

The Vulnerable Subject: Anchoring Equality in the Human Condition (Martha Fineman)

Ellen Gordon-Bouvier, School of Law, Oxford Brookes University

The work

In 2008, the US feminist scholar, Professor Martha Albertson Fineman, published her seminal article ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ in the *Yale Journal of Law and Feminism* (Fineman, 2008), marking the beginning of her development of a theory of universal human vulnerability. Fineman’s vulnerability theory has had enormous influence among law and social justice scholars over the past decade, with numerous symposiums and conference streams being dedicated to the consideration of different aspects of vulnerability, many of these organised by the ‘Vulnerability and the Human Condition’ initiative based at Fineman’s home institution, Emory University, Georgia, US. This chapter explores the nature of Fineman’s theory of universal vulnerability, its significance for law and social justice scholarship, as well as detailing how other scholars, myself included, have developed parts of the theory in different directions. The chapter draws not only on Fineman’s 2008 article, but also charts how she has developed and refined vulnerability-theory through subsequent works.

The context

Vulnerability-theory is, at its heart, a critique of the liberal theoretical principles that underlie law and politics in Western societies and which inform policy and law-reform debates. As Fineman (2008, p 2) argues, liberal theories take as their presumption that humans are by nature autonomous, rational, and self-sufficient, and laws are constructed with a hypothetical “autonomous and independent subject” in mind. Examples of these liberal theoretical perspectives include Kant’s (Kant, 1996) theory of internal moral law, Rawls’ (Rawls, 1971), theory of justice, Locke’s (Laslett, 1988) liberal individualism, and Raz’s (Raz, 1986) notion of liberal perfectionism. Under these accounts, autonomy is presented as an innate human quality, which the state has a duty to respect and protect. Liberal individualism regards

state interference as generally harmful because it constrains individual autonomy and freedom. Instead, the ideal liberal state should be restricted to the role of a ‘night-watchman’ (Nozick, 1974), present to enforce individual rights and to safeguard autonomy, but remaining restrained in all other regards. For instance, Nozick (1974: 25) argues that the state should not seek to redistribute material and economic resources among citizens in pursuit of some overarching notion of common good, as to do so would be tantamount to theft.

This is not to say that the liberal legal tradition altogether ignores those who are less fortunate or is completely blind to the existence of injustice and oppression among populations. However, legal and political responses to societal inequalities such as racism, sexism, or homophobia have tended to centre primarily around principles of non-discrimination and formal equality, whereby the affected person is compared to a hypothetical comparator who is not a member of the oppressed group (Fineman, 2008: 2; 2012a). Legal measures are then put in place to give enhanced protection to members of the oppressed group, ostensibly preventing them from being treated less favourably and seeking to place them in the position of those who do not belong to the group.

Vulnerability theory is highly critical of initiatives based around formal legal equality. Fineman argues that the use of the hypothetical comparator reinforces that the protected identity categories constitute weaknesses that necessitate legal protection. It rests on an assumption that the norm is ‘invulnerability’, as represented by the hypothetical individual who possesses none of the relevant characteristics. Additionally, she notes that non-discrimination initiatives focus on the individual rather than the role that the state plays in the creation of conditions that lead to certain sectors of the population experiencing disadvantage (Fineman, 2008: 5). As she argues, “[f]ormal equality leaves undisturbed- and may even serve to validate- existing institutional arrangements that privilege some and disadvantage others. It does not provide a framework for challenging existing allocations of resources and power” (Fineman, 2008: 3).

The inherent human condition- a new approach

Fineman’s vulnerability-perspective presents a radical alternative to the liberal tradition. Instead of the current presumption of autonomy (albeit with special provisions for narrowly defined ‘vulnerable

populations'), Fineman (2008, p 9) argues that, rather than connoting victimhood or weakness, vulnerability must be reframed as "a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility". She suggests that inherent human vulnerability should be reflected in law, and in the structure and organisation of state institutions. Vulnerability exists because humans are ultimately *embodied* beings who are susceptible to "the ever-present possibility of harm and injury from mildly unfortunate to catastrophically devastating events" (Fineman, 2008: 9). By contrast, Fineman argues that the hypothetical liberal subject is *disembodied*. The constant possibility of bodily injury through accident and illness, and the inevitability of physical decline and dependency do not feature within the liberal perspective. Whereas vulnerability theory acknowledges the fluctuations of bodily strength throughout the biological life-course, the liberal theoretical model sees the body as static and unchanging. As Fineman (2010, p 265) argues, the liberal subject, such as it exists in the literature, is a mere snapshot of a human, taken at the height of physical strength, with the helplessness of infancy and childhood regarded as "a stage that the liberal subject has long ago transcended or left behind". To the extent that the liberal subject *is* considered to have a body, this is, as Naffine (2003, p 365) argues, a *male* body, commenting that "[the liberal subject] is never pregnant, for this would threaten his physical integrity". Additionally, where the body appears in liberal theory, it is inevitably separated from, and secondary to, the rational mind (Gear 2011). This is, as Halewood (1995, p 1340) argues, necessary for the liberal thesis, as "the separation of subjects from objects, by shearing subjects of all distinguishing embodiment or particularity, permits the formal equality of legal subjects".

The second strand of vulnerability theory, which Fineman has developed in greater detail in her more recent work, is the notion that the embodied vulnerable subject is inherently *embedded* within a network of relationships, both with other individuals and with the state and its various institutions (Fineman, 2017; Lewis and Thomson, 2019). This is a core feature of the human condition. It is universal embodied vulnerability that "presents opportunities for innovation and growth, creativity and fulfilment. It makes us reach out to others, form relationships, and build institutions" (Fineman, 2012b: 96). Yet, as Fineman argues, the natural and inevitable dependency that results from embodiment and

fluctuates throughout the life course is stigmatised in liberal discourses, used as evidence of a failure to attain autonomy and self-sufficiency (see Fineman 2004). Liberal theory sees relationality as a potential constraint on the exercise of individualistic autonomy rather than an inescapable feature of personhood.

Fineman's emphasis on the universality of vulnerability represents a radical departure from the identity-based approach prevalent in other social justice scholarship. Instead of highlighting the plight of an identified group of people (e.g. women, or the elderly), Fineman implores us to avoid exclusive focus on the divisions between these groups, and to recognise that vulnerability is something that affects us all. This also means accepting that it is not possible to eliminate vulnerability, and nor would this be a desirable result. Instead, law and policy need to be reoriented around acceptance of vulnerability as an inevitable and universal condition. The imagined legal subject, or 'law's person', around whom law and policy is framed, must be the vulnerable subject, rather than the wholly unrealistic autonomous, disembodied subject featuring in dominant liberal legal and political thought. The result of this will be that vulnerability is no longer regarded as out of the ordinary. Nor will inevitable episodic dependency be treated as a failure to attain autonomy. Rather, it is merely a consequence of being human and of inhabiting a fragile body.

The notion of a shared universal vulnerability as an alternative to identity-based approaches may appear to ignore or minimise the struggles of certain sectors of the population. Both in the US, where Fineman is writing, and in the UK and other Western societies, inequality between citizens is highly visible. Taking the example of the UK, austerity politics brought in by successive Conservative governments over the past decade have seen a widening of the gulf between the rich and poor. In the face of such obvious and gross inequalities, it may appear difficult to defend the core argument that we are all fundamentally vulnerable. However, Fineman makes an important distinction between vulnerability (which is universal and unavoidable), and *resilience*, which refers to the resources that an individual possesses that can help to ameliorate the impacts of being vulnerable. Thus, the divide between rich and poor reinforced by Conservative and capitalist policies relates to the difference in levels of resilience that these groups possess. Fineman (2013, p 22) has defined resilience as

assets – reservoirs of capabilities, advantages, or coping mechanisms that cushion us when we are facing misfortune, disaster and violence, as well as constituting the resources that we will need if we are to take risks and avail ourselves of opportunities as they arise.

This makes it clear that, unlike the term's use in neoliberal parlance (see Chandler and Reid, 2016), resilience within vulnerability theory does not refer to an internal disposition or hardiness, but focuses on the state's distribution of a variety of resources. The neoliberal state, in its adherence to principles of restraint and the promotion of individual self-sufficiency, does seek to achieve parity of resources between its citizens. State restraint allows some individuals to prosper and amass wealth far in excess of need, while others are barely able to provide for the basics of survival. Yet, the neoliberal state promotes the myth that all individuals are autonomous and possess equal capacity for economic self-sufficiency (Fineman 2004). This permits inequality to remain unchallenged. Dependency, which is an inevitable aspect of the human condition, becomes labelled as a failure to avail oneself of the resources that the state provides to all. It is regarded as both undesirable and out-of-the-ordinary and, even if limited means of support are provided (e.g. in the form of welfare-benefits), this is stigmatised and regarded as a burden on the remainder of society.

Fineman encourages us to interrogate how the state distributes its resources and how its existing laws and policies are failing huge swathes of the population, while the state remains able, through the rhetoric of personal responsibility, to deny its role in creating responsibility. She advocates for a “responsive state” to replace the current restrained night-watchman state (Fineman 2010). The responsive state, she argues, “[r]ecognises that it and the institutions it brings into being through law are the mean and mechanisms whereby individuals accumulate the resilience or resources that they need to confront the social, material and practical implications of vulnerability” (Fineman, 2013: 17).

Vulnerability theory as a foundation for social justice scholarship

Fineman's vulnerability theory has prompted a radical reconceptualisation of how social justice issues are approached. Many scholars have been versed in the rhetoric of formal equality and human rights, which can be difficult to abandon. However, as Fineman argues, appeals to formal legal equality do not sufficiently challenge the state's promotion of unrealistic standards of individualism and autonomy. Additionally, identity-based approaches usually involve relatively narrowly drawn categories of

‘vulnerable populations’. Thus, the invulnerable liberal subject remains the norm, while vulnerability and dependency continue to be stigmatised. By contrast, vulnerability-based approaches involve a move away from the individual towards interrogation of broader state structures and the various inequalities they produce. I will now examine how various law and social justice scholars have adopted different aspects of Fineman’s theory, including the construction of vulnerability as victimhood, the role of the family as a state institution, the shaping of power-relations, and the limitations of formal equality approaches.

Critiquing narrow conceptions of vulnerability

As Fineman argues, liberal theories are based around the imagined conceptions of personhood as innately autonomous and rational. This, in turn, leads to vulnerability and visible dependency being stigmatised and ‘othered’. Rather than accepting the universal and unchangeable nature of vulnerability, liberal accounts regard it as a failure to attain autonomy. Furthermore, by employing excessively narrow and rigid categories of ‘vulnerable groups’, those who do not fit into these definitions are disregarded and expected to conform to the norm of invulnerability.

Jess Mant and Julie Wallbank’s (2017) analysis of access to public funding in private family law cases critiques the liberal tendency to construct vulnerability as victimhood and an exceptional condition. They examine the impact of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (‘LASPO’), which involved a large-scale withdrawal of Legal Aid for the vast majority of private family cases. Public funding in private-law proceedings is now restricted to those cases where the applicant can provide evidence that she is a victim of domestic abuse. The authors combine a vulnerability-analysis with Mariana Valverde’s theoretical work on scale and jurisdiction (see Valverde, 2015; 2009). In doing so, they seek to “map the shift that has taken place within family law as a result of the political boundary that the act has drawn between ‘vulnerable’ litigants eligible for legal aid and the rest of families engaging with private family law, for whom self-sufficiency and responsibility is encouraged and expected” (Mant and Wallbank 2017, p 629).

As the authors point out, the LASPO reforms have led to a reduction in the “formal scale” of family law (referring to adjudication by the courts), shifting the disputes that previously fell within its remit

towards the realm of unregulated, informal dispute resolution. This shift has been justified through binary categories such as vulnerable and invulnerable, and deserving and undeserving. As they note, the domestic violence exemption is evidence of a “bright-line rule approach to defining vulnerability” (Mant and Wallbank, 2017: 630). Under the LASPO reforms, vulnerability is an exceptional state, being defined by notions of victimhood and helplessness. As the authors argue, this means that those who are unable to place themselves within the category of deserving victim, “are pushed into the informal scale which they may potentially struggle to negotiate and become part of the newly disappearing class of vulnerable subjects of family law” (Mant and Wallbank, 2017).

Mant and Wallbank also note how the bright-line approach to vulnerability is underpinned by norms of individual responsibility and self-sufficiency. As the authors argue, the initial Ministry of Justice proposals for withdrawing legal aid were premised on the notion that “legal issues arising from litigants’ personal life choices are less likely than public law matters to be regarded as important enough to be eligible for legal aid” (Mant and Wallbank, 2017: 640). This again starkly reinforces the perceived binary between deserving victims falling into the domestic violence exception and those whose dependency on the state is stigmatised as a failure to attain autonomous personhood. Those who fail to meet the test for vulnerability are considered ‘invulnerable’ in the sense that they are not deemed to be in need of access to the court to resolve their disputes. These post-LASPO provisions are also a clear illustration of Fineman’s definition of the restrained state, espousing a culture of private ordering that places responsibility of resolving disputes on the individual, providing only the bare minimum in terms of upholding and endorsing privately negotiated settlements (Fineman, 2008).

Feminist analyses of the private family

Fineman’s theory presents an attractive prospect for feminist scholars. It challenges and cuts through the rhetoric of the division between the public and the private realm, explaining this as a myth that the restrained state relies upon to uphold unrealistic ideals of autonomy and individualism. Within the liberal tradition, law makes frequent claims that it is a closed system of logic; one that is rational and ordered and separate from the private realm of its citizens (Fox-O’Mahony, 2014). However, as Fineman argues, the idea of the absent state is a fallacy. Even where it claims to be restrained, such as

in ostensibly private contracts and transactions, the state is always present, enforcing the norms and boundaries that govern interactions between its citizens (Fineman, 2008: 6). Thus, vulnerability theory adds to the existing rich feminist scholarship on the problematic aspects of the public/private divide (see e.g. Olsen, 1984).

Vulnerability theory provides a particularly useful lens through which to analyse and critique the role of private family in upholding and reinforcing norms of autonomy and invulnerability. Within liberal theory, the private family is presented as lying predominantly beyond the reach of law, as well as representing a natural way that people choose to order their lives. Yet, as Fineman argues, there is little natural or inherent about the family. Instead, she suggests that it should be viewed as a state-created institution that is designed to uphold the mythical image of autonomy. Visible signs of human vulnerability and of the embodied condition become concealed behind the folds of the family and are removed from public view and concern. The family as a unit is expected to be autonomous and economically self-sufficient with little scrutiny of how labour is divided within the home. Often, this results in a division of gendered roles within the home that puts those who perform caregiving labour at a disadvantage. In her 2004 book, 'The Autonomy Myth', a precursor to her work on vulnerability, Fineman criticises the way that the liberal state laws and policies stigmatise those who perform the vital work that is needed in order for adults to attain independence. She remarks of the significant debt that is due them by the state for the facilitation of the myth of autonomy as the norm.

My own work has examined the position of cohabiting caregivers through a 'relational vulnerability' lens, which focuses on how the state uses gendered principles of privacy and sentimentality to marginalise and devalue socially reproductive work performed in a family context (Gordon-Bouvier, 2019; 2017). Whereas the number of unmarried families is rapidly increasing, English law does not permit judicial redistribution of financial assets on relationship breakdown, as it does for married couples. Instead, disputes fall to be resolved using ordinary principles of property and trusts law, which express a strong preference for direct financial contributions to the property in question. My work has examined the position of unmarried informal caregivers, whose contributions within the relationship have taken the form of socially reproductive labour (including childcare and housework), usually at the

expense of their future economic earning-capacity. These individuals often struggle to show that they have acquired a proprietary interest in the home, and frequently face financial hardship following relationship breakdown.

Fineman's vulnerability lens has allowed me to turn the existing debate on its head. Previous academic debates around the rights of cohabitants have often been framed in terms of the state being essentially absent, with cohabitation being viewed as lying 'outside the law'. I have challenged this perspective, arguing that the state's position reinforces caregiving as a private, gendered, and sentimentalised pursuit (Gordon-Bouvier, 2019). By denying cohabiting caregivers legal rights, the state is actively participating in the marginalisation of socially reproductive labour, ensuring that it remains concealed within the private family, where it does not disrupt the state's promotion of the autonomous liberal subject as the norm. Rather than recognise caregiving as an inevitable aspect of the universal human condition (which is interspersed with periods of dependency on others), its devaluation in legal and political discourses sees caregivers labelled as having failed to attain autonomy. By moving away from the existing framework of the debate, Fineman's theory has allowed me to challenge the assumptions and myths that underpin law's treatment of cohabitants.

Challenging law's construction of power relations

Vulnerability theory prompts a move away from focus on individuals and narrowly defined groups, towards a more holistic appreciation of how broader state institutional structures perpetuate inequalities among legal subjects. An interesting example of scholarship in this area is provided by Stu Marvel's (2016) vulnerability-analysis of the treatment of sexual assault on university campuses. As she notes, US rape-statutes often require the victim to show the presence of physical force in order for an assault to be classed as rape. This is in contrast to a growing culture, particularly prevalent on university campuses, which focuses on the absence or presence of *consent*, rather than physical force. Other scholars have called for the criminal justice system to 'catch up' and align itself to 'consent culture' (see Tuerkheimer, 2015). As such, the criminal justice system is regarded as out of date in comparison with the more progressive campus-movement. As Marvel notes, her goal in framing these issues through a vulnerability-lens is to challenge existing conceptions of sexual violence and victimhood. She argues

that “[b]y tracking questions of consent, criminality, and sexual agency through a vulnerability lens, we may move away from the ‘vulnerable victim’ model to engage a more robust understanding of resilience and institutional responsibility” (Marvel, 2016: 2036).

Indeed, as Marvel (2016, p 2040) notes, law consistently configures rape and sexual assault in terms of an imagined ‘vulnerable’ victim, whose physical boundaries are violated by the perpetrator. Here, vulnerability is understood not as a universal human condition, but as a “special precarity or openness to harm” (p 2040). And, as Marvel argues, women are constructed in wider social and cultural discourses as being especially vulnerable to sexual assault, which in turn feeds into legal perceptions of rape (p 2040). The requirement of force reinforces the idea of a weak and helpless victim. As Marvel also points out, it is symbolic of a racialised history, whereby the victim is imagined as “a virtuous white woman ready to struggle to the death against an assault upon her virginity” (p 2043). However, this definition has shown itself to be highly problematic, including its inability to deal with ‘out of the ordinary’ incidents, such as a case where the perpetrator did not use force because the victim was asleep, which has prompted critique and calls for a consent-based model (p 2039). However, as Marvel warns, the consent-based model is also based on distinctions between those who have agency (demonstrated through giving consent) and those who are categorised as helpless victims.

Marvel moves away from the victim-perpetrator dynamic and the role of consent, which is inevitably based on a vision of invulnerability as the norm. As she argues:

Rather than focus on the ‘vulnerability’ of victims, we can analyze the body of rape jurisprudence as an institutional system expressly designed to mitigate certain forms of human vulnerability. It is a structure created to provide resources and support to some people, while potentially denying those same mechanisms of support to others (Marvel 2016, p 2042)

Here, Marvel is challenging the notion of vulnerability as an out-of-the-ordinary condition. As vulnerability is universal, the perpetrator too is vulnerable. The difference is that the state’s institutional structures (including the criminal justice system) currently provide perpetrators with resilience (by narrowing the definitional categories of rape), which in turn reduces victims’ resilience. Thus, Marvel argues, legal responses to rape could be reimagined in terms of an analysis of the institutional structures

upon which we all depend. This avoids the problem of making distinctions of vulnerability/invulnerability based on notions of consent and agency.

Exposing limitations of formal equality approaches

Fineman's theory encourages scholars to reject formal legal equality solutions to social justice issues. As she argues, these fail to interrogate the unequal underlying structures of the state and its institutions. An example of this aspect of the theory being explored can be found in Fae Garland and Mitchell Travis's (2018) work on the rights of intersex individuals. In their analysis, the authors draw on Fineman's theory to consider the interaction between law and other state institutions, including the medical profession, and the impact that this has on intersex subjects. As they explain, intersex is an under-explored area and, until recently, has been invisible in law. Instead, affected individuals have been subjected to often unnecessary and intrusive medical procedures at the hands of medical professionals, who seek to align them with one of two binary sexes. Garland and Travis (2018, p 589) argue that:

legal silence effectively legitimises the medical account of intersex as a purely material concern, permits attempts to 'normalise' these bodies and enables their social and cultural erasure. Thus, law aligns itself with the biomedical discourse of intersex depicting such bodies as deviant or unruly and in need of taming

As mentioned above, vulnerability theory prompts a reconceptualisation of notions of legal silence and supposed state absence. As is the position with cohabitants, the state is never truly removed from any interactions between its citizens. Garland and Travis (2018, p 589) note that "law's silence is...not neutral; rather it perpetuates the existence of a striking power imbalance between intersex people, their families and the medical profession". They further argue that law's detachment from intersex status, permits the notion of the biological sex-binary to be perpetuated as an unchallengeable truth, which in turn has a detrimental impact on those who do not fit into it. By refusing to intervene, law is legitimising the often-brutal medical interventions that allow the sex-binary to be upheld.

Garland and Travis's work also draws on Fineman's argument that formal equality solutions are insufficient to challenge the structural inequalities perpetuated by the state. Indeed, those jurisdictions that *do* recognise intersex status have sought to respond with formal legal equality initiatives,

“integrating intersex as a ‘protected characteristic’ within anti-discrimination law and/or by using third markers to signify an intersex ‘status’” (Garland and Travis 2018, p 591). However, Garland and Travis critique the limited impact of such matters on the resilience of intersex individuals. As they argue, the non-discrimination approach does not prevent unnecessary medical interventions and, as such, does not sufficiently empower the intersex subject against the force of the medical discourse. Indeed, measures that recognise intersex as a protected characteristic “inevitably require some affirmative action through self-identification by the individual”, meaning that “the individual (or parents) must openly challenge the biomedical discourse and the culture of erasure themselves before legal provisions based on status are able to take effect” (Garland and Travis 2018, p 592). Thus, the authors have provided an illustration of Fineman’s concerns around the inherent limitations of formal equality approaches.

Developing vulnerability theory: Filling the gaps

While Fineman’s theory has had considerable influence in law and social justice scholarship, it has also prompted scholars to offer refinements and developments of the theory, addressing some of the perceived limitations of its current form. Mackenzie, Rogers, and Dodds (Mackenzie et al., 2014) have remarked that Fineman’s conception of vulnerability focuses almost exclusively on biological embodied vulnerability, which they regard as an over-simplified model that does not explain all forms of harm to which humans are subject. Addressing this perceived gap, they have developed a taxonomy of vulnerability, which makes distinctions between its different forms. While Mackenzie et al recognise and endorse Fineman’s notion of universal vulnerability (which they term “inherent vulnerability”), they also argue that humans can be subject to additional vulnerabilities, including *situational* vulnerability, which arises from “the personal, social, political, economic or environmental situation of a person or social group” (Rogers et al., 2012: 24), which can be either temporary or enduring. They refer to examples such as imprisonment or living in an area affected by natural disaster. They also recognise *pathogenic* vulnerability, which has been described as “a subtype of situational sources that arise from dysfunctional social or personal relationships...often characterized by prejudice, abuse, neglect or disrespect, or from political situations characterized by injustice, persecution or political violence” (Lange et al., 2013: 336). Furthermore, they distinguish between that vulnerability which is

dispositional, or potential, and that which is *occurrent*, or actual (Mackenzie et al., 2014: 8). While the embodied human condition makes us all *disposed* to harm and injury (what Hamrouni (2016) has termed “ordinary vulnerability”), the authors point out that this is different to harms that are occurrent and will warrant different responses by the state (Mackenzie et al., 2014: 7).

Drawing these distinctions between ordinary and “more than ordinary” (see Sellman, 2005) states of vulnerability appear to contradict the central tenet of Fineman’s theory; that vulnerability is a universal condition, whereby no individual is any more or less vulnerable than another. However, I suggest that recognising more than ordinary states of vulnerability does not undermine the argument that embodied vulnerability is universal. To an extent, this seems to be a debate over nomenclature. As discussed above, Fineman’s theory fully recognises that vulnerability is not experienced uniformly across populations and that some individuals experience severe hardship while others prosper. However, she attributes this to variations in levels of resilience, caused by the organisation of state institutions, rather than accept the suggestion that some individuals and groups are more vulnerable than others. The question is whether the distinction between extraordinary vulnerability and lack of resilience is a fundamental one, when the theorists are essentially describing the same problem. I suggest that there is a conceptual difference between the two. By exclusively defining vulnerability in broad and biological terms, as Fineman does, there is a risk that the theory will struggle to address those harms that cannot be attributed to the vulnerable human condition, such as state-perpetrated violence and direct discrimination against particular groups. I have written elsewhere (Gordon-Bouvier, 2019) that by labelling state-created harms as a lack of resilience, this risks unhelpfully de-emphasising the state’s active role in their creation. There is also merit, in my view, in distinguishing between types of vulnerability (ordinary or more-than-ordinary) as the *source* of potential or occurrent harm, and resilience as the *response* to it. For that reason, I see considerable value in undertaking a more nuanced analysis of vulnerability, as this will inform ideal responses, as well as the duties owed by others towards those experiencing more-than-ordinary vulnerabilities. My own work on the legal position of cohabitants develops the notion of “relational vulnerability” as a more-than-ordinary form of vulnerability impacting those who undertake socially reproductive work in the unmarried family context

(Gordon-Bouvier, 2019; 2017). As I explain, the recognition of relational vulnerability does not deny or undermine the existence of embodied universal vulnerability. Indeed, it is the existence of universal vulnerability that necessitates the performance of socially reproductive labour. However, the source of the various harms that cohabiting homemakers experience (which are both economic and psychological in nature) result primarily from the state's failure to value socially reproductive labour rather than being a direct consequence of the embodied human condition.

The other sense in which the theory has been developed relates to the interaction between vulnerability and autonomy. Fineman's theory notably departs from the autonomy-perspective. She views autonomy as an excessively individualistic concept, which bears little relation to the embodied and relationally embedded vulnerable subject (Fineman, 2010). As such, she believes it unhelpful to regard the promotion of autonomy as a goal of the responsive state. This rejection of autonomy has attracted criticism from scholars who believe it offers the potential to anchor state-responses in normative aims. For example, Kohn (2014) has argued that Fineman's rejection of autonomy as a guiding principle for law reform initiatives risks promoting policies that are overly paternalistic and ignore the documented physical and psychological benefit to the individual of being able to make her own life-choices. Mackenzie (2014) makes the same point, also arguing that Fineman's interpretation of autonomy is its excessively individualistic form, as espoused by the classical liberal theories. Instead, Mackenzie (2014, p 41) proposes that autonomy should be defined *relationally*, recognising that the state of being autonomous "involves social and reciprocal duties to others". This also echoes Nedelsky's (2011: 118) argument that "autonomy is made possible by constructive relationships – including intimate, cultural, institutional – all of which interact". Mackenzie (2014, p 42) suggests that when autonomy is reconceived as a relational condition, it can serve as a useful goal for achieving social justice, recognising that "the capacity to exercise some degree of self-determination is crucial for leading a flourishing life".

As this discussion shows, there remain uncertainties and points for development within Fineman's theory. However, this is inevitable in the context of a theory of this scale, which aims to provide an alternative to liberal autonomy-based 'grand-theories' (which themselves have prompted disagreements

between proponents). It would be unrealistic for a broad and overarching theory such as Fineman's to provide workable solutions to all contexts in which it is applied. Instead, the expansion and reconceptualisation of Fineman's theory that has taken place in specific contexts should be regarded as a welcome injection of greater nuance, without rejecting the fundamental tenet that the human condition is inherently vulnerable.

Vulnerability theory's legacy

Fineman's 2008 article provided the foundation for a radical new approach to law and social justice scholarship. As I have illustrated in this chapter, the theoretical perspective advanced by the article has had a substantial impact within the academic community. By moving the focus away from the pursuit of formal legal equality, Fineman encourages us to examine how the state structures its institutions around an unrealistic disembodied version of personhood. It is only by recognising the state's pivotal role both in the creation of conditions of inequality and in providing resilience for its citizens that problems pertaining to social justice can be resolved.

The sheer number of scholars that have employed the vulnerability lens in their work points to the theory's undoubted influence. This is providing a counterpoint in a political climate that appears increasingly wedded to neoliberal notions of individualism and economic self-sufficiency. However, as I have argued in this chapter, Fineman's theory is general rather than specific. It is attractive on a large scale but requires refinement when applied in different legal contexts. Moving forwards, I see scope for vulnerability-theory to be combined with other critical theoretical perspectives, such as in Mackenzie's consideration of the nexus between vulnerability and relational autonomy and in my own work, which draws on Nedelsky's concept of 'networked relations' (see Nedelsky, 2011). Combining the theory with other perspectives can help to fill some of the gaps that critics perceive within its current iteration.

There is also the opportunity for clarification of key concepts within Fineman's work. For instance, the notion of resilience has been accused of being somewhat under-theorised within the current scholarship (see Lotz, 2016). A comprehensive theory of resilience is vital for the question of state responses to vulnerability. In my own work, I have argued that Fineman's theory regards resilience as consisting

predominantly of access to external resources (which are provided by the state and its institutions). Fineman argues that the state's distribution of resilience should achieve substantive equality among its citizens. However, I suggest that there is merit in considering whether resilience should also consist of an internal element, which would help measure the effectiveness of different proposed state-responses. Resilience should not merely involve access to resources but also produce the state of *perceiving oneself to be resilient*. Here, I have drawn on the relational autonomy perspective discussed above, arguing that self-determination and the capacity to make choices (albeit in the context of one's network of relationships) is a key component in feeling resilient and that the state should aim to foster this in its structuring of institutions.

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