability of change over time. I take the occasion of this tribute issue honoring Martha Albertson Fineman's oeuvre to outline some ideas about the significance of vulnerability theory as a category of analysis in legal history. To begin, vulnerability theory makes historical analysis critical to law by placing historical *change* (and not just originalist inquiry) at the core of legal analysis. Vulnerability theory draws our attention to the fact that human beings are constantly susceptible to change, both positive and negative, in our bodily, social, and environmental circumstances. Vulnerability theory, therefore, reconceives the universal political–legal subject as dynamic rather than static, materially fragile, and socially interdependent. Vulnerability theory is thus well-suited to legal history because it foregrounds temporality as a means to understand social experience as well as institutional arrangements under law. The theory demonstrates that any theory of social justice must account for change over time.

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[9] *See id.* at 18 (arguing that one advantage of vulnerability theory over antidiscrimination analysis is the attention it brings to how institutions allocate assets).

[10] *Id.* at 16.

[11] This may stem from what I view as Fineman's personal commitment to political pragmatism. This a quality I have observed over the last three years in discussing subjects with Martha that have ranged from the travesties of the 2016 presidential election and its consequences to far more mundane institutional squabbles.

[12] Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, *in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 13, 22–24 (Martha Albertson Fineman & Anna Grear eds., 2013).

Even as it demonstrates the relevance of temporality for legal theory, vulnerability theory demands that historians pay greater attention to the persistence of enduring and constant human needs across time. Over the last three decades, critical-race and feminist theory has informed historical scholarship by showing how ideas about identity and difference have structured social–legal institutions. Vulnerability theory, I would argue, challenges historians to examine how history is shaped, too, by what Fineman terms inevitable, biological dependency across the life course as well as the derivative dependency of caregivers. These existential characteristics have provoked varied and shifting institutional and legal responses over time.[13] The question for legal historians is how and why law has constructed and reconstructed the institutional arrangements of dependency. Accordingly, recognition of vulnerability can offer new ways to organize historical periodization and theories of causation.

This Essay uses an illustrative example from my own scholarship to demonstrate the capacity for vulnerability theory to enrich legal history. It analyzes the legal construction and obfuscation of vulnerability in the U.S. "welfare regime": the public as well as private arrangements that order social provisioning. As a short Essay meant to provoke rather than to answer questions, the piece is necessarily cursory in its treatment of historical causation, controversies, and patterns. First, I outline the relationship between gender and vulnerability in the liberal welfare regime, premised on concepts of feminine vulnerability and masculine independence. Second, I discuss the ways in which the neoliberal welfare regime assumes invulnerability: it valorizes sex neutrality, while reinforcing private responsibility for dependency. Third, I use vulnerability theory to help illuminate a historical path not taken: the transformation of the welfare regime according to the model of the universal, interdependent caregiver rather than the universal, autonomous breadwinner. Throughout this brief exposition, I endeavor to explain how Fineman's theoretical insights inform my own methodology and analysis as a legal historian.

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[13] *See generally* JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE (3rd prtg. 2006) (describing the origins of private health insurance and employee benefits); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992) (explaining why the United States became a maternalist welfare state in the Progressive Era, providing assistance to mothers and their children, rather than a paternalist welfare state that extended social insurance to all workingmen and their families); Kristin A. Collins, *"Petitions Without Number": Widows' Petitions and the Early Nineteenth-Century Origins of Public Marriage-Based Entitlements*, 31 L. & HIST. REV. 1 (2013) (describing the historical origins of widows' pensions in response to the economic vulnerability of Civil War widows).

I. GENDERED VULNERABILITY IN THE LIBERAL WELFARE REGIME

Fineman's vulnerability theory is initially useful to the legal historian as a conceptual foil that helps expose historical ideas about vulnerability. Fineman argues that the concept of universal vulnerability may function "as a heuristic device . . . to examine hidden assumptions and biases that shaped its original social and cultural meanings."[14] My own scholarship explores how ideologies of gender, race, and class have produced ideas about differential vulnerability.[15] Holding in mind the idea of universal vulnerability aids historical inquiry into how law and policy differentially responds to human needs.

To understand the ideological construction of vulnerability in the welfare regime, we need to shift the institutional focus of conventional legal historical scholarship. Legal historians today are building a robust field of scholarship analyzing the administrative state.[16] Fineman's scholarship is amenable to this project, as it turns legal scholars' attention from courts toward legislatures and administrative agencies. Fineman is not concerned with rights that function as "trumps,"[17] so much as democratic deliberation about competing needs; nor is she concerned with freedom so much as she is with responsibility. I have found this orientation generative in examining the legal history of the welfare state.

In the first half of the twentieth century, policymakers' "gendered imagination" shaped their creation of a liberal labor and social welfare regime.[18] Reformers, legislators, and judges mapped ideas about feminine vulnerability and masculine invulnerability onto the nation's federalist constitutional system. Policymakers viewed women as uniquely and inherently vulnerable because of both their biology and their social role; maternalist labor protections responded to feminine, rather than universal, vulnerability. Policymakers, by contrast, built

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[14] Fineman, *supra* note 2, at 9.

[15] *See generally* Deborah Dinner, *Beyond "Best Practices": Employment Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059 (2017) (analyzing how neoliberal interpretations of sex discrimination law came to legitimate cutbacks in labor protections); Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79 (2016) (describing how groups of divorced fathers shaped law and policy responsive to their own vulnerability and that of their children).

[16] There are numerous outstanding examples; for recent work see generally JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL (2012); NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940 (2013); GAUTHAM RAO, NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE (2016); KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972 (2016).

[17] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1978).

[18] ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 5–6 (2001).

federal labor law on the model of the white, male industrial worker, presumed independent and only episodically vulnerable.

During the Progressive Era, social feminists and their allies wielded a gendered discourse of vulnerability as a means to circumvent *Lochnerian* constitutional jurisprudence. In this period, courts regularly used a substantive interpretation of the Due Process Clause of the Fourteenth Amendment to strike down protective labor regulation as a violation of workers' freedom of contract.[19] Progressive reformers argued that women's particular physical vulnerability, as well as their unequal bargaining position in the labor market and the public interest in protection the health of mothers, justified sex-based labor standards.[20]

They won their first major legal victory with the U.S. Supreme Court's 1908 *Muller v. Oregon* decision, upholding a maximum-hours law for women workers.[21] The Court reasoned that stark differences existed between the sexes both "in structure of body" and the socio-legal capacity for "the self-reliance which enables one to assert full rights."[22] In essence, the Court affirmed concepts of embodied sex difference and also recognized the state's interest in protecting the health and well-being of mothers.[23] The construction of gendered vulnerability provided the constitutional rationale for a maternalist regime of labor protection.

In *Muller*'s wake, state legislatures took up the mantle of maternalism and instituted a regime of sex-based protective labor laws. "By the early 1920s, all but four states had enacted" sex-based limits on women's work hours.[24] Massachusetts passed the first minimum-wage law for women in 1912, and fourteen states, the District of Columbia, and Puerto Rico followed on its heels.[25] These laws had dual effects. They mitigated the exploitation of working-class women who lacked the protection of unions and who had little bargaining power

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[19] *See, e.g.*, HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 101–46 (1993).

[20] On the maternalist legal strategy to circumvent freedom of contract ideology, see VIVIEN HART, BOUND BY OUR CONSTITUTION 63–129 (1994); NANCY WOLOCH, A CLASS BY HERSELF: PROTECTIVE LAWS FOR WOMEN WORKERS, 1890S–1990S 18–25 (2015); Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and* Adkins v. Children's Hospital*, 1905–1923*, 78 J. AM. HIST. 188 (1991).

[21] 208 U.S. 412, 423 (1908).

[22] *Id.* at 422.

[23] Of course, maternalist labor laws involved exclusions that had racialized effects. Therefore, the Court affirmed protection for some, but not all, mothers.

[24] Dorothy Sue Cobble, *Economic Justice for All: Some Jersey Roots*, N.J. STUD., Summer 2016, at 4.

[25] *Id.*

to negotiate for humane work conditions. At the same time, employers and unions deployed sex-specific labor standards to entrench gender segregation in the labor market.[26] In addition, maternalist labor laws excluded some of the most precarious women workers in domestic and agricultural jobs held, in large part, by women of color. Social feminists and progressive reformers, however, hoped that this maternalist regime would provide a foundation for a universal labor regime, protecting male and female workers alike in all sectors of the economy.[27]

The liberal labor and welfare regime, by contrast, presumed white men's independence. Their status derived at once from their autonomy from government interference, their capacity to provide for dependent wives and children, and their ability to counteract employer power through voluntary organization.[28] The ideology of masculine independence limited the scope of the welfare regime that developed in the first half of the twentieth century. Policymakers viewed state intervention in the employment relationship as aberrational rather than as normative. During the Progressive Era, advocates justified workmen's compensation as necessary to meet the needs of dependent family members in an era of increased industrial accidents.[29] Yet, during the New Deal, ideas about masculine independence led the labor movement and prominent social scientists to oppose legislative proposals that would have guaranteed unemployment insurance for all workers. Instead, they supported a legislative scheme that made unemployment insurance, in large part, the responsibility of private employers, tying eligibility to patterns of workforce attachment that excluded most minorities and women.[30] In the postwar period, only five states (Rhode Island, California, New York, New Jersey, and Hawaii) and Puerto Rico implemented state temporary disability insurance schemes.[31] Legislative recognition for regular periods of sickness was at odds with the ideal of the independent, masculine worker. Advocates for national health insurance met crushing opposition from both the American Medical Association and the

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[26] *See* KESSLER-HARRIS, *supra* note 18, at 19–63 (analyzing the gendered ideal of the right to work in the early twentieth century).

[27] WOLOCH, *supra* note 20, at 18–20.

[28] On masculinity and free-labor ideology, see generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988); LAWRENCE B. GLICKMAN, A LIVING WAGE: AMERICAN WORKERS AND THE MAKING OF CONSUMER SOCIETY (1997); AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998).

[29] JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 33–42 (2004).

[30] KESSLER-HARRIS, *supra* note 18, at 74–88.

[31] Elizabeth Duncan Koontz, *Childbirth and Childrearing Leave: Job-Related Benefits*, 17 N.Y. L.F. 480, 482–83, 483 nn.16–19 (1971).

private insurance industry.[32] The presumption of masculine invulnerability, therefore, underpinned a liberal welfare regime that conceptualized private responsibility for dependency as primary, and public social insurance as exceptional and supplemental.

Meanwhile, maternalist labor regulation did ultimately serve as the wedge that cracked open the door to federal labor regulation. The 1937 case of *West Coast Hotel v. Parrish* marked the "switch in time," signaling the Court's turn to legitimate the constitutionality of New Deal labor and social regulation.[33] In the 1923 case *Adkins v. Children's Hospital of the District of Columbia*, the Supreme Court had struck down the District of Columbia's minimum-wage law for women.[34] The majority opinion reasoned that, in contrast to limits on work hours, there existed no clear nexus between minimum wages and women workers' health. In addition, the Court concluded that progress in the civil and political status of women culminating in the passage of the Nineteenth Amendment had eliminated the justification for government interference in women's freedom of contract.[35] The Court in *West Coast Hotel*, however, reversed *Adkins*. In addition to protecting women's health, the state had an interest in mitigating the burden on communities created by the need subsidize women workers exploited in the labor market.[36] A revolution in constitutional jurisprudence enabled reformers to dust off proposals for federal maximum-hour and minimum-wage regulations, which they had stowed away in response to earlier Court decisions hostile to the New Deal. In 1938, Congress passed the Fair Labor Standards Act (FLSA), which enshrined a forty-four hour workweek (reduced to forty hours three years later) with mandatory overtime pay for additional hours; prohibited the transport in interstate commerce of goods produced by child labor; and instituted a flat minimum wage for covered workers across industries.[37]

Although formally race and sex-neutral, the FLSA was far from universal. Roosevelt struck a devil's bargain with Southern Democrats, yielding a final bill that excluded agricultural and domestic workers as well as workers in food processing, packing, and transportation, government employees, not-for-profit employees, and seamen. The FLSA extended federal protection to only 20% of

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[32] *See* KLEIN, *supra* note 13, at 211–16.

[33] *See generally* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 177 (1995).

[34] 261 U.S. 525 (1923).

[35] *Id.* at 552–53.

[36] West Coast Hotel v. Parrish, 300 U.S. 379, 398–400 (1937).

[37] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012).

workers—14% of women compared to 39% of men—and covered almost no African-American workers.[38] The minimum wage set in 1938, twenty-five cents an hour, was so low as to fall below some regional standards. In addition, the FLSA prohibited discrimination in wage rates between men and women. Yet, ongoing sex segregation in the labor market, and the exclusions embedded in the FLSA itself, meant this provision had more symbolic than practical import.[39]

The liberal welfare state's blindness to universal vulnerability both entrenched gender and racial hierarchies and undermined state responsibility to workers more broadly. Policymakers had modeled federal labor law and social insurance mechanisms on the paradigmatic white, male industrial worker. They denied protection to the majority of women and minority workers by categorical (although formally race and sex neutral) exclusion. Moreover, the social welfare mechanisms that emerged were constrained by their administration as a benefit of private employment, rather than as a right of citizenship. Meanwhile, state labor law offered protections to women workers only, premised on the model of feminine biological and social vulnerability. Law and policy did not conceptualize men as similarly subject to constant—rather than exceptional—physical instability and as caregivers who required social supports for their family and civic responsibilities. State labor law—meant to protect those who fell outside the paradigmatic liberal male subject—was gendered feminine.

II. SEX-NEUTRALITY AND THE CONSTRUCTION OF (IN)VULNERABILITY IN THE NEOLIBERAL LABOR REGIME

Fineman's theory further enriches the legal history of the U.S. welfare regime by exposing the limits of antidiscrimination law. Fineman argues that the claim to nondiscrimination poses no challenge to a minimal welfare state that fails to provide adequate education, health care, food, housing, and other fundamental social goods.[40] Fineman's work causes us to interrogate further the limits of the anti-stereotyping theory that dominates contemporary scholarship on sex equality. Anti-stereotyping theory is undeniably more capacious than formal equality, as it destabilizes the very construction of what counts as "masculine" and "feminine." Anti-stereotyping promotes women's capacity to fulfill a role as breadwinners, entering traditionally male fields in both industrial and blue-collar work. It also furthers men's capacity to fulfill their roles as

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[38] KESSLER-HARRIS, *supra* note 18, at 106; *see* IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 263–72 (2013).

[39] KESSLER-HARRIS, *supra* note 18, at 115–16.

[40] *See* Martha Albertson Fineman, *Introducing Vulnerability*, *in* VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK, *supra* note 1, at 1, 2–3.

caregivers, requiring the extension of public and private benefits for caregiving on a sex-neutral basis. Anti-stereotyping, however, cannot place a demand on either the state or employers to enhance support for caregiving. The theory leaves intact institutional arrangements that make the private family, rather than the larger society, responsible for biological and derivative dependency.[41]

This insight helped to inspire my recent article, which shows how sex-discrimination law in the late twentieth century intertwined with retrenchment in the welfare state and cutbacks in labor protections. The anti-stereotyping logic of sex discrimination law shares with neoliberalism concepts of individual freedom, market-based efficiency, and a minimal state. My article challenges the pervasive narrative in the historical literature that the demise of maternalist labor standards marked the dawn of a new era of sex equality. Instead, I show that the use of sex-equality law to erode maternalism left both working-class women and men, who labor outside the reach of federal protections, in positions of deepening precarity.[42]

While Fineman argues that the logic of antidiscrimination obscures universal vulnerability, my work shows that the coincidence of antidiscrimination and neoliberal trends was contingent rather than inevitable. In the late twentieth century, the ascendance of sex equality as a legal ideal held the potential to transform the liberal welfare regime. Law might assimilate previously excluded groups—women and racial minorities—to a labor regime premised upon masculine independence. Alternatively, sex equality might catalyze the remaking of the welfare regime in recognition of the biological and social vulnerability of men as well as women. Labor feminists pursued this latter ideal, endeavoring to couple new antidiscrimination mandates with enhanced labor protections. Business, however, mobilized to defeat their claims and to wield Title VII as a tool to deregulate the employment relationship. Judges made interpretive decisions that limited the redistributive scope of antidiscrimination statutes. In sum, law and policy jettisoned ideals of feminine vulnerability and embraced conceptions of sex-neutral invulnerability.[43]

Shifts in the economy, law, and society placed increasing expectations on women to assume the role of breadwinner. The postwar period, often considered a time of unparalleled national affluence, also saw an increase in consumption

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[41] For the definition of biological and derivative dependency, see MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 35–38 (2004).

[42] Dinner, *supra* note 15, at 1062–64.

[43] *See generally* DEBORAH DINNER, CONTESTED LABOR: GENDER AND THE LAW IN NEOLIBERAL AMERICA (forthcoming 2019); Dinner, *supra* note 15.

standards. Married women faced heightened pressure to maintain full-time employment to pay for their children's college educations—newly important to enter the middle class—as well as for the growing cost of health care. The number of married white women who worked outside the home increased from 12.5% in 1940 to 20.7% in 1950, and 29.8% in 1960.[44] Workforce participation rates for married women of color were higher and, likewise, climbing: from 27.3% in 1940, to 31.8% in 1950, to 40.5% in 1960.[45] In addition, rising divorce rates and delayed marriage also made women's income crucial to families' economic security.[46] Changing patterns of women's labor-force attachment normalized women's dual role as workers and caregivers.

In a transforming labor market, working women's interest in employment opportunity converged with employers' interest in greater managerial freedom. As working women's economic and social roles in their families evolved, their calculus regarding maternalist labor law shifted. Low-income, nonunionized female workers, in retail and service sectors of the economy not covered by federal labor law, were more likely to continue to prioritize maternalist labor protections. By the mid-1960s, however, other working women began to smart under the constraints of maternalist-protection and maximum-hours laws, in particular. They did not embrace long hours uncritically, but they wanted the higher pay that came with overtime work and with access to the jobs long reserved for male workers.[47] After the passage of Title VII of the Civil Rights Act of 1964, women's rights consciousness deepened. Working women began to file lawsuits in federal district courts that gave them access to the kinds of industrial jobs previously deemed male preserves.

At the same time, employers also deployed Title VII as a deregulatory tool. Employers opposed maternalist labor standards because they interfered in managerial freedom, held potential to increase employers' costs in female-dominated industries, and trapped employers between liabilities imposed by state and federal law. For example, in the case of *Homemakers, Inc. of Los*

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[44] CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 16–17 (1990).

[45] *Id.*

[46] Divorce rates spiked following the end of World War II, and then fell in the late 1950s and early 1960s to rates lower than those of the last century (less than 10 per 1,000 married couples). Betsey Stevenson & Justin Wolfers, *Marriage and Divorce: Changes and Their Driving Forces*, 21 J. ECON. PERSP. 27, 28–29 (2007). Divorce rates then climbed steadily, "doubling between the mid-1960s and mid-1970s." *Id.* at 28. *See also* Sheela Kennedy & Steven Ruggles, *Breaking Up Is Hard to Count: The Rise of Divorce in the United States, 1980–2010*, 51 DEMOGRAPHY 587, 589 (2014).

[47] *See* Deborah Dinner, *Equal by What Measure? The Lost Struggle for Universal State Protective Labor Standards*, *in* VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK, *supra* note 1, at 283, 285–86.

Angeles v. Division of Industrial Welfare, a division of Upjohn Pharmaceutical Company deployed Title VII to challenge a California law requiring overtime pay for female employees.[48] As the district court observed, the employer's motives were self-serving.[49] Homemakers, Inc. employed an overwhelmingly female workforce that provided housekeeping and practical nursing services to individuals and local governments. The company's challenge to the overtime law would enable it to pay its own employees less. In the 1970 case *Caterpillar Tractor Co. v. Grabiec*, Caterpillar Tractor and Illinois Bell Telephone successfully argued that a sex-specific maximum-hours law violated Title VII by depriving women of the opportunities men enjoyed to earn additional income.[50] The next year, General Electric Co. and the International Union of Electrical Workers together litigated in Kentucky to win the right to give women workers overtime assignments.[51] By defining sex equality as the elimination of gender stereotypes, these lawsuits re-categorized women workers as isolated, independent breadwinners. In this process, society lost an opportunity to transform workplace structures that make work and family conflict—structures that were historically shaped through gender ideologies but which sex neutrality disguised rather than exposed.[52]

That the end of maternalism intertwined historically with the contraction, rather than the expansion, of the welfare state proved especially consequential as the nation transitioned from an industrial to a service economy. Law and society expected women as well as men to conform to the model of the industrial breadwinner. Yet increasing numbers of low-income workers occupied feminized sectors of the economy, toiling within contingent retail and service sectors. With the erosion of maternalism, feminists and labor activists lost an ideological foothold on state labor protection. Even with the 1974 extension of the FLSA to agricultural and domestic workers, significant sectors of the labor force, today, remain outside the protection of federal labor law. These workers are disproportionately women of color; many are global migrants. From this vantage point, the erosion of maternalist labor standards marks a turning point in the deepening precarity of workers. As historian Katherine Turk shows in her

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[48] *Id.* at 299; *see also* Homemakers, Inc. of L.A., v. Div. of Indus. Welfare, 356 F. Supp. 1111, 1113 (N.D. Cal. 1973).

[49] *Homemakers*, 356 F. Supp. at 1113 (suggesting that "this Court may question the motives of [the] plaintiff and sympathize with its women employees").

[50] 317 F. Supp. 1304 (S.D. Ill. 1970).

[51] WOLOCH, *supra* note 20, at 214–15.

[52] *See* Dinner, *supra* note 15, at 1078–82.

path-breaking new book, *Equality on Trial*, the gendered divide in the workplace became a class divide in the last decades of the twentieth century.[53]

III. UNIVERSAL, CONSTANT VULNERABILITY, AND HISTORICAL CONTINGENCY

The last utility of vulnerability theory to the legal history of the U.S. welfare regime is perhaps the most important. Like her art, Fineman's theory helps to reveal the negative spaces in this history: alternative ideas, institutional forms, and laws that might have transformed legal liberalism. Attention to universal vulnerability as a heuristic device illuminates historical moments of dissent and contingency. Here, I sketch such moments in which labor feminist activists mobilized a discourse of universal vulnerability.

As sex-discrimination law eroded maternalist labor legislation in the late 1960s and early 1970s, labor feminists fought to extend these laws from women to men. Many working-class women and their advocates viewed the advent of sex equality norms as a mechanism to expand the scope of state labor standards. They sought to fuse a Civil Rights era commitment to antidiscrimination with an earlier social-welfare tradition that dated to the Progressive and New Deal eras. Universal state protective laws were especially important in light of the limitations of federal labor law. These laws might extend protections to workers in the retail, service, and other contingent sectors of the economy who were excluded from coverage under the FLSA. In addition, labor advocates sought maximum-hour limitations, which would offer employees categorical protection from mandatory overtime work, even as the FLSA's premium pay requirement weakened as a disincentive to longer hours.[54]

Labor feminists endeavored to substitute a political understanding of universal vulnerability in place of maternalist justifications for state protection. In advocating maximum-hours laws for all workers, male and female, they argued that it was immoral to require some workers to work overtime while other workers—disproportionately women and minorities—were unemployed. They also sought to replace the gendered argument that mothers needed limits on work hours, with the sex-neutral argument that all workers needed "leisure time to be

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[53] *See generally* KATHERINE TURK, EQUALITY ON TRIAL: GENDER AND RIGHTS IN THE MODERN AMERICAN WORKPLACE (2016).

[54] As work benefits accounted for a greater proportion of employment costs and salaries a lesser proportion, the premium pay requirement of the FLSA weakened as an incentive for employers to hire additional workers rather than increase hours.

with their families, for living and relaxing."[55] Universal overtime laws would foster workers' capacity "to perform their duties as citizens."[56] Last, labor advocates adapted an ideal of worker self-ownership, with roots in antebellum free-labor ideology, to argue for the importance of state mitigation of employers' power over workers' time. These arguments failed because of employer opposition and because of the difficulty of generating political support for the ideal of universal vulnerability. Rather than reconstructing male workers as vulnerable, state labor law instead constructed female workers as independent and autonomous. Over the course of the 1970s, at least five states—California, Michigan, Pennsylvania, Oregon, and Rhode Island—considered voluntary overtime legislation, yet no state passed it.[57]

CONCLUSION: TEACHING THE LEGAL HISTORY OF THE WELFARE STATE

While Fineman's vulnerability theory powerfully informs my research, it is in teaching that I gained the greatest appreciation for its potential as a conceptual frame for the legal history of the welfare state. This past year, I taught a seminar titled "Family, State, and Vulnerability." We began by reading one of Fineman's essays on vulnerability theory,[58] coupled with T.H. Marshall's classic essay *Citizenship and Social Class*,[59] as well as excerpts from an article by Janet Halley interrogating the distinctions between family law and social welfare policy in the law-school curriculum.[60] The purpose of these three foundational pieces was to establish a shared understanding of the ideas of vulnerability, social citizenship, and the socially constructed boundaries of legal jurisdiction. We then proceeded on a tour of U.S. welfare state history, beginning with debates about American exceptionalism and the hybrid character of the public–private welfare regime. We discussed widows' pensions in the postbellum period, maternalism in the Progressive Era, the role of race and gender in shaping New Deal welfare policy, the expansion and limitations of social citizenship in the postwar era, holes in the safety net created by the Great Society, and the civil rights and feminist revolutions, among other topics.

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[55] Dinner, *supra* note 15, at 1078 (quoting Dorothy Haener, Int'l Representative, Int'l Union, UAW, Statement at Public Hearing to the Mich. Occupational Standards Comm'n 7 (Aug. 19, 1968) (on file with Walter P. Reuther Library, Wayne State University, Detroit UAW Women's Department Papers)).

[56] *Id.*

[57] *See* Dinner, *supra* note 47, at 304.

[58] Fineman, *supra* note 12, at 13–27.

[59] T.H. MARSHALL, *Citizenship and Social Class*, *in* CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT 65 (1964).

[60] Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 1–6 (2011).

Throughout the course, we returned repeatedly to the question of how policy responded or failed to respond to universal vulnerability.

The ways in which my students engaged and interrogated Fineman's theory consistently impressed and instructed me. The class, as an entirety, grew engrossed by the double-bind of the U.S. welfare state—at each moment that the state expanded the scope of its protections and the bounds of social and economic citizenship, it also reinforced race and gender hierarchies. Students drew different conclusions from this dynamic, and some held fast to the goal of state recognition of universal human vulnerability. Others drew from the history lessons in skepticism and remained continually wary of the state's purposes and the capacity for advocates to instantiate more egalitarian concepts of protection. On the last day, the debate continued, and we remained energized. That is what I take as Martha Albertson Fineman's greatest inspiration as a teacher and theorist: her unending enthusiasm for learning, commitment to teaching, and dedication to questioning what we easily understand as true. Her scholarship can help to make the negative spaces in our own understanding come alive with new questions.