FOREWORD

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Recent years have seen an exponential growth in literature on vulnerability across academic disciplines. To be vulnerable is to face a risk and lack the resources to avoid the risk or respond adequately to the risk if it materialised. Traditionally, vulnerability has been used to identify particular individuals or groups of people as particularly at risk of being harmed and therefore needing state protection or services. Children, in particular, have been widely regarded as a vulnerable group who are particularly susceptible to harm and unable to look after themselves.[1]

This traditional understanding has been challenged by those promoting universal vulnerability.

It has been claimed, most notably by Martha Fineman, that vulnerability is an inevitable aspect of the human condition.[2] This, if true, must cause us to question the weight that the law attaches to autonomy, self-sufficiency and individualised conceptions of human rights. Supporters of universal vulnerability claim that vulnerability is an inherent part of being human.[3] Supporters of this view identify several innate features of humanity which reveal our vulnerable nature. These include our corporal nature (our bodies are frail, naturally wear down and are 'profoundly leaky'[4]); the importance of relationships to our identities and well-being;[5] and our dependency on others for our physical and psychological well-being. Ultimately, as Jo Bridgeman puts it, '[h]umans are vulnerable … because we care, love, are intimately connected to others'.[6]

Martha Fineman has done more than anyone to develop the concept of universal vulnerability and she summarises it in this way:

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1 See Jonathan Herring, *Vulnerability, Childhood and the Law* (Springer, 2018) for a rejection of this argument.

2 Martha Albertson Fineman (2012) '"Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20 *Elder Law Journal* 71, 86–7.

3 Robert E Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (University of Chicago Press, 1985); Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Needs a Theory of Vulnerability' (2012) 5(1) *International Journal of Feminist Approaches to Bioethics* 11, 12.

4 Margrit Shildrick, *Embodying the Monster: Encounters with the Vulnerable Self* (Sage, 2002).

5 Jonathan Herring, *Caring and the Law* (Hart Publishing, 2013) ch 2.

6 Jo Bridgeman, 'Relational Vulnerability, Care and Dependency' in Julie Wallbank and Jonathan Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge, 2014) 198, 201.

> The vulnerability approach recognizes that individuals are anchored at each end of their lives by dependency and the absence of capacity. Of course, between these ends, loss of capacity and dependence may also occur, temporarily for many and permanently for some as a result of disability or illness. Constant and variable throughout life, individual vulnerability encompasses not only damage that has been done in the past and speculative harms of the distant future, but also the possibility of immediate harm. We are beings who live with the ever-present possibility that our needs and circumstances will change. On an individual level, the concept of vulnerability (unlike that of liberal autonomy) captures this present potential for each of us to become dependent based upon our persistent susceptibility to misfortune and catastrophe.[7]

Martha Fineman accepts that in a typical lifespan there will be times of different capacities and strengths.[8] Vulnerability theorists differ on whether this simply reflects the differences in social provisions offered to different groups[9] or whether the course of life brings with it different experiences of vulnerability.[10] But all agree, the typical 'adult liberal subject' focuses on just one part of that life span (middle age) and essentialises this as the standard as the norm for humanity.

A further important aspect of vulnerability theory is to reject the assumption that vulnerability is something to be avoided or overcome. Rather, vulnerability is to be greatly welcomed. Our mutual vulnerability requires us to reach out to others to offer and receive help from them. The virtues of beneficence and compassion are encouraged and necessary. We have to become open to others and our own and others' needs. A recognition of our mutual vulnerability leads to empathy and understanding. It creates intimacy and trust. It compels us to focus on interactive, cooperative solutions to the issues we address.

If it is true that all humanity in its nature is vulnerable then this requires a complete rethinking of the structure of legal regulation.[11] A legal response based on a norm of vulnerable people would be a more realistic and effective one. The principles we held once so dear – autonomy, liberty, freedom – are a woefully-inadequate response to our vulnerable nature. Susan Dodds also argues that we need a legal and social system which is premised not on individualistic conceptions of autonomy but an acceptance of our vulnerability:

> A vulnerability-centered view of the self and of persons is better able to capture many of our moral motivations and intuitions than can be captured by an autonomy-focussed approach. We are all vulnerable to the exigencies of our embodied, social and relational existence and, in recognising this inherent human vulnerability, we can see the ways in which a range of social institutions and structures protect us against some vulnerabilities, while others expose us to risk. We do not have to view our obligations towards those who lack the capacity to develop or retain autonomy as having a different source from our obligations towards those whose autonomy is made vulnerable due to a degree of dependency. It may be easier to recognise the social value of provision of care if it is viewed as

7 Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1, 12.

8 Ibid.

9 The view promoted in Herring, *Vulnerability, Childhood and the Law*, above n 1.

10 The view Martha Fineman appears to take: Fineman, 'The Vulnerable Subject', above n 7, 11.

11 Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016); Fineman, 'The Vulnerable Subject', above n 7, 12.

> something on which we all have been dependent and on which we are all likely to be dependent at different points in our lives, rather than altruistic behaviour extended to those who lack 'full personhood'.[12]

A recognition of our mutual vulnerability and the reliance we all have on the provision of help from the state and others must be at the heart of our political and legal response. As Martha Fineman argues, law tends to emphasise and presume actors are marked by autonomy, self-sufficiency, and self-determinacy. She spells out the significance of this approach:

> When we only study the poor, the rich remain hidden and their advantages remain relatively unexamined, nestled in secure and private spaces, where there is no need for them or the state to justify or explain why they deserve the privilege of state protection. … We need to excavate these privileged lives.[13]

As Fineman argues, a universal vulnerability approach highlights the extent to which all of us are supported by social provision, but also the way that some people are particularly privileged in terms of state provision. But once that is accepted the role of the law can shift to restricting and reducing the power of the powerful, rather than seeking to protect the vulnerable from an exercise of power. Those labelled 'vulnerable' are not some pre-existing category but better seen as having been labelled as such in order to legitimate political ends and to justify current inequalities.

Much work is required in seeking how to implement this writing and thinking into practical ways.[14] It must be accepted that much of the writing on universal vulnerability has been at a fairly abstract way. There has not been much that has sought to directly apply the theoretical material to concrete situations. It is therefore especially welcome that this Special Issue has focussed on that work. As can be seen from these papers, while the focus is primarily on practical issues around vulnerability, they also highlight tensions within the theoretical work.

Dominique Allen's article explores challenging workplace disability discrimination, using the *Fair Work Act 2009* (Cth) section 351 ('*FWA*'). It notes that section 351 does not use discrimination but rather talks of adverse action. In terms of the broader issues around vulnerability there are two issues raised by the article which are of particular interest. The first is that the *FWA* uses an independent regulator to enforce its provisions. This moves away from an assumption that it is the responsibilities of employees to object to unfair treatment, and recognises it as a state responsibility. The second is that the use of 'adverse action' rather than discrimination avoids the difficulty of comparison which can be problematic in discrimination law because that tends to reinforce artificial binaries (disabled–able bodies; male–female etc).

The article by Heli Askola examines the issue of forced marriage. It accepts the standard understanding of vulnerability: that is, a group who are particularly at risk of being forced into marriage. However, it argues that the range of factors

12 Susan Dodds, 'Depending on Care: Recognition of Vulnerability and the Social Contribution of Care Provision' (2007) 21 *Bioethics* 500, 507.

13 Martha Albertson Fineman, 'Grappling with Equality: One Feminist Journey' in Martha Albertson Fineman (ed), *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* (Routledge, 2011) 58.

14 Herring, *Vulnerable Adults and the Law*, above n 11.

that create this vulnerability are complex and the law requires a more nuanced approach to respond to it. Interestingly this opens up the possibility (not explored fully in the article) of exploring the pressures that are behind every marriage, created by legal, social and religious pressures.

Fleur Beaupert's article explores how laws which are designed to protect 'vulnerable groups' can themselves generate and exacerbate vulnerability. As the article notes, mental health law, often justified in the name of protecting those with mental illness who cannot look after themselves, can lead to control, coercion and violence against people with mental health issues. A similar issue is raised in Sinead Butler's analysis of abuse of police powers and investigation. The article is interesting because it highlights the vulnerability of a group (the police) who would not commonly describe themselves in those terms. The control by the police of investigations into themselves reflects the fears they have about being held to account. By failing to embrace their vulnerability and the fact that they should be open to external scrutiny, they exacerbate the perception that the police abuse their powers. That is reflected too in Stephen Gray's article about the immunity from criminal liability offered to police, corrections staff and other law enforcement officers for actions performed in the course of their duties. While enacted to protect officials 'doing their best' to deal with 'troublesome people', in fact, as this article shows, it has operated to the disadvantage of vulnerable groups, particularly Aboriginal people.

An insightful analysis of the application of vulnerability literature is offered by Terry Carney and, in particular, the use of substituted decision-making in social security law. The article welcomes the shift from individual to relational thinking, but argues that the concept is too capacious and vague to be useful. There is merit in this critique, although the concept of vulnerability is intended to operate at a high level of generality and needs analysis of the kind Carney provides to explore how it plays out in particular contexts.

One of the benefits of a universal vulnerability approach is that it shines light on those who have power in society. If our nature is to be vulnerable and dependent on others, the fact that some have power and appear self-sufficient reflects the authority and power given by society, rather than any innate ability. This is a helpful lens through which to read Tanya D'Souza, Laura Griffin, Nicole Shackleton and Danielle Walt's article on hate speech. As they highlight, hate speech against women has become pervasive and insidious and has become normalised. The article might have added that 'pro-masculine' or male norm speech has an impact too. It is also a useful perspective from which to read Thomas Hvala's article on parental leave IVF treatment. This is a good example of how that a certain image of what is a parent means the state can put in supportive mechanisms for them, leaving those who fall outside the approved image of a parent lacking resources to respond to their natural vulnerability. A further powerful example of the importance of looking at societal allocation of power is the article by Shireen Morris, regarding constitutional reform in light of the Uluru Statement from the Heart's call for a guaranteed First Nations voice in their affairs. It is an excellent example of how different groups can be

marginalised or empowered through societal forces, but that is then justified in the name of vulnerability. The article explores how that can be challenged.

Yvette Maker, Jeannie Marie Paterson, Anna Arstein-Kerslake, Bernadette McSherry and Lisa Brophy explore consumer protection law for those with cognitive disabilities in light of the *United Nations Convention on the Rights of Persons with Disabilities* ('*CRPD*'). They note that the law responds to these issues by putting in place mechanisms to protect 'vulnerable consumers' from transactions where their consent was not genuine. They helpfully set out some proposals for a more meaningfully supportive contract law for consumers with cognitive difficulties. What I would have liked to see is more exploration of whether in fact we need simply to rethink all contract law to recognise our universal vulnerability – a contract law focussed on a recognition that we need to look out for each other and support each other in entering contracts, rather than one that seems designed to enable one party to a contract to exploit it to the disadvantage of another.

Two articles explore refugees from the perspective of vulnerability. Alexander Reilly looks at the vulnerability of Safe Have Enterprise visa holders and Emily McDonald and Maria O'Sullivan explore the refugee status determination ('RSD') process. As they demonstrate, the difficulty is that key facts are often unknown and hard to verify on documentation and so much can turn on an applicant's credibility and speculation about their country of origin. They highlight the balance between fairness and efficiency which is required of the system. As they indicate, however, the perceived need for 'efficiency' renders the applicant vulnerable as they are required to present their case without language skills. As they suggest, the difficulties here challenge the assumption that law can be impartial and make definitive assessments of facts. Perhaps they show that law itself is in its nature vulnerable.