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SECURITIES REGULATION

Why the SEC Pay Ratio Disclosure Rule Doesn't Work

by George S. Georgiev



When Equality is Less than Just
Martha Albertson Fineman

The Ecology of Childhood
Barbara Bennett Woodhouse



Mary Anne Bobinski began her term as Emory Law's dean on August 1, the first woman to serve in that role since the school's founding in 1916. Bobinski was formerly a professor at the Allard School of Law, where she served as dean from 2003 to 2015. Her research and teaching interests include torts, health law, health care finance, bioethics, legal aspects of HIV infection, and reproductive health law issues. We invite you to visit her profile page on our website.

bit.ly/MABobinski



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About Emory Law Insights

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Legal Scholarship and Policy in a Politically Driven World

Many ideas now viewed as just, normal, and necessary were considered radical at their start — child labor laws, a 40-hour workweek, and the concept that no man should own another. But change only begins when someone analyzes a problem and writes down a solution. That’s an important function of legal scholarship — to call out law or policy that is immoral, inequitable, inefficient, unclear, or poorly formed.

Our cover article by Associate Professor **George S. Georgiev** does just that in addressing the pay ratio rule of the Dodd–Frank Wall Street Reform and Consumer Protection Act. The rule requires public companies to disclose the pay ratio between the salary of a company’s median employee and that of its CEO. That reporting, begun in 2018, has generated more than just outraged headlines — cities, states and a few countries have passed or considered laws to address what appears to be a terrible gap in compensation. However, the information the rule supplies is nearly useless because of the many ways reporting may be manipulated, Georgiev and his co-author Steven A. Bank write. They urge the SEC to abandon the rule’s numbers-only reporting approach, saying, “[A] narrative disclosure approach would be in line with the format of existing disclosure requirements relating to executive compensation.”

L. Q. C. Lamar Professor of Law **Barbara Bennett Woodhouse** devoted a decade to her upcoming book that compares childhood in two fairly tiny villages — one in the US and the other in Italy. Both were affected by the Great Recession, which took a global toll on government spending for education and social welfare. But a host of other factors, beyond funding, were also at play in influencing each community’s sense of well-being. How each town emerged from that storm is part of Woodhouse’s theory of ecogenerism.

We like to assume equal treatment under the law solves race and gender problems. But here, Robert W. Woodruff Professor of Law **Martha Albertson Fineman** writes about the limits of equality as solution to these issues. Decades of research led to her theory on vulnerability, which she sees as a universal human condition. Equality is indeed a solution in instances such as one person, one vote, or equal pay for equal work, she says. However, she suggests we “bring human vulnerability to the fore in assessing individual and state responsibility and redefining the parameters of social justice.”

“Cutting edge legal scholarship can bring theoretical lessons to bear on problems and issues, in order to generate insights and solutions that often elude practitioners and policymakers,” says **Jonathan R. Nash**, the law school’s recently announced (and inaugural) associate dean for research. He adds: “I’m honored to have the chance to promote and expand our faculty’s already impressive scholarly footprint. Dean Bobinski’s decision to create this position confirms the law school’s strong and continued commitment to faculty scholarship as a driving force behind the school’s excellence, and its influence in the legal academy and beyond.”

The Flaws and Misuse of the SEC's Pay Ratio Disclosure Rule



George S. Georgiev

Associate Professor of Law

BA, Colgate University, 2002
MA, University of Munich, 2008
JD, Yale Law School, 2007

Scholarly interests: business law, corporate governance, securities regulation, mergers & acquisitions, corporate finance, executive compensation

Full profile: bit.ly/GSGeorgiev

Professor Georgiev teaches and writes about business law. His current research examines the intersection of corporate governance and securities regulation, including questions about the design and performance of the SEC disclosure regime. His courses include Business Associations, Contracts, and Corporate Governance. Georgiev joined Emory Law in 2016 after serving as a visiting assistant professor at UCLA School of Law. Prior to that, he was a corporate lawyer with Sullivan & Cromwell LLP and Clifford Chance LLP. While in practice, he advised on large cross-border M&A deals and financing transactions for corporations and sovereigns, including landmark transactions such as the recapitalizations of several large banks during and after the 2008 global financial crisis. Georgiev is a member of the New York bar. His research has been published in journals including *Boston College Law Review*, *UCLA Law Review*, *Utah Law Review*, and *Minnesota Law Review*, and he has been quoted by the *New York Times*, *Los Angeles Times*, *Financial Times*, BBC, and *Bloomberg*. The excerpted article that follows was discussed at a recent congressional hearing, and has been featured in the *Los Angeles Times*, *Bloomberg*, *CFO Magazine*, *Agenda (Financial Times)*, NPR's *AirTalk*, the *Columbia Law School Blue Sky Blog*, and the *Oxford Business Law Blog*.

SELECTED PUBLICATIONS

Securities Disclosure As Soundbite: The Case of CEO Pay Ratios, 60 *Boston College Law Review* 1123 (2019) (with Steven A. Bank)

Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation, 64 *UCLA Law Review* 604 (2017)

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Securities Disclosure as Soundbite: The Case of CEO Pay Ratios

by George S. Georgiev (excerpt)

Since 2018, US public companies have had to calculate and report a new, unconventional statistic—a CEO pay ratio—which links CEO pay to the pay of rank-and-file workers. Based on a last-minute addition to the Dodd-Frank Act of 2010, the disclosure requirement generated significant controversy during the lengthy SEC rulemaking process. Companies and their executive compensation consultants spent years and considerable resources preparing to comply with the rule. Once the pay ratio figures started arriving in 2018, they captured public imagination in ways that the typically long and technical corporate disclosure documents never do. The sizeable pay gaps highlighted by the data have led to extensive media coverage, fueling public outrage and reinforcing concerns over pay inequity and economic inequality. Progressive politicians have cited the pay ratio data when proposing new business regulation bills. The city of Portland, Oregon, has imposed a penalty business tax on firms whose pay ratio exceeds 100:1. Similar measures have been proposed in states from California to Illinois to Massachusetts, and at the federal level.

In a recent article, co-authored with Professor Steven Bank of UCLA School of Law, we analyze the history, design, and effectiveness of the pay ratio disclosure rule. We suggest that the rule reflects a unique approach to securities disclosure, which we term disclosure-as-soundbite. This approach is characterized by high public salience—the pay ratio is superficially intuitive and resonates with the public to an extent much greater than other disclosure does; and by low informational integrity—the pay ratio is a relative outlier in terms of certain baseline characteristics of disclosure, meaning that the information is lacking in accuracy, difficult to interpret, and incomplete. We find that in its current formulation the rule is ineffectual and potentially counterproductive when viewed as a means of generating useful and reliable information for investors, or influencing firm behavior on matters of worker and executive compensation. The pay ratio is more successful in fomenting or contributing to public discourse on broader societal matters relating to pay inequity and economic inequality, though the quality of the underlying information likely limits the quality of the discourse.

High public salience is a deliberate design feature of the rule. By linking the earnings of workers to those of corporate executives, the pay ratio takes on a personal dimension absent in other disclosure. Expressed as a single, seemingly straightforward number, it can appear to carry a great deal more information than it actually does. This allows for powerful rhetorical

points, as highlighted by the following news story headlines from 2018: “Want to Make Money Like a CEO? Work for 275 Years;” “CEOs Paid 1,000 Times More Than Average Workers;” “At Walmart, the CEO Makes 1,188 Times as Much as the Median Worker;” and “Fortune 500 CEOs Are Paid from Double to 5,000 Times More Than Their Employees.” This explains the pay ratio’s success in attracting the attention of a broad set of audiences, including the news media, national politicians, state and local governments, labor unions, think tanks, and firms’ employees and customers (in addition to corporate decision-makers and advisers).

The flipside of the pay ratio’s high public salience is its low informational integrity relative to the rest of the securities disclosure regime. Though not perfect, disclosure rules generally share certain baseline characteristics—accuracy, comprehensibility, and completeness. The pay ratio is an outlier on each of these counts. The accuracy of the information is questionable because of the broad ways in which the SEC defined the underlying inputs—median worker pay and CEO pay—along with the methodological flexibility it granted firms in making the relevant calculations. Each firm’s pay ratio also presents a challenge of interpretation, and hence comprehensibility, because of the absence of objective pay ratio benchmarks and the lack of comparability among different firms’ ratios. Finally, the SEC rule requires firms to disclose only numbers, without explanation or context, which renders the information incomplete in what we believe are important ways.

The pay ratio’s low informational integrity is illustrated by the ease with which individual firms’ characteristics can skew the reported figures. A firm with a founder-CEO who draws a modest annual salary while holding a large block of stock would report a low pay ratio, hiding the fact that the founder-CEO may have profited greatly from the annual appreciation of his stock holdings. Firms organized as limited partnerships, a common model in the private equity industry, compensate their CEOs primarily through partnership distributions. Because those are not included in the calculation of annual total compensation, such firms may also report pay ratios that are artificially low. Finally, if two firms in the same industry differ only in the way their labor force is organized, with one of them outsourcing its low-paid jobs, the firms would report widely different pay ratios, which would obscure internal pay equity rather than illuminate it.

The nature of the pay ratio also makes any aggregate information extremely malleable. Different news stories from 2018 featured different aggregate

CEO-to-worker pay ratios, ranging from 361:1 at the high end to 144:1 at the low end, with several other reported ratios occupying spaces in between. These differences reflected different sample sizes, the timing of aggregation, and the aggregation methodology (average vs. median). On a superficial level, however, each of the ratios purported to reflect the economy-wide CEO-to-worker pay ratio. Even when the precise method of aggregation was flagged in the reports, it likely did not register with the public. Instead, the various aggregate figures became little more than soundbites.

The article also analyzes the rule's lengthy and, at times, fraught path to adoption. During a multistage rulemaking process, the SEC received over 2,000 unique comment letters and over 320,000 form letters about the rule from a wide range of stakeholders, including many members of Congress. Without any legislative history to go by and under constant pressure from ardent opponents and proponents of pay ratio disclosure, the SEC had to work to fit the highly specific congressional mandate within the existing tapestry of federal securities regulation. To do so, the SEC justified the rule with reference to informing investors' say-on-pay voting decisions, and sought to minimize the costs of compliance by affording firms broad flexibility in calculating the pay ratio.

A close examination of the political dialogue and rulemaking process reveals that stakeholders have ascribed several different functions to the rule, in addition to or in lieu of, the informational function, which the SEC endorsed. One of these is a behavioral function—the pay ratio as a means of influencing corporate decision-making in substantive ways. For example, the disclosure requirement could in theory induce firms to improve their pay ratio by reducing CEO pay or increasing median worker pay or, more generally, encourage them to devote more attention to employee compensation matters. Another is a public discourse function—the pay ratio as a means of fostering or contributing to a public conversation about economy-wide pay inequities and economic inequality more broadly. The informational, behavioral, and public discourse functions are not exclusive of one another, and this overall ambiguity about the rule's functions is an important part of understanding the rule itself.

Our analysis of the rule's effectiveness takes these different functions into account. We find that the pay ratio rule is ineffectual and potentially counterproductive in fulfilling an informational or a behavioral function due to its low informational integrity—the inherent lack of accuracy, difficulty in interpretation, and incompleteness of the information. The pay ratio's high public salience does nothing to help in this regard. On the other hand, high public salience renders the pay ratio rule more successful

in fulfilling a public discourse function: The nature of the subject matter and the superficial simplicity of the information can be very effective in attracting public attention to questions of pay inequity and economic inequality. The quality of the discourse, however, is limited by the rule's low informational integrity.

Our policy proposal focuses on improving the pay ratio's informational integrity and moving beyond the disclosure-as-soundbite approach. As currently formulated, the rule does not require firms to provide context or explanation for the disclosed pay ratio numbers. In other words, in an effort to ensure maximum flexibility and minimize compliance costs, the SEC adopted a numbers-only approach to pay ratio disclosure. We suggest that the SEC should revisit this decision and mandate a narrative disclosure approach that provides information about median worker pay and the resulting pay ratio with more context, nuance, and explanation. Doing so would make firms' disclosures easier to interpret and more complete, which could improve the pay ratio's ability to fulfill an informational or a behavioral function. It could also improve the quality and increase the quantum of compensation-related information that can be used as part of public discourse. This narrative disclosure approach would be in line with the format of existing disclosure requirements relating to executive compensation.

Looking ahead, pay ratios may be here to stay despite their problematic nature. The Portland, Oregon, ordinance imposing special business taxes on firms that exceed a 100:1 pay ratio is raising revenue as of 2019, and several other states are considering similar legislation. Pay ratios have also gained traction internationally: US-style disclosure rules have been adopted in the United Kingdom (with effect from 2020) and India (with effect from 2013) and have been mooted in Australia and at the EU level. Israel has adopted a law limiting the deductibility of CEO pay for firms in the financial sector to 44 times the pay of their lowest-paid worker. A failed 2013 referendum in Switzerland sought to cap companies' pay ratios at 12:1. And in the United Kingdom, politicians have proposed using pay ratios to set caps on pay for government workers and contractors. Such developments make understanding the impact and the pitfalls of pay ratios all the more important.

More broadly, there is also a strong push to require firms to provide additional disclosure of their human capital management practices and for boards' compensation committees to oversee employee compensation alongside executive compensation. These issues are subject to ongoing research.

—from *Securities Disclosure As Soundbite: The Case of CEO Pay Ratios*, 60 *Boston College Law Review* 1123 (2019) (with Steven A. Bank)

The Environment We Create for Children Shapes Society



Barbara Bennett Woodhouse

L. Q. C. Lamar Professor of Law

Diploma Superiore, Università per Stranieri, 1965
BA, University of the State of New York, 1980
JD, Columbia University Law School, 1983

Scholarly interests: children's constitutional law and human rights, comparative and international family law, constitutional law, child welfare, family law, adoption

Full profile: bit.ly/BBWoodhouse

Professor Woodhouse is among the nation's foremost experts on children's rights. She joined Emory Law in 2009 as the L. Q. C. Lamar Chair in Law. Prior to that, she founded the University of Florida Levin College of Law Center on Children and Families. She was also a litigator at New York's Debevoise and Plimpton. As an academic, she has participated in many appellate cases involving adoption, custody, and juvenile justice. She is a member of the bars of New York and the US Supreme Court, and clerked for both the Hon. Abraham D. Sofaer and US Supreme Court Associate Justice Sandra Day O'Connor. Woodhouse has published more than 75 articles and book chapters. Her book, *The Ecology of Childhood: How Our Changing World Threatens Children's Rights*, is forthcoming in 2020. She received the American Political Science Association's award for best book on human rights, and was named a Human Rights Hero by the ABA's *Journal on Human Rights*. She was a Fernand Braudel Senior Fellow at the European University Institute and served on the Executive Council of the International Society for Family Law for eighteen years.

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Hidden in Plain Sight: The Tragedy of Children's Rights From Ben Franklin To Lionel Tate (Princeton University Press 2008)

The Ecology of Childhood: How Our Changing World Threatens Children's Rights

by Barbara Bennett Woodhouse (excerpt)

This book project occupied an entire decade, from 2008 to 2018. It unfolded on two continents and utilized a wide range of methods, from legal research and comparative law to site visits and ethnographic fieldwork in two villages (Scanno, Italy, and Cedar Key, Florida) and it introduces narratives and case studies from my own work as examples. . . . It began as a relatively simple comparative study of childhood in two developed countries, using the ecological model of childhood as its framework. An unanticipated event—the Great Recession—reshaped the project almost as soon as it was started. The devastating effects on children and families of global economic crisis left no doubt that global forces, instead of being distant and abstract from the ecology of childhood, could threaten the welfare of children even in economically advanced countries. In response, I expanded the project to consider these potentially toxic forces, gathered under the umbrella of globalization. These global phenomena include unrestrained capitalism, technological change, rising inequality, mass migration, racial conflict, and, most global of all, the human-made juggernaut of climate change. These forces are already at work, destabilizing and degrading the social and physical environments necessary to the survival and well-being of the young. Not only this generation of children but succeeding generations are at risk. . . .

The true measure of a just and sustainable society is whether it meets the basic needs of its children and whether its policies foster environments in which children, young people, and families can flourish.

If human society is to survive, we must place the well-being of future generations at the top and not the bottom of our social agenda. A society's welfare is not captured by measures such as a rising GDP or a higher competitiveness index. As I have argued in my prior writings, which introduced the theory of "ecogenerism," the true measure of a just and sustainable society is whether it meets the basic needs of its children and whether its policies foster environments in which children, young people, and families can flourish. Without these preconditions for sustainable communities, a society's human capital dwindles and, eventually, disappears. A far better benchmark than GDP is found in evidence-based research into child well-being and a far better value system than short-term efficiency is found in the UN Convention on the

Rights of the Child, which identifies children's most important needs and assigns responsibility for their nurture and protection not only to parents but to the larger community. The book ends by proposing ways in which each reader, wherever and however situated, can contribute to the goal of building a better world for children on the theory that a world fit for children will be a world fit for everyone.

The analysis in this book is grounded in the ecological model utilized by many disciplines in studying childhood. Pioneered by social scientists studying children's development, this model is designed to place children's lives in social context. It imagines children at the center of a constellation of social institutions and social structures ("microsystems" and "exosystems") that include and surround them. Permeating every part of this universe is the "macrosystem," the ever-present climate of ideas, values, prejudices, and powers that create hierarchies that are often damaging to children. In addition to providing insights into fostering the development of children, both as individuals and in groups, the ecological model can provide insights into larger environments for rearing children as well. The ecological model recognizes that childhood is dynamic, not static, and thus events unfolding in any of the systems affecting childhood will have spillover effects into the others. It also recognizes that macrosystemic values, like H₂O in a natural ecological system, are not static but flow up from the microsystems as well as down from on high. Unlike laws of gravity or physics, macrosystemic laws, both written and unwritten, are generated by human societies. In sum, the cultural macrosystem is created by us and can be reformed and reshaped by us. . . .

By 2011, three years into my project, at the top of my agenda was the task of locating an Italian community to serve as my Italian petri dish. It had to be small enough to study in fine-grained detail and yet sufficiently prototypical to serve as a bridge between the theoretical model and the real lives of children and families. I happened upon the Italian mountain village of Scanno by accident, while on my way to southern Italy in May 2011 . . . The evening when we first saw Scanno, we had been travelling on the Italian A-24, a modern highway that bisects the Italian peninsula from Rome on the Mediterranean coast to Pescara on the Adriatic coast. Called the Highway of the Parks (*Autostrada dei Parchi*), this marvel of engineering tunnels through the Abruzzi mountains, part of the Apennine chain that runs from the crown of the Alps to the toe of the Italian boot-shaped peninsula. We were on our way to Lecce, in the province of Puglia, located at the heel. As evening

approached, we needed a convenient spot to spend the night. Looking at our map, Scanno seemed ideal—just twenty kilometers off our route. What our map did not reveal was the hair-raising adventure ahead. Between the superhighway exit and Scanno lay thirteen miles of narrow road—often wide enough for only one car—snaking up the spectacular Sagittarius Gorge, climbing steeply around hairpin curves, clinging to the edges of steep precipices, and tunneling through galleries hewn by hand in rocky cliffs. It took forty-five minutes of heart-in-mouth driving for us to reach our destination.

Finally, the village of Scanno came into sight, tucked in a narrow valley and encircled by 7,000-foot mountains. . . . As we expected in this part of Italy, the town center was a warren of cobblestone streets, connected by pedestrian steps, winding among ancient stone buildings and punctuated by church towers. What we did not expect to see was dozens and dozens of children. . . . The birth rate in Italy had recently hit an all-time low, well below the replacement level. While large families remain common in southern Italy, family size in central and northern Italy

I had grown used to the lament that children were disappearing from the Italian piazza. But the central piazza of Scanno was alive with children: in parents' arms and on grandparents' knees, in strollers and on tricycles.

has fallen sharply. There is enormous irony in the fact that babies are becoming a scarce commodity in a culture that worships babies. I had grown used to the lament that children were disappearing from the Italian piazza (public square). But the central piazza of Scanno was alive with children: in parents' arms and on grandparents' knees, in strollers and on tricycles. We saw toddlers practicing their first steps, as well as kids riding bikes and scooters, kicking balls, and playing with dolls, while adults chatted nearby and old folks rested on benches. As if to drive home the centrality of children in this community, one whole side of the piazza was devoted to the Good Shepherd Children's Nursery (*Asilo dell'Infanzia Buon Pastore*), the community's day nursery and kindergarten. As we explored the narrow streets, we saw many doors with rosettes of ribbons announcing, in blue or pink, the arrival of a new infant.

Why was Scanno so full of children? I began my field research that evening by asking this question of people we met in the piazza. Their responses showed a common theme: Scanno was a good place to raise

children. This was a friendly environment (*ambiente*) for children and families. We could see this for ourselves. With streets and piazzas largely free from traffic, children could play together in the same spaces where grandparents and teenagers also congregated. Economic and age segregation seemed to be at a minimum. Young families were not isolated from each other behind walls and fences; they were an integral part of the community, and they experienced the support of neighbors and extended family. . . .

The next morning, to learn more about Scanno, I stopped by the town hall (*Palazzo Comunale*) and was encouraged by what I learned. The mayor was out of town, but the ladies who worked there suggested I contact Don Carmelo, the parish priest. "He knows everything there is to know about family life in Scanno," they told me. They assured me that I would find him in church and sent me back to the main piazza to knock at the sacristy door of *Santa Maria della Valle* (St. Mary of the Valley). Monsignor Carmelo Rotolo, who was just finishing Mass, was a short, stocky, white-haired man in his eighties with a welcoming smile. Although he had been promoted to Monsignor, he still preferred the simple parish priest's title of Don (Father). He was born in Scanno and had been its parish priest for over thirty years. When I told him about my idea of studying childhood in Scanno, he encouraged me to come back the following spring and promised ("God willing") that he would be there to help me get started.

I went back in the spring of 2012. Don Carmelo was as good as his word. He entrusted me to a lady named Anna who took me across the square to the Good Shepherd Nursery that I had noticed on my earlier visit. I had assumed it was a religious institution. In the United States, where we have a tradition of separation of church and state, the lines between secular and sectarian are fairly clear. A hybrid institution like the Good Shepherd Nursery would be an anomaly in the United States. Good Shepherd is a community nursery and children's center, supported by private donors as well as by the Catholic Church and state funding. It has a citizen board but is staffed by an order of teaching nuns. Its big, airy, three-story home was built with labor and money donated to the children of Scanno by a group of citizens in the 1930s. The Good Shepherd Nursery has touched the life of virtually every Scanno child for eighty years. As I later learned, my visit to the nursery reverberated in kitchens all over town as children reported to their parents and grandparents that a *Professoressa Americana* (American lady professor) had come to their school. They had sung her a song in English and she had talked to them in Italian.

—from *The Ecology of Childhood: How Our Changing World Threatens Children's Rights* (New York University Press, forthcoming 2020)

Equality Is Not Always Just



Martha Albertson Fineman

Robert W. Woodruff Professor of Law

BA, Temple University, 1971

JD, University of Chicago, 1975

Scholarly interests: equality theory, family law, feminist legal theory, sexuality and the law, vulnerability theory, critical theory, legal regulation of intimacy

Full profile: bit.ly/MAFineman

Professor Fineman is an internationally recognized authority on family law and feminist jurisprudence. Prior to joining Emory Law in 2004 she taught at the University of Wisconsin, Columbia University, and Cornell Law School, where she held the Dorothea Clarke Professorship — the nation’s first endowed chair in feminist jurisprudence. In 1984, she founded the Feminism and Legal Theory (FLT) Project, and in 2008, the Vulnerability and the Human Condition Initiative (VHC) emerged from that research. As director, Fineman organizes international academic workshops where scholars engage in the concepts of vulnerability, resilience, and a responsive state to construct a universal approach to address the human condition. Fineman’s research examines the legal regulation of family and intimacy, and the implications of universal dependency and vulnerability. Her books include *The Autonomy Myth: A Theory of Dependency*; *The Neutered Mother, and The Sexual Family and other Twentieth Century Tragedies*; and *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*. Her dozens of journal articles include “The Vulnerable Subject: Anchoring Equality in the Human Condition,” the basis for her 2013 book, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*. Fineman is a Life Fellow of the American Bar Foundation and has received the Harry J. Kalven Jr. Prize, the Ruth Bader Ginsburg Lifetime Achievement Award, and the Miriam M. Netter ’72 Stoneman Award.

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Vulnerability and Inevitable Inequality

by Martha Albertson Fineman (excerpt)

The abstract legal subject of liberal Western democracies fails to reflect the fundamental reality of the human condition, which is vulnerability. While it is universal and constant, vulnerability is manifested differently in individuals, often resulting in significant differences in position and circumstance. In spite of such differences, political theory positions equality as the foundation for law and policy, and privileges autonomy, independence, and self-sufficiency.

This article traces the origins and development of a critical legal theory that brings human vulnerability to the fore in assessing individual and state responsibility and redefining the parameters of social justice. The theory arose in the context of struggling with the limitations of equality in situations I will refer to as examples of “inescapable” inequality. Some paired social relationships, such as parent/child or employer/employee are inherently, even desirably, unequal relationships. In recognition of that fact, the law creates different levels of responsibility, accepting disparate levels of authority, privilege, and power. Those laws, and the norms and rules they reflect, must carefully define the limits of those relationships, while also being attentive to how the social institutions in which they exist and operate (i.e. the family and the marketplace) are structured and functioning.

1. Introduction

My work over the past several decades has grappled with the limitations of equality. This struggle has resulted in the development of a legal paradigm that brings vulnerability and dependency, as well as social institutions and relationships, together into an analysis of state responsibility. This analysis goes well beyond concern with formal equality and impermissible discrimination.

What follows is an account of the development of a theory based on human vulnerability in which the state is theorized as the legitimate governing entity and is tasked with a responsibility to establish and monitor social institutions and relationships that facilitate the acquisition of individual and social resilience. The theory is based on a descriptive account of the human condition as one of universal and continuous vulnerability. The Anglo-American liberal legal imagination often obscures or overlooks this reality. The potential normative implications of the theory are found in the assertion that state policy and law should be responsive to human vulnerability. However, the call for a responsive state does not dictate the form responses should take, only that they reflect the reality of human vulnerability. Thus, this approach to law and policy allows for the adaptation of solutions

appropriate to differing legal structures and political cultures.

Vulnerability theory provides a template with which to refocus critical attention, raising new questions and challenging established assumptions about individual and state responsibility and the role of law, as well as allowing us to address social relationships of inevitable inequality. In this regard, vulnerability theory goes beyond the normative claim for equality, be it formal or substantive in nature, to suggest that we interrogate what may be just and appropriate mechanisms to structure the terms and practices of inequality.

An equality model or antidiscrimination mandate is certainly the appropriate response in many instances: one person, one vote and equal pay for equal work are areas where equality seems clearly suitable. However, equality is less helpful, and may even be an unjust measure, when applied in situations of inescapable or inevitable inequality. . . .

In considering human vulnerability it is significant that, as embodied beings, individual humans find themselves dependent upon, and embedded within, social relationships and institutions throughout the life-course. While the institutions and relationships upon which any individual relies will vary over time and in response to changes in embodiment and social contexts, the fact that we require some set of social relationships and institutional structure remains constant. A vulnerability approach argues that the state must be responsive to the realities of human vulnerability and its corollary, social dependency, as well as to situations reflecting inherent or necessary inequality, when it initially establishes or sets up mechanisms to monitor these relationships and institutions.

Understanding human vulnerability suggests that equality, as it tends to be used to measure the treatment of individuals or groups, is a limiting aspiration when it comes to social justice. Equality typically is measured by comparing the circumstances of those individuals considered equals. This approach inevitably generates suspicion of unequal or differential treatment absent past discrimination or present

stereotyping, particularly if practiced by the state. Even in its substantive form, assessments of equality focus on specific individuals and operate to consider and compare social positions or injuries at a particular point in time.

An equality model or antidiscrimination mandate is certainly the appropriate response in many instances: one person, one vote and equal pay for equal work are areas where equality seems clearly suitable. However, equality is less helpful, and may even be an unjust measure, when applied in situations of inescapable or inevitable inequality where differing levels of authority and power are appropriate, such as in defining the legal relationship between parent and child or employer and employee. Such relationships historically have been relegated to the 'private' sphere of life, away from state regulation. When explicitly addressed, situations of inevitable inequality are typically handled in law and policy either by imposing a fabricated equivalence between the individuals or by declaring that an equality mandate does not apply because the individuals to be compared are positioned differently. An example of the imposition of fictitious equality, in response to inevitable inequality, is evident in situations involving parties who occupy obviously unequal bargaining positions, like the contract that is fabricated in the employment context. The distinction in the legal treatment of children as compared with adults also exemplifies the differently positioned resolution for unequal legal treatment. In both instances, state responsibility for ensuring equitable treatment for differently positioned individuals is minimized within the overriding framework of equality. . . .

2. Vulnerability Theory

2.1 Reconstructing the Political Subject as the Vulnerable Subject in Law

Although it is often narrowly understood as merely "openness to physical or emotional harm," vulnerability should be recognized as *the* primal human condition. As embodied beings, we are universally and individually constantly susceptible to change in our well-being. Change can be positive or negative—we become ill and are injured or decline, but we also grow in abilities and develop new skills and relationships. The term "vulnerable," used to connote the continuous susceptibility to change in both our bodily and social well-being that all human beings experience, makes it clear that there is no position of invulnerability—no conclusive way to prevent or avoid change.

For the most part, human vulnerability has been ignored or marginalized in mainstream legal theory or political philosophy. Particularly in contemporary politics increasingly shaped by themes of austerity and purported threats from immigration, we see a

growing fixation on personal responsibility, individual autonomy, self-sufficiency and independence, buoyed by an insistence that only a severely restrained state can be an economically responsible one. When the term vulnerability is used, it is typically (and inaccurately) attributed to only some individuals or groups, who are referred to as "vulnerable populations." It is also used as a basis for comparison: some people are viewed as more or less vulnerable, or as differently or uniquely vulnerable. This perspective ignores the universality and constancy of vulnerability as I use the term and is merely another way of identifying bias, discrimination, and social disadvantage rather than focusing on structural arrangements that affect everyone. In other words, it is another way to present an equal protection argument.

Human vulnerability has social, as well as physical and material consequences. On the most obvious level, our embodiment means that we are innately dependent on the provision of care by others when we are infants and often when we are ill, aged, or disabled. It is human vulnerability that compels the creation of social relationships found in designated social institutions, such as the family, the market, the educational system and so on. The very formation of communities, associations, and even political entities and nation-states are responses to human vulnerability. Social problems emerge when these social institutions and relationships are not functioning well.

Importantly, a vulnerability approach does not begin with discrimination or difference in legal treatment as the primary evil to be addressed. Rather, it begins with the assertion that we need to rethink this conception of the legal subject to make it more reflective of the actual human experience. It requires that we recognize the ways in which power and privilege are conferred through the operation of societal institutions, relationships and the creation of social identities, sometimes inequitably. Because law should recognize, respond to, and, perhaps, redirect unjustified inequality, the critical issue must be whether the balance of power struck by law was warranted.

Social identities are manifested within institutions and do not manifestly reflect individual characteristics, such as race or sex. However, they do represent the allocation of power and privilege between occupants based on the social function of the institution and their social roles within it. Individuals occupy different social identities as they age and expand their interaction with different social institutions and relationships (from child to teenager to adult—from family to school to workplace). General idealized social identities, such as parent/child, employer/employee, and shareholder/consumer are formed and operate as functional and ideological constructs, which tend

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FACULTY HONORS

Recent Accolades

In April, Asa Griggs Candler Professor of Law **Margo A. Bagley** was appointed to the National Academies of Sciences, Engineering, and Medicine's Committee for Advancing Commercialization from the Federal Laboratories, from 2019 to 2021. The ad hoc group functions under the Academies' Board on Science, Technology, and Economic Policy, to "identify and prioritize opportunities to add economic value to US industry through enhanced utilization of intellectual property around digital products created at federal laboratories."

In August, **Dorothy A. Brown** was named Asa Griggs Candler Professor of Law. Brown joins the short list of 22 professors at Emory who have earned the designation, which includes six other members of the Emory Law faculty.

The American Society for Legal History has honored Asa Griggs Candler Professor of Law **Mary L. Dudziak** with the establishment of The Mary L. Dudziak Digital

Legal History Prize, to be awarded for the first time this year. Created to honor "a digital history pioneer," the annual prize will go to an outstanding digital legal history project, either "traditionally published peer reviewed scholarship or born-digital projects of equivalent depth and scope."

Robert W. Woodruff Professor of Law and McDonald Distinguished Professor of Religion **John Witte Jr.** has been invited as a Gifford Lecturer for 2020. Gifford Lecturers present at the Universities of Edinburgh, Aberdeen, Glasgow, and St. Andrews. Previous Gifford Lecturers represent an array of disciplines and include some of the greatest minds of the past century—including Hannah Arendt, Noam Chomsky, William James, Reinhold Niebuhr, Charles Taylor, Karl Barth, Iris Murdoch and Carl Sagan.

L. Q. C. Lamar Professor of Law **Barbara Bennett Woodhouse** was elected to membership in the American Law Institute.



Bagley



Brown



Dudziak



Witte



Woodhouse

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to shape individual options. These linked, complementary social identities also may reflect an intrinsic inequality between their occupants, an inequality that is often not only justifiable, but also necessary.

Idealized identities are human constructions and, as such, they are not static. However, as archetypes they do reflect the historic values and priorities of society and tend to be relatively stable for extended periods of time. Proposed changes in, or widespread deviations from, these idealized identities can provoke social turmoil and backlash. So too, changes in individual status can give rise to insecurity and anger or frustration, as well as a sense of accomplishment or opportunity.

What vulnerability theory offers is a way of thinking about political subjectivity that recognizes and incorporates differences and can attend to situations of inevitable inequality among legal subjects. 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. A vulnerability analysis incorporates a life-course perspective while also reflecting the role of the social institutions and relationships in which our social identities are formed and enforced. It also defines a robust sense of state responsibility for social institutions and relationships.

—from *Vulnerability and Inevitable Inequality*, 4 *Oslo Law Review* 133 (2017)

Recent Work by Our Faculty

BOOKS

Mary Anne Bobinski

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Laurie R. Blank

International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War (2nd. ed., Wolters Kluwer 2019) (with Gregory P. Noone)

Deborah Dinner

The Sex Equality Dilemma: Work, Family, and Legal Change in Neoliberal America (Cambridge University Press, forthcoming 2020)

Rafael Domingo

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Richard D. Freer

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Peter Hay

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Julie Seaman

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Frank J. Vandall

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Liza Vertinsky

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Alexander Volokh

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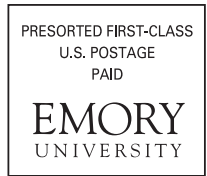
Barbara Bennett Woodhouse

Advocating for Every Child's Right to a Fair Start: The Key Roles of Comparative and International Law, 71(1) *Florida Law Review* 26 (2019)



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The 2019 David J. Bederman Lecture

On October 28, Emory Law welcomes the Honorable Rosalie Silberman Abella, justice of the Supreme Court of Canada, who will deliver the lecture "International Law and Prospects for Justice."



Justice Abella joined the court in 2004, and is the first Jewish woman to serve. She is also the first refugee to serve on the court. Many times honored for her commitment to human rights, Abella was born at a displaced persons camp in Germany, and arrived in Canada with her parents in 1950. She was appointed to the bench at age 29, the youngest person ever appointed to the Canadian judiciary.

The Bederman Lecture is presented by the Center for International and Comparative Law. It honors the memory of Emory Law Professor David J. Bederman and celebrates his extraordinary accomplishments in scholarship, teaching, and advocacy.