

EDITORIAL

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Theorists and philosophers have reflected on the meaning of vulnerability within different contexts.¹ A perhaps more ‘traditional’ conception of vulnerability focuses on particular circumstances of heightened vulnerability, which Catriona Mackenzie, Wendy Rogers and Susan Dodds have characterised as ‘situational’ vulnerability.² Under this model, specific situations that exacerbate vulnerability have been further divided into other categories, including ‘social, political and environmental determinants’ of vulnerability.³

Recent decades have heralded a new approach to considering vulnerability that challenges ideas of situational, specific vulnerability. Notably, Martha Albertson Fineman posits that vulnerability is something that is inherent, constant and shared by all of humanity.⁴ She rejects the idea that an individual or group can be ‘considered more or less vulnerable ... or specifically or especially vulnerable’,⁵ and instead focuses on how institutions can engender differing levels of *resilience*, and how inherent vulnerability may be *revealed* by particular situations.⁶

The law concerns itself with the notion of vulnerability in a number of ways. The law’s emphasis on protecting those it perceives as vulnerable may be seen across a variety of areas, including the notion of capacity,⁷ the *parens patriae*

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- 1 See generally Catriona Mackenzie, Wendy Rogers, and Susan Dodds, ‘Introduction: What Is Vulnerability, and Why Does It Matter for Moral Theory?’ in Catriona Mackenzie, Wendy Rogers, and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2013) 1.
- 2 Ibid 7–8; see, eg, Jaime Lindsey, ‘Developing Vulnerability: A Situational Response to the Abuse of Women with Mental Disabilities’ (2016) 24 *Feminist Legal Studies* 295, 295–6.
- 3 Wendy Rogers, ‘Vulnerability and Bioethics’ in Catriona Mackenzie, Wendy Rogers, and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2013) 61, 61; International Bioethics Committee, United Nations Educational, Scientific and Cultural Organization, *Report of IBC on the Principle of Respect for Human Vulnerability and Personal Integrity*, UN Doc SHS/EST/CIB-17/10/CONF.501/2 Rev 2 (22 June 2011) 3–4 [12]–[14].
- 4 Martha Albertson Fineman, ‘Equality, Autonomy, and the Vulnerable Subject in Law and Politics’ in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2013) 13, 20.
- 5 Martha Albertson Fineman, ‘Fineman on Vulnerability and Law’ on *New Legal Realism* (30 November 2015) <<http://newlegalrealism.org/2015/11/30/fineman-on-vulnerability-and-law>>.
- 6 Fineman, ‘Equality, Autonomy, and the Vulnerable Subject’, above n 4, 24.
- 7 Margaret Isabel Hall, ‘Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability’ (2012) 58 *McGill Law Journal* 61, 63; Victorian Law Reform Commission, *Guardianship: Final Report*, Report No 24 (2014) 99.

jurisdiction of courts,⁸ guardianships and powers of attorney, and equity's focus on unconscionable conduct,⁹ to name but a few. Equally, however, the law has been guilty of exacerbating problems associated with circumstances of specific vulnerability, sometimes under the guise of providing assistance or protection.¹⁰ Indeed, the power of the law to do so has long been one of the key concerns of the UNSW Law School. The Faculty proudly displays the following quotation by founding Dean Hal Wootten on the walls of its Law Building: 'a law school should have and communicate to its students a keen concern for those on whom the law may bear harshly. ... The poor, the Aborigines, the handicapped, the deviants need their champions in the law as elsewhere'.¹¹

In considering the interaction of the law with different models of vulnerability, three questions arise – the first taking a more theoretical approach to the concept of vulnerability, and the second and third focusing more on the practical application of the law:

1. How does the law define vulnerability?
2. How does – and how should – the law protect people, groups or institutions it has classified as vulnerable?
3. How does the law exacerbate vulnerability?

In this Issue, the *University of New South Wales Law Journal's* first under its new publication structure to contain only thematic articles, I sought to create a space in which these questions could be answered.

The twelve articles in this Issue weave the theme of vulnerability through a range of other issues, including Indigenous and constitutional law, police powers, mental health law policies and systems, social security law, treatment of people with disabilities, employment law, gender-specific issues, forced marriage, and refugee law. Some authors embrace Fineman's conception of universal vulnerability and inequality of resilience. Others direct their attention more towards examples of situational or pathogenic vulnerability, and others still question the utility in applying the vulnerability framework in certain areas of law. Regardless of their approach, each provides a strong and unique perspective on the theme.

It takes a village to raise an Issue and as a result I am incredibly grateful to many people for their hard work, insights and assistance throughout the process.

First, I would like to thank the authors for entrusting me with seeing their articles through to publication. It has truly been a pleasure to work with you. I

8 Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report No 144 (2010) 170.

9 See Mark Pawlowski, 'Unconscionability as a Unifying Concept in Equity' (2001) 16 *Denning Law Journal* 79.

10 Mackenzie, Rogers and Dodds refer to this as 'pathogenic' vulnerability: Mackenzie, Rogers and Dodds, above n 1, 9. A prime example is Australia's treatment of Indigenous people and communities, particularly regarding the so-called 'protectionist' policies that led to the stolen generations: Human Rights and Equal Opportunity Commission (Cth), 'Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (Report, 1997) 23–8.

11 University of New South Wales Faculty of Law, 'Handbook' (1971) 10, quoted in Sir Gerard Brennan, '25th Anniversary of the University of New South Wales Law School' (1997) 20 *University of New South Wales Law Journal* 210, 213.

also acknowledge the anonymous peer reviewers for their invaluable assistance in making publication decisions and helping the articles reach an even higher standard.

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I thank our premier sponsor King & Wood Mallesons for hosting the launch on 27 September, and gratefully acknowledge our two other premier sponsors, Allens Linklaters and Herbert Smith Freehills, for their generous support.

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Finally, I would like to thank my mother, Yvonne Low, for providing the illustration for the theme, as well as my friends and family and God for making all of this possible.

THEMATIC: VULNERABILITY AND THE LAW



Illustration by Yvonne Low