Discrimination and the foundation of justice: hate speech, affirmative action, institutional opinions

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Chapter III

A Liberalism of Fear

The Need for a Liberalism of Fear – Vulnerability as a *Telos* – (In)justice and a Liberalism of Fear – Dignity and a Liberalism of Fear – Capabilities and Discrimination

16.
The Need for a Liberalism of Fear

The anathema to life is death. But it is death, and assorted suffering, that is perhaps the most affecting reminder of the fragility of our existence, and which brings the obligations of our societal institutions with respect to every human life in sharp focus.[1] It was abhorrence of death and suffering which brought about humanism, liberalism, and the modern human rights discourse. And attention to suffering is the course that I will now pursue in search for a solution to the predicament in which my investigation into the legitimacy of group-based approaches to anti-discrimination measures, finds itself. Namely, is it possible to establish minimum requirements with regard to the possibilities and limitations of liberal states to protect citizens against discrimination, in spite of the rather vague liberal positions and the tangled forest of human rights obligations?

To realize this undertaking comprehensively but concise, requires me to abandon the preceding eagle-eyed view for the perspective of an observer who looks at the matter from a certain angle: the opposition to discrimination. Up until this point, I rather uncritically presented a general notion of the central tenets of liberalism and an aerial perspective of the genealogy of the modern human rights discourse. Additionally, I defended

[1] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011), 420.

the prevailing view of both these phenomena against (proposed) deviations, such as the third generation of rights, (mere) formal democracy, and illiberal human rights. Mindful of Popper's skeptical maxim that no policy is above reform, I will now critically dissect the manner in which most liberal states approach state action.[2] In doing so, I show how this attitude carries within it the seeds of the prevalence of group-based approaches to the protection against discrimination, that I examine subsequently. Following this examination, I propose a branch of my own, that can serve as a foothold when we climb the liberal tree. This liberalism of fear – founded on the notion of our universally shared vulnerability – exemplifies, I think, the ultimate and most important function of our fundamental rights; that being a bulwark against inhumanity. Unsurprisingly, its primary subject is the individual, who is arguably all too often at risk to be mangled between the state and all sorts of groups and associations. This branch will be guiding us when I get even more specific in the next chapter. Therein I offer a brief reconnaissance of the Dutch *Rechtsstaat*, the stage for the group-based approaches to discrimination that I investigate later on, and those peculiarities of discrimination law which are relevant for this jurisdiction.

THROUGH THICK AND THIN

Let us first establish the commonalities found within the prevailing approaches to state action in general, and the protection against discrimination in particular, in most liberal states. With those in mind, I will be able to compare the anatomy of most current liberal approaches, including the inclination to employ some sort of group-based approach, to a teleological alternative. This alternative would relate the opposition to discrimination to a certain goal which applies to all individuals. As with my examination of the foundation of the modern human rights discourse, this subsection gets a bit technical. The discussions on the necessary tasks of liberal states have been refined over decades of scholarly tête-à-têtes and, through these debates, legal scientists have developed their own language on the subject.

[2] Edmund Fawcett, *Liberalism: The Life of an Idea* (Princeton: Princeton University Press, 2018), 279.

To understand the prevalent liberal approaches to state action and my alternative, we have to return to the basics: the practical implementation of liberalism. In contemporary liberal states there are roughly two adaptations, the Rule of Law and the *Rechtsstaat*.[3] As with liberalism itself, these concepts, as well as the differences between them, are essentially contested.[4] But there are influential and commonly discussed variants. Two of the most important of these variants are the conceptions of the Rule of Law and the *Rechtsstaat* as 'thick' or 'thin'.[5] Despite their differences, both conceptions present remarkably similar problems regarding the arguably most pressing responsibilities of liberal states, such as opposing discrimination.

The monikers thick and thin mainly indicate how much is expected of a state to ensure the prerequisites of liberalism, including the enjoyment of fundamental rights by individual citizens.[6] They are each on the edge of a spectrum: in the thick conception the state has a more active role concerning the enjoyment of rights by its citizens, while in the thin conception the state is less active. The difference between thick and thin thus concerns the amount of state tasks and not their nature or contents.[7] A liberal state which adheres to a thick conception of the Rule of Law or the *Rechtsstaat* could therefore still fail discriminated individuals, if the larger amount of tasks does not cover the necessary components of a proper approach to discrimination.[8] The issue of these components does not only refer to the matter of (not) doing enough: the mere presence of specific components,

[3] Martin Krygier, "The Rule of Law: Pasts, Presents, and Two Possible Futures," *Annual Review of Law and Social Science* 12, no. 1 (2016): 200, 204; Barry Weingast and Gillian Hadfield, "Microfoundations of the Rule of Law," *Annual Review of Political Science* 17, no. 1 (2014): 22; Sanne Taekema, "Sleutelen aan de Rechtsstaatgedachte: Het Nut van Samenwerking tussen Rechtsfilosofie, Rechtssociologie en Rechtswetenschap," *Tijdschrift voor Consitutioneel Recht* 4, no. 4 (2013): 286–87.
[4] Introduction, section 4.
[5] Taekema, "Sleutelen aan de Rechtsstaatgedachte," 288.
[6] Maurice Adams, "De Temporele Dimensie van de Rechtsstaat: Beschouwingen naar Aanleiding van het Jaarverslag van de Raad van State," *Ars Aequi* 65, no. 10 (2016): 788.
[7] Erwin Dijkstra, "Addressing Problems Instead of Diagnoses: Reimagining Liberalism Regarding Disability and Public Health," *Netherlands Journal of Legal Philosophy* 50, no. 1 (2021): 27–28.
[8] Martin Krygier, "Rule of Law (and Rechtsstaat)," in *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, ed. James Silkenat, James Hickey, and Peter Barenboim (Cham: Springer, 2014), 56.

like a group-based approach, can in itself present a failure in this respect.

Whether a liberal state adheres to a thick or a thin conception of the Rule of Law or the *Rechtsstaat* respectively, does not tell us much about the way in which their approach to the protection against discrimination relates to the liberal concerns with the individual and power. This relation depends less on the amount of tasks and more on the local ideas on the precise role and limitations of the state. These ideas are, by and large, contingent upon the interpretation of the demands of the values which hold up the pediment of the modern human rights discourse: liberty, equality, and dignity.[9] The former two values in particular are commonly perceived as important in this regard.[10] There is a tendency within most liberal states to try and find an equilibrium between negative and positive liberty, and between formal and substantive equality.[11] These balancing acts chiefly account for the divergence between the Rule of Law and the *Rechtsstaat*-traditions in the modern era and their disparate approaches to discrimination.

Even in the absence of an ironclad rule, we can observe that most liberal states that adhere to the Rule of Law tilt towards a thin conception of state tasks, whereas many states in continental Europe, which place themselves firmly within the *Rechtsstaat*-tradition, coalesce towards a more thick conception – an attitude that we might also describe as social liberalism.[12] More important with regard to fundamental rights in general, and discrimination in particular, are the nominally different views on the role

[9] Martha Fineman, "Contract and Care," *Chicago-Kent Law Review* 76, no. 3 (2001): 1403, 1412; Caroline Raat, "Stories and Ideals," in *The Importance of Ideals: Debating Their Relevance in Law, Morality, and Politics*, ed. Wibren van der Burg and Sanne Taekema (Brussels: P.I.E.-Peter Lang, 2004), 102–3.

[10] Joan Tronto, *Caring Democracy: Markets, Equality, and Justice* (New York: New York University Press, 2013), 88; Sarah Stephens, "Freedom from Religion: A Vulnerability Theory Approach to Restricting Conscience Exemptions in Reproductive Healthcare," *Yale Journal of Law and Feminism* 29, no. 1 (2018): 103.

[11] Martha Fineman, "The Vulnerable Subject and the Responsive State," *Emory Law Review* 60, no. 2 (2010): 257–58, 265–66.

[12] Paul Tiedemann, "The Rechtsstaat-Principle in Germany: The Development from the Beginning Until Now," in *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, ed. James Silkenat, James Hickey, and Peter Barenboim (Cham: Springer, 2014), 188–89; Dijkstra, "Addressing Problems Instead of Diagnoses," 28. Social liberalism has its roots in New Liberal ideas and the adjacent movement in the period between 1880-1914, see: Chapter II, section 13, note 102; Fawcett, *Liberalism*, 186.

of the state within these divergent adaptations. Within the Rule of Law-tradition the emphasis of state responsibility pertains to the existence of liberal institutions as such.[13] This course of action privileges negative liberty – that is, freedom from state interference – and prioritizes formal equality – which means that citizens can expect similar treatment from the state, including institutional support, with limited regard for the actual improvement of their situation.[14] Such a categorical emphasis on the mere existence of institutions conceivably leaves a blind spot towards the aspiration to the full enjoyment of fundamental rights by all individual citizens in their day-to-day life.[15] Liberal states within the *Rechtsstaat*-tradition, on the other hand, often assume state interference necessary in order to guarantee the prerequisites of liberalism. They employ a more positive interpretation of liberty and, consequently, strive towards a more substantive idea of equality.[16] Citizens who lack full enjoyment of their fundamental rights can therefore expect institutional support beyond the mere existence of liberal institutions and procedures. Having said this, and continuing the earlier stated misgivings, I arrive at the question how both implementations of liberalism – states adhering to a thin conception of the Rule of Law, as well as the apparently better positioned states within the social liberal corner of the *Rechtsstaat*-tradition – are, for the most part, inclined to resort to some sort of group-based approach when opposing discrimination in the relationship between citizens. This inclination seems to stem from certain similarities in the anatomy of their approaches to the protection against discrimination: they can be said to share a central feature.

A FLAWED ANATOMY

What is this feature that is shared between liberal states in the Rule of Law and *Rechtsstaat*-traditions, and that contributes to their tendency to employ

[13] Krygier, "The Rule of Law," 214.
[14] Judith Shklar, "Positive Liberty, Negative Liberty in the United States," in *Redeeming American Political Thought*, ed. Stanley Hoffmann and Dennis Thompson (Chicago: University of Chicago Press, 1998), 123–24.
[15] Dijkstra, "Addressing Problems Instead of Diagnoses," 28.
[16] Krygier, "Rule of Law (and Rechtsstaat)," 50.

group-based approaches with regard to the protection against discrimination? What this feature is not, is perhaps as important as what it is. This feature does not connote the general prohibition of discrimination, which is present in most liberal states, even if it was only through their international obligations. Instead, this feature relates to the design of those practical measures to which citizens can turn when they face discrimination.[17] In other words: discrimination law.[18] Because, in their balancing act between the two main interpretations of liberty – negative or positive – and equality – formal or substantive – both of the previously elaborated practical implementations of liberalism tend to limit the support that is available through discrimination laws to certain delineated groups.[19] The degree to which one is protected by the state and other societal institutions against discrimination therefore depends on the anatomy of the local discrimination laws and the groups they encompass, instead of a fundamental and transparent deliberation on the duties and boundaries liberal states have to observe with regard to the protection against discrimination in general.

If we survey the Netherlands as an example: discrimination has been prohibited on any and all grounds in article 1 of the Dutch Constitution (*Grondwet*), even though some grounds are suggested.[20] The Constitution plays a limited role in the opposition to discrimination, though, due to two reasons. In the first place, according to the *travaux préparatoires*, this article 1 leaves the actually protected personal grounds to the scrutiny of social reality ("*de maatschappelijke werkelijkheid*"), except for those that are explicitly mentioned.[21] In the second place, the Dutch judiciary has to

[17] Martha Fineman, "Beyond Identities: The Limits of an Antidiscrimination Approach to Equality," *Boston University Law Review* 92, no. 6 (2012): 1731–33.
[18] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015), 1–2.
[19] Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge: Harvard University Press, 2006), 156–60; Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 2002), 94; Jonathan Wolff, "Fairness, Respect and the Egalitarian Ethos," *Philosophy and Public Affairs* 27, no. 2 (1998): 112; Fineman, "Beyond Identities," 1731, 1735.
[20] Rikki Holtmaat, *Grenzen aan Gelijkheid* (The Hague: Boom Juridische Uitgevers, 2004), 5.
[21] *Parliamentary Documentation House of Representatives* 1981/1982, 16 905-16 938, no. 5, 16; Jurgen de Poorter and Marjolein van Roosmalen, *Rol en Betekenis van de Grondwet: Constitutionele Toetsing in Relatie tot de Raad van State* (The Hague: Raad van State, 2010),

comply with article 120 of that same Constitution. This provision prohibits judicial review of existing laws, including those which pertain to discrimination and that often do limit support to certain, delineated groups.[22]

Whether one is protected against discrimination in one's relationship with other citizens, thus depends largely on the anatomy of the applicable discrimination laws. The anatomy of these laws is not arbitrary. Such statutes do exhibit their own internal logic. And it is because of this logic that the anatomy of many discrimination laws in liberal states displays the earlier described tendency to skew towards the protection of merely certain delineated groups. The logic behind the anatomy of these discrimination laws, can be summarized with three characteristics: a. an anti-discrimination angle; b. the notion of desert; and c. an artificial border between the public and the private sphere. These characteristics are, by and large, as relevant for liberal states that adhere to the Rule of Law as they are for those within the *Rechtsstaat*-tradition, and they can be related to almost any instance of state action or neglect within these countries.[23] As such, these characteristics – which I primarily derive from the works of political philosophers Martha Fineman and Jonathan Wolff – can also be said to inform the extent of state tasks beyond opposing discrimination, like an adequate system of public health.[24] I will now explain these characteristics.

Let's begin with the anti-discrimination angle and its relevance for discrimination laws. This characteristic is an offshoot of the generally accepted notion that, in a liberal society, equality first and foremost concerns formal equality.[25] Consequently, most contemporary liberal states – even those with a more social liberal attitude – typically delineate a number of

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[22] Marloes van Noorloos, *Hate Speech Revisited: A Comparative and Historical Perspective on Hate Speech Law in the Netherlands and England & Wales* (Cambridge: Intersentia, 2011), 196; August Belinfante and Joost Reede, *Beginselen van het Nederlandse Staatsrecht,* ed. Laurens Dragstra et al. (Deventer: Kluwer, 2012), 209–12.

[23] Dijkstra, "Addressing Problems Instead of Diagnoses," 29.

[24] Ibid.

[25] Martha Fineman, "Equality, Autonomy, and the Vulnerable Subject in Law and Politics," in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, ed. Martha Fineman and Anna Grear (Farnham: Ashgate Publishing, 2013), 14–16; Erwin Chemerinsky, "In Defence of Equality: A Reply to Professor Westen," *Michigan Law Review* 81, no. 3 (1983): 575, 578.

disadvantaged demographics whose members are supposed to lack this kind of equality and are entitled to state action in this regard.[26] Within both the thick and the thin conception of state tasks, this leads to the selection of certain groups, who are supposed to be in an unequal position due to discrimination. These are, as an exception, eligible for a measure of institutional support. This situation has severe consequences for the citizens who experience discrimination but are not categorized as belonging to one of the delineated protected groups in the appropriate laws, which would entitle them to the available forms of protection.[27] Such is true, even if we note that the lists with protected categories can be expanded if need be. Because, whether one enjoys the right to be protected against discrimination would still be dependent on the political, cultural, and social context.[28]

Intertwined with the anti-discrimination angle is the notion of desert. In general, not only does one have to qualify for societal assistance, but (the continuation of) such support, increasingly, has to be earned.[29] Within the context of discrimination law, this idea of desert has two aspects. It (partly) determines a. the groups which are selected for protection through discrimination laws; and b. when and if such safeguards against discrimination are enforced.[30] The first aspect aligns with the aforementioned political, cultural, and social context of the protection against discrimination. It is the subject of this work and thus treated in the coming chapters. There I will show how specific notions of desert have played an influential role relating to the architecture of the Dutch group-based approaches to discrimination that involve hate speech, affirmative action, and institutional opinions. The second aspect primarily concerns discriminatory state action, which is beyond the scope of this work. To summarize, this aspect denotes situations wherein discriminatory practices by societal institutions are – for a shorter or longer period of time, partly or entirely – condoned, excused, or ignored within a liberal state if the group

[26] Fineman, "The Vulnerable Subject and the Responsive State," 252.
[27] Martha Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law and Feminism* 20, no. 1 (2008): 3–4.
[28] Fineman, "Beyond Identities," 1731, 1734.
[29] Tronto, *Caring Democracy*, 86–87, 99, 144; Kymlicka, *Contemporary Political Philosophy*, 94–95; Wolff, "Fairness, Respect and the Egalitarian Ethos," 112, 121.
[30] Fineman, "The Vulnerable Subject," 3–4.

in question is assumed by institutional actors throughout this state to merit such treatment, or if such treatment is deemed necessary by those same actors to achieve some desirable policy goal.[31] These practices present a frightening throwback to the trajectory of human rights before 1948.

The third characteristic of the logic behind the prevailing approaches to state action in most liberal states, whether they adhere to the Rule of Law or the *Rechtsstaat*, is the separation between a public and a private sphere. Focused on the topic at hand, one does not merely have to qualify for institutional support through discrimination laws – and thus often belong to a group which is assumed to merit consideration – as well as deserve this protection, but these laws in addition do not cover all areas of life where discrimination can take place.[32] This is another consequence of the balancing act between the different interpretations of liberty and equality: the state is supposed to refrain from interference in a rather broadly defined private sphere. Much that can go wrong in the relationship between citizens, including a lot of discrimination, is consequently subtracted from the responsibility of the state and other societal institutions.[33]

A TELEOLOGICAL ALTERNATIVE

The hitherto introduced balancing act between negative and positive lib-

[31] Aranka Kellermann, "Begrippen en Definities," in *Met Recht Discriminatie Bestrijden*, ed. Carolina de Fey, Aranka Kellermann, and Jacky Nieuwboer (The Hague: Boom Juridische uitgevers, 2004), 28; Jacky Nieuwboer and Carolina de Fey, "Strafrecht," in *Met Recht Discriminatie Bestrijden*, ed. Carolina de Fey, Aranka Kellermann, and Jacky Nieuwboer (The Hague: Boom Juridische uitgevers, 2004), 92–93; Marc Hertogh, "The Living Rechtsstaat: A Bottom-Up Approach to Legal Ideals and Social Reality," in *The Importance of Ideals: Debating Their Relevance in Law, Morality, and Politics*, ed. Wibren van der Burg and Sanne Taekema (Brussels: P.I.E.-Peter Lang, 2004), 79–81; Kymlicka, *Contemporary Political Philosophy*, 328; Jonathan Wolff, "Fairness, Respect and the Egalitarian 'Ethos' Revisited," *The Journal of Ethics* 14, no. 3/4 (2010): 347–49.

[32] Fineman, "The Vulnerable Subject and the Responsive State," 263, 265–66; Martha Fineman, "Vulnerability and Inevitable Inequality," *Oslo Law Review* 4, no. 3 (2017): 144–45.

[33] Fineman, "The Vulnerable Subject," 3–4; Martha Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: The New Press, 2005), 59, 208, 223–25. This is not inevitable, as early liberals did address injustice(s) in the private sphere, and there are contemporary proposals with that same aim, see: Brian Barry, *Culture & Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Harvard University Press, 2001), 130.

erty, and formal and substantive equality – as well as the subsequent anatomy of the prevalent liberal approaches to discrimination – is emphatically not without its reasons. This prudency aims to curtail the power of the state and other societal institutions.[34] Because the state is, as I will explore further below, a dangerous entity, even in the pursuit of lofty goals like the opposition to discrimination. To confine its tasks to certain groups, corroborated by superficially valid reasons like desert, and to limit the intrusions of the state and other societal institutions beyond the strictly public sphere can therefore, at first glance, appear understandable to the liberal mind. However, when the most influential discussions of the implementation of liberalism are about the amount of state tasks – on the spectrum of a thick to a thin conception of state action – the selection of the groups and the areas of life for whom and where discrimination is or is not opposed, can quickly begin to appear arbitrary. And with arbitrariness comes the danger of privileges and disadvantages; a danger that the liberal movement and the modern human rights discourse aimed to avoid. Because without a sufficient theoretical substantiation it is impossible to explain why, for example, the Dutch hate speech ban and Equal Treatment Act (*Algemene Wet Gelijke Behandeling*) should only pertain to a few delineated personal characteristics and – in the latter case – a few specific relations, and not others.[35] A more fundamental discussion beyond the anatomy of the currently prevalent liberal approaches to discrimination is needed.

Can we find a more fruitful path for liberal states to determine and fulfill their human rights obligations with regard to the opposition to discrimination, which transcends the disadvantages of the currently prevailing approaches? Martin Krygier proposes the teleological approach as an important complement to the contemporary anatomical orthodoxy in most liberal states.[36] In the vein of social liberalism, and following the insights of Phillip Selznick, we could thus relate the state task to oppose discrimination to certain goals. These goals would in turn determine the

[34] Fawcett, *Liberalism*, 322.
[35] Erwin Dijkstra, "Het Versmade Strafrecht? Een Breder Perspectief op het Toevoegen van Geslachtskenmerken, Genderidentiteit en Genderexpressie aan de AWGB," *Nederlands Juristenblad* 94, no. 17 (2019): 1243.
[36] Krygier, "Rule of Law (and Rechtsstaat)," 55–56.

extent and boundaries of this responsibility.[37] The practical implementation of human rights obligations in general, and those pertaining to discrimination in particular, is therefore best served with an actionable government – and thus some form of the previously elaborated thick conception – but it is also important to adjust the results to a proper goal or *telos*.[38]

If we aim to explore this alternative path, we are in need of a paradigm shift. From the inclination towards a group-based approach, that stems from the three characteristics of the logic behind the anatomy of the prevalent liberal approaches to state action, to an idea that can substantiate an approach which appreciates the concerns with the individual and power that produced humanism, the liberal movement, and the modern human rights discourse. The paradigm of vulnerability theory intends to do justice to all human suffering, including discrimination, and eschews privileges and other (soft) group rights, as well as the corresponding disadvantages. As such, it can perhaps prove a suitable candidate for the goal on which I can construct a branch of liberalism that is able to evaluate the legitimacy of the Dutch group-based approaches to the protection against discrimination. Better yet, it might even suggest a tentative alternative for these approaches while remedying the dilemmas that accompany them.

17.
Vulnerability as a *Telos*

As the three characteristics of the logic behind the anatomy of the prevalent liberal approaches to state action – including opposing discrimination in the relationship between citizens – tend to skew towards some form of a group-based approach, they fall short of the central liberal concerns as I set them forth above. Thus, I resolved to find a teleological alternative for the current liberal legal architecture. This alternative can provide the framework with which I evaluate the three selected

[37] Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley: University of California Press, 1992), 174; Philip Selznick, "Legal Cultures and the Rule of Law," in *The Rule of Law after Communism*, ed. Martin Krygier and Adam Czarnota (Aldershot: Ashgate, 1999), 26.
[38] Dijkstra, "Addressing Problems Instead of Diagnoses," 31.

incarnations of group-based approaches to opposing discrimination in the Netherlands in the latter half of this work. In the foregoing, I argued the need for such an alternative. But from this argument it does not need to follow that vulnerability theory can deliver the coveted foundation for a more suitable interpretation of liberalism. As such, I need to substantiate my suggestion: why can vulnerability theory as a *telos* do justice to the liberal concerns with the individual and power, where the currently common liberal approaches, through their flawed anatomy, are inclined towards group-based approaches? This is the central question that I will answer in this section, before moving on to a liberalism of fear proper.

VULNERABILITY THEORY

The central proposition of vulnerability theory holds that vulnerability is an integral part of the human condition.[39] We are, after all, fragile beings living finite lives.[40] The consequences of this vulnerability in each of our lives, though, depend on our bodily and psychological situation, as well as on our social and institutional relationships.[41] The latter circumstances are the most relevant within the context of discrimination law. Especially social norms, depending on how they are incorporated in (in)formal societal structures and rules, account for much of the present disadvantages faced by those who can be said to belong to marginalized groups. As such, we are all vulnerable to discrimination, but the configuration of most Western societies and the adjacent social norms, at this moment in time, primarily marginalize people with certain personal characteristics, such as persons of color, the elderly, women, and persons who identify on the spectrum of LGBTI+.[42] Emphasis on negative liberty and formal equality, according

[39] Fineman, "The Vulnerable Subject," 8; Fineman, *The Autonomy Myth*, xvii; Morgan Cloud, "More than Utopia," in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, ed. Martha Fineman and Anna Grear (Farnham: Ashgate Publishing, 2013), 87.

[40] Fineman, "The Vulnerable Subject," 1, 8; Nussbaum, *Frontiers of Justice*, 160.

[41] Fineman, "The Vulnerable Subject and the Responsive State," 264, note 43, 268; Fineman, "Vulnerability and Inevitable Inequality," 143, 145; Fineman, "Beyond Identities," 1754.

[42] Frank Cooper, "Always Already Suspect: Revising Vulnerability Theory," *North Carolina Law Review* 93, no. 5 (2015): 1341; Martha Fineman, "Vulnerability, Resilience,

to vulnerability theorists, leaves the aforesaid relationships underexamined and therefore habitually reinforces the status quo. As a consequence, this emphasis leaves undisturbed, or may even engender, institutional arrangements and practices that privilege some and disadvantage others.[43]

One exponent of the latter arrangements are those measures that oppose discrimination on a group-basis, which protect some groups but not others.[44] Such measures are to be scrutinized, vulnerability theorists assert, as they often include those who do not need protection and exclude those who do.[45] Martha Fineman takes "affirmative action and other 'remedial' plans that propose unequal treatment in order to address existing inequalities" as examples of the latter dynamic.[46] Such measures, in her account, regularly give opportunities for advancement to (relatively) privileged persons within a protected group, while at the same time denying support to those whose marginalization transcends the "current framework of identity groups."[47] The abandonment of the plight of the latter persons means that many people, who are confronted with discrimination as a manifestation of our universally shared vulnerability, lack proper protection.[48] This dynamic can undermine the legitimacy of state action, as conferred by the individual and universal characterization of our fundamental rights since the inception of the modern human rights discourse. Public support for anti-discrimination measures also has the potential to erode, because the protection against discrimination itself becomes a contest and thus possibly subject to resentment.[49] It is therefore necessary, Fineman concludes from the preceding observations, to forego group-based approaches with regard to state tasks. Instead, we should thoroughly contemplate the extent to which the state and other societal institutions

and LGBT Youth," *Temple Political & Civil Rights Law Review* 23, no. 2 (2014): 313; Fineman, "Beyond Identities," 1754.

43 Fineman, "The Vulnerable Subject," 3.

44 Ibid., 4; Martha Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago: University of Chicago Press, 1994), 52.

45 Fineman, "The Vulnerable Subject," 4.

46 Martha Fineman, "Beyond Equality and Discrimination," *SMU Law Review Forum* 73, no. 1 (2020): 52, n. 2. The subject of affirmative action is taken up again in Chapter VI.

47 Fineman, "The Vulnerable Subject," 4, 18.

48 Ibid., 21–23.

49 Fineman, "The Vulnerable Subject and the Responsive State," 253.

have the responsibility to ameliorate actual manifestations of vulnerability in the daily lives of individual citizens, such as the confrontation with discrimination, and design our rules and regulations accordingly.[50] By highlighting the need to work from actual manifestations of vulnerability, instead of a delineated set of protected groups, the paradigm of vulnerability theory can be said to have the capacity to address the legal-theoretical dilemmas with the group-based approaches that are employed within many discrimination laws in liberal states, and which are the subject of this work.[51]

THE REMEDIES OF VULNERABILITY THEORY

Now that I have established the basics of vulnerability theory and its criticisms of the group-based approaches that are part and parcel of many of the discrimination laws within liberal states, I arrive at the query whether this theory can give us any guidance for establishing a branch of the liberal tree that is able to both oppose discrimination and forego group-based approaches. As they have given us a diagnosis, can vulnerability theorists deliver on the remedy? The aforementioned Martha Fineman offers what I would consider an appropriate *telos* to relate my interpretation of liberalism to. The vulnerability of the individual is, in her view, not only an expedient ground to criticize the group-element present in the anatomy of most liberal approaches to anti-discrimination measures, but it can also establish and inform the responsibilities of liberal states in these matters.[52] She postulates that, if we ask ourselves what the values of liberty, equality, and dignity demand, we inevitably arrive at the universally shared plight of almost eight billion vulnerable human beings.[53] It can therefore be productive to modify the prevalent liberal approach to state action in general, and to the opposition to discrimination in particular, with a turn towards addressing the necessities engendered by our inescapable vulnerability.

These necessities of vulnerability, Fineman asserts, concern in the

[50] Fineman, "The Vulnerable Subject," 2, 8–9, 12–15.
[51] Ibid., 1–2; Fineman, "The Vulnerable Subject and the Responsive State," 252.
[52] Ibid., 255–256.
[53] Ibid., 262, 275.

first place resilience.[54] This resilience can be created by providing everyone with the physical, human, and social resources necessary to cope with the actualized manifestations of our universally shared vulnerability in their lives.[55] Realizing the demands of vulnerability as a leading goal, would principally mean that the liberal balancing act between the prevalent notions of liberty and equality, ends with a central role for a more positive notion of liberty and a more substantive idea of equality than is now common within any contemporary liberal state.[56] This may sound familiar, but beware: vulnerability theory surpasses the juxtaposition of the thick and the thin conceptions of state action.[57] Because, the state does not only has to act more, in order to aid all individuals who are confronted with manifestations of our universally shared vulnerability, but it also has to act less, as the shortcut or blanket approach of group-based statutes is no longer available to her.[58] Furthermore, the state has to become a larger presence in what is now called the private sphere.[59] With regard to discrimination, the state thus should both do more – for those who experience discrimination, but did not receive proper support in the past – and less – as it can forego assistance for those persons within currently protected groups who are not confronted with the manifested vulnerability that is discrimination.

Proposals like those of Fineman and other vulnerability theorists present a drastic shift away from the anatomy of the current liberal approaches to state tasks. But they can, I would argue, do the liberal concerns with the individual and power justice, while more comprehensively combatting the societal ill known as discrimination. Because, the goal of com-

[54] Fineman, "Vulnerability and Inevitable Inequality," 147–149; Fineman, "The Vulnerable Subject and the Responsive State," 269.
[55] Peadar Kirby, *Vulnerability and Violence: The Impact of Globalization* (London: Pluto Press, 2006), 13, 55; Fineman, "The Vulnerable Subject," 14.
[56] Fineman, "The Vulnerable Subject and the Responsive State," 262, 275. For the connection with a liberalism of fear, further developed below, see: William Scheuerman, "Law and the Liberalism of Fear," in *Between Utopia and Realism: The Political Thought of Judith N. Shklar*, ed. Samantha Ashenden and Andreas Hess (Philadelphia: University of Pennsylvania Press, 2019), 59.
[57] Fineman, "Beyond Identities," 1759–60.
[58] Fineman, "The Vulnerable Subject and the Responsive State," 254, 257–61; Fineman, "Beyond Identities," 1750, 1759–60. This relates to Shklar's liberalism of fear, see: Scheuerman, "Law and the Liberalism of Fear," 55.
[59] Fineman, "The Vulnerable Subject and the Responsive State," 258–59.

monly shared resilience against manifestation of our vulnerability, makes it our collective responsibility to ameliorate the disadvantages that persist in our own day and age, as well as to prevent future marginalization.[60]

Overviewing the preceding analysis of vulnerability theory, I feel it is safe to suggest that we can extend the proposals to treat our universal vulnerability as a foundational concept in law and politics to fundamental rights, even if some vulnerability theorists appear skeptical towards such a rights-based approach.[61] My reimagining of liberalism, the endpoint of our search for a suitable branch of the liberal tree, would thus implore an interpretation of the existing human rights obligations which is anchored towards all those individuals who lack the full enjoyment of their rights through their exposure to manifestations of our universally shared vulnerability. The latter would naturally include discrimination, as will become evident below. This is not an entire novel approach: vulnerability reasoning – together with the notion of substantive equality, as advanced by vulnerability theorists – has proven to exert a growing influence and already instigated real change in the world of human rights. Instances of this impact can be discerned, among other places, in the jurisprudence of the ECtHR.[62] However attractive this paradigm is, though, basing an interpretation of liberalism on vulnerability theory comes with its own challenges. These challenges involve finding a solution for some of the compelling criticisms that have been levelled against this theory.

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[60] Fineman, "Beyond Identities," 1758–59.

[61] Martha Fineman and Anna Grear, "Introduction: Vulnerability as Heuristic - An Invitation to Future Exploration," in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, ed. Martha Fineman and Anna Grear (Farnham: Ashgate Publishing, 2013), 2; Fineman, "The Vulnerable Subject and the Responsive State," 255.

[62] Catherine MacKinnon, "Substantive Equality: A Perspective," *Minnesota Law Review* 96, no. 1 (2011): 1–27; Alexandra Timmer, "A Quiet Revolution: Vulnerability in the European Court of Human Rights," in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, ed. Martha Fineman and Anna Grear (Farnham: Ashgate Publishing, 2013), 147–48. Though the use of vulnerability reasoning by the ECtHR arguably differs from the one employed in this work. The court appears to "[understand] vulnerability as a rather binary characteristic of specific individuals and groups" and this might impact the rights protection of those not considered vulnerable, see: Corina Heri, "Shaping Coercive Obligations through Vulnerability: The Example of the ECtHR," in *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR*, ed. Laurens Lavrysen and Natasa Mavronicola (London: Bloomsbury, 2020), 96.

CRITICISMS OF VULNERABILITY THEORY

Vulnerability theorists have throughout the years met with powerful objections. Perhaps the most important general critique of vulnerability theory is the allegation that proponents provide few tangible guidelines for its implementation.[63] And even when vulnerability theorists offer a practical guide, critics assert, they often fall back on the same aspects of the liberal approaches they themselves tend to criticize, such as delineating groups which are entitled to extra scrutiny.[64] Worse still, such guidelines tend to be paternalistic; they foster dependence on the state and erode the autonomy of the individual.[65] These observations show that vulnerability theorists can unwittingly align themselves with exactly those tendencies within contemporary liberal states that they seek to remedy. As I proceed to my own reimagining of liberalism, which envisions vulnerability theory as its starting point, I have to come to terms with these challenges.

18.
(In)justice and a Liberalism of Fear

In the foregoing, I sketched the central tenets of liberalism, the double foundation of the modern human rights discourse, and the problems that the three aspects of human rights overreach presented. We can now see how the anatomy of the prevalent approaches to discrimination in most liberal states reflects these problems. The result is that, in the practice of discrimination law, it is often only the discrimination plight of some groups that is addressed, and haphazardly at that. As the remedy for this flawed anatomy, I proposed a teleological approach, which would take the

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[63] Nina Kohn, "Vulnerability Theory and the Role of Government," *Yale Journal of Law and Feminism* 26, no. 1 (2014): 11.
[64] Ibid., 12.
[65] Sean Coyle, "Vulnerability and the Liberal Order," in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, ed. Martha Fineman and Anna Grear (Farnham: Ashgate Publishing, 2013), 61–75; Cloud, "More than Utopia," 91–93; Beverley Clough, "Disability and Vulnerability: Challenging the Capacity/Incapacity Binary," *Social Policy & Society* 16, no. 3 (2017): 469, 474–75.

common possession of resilience against our universally shared vulnerability as the appropriate *telos*. With this proposed approach, called a liberalism of fear, I want to establish a branch of the liberal tree that is founded on the premises of vulnerability theory but without its drawbacks. This branch constitutes my attempt to reimagine a liberalism which furthers the promise of the modern human rights discourse towards all individuals.

Through the information conveyed in the current section, I aim to lay the basis for my in-depth explanation of a liberalism of fear in the next two sections. There I will also discuss its relevance for opposing discrimination and addressing the three aspects of human rights overreach. In the coming pages, I initially aim to introduce the premises that would sustain a liberalism of fear. Following the elaboration of these premises, I establish the advantages of a liberalism of fear, relative to more well-known theories of justice in the liberal tradition. Closing out this section, I shall dwell for a bit on the awkward position of the state within a liberalism of fear. Before any of this can commence, though, I will first briefly and succinctly set forth the core ideas of a liberalism of fear. This course of action may look redundant with respect to the next two sections. But I figured that with these core ideas in mind the reader would be able to easier follow the more comprehensive and rather technical account that follows later on.

THE CORE IDEAS OF A LIBERALISM OF FEAR

A liberalism of fear mainly draws from three texts written by political philosopher Judith Shklar: her 1990 book *The Faces of Injustice* and her 1989 essays "The Liberalism of Fear" and "Positive Liberty, Negative Liberty in the United States."[66] A liberalism of fear deviates from Shklar's thinking

[66] Judith Shklar, "The Liberalism of Fear," in *Liberalism and the Moral Life*, ed. Nancy Rosenblum (Cambridge: Harvard University Press, 1989), 21–38; Judith Shklar, *The Faces of Injustice* (New Haven: Yale University Press, 1990); Shklar, "Positive Liberty, Negative Liberty in the United States." The latter essay was written in 1989 and originally published in French in 1990: Judith Shklar, "Liberté Positive, Liberté Négative en Amérique," in *Les Usages de La Liberté (Rencontres Internationales de Genève: Tome XXXII)*, ed. Georges Cottier and Jean Starobinski (Neuchâtel: Les Éditions de la Baconnière, 1990), 107–25. Shklar's liberalism of fear and my own interpretation are not to be confused with the similarly titled theory of Edmund Cahn, see: Jerome Shestack, "The Philosophic Foundations of Human Rights," *Human Rights Quarterly* 20,

in some major ways, though, as I take vulnerability theory as my starting point and tailor Shklar's ideas concerning liberalism to the subject of this work; the legitimacy of group-based approaches to the protection against discrimination in light of the central tenets of liberalism and the modern human rights discourse. In the following, I will therefore chiefly present my interpretation of her ideas, which I have modestly titled *a* liberalism of fear, as it is only one of the many possible applications of Shklar's work.[67]

With a liberalism of fear I aim to present a *minimalist conception*. In other words, I intend to offer a conception of liberalism that establishes the minimum extent of the duties of liberal states, as well as the indispensable boundaries such states have to observe at all times – even when they pursue lofty goals. Within a liberalism of fear, the responsibilities and the limitations of the state concern the individual and the ills that can befall them – or differently put: manifestations of their vulnerability – with the aim of preventing any person to live a life that could be called undignified. The central concept to secure these ambitions is access: every individual should have access to resilience, facilitated by the state and other societal institutions. This resilience will also lessen one's dependency on groups and other associations. Such support is envisioned to be a possibility and not an imposition. As it concerns the ills that can befall a person and merely envisions access to support in those cases, a liberalism of fear thus constitutes a very basic extent of the right. This leaves plenty of room for an expansion of state tasks, if this is politically viable and within the necessary borders of legitimate state action. Through a liberalism of fear, liberal states would therefore have some guidelines while they try to find their way within their human rights obligations. Even if they do not or cannot warrant all fundamental rights equally, there would still be a resolute foundation of rights protection – be it through state action or state confinement – which pertains to any and all individuals. The protection against discrimination within the relationship between citizens would undoubtedly be part of the minimum extent of the responsibilities of liberal states,

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no. 2 (1998): 224–25.

[67] Samuel Moyn, "Before — and Beyond — the Liberalism of Fear," in *Between Utopia and Realism: The Political Thought of Judith N. Shklar*, ed. Samantha Ashenden and Andreas Hess (Philadelphia: University of Pennsylvania Press, 2019), 24–46.

as this is *par excellence* a manifested vulnerability which requires state-facilitated resilience. As I have sketched the inspirations and core ideas of a liberalism of fear, I now move on to the premises that sustain these ideas.

THE PREMISES OF A LIBERALISM OF FEAR

A liberalism of fear extends from the age-old liberal concerns with power, which were the subject of the first two chapters of this work, remembering the horrors power imbalances have wrought.[68] As such, its objective is to minimize the influence of the worst everyday torments people – through public or private means – can concoct for their fellow human beings. This objective connects the observations of the early humanist and liberal thinkers with the central proposition of vulnerability theory: the human condition is vulnerable and it is this vulnerability that is the first and primary concern of the institutions that we have designed as a society, including the state.[69] In this regard, a liberalism of fear is a move back to basics. It mainly cares about what philosopher Karl Jaspers calls the frontiers of life: life, death, and the cold jaws of fate.[70] With a liberalism of fear, the detriments to an individual's life plan take center stage. It is not about the acts an individual can conduct, but the ills that can befall them. About needs instead of desires.[71] About power and the trials and tribulations of those who lack power in their interactions with those who exert it.[72]

With this focal point, the necessary public attention for the most insidious modern tragedies that human beings have devised for each other, comes naturally.[73] These tragedies would include xenophobia, homo- and

[68] Shklar, "The Liberalism of Fear," 27; Katrina Forrester, *In the Shadow of Justice: Postwar Liberalism and the Remaking of Political Philosophy* (Princeton: Princeton University Press, 2019), 264.
[69] Fineman, "Beyond Identities," 1769.
[70] Karl Jaspers, *Inleiding in de Filosofie*, trans. Mark Wildschut (Nijmegen: VanTilt, 2013), 17.
[71] David Beetham, "What Future for Economic and Social Rights?," *Political Studies* 43, no. 1 (1995): 54.
[72] Shklar, "The Liberalism of Fear," 27; Scheuerman, "Law and the Liberalism of Fear," 47; Peter Jones, "Human Rights, Group Rights, and Peoples' Rights," *Human Rights Quarterly* 21, no. 1 (1999): 82.
[73] Cooper, "Always Already Suspect," 1346–1347.

transphobia, racism, ableism, ageism, sexism, and all other forms of discrimination. Furthermore, by maintaining a strict focus on the individual and their vulnerability, a liberalism of fear is able to address those ills that remain unaddressed within the current group-based approaches; now and in the future. Because, as said above, nobody can predict tomorrow's pariahs and thus make an exhaustive list of those groups that the law should protect. One has only to be reminded of the Khmer Rouge which, alongside national and ethnic minorities, targeted city dwellers and persons who wore glasses or were otherwise assumed to be intellectuals, as enemies of the regime.[74] A liberalism of fear acknowledges that there is no real difference between an active and an inactive state with regard to its core tasks: inaction just means responsibility for continuing injustice.[75] Injustices like some persons lacking full enjoyment of their fundamental rights because of unaddressed discrimination by their fellow citizens. This emphasis on injustice might ground a practical implementation of vulnerability theory, while surpassing the obstacles presented by the currently prevalent liberal approaches to state action – as summarized with the anti-discrimination angle, the notion of desert, and the strict distinction between a public and a private sphere – as well as the drawbacks of vulnerability theory itself.

JUSTICE

And here we arrive at the phrase which I intentionally and temporarily left at the sidelines in section 12 of Chapter II: justice. I need to discuss justice if I intend to argue that injustice should be the focus of our branch of the liberal tree instead of its more popular cousin. Because it is, at least in part, the general understanding of justice that led to the flawed anatomy of the currently prevalent approaches to opposing discrimination within liberal states – the approaches wherein states do too little to address this kind of marginalization, while also overstepping their arguable limitations. To substantiate this thesis and convincingly position injustice as the basis of a liberalism of fear, I shall briefly indicate why justice, in its presently most

[74] Robert Sternberg and Karin Sternberg, *The Nature of Hate* (New York: Cambridge University Press, 2008), 181–82, 186–87.
[75] Fineman, "Beyond Identities," 1759–1760; Shklar, *The Faces of Injustice*, 3, 56, 74.

influential interpretations, does not readily allow for an adequate response to discrimination and why it does allow for group-based approaches.

As a phrase, justice has a long and storied history. It has instigated progress as well as legitimized oppression.[76] In the contemporary era, roughly since the advent of the modern human rights discourse, the word 'justice' has retained both its importance and its multitude of understandings. Perhaps most famously, justice in its currently prevailing sense has been described by political philosopher John Rawls as "the first virtue of social institutions."[77] However, as Alasdair Macintyre pointedly observes in the introduction to his 1989 book *Whose Justice? What Rationality?*, there are many "rival justices" and the contents of these depend on a host of other matters, such as one's views on rationality.[78] As a consequence, the phrase justice is often interpretated differently in a moral than in a legal or political context, and within these contexts various movements and theorists offer disparate definitions – especially with regard to human rights.[79]

The most important idea of justice for this work is the one which Shklar calls "the normal model" and that predominantly governs the legal-political context of most liberal states. This model concerns distributive justice.[80] The previously discussed common liberal approaches to state action in general, and discrimination in particular, are arguably heavily indebted to the procedural variant of this model of distributive justice.[81] In

[76] A more extensive introduction to justice can be found in the following works: John Rawls, *A Theory of Justice* (Cambridge: Belknap Press of Harvard University Press, 1971); John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005); Elizabeth Anderson, "What Is the Point of Equality?," *Ethics* 109, no. 2 (1999): 287–337; Hans Kelsen, "What Is Justice," in *What Is Justice? Justice, Law, and Politics in the Mirror of Science*, ed. Hans Kelsen (Berkeley: University of California Press, 1971), 1–24; Wolff, "Fairness, Respect and the Egalitarian Ethos"; Dworkin, *Justice for Hedgehogs*.

[77] Rawls, *A Theory of Justice*, 3.

[78] Alasdair Macintyre, *Whose Justice? Which Rationality?* (Notre Dame: University of Notre Dame Press, 1989), 1–4.

[79] Marlies Galenkamp, *Individualism versus Collectivism: The Concept of Collective Rights* (Rotterdam: RFS, 1993), 65–66, 72. The most influential proposals for the right interpretation of justice are discussed in: Kymlicka, *Contemporary Political Philosophy*.

[80] Shklar, *The Faces of Injustice*, 17. See also: Alasdair Macintyre, *After Virtue* (London: Bloomsbury, 2011), 137–39.

[81] Brian Barry, *Why Social Justice Matters* (Malden: Polity Press, 2005), 22–26; Kasper Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (Oxford: Oxford University Press, 2014), 70, 194.

short, this model is primarily concerned with the rules that distribute the statuses and entitlements of the members of a political body. The question whether a society is just, thus shifts to the query whether its rules and the distribution they engender are just.[82] But when are rules just, one might ask? The justness of rules would, within 'the normal model', be determined by the procedure through which these rules are adopted.[83] It is with regard to this notion that I called this influential conception of the model of distributive justice the procedural variant. Within this context, the thought experiment of the social contract is considered the foremost candidate for a supposedly just foundation of society and for the subsequent procedures to adopt its rules, both the most basic precepts and the more superfluous.[84]

The social contract originated as a way to legitimize societal structures, and establish authority and obligations, without resorting to the supernatural.[85] The interpretation of this thought experiment by the aforementioned Rawls is viewed as the chief influence on 'the normal model' of justice.[86] His ideas are assumed by many scholars to have played a large role in liberal states or to be, in any case, a reflection of the leading trends since the second half of the 20th century.[87] It is, according to Rawls, rational as well as beneficial for most persons who can be expected to be productive for the major part of their lives to cooperate through a social contract.[88] Because, this method would make the resulting society both

[82] John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge: Belknap Press of Harvard University Press, 2001), 10, 26; Rawls, *A Theory of Justice*, 4–17, 83–95.
[83] Ibid., 120, 126–27; Nussbaum, *Frontiers of Justice*, 53.
[84] Sheldon Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* (Princeton: Princeton University Press, 2016), 536; Gien Newey, *The Routledge Guidebook to Hobbes' Leviathan* (New York: Routledge, 2014), 143–44, 337. To what extent more superfluous rules should be governed by the procedures engendered through the social contract varies by theorist. For a critical view on the social contract as the foundation of modern societies, see: Larry Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (Cambridge: Belknap Press of Harvard University Press, 2014), 352–256.
[85] Newey, *The Routledge Guidebook to Hobbes' Leviathan*, 143–44, 337.
[86] Fawcett, *Liberalism*, 334–45; Wolin, *Politics and Vision*, 495.
[87] Wibren Van der Burg and Roland Pierik, "John Rawls: De Filosoof van de Liberaal-Democratische Verzorgingsstaat," *Nederlands Juristenblad* 88, no. 18 (2003): 918; Simon Blackburn, *Ethics: A Very Short Introduction* (Oxford: Oxford University Press, 2001), 109–10.
[88] Rawls, *Political Liberalism*, 21; Rawls, *A Theory of Justice*, 11–12, 126–27; Macintyre, *Whose Justice? Which Rationality?*, 337–338.

acceptable and fair to them.[89] Such benefits can be expected, Rawls insists, for the reason that his interpretation of this thought experiment guarantees the necessary degree of justice.[90] To achieve this degree of justice and make such a cooperation palpable to its participants, the basic structure of the society that is fashioned through the social contract, Rawls continues, has to be created from a hypothetical original position. From this position, wherein most personal attributes of the persons involved would be ignored for the occasion, we can chose the principles of justice which are to govern the basic structure of society and – in turn – its subsequent rules.[91] If people continue to choose rationally throughout their negotiations in the original position, Rawls asserts, then this procedure would yield two specific basic principles.[92] The first principle holds that everyone has an equal claim to a suitable roster of basic rights and liberties.[93] The second principle establishes that social and economic inequalities are only permissible if they benefit society as a whole and specifically those that are the least well-off, as well as if the better-situated positions are attainable for all. The first principle has priority over the second.[94] Because, in Rawls' view, curtailing freedoms to address inequality could seldom benefit the resulting society as a whole and would therefore not be agreed upon in the original position.[95] Rawls holds that these principles of justice allow us, to a certain extent, to obtain a fair basic structure for our society and proper adjacent procedures for the remaining necessary rules. Indeed, to a certain extent. Because perfect procedural justice is rare if not impossible. Even the most carefully designed procedures will not invariably distribute statuses and entitlements fairly. Procedural justice will mostly be imperfect. A just result following the procedure is likely, but not guaranteed. Such

[89] Rawls, *A Theory of Justice*, 120.
[90] Ibid., 100–108.
[91] Ibid., 11–22.
[92] Ibid., 60.
[93] Rawls, *Political Liberalism*, 5–6. At least one kind of rights is excluded from the full protection of the first principle. Property rights can be abridged on account of the second principle, see: Thomas Nagel, "Rawls and Liberalism," in *The Cambridge Companion to Rawls*, ed. Samuel Freedman (Cambridge: Cambridge University Press, 2003), 67.
[94] Rawls, *A Theory of Justice*, 43.
[95] Ibid., 62–65.

are the bare bones of the Rawlsian variant of 'the normal model' of justice.

With the preceding sections in mind, it is easy to gauge why the authoritative Rawlsian interpretation of 'the normal model' has contributed to the anatomy of the currently prevalent liberal approaches to state action in general and discrimination in particular. The precedence of the first principle of justice may remind us of the game of musical chairs played by different interpretations of liberty and equality within the liberal approach. More tangibly and more importantly, Rawls' theory of justice skews towards thinking in group-based entitlements and exclusions.[96] According to this account, it is not rational to cooperate with those who are not productive. As a result, the basic structure of society, the principles of justice, and the procedures to adopt further rules, are designed without their interests in mind.[97] Furthermore, the second of his aforementioned principles depends on an – admittedly imperfect – calculus of the group that is worst off in society.[98] As such, the assumptions and principles that can be derived from Rawls' theory of justice, which could be considered the most influential theory relating to 'the normal model' of justice, already seem to favor group-based considerations and ditto rules.[99] Lastly, the adjacent focus on the distribution of statuses and entitlements has generally had the effect that policy discussions are now dominated by the question whether the government should retreat or facilitate the individual – the choice between a thick or a thin conception of state tasks – instead of the issue of *what* each of us can expect the government to do on our behalf, at least at a minimum, in matters that concern Jaspers' frontiers of life.[100] Thus, the thought experiments and procedures, envisioned by Rawls and his ilk, which should guarantee the (imperfect) justness of rules, have evidently the capacity to fail the most pressing rights plights of some of us.[101]

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[96] Nussbaum, *Frontiers of Justice*, 22–23.
[97] Ibid., 111; Rawls, *A Theory of Justice*, 183; Rawls, *Political Liberalism*, 21.
[98] Rawls, *A Theory of Justice*, 60, 92.
[99] Erwin Dijkstra, "Wanneer Je Leven Bepaald Wordt door de Wet: Over Handicap, Regelgeving en Identiteit," *Handicap & Recht* 5, no. 2 (2020): 41–42.
[100] Jan-Werner Müller, *Furcht und Freiheit: Für einen Anderen Liberalismus* (Berlin: Suhrkamp Verlag, 2019), 18–19; Shklar, *The Faces of Injustice*, 118.
[101] Kerry Whiteside, "Justice Uncertain: Judith Shklar on Liberalism, Skepticism, and Equality," *Polity* 31, no. 3 (1999): 517.

INJUSTICE

It is no surprise then that Rawls' theory of justice, and 'the normal model' of distributive justice that takes after him, does not give injustice its due, to reference the first chapter title of *The Faces of Injustice*.[102] As a consequence, the imperfect procedures of distributive justice that are present in most liberal states and which underpin the justness of their rules – as well as determine the anatomy of their approach to discrimination – still leave important manifestations of our universally shared vulnerability to chance. As I have shown in the Introduction and in the previous section – and which will become even more evident shortly – this makes persons who encounter manifestations of our universally shared vulnerability, such as discrimination, dependent on factors which should not matter under the modern human rights discourse. Like the standing of the societal salient groups amongst whom they are counted by the state and other institutions.

The preceding points are part of an undercurrent within many critiques of the social contract and the procedural variant of the model of distributive justice, even though the terms that are used often differ. These criticasters point us towards those who inevitably fall through the cracks of the fashionable interpretations of such thought experiments and the rules they engender in the real world.[103] Let us look at an example, as provided by Martha Nussbaum. She asserts that the pervasive influence of a certain notion of the social contract within liberal states, combined with the adjacent and subsequent architecture of the procedures which should guarantee the justness of the rules in these states, creates societies which exclude physically and mentally impaired persons – those who cannot be expected to be productive over the majority of their lives – from its most elementary rules and deliberations.[104] Hence the full enjoyment of their fundamental rights by this group remains an afterthought, depending on

[102] Shklar, *The Faces of Injustice*, 15–50; Forrester, *In the Shadow of Justice*, 264.
[103] Many of these positions are summarized in: Rutger Claassen, *Het Eeuwige Tekort: Een Filosofie van de Schaarste* (Amsterdam: Ambo, 2004).
[104] Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 105, 113, 116–17. See also: Norman Daniels, "Democratic Equality: Rawls's Complex Egalitarianism," in *The Cambridge Companion to Rawls*, ed. Samuel Freedman (Cambridge: Cambridge University Press, 2003), 242.

the political currents of the day.[105] A matter of charity instead of rights.[106]

To summarize the foregoing with respect to the frontiers of life: the famous thought experiments on distributive justice, which are a crucial part of the influence that is currently exerted by 'the normal model' of justice in liberal states, have the potential to fail the protection of the most basic fundamental rights for some – be it through their design or through their priorities. And this is at least partly due to their inclination to think in groups. I would argue that, if we would take commonly shared resilience against manifestations of our universally shared vulnerability as the *telos* of our collective responsibility, and if we aim to adhere to the concerns with power and the individual which define the liberal movement, this lacuna can be properly addressed. In other words: the minimum of state efforts concerning fundamental rights, including the protection against discrimination, is perhaps better conceptualized with a focus on injustice than justice. This would put the spotlight on the responsibility of liberal states to address the worst ills that can befall us, naturally within necessary limits.

With a liberalism of fear I therefore do not intend to offer a traditional theory of justice and add to the myriad of volumes on this subject.[107] The foundation of justice – in the sense of what we can *at a minimum* expect from the state in terms of action and constraint with regard to our fundamental rights – will, within in the context of this work, be primarily assumed to pertain to injustice. Because the manifestations of vulnerability in our distinct lifetimes, whether they are bodily or societal, do not constitute questions of justice as these are commonly perceived. They relate to a matter which precedes most theories of justice: are the ills that befall a person injustice or mere misfortune?[108] This is an important issue, because only in the first case ailments are transferred to our collective responsibility and therewith the responsibility of our societal institutions, such as the state. And with respect to the frontiers of life, including discrimination, this issue is simply too important to leave to the all too elegant thought experiments, imperfect procedures, and grand distributive designs of the

[105] Nussbaum, *Frontiers of Justice*, 98 105, 109, 113, 116–17, 122, 135, 137–38, 167.
[106] Ibid., 108–9; Rawls, *A Theory of Justice*, 230.
[107] Shklar, *The Faces of Injustice*, 15.
[108] Ibid., 1.

currently prevalent ideas of justice. That is, of course, if we take commonly available resilience against our universally shared vulnerability as a *telos*.

If we follow this admittingly idiosyncratic interpretation of the currently prevailing foundation of justice, that it should mainly pertain to injustice, many of the common ideas about and theories of justice suddenly belong to the good instead of the right. Meanwhile, new priorities are added to the right, which is the subject of the liberal political program. As such, a liberalism of fear – as suits a minimalist conception of the liberal political program – concerns itself mostly with two questions: which manifestations of our universally shared vulnerability constitute injustice and when does the alleviation of injustice belong to our collective responsibility? More practically, these questions can be reformulated as one query: when do the actions, or the lack thereof, by the state and the other societal institutions under her direction, cause or perpetuate injustice?[109] Such an approach will not solve all problems: solving injustice does not necessarily bring justice.[110] But it does bring change. As with this line of thinking it is plausible that the state will acquire additional responsibilities, while others will – relatively speaking! – become less pressing. This connection between injustice and the state as the primary accountable body with regard to our collective responsibility, brings me to the awkward position of that state as both a purveyor of injustice and an indispensable institution in the battle against it. A brief survey of this position and how it relates to vulnerability theory, can illustrate the advantages of a liberalism of fear in this area.

THE TWO FACES OF THE STATE

The modern state is a powerful and dangerous entity.[111] Within its territory the state, in conjunction with other societal institutions, constitutes a coercive structure one cannot avoid nor circumvent. The state has more or less a monopoly on violence, and – in a general sense – one cannot simply

[109] Ibid., 65, 70–71; Fineman, "The Vulnerable Subject and the Responsive State," 267, 269; Tronto, *Caring Democracy*, 71.
[110] Shklar, *The Faces of Injustice*, 101.
[111] Aernout Nieuwenhuis, *Over de Grens van de Vrijheid van Meningsuiting* (Nijmegen: Ars Aequi Libri, 2015), 36.

become a citizen of another state.[112] As my overview of modern tragedies in the Introduction and the early trajectory of human rights in Chapter II showed, the state can potentially support and condone discriminatory assumptions and actions, as well as oppose them. This is one of the reasons that this work is weary of group rights, as these have been abused by states in this manner in the past.[113] A passive state, though, can play a just as pivotal role in such abuse by citizens themselves – on their own, as well as through a group or association. As its inaction would allow discriminatory practices to persist. When it comes to injustice, the state has two faces.[114]

It is for this reason, that the primary project of liberalism, and this includes practical implementations like the Rule of Law and the *Rechtsstaat*, aims to curtail the power of the state and, through it, other societal institutions.[115] Central to this ambition is the importance of rights-mandated respect from the state for each and every person as an individual.[116] This respect also entails, as we have seen, the abolishment of the privileges which used to be conferred by the state and other societal institutions on groups and individuals.[117] To be preserved from state interference or to benefit from state support is, under the modern human rights discourse, arguably the prerogative of all of us equally. As said, human suffering can both be actively pursued by the state as well as condoned by inaction. As Shklar poignantly points out through some of the lowest lows in American history: the enjoyment of fundamental rights does not only require respect from the state for one's status as a rights bearing subject, but also necessitates the state to compel other citizens, groups, and associations to fol-

112 Fineman, "Vulnerability and Inevitable Inequality," 148; Martha Minow, *Not Only for Myself* (New York: New Press, 1997), 64; Holtmaat, *Grenzen aan Gelijkheid*, 16. Compare Max Weber's definition of the state as "*diejenige menschliche Gemeinschaft, welche innerhalb eines bestimmten Gebietes – dies: das 'Gebiet', gehört zum Merkmal – das Monopol legitimer physischer Gewaltsamkeit für sich (mit Erfolg) be-anspruchtt.*", see: Max Weber, *Staatssoziologie: Soziologie der Rationalen Staatsanstalt und der Modernen Politischen Parteien und Parlamente* (Berlin: Duncker & Humblot, 1966), 27.

113 Galenkamp, *Individualism versus Collectivism*, 43.

114 I adapted this metaphor from Habermas, see: Jürgen Habermas, *Die Einbeziehung des Anderen: Studien zur Politischen Theorie* (Frankfurt: Suhrkamp Verlag, 1999), 162.

115 Fawcett, *Liberalism*, 5–6; Noorloos, *Hate Speech Revisited*, 22.

116 Fawcett, *Liberalism*, xii, 3.

117 Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford: Oxford University Press, 2016), 71, 81; Fineman, "The Vulnerable Subject," 5–8.

low suit.[118] As such, the aforementioned focus on negative liberty and formal equality in liberal states constitutes a rights failure. Because fundamental rights cannot be effectuated for all without a measure of positive liberty and substantive equality. If liberalism should aim to be a liberalism of rights, as I propose below, then the real conflict is not on the spectrum of the thick to the thin conception of state tasks.[119] Instead we have to choose which fundamental rights every individual has and in what manner these rights are to be effectuated by the state and, under its direction, other societal institutions.[120] By emphasizing these choices, we can observe that a liberalism of fear differs from another, more influential alternative for the common liberal view of state tasks: libertarianism. In a liberalism of fear the state is assumed to have a larger amount of tasks and has to serve a more elaborate list of priorities than libertarianism would allow for.[121] Additionally, a liberalism of fear does not see the state as merely a dangerous boogeyman. It acknowledges that a liberal state, which both refrains itself and acts when it is imperative, is itself a necessary but vulnerable possession. This vulnerability is not far-fetched, as we could already discern it in my account of the relationship between liberalism and democracy.[122]

As a consequence of the hitherto elaborated positions, we can conclude that the perception of the state within a liberalism of fear aligns with the previously discussed three dimensions of the obligations conferred by the modern human rights discourse: to refrain, to protect, and to fulfill.[123] If we circle back to discrimination, we can observe that an abhorrence of injustice demands more from the state than to forego discriminatory practices. It should also oppose discrimination in other ways.[124] However, the dangers of positive liberty and substantive equality are perhaps as great as their necessity. Even if we take vulnerability as the *telos* which informs the

[118] Shklar, "Positive Liberty, Negative Liberty in the United States," 111–12, 125.
[119] Ibid., 117; Judith Shklar, *Ordinary Vices* (Cambridge: Harvard University Press, 1984), 239; Scheuerman, "Law and the Liberalism of Fear," 52.
[120] Shklar, "Positive Liberty, Negative Liberty in the United States," 125.
[121] Kymlicka, *Contemporary Political Philosophy*, 102, 104, 108.
[122] Chapter I, section 9; Fineman, "Beyond Identities," 1762–63.
[123] Chapter II, section 13; Aernout Nieuwenhuis, Maarten Den Heijer, and Wouter Hins, *Hoofdstukken Grondrechten* (Nijmegen: Ars Aequi Libri, 2017), 151.
[124] Shklar, "Positive Liberty, Negative Liberty in the United States," 111–12.

aforementioned choices regarding our fundamental rights, we have to remember that – like many valiant attempts to better the world – benign institutional policies founded on fear and aimed at protecting individuals against injustice can, and often did, engender their own injustices.[125] As Katrina Forrester puts it, while discussing criticisms of Shklar's views on liberalism: "Many kinds of unpleasant, unfair, unjust, and exploitative domestic and international political arrangements could be justified in the name of protecting individuals […]."[126] We can thus sum up the relevant concerns with the role of the state, as they pertain to a liberalism of fear, as such: the state needs to be restrained as well as stirred to certain actions. And this is exactly what my proposed branch of the liberal tree offers.

19.
Dignity and a Liberalism of Fear

Hitherto I have sketched the ambitions of a liberalism of fear, the ways in which it surpasses contemporary theories of justice, and its preliminary concerns with the role of the state. I shall now describe the proposal for a liberalism of fear in more detail. To take vulnerability as the leading concept with regard to the implementation of our fundamental rights, does not detract from the central tenets of the liberal movement: human progress can still imagined by means of institutionalizing conflicts, through rules that check all kinds of power and which respect any individuals and their life plans. But a liberalism of fear has a different focus than the currently more prevalent interpretations of these tenets. As said, but it bears repeating, a liberalism of fear concerns itself in the first place with the ills that can befall the individual. It advocates the facilitation of resilience against such manifestations of our universally shared vulnerability by means of sufficient resources. These resources should be provided by the state and other societal institutions, at least up until an appropriate minimum, to us all. But this is not as straightforward as it seems.

[125] Corey Robin, *Fear: The History of a Political Idea* (Oxford: Oxford University Press, 2004), 3–25.
[126] Forrester, *In the Shadow of Justice*, 265.

Because, in the first place, we need to know how we can determine the ills for which the resilience constitutes a task for those institutions that we – as a society – have burdened with the execution of our collective responsibility. Or in other words, which ills are an injustice? I propose to define the latter ills as those manifestations of our vulnerability – bodily, psychological, social, institutional – which inhibit a life that can be called dignified.[127] The amelioration of these ills, however, does not provide the state, or any other societal institution for that matter, with a *carte blanche*. A liberalism of fear may be an attempt to give the insights of vulnerability theory a practical bite, but it also acknowledges – and tries to appease – the alleged dangers of this alternative paradigm. Above all, it aims to avoid the pitfalls of paternalistic policies and the possibility of a return to some form of a group-based approach. It does so by connecting the notions of positive liberty and substantive equality, as propounded by vulnerability theorists, with a renewed appraisal of another value. A value which is often considered less photogenic than liberty and equality. The value of dignity.

RE-EVALUATING DIGNITY

The demands of human dignity will be our measure to determine both the practical extent as well as the indispensable boundaries of our expanded collective responsibility.[128] With their responsibilities expanded in this way, liberal states should be able to better discern and fulfill the minimum of their human rights obligations towards each and every individual. In order to guarantee the minimal conditions of a dignified life for everyone, a liberalism of fear, in the first place, supports a greater emphasis on the previously elaborated notions of positive liberty, to accommodate the necessary state action, and substantive equality, to legitimize such action. This ephemeral dance would ideally crystallize, in one word, with more *access*. Access to resources which provide every individual with the circumstances that make them more resilient to their embodied, as well as their relational vulnerabilities. Such access thus guarantees an individual's ability to, at a

[127] Nussbaum, *Frontiers of Justice*, 159–60.
[128] Connor O'Mahony, "There Is No Such Thing as a Right to Dignity," *International Journal of Constitutional Law* 10, no. 2 (2012): 555.

minimum, lead a life worthy of being called dignified.[129] With regard to the legitimacy of group-based approaches to discrimination, the demands of dignity would entail that anti-discrimination measures pertain to everyone, instead of merely certain delineated groups. Be that as it may, this idea of access also requires that, while one can always invoke such measures, they can never ever be imposed by the state. Lest we forget the abuse of anti-discrimination measures, like hate speech bans, in the past.[130] A liberalism of fear can thus appease the previously described, more prolific critiques of vulnerability theory, while offering a way forward to address the most fundamental risks that plague every human life, whether one is aware of those risks, or not. Let us now look what the preceding observations mean for the problems with the prevalent liberal approaches to discrimination.

As a liberalism of fear concerns all incarnations of the ills that may inhibit a dignified life, it avoids at least the first two problems with many of the liberal approaches to discrimination. This is because there is no more need to determine who lacks formal equality and who deserves the protection that is subsequently offered by anti-discrimination measures. Furthermore, it may also be clear that a liberalism of fear aims to address the rights plight of disadvantaged individuals beyond a narrowly defined public sphere.[131] However, these ambitions, as well as their theoretical advantages over the anatomy of the common approaches to discrimination in liberal states, still leave us without a specific idea of the demands of dignity and exactly how far we can deviate from the staunch liberal devotion to the distinction between a public and private sphere. We still need an answer to the following question: what precisely constitutes the actionable minimum and ditto boundaries of state involvement within a liberalism of fear? That is to say, we have to attain clarity on the state's duties beyond the preceding, rather vague and open-ended notion of resilience against those manifested vulnerabilities that would inhibit a dignified life.

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[129] Fineman, "The Vulnerable Subject," 20; Fineman, "The Vulnerable Subject and the Responsive State," 270–72; Fineman, "Vulnerability and Inevitable Inequality," 147–49.
[130] Jeremy Waldron, *The Harm in Hate Speech* (Cambridge: Harvard University Press, 2012), 50; Nadine Strossen, "Balancing the Right to Freedom of Expression and Equality," in *Striking a Balance: Hate Speech, Freedom of Expression, and Non-Discrimination*, ed. Sandra Coliver (London: Article 19/University of Essex, 1992), 303.
[131] Shklar, *The Faces of Injustice*, 7.

ADDRESSING HUMAN RIGHTS OVERREACH

The practical implications of a liberalism of fear will be discussed in the next section. To conclude my introduction of this proposed framework, I want to devote a few words to the relationship between a liberalism of fear and the three developments which I subsumed under the header of human rights overreach. The commitment to a liberalism of fear is political in nature – just like the choice for the previously discussed anatomy of the prevalent liberal approaches to discrimination.[132] A liberalism of fear presents the political choice to take our universally shared vulnerability as our *telos* while finding our way through the tangled forest of human rights obligations. So that we may establish what all of us – at a minimum – can expect from the state and other societal institutions.[133] But contrary to other implementations of the central tenets of liberalism, as they were incorporated by the modern human rights discourse, a liberalism of fear emphasizes this political character heavily. Consequently, it would bring back the question of politics to human rights matters. The effectuation of our fundamental rights once again becomes a *political* responsibility. A responsibility to which one can hold institutions accountable. If states and other societal institutions selectively warrant fundamental rights, be it merely a small range of rights or only for some groups, than that is a political decision which has to be justified and may be disputed. Which brings us to the issue that not all our rights are effectuated. The political commitments that are advocated by a liberalism of fear would probably entail the elimination of the distinction between the first and second generation of rights. As through this line of thinking, economic harm could be cemented as being as much a serious and actionable fundamental rights issue as universal suffrage.[134] Because, especially economic, social, and cultural rights may prove vital if one aims to provide resilience to manifestations of our vulnerability that constitute injustice. Specifically, but not exclusively, for persons who

[132] Shklar, "The Liberalism of Fear," 32.
[133] In a liberalism of fear, these expectations pertain as much to what the state has to do, or its duties, as to what it can't do, or its restraints, see: Shklar, *Ordinary Vices*, 237.
[134] Joy Gordon, "The Concept of Human Rights: The History and Meaning of Its Politicization," *Brooklyn Journal of International Law* 23, no. 3 (1998): 700, 790.

belong to marginalized groups or who are otherwise disadvantaged.[135]

Group-based approaches to fundamental rights, the third aspect of human rights overreach, would ultimately be phased out. International covenants and national laws should in principle no longer pertain to selections of marginalized groups but to manifestations of our shared vulnerability. As a result, persons in the currently delineated groups would receive their present support and beyond. Moreover, when the anti-discrimination angle, notion of desert, and solemn focus on the public sphere – which characterize the current liberal approaches – become relics of the past, those who now miss out on such support, as their marginalization is not attached to a selected personal characteristic, would be able to more fully enjoy their fundamental rights, like the protection against discrimination.

Principles have a tendency to clash with the messiness of reality, though. An approach based on a liberalism of fear would therefore leave the specific attention for marginalized groups in the existing rights covenants initially intact, while attempting to extend this care *systematically* to all other disadvantaged persons and groups who need it.[136] The same goes for similar approaches in national laws. At the level of realized fundamental rights protections, including the protection against discrimination, it can therefore be expedient to temporarily retain some of the present group-based approaches. Because, one should not abolish existing protections while it is not yet clear whether the proposed universal and individual replacement is politically feasible. But make no mistake: a liberalism of fear, in the vein of vulnerability theory, does present the return to a universal and individual perspective on human rights, beyond group-based approaches. It should therefore be clear that groups are never the starting point and that group-based approaches are, in time, doomed to disappear. Furthermore, every choice in the direction of a group-based approach, temporary or not, should be sufficiently justified.[137] This arguably also entails that the drawbacks of such approaches are to be mentioned and discussed. Primarily the insight that the worst atrocities committed by states, as well as by individuals and private associations, were often on a group

[135] Ibid., 697, 787.
[136] Fineman, "Beyond Identities," 1746.
[137] Ibid., 1752.

basis.[138] The fear for the ills that can befall an individual should never supplant the realization that the state is as prone to help as it is to disadvantage some and privilege others, when it is not sufficiently constrained.[139]

With this return to politics, universalism, and the individual, a liberalism of fear tackles all three aspects of human rights overreach which, albeit partly, contributed to the tendency in liberal states to employ group-based approaches to state action, including the protection against discrimination. Which brings us to how a liberalism of fear would look in practice.

20.
Capabilities and Discrimination

Until now, I have showed in this chapter how the currently prevalent liberal approaches to discrimination – and other state tasks, for that matter – did not rule out, or even incentivized, the kind of group-based approaches which in Chapters I and II proved to be contrary to the liberal ideas that undergird the modern human rights discourse and its universal and individual foundation. As a remedy, I proposed a teleological alternative: a liberalism of fear. The relevant goal was the all-round availability of resilience against our universally shared vulnerability. In order to achieve this goal, both state restraint an state action turned out to be necessary. This required me to re-examine the role of that third value which inspired the modern human rights discourse: dignity. Dignity would be the measure for the extent of what the state should do, at a minimum, to facilitate resilience with regard to the frontiers of life for each and every individual. But it would also be the measure for all those things the state should not do. In this way, we would all be spared the gravest of injustices.

A liberalism of fear proved to make sense in theory, as it provides a guide through the tangled forest of human rights obligations and addresses the three aspects of human rights overreach. But we were left with two crucial questions: how would a liberalism of fear work in practice and how would it address the strict liberal focus on the public sphere at the

[138] Ibid., 1755–56; Jones, "Human Rights, Group Rights, and Peoples' Rights," 81–82.
[139] Fineman, "Beyond Identities," 1761.

expense of continuing injustice in a very extensive private sphere? These questions, and especially the first one, can be translated as follows: Which claims can rights subjects make at a minimum and what corresponding obligations and restrictions do liberal states have? In this closing part of my elaboration on the branch of the liberal tree with which I will evaluate the three Dutch group-based approaches to discrimination in the second part of this work, I shall explore the capabilities approach in the interpretation of the previously introduced Martha Nussbaum. I propose that this approach could provide a liberalism of fear with a roadmap to ensure *in practice* the full enjoyment of a core of fundamental rights for all individuals to a sufficient minimum; whether they belong to a marginalized group, are otherwise disadvantaged, or merely at risk of becoming so in the future.

THE CAPABILITIES APPROACH

Nussbaum's capabilities approach starts from the assumption that, by observing the human condition and examining human existence through history, we can formulate a list of capabilities which people should be able to explore within a dignified life.[140] These capabilities address both our bodily and psychological vulnerabilities. One can think of the capability of a relatively painless existence, for instance. They also cover most conceivable social and institutional disadvantages. Such capabilities include living with sufficient protection against discrimination and participating fully in society, including institutions like the labor market. Only when these capabilities are available for everyone at a sufficient minimum, can we all make and follow our own life plan. These capabilities thus provide the minimum conditions under which a life can be called worthy of human dignity.[141]

The minimum advocated by the capabilities approach is a hard limit that pertains to all. It rules out the previously elaborated anti-discrimi-

[140] Martha Nussbaum, "Human Functioning and Social Justice: In Defence of Aristotelian Essentialism," *Political Theory* 20, no. 2 (1992): 205, 214–215; Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000), 71–73.
[141] Nussbaum, "Human Functioning and Social Justice," 205, 214–15, 217–23; Nussbaum, *Frontiers of Justice*, 169–173.

nation angle and notion of desert that characterized the prevalent liberal approaches to state action. As such, the conduct with which states pursue this minimum cannot be tailored to certain groups. Nussbaum gives as an example that they cannot deem "[b]rutal and oppressive discrimination on grounds of race […] unacceptable" but simultaneously chalk "brutal and oppressive discrimination on grounds of sex" up to "a legitimate expression of cultural difference."[142] As for the liberal distinction between a public and a private sphere: the capabilities approach requires states and other societal institutions to interfere to a larger extent in those parts of life that are, at present, often designated as private. In summation, the capabilities approach concretizes the minimum extent of our collective responsibility in a way that pertains to all of us equally, and it avoids the artificial boundaries that are present in the prevalent liberal approaches to state action.

If the capabilities approach would be the practical elaboration of a liberalism of fear, then the appropriate duties imposed on states through their human rights obligations would consist of the facilitation of these capabilities for their populations.[143] As human rights obligations should remain political, the onus lies on the political process to select those imperative capabilities that citizens could reasonably expect to be able to explore because of their fundamental rights and the underlying values.[144] International rights catalogues – such as the ICESCR and the ICCPR – that were signed and ratified by the political representatives of their respective states, already provide ample guidance in this regard. And where there remains room for debate, or if there are capabilities identified which are deemed necessary for a dignified life but seemingly lack codification in the existent rights catalogues, one can turn to the capability lists as proposed by political philosophers, such as the aforementioned Nussbaum. In this way, capabilities would become part of the discourse surrounding the implementation and enforcement of fundamental rights – informing the interpretation of current and future rights catalogues, and indicating which rights, at the very least, should engender the threefold duty to refrain, to protect, and to fulfill. The ambition to make a liberalism of fear, a liberal-

[142] Nussbaum, *Frontiers of Justice*, 260.
[143] Ibid., 78, 179–216.
[144] Nussbaum, "Human Functioning and Social Justice," 223.

ism of rights, is thus at home with the capabilities approach. The practical responsibility engendered by a liberalism of fear, to effectuate (at least) a core of fundamental rights that secures a minimum of capabilities for all, would inevitably concern the opposition to discrimination.[145] To live with sufficient protection against discrimination, as aforesaid, is to become one of the capabilities to which we are all entitled through our fundamental rights and the realization of which is a state obligation. This is in line with the modern human rights discourse, which can be said to be intrinsically linked to the struggle against discrimination from its very beginnings.[146]

The institutional obligation to provide a minimum of capabilities to every human being, including protection against discrimination, may seem overwhelming at first. The idea, however, is not that far-fetched. As we are concerned with a general minimum – however unattainable such a guarantee may seem to currently disadvantaged persons – we deal with a delineated, residual duty for states, not a bottomless liability.[147] As such, the capabilities approach does not differ that much from the ambitions of the ICESCR, as emphasized in General Comment no. 14.[148] Even better, such a tangible goal that relates to every individual makes it easier to assign responsibilities to the state and other societal institutions, as well as to hold them accountable for the results.[149] As such, the practical elaboration of a liberalism of fear may be less aspirational than the grand designs of the famous theories of justice, but it is more feasible and leaves no-one behind.[150] To conclude, through the recommendations of a liberalism of fear, as shaped in practice by the capabilities approach, the universal and individual characterization of our fundamental rights would become meaningful in the lives of all those who suffer. Because, the plight of all the currently disadvantaged individuals and marginalized groups, who at present

[145] Nussbaum, *Frontiers of Justice*, 77.
[146] Fineman, "Beyond Identities," 1744; Galenkamp, *Individualism versus Collectivism*, 68. This goes for both the general and the specialized international rights catalogues, cf.: Introduction, section 1, note 12.
[147] Henry Shue, "Mediating Duties," *Ethics* 98, no. 4 (1988): 689; Beetham, "What Future for Economic and Social Rights?," 53.
[148] Chapter II, section 13; Beetham, "What Future for Economic and Social Rights?," 47, 50–58.
[149] Ibid., 52–53.
[150] Ibid., 60; Gordon, "The Concept of Human Rights," 697, 724.

lack a sufficient minimum of capabilities to explore, would be foregrounded and addressing their struggle satisfactorily would finally be inevitable.

CRITICISMS OF THE CAPABILITIES APPROACH

To close out this chapter on a liberalism of fear, I want to address three criticisms of the capabilities approach and two critiques of a liberalism of fear as a whole. I treat the latter objections – that a liberalism of fear is not a grand or transformative enough of an idea, and that fear and vulnerability are not universal – in this section on the capabilities approach, because the addition of the capabilities approach to my proposed branch of the liberal tree helps me to refute them with regard to a liberalism of fear.

Let us start with the criticisms of the capabilities approach. In the first place, there is the notion that no list of capabilities can be universal. Leslie Francis and Anita Silvers, for instance, postulate that the empirically determined needs of the mentally impaired do not align with the list that Nussbaum proposes.[151] As this complaint focusses on Nussbaum's own work, it does not have to hold true for a liberalism of fear. The proposal for a liberalism of fear is to position the fundamental rights that pertain to the frontiers of life as the minimum of those capabilities that individuals should be able to explore during their lifetime. As these capabilities merely concern the frontiers of life – death and suffering, for example – they are as relevant for a person with mental impairments as any other. A problem that remains with respect to the criticisms from Francis and Silvers, is the fact that the mentally impaired – in the political systems of many liberal states – often did not have a proper say in the selection of those who authorized the human rights treaties, or even of those who now decide on their implementation.[152] But this is a general problem with the political representation of mentally impaired persons, which would be an obstacle for any political proposal. As such, it can – and, quite frankly, should – be

[151] Leslie Francis and Anita Silvers, "Liberalism and Individual Scripted Ideas of the Good: Meeting the Challenge of Dependent Agency," *Social Theory and Practice* 33, no. 2 (2007): 316–19.
[152] Erwin Dijkstra, "Het Stand Still-Beginsel en de Uitvoering van het VN-Verdrag Handicap," *Handicap & Recht* 6, no. 1 (2021): 23.

solved, but by other means than abandoning the capabilities approach.[153]

A second critique of the capabilities approach concerns the position that legal philosophers would come to occupy with capabilities lists.[154] These lists might appear common sense or technocratic. But as we know from our encounter with the technocratic organizations that oversee the implementation of human rights obligations: the kind of choices that are made through capabilities lists are far from neutral.[155] It is politics all the way down.[156] And if they are implemented from the top down as the only authoritative interpretation of our fundamental rights, such lists would indeed elude the democratic process and curtail meaningful public debate. In their present form, though, these kinds of lists function more as an expansion of our collective horizon. They are just one addition to the pool of political ideas that can be used for the interpretation of the obligations of the modern human rights discourse. As political philosopher Rutger Claassen argues, there is no Platonic philosopher-king involved who plans to rule from a proverbial ivory tower. Claassen solely sees mere practical philosophers who work towards expanding the available possibilities for a better world.[157] And the capabilities approach arguably already exerts such an influence, and would continue to do so as part of a liberalism of fear, without the top down imposition of the proposed capability lists.[158]

The third and last criticism of the capabilities approach that I want to address, originates in the work of Ronald Dworkin. We already encountered this legal philosopher when we discussed his definition of political programs. Dworkin argues that the capabilities approach – in this case the version of Amartya Sen – underestimates the importance of welfare and income. The latter resources can compensate for a lack of the capabilities

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153 Francis and Silvers, "Liberalism and Individual Scripted Ideas of the Good," 331–32.

154 Rutger Claassen, "Making Capability Lists: Philosophy versus Democracy," *Political Studies* 59, no. 3 (2011): 491; Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000), 299.

155 Chapter I, section 10.

156 Stanley Fish, *The Trouble with Principle* (Cambridge: Harvard University Press, 1999), 101.

157 Claassen, "Making Capability Lists," 500, 502, 505.

158 David Clark, "Capability Approach," in *The Elgar Companion to Development Studies*, ed. David Clark (Cheltenham: Edward Elgar Publishing, 2006), 32.

most often found on capabilities lists.[159] The capabilities approach is of course no philosopher's stone, nor is it the only way to ensure full enjoyment of the most basic fundamental rights for every individual.[160] However, as the practical elaboration of the ideas contained within a liberalism of fear, it brings in sharp focus the function of these rights as a rail against inhumanity. And it does so in a way which mere welfare and income numbers would be less able to. This is possible, because – as a combination of vulnerability theory, Shklar's ideas on liberalism, and Nussbaum's capabilities approach – a liberalism of fear as a whole arguably surpasses its parts.

TWO ANTICIPATED CRITICISMS OF A LIBERALISM OF FEAR

The whole may be greater than the sum of its parts, but that whole is not uncontested. In addition to the capabilities approach, vulnerability theory and Shklar's ideas also have their critics. And some of these criticisms are applicable to the previously elaborated branch of the liberal tree. I already introduced the two objections that will be discussed here. These concern the perceived lack of scope of a liberalism of fear and the claim that the vulnerability of our human condition is not so universally shared as I think.

There is something to say for the contention that a liberalism of fear is no grand idea.[161] It is true that the chorus of liberals such as Shklar, who keep emphasizing the barbarities of the past, can be perceived as a confinement in thinking and may appear a block on the road to transformative politics.[162] Two remarks can, I think, serve as a counterpoint to this criticism. In the first place: a liberalism of fear, especially in the iteration that I propose, arguably *is* a grand and even transformative idea. The ambition to guarantee a core of fundamental rights to an actionable minimum for every individual, regardless of the many debilitating vulnerabilities that can manifest in their lives, all the while keeping a keen eye on the dangers

[159] Dworkin, *Sovereign Virtue*, 300–301.
[160] Nussbaum, *Frontiers of Justice*, 222.
[161] Forrester, *In the Shadow of Justice*, 264–65.
[162] John Dunn, "Hope over Fear: Judith Shklar as Political Educator," in *Liberalism without Illusions: Essays on Liberal Theory and the Political Vision of Judith N. Shklar*, ed. Bernard Yack (Chicago: University of Chicago Press, 1996), 52; Forrester, *In the Shadow of Justice*, 265.

of state conduct, is rather bold. Such a minimum is rare, even if we solely consider the most basic fundamental rights. And this includes the protection against discrimination, as the second part of this work shows. Because in everyday practice, many still lack the human rights protection they need. Thus, the adaptation of a liberalism of fear would mean "an important step towards a future which prioritizes our codified human rights and their underlying values for everyone."[163] Secondly, there are good reasons why liberals are wont to emphasize historical horrors and tend to disdain the revolutions that are often envisioned by so-called transformative politics. Shklar and associated liberal thinkers like Bernard Williams and Richard Rorty, have the right of it in this regard when they hold up history to bring to life political realities, and make their claims on the basic requirements of liberalism and the modern human rights discourse relating to human misery.[164] The choices which a liberalism of fear proposes are simple: less pain, less death, less hunger, less discrimination, etcetera.[165] This is the basis or the minimum extent of the right. The remainder and the good are up to humankind. It is also this historicity and these simple choices, the consequences of which people have seen or experienced throughout their lives, that will probably provide the public support for the implementation of a liberalism of fear.[166] Because, the limitations of our expectations from fundamental rights can be adjusted. And if we see others, on an individual basis, resist the consequences of previously highly impactful vulnerabilities successfully, we can imagine the same for ourselves in the future.[167]

Which leaves me with the last point of contention that I want to discuss: the supposed universality of our vulnerabilities. This is the line of argument that most critics brought to the table when I presented the kernel of a liberalism of fear at conferences and in scholarly articles. These

163 Dijkstra, "Addressing Problems Instead of Diagnoses," 39.
164 Forrester, *In the Shadow of Justic*, 264–66; Judith Shklar, "Putting Cruelty First," *Daedalus* 111, no. 3 (1982): 17– 27; Bernard Williams, "The Women of Trachis: Fictions, Pessimism, Ethics," in *The Sense of the Past: Essays in the History of Philosophy*, ed. Myles Burnyeat (Princeton: Princeton University Press, 2006), 55–58.
165 Adam Gopnik, *A Thousand Small Sanities: The Moral Adventure of Liberalism* (London: Riverrun, 2019), 226.
166 Dijkstra, "Addressing Problems Instead of Diagnoses," 39.
167 Conclusion, section 43; Lynn Hunt, *Inventing Human Rights: A History* (New York: Norton, 2007), 29.

objections ranged from religious ascetism – people who would opt to live hungry, excluded, and wounded in the streets if it would mean a deeper experience of faith – to reasons which rose above the plight of the individual. The critics who brought forth the latter reasons can be subdivided in two groups. The first subgroup prioritized incentives to achieve socially valuable feats and other group matters. The second subgroup thought the protection of certain, currently marginalized groups more feasible than the proposed assurance of a sufficient minimum of capabilities for every individual. With regard to the religious ascetics and those who emphasize group matters, I want to reiterate that a liberalism of fear concerns access to resources that provide resilience against manifestations of our universally shared vulnerability. This resilience is to be facilitated to a sufficient level of certain, politically determined capabilities, as informed by our fundamental rights. A liberalism of fear is emphatically not an imposition by the state. Those who want to live as ascetics or sacrifice their own wellbeing for group interests, would still be able to do so.[168] Furthermore, when people can all explore the aforementioned capabilities, they have arguably obtained – through the proper implementation of their universal and individual fundamental rights – more means and possibilities to achieve their religious or group goals. Even better, they can do so with the guarantee of a measure of freedom from interference by the state and other institutions, as well as unhindered by the unwelcome intrusions of assorted private groups and associations.[169] And this last point is key. It also shows why group-based approaches are no longer necessary. Because a liberalism of fear would provide more protection for currently disadvantaged persons and marginalized groups, both against institutional abuses of power and against those private actors that at present discriminate them, not less.

Throughout the rest of this work, I regularly return to the last two objections, which stress the importance of group matters and the necessity of – at least – protecting certain, currently marginalized groups. Because these are often brought up as part of the reason for employing a group-based approach to the protection against discrimination. For now, it is safe

[168] Brian Barry, "How Not to Defend Liberal Institutions," *British Journal of Political Science* 20, no. 1 (1990): 6.
[169] Fawcett, *Liberalism*, 426, 436–37.

to conclude that we can continue to characterize the modern human rights discourse as both universal and individual in nature. This characterization can also be recognized within the political structure of most liberal states, notwithstanding the flawed anatomy of the common liberal approaches to state action or the prevalence of group-based approaches to discrimination. As such, a liberalism of fear presents a throwback and a refinement, rather than a revolution. It aims to hold liberal states to the benchmark to which they agreed when they made the choice to adopt the modern human rights discourse. The proposed minimum extent of our collective responsibility may appear newfangled, but it merely brings into focus our existing duties with regard to the bare necessities for every human life, the lack of which formed the impetus for many of the existent rights catalogues. The hereto constructed foundation of justice – which consists of universal and individual fundamental rights and mainly focuses on injustice – can, at least in theory, also be recognized in the political structure of the jurisdiction that is the stage for the second part of this work, the Dutch *Rechtsstaat*.