Relational Vulnerability: Theory, Law and the Private Family

Chapter 1: Introducing Relational Vulnerability

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Chapter 1: Introducing Relational Vulnerability

Over the past decade, a new discourse of human vulnerability has emerged in socio-legal and critical studies, providing a novel lens through which to analyse law and state policy. This 'vulnerability-theory' is rooted in the notion that, as humans, we all share an inherent vulnerability that is ultimately grounded in our *embodied* nature. As the theory's leading proponent, Professor Martha Fineman (2008, p 9), argues, the human condition is susceptible to "the ever-present possibility of harm and injury from mildly unfortunate to catastrophically devastating events". As a result of our embodiment, Fineman (2017, p 134) asserts that we are also "dependent upon, and embedded within, social relationships and institutions throughout the life course". Being vulnerable, Fineman argues, is a constant and unavoidable state and, try as we might, we can no more escape being vulnerable than we can escape our own bodies. Therefore, the theory does not seek to eliminate vulnerability (because such a thing would be impossible), but instead calls for a more responsive and engaged state; one that will acknowledge the reality of the embodied and embedded human condition and, through its various institutions, provide the resources, or *resilience*, necessary to reduce the risk of harm, rather than its current practice of stigmatising dependency, regarding it as a failure to attain autonomous personhood (Fineman, 2010).

It is difficult to do justice in relatively few words to the full impact that this 'vulnerability-turn' has had on legal scholarship, both in the UK and globally. The past five Law and Society Association annual meetings have featured numerous paper sessions and roundtable discussions centred around vulnerability. Fineman's own Vulnerability and the Human Condition Initiative at Emory University, USA was founded in 2008, and organises symposiums, conferences, and discussions across the world. Thus, it is clear to see the theory's impact, uniting scholars across a range of socio-legal disciplines through the common thread of recognising

vulnerability as a universal condition. This has led to a substantial reinvigoration and reconceptualisation of debates in a range of legal areas, including transgender rights (Dietz and Pearce, 2020), disability law (Clough, 2017), bioethics (Thomson, 2018), and criminal justice (Dehaghani and Newman, 2017).

This book is an expansion of, and contribution to, the existing scholarship on vulnerability. Using Fineman's notion of universal vulnerability as a foundation, I build upon it by putting forward a new model of what I term *relational vulnerability* that I apply in the specific context of English law's treatment of unpaid work when performed in the context of the private married or unmarried family. In doing so, I also want to develop a more nuanced understanding of universal, embodied vulnerability, emphasising its inherently temporal nature, marked by both unpredictability and inevitability. My approach builds on Fineman's notion of human relational and institutional embeddedness, exploring how the relational structures in which we are all inevitably situated can expose us to harms rather than providing resilience. The existing universal model of vulnerability has been accused of focusing excessively on vulnerability that is biological in origin, arising from the embodied human condition (see Mackenzie et al., 2014). By contrast, this book's context-specific theoretical approach distinguishes between vulnerability that occurs as a result of embodiment and is therefore unavoidable, and that arising from other sources, which is often preventable. I argue that it is not just our bodies that expose us to the risk of harm, but that additional disadvantages can also arise as a result of how the state and its institutions, including law, responds to our embodiment and relationality.

The setting for the book is the legal regulation of the private family and specifically English law's response to the various disadvantages that flow from gendered role specialisation

during marriage or cohabitation. While there already exists substantial feminist literature on this topic (for example Thompson, 2015; Barlow, 2015; Garland, 2015), the vulnerability lens allows me to examine the issues from a novel perspective and to take the debate in a new direction. I argue that the state and law, driven by increasingly neoliberal[1] policies and motivations, structures the private family to function as a mask for the inevitable *dependency-work* that is necessary to sustain the human life course. This term, which has been employed by a number of feminist scholars (see e.g. Fineman 2000; Kittay 1999) is given a broad definition in this book, encompassing all forms of socially reproductive labour, including (but not limited to) caring for children and adults, providing the support necessary for adults to engage in the workforce, and performing the work necessary to produce and maintain the home as the locus of the private family. Dependency-work's concealment within the family (where it is predominantly assigned to its female members) allows the state to promote an artificial, disembodied version of personhood, one that permits it to remain restrained and unresponsive to vulnerability. This comes at the direct expense of those who perform the work (termed 'dependency-workers' in this book), who are exposed to a range of avoidable harms throughout their lives.

While I argue that the relational vulnerability affecting dependency-workers exposes them to various preventable disadvantages, I also recognise that relational vulnerability is inextricably tied to the embodied 'ordinary' vulnerability that affects us all. The relational vulnerability I explore in this book arises because the state wishes to imagine that we are disembodied, atomistic, and *in*vulnerable and relies on hidden and unpaid labour to uphold this image. Legal and policy reform must address not only the harms currently suffered by

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[1] In this book, I use neoliberalism as a loose term to describe the prevalence of state policies that promote personal responsibility, market freedom, and individual economic self-sufficiency (see Harvey, 2007). Neoliberal policies are based on the classic liberal theories of personhood that I discuss throughout the book.

dependency-workers but must also acknowledge the embodiment, fragility, and embedded relationality of humanity.

Being vulnerable: the inherent human condition

Discourses of vulnerability have historically been employed when advocating for special protections for identifiable groups thought to possess particular sensibilities, such as 'the elderly', or 'persons with disabilities' (Formosa, 2014). For instance, Goodin (1985) calls for collective societal responsibility for protecting those that are *especially* vulnerable owing to their dependency on others. Equally, in other fields where a vulnerability discourse has traditionally been employed, including medicine, social psychology, and child protection, terms such as 'vulnerable patient' or 'vulnerable child' connote some special need or weakness that falls outside the expected norm. By instead emphasising vulnerability as a constant and *shared*, rather than extraordinary, state of being, Fineman's universal model moves away from potentially negative connotations of victimhood (see Clough, 2017). This demonstrates vulnerability theory's radical and transformative potential in a range of fields, encouraging a fundamental reordering of the state and its institutions; one that has the potential to achieve social justice on a substantially broader scale than the somewhat hollow call for anti-discrimination measures for marginalised 'vulnerable groups', which rests on the assumption that the norm is *in*vulnerability (Fineman, 2012).

Vulnerability theory criticises and challenges the problematic and flawed conceptions of personhood proffered by classical liberal legal and philosophical theories, which underpin modern, increasingly neoliberal, state policies. It argues that these are modelled on a hypothetical *autonomous liberal subject* that is self-sufficient, rational, and disembodied (Barclay, 2000; Grear, 2011). In very generalised terms, the liberal legal and political theories that vulnerability

theory critiques are based on the assertion that humans possess innate free will and inner moral agency, which the state has a duty to protect. Examples of this include Kant's (1996) theory of internal moral law, Rawls' (1971) theory of justice, Raz's (1986) notion of liberal perfectionism, and Dworkin's (1988) theory of individual freedom. From a critical feminist perspective, these theories promote a problematic and unrealistic version of personhood that struggles to explain relationships of affection, dependency, and care. Liberal theories of personhood fail to acknowledge that, in intimate and familial unions, people frequently make decisions that do not appear to be in their own interests, motivated or dictated by their relational connections. Liberal theory's lack of engagement with relationality sometimes depicts these decisions as indicating an absence of rationality or autonomy on the part of the decision maker, for example in the case law governing the doctrine of undue influence in contract law, where dependency on another person can be viewed as evidence of lack of free will (see Auchmuty, 2002). Liberal and neoliberal accounts tend to pathologise vulnerability and dependency as weaknesses, symbolic of a failure to attain autonomous personhood (Chandler and Reid, 2016). Questions of relationality, affection, and emotion are thought to lie beyond legal and state concern and are instead consigned to an imagined 'private realm', into which the state does not interfere (O'Donovan, 1985).

Vulnerability theorists call for the state to abandon its reliance on liberal versions of personhood, moving towards a "responsive state", which is one that:

> Recognises 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, p 17)

The idea of the responsive state represents a radical departure from the liberal models of law and citizenship that regard state power as potentially harmful to the expression of individual autonomy (see e.g. Mill, 1869). Liberal theories idealise a minimalist or 'night-watchman' state, whose role is restricted to upholding individual freedoms but does not seek to interfere further into the lives of its citizens (Nozick, 1974). Yet, it is this restraint that has led to substantial societal inequality, with those who are unable to live up to the self-sufficient ideal being blamed for what is in fact an inevitable part of the human condition.

While the universal model refutes the idea of varying *degrees* of vulnerability (in the sense that some individuals or groups are more vulnerable than others), it very clearly recognises that not all individuals experience their inherent embodied vulnerability the same way. This, Fineman (2010) argues, is not due to differences in levels of vulnerability, but rather the degree of *resilience* (i.e. the ability to withstand the impacts of vulnerability) that an individual possesses. I will return to the concept of resilience in more detail in Chapter 6 but, broadly, the universal thesis conceives of it as encompassing access to a range of resources controlled by the state and its institutions, including material wealth, social networks, as well as environmental assets (Fineman, 2013, pp 22-23). Resilience is inherently relational, with the individual's experience of the embodied condition being directly influenced by her place within institutional and interpersonal structures (Fineman, 2014; Lewis and Thomson, 2019).

Expanding the boundaries of the universal model

Although the theoretical framework that I develop in this book is draws substantially on the universal model of vulnerability discussed above, it also makes a novel contribution to the scholarship by offering an expansion on the theory in its current form. As well as developing a theoretical framework of vulnerability in the specific context of English family law, I also wish

to engage with and respond to some of the critique that other scholars have levelled at the universal model of vulnerability. Thus, in this section, I will outline some of vulnerability theory's current limitations, which must be addressed to produce a robust model that is useful not only at an abstract level but can also prompt shifts in law and policy. My own position is that the universal model serves as a starting point rather than a complete solution; a foundation for further development and analysis of the different ways that vulnerability can exist and be addressed. I believe that much of the critique of universal model can be addressed while still maintaining a commitment to the fundamental tenets of the theory.

The first criticism relates to the *scale* of the universal model, which potentially affects its workability when applied to specific contexts. The theory's breadth is deliberate. Fineman explicitly states that she wants to move away from the tendency to structure models of social justice around recognising the rights of narrowly defined identity-based groups and seeking to promote and elevate their position within law and policy using the language of formal legal equality. She argues that the identity model is deficient, primarily because it fails to challenge the underlying assumption that self-sufficient personhood represents the norm (Fineman 2012). Fineman (2008, p 1) describes her theory as a "post-identity" one, "not focused only on discrimination against defined groups, but concerned with privilege and favor conferred on limited segments of the population by the state and broader society through their institutions" (see also Fineman, 2020). Nonetheless, other scholars have labelled these aims excessively ambitious. As Valverde has commented:

> [T]he new language of 'vulnerability' has a much more diffuse political audience and a less clear bit on any one element within the state. Does Fineman intend to provide a theory that will help disabled people, children, the elderly, and women to rally around a new, anti-individualist consensus? If so, the ambition is a worthy one, but in the age of micro-polling and fragmented voting groups it is difficult to see how the recognition

of 'vulnerability' as a central human condition, one on a par with individual freedom, could give rise to legal and political change (Valverde, 2015, p 19)

I suggest that one limitation here is that the universal model's emphasis on shared vulnerability does not at first sight appear to be particularly representative of the society in which we live. After all, the gap between the rich and poor is visibly growing, as states adopt increasingly neoliberal policies. Racial, gender, and class inequalities are being brought to the forefront. To then emphasise that we are all equally vulnerable can appear as if the theory is overlooking many of the visible patterns of inequality and denies the privilege enjoyed by some sectors of society. To a large extent, this is addressed through the theory's conceptual distinction between vulnerability and resilience. Resilience refers to a range of material, social, and environmental resources, access to which impacts on how one's own vulnerability is experienced. While embodied vulnerability is inherent and universal, resilience is unequally distributed across populations. However, if unequal access to resilience should in fact be the focus for law and policy reform, it begs the question of why the theory so emphasises the shared nature of vulnerability. Certainly, the topic of this book – the role played by the private family in law and its disproportionate negative impact on dependency workers – requires further exploration of vulnerability in a specific rather than general context. Therefore, while my framework of relational vulnerability maintains a commitment to the central tenets of the universal model by acknowledging that all persons are inherently vulnerable, it also explores the avoidable and context specific harms affecting dependency-workers within the private family.

As I mentioned above, others have critiqued the universal model's definition of what it means to be vulnerable, which centres predominantly on harm arising from the embodied human condition. As Mackenzie (2014, p 38) argues, this ignores that "many types of vulnerability are primarily the result not of unavoidable biological processes but of interpersonal and social

relationships or economic, legal and political structures". Thus, the universal model could be considered less useful in contexts where the harm in question cannot be traced (or only relatively tenuously so) to biological processes. To an extent, this critique is not entirely warranted, given Fineman's clear focus on resilience and the various unequal ways that individuals are embedded within relational and institutional networks, revealing both "differences and dependencies" (Fineman 2014, p 318). Thus, she cannot accurately be described as *ignoring* non-biological harms, particularly those arising from relational structures – it is merely that she labels these as an absence of resilience rather than additional vulnerabilities. Nonetheless, in this book, I choose to describe the disadvantaged position of dependency-workers as an additional or extraordinary vulnerability rather than a mere absence of resilience against embodied harm. My reason for doing so (as I have suggested elsewhere) is that I believe that labelling structural harms purely as an absence of resilience (with the insinuation that they result from state inaction rather than deliberate infliction of harm to further its own goals), instead of theorising them as a specific type of vulnerability affecting certain, but not all, individuals, could have the inadvertent effect of reducing the state's culpability as a perpetrator of harm (Gordon-Bouvier, 2019b). Nonetheless, as I argue in more detail in Chapter 6, in addition to being exposed to additional harms (i.e. relationally vulnerable), the dependency-worker does also lack resilience against her inherent embodied vulnerability, and the state must seek to address this at the same time as eliminating relational vulnerability. As this discussion reveals, much of the divergence between theorists in this context relates to nomenclature, as the issues and problems theorised remain the same ones, whether they are referred to as vulnerability or an absence of resilience. It also reveals the extent to which vulnerability and resilience, as theoretical concepts, are fundamentally intertwined.

There is maybe a sense among proponents of the universal model that acknowledging multiple sources of vulnerability, including those that predominantly affect identifiable groups, undermines the theory's central thesis of shared vulnerability. I disagree with this and do not consider the concepts of universal vulnerability and what can be termed "more-than-ordinary vulnerability" (Sellman, 2005) to be inherently incompatible. The problem with identity-based and formal equality approaches to rights is not so much that they identify specific groups as requiring protections, but rather that they measure equality solely by reference to how closely the vulnerable group can be made to resemble the (invulnerable) norm. Thus, they do nothing to challenge erroneous presumptions of individualism. Referring to identifiable sectors of populations is difficult to avoid when discussing social inequality. Indeed, critics have observed that when applied to specific legal contexts, the universal model itself revers to group-based language, even if this is labelled an absence of resilience rather than vulnerability. In particular, Kohn (2014, p 11) has accused Fineman of "[adopting] the very type of targeted group approach to addressing vulnerability that she has vigorously opposed" when applying vulnerability theory to elder law. The argument I develop in this book is that recognition and discussion of the struggles faced by specific groups and populations does not contradict the universal thesis of vulnerability. Indeed, as I outline in more detail in Chapter 3, the additional vulnerabilities and harms to which dependency-workers are exposed arise specifically because the state fails to acknowledge the reality of inherent human vulnerability. Thus, relational vulnerability as a 'more-than-ordinary' set of harms is deeply intertwined with 'ordinary' or inherent embodied vulnerability and cannot be considered in isolation from it.

This leads me on to the final limitation of the theory in its current form, namely that that both the concepts of vulnerability and resilience are under-theorised in terms of how they are

experienced by, and impact upon, the individual (see Rogers et al., 2012). This is largely

deliberate, as Fineman seeks to move away from the scale of the individual, turning the attention

to the wider social structures and the actions of the state. Yet, when the universal model is

applied in practice, the problems of ignoring individual impact become apparent. Kohn notes that

Fineman's rejection of autonomy as a normative goal of vulnerability theory can yield

excessively paternalistic results, with the potential for undermining both individual freedom and

human dignity (Kohn, 2014, pp 14-15). The difficulty is that the universal model, in its rejection

of individual autonomy or indeed any significant focus on the individual's own perception of her

own vulnerability and resilience, does not seek to offer any meaningful alternative way of

evaluating different potential state responses to vulnerability. In the elderly adults context, Kohn

argues that Fineman's approach, which overlooks scrutiny of how the older individual herself

will experience protective legal measures, "not only has the potential to promote the radical

disempowerment of older adults but is also unnecessary to protect them" (Kohn, 2014, p 20).

The problem is that, in rejecting autonomy as a normative goal for her theory, Fineman

relies on a narrow, highly individualistic definition of the concept (Mackenzie, 2014, p 37).

Indeed, the classical accounts of autonomy view it as an integral part of the self; the ability to

self-govern and to live according to one's own internal moral law (Kant, 1996). According to

this definition, all persons are presumed to be born free and to possess powers of self-

determination (Barclay, 2000, p 54). By contrast, feminist theorists have sought to

reconceptualise autonomy as consisting of an inevitable relational component. This model argues

that "persons are socially embedded and that agents' identities are formed within the context of

social relationships and shaped by a complex of intersecting social determinants, such as race,

class, gender and ethnicity" (Mackenzie and Stoljar, 2000, p 4). Thus, autonomy is viewed not as

inborn, but as a condition that can only exist if we are treated as autonomous agents by those around us and by the state. As Nedelsky (2011, p 118) argues, "autonomy is made possible by constructive relationships- including intimate, cultural, institutional- all of which interact". Rather than the restrained 'night-watchman' state preferred by liberal theorists, the relational account sees the state as playing a pivotal role, both in recognising the individual as being autonomous and having the capacity to make choices, and in providing the material conditions necessary for autonomy (Nedelsky, 1993; Herring, 2014).

Thus, Fineman's reluctance to embrace relational autonomy as a normative goal for her theory represents something of a missed opportunity. As with the remainder of the theory, the problems are perhaps not so evident at an abstract level. However, once placed into context, the universal model struggles to effectively differentiate between different legal and policy options that may be said to address a particular problem. A responsive state must ensure that the various resources that constitute resilience are distributed equitably across populations. To this end, I argue that resilience-promotion, as a state response to vulnerability, must consist of identifiable normative goals, which includes a commitment to relational autonomy. Allocation of material resources on its own is insufficient to achieve resilience. After all, the controversial Universal Credit scheme that operates in the UK represents, on its face, state distribution of resources. It is of course completely inadequate and harmful because it actively disempowers recipients, stigmatising and excessively scrutinising them. I am not suggesting that vulnerability theory would endorse Universal Credit, but the point is that the theory in its current form is not always capable of explaining why some methods of resource-distribution are clearly preferable to others, and that stems from its rejection of autonomy as a normative goal of resilience. This is an aspect

that I directly address by exploring the theoretical and normative foundations of resilience in Chapters 6 and 7.

A theory of relational vulnerability: core claims

My theoretical framework of relational vulnerability focuses on the harm caused by the socially and legally constructed private family as a means for the state to conceal the embodied and relational reality of vulnerability and dependency and avoid responsibility for it. I argue that the 'more-than-ordinary' harms that constitute relational vulnerability are direct products of the state's marginalisation of the essential dependency work performed under the cloak of the idealised, heterosexual family unit. To fully explore the notion of relational vulnerability, I also seek to deepen existing understandings of inherent embodied vulnerability. In doing so, I rely on three core theoretical claims.

Multifarious vulnerabilities

My first claim is that vulnerability should be understood as multifarious rather than solely resulting from the human condition. I fully agree with Fineman's argument that we are all exposed to the constant and inescapable risk of harm to our embodied selves and this is a fundamental part of human existence. However, I suggest that some of us are also exposed to harms that are not embodied in nature, and (as I explained above) I believe these to be better theorised as additional vulnerabilities rather than an absence of resilience against inherent vulnerability. As discussed above, my recognition of multifarious vulnerabilities is shared by other theorists, most notably Mackenzie et al's (2014) development of a taxonomy of vulnerability. Their model draws distinctions between *inherent, situational*, and *pathogenic* vulnerabilities. According to the authors, whereas inherent vulnerability results primarily from inescapable biological process, situational vulnerability occurs when external circumstances,

such as war or incarceration, operate to render the individual temporarily vulnerable (Mackenzie et al., 2014, p 9). Additionally, and more relevant to my approach, they describe pathogenic vulnerability as a subcategory of situational vulnerability resulting from adverse social conditions, such as oppressive interpersonal relationships and unequal institutional structures.

Applying this taxonomy, my model of relational vulnerability would fall into the category of a pathogenic vulnerability, given that it arises from the unequal, state-constructed institution of the private family unit. It is worth emphasising here that when discussing unequal relationships, I am less concerned (although not entirely unconcerned) with the individual behaviour of the parties than the ways in which relationships are structured by the state. Therefore, I employ the term relational vulnerability in a somewhat different manner to others who have used it, such as Kabeer's (2014, p 1) work on abusive relationships, where she argues that relational vulnerability involves the individual being "embedded in highly asymmetrical social relations and the associated dependencies". However, she explains that she sees these asymmetries as arising primarily from the intentional and malevolent act of one person against another (Kabeer, 2014). By contrast, the relational inequalities to which I refer throughout the book are not framed in terms of 'bad behaviour' on the part of either parties. Instead, I move beyond the private and interpersonal, arguing that even the most intimate of relationships are shaped by wider state power and structures.

Vulnerability's temporality

My second claim is that vulnerability, both the inherent and embodied form to which we are all subject, and the additional relational vulnerability affecting dependency-workers, is inherently infused with questions of time and temporality. These must be rendered visible to fully understand vulnerability's nature and its effects on the individual subject. The universal

model is replete with references to time and its impact on the experience of being vulnerable. I argue that the human life course is characterised by both inevitability and unpredictability. It is a certainty that our bodies will move through the identifiable stages of infancy, childhood, adulthood, and old age. Simultaneously, human life is inherently unpredictable, and intervening events such as accident, injury or illness, have the power to instantly alter an individual's expected life trajectory. I also conceive of the relational vulnerability arising from the socially constructed private family, as temporal. The private family is characterised by a series of expected defining events, including leaving home, employment, marriage or partnering, childrearing, and eventual retirement. The order and timing of these events is also governed by societal norms, marking a 'correct' time at which they should happen (Freeman, 2011; Valverde, 2015).

The temporalities of the biological and socially constructed life courses are deeply intertwined. Embodied vulnerability is not a fixed state, but a fluctuating condition moving through different stages and cycles. For some part of life, many people are 'temporally powerful', meaning that, although not entirely self-sufficient, they are at least physically capable of emulating the image of the ideal liberal subject. In this sense, it is perhaps better to view the hypothetical liberal subject not as entirely disembodied, but as possessing a body that is always temporally powerful and does not decline or age. The issue is not that it is impossible to live up to the autonomous ideal, but that this is not an option available to all, and that for those who *can* demonstrate compliance, it can never be a permanent state, due to the fluctuations of the life course.

The nature of the life course means that we are not only reliant on others, but our future selves are also reliant on our present, more temporally powerful selves. At the peak of physical

power, individuals can amass the resources necessary to deal both with the inevitable (ageing and decline) and the unpredictable (accident or illness) aspects of the future. A core aspect of relational vulnerability is that this ability to provide for our future selves is made more difficult, often impossible, for those engaged in dependency. Even at the peak of their physical power, dependency-workers' obligations in the present (which are governed by the socially constructed temporality of the private family) means that they cannot make independent provision for their future selves. This means that relational vulnerability must also be understood as a fluctuating condition. Its existence, while the family is intact, is often concealed behind the structure of the private family. The restrained state is concerned that the family as a unit is economically self-sufficient but is largely unconcerned with how work and resources are divided between its members. It is only if the family unit (which is an increasingly fragile institution) breaks down that the relational vulnerability of dependency-workers comes into public view. At this stage, law can intervene, ostensibly to address issues of relationship-generated disadvantage through the division of available resources. Yet, as I argue in Chapters 4 and 5, this provision is inadequate and, in the case of both the married and cohabiting family, merely seeks to exacerbate relational vulnerability by upholding the image of the autonomous ideal by devaluing dependency-work and ignoring its temporal impact as a problem stored up for the future. While analyses of relationship generated disadvantages are generally confined to the point at which the relationship breaks down, it must be viewed as a life-long condition. The full impact of performing dependency-work is often not revealed until later in the life course, when the dependency-worker's own temporal powers have subsided.

Law, relationality, and the private family

The third core claim of relational vulnerability theory is that the private family is a social, political, and legal construct that enables the state to conceal the realities of human vulnerability and dependency, allowing it to remain restrained. Although families invariably take numerous forms, they are all judged against an imagined ideal, which remains the married, heterosexual, nuclear unit (see Harding, 2015). Family law and policy is invariably made and interpreted with this ideal in mind (Brown, 2019).

As I discussed above, humans are inherently relational. Indeed, the notional of relational embeddedness is a core tenet of Fineman's theory and directly impacts on how embodied vulnerability is experienced and perceived (Fineman, 2014; 2017). We all exist within wide and complex networks of relationships that consist not only of interpersonal connections such as partners, children, and parents, but also numerous private and state institutions, including employers, healthcare, and legal systems (Nedelsky, 2011; Fineman, 2017). This relational network, which is ultimately controlled and shaped by the state's actions, impacts on how we live with our inherent vulnerability. It can either support us or cause us harm and I argue that the dependency-worker is inevitably situated within a disempowering and often harmful relational network.

Liberal theories rely on a conceptual separation between public and private life. The family is presented as a natural and inherent way in which the majority of persons choose to order their lives, existing in separation from the public sphere of state power. However, as Fineman (2004) argues, the family is merely another state institution, albeit one that is labelled as private and self-sufficient. The state delegates responsibility for all elements of caregiving and other dependency-work to the family. Simultaneously, it expects the family to function as an

economically autonomous unit, with dependency on the state consistently labelled as a failure (Fineman, 2004). This enables the state to limit or even deny responsibility for vulnerability and dependency. Thus, for the restrained state, the family and the gendered ideologies that define and hold it together are crucial. Without it, it would need to respond much more proactively to its citizens and provide them with necessary support throughout the life course.

Although I discuss various state institutions, my main focus in this book is *law's* role in upholding the ideology of the private family and thereby marginalising dependency-workers. Law is a powerful state institution whose actions and proclamations carry considerable authority and symbolic force. Critique can be challenging because law is consistently depicted as logical, unemotional, and unbiased (Fox-O'Mahony, 2014). Family law claims to be neutral to issues of gender, sexuality, or preferred family form (see Collier, 2009), yet as I show in Chapters 4 and 5, the legal framework governing both the married and unmarried family is replete with references to gendered ideologies. As I argue, while law's black letter may indeed appear neutral, legal actors always draw on a background tapestry of myths, ideologies, and assumptions about human behaviour when interpreting it. Without acknowledging that it does so, family law constantly reinforces the liberal autonomous ideal.

Chapter summaries

In Chapter 2, I analyse vulnerability's inherent temporality and the relationship between inherent embodied vulnerability and state-created relational vulnerability. The human condition involves inevitable and unpredictable fluctuations in vulnerability, characterised by periods of power and dependency. By adopting this view of vulnerability, I argue, it is possible to accommodate the view that certain groups are more vulnerable (due to their temporal position), without undermining the core claim that embodied vulnerability is a universal condition. I also

consider how human relationality and embeddedness arises as a direct consequence of vulnerability. As Fineman (2017) argues, our embodied nature renders us dependent on others for care and sustenance. Yet, this relationality is ultimately constructed and governed by the state and its various institutions, including law (Nedelsky, 2011). This leads on to a critique of the socially constructed heterosexual private family, which ensures adherence to an image of autonomous personhood upon which liberal and neoliberal state policies are based. The family, consisting of various gendered expectations, masks the constant work needed to sustain human life. However, dependency-work's perceived lack of value means that those who perform it suffer relational vulnerability.

In Chapter 3, I develop the concept of relational vulnerability further, arguing that it consists of three intersecting strands of harm: economic, psychological, and spatial. Dependency-workers have a reduced ability to amass economic resources, as time and energy is expended on sustaining others within their relational network. They struggle to make provision for their future selves, meaning that they are likely to feel the impact of their inherent embodied vulnerability more strongly in the future (for example through having insufficient resources to feed or clothe themselves or to pay for adequate healthcare). Psychological harm can arise as a result of the dependency-worker's marginalisation; from being viewed as a second-class citizen. The restrained state's expectation that the family be self-sufficient means that dependency-workers become "derivatively" (see Fineman, 2004) dependent on others, including partners and the state. If the private family breaks down (i.e. through divorce or separation), dependency-workers are often forced to turn, at least partly, to the state for support, which is then labelled as a failure to attain self-sufficiency. Finally, spatial harm refers to the dependency-worker's potentially precarious relationship to her home. A key part of being embodied and relationally embedded

consists of the need for a secure place to live that transcends the merely economic. This is vital for a sense of wellbeing and belonging. Although the state designates dependency-work to the space of the home (see Williams, 2002), dependency-workers' lack of financial power means that they have a fragile relationship to their homes, with the breakdown of family relationships often involving the loss of the family home, a move to more temporally uncertain accommodation, and a struggle to find lasting security.

In Chapters 4 and 5, I seek to apply and contextualise the relational vulnerability framework by focusing on the private family as it is constructed in English law. I argue that the way that law allocates potentially resilience-creating resources within the family contributes to the devaluation and marginalisation of those who perform dependency work, exacerbating rather than addressing their relational vulnerability.

Chapter 4 examines the married (or civilly partnered) family, particularly the redistributive scheme applicably on divorce. I argue that modern conceptions of marriage as a partnership of equals (seen for example in *White v White* [2001] 1 AC 596), which established a principle of non-discrimination between homemaker and breadwinner contributions) has done relatively little to truly empower married dependency-workers. Marriage's temporality has changed from a lifelong institution, which, although oppressive, at least provided a level of certainty in terms of the (typically male) breadwinner's financial obligations towards the (typically female) homemaker. Instead, modern marriage is increasingly couched in discourses of autonomy, especially in terms of financial obligations. On divorce, law emphasises the importance of 'self-righting'; an ability to swiftly recover from the economic impacts of marriage. Long-term post-divorce dependence is viewed with growing disapproval and accusation of female 'gold-digging' (Thompson, 2016; 2019; Gordon-Bouvier, 2020), and courts

are increasingly supportive of contracting out and limiting post-divorce liability through nuptial agreements (see *Radmacher v Granatino* [2010] UKSC 42).

I argue that the legal framework reinforces the state's expectations that its citizens be autonomous, disembodied, and self-sufficient. While dependency-work is ostensibly viewed as equal to paid work, this is not a genuine equality. Law's emphasis on self-righting within an 'appropriate' period of time after divorce means that those who have performed dependency-work in a marriage are disadvantaged, often for the rest of their lives, even if they receive a 'fair' settlement at the point of divorce. While married dependency workers may be better protected from economic, emotional, and spatial harms than their unmarried counterparts, substantial inequality remains.

In Chapter 5, I apply the vulnerability lens to the unmarried, cohabiting family. Marriage's position as the dominant form of family life is in decline, with increasing numbers of unmarried families. Yet, while these families are functionally similar to the married family (in terms of their responsibility for dependency work), English law is infamous for its failure to provide specific legal remedies upon relationship breakdown, forcing cohabitants to rely on confusing and potentially unjust property and trusts law (for critique, see Douglas et al., 2009; Barlow and James, 2004). The property law framework fails to adequately value non-financial contributions and displays evidence of gender-bias, often depicting women's contributions to the relationship as motivated primarily by love and affection (Lawson, 1996; Gordon-Bouvier, 2019a).

I argue that cohabitation is erroneously understood as existing 'outside the law', an active choice made by couples to avoid the legal consequences of marriage, which the state should

respect by avoiding imposing legal remedies. However, I make the point that the state is never truly *absent*, no matter how minimally it protects its subjects. By refusing to provide a remedy for those left disadvantaged by performing dependency work in unmarried relationships, the state is sending a powerful message that it does not value this work or those who perform it. Even more so than in marriage, the state creates substantial imbalance in cohabiting relationships where one party undertakes the bulk of dependency-work.

Spatial aspects of relational vulnerability are especially prevalent within cohabiting relationships. The predominantly retrospective search for monetary contributions and agreements means that connections to the home that have been established over time are ignored in a way that is less prevalent in the matrimonial case law. Equally, there is little to no consideration of the 'future self' and her needs. Instead, the court's inquiry is confined to the significance of events that have already taken place.

Chapters 6 and 7 examine resilience. I argue that a deeper understanding of resilience and its normative aims, is essential in terms of addressing the accusations of paternalism that have been levelled at vulnerability theory, while still maintaining the position that it is the state, not the individual, that is ultimately responsible for resilience. In this chapter, I consider the roots of resilience in social psychology, where it is described as a largely internal process of overcoming and adapting to hardship. Resilience has become a buzzword within neoliberal thought, where it is considered a 'solution' to the 'problem' of vulnerability. Neoliberal conceptions of resilience consider that the individual is capable of overcoming adversity without assistance from the state. By contrast, vulnerability-theory regards resilience as an external set of material assets and other resources that are controlled by the state (Fineman, 2010). It rejects the neoliberal notion that the individual is able to make herself resilient.

I explain that while I largely agree with the view of resilience as a set of external resources, I nonetheless believe that it possesses an internal element that has hitherto been absent from the leading vulnerability accounts. Internal resilience – the notion of *feeling resilient* – is necessary to combat the accusations that vulnerability theory is excessively paternalistic. For dependency-workers to become resilient, they need access to resources that reduce or eliminate the economic, psychological, and spatial harm that they currently experience. Thus, resilience must have a normative goal of achieving substantive equality. In addition, any state response should also aim to foster relational (rather than individualistic) autonomy.

Finally, in Chapter 7, I apply the above normative framework of resilience to three hypothetical state responses to relational vulnerability, evaluating their efficacy in terms of promoting relational autonomy and substantive equality. The first is redistribution, which is used in many jurisdictions, including England and Wales, as a response to relationship-generated disadvantages. Although redistribution provides flexibility and the potential for individualised justice, I ultimately argue that it fails to made dependency-workers resilient, due to the fact that it permits the state to remain largely restrained while framing the response as a dispute between private individuals. The second response is state subsidy, where dependency-workers would be paid an income from their work, symbolising the value they provide to the state. Here, I draw on basic income and 'cash for childcare' schemes in Scandinavia and Finland, considering how these could be adapted to make the dependency-worker resilient. I argue that there is significant potential for such a scheme, especially given its ability to provide resources throughout the life course rather than merely at the point of relationship breakdown. However, as has been observed in countries where state subsidy exists, it risks perpetuating gender inequality by paying women to stay at home rather than supporting them in the paid work force and prompting an equal

division of dependency-work. Finally, I consider a state response based around home ownership, in the form of a modified deferred community of property scheme that would award an enhanced share in the home to dependency-worker. This would address the issue of spatial harm and lack of ontological security that I discussed in Chapter 3. Ultimately, however, I conclude that such a scheme would likely only benefit relatively affluent families who own their own home, which makes it unsuitable as the sole response from the state.

I conclude that a holistic response is required, perhaps incorporating elements of all three schemes. Crucially, the responsive state needs to revalue dependency-work. Just as the restrained state expects financial self-sufficiency from its citizens, the imagined responsive state could require some degree of participation in dependency-work as part of citizenship. Realistically, this will require a radical change in policy at various state levels, including social welfare, employment practices, and discourses around gender and caregiving (moving towards a position that views care as a collective, rather than private and gendered, endeavour).

Conclusion

As I make clear throughout the book, my aim is not to produce definitive solutions to current problems. Therefore, it is unlikely that even my imagined dependency-valuing responsive state will be able to address all the problems that this book will uncover. Rather, I seek to promote a change in the way that problems are conceived and addressed. To a large extent, the groundwork has been done by Fineman and the many scholars who adopt her model and I am merely following in their footsteps. Yet, I hope that my theoretical framework can provide answers to some of the gaps left by the universal model, as well as paving the way for more nuanced and context-specific vulnerability scholarship that builds upon the compelling and transformative foundation that Fineman has created.

Bibliography

Auchmuty R. (2002) 'Men Behaving Badly: An Analysis of English Undue Influence Cases' **1** *Social & Legal Studies* 257

Barclay L. (2000) 'Autonomy and the Social Self' in Mackenzie C and Stoljar N (eds) *Relational Autonomy: Feminist Perspectives on Automony, Agency, and the Social Self* (Oxford: Oxford University Press)

Barlow A. (2015) 'Solidarity, Autonomy and Equality: Mixed Messages for the Family' **27** *Child & Family Law Quarterly* 223

Barlow A and James G. (2004) 'Regulating Marriage and Cohabitation in 21st Century Britain' **67**(2) *Modern Law Review* 143

Brown A. (2019) *What is the Family of Law? The Influence of the Nuclear Family* (Oxford: Hart)

Chandler D and Reid J. (2016) *The Neoliberal Subject: Resilience, Adaptation and Vulnerability* (Lanham: Rowman & Littlefield)

Clough B. (2017) 'Disability and Vulnerability: Challenging the Capacity/Incapacity Binary' **16**(3) *Social Policy & Society* 469

Collier R. (2009) 'Fathers' Rights, Gender and Welfare: Some Questions for Family Law' **31**(4) *Journal of Social Welfare and Family Law* 357

Dehaghani R and Newman D. (2017) '"We're Vulnerable Too": An (Alternative) Analysis of Vulnerability Within English Criminal Legal Aid and Police Custody' **7**(6) Oñati Socio-Legal Series 1199

Dietz C and Pearce R. (2020) 'Depathologising Gender: Vulnerability in Trans Health Law' in Dietz C, Travis M and Thomson M (eds) *A Jursprudence of the Body* (Basingstoke: Palgrave Macmillan)

Douglas G, Pearce J and Woodward H. (2009) 'Cohabitants, Property and the Law: A Study of Injustice' **72**(1) *Modern Law Review* 24

Dworkin G. (1988) *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press)

Fineman MA. (2004) *The Autonomy Myth: A Theory of Dependency* (New York: The New Press)

Fineman MA. (2008) 'The Vulnerable Subject: Anchoring Equality in the Human Condition' **20**(1) *Yale Journal of Law & Feminism* 1

Fineman MA. (2010) 'The Vulnerable Subject and the Responsive State' **60**(2) *Emory Law Journal* 251

Fineman MA. (2012) 'Beyond Identities: The Limits of an Anti-Discrimination Approach to Equality' **92** *Boston University Law Review* 1713-1770.

Fineman MA. (2013) 'Equality, Autonomy and the Vulnerable Subject in Law and Politics' in Fineman MA and Grear A (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Farnham: Ashgate)

Fineman MA. (2014) 'Vulnerability, Resilience, and LGBT Youth' **23** *Temple Political & Civil Rights Review* 307

Fineman MA. (2017) 'Vulnerability and Inevitable Inequality' **4**(3) *Oslo Law Review* 133

Fineman MA. (2020) 'Beyond Equality and Discrimination' **73** *SMU Law Review Forum* 51

Formosa P. (2014) 'The Role of Vulnerability in Kantian Ethics' in Mackenzie C, Rogers W and Dodds S (eds) *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford: Oxford University Press)

Fox-O'Mahony L. (2014) 'Property Outsiders and the Hidden Politics of Doctrinalism'' **67**(1) *Current Legal Problems* 409

Freeman E. (2011) *Time Binds: Queer Temporalities, Queer Histories* (Durham, NC: Duke University Press)

Garland F. (2015) 'Gender Imbalances, Economic Vulnerability and Cohabitation: Evaluating the Gendered Impact of Section 28 of the Family Law (Scotland) Act 2006' **19**(3) *Edinburgh Law Review* 311

Goodin R. (1985) *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities*: (Chicago: University of Chicago Press)

Gordon-Bouvier E. (2019a) 'Crossing the Boundaries of the Home: A Chronotopical Analysis of the Legal Status of Women's Domestic Work' **15**(4) *International Journal of Law in Context* 479

Gordon-Bouvier E. (2019b) 'Relational Vulnerability: The Legal Status of Cohabiting Carers' **27**(2) *Feminist Legal Studies* 163

Gordon-Bouvier E. (2020) 'The Open Future: Analysing the Temporality of Autonomy in Family Law' **32**(1) *Child and Family Law Quarterly* 75

Grear A. (2011) 'The Vulnerable Living Order: Human Rights and the Environment in a Critical and Philosophical Perspective' **2**(1) *Journal of Human Rights and the Environment* 23

Harding R. (2015) 'Parenting after Equality: (Re)Inscribing the Heteronormative Family' in Leckey R (ed) *After Legal Equality: Family, Sex, Kinship* (Abingdon: Routledge)

Harvey D. (2007) *A Brief History of Neoliberalism* (New York: Oxford University Press USA)

Herring J. (2014) *Relational Autonomy and Family Law* (London: Springer)

Kabeer N. (2014) *Violence Against Women as 'Relational' Vulnerability: Engendering the Sustainable Human Development Agenda* (New York: United Nations Development Programme)

Kant I. (1996) *Kant: The Metaphysics of Morals* edited by McGregor MJ (Cambridge: Cambridge University Press)

Kohn NA. (2014) 'Vulnerability Theory and the Role of Government' **26**(1) *Yale Journal of Law & Feminism* 1

Lawson A. (1996) 'The Things We Do for Love: Detrimental Reliance in the Family Home' **16**(2) *Legal Studies* 218

Lewis S and Thomson M. (2019) 'Social Bodies and Social Justice' **15**(3) *International Journal of Law in Context* 344

Mackenzie C. (2014) 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' in Mackenzie C, Rogers W and Dodds J (eds) *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford: Oxford University Press)

Mackenzie C, Rogers W and Dodds S. (2014) 'Introduction' in Mackenzie C, Rogers W and Dodds S (eds) *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford: Oxford University Press)

Mackenzie C and Stoljar N. (2000) *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford: Oxford University Press)

Mill JS. (1869) *On Liberty* (London: Longmans, Green, Reader and Dyer)

Nedelsky J. (1993) 'Property in Potential Life? A Relational Approach to Choosing Legal Categories' **6**(2) *The Canadian Journal of Law and Jurisprudence* 343

Nedelsky J. (2011) *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press)

Nozick R. (1974) *Anarchy, State, and Utopia* (New York: Basic Books)

O'Donovan K. (1985) *Sexual Divisions in Law* (London: Weidenfeld and Nicolson)

Rawls J. (1971) *A Theory of Justice* (Cambridge, Mass: Harvard University Press)

Raz J. (1986) *The Morality of Freedom* (Oxford: Oxford University Press)

Rogers W, Mackenzie C and Dodds S. (2012) 'Why Bioethics Needs a Concept of Vulnerability' **5**(2) *International Journal of Feminist Approaches to Bioethics* 11

Sellman D. (2005) 'Towards an Understanding of Nursing as a Response to Human Vulnerability' **6**(1) *Nursing Philosophy* 2

Thompson S. (2015) *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Oxford: Hart)

Thompson S. (2016) 'In Defence of the 'Gold-Digger'' **6**(6) *Onati Socio-Legal Studies* 1225

Thompson S. (2019) 'A Millstone Around the Neck? Stereotypes About Wives and Myths About Divorce' **70**(2) *Northern Ireland Legal Quarterly* 179

Thomson M. (2018) 'Bioethics & Vulnerability: Recasting the Objects of Ethical Concern' **67** *Emory Law Journal* 1207

Valverde M. (2015) *Chronotopes of Law: Jurisdiction, Scale and Governance* (Abingdon: Routledge)

Williams A. (2002) 'Changing Geographies of Care: Employing the Concept of Therapeutic Landscapes as a Framework in Examining Home Space' **55** *Social Science & Medicine* 141