

## WOMEN, MARRIAGE AND MOTHERHOOD IN THE UNITED STATES: ALLOCATING RESPONSIBILITY IN A CHANGING WORLD

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The lesson from the United States is that egalitarian law reform alone is inadequate to achieve gender equality, be it at home or in the workplace. Formal equality may be useful in defining some relations between adults, but family dynamics, as well as the realisation that state and market institutions must be responsive to human dependency and vulnerability, must also be factored into considerations of what is needed in the way of reforms. For example, merely encouraging egalitarian family policies has not resulted in significantly removing the obstacles to women's equal participation in the workplace when they become mothers. The State must also respond to the situation of women (and others) who are placed in vulnerable positions in the workplace because of the care work they perform in the family. A responsive State would pay attention to the operation and functioning of the institutions, entitlements and other mechanisms that provide the resources that individuals need in order to successfully undertake responsibility for those who are dependent in society, such as infants and children, as well as some elderly, disabled, or ill adults. It is time to expand our rhetoric of 'personal responsibility' to include a notion of 'shared responsibility', in which the state and market institutions are charged with ensuring that there is truly equality of access and opportunity. This would require the accommodation of our shared human vulnerability and dependency, as well as the undoing of institutional practices and relations that unduly privilege the circumstances of some workers while tolerating the structural disadvantages with which others grapple on a daily basis.

### I. CONTEXT

This special issue of the *Singapore Journal of Legal Studies* commemorates the 50<sup>th</sup> anniversary of the *Women's Charter*.<sup>1</sup> Intriguing from an American feminist perspective is the fact that something deemed a *women's* charter is almost exclusively concerned with family issues such as marriage, divorce and parental responsibility. The organisation of the family was evidently viewed as the most crucial reform for women by the mostly male politicians of the People's Action Party.<sup>2</sup> The *Women's Charter Bill* was presented to the First Session of the First Legislature in Singapore in March of 1960.<sup>3</sup> Statements from leaders of both parties were clear that the energy

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<sup>1</sup> The current version is Cap. 353, 2009 Rev. Ed. Sing., as amended by Act No. 2 of 2011.

<sup>2</sup> See announcement by PAP Chairman Toh Chin Chye at special Party Congress on 25th April 1959, *The Tasks Ahead Part 1* (Singapore: Petir, 1959) at 7-8 and 11.

<sup>3</sup> See Sing., *Legislative Assembly Debates*, vol. 12, col. 406 at 406 (2 March 1960). See also Leong Wai Kum, *Principles of Family Law in Singapore* (Singapore: Butterworths Asia, 1997) at 38-44.

and assistance necessary to build the nation required women, as well as men, to participate.<sup>4</sup> The then existing gendered and unequal status of marriage and divorce law was evidently viewed as one of the most significant impediments to women's full participation in the efforts to grow the economy and build the nation that were to be undertaken in post-colonial Singapore.<sup>5</sup>

Interestingly, women's rights advocates in the United States around the same period were also considering what was necessary for women's full participation in society and reached a similar conclusion. Following the revitalisation of the feminist movement during the 1960s, family law reform was seen as essential to realising greater equality for women in the market and political spheres of American life. Feminist reformers anchored the quest for gender equality in the belief that family relationships reflected and reinforced the notion that there were significant differences between men and women which justified the exclusion of women from many opportunities in public and political institutions.

This essay considers the trajectory of American family law reforms, as well as the structural and ideological obstacles for many women to realising equality aspirations in both the family and marketplace. My ultimate conclusion is that attempts at gender equality reform in the family will fail without corresponding accommodations, including complementary structural and operational adjustments, by the state and market institutions. While the many cultural and political differences between Singapore and the United States indicate that this analysis should not be deemed as either a 'cautionary tale' or indicative of Singapore's current circumstances, what has happened with the American reform may suggest lessons for other economies. At the very least, there is an opportunity for fruitful comparative work on the United States' and Singapore's experiences in addressing family, work and how the aspiration for gender equality may be fully realised.

## II. DEFINING FAMILY LAW REFORM<sup>6</sup>

By and large, legal feminist reformers in the United States during the 1960s, 1970s, and 1980s agreed that women, both inside and outside the family, were primarily defined and thus confined by their assigned family roles, which reflected norms of economic dependency, self-sacrifice and subservience. Different expectations, as well as rights and responsibilities, were built into the 'complementary' gendered roles of husband and wife, father and mother. The expectations for mothers in particular were problematic from the feminist point of view, often analysed as oppressive and as impediments to individual growth and independence. Further, family roles displaced other aspirations on an ideological level, with concrete implications for the educational and career opportunities available to women. Expectations governing the private (family) sphere correspondingly defined aspirations and possibilities for women in the public (workplace) sphere.

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<sup>4</sup> See Sing., *Legislative Assembly Debates*, vol. 12, col. 438 at col. 454 (6 April 1960).

<sup>5</sup> See Sing., *Legislative Assembly Debates*, vol. 14, col. 1545 at col. 1546 (24 May 1961).

<sup>6</sup> The information in this section summarises the case study and analysis of the reforms undertaken in Wisconsin as detailed in Martha Albertson Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago: University of Chicago Press, 1991) at 18-22 [*The Illusion of Equality*].

American feminist reformers argued that absolute equal treatment and gender neutrality were the only appropriate bases for reforms both in and outside of the family. This tactic was based on the perceived need to eliminate any notion that there were relevant differences between the sexes that would justify differences in legal treatment. In the family, equal treatment and gender neutrality led to the introduction of a partnership model to replace the gendered and hierarchical common law model of marriage. Legal feminists were truly interested in the establishment of a broad egalitarian family ideal and the partnership model of marriage reflected that aspiration. The idea was to make husbands and wives share *all* responsibilities and benefits of the institution of marriage—to androcentrise the family roles and facilitate the sharing of them. The hope was that this would equalise opportunities outside of the family as well. We now speak of parents instead of mothers and fathers; spouses instead of wives and husbands.<sup>7</sup> We have joint custody or shared parenting and mothers cannot be afforded any special consideration because they were the ones who did the nurturing rather than career building in the marriage.

The partnership model in the family had economic implications also. It incorporated a ‘contribution’ rationale, borrowed from the business context, in order to legitimate the transfer of money and property accumulated during marriage from wage-earning husbands to domestic service providing wives at divorce. The family partnership model incorporated norms of formal equality and shared responsibility that significantly altered expectations concerning provisions for the economic well-being of the family. Both parents now share responsibility to support the children and are supposed to provide for themselves and each other in an equal manner. The idea that a wife is economically dependent on her husband is incompatible with the new model of marriage.

These ‘revolutions’ in the organisation of marriage had particularly significant implications on the economic position of women and children post-divorce.<sup>8</sup> While the new norm of equal division of marital property at divorce bettered the position of some women, the virtual abolition of alimony or spousal maintenance denied custodial mothers access to ongoing support from husbands and forced them to rely on work and earn their own wages. Arguments that a custodial mother needed to continue to have a share in her husband’s income post-divorce, because her on-going child care responsibilities would inhibit her full participation in the workforce, were cast aside as antiquated and inappropriate for our new gender-neutral world. Economically based arguments that child rearing resulted in losses from lost opportunities and forgone income that should be equitably shared gained some traction in moving away from the formal gender equality model, but only in limited cases where the stereotypical breadwinner/caretaker model was present in a long-term marriage.<sup>9</sup> Arguments for more than half of the property or for on-going spousal support were seen as a form of stigmatising special pleading for women who also just happened to be mothers.

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<sup>7</sup> This phenomenon has been further explored in Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (New York: Routledge, 1995) at 67-71 [*The Neutered Mother*].

<sup>8</sup> *Ibid.*, at 26-33.

<sup>9</sup> See Fineman, *The Illusion of Equality*, *supra* note 6, at 36-37.

### III. THE INADEQUACIES OF EGALITARIAN FAMILY LAW REFORM

I have argued for decades that the concept of formal equality, while perhaps useful in defining some relations between adults, is inadequate, even detrimental, in addressing the dynamics inherent in the family.<sup>10</sup> In particular, the complicating factor is how to theorise motherhood (or caretaking), both ideologically and structurally. Furthermore, how could law and society and its institutions be restructured in light of those theories? In asking questions about motherhood, our focus moves from the male/female dyad of family law to that of mother/child. This relationship cannot be conceptualised as a relationship between equals founded on principles such as partnership and contract. Indeed, childhood is mired in an inequality founded on dependency and the child's dependency historically has shaped the social and legal meanings of motherhood and fatherhood in America.<sup>11</sup> Children are inherently dependent on others to care for them. This type of dependency is developmental and biological in nature. It is universally experienced (what I have called "inevitable dependency"<sup>12</sup>). All human beings are dependent in this sense as infants and children, and many will be dependent as they age, or become disabled, or ill as adults.

In addition to inevitable dependency, I have theorised a structural dependency labelled 'derivative'. The concept of derivative dependency captures the very simple, but often overlooked fact that those who care for inevitable dependents (such as mothers) are dependent on resources in order to successfully undertake that care.<sup>13</sup> In contrast to inevitable dependency, derivative dependency is not universally experienced. Many in society avoid taking responsibility for caring for children, the elderly or ill. The role of being derivatively dependent is experienced only by some members of a society. Cultural, ideological and legal structures define the caretaker role and assign it to those who are expected to assume the work of caring for those who cannot care for themselves.<sup>14</sup>

In the traditional dominant patriarchal script of common law countries, dependency has been assigned to an ideal family, which is marital and heterosexual in form.<sup>15</sup> This family is also gendered and hierarchically organised, with a wage earner and a domestic labourer complementing each other in addressing dependency. Economic contributions are privileged in relation to care work, which is not assigned a market value, but compensated through a duty to support placed on the wage earner. This family—at least in its ideal form—is also self-sufficient and independent and is expected to provide adequate economic and caretaking resources to manage both

<sup>10</sup> See Fineman, *The Illusion of Equality*, *supra* note 6; Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008) 20 *Yale J.L. & Feminism* 1, at 2-5 [*The Vulnerable Subject: Anchoring Equality in the Human Condition*]; Martha Albertson Fineman, "The Vulnerable Subject and the Responsive State" (2011), 60 *Emory L.J.* 251 [*The Vulnerable Subject and the Responsive State*].

<sup>11</sup> See generally Fineman, *The Neutered Mother*, *supra* note 7 (arguing that discussions of the family must include the concepts of dependency and caregiving).

<sup>12</sup> *Ibid.*, at 162.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> See generally Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: The New Press, 2004) [*The Autonomy Myth*].

the inevitable and derivative dependencies of its members. It must do this without resorting to assistance from the state, or be deemed a failure.<sup>16</sup>

This image of the ideally self-sufficient family achieved through complementary family roles has also determined the appropriate relationship between that family and the State, as well as that between the family and economic or market institutions.<sup>17</sup> The self-sufficient family is separated from other institutions—it is a private family. The family is the quintessential private institution, while the State represents the quintessential public sphere. The market and its institutions are more fluid and chameleon-like; they are not seen as public *vis-à-vis* the family, but private *vis-à-vis* the State.<sup>18</sup> The appropriate relationship between the public State and the private family (as well as the state and market institutions) in the United States is that of non-intervention.<sup>19</sup> The self-sufficiency of the private family is rewarded with a conferral of privacy. Further, this self-sufficiency removes the need for the State to engage in policies and programmes that provide social goods to the typical family. State provision is stigmatised and reserved for the failed family through a process that is means-tested and supplies only limited subsidy and support.<sup>20</sup>

The imagining of a gender neutral egalitarian family has not done away with either inevitable or derivative dependency; children still need care and caretakers still need economic and material resources to undertake that care successfully. Further, and more importantly, the family-based reforms did nothing to challenge the dominant cultural and political belief that dependency was primarily the responsibility of the private family and that care and economic resources should come from the family alone. That patriarchal legacy has had consequences for women's equality.

Family law reforms have tried to mandate that the burdens and responsibilities associated with dependency be shared within the family by husbands and wives. Yet, if dependency remains primarily the responsibility of the private family, equal sharing will be difficult to accomplish. This is why many women find themselves still consigned to historically gendered roles—making sacrifices in order to care as mothers, wives, sisters, daughters and daughters-in-law for those who are dependent.

#### IV. THE NEGLECTFUL STATE

Experience with an attempt to use gender neutral and egalitarian family policies to increase the position and participation of women in the workplace in the United States suggests that it will fail unless there are also corresponding changes in other societal institutions.<sup>21</sup> In other words, there are no separate spheres. There are only symbiotic, overlapping and often simultaneously complementary and conflicting institutional relationships.<sup>22</sup> It is important for those seeking changes within the

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<sup>16</sup> *Ibid.*

<sup>17</sup> See Fineman, *The Vulnerable Subject and the Responsive State*, *supra* note 10.

<sup>18</sup> Cf. Iris Marion Young, "Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory" in Joan B. Landes, ed., *Feminism, the Public and the Private* (New York: Oxford University Press, 1998) at 421 (discussing the ways in which privacy rhetoric excludes particular persons and ideas from public discussion).

<sup>19</sup> See Fineman, *The Autonomy Myth*, *supra* note 15, at 59, 208.

<sup>20</sup> See Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, *supra* note 10 at 2.

<sup>21</sup> See Fineman, *The Vulnerable Subject and the Responsive State*, *supra* note 10.

<sup>22</sup> See generally Fineman, *The Neutered Mother*, *supra* note 7.

family to realise that the structure and workings of both the market and the State profoundly affect the wellbeing of and possibilities for the family, and may make change difficult or impossible to accomplish. We can impose all the gender equality aspirations we want in the family, but if the State and the market continue to operate in ways that conform to old gendered patterns, gender equality will be close to impossible to achieve, particularly for women who are mothers.<sup>23</sup>

#### A. Maternal/Child Poverty

Over the past few years studies have suggested that motherhood is now a pre-eminent cause of economic disadvantage in America.<sup>24</sup> While discussions typically focus on young or single mothers, it seems that all mothers are disadvantaged. Some commentators early in these debates seemed to feel that there is just something about the experience of motherhood that makes women alter their lives in ways that result in negative economic consequences.<sup>25</sup> This perspective, which continues to have influence in the debates, attributes economic outcomes to a 'natural' phenomenon and as outcomes of individual preference, sidestepping the need for institutional reform. In fact, generally, when contemporary politicians and pundits grapple with maternal poverty, they tend to suggest solutions that are simply replays of old favourites from welfare reforms that took place in the 1990's, which were attempts to push women to act in conformity with gendered roles and patriarchal ideals.<sup>26</sup> Mothers should get married if they are not and once married, stay married. Women should postpone motherhood until they can afford children (or until their husband can). In addition, work requirements are imposed as a form of punishment, rather than structured to provide opportunities for economic and social mobility through training and education for single and poor mothers.

Of course, there are some important political and policy differences among politicians and pundits. Some see a need for some form of government action or support as necessary before poor or single mothers are able to work. 'Progressive' politicians believe the State has a role to play in providing child care subsidies and services that facilitate entrance into or continuation of employment for mothers.<sup>27</sup> 'Conservatives' are more apt to advocate an individualised approach to the demands of dependency, relying on the traditional marital family and a breadwinner/housemate model as the main remedies for maternal and child poverty.<sup>28</sup>

<sup>23</sup> Attempted changes in the structure or function of the family also affect other institutions and place pressure on both the market and the state. Such pressure creates tensions, ruptures and demands for accommodation and supportive adjustment. These requisite changes in the market and the state do not always happen easily, successfully, or at all.

<sup>24</sup> See Karen Christopher, "Single Motherhood, Employment, or Social Assistance: Why are U.S. Women Poorer than Women in Other Affluent Nations?" (2002) 6(2) *Journal of Poverty* 61, at 74 [*Single Motherhood*].

<sup>25</sup> See Victor R. Fuchs, *Women's Quest for Economic Equality*, 1<sup>st</sup> ed. (United States of America: First Harvard University Press, 1988), at 49.

<sup>26</sup> See Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, *supra* note 10, at 17; Fineman, *The Neutered Mother*, *supra* note 7, at 101-110 (discussing mothers of all races characterised as deviant for their rejection of the patriarchal form of family).

<sup>27</sup> See Christopher, *Single Mother*, *supra* note 24, at 63-64.

<sup>28</sup> See Fineman, *The Autonomy Myth*, *supra* note 15, at 31-34.

Interestingly, although their specific responses differ, progressives and conservatives are unified in placing the ultimate responsibility for the economic condition of the family on individuals, primarily mothers. Both political positions reflect both the legacy of the ideal family (which is economically self-sufficient and independent) and a gender neutral commitment to personal responsibility in which both women and men are equally responsible for themselves and their families. This individual responsibility/employment-based strategy does not focus on social welfare, collective responsibility or some notion of desert based on maternal contributions to society. The idea that motherhood earns some entitlement to resources or accommodations beyond the family can be ridiculed in the abstract and recognised in practice only in a limited, grudging, and punitive manner by the State when an individual family is in dire need of help.

Obviously the next question should be: how realistic are these individualised employment-based alternatives to state support and subsidy of motherhood? The 'get and stay married' solution may sometimes work in alleviating poverty, but marriages do not always succeed and divorce levels remain high. In addition, poor women tend to marry poor men, so marriage in those circumstances will not help very much. Furthermore, unless human sexuality changes substantially, there will always be births out of wedlock.

As for the employment-based strategy, we confront the legacy of the old wage-earner/helpmate paradigm: the workplace was not initially designed and has not been reformed to accommodate motherhood. This has resulted in what we now label as the work/family conflict, which refers to the inherent incompatibility of wage with family or caretaking work. Caretaking involves time, commitment, compromises and sacrifices of individual opportunities for the good of others. Caretaking often translates into losses in earning ability and foregoing career development.

### B. *The Motherhood Penalty*

This struggle between motherhood and the structure of wage work is not just a problem for the poor. Middle-class motherhood has its penalties and economic disadvantages. In fact, economic and social science literature looking at the United States now discusses something dubbed the "motherhood penalty".<sup>29</sup> Interestingly, this literature begins with the insight that gender equality has worked—at least in some contexts. The gender-wage gap has just about disappeared if we only compare men with childless women with equivalent qualifications and in similar jobs, dropping women who are mothers out of the equation. In fact, the gender-wage gap has been reported to now be less than a few cents for women holding professional positions. Some studies indicate that childless women can even earn more than equivalent men in some instances.

However, encouraging as those studies are, a recently discovered 'parental wage-gap' should be of considerable concern. The United States Congressional Joint Economic Committee recently held hearings on gender wage equity and the effects of motherhood on wages. Sociologist Michelle Budig testified that while childless

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<sup>29</sup> See Shelley J. Correll, Stephen Benard & In Paik, "Getting a Job: Is There a Motherhood Penalty?" (2007) 112(5) *Am. J. Soc.* 1297 at 1299.

professional women earned 94 cents of a childless man's dollar, mothers in those positions earned 60 cents of every father's dollar.<sup>30</sup> She labelled this latter difference as a "wage penalty" for motherhood. In addition and notably, *all* women experience reduced earnings for every child they have.<sup>31</sup>

There is some dispute about what causes this gap, with some commentators arguing that the difference is related to the fact that women who are mothers perceive the need to work fewer hours. Thus, they may accept lower earnings to secure more family-friendly jobs.<sup>32</sup> Interruptions in work life due to childbearing have also been blamed for the motherhood penalty.<sup>33</sup> Importantly, from the perspective of assessing what policies might constitute appropriate legal and societal responses, such explanations minimise the significance of structural reasons for the motherhood wage gap. These reasons also suggest that additional policy initiatives are unnecessary, since the unbalanced wages are the result of individual choices, not discrimination or bias.

However, Professor Budig concluded that even if such choices accounted for some of the gap, the available research indicated that taking preferences into account and adjusting for differences, there would still be a wage penalty accruing for mothers, of roughly 3% for every child she has.<sup>34</sup> In other words, the studies indicate that there is some residual gendered wage gap not explained by aggregate choices. Professor Budig argued that this gap was due to discrimination against mothers by those (both men and women) who feel that if they have children, women should not be working full-time.

Professor Budig further testified that based on the research, fatherhood had the effect of *enhancing* a man's wages. Fathers in *all* racial and ethnic groups received a "fatherhood bonus" when compared with childless men.<sup>35</sup> Once again, some of these fatherhood benefits or premiums were attributed to "gender-neutral" factors, such as the fact that men who were fathers, on average, were older than childless men. Thus, they had more work experience or opportunities for advancement in a profession or position. However, as Professor Budig concluded in putting the findings on motherhood and fatherhood together, parenthood exacerbates gender inequality in American workplaces.<sup>36</sup> Mothers lose wages, while fathers gain them as a result of parenthood.

Professor Budig's suggestion that the research shows some residual discrimination against mothers should be understood against the background of the requirements of civil rights and employment laws that mandate some impermissible discrimination before state remedial action is deemed appropriate under *Title VII*.<sup>37</sup> Discrimination on some bases violates the equality guarantee, but it is a concept of limited usefulness if the harm is the result of existing widespread structural and institutional disadvantages. Discrimination focuses the legal inquiry on specifics of an individual case (or a class of cases). It is based on intentional and knowing actions by an individual or

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<sup>30</sup> U.S., *New Evidence on the Gender Pay Gap for Women and Mothers in Management: Hearing Before the U.S. Cong. J. Economic Comm.*, 111th Cong. (2010) (Michelle J. Budig, Associate Professor of Sociology, University of Massachusetts), at 4 [*Gender Pay Gap Hearing*].

<sup>31</sup> *Ibid.*

<sup>32</sup> See Christopher, *Single Mother*, *supra* note 24, at 63-64.

<sup>33</sup> See *ibid.*

<sup>34</sup> *Gender Pay Gap Hearing*, *supra* note 30, at 5.

<sup>35</sup> *Ibid.*, at 6.

<sup>36</sup> *Ibid.*

<sup>37</sup> Pub. L. No. 88-352, s. 2000(e), 78 Stat. 241, 253-66.

individuals that exclude or treat some person or persons differently based on their characteristics.<sup>38</sup> Even if the motherhood penalty were to come under the mandates of *Title VII*, in order to prevail, a woman would have to prove that her individual wage gap was the product of such discrimination unless she could avail herself of the theory of ‘disparate impact’<sup>39</sup> or that her situation came under the *Equal Pay Act*.<sup>40</sup>

As interesting as speculation about the extent of discrimination against mothers might be, I suggest that the real heart of the dilemma presented by the motherhood penalty is *not* found in such discrimination. Rather, it is rooted in cultural and social legacies arising from historically gendered patterns of family formation and functioning that affect expectations and aspirations of and for women who are mothers on an individual level. Importantly, these legacies are further complicated by the misallocations of near total responsibility for dependency to the family, which meant that other societal institutions have not had to change to accommodate or contribute support for care taking. Institutionally, regardless of who assumes the burden of care-taking within the family, unless there are such corresponding adjustments, caretaking will result in disadvantage in the market and workplace.

The policy responses most likely to be made when structural disadvantages are noted are to suggest that support should be forthcoming from the State. Suggestions include child allowances, universal long-term job protection following birth or adoption of a child and short-term paid maternity and paternity leaves.<sup>41</sup> Such provisions are often found in industrialised societies in which the government has historically been deemed to have some responsibility to help the family with the economic and structural costs associated with having and raising children.<sup>42</sup> Data from countries

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<sup>38</sup> See *International Brotherhood of Teamsters v. United States*, 431 U.S. 32 at 335 (1977) (finding that proof of discriminatory intent is critical for a discrimination action under *Title VII*).

<sup>39</sup> This theory applies when an employer has treated classes of people differently using apparently neutral employment policies. The *disparate impact* theory of liability will succeed if the plaintiff can prove that these employment policies had the effect of excluding persons who are members of *Title VII*’s protected classes. Once disparate impact is established, the employer must justify the continued use of the procedure or procedures causing the adverse impact as a ‘business necessity’. If the plaintiff proves that the employer’s practice had a disproportionate impact on a protected class, the burden shifts to the defendant to justify its use of the challenged practice. The Supreme Court has put limits on the *disparate impact* theory. For example, the Court has made it clear that it is not unlawful for an employer to apply different standards of compensation or different terms or conditions of employment to employees, if the employer acts according to a legitimate seniority system. This is true even if the seniority system has a discriminatory effect, as long as the system was not intended to be discriminatory. Many commentators have concluded that recovery under this theory is extremely difficult in practice.

<sup>40</sup> Pub L. No. 88-38, s. 206(d)(1), 77 Stat. 56 prohibits wage discrimination on the basis of sex for “equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions...”. Aside for the questions raised by the language of the statute such as just what constitutes “equal” jobs, skill, effort, and responsibility, or how we define “similar working conditions”, there are enumerated statutory exceptions based on seniority, merit, systems that measure earnings by quantity or quality of production or the catch-all category of “a differential based on any other factor other than sex” that may be viewed as effectively swallowing the rule in most situations.

<sup>41</sup> See Christopher, *Single Mother*, *supra* note 24, at 76.

<sup>42</sup> See Michelle J. Budig, Joya Misra, Irene Böckmann, “*The Wage Penalty for Motherhood in a Cross-National Perspective: Relationships with Work-Family Policies and Cultural Attitudes*” (Paper presented to the Population Association of America Annual Meeting Program April 2010), online: Population Association of America 2010 Annual Meeting Program <<http://paa2010.princeton.edu/download.aspx?submissionId=101609>>, at 5-13.

with universal free early childhood education for preschool children, accompanied by high quality day care for very young children, indicates that such employment support is particularly effective in increasing mothers' employment rates.<sup>43</sup> Further, such programmes have a truly universal reach. In countries like Sweden and France, 80 to 95% of children aged 3 to 5 years are in publicly supported day care.<sup>44</sup> In contrast, in the United States, only about 14% of children in the same age group have accessed publically subsidised child care.<sup>45</sup>

It seems indisputable that such measures would help the middle-class and professional American mother avoid some of the economic burdens associated with motherhood and might also lessen the wage penalty. Such measures might also help to reduce maternal poverty for single and low-wage earning mothers.<sup>46</sup> There are serious roadblocks to implementing such programmes in the United States. Recently, the economic recession has served as an excuse and provided political cover for arguments to further dismantle what was an already weak commitment to social welfare programmes. However, the real hurdles are ideological, epitomised in the particularly distorted vision of what constitutes autonomy, independence and individual responsibility that has overtaken political rhetoric and action in the United States.<sup>47</sup>

### C. *The Need for a Responsive State*

Our historic approach to family well-being in the United States has largely excluded the role of the market and its institutions in situating the family within society. The responsibility of the State may be part of the discussion, but even if there was some miracle of mass conversion and policy makers supported mother-friendly state subsidies, we would still find a significant percentage of mothers clustered in poverty or near-poverty level, as well as only a slight decrease in the pressures experienced by wage earning mothers. State provision of benefits, such as childcare or child allowances, although necessary, will not be sufficient to significantly alleviate maternal poverty or eliminate the motherhood penalty in the United States.<sup>48</sup>

This assertion forces us back to consideration of the relationships among family, State, and market institutions. Even if we seek to significantly reform the family and even if that is accompanied by State provision of services and subsidy, if the market and its institutions remain unreformed, then transformations in the family (and, consequentially, in the gendered nature of the relationship between men and women) will elude us.<sup>49</sup> State provision of subsidy and services for the family must be complemented by market accommodations for caretakers and caretaking. The privileged ways in which the market institutions are currently structured means that

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<sup>43</sup> *Ibid.*, at 28.

<sup>44</sup> *Ibid.*, at 39.

<sup>45</sup> *Ibid.*

<sup>46</sup> See Christopher, *Single Mother*, *supra* note 24, at 76.

<sup>47</sup> This argument is fully developed in Fineman, *The Autonomy Myth*, *supra* note 15.

<sup>48</sup> Karen Christopher, "Family-Friendly Europe: Decent Wages and Generous Social Supports to Reconcile Work and Parenting Add Up to a Family Policy That's Smarter Than Marriage Promotion" *The American Prospect* (8 April 2002), online: Third World Traveler <[http://www.thirdworldtraveler.com/Europe/Family\\_Friendly.htm](http://www.thirdworldtraveler.com/Europe/Family_Friendly.htm)>.

<sup>49</sup> See Fineman, *The Autonomy Myth*, *supra* note 15, at 201.

family-friendly changes will probably not be voluntarily undertaken, at least not in regard to all or most workers.<sup>50</sup> Rather, they will realistically require State encouragement in the form of establishment of systems of market incentives and regulations to make accommodation a new, generally applicable workplace norm.<sup>51</sup> Consequentially, the first category of responses by the State would address the structure of market institutions and their flexibility in accommodating caretaking.

But measures beyond accommodation are also necessary. The State must also act to ensure a more egalitarian workplace by fostering measures that will move evolving workplace practices and norms of compensation more toward equalisation than have those that have evolved under a relatively unsupervised system of neo-liberal capitalism.<sup>52</sup> This second set of responses takes us well beyond a focus just on motherhood and the family to consider the position of families and individuals in relation to market institutions more broadly. Taking equality of opportunity seriously requires consideration of structural arrangements and disadvantages that are produced by more ubiquitous forces than discrimination in the market.<sup>53</sup> In fact, that we talk about a 'work/family conflict' is in and of itself an indication or symptom of conceptual distortion in which a distinction in policy and law is drawn between what is public and what is private. This line defines what is appropriate for State action in contemporary political and policy debates in the United States, but it does so without considering the basic conceptual incoherence upon which the distinction rests. Interests are organised into aggregates such as the family and the market in ways that suggest differences in regard to State involvement and positioning. The whole idea that the State is not implicated in and can be an outsider to the reconciliation of family and market must be called into question.<sup>54</sup>

A responsive State recognises that true equality of opportunity is impossible without regulation and vigilance in regard to both family and, particularly of, market relations. Other modern governments have recognised this and responded accordingly. Some industrial countries have built in routine opportunities for state involvement with the workings of the market that are designed to benefit workers generally.<sup>55</sup> Some States have actually promoted more economic democracy and mediated capitalism by evolving social-democratic political parties that directly address workers' general needs across the full range of work/family situations. This means viewing the State as allied with workers and market in defining the terms of employment and responsibility. It means not abandoning workers and rendering

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<sup>50</sup> The *Family and Medical Leave Act of 1993*, Pub. L. No. 103-3, 107 Stat. 6 covers only workplaces with 50 employees. Some workplaces offer day care for highly valued workers, but it is not generally available throughout American workplaces, nor are flexible hours, shared job positions or other accommodations for caretakers.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Gender Pay Gap Hearing*, *supra* note 30, at 5.

<sup>53</sup> See Fineman, *The Autonomy Myth*, *supra* note 15, at 259-261.

<sup>54</sup> I earlier noted that the market has the best of all worlds when it comes to the public/private divide: being labelled public *vis-à-vis* the family, but private *vis-à-vis* the state. A positioning as a public institution for some purposes allows the market to claim a privileged relationship when it comes to subsidy and positive state interventions, while its alternative ego as private allows it to resist negative incursions by regulatory agencies and state administrators.

<sup>55</sup> Irene Ng, "How Unique and Sustainable is the Singapore Welfare Model?: Evaluating Welfare Statism in Singapore in Historical and Comparative Context" (Oct. 31, 2004) [unpublished, archived online: <[http://sitemaker.umich.edu/ireneng/files/singapore\\_welfare\\_1005.pdf](http://sitemaker.umich.edu/ireneng/files/singapore_welfare_1005.pdf)>].

them dependent upon the perceived self-defined needs of the market. Higher rates of unionisation are supported through union-friendly laws that lead to more egalitarian wage structures and more universal access to pension plans.<sup>56</sup> In some societies, in order to more equally balance the power disparity between market institution and individual worker, the government is even a partner to wage and workplace negotiations, something that would be unthinkable in the United States.

These kinds of State responses evident in other nations raise the issue of what is the appropriate nature and extent of state responsibility regarding the organisation and operation of the interaction between family (and individual family members) and the market and its institutions. My argument for greater State involvement has been based on my perception that the work that is done in the family—work that produces the citizen, the worker, the consumer, the soldier, the student, the teacher and so on—is essential to the continuation and well-being of not only the State, but also the market and its institutions. As a result, it is incumbent upon the State to redistribute responsibility for dependency across societal institutions so that the burdens, not only the benefits, of caretaking are more equitably shared.

One way to do this would be to ensure a more egalitarian workplace that does not disadvantage those who do caretaking, but beyond this for families and individuals, it is also necessary to monitor market activity more actively to see that it does not frustrate equality of opportunity through existing systems of compensation and privilege more generally.<sup>57</sup> Importantly, such measures would not only alter market-state relations, but also transfer some of the economic costs of family or individual failure to thrive in neo-capitalism onto the market and away from the State. It would not be the State supplying subsidies and support in the form of welfare to the family, job training to individuals and so on; instead, it is the market that would be mandated to provide what should be deemed a 'living wage' and other positive goods, such as insurance to working individuals and families. It should not be the case—as it currently is in the United States—that someone who works full-time can nonetheless live below the poverty level and have to rely on stigmatised State assistance.<sup>58</sup>

This wage inequity may be most extremely evident in the case of mothers and children, but as this essay argues, this is not merely a product of gender discrimination—or even discrimination against mothers—at least not as narrowly understood. Rather, it is the result of a relatively unfettered market system operating under cover of an asserted mantle of meritocracy and neutrality.<sup>59</sup> This system proceeds under simplistic and individualistic premises that value autonomy more than

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<sup>56</sup> Timothy Noah, "The United States of Inequality" *Slate* (Sept. 3, 2010), online: *Slate Magazine* <<http://www.slate.com/id/2266025/entry/2266026>> [*The United States of Inequality*]. In the U.S., unions have been in decline since Ronald Regan's presidency. The laws are often hostile and block union organising.

<sup>57</sup> See Fineman, *The Autonomy Myth*, *supra* note 15, at 260.

<sup>58</sup> Arindrajit Dube & Ken Jacobs, "Hidden Cost of Wal-Mart Jobs: Use of Safety Net Programs by Wal-Mart Workers in California" *UC Berkeley Briefing Paper Series* (2 August 2004), online: UC Berkeley Labour Centre <<http://laborcenter.berkeley.edu/retail/walmart.pdf>>, at 4-8. About one-third of U.S. women earn wages too low to free their families from poverty; many Wal-Mart workers are on food stamps. Minimum wage is another state subsidy of business—arguments that workers would not be hired and so forth should not obscure this transfer of wealth from taxpayers to corporate profits.

<sup>59</sup> See Fineman, *The Autonomy Myth*, *supra* note 15, at 7.

equality.<sup>60</sup> In such a system, inequality is bound to prevail for most participants who are isolated from structures of power and privilege whether they are men or women, mothers or fathers.<sup>61</sup>

In the United States, we have a system that facilitates and continues existing and entrenched privilege and disadvantage. Furthermore, while politicians mouth platitudes about equal access and opportunity, they propose severe cuts in education spending, child welfare benefits and programmes designed to lift the poor out of situations of severe deprivation in order to address the federal and State deficits.<sup>62</sup> This, without any sense of irony or shame for their participation in earlier spectacles of bailouts for financial institutions and the profiteers who caused the economic crisis and/or in the extension of tax breaks for the very wealthiest Americans. The wealthy corporations and individuals have now ‘recovered’ from the Great Recession, experiencing record profits and huge bonuses, while unemployment for the average American remains high and the poverty ranks grow.<sup>63</sup>

Our current constitutional jurisprudence offers little help to the disadvantaged. While we talk about equal opportunity, there is no constitutional right to an education at all, let alone to an equal education.<sup>64</sup> We tolerate, even justify widespread and gross instances of inequality, not only in opportunity, but also in the distribution of basic social goods—goods necessary for human survival, such as housing, food and health care.

## V. THE RHETORIC OF SHARED RESPONSIBILITY

The types of systematic and comprehensive restructuring of the intertwined market-state-family relationships that must take place to provide meaningful equality of opportunity would necessitate a vastly more active, responsive and responsible state than what seems possible under the prevalent contemporary ideology in the United States. In the first place, the equality narrative in the United States is based on an anti-discrimination model that valorises sameness of treatment and is intentionally oblivious to individual differences in situation and circumstance.<sup>65</sup> In addition, unlike many other industrialised democracies, we have an ideology of a restrained State and a sacrosanct free market and any form of regulation is violently resisted as contemporary American political rhetoric clearly shows.<sup>66</sup> The results of this

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<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*, at 273.

<sup>62</sup> *Ibid.*, at 90.

<sup>63</sup> See Noah, *The United States of Inequality*, *supra* note 56, at 35, 41.

<sup>64</sup> See *Plyler v. Doe*, 457 U.S. 202 at 221 (1982) (finding that education is not a fundamental right).

<sup>65</sup> See generally Fineman, *The Illusion of Equality*, *supra* note 6; see also Fineman, *The Autonomy Myth*, *supra* note 15 at 10 (“Equality is manifested in mere formal or legal guarantees of sameness of treatment for individuals.”).

<sup>66</sup> See U.S., *Causes of Poverty, with a Focus on Out-of-Wedlock Births: Hearing Before the Subcomm. on Human Resources of the House Committee on Ways and Means*, 104<sup>th</sup> Cong. (1996) at 16 (Rep. Tim Hutchinson) (“[I]nstead of lifting people out of poverty and despair we have developed a cycle of dependency that is now entering its third generation...[W]elfare reform legislation must also include strong work requirements. We must restore [to] individuals the dignity of work.”). In contrast, the United Kingdom recently passed the *Equality Act*, which requires public decision makers to have “due regard” for the need to advance equality of opportunity. Sandra Fredman, “Positive Duties and Socio-Economic

ideology is a system in which American women, men and children experience significantly higher levels of economic hardship and less social mobility than their counterparts in other affluent Western nations.<sup>67</sup>

Achieving a more equitable and just society requires challenging the terms of the contemporary discussion about ‘personal responsibility’, as well as confronting and exposing the conceptual flaws inherent in the idea of a restrained State. There are two unifying threads between arguments for valuing caretaking and arguments for a right to a living wage that might aid in that endeavour. First is the idea that societal wealth is not the only measure of national or individual wellbeing.<sup>68</sup> Second, wealth is the product of various, complementary and often very different types of contributions, including care work and physical or intellectual labour.

The second of these ideas recognises that wealth does not only or even primarily arise from investment of capital. Recognition of the non-capital contributions to societal wealth and well-being should require a corresponding assessment of the costs associated with making those contributions. Such an assessment might lead to a reassessment of the current attempt to ideologically confine such costs only to the family and individual caretakers. It might also prompt public and political recognition that worker and caretaker contributions have not only been seriously undervalued, but also accrued penalties in a system that privileges economic over physical, material, emotional and intellectual contributions: a system that ignores costs placed on labour, as well as benefits produced by non-entrepreneurial work for both market and state institutions.

In a just system—one that recognises that there are responsibilities that accrue when benefits are conferred—market institutions would not only better share benefits,<sup>69</sup> but also more equitably distribute responsibility for dependency, valuing the work of caretakers and accommodating or facilitating fulfilment of their role as partners in productivity and the generation of wealth. More specifically, the performance of market institutions should not be based only on the legal profits they amass for shareholders, but also on the quality of their policies toward their workers and the contributions they make to a more egalitarian society. Tax policy could be one mechanism for recognising institutional expressions of shared responsibility and actions or policies reflecting commitment to equality of opportunity and intergenerational

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Disadvantage: Bringing Disadvantage onto the Equality Agenda” (2010) 3 Eur. H.R.L. Rev. 290 at 290, 295 (quoting *Equality Act 2010* (U.K.), 2000, c. 15, s. 149(1)).

<sup>67</sup> See Noah, *The United States of Inequality*, *supra* note 56, at 3.

<sup>68</sup> I am going to focus on the second insight, but it is important to note that it seems to be the distribution of wealth that is critical to ‘happiness’ and inequality of wealth seems to be an indication of aggregate and individual unhappiness. See generally Richard Wilkinson & Kate Pickett, *The Spirit Level: Why Greater Equality Makes Society Stronger* (New York: Bloomsbury Press, 2009) [*The Spirit Level*]. In this regard it is interesting that despite the United States’ provisions against discrimination, it ranks just below Singapore as one of the most unequal countries out of the rich, industrialised nations. See *The Spirit Level*, at 17 fig. 2.1. Social mobility was also limited. Data from the 1980s and 1990s show that about 36% of children who are born into the bottom fifth of wealth distribution will remain in that class as adults. See *ibid.*, at 160. Studies of fathers’ incomes when their sons were born and then their sons’ incomes at age 30, show that social mobility has declined rapidly since the 1980s. See *ibid.*, at 159–61. Studies examined in *The Spirit Level* suggest that higher inequality decreases levels of trust in a society, and less trusting members of society are less willing to donate time and money to helping others. See *ibid.*, at 54–57.

<sup>69</sup> See Noah, *The United States of Inequality*, *supra* note 56, at 54 (illustrating the rise in productivity in the U.S. over the past decades, but also the stagnation and decline in real wages).

equity.<sup>70</sup> The economic rewards an institution accrues are made possible by a combination of contributions: family and care work, labour productivity and capital investment, which should not only be counted, but more equitably distributed. In asserting the vision for societal reform, it is important not to unduly privilege the existing mechanisms and values of our current workplace and other public institutions. And certainly, it will be important to make the domestic and care aspects of life much more central to our understanding of institutional responsibility than they were in earlier feminist, gender neutral family law reforms.

At this point, I cannot resist the temptation to suggest that the many positive and care-affirming norms associated with archetypical notions of ‘mothering’ be expanded and employed to define what is expected from institutions acting within the ‘private sphere’. The experience and practice of motherhood, along with its demands and dilemmas, should inform our social policy and define our expectations for the State and all its institutions. If we were to adopt this perspective, dependency and vulnerability could no longer be ignored or made to seem incidental to defining state and societal responsibility. Politicians, pundits, economists, legal and political theorists would not be permitted to ignore dependency and vulnerability, as they now do, in spinning out their incomplete and incoherent visions for efficiency, justice and equality.<sup>71</sup>

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<sup>70</sup> Matthew T. Bodie, *Employees and the Boundaries of the Corporation* 13 (Saint Louis Univ. School of Law Legal Studies Research Paper Series, Working Paper No. 2011-13). One way to accomplish this would be by raising corporate and business taxes and giving tax credits for concrete programmes recognising the institution’s shared responsibility. This way, Costco, which pays for health insurance and provides more of a living wage to its workers, would have the tax advantages denied to Wal-Mart, with its low wages that have forced workers in some areas to resort to food stamps for groceries and Medicaid for health needs.

<sup>71</sup> Ann Orloff describes what happened when the contrary happened and we moved away from motherhood norms in the American welfare reform context during the later part of the Twentieth Century. She describes the reforms as a movement from a maternalist social welfare policy to one based on employment. See Ann Shola Orloff, “Systems of Social Provision and Regulation: Theories of State, Social Policies and Modernity” (Paper presented to the “New Challenges for Welfare State Research” Annual Meeting of the International Sociological Association Research Committee on Poverty, Social Welfare and Social Policy, August 2003) [unpublished] at 18, online: <<http://www.northwestern.edu/ipr/publications/papers/2004/WP-04-07.pdf>>. As a result, poor mothers were placed in the position of being dependent on men and the market and its institutions, rather than on the state should they fall upon ill fortune and have to seek assistance. See *ibid.*, at 13. One glaring difference between this arrangement and that which existed earlier was the absence of any sense of entitlement—no guarantee of support from some source. Certainly the market was not perceived to be responsible for these mothers and their children. Motherhood was asserted to be incidental and inconsequential in assessments of what constituted fair or just social policy—women were the equals of men and any recognised differences would inevitably result in exclusion, stigma and discrimination. It therefore makes some perverse sense that in the subsequent American welfare reform poor mothers were also cast as the equals of both wealthier mothers and all others. They should work if they need assistance and marry if they needed support. As such, they should assume the same responsibility for both themselves and their children as was placed on men in their roles as husbands and fathers and other women who somehow managed in their roles as wives and mothers who were also wage earners. If poor women were unable to meet their parental responsibility, some in Congress suggested orphanages for existing children and mandatory birth control to prevent future births. See Fineman, *The Autonomy Myth*, *supra* note 15, at 184. These proposals were from the right, but discourse on the left was also unsympathetic to the notion that mere motherhood carried with it much more in terms of a claim to ‘special’ treatment or consideration. In fact, some argued that finding any special virtues in motherhood was at best misguided—at worst anti-equality and oppressive to woman. See *ibid.*, at 183.

VI. VULNERABILITY AND THE HUMAN CONDITION<sup>72</sup>

In my recent work I have been developing a vulnerability thesis in which the autonomous individual subject of liberal theory is replaced with a construct that I call the ‘vulnerable subject’. The use of this vulnerable subject as the basis for analysis would anchor our discussions of equality in the actually-lived human condition, rather than in some abstract construct built around the false assumptions that all citizens are fully functional, that capabilities are equivalent across individuals and that capabilities remain constant throughout an individual’s lifetime. The analysis begins with the insight that vulnerability is inherent in the human condition and, further, when our vulnerability is realised, we may become dependent—economically, socially, psychologically and physically. Vulnerability comes partly from our materiality—our embodiment and, as such, it is both universal and constant. Our bodily vulnerability is apparent at the beginning of life when we were totally dependent on others for our survival. But vulnerability in the sense which I am developing accompanies us continuously throughout life, as we age, become ill, disabled or need care from others and finally die.

But vulnerability analysis does not depend on the image of a dependent individual. Even fully realised and functioning adults remain vulnerable: to external ‘natural’ forces, such as the environment or climate that may inflict bodily harms. In addition, it is significant that a great deal of our vulnerability whether of a bodily nature, or societal form is beyond our control as individuals; some vulnerabilities we cannot even anticipate, let alone protect against. Vulnerabilities may also be beyond the capacity of society and its institutions to eliminate.

Importantly, vulnerability as I am theorising it extends beyond the body with its interior weaknesses and fallibilities. Institutions play a central role in the analysis and a significant part of the vulnerability conceptualisation focuses on the fact that the State can and does create institutions, relationships, entitlements, and other methods or mechanism whereby individuals can gain ‘resilience’ in the face of vulnerability. The role of law in the creation, maintenance, and regulation of those institutions is central. Whether we discuss the family, the corporation, or the market more generally, the law and legal institutions define the principles for and the consequences of formation and dissolution, determining legitimacy and defining when coercion, subsidy, or regulation is appropriate. The point is that as social animals, humans are vulnerable to the institutions and structures that define life’s circumstances and opportunities. Because these institutions may themselves be vulnerable to corruption, decay, capture or decline, the State has a corresponding responsibility to see that these institutions afford equal opportunity and access; that they do not unduly privilege some while tolerating the disadvantage of others or expose some to risk while protecting others from it.

My hope is that taking human vulnerability seriously and placing it at the core of our understanding of state responsibility will lead to an expansion of the way we think about regulation and market responsibility. The realities of our universal, constant,

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<sup>72</sup> This concluding section is based on my new work: Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, *supra* note 10; Martha Albertson Fineman, “Evolving Images of Gender and Equality: A Feminist Journey” (2009) 43 *New Eng. L. Rev.* 437; and *The Vulnerable Subject and the Responsive State*, *supra* note 10.

and inescapable vulnerabilities argue for a responsive State that ensures equality of opportunity and access for individuals to society's institutions. True access requires that the State take existing structural differences into account and work to neutralise them, so that those who have been historically disadvantaged are uplifted to a more level playing field.