

# RELATIONAL AUTONOMY, VULNERABILITY THEORY, OLDER ADULTS AND THE LAW: MAKING IT REAL

MARGARET ISABEL HALL\*

## Abstract

The ‘making it real’ theme of this collection concerns the ways in which theories or conceptualisations of vulnerability and autonomy are and/or can be ‘made real’ through legal structures and practice. This introductory essay discusses autonomy and vulnerability as words/ideas with multiple meanings within legal doctrines and legal discourse. These meanings include the traditional equivalence in law between autonomy and the liberty of a normatively invulnerable liberal subject, the very different idea of autonomy as (necessarily) relational, and the burgeoning theoretical discourse around vulnerability as a legally meaningful idea. In this introductory essay, the author sets out her own approach to/articulation of vulnerability and relational autonomy as legally meaningful concepts, together with suggestions for making these conceptual frameworks ‘real’ in the law relating to advance planning and court appointed/statutory guardianship (as areas of law with particular relevance for older adults).

## I. INTRODUCTION

Truth happens to an idea, it becomes true, it is made true by events. Its verity is in fact an event, a process: the process namely of its verifying itself, its-verification.<sup>1</sup>

The papers in this special issue of the *Elder Law Review* consider different aspects of and approaches to the concepts of vulnerability and autonomy within areas of the law with particular relevance to the experience of older adults. The words ‘vulnerability’ and ‘autonomy’ have no essentialist meaning, as reflected in the diverse contributions to this issue. There is no right or wrong way to talk about either idea, although some approaches are more useful than others in terms of the basis they provide for social and legal action.

The traditional meanings of autonomy and vulnerability in law (autonomy as liberty and the location of vulnerability in ‘vulnerable populations’) have become so fused with existing legal rules and structures that it is difficult now to see them for what they are: provisional versions or accounts of what it means to be vulnerable, and to be a person in possession of autonomy. The

---

\*Professor and BC Notaries Chair, School of Criminology, Simon Fraser University, Simon Fraser University, British Columbia, Canada. The author would like to thank and acknowledge the Macquarie University Research Centre for Agency, Values and Ethics and the Macquarie University Faculty of Law as hosts of a 2018 workshop on the theme of relational autonomy, vulnerability and “making it real”, which served as the genesis for this collection.

<sup>1</sup> William James, *Pragmatism* (Cambridge: Harvard University Press, 1975) 35.

‘making it real’ theme of this special issue of the Elder Law Review addresses the challenge of making new theoretical frameworks “real” within and through legal rules and structures in light of these taken-for-granted accounts.

The idea of autonomy as self-direction without external interference was described by the Supreme Court of Canada as the “basic theory underlying the [*Canadian Charter of Rights and Freedoms*], namely that the State will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating those choices to any one conception of the good life.”<sup>2</sup> Private actor interference with another person’s autonomy (as opposed to State interference) is more complicated on the terms of this account; in theory, because an individual can choose to opt out of a relationship that interferes with her freedom, remaining within it can be characterised as that person’s autonomous choice or ‘conception of the good life.’ Private law rules about testamentary freedom and freedom of contract are conceptually of a piece with this idea of autonomy as freedom from the interference of others. To the extent that private law recognises the impact of relationship context on the exercise of free decision-making, however, it provides a thicker and more nuanced account of what it means to be autonomous. That recognition is provided through the doctrines of equitable fraud: undue influence and unconscionability. Perhaps because of the split between law and equity, this thicker concept of autonomous decision-making has not had a significant impact on the traditional taken for granted meaning of autonomy in law: autonomy as negative freedom.

Traditional accounts of vulnerability in the law are constructed around ‘vulnerable persons’ (as members of ‘vulnerable populations’) in opposition to a theoretically *invulnerable* norm. The specialness/apartness of vulnerable populations is understood as justifying interferences with self-direction that would otherwise be unacceptable. The vulnerability of children (and their difference from adults), for example, justifies rules that restrict children’s freedom to act on the basis of their own choices. In this way, identification as a vulnerable population member is associated with disempowerment and paternalism; to be ‘vulnerable’ in this sense is to be

---

<sup>2</sup> *R v Morgentaler*, [1988] 1 SCR 30, 171, 44 DLR (4th) 385, Wilson J, concurring (the majority agreed with Justice Wilson on this point). Writing for a united court in *Carter v Canada* 2015 SCC 5 at para. 64 Chief Justice McLachlin described the law’s ‘concern for the protection of individual autonomy and dignity’ as underlying both the right to liberty and the right to security of the person protected by section 7 of the *Charter*.’

perceived as lesser than. At the same time, vulnerability-identification can provide access to services and protection from harm (including harm by others) that is not otherwise available.

These traditional accounts, while deeply embedded within the law, are not immutable.<sup>3</sup> As discussed in the following section, ‘autonomy’ and ‘vulnerability’ as *concepts* are broad and multifaceted in ways that include (but are not limited to) the traditional legal accounts described above. Different aspects of each broad concept may be more or less emphasised within a particular area of law, or within other organised social activities (health care and education e.g.). The fact that change in the way we understand autonomy is possible does not make it desirable in every case, however; the question of whether change is warranted depends on the extent to which current understandings of autonomy succeed or fail as the basis for rules and structures that actively facilitate just outcomes. Where an account of vulnerability and/or autonomy informs the law in ways that frustrate justice, and/or generate additional problems, that account must be re-examined and re-constructed if necessary. The law is both vast and various, and this kind of inquiry must be carried out on a case by case basis; it may be that particular accounts of autonomy and vulnerability work well in some contexts, less so in others.

This introductory essay considers autonomy and vulnerability within two areas of law with particular relevance to older adults: advance planning and guardianship. I suggest that traditional legal accounts of autonomy and vulnerability are especially problematic in these contexts because of the relationship between dementia, diminished decision-making capacity and old age. Individuals who have been identified as incapable of making certain kinds of decisions are a *de facto* vulnerable population in law to the extent that interference with choice and action will be justified on the basis of that identification. The fact that interference is limited to specific decision-making domains (personal, financial, or health-care decisions e.g.), as opposed to a broader category of ‘incapable persons’, does not alter this conceptual framework. The relationship between dementia and old age (including both the physiology of old age and social ageism) makes it especially likely that a loss of decision-making ability will be identified in older adults, creating a special dynamic between old age, vulnerability and autonomy despite the fact that older adults are not identified as a ‘vulnerable population’ *per se*. To the extent that

---

<sup>3</sup> Margaret I. Hall ‘Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability’ (2012) 58(1) *McGill Law Journal* 1.

identification as a ‘vulnerable person’ changes autonomy-status within the traditional accounts described above, these accounts are problematic. To be identified as vulnerable can provide access to help that is essential to both psychological and physical wellbeing (and that may be desired) but that is not sought out and/or is rejected because the autonomy-cost of that identification is too high. Could alternative accounts of vulnerability and autonomy provide more workable/less problematic bases for responding to the needs of persons experiencing dementia in old age? If so, what would that look like?

The first part of this essay examines the traditional accounts of autonomy and vulnerability set out in legal rules and doctrine, and the non-traditional theories of relational autonomy and vulnerability that have been articulated in contemporary legal theory. The second part of this essay sets out the author’s own conceptual framework for understanding autonomy and vulnerability (drawing on the theoretical work discussed in the previous part) as potential bases for legal rules and structures. The third part of this essay considers how these new ways of thinking about vulnerability and autonomy can inform laws relating to advance planning and guardianship.

## II AUTONOMY, VULNERABILITY, AND THE LAW

### A *Autonomy as Liberty and the Invulnerable Liberal Subject*

#### 1 *Autonomy*

The concept of ‘autonomy’ has no single, settled meaning beyond a general consensus that autonomy is a ‘feature of persons’ that is ‘desirable to have’:<sup>4</sup>

It is used sometimes as an equivalent of liberty (positive or negative in Berlin’s terminology), sometimes as equivalent to self-rule or sovereignty, sometimes as identical with freedom of the will. It is equated with dignity, integrity, individuality, independence, responsibility, and self-knowledge. It is identified with qualities of self-assertion, with critical reflection, with freedom from obligation, with absence of external causation, with knowledge of one’s own interests. It is

---

<sup>4</sup> Gerald Dworkin, ‘The Concept of Autonomy’ in John Christman, ed, *The Inner Citadel: Essays on Individual Autonomy* (New York: Oxford University Press, 1989) 54 , 54.

related to actions, to beliefs, to reasons for acting, to rules, to the will of other persons, to thoughts and to principles.<sup>5</sup>

As described above, autonomy is a broad and multi-faceted virtue, different aspects of which may be more or less relevant and/or emphasised within different contexts. The individualist account of autonomy (autonomy as negative liberty) is one account or theory of autonomy and does not comprise ‘autonomy’ itself.

The principle of autonomy in public law (concerning the relationship between the individual and the state) is synonymous with negative liberty and the ‘political metaphor’ of the sovereign self.<sup>6</sup> Martha Albertson Fineman has described ‘[s]elf-government...[a]s the ideal [that] defines the individual subject of liberal political discourse’.<sup>7</sup>

Individual liberty interests are what are protected—autonomy entails being left alone to satisfy our own needs and provide for our own families without undue restraint.<sup>8</sup>

The poorly ruled person may be substantively oppressed through the choices she or he makes (to remain in an abusive relationship or community e.g.), but ‘like a badly governed nation, he may retain his sovereign independence nevertheless.’<sup>9</sup> Thus, the ‘right knowingly to be foolish’ is identified in public law as an important incident of autonomy, and a ‘critical component of the right to liberty’ protected by the *Canadian Charter of Rights and Freedoms*, s 7.<sup>10</sup>

This liberal theory of autonomy is both descriptive (as a theory of human behaviour) and normatively prescriptive (identifying the protection of individual sovereignty as a core function

---

<sup>5</sup> Ibid 54-55.

<sup>6</sup> The philosopher Feinberg has suggested that ‘autonomy’, derived from the Greek for ‘elf’ and ‘rule’, may have originally been used to apply to states and that ‘personal autonomy’ should be understood as a ‘political metaphor’ J. Feinberg ‘Autonomy’ in J. Christman, ed. *The Inner Citadel: Essays on Individual Autonomy* (New York: Oxford University Press, 1989) 27, 30. See also, Harry G Frankfurt, ‘Freedom of the Will and the Concept of a Person’ (1971) (68(1) *The Journal of Philosophy* 5.

<sup>7</sup> Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: New Press, 2004) 18

<sup>8</sup> Ibid. See also, Paul Root Wolpe, ‘The Triumph of Autonomy in American Medical Ethics: A Sociological View’ in Raymond DeVries and Janardan Subedi, eds, *Bioethics and Society: Sociological Investigations of the Enterprise of Bioethics* (Englewood Cliff: Prentice Hall, 1998) 38.

<sup>9</sup> Feinberg (n 6) 30.

<sup>10</sup> *Koch (Re)* (1997), [1997] OJ No 1487 at 17, 33 OR (3d) 485 [ONSC], Quinn J., cited in *Starson v Swayze* 2003 1 SCR 722.

of law). As a theory of human nature, each ‘sovereign’ individual exercises control over her or his person (including matters pertaining to the physical, psychological, and emotional self) through ‘decision-making’ i.e. a cognitive process in which the consequences of a particular decision are foreseen, understood, and weighed against other potential decisions in connection with the individual’s interests and priorities. A ‘decision’ is a choice resulting from this cognitive process, which is then treated as the person’s ‘own.’ Each individual’s identity- her or his ‘sovereign’ or autonomous self- is effectively constructed through decision-making of this kind, making interference with that process an interference with personal identity and (physical, psychological, and emotional) integrity at the most essential level.<sup>11</sup> The close association of autonomy with the legal concept of dignity<sup>12</sup> flows from this intersection.

A necessary consequence of locating autonomy in the process of decision-making is to exclude persons considered incapable of decision-making from the ranks of the autonomous<sup>13</sup> (and possibly, by implication, from the ambit of dignity). Such persons are by definition non-autonomous- failed (as opposed to poorly governed) states. The philosopher Joel Feinberg described persons who were non-autonomous in this sense as ‘wantons’, a class in which he would include ‘infants, the comatose, the insane, the severely retarded, and the senile.’<sup>14</sup>

Article 12 of the *Convention on the Rights of Persons With Disabilities* (the CRPD)<sup>15</sup> has characterised differential legal treatment on the basis of mental disability (including impaired decision-making ability) as a form of discrimination *contra* to fundamental human rights principles, challenging the autonomy/decision-making equivalence described above. Article 12 has been interpreted<sup>16</sup> as recognising the ability of *all* persons to exercise self-direction and

---

<sup>11</sup> See, Ronald Dworkin ‘Autonomy and the Demented Self’ (1986) 64(2) *Milbank Quarterly* 4; Gerald Dworkin, ‘The Concept of Autonomy’ in John Christman, ed, *The Inner Citadel: Essays on Individual Autonomy* (New York: Oxford University Press, 1989) 54.

<sup>12</sup> *Carter v Canada* (n 2).

<sup>13</sup> *Hall* (n 3).

<sup>14</sup> Feinberg (n 6) 30. See also, Harry G Frankfurt, ‘Freedom of the Will and the Concept of a Person’ (1971) 68 (1) *The Journal of Philosophy* 5.

<sup>15</sup> *Convention on the Rights of Persons With Disabilities* G.A. Res. 61/106 UN Document A/RES/61/106 (Dec. 6, 2006).

<sup>16</sup> *General Comment No. 1* (2014), 11th Sess, adopted 11 April 2014, UN Doc C/GC/1 online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>> [CRPD, *General Comment No. 1*] at para. 13. The *General Comment* provides an “authoritative, if not binding interpretation”; See Wayne Martin et al, ‘Achieving CRPD Compliance: Is the Mental Capacity Act of England and Wales Compatible with the UN Convention on the Rights of Persons with Disabilities? If Not, What Next?’ (2015) Report Submitted to the UK

autonomy through the expression of will and preference, including where the expression and implementation of will and preference depends on the support of others. While more inclusive, the location of autonomy in the exercise of will and preference (as opposed to decision-making) is not as different from the classic liberal paradigm as it might seem; to be autonomous is still equivalent to self-direction understood as a spectrum that includes both decisions and the less cognitively demanding will and preference. Removing decision-making ability assessment as the line separating one kind of person (whose choices may be over-ruled) from another (whose choices can never be over-ruled regardless of content) does undo the *de facto* identification of impaired decision-making ability as a vulnerable population characteristic, however.

## 2. Vulnerability

The concept of ‘vulnerability’, like autonomy, has no single, settled meaning. The *Oxford English Dictionary* provides two: vulnerability as the special characteristic of vulnerable persons (‘person[s] in need of special care, support, or protection because of age, disability, or risk of abuse or neglect’), and vulnerability as ‘expos[ure] to the possibility of being attacked or harmed, either physically or emotionally.’<sup>17</sup>

The vulnerability of ‘vulnerable persons’ or populations underlies the *parens patriae* jurisdiction and those areas of public law concerned with different aspects of protection and special services and/or assistance (adult guardianship, adult protection, and mental health legislation for example). The identification of one or more characteristics which (if found) will classify an individual as vulnerable is essential to this model. These identifiers, because they work to label a person as other

---

Ministry of Justice, online:

[https://www.researchgate.net/publication/279058525\\_Achieving\\_CRPD\\_Compliance\\_Is\\_The\\_Mental\\_Capacity\\_Act\\_Of\\_England\\_And\\_Wales\\_Compatible\\_With\\_The\\_UN\\_Convention\\_On\\_The\\_Rights\\_Of\\_Persons\\_With\\_Disabilities\\_If\\_Not\\_What\\_Next](https://www.researchgate.net/publication/279058525_Achieving_CRPD_Compliance_Is_The_Mental_Capacity_Act_Of_England_And_Wales_Compatible_With_The_UN_Convention_On_The_Rights_Of_Persons_With_Disabilities_If_Not_What_Next); N Devi, J Bickenbach and G Stucki. ‘Moving Towards Substituted or Supported Decision-making? Article 12 of the Convention on the Rights of Persons with Disabilities’ (2011) 5 *European J Disability Research* 249; P Gooding ‘Navigating the Flashing Amber Lights of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns’ (2015) (15(1) *Human Rights L. Rev* 45; Kristen Booth Glen, ‘Changing Paradigms: Mental Capacity, Legal Capacity Guardianship, and Beyond’ (2012) 44(1) *Colum. Human Rights L Rev* 93, 98; Nina A. Kohn, Jeremy A. Blumenthal and Amy T. Campbell. ‘Supported Decision Making: A Viable Alternative to Guardianship?’ (2013) 117(4) *Penn St L Rev* 1111.

<sup>17</sup> *The Oxford English Dictionary*, 2015, *sub verbo* vulnerable’.

(outside the invulnerable norm),<sup>18</sup> will always be contested, and de-identifying personal characteristics as vulnerability markers is associated with enhanced social respect and autonomy recognition. The identification of women as *per se* vulnerable persons was (and for some remains) integral to gender-based discrimination and the denial of women's autonomy, for example. The social construction of older adults as *per se* vulnerable has been rejected on a similar basis; that any benefits afforded in terms of protection and services is outweighed by the negative impact of stigma. The stigma of vulnerability creates a strong incentive for persons to avoid that label if at all possible, even at the expense of hiding or lying about heightened exposure to or experience of harm. Benbow and Jolley have observed that people living with dementia may be well aware that they are vulnerable (in the sense of heightened risk of harm) and concerned about it, but reluctant to seek help or access service because of concerns about labelling and the stigma that would follow (Benbow and Jolley have also suggested that stigma may lead to the under-identification/diagnosis of dementia by physicians).<sup>19</sup> The successful aging narrative, in which old age is reconstructed as a kind of never ending middle age (for those who take care of themselves properly) is one response to avoiding vulnerable populations stigma, seeking to 'normalise' old age through a denial of difference.<sup>20</sup>

### B *Relational Autonomy and (Post Vulnerable-Populations) Theories of Vulnerability*

The traditional accounts of individualist autonomy and normative invulnerability associated with liberal legal thought have been challenged in recent decades by a rich theoretical legal scholarship around relational accounts of autonomy and the meaning of vulnerability (including but not limited to Martha Fineman's seminal work on the 'vulnerable subject').<sup>21</sup> These non-traditional accounts seek to articulate autonomy and vulnerability in ways that describe the full embodied spectrum of human experience. Identifying vulnerable populations in opposition to an *invulnerable* norm at once pathologises 'vulnerable persons' while failing to

---

<sup>18</sup>Described by Caroline Knowles as 'typically associated with victimhood, deprivation, dependency or pathology. Caroline Knowles, *Family Boundaries: The Invention of Normality and Dangerousness* (Toronto: University of Toronto Press, 1997) at 108-109.

<sup>19</sup> S.M. Benbow and David Jolley 'Dementia: Stigma and its Effects' 2012 2(2) *Neurodegenerative Disease* 165,168

<sup>20</sup> See Sarah Lamb, ed. *Successful Aging as a Contemporary Obsession: Global Perspectives* (New Brunswick, NJ: Rutgers University Press, 2017).

<sup>21</sup> Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale JL & Feminism* 1, 8.



acknowledge/respond to the vulnerability of all persons to physical, social, psychological/emotional and financial harm. The individualist idea of autonomy as dependent on independent decision-making ignores the significance of social, relationship and material context on every person's reality (including but not limited to the decisions that she or he makes).

### 1 *Relational autonomy*

*Relational* autonomy theory conceptualises autonomy as a condition of persons which is necessarily consequent on the material, social, and relationship contexts in which the person is situated.<sup>22</sup> Contrary to the 'sovereign self', whose autonomy is located in her or his freedom from others, this relational account posits autonomy as a way of being in the world that is always context dependent. Autonomy, from this perspective, is a practice- a way of being in the world that is influenced by the nature of our intimate relationships, the material resources we can command and the options available to us, the socially constructed identities we live with (as old, or fat, or racialized e.g.), and our concept of self as shaped by present and past circumstances. The idea of a sovereign self outside of and protected from context is, from a relational perspective, a fantasy version of what it means to be a human in the world. As such, it is deeply unhelpful in terms of promoting autonomy as a valuable social objective.

Rosie Harding has identified three 'somewhat distinct' approaches to the idea of 'relationality' within the broad conceptual framework of relational autonomy theory: relationality as care ethics (breaking the equivalence between autonomy and rational self-interest); relationality as restraint (the conceptual inadequacy of individualist autonomy theory as an account of the deeply contextualised reality of the human condition); and relationality as inter-personal context (the need for legal decision-making to take into account the context in which the individual is situated in addition to the individual herself).<sup>23</sup> Prof. Harding goes on to articulate a 'fourth dimension of relationality' - a 'lens focused on the dynamics of everyday life' allowing for a 'focus on the embodied individual whilst being mindful of the interpersonal and structural contexts that shape

---

<sup>22</sup> Jennifer Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1(1) *Yale Journal of Law & Feminism* 7.

<sup>23</sup> Rosie Harding. *Duties to Care: Dementia, Relationality, and Law* (Cambridge, UK: Cambridge University Press, 2017) 22-25.

lives’ - as ‘the most conceptually rich and potentially the most empirically powerful.’<sup>24</sup> This ‘fourth dimension’ resonates with Jennifer Nedelsky’s description of relational autonomy as a way of being in the world; we act as our ‘meaning’, of which our social and relationship context is at least partially constitutive, inclines us to act; ‘there are no human beings in the absence of relations with others... [and] we take our being in part from those relations.’<sup>25</sup> Harding cites Nedelsky’s description of the relational self as shaped by and (in turn) shaping ‘all interactions’, with ‘[e]ach set of relations [referring to social, material and relationship contexts]... nested in the next, and all interact[ing] with each other.’<sup>26</sup>

Harding concludes that this fourth relational lens most usefully informs ‘the socio-legal problem of how best to care for people living with dementia and those who care for them’ by ‘embedding an understanding of relationality’ into the regulation of dementia care and the ‘policy, strategy, guidelines, circulars, codes of practice’ of non-legal institutional actors, whose decisions are ‘much more likely to affect the lives of persons with dementia than courts or other formal legal bodies.’<sup>27</sup> The question of how a relational understanding of and approach to autonomy can inform legal rules in contexts other than care regulation engages the fundamental insight of relational autonomy theory in different ways, as discussed in the Part 3 of this essay.

## 2 *Vulnerability theory*

Martha Albertson Fineman has described vulnerability as a ‘universal, inevitable and enduring aspect of the human condition,’<sup>28</sup> a function of physical embodiment and the social, material and relationship contexts in which all humans are embedded. Those contexts may be sources of strength and security but also of exploitation and harm; recognising the universality of vulnerability means, for Fineman, recognising a key role for the state in creating conditions that will foster ‘resiliency’.<sup>29</sup> Vulnerability can never be cured or removed but communities can be strengthened in ways that will decrease damage where that vulnerability materialises as harm.

---

<sup>24</sup> Harding (n 23) 26.

<sup>25</sup> Nedelsky (n 22) 9.

<sup>26</sup> Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (Oxford, UK: Oxford University Press, 2011) 31 cited in Harding (n 23) 26.

<sup>27</sup> Harding (n 23) 35

<sup>28</sup> Fineman (n 21) 8.

<sup>29</sup> Fineman describes ‘resilience’ as ‘the crucial but incomplete remedy for vulnerability... nothing can completely mitigate vulnerability, [but] resilience is what provides an individual with the means and ability to recover from

Fineman describes human vulnerability as ‘undeniably universal’ but ‘also particular: it is experienced uniquely by each of us and this experience is greatly influenced by the quality and quantity of resources we possess or can command.’<sup>30</sup> A normatively *invulnerable* liberal subject ‘stands not only outside of the passage of time, but also outside of human experience,’ ‘captur[ing] only one possible developmental stage- the least vulnerable- from among the many possible stages an actual individual might pass through if s/he lives a “normal” lifespan.’<sup>31</sup> Mackenzie, Rogers and Dodd have described the stigma and ‘othering’ created by vulnerable population labelling (as a weak, dependent, siphoners of resources from ‘normal’/invulnerable persons) as itself a ‘pathogenic’ source of enhanced or heightened vulnerability, ‘where the response intended to ameliorate vulnerability has the paradoxical effect of exacerbating existing vulnerabilities or generating new ones.’<sup>32</sup>

The second dictionary definition of vulnerability as the ‘expos[ure] to the possibility of being attacked or harmed, either physically or emotionally’ (as opposed to the special vulnerability of vulnerable populations) - is consistent with the ‘vulnerable subject’ described above. This idea is also implicit in several doctrines of common law and equity. Tort scholar Jane Stapleton has identified vulnerability (vulnerability as exposure to harm) as the ‘golden thread’ and ‘central organizing feature’ of tort law generally, and of negligence law in particular, the duty of care comprising ‘the most extreme form of vulnerability: namely, where a person is exclusively dependent on another to take care, even if that person is a total stranger.’<sup>33</sup> This vulnerability will be created whenever the elements of the negligence duty of care- reasonable foreseeability of harm in a relationship of proximity- are present, regardless of a plaintiff’s ‘vulnerable population’ identity (although personal vulnerability may be relevant to proximity). The duty to

---

harm, setbacks, and the misfortunes that affect her or his life.” Martha Albertson Fineman ‘Equality and Difference- The Restrained State’ (2015) 66(3) *Alabama Law Review* 609, 622.

<sup>30</sup> Fineman, (n 21) 8.

<sup>31</sup> *Ibid* 11-12.

<sup>32</sup> Catriona Mackenzie, Wendy Rogers and Susan Dodd ‘Introduction: What is Vulnerability and Why Does it Matter for Moral Theory?’ in C. Mackenzie, W. Rogers and S. Dodd, eds. *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford, UK: Oxford University Press, 2014) 9.

<sup>33</sup> Jane Stapleton, ‘The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable’ (2003) 24(2) *Austl. Bar Rev* 135 (‘[o]ver the past 20 years, the court has identified this as a core moral concern of tort law and whatever limits may govern this vulnerability concept it certainly has a powerful convincing core’ 142). See also, Carl F Stychin, ‘The Vulnerable Subject of Negligence Law’ (2012) 8(3) *Intl J L Context* 337.

take reasonable care is a duty to acknowledge and take responsibility for that situational vulnerability, taking into account the personal characteristics of defendant and plaintiff (as factors relevant to proximity), by acting in a way that mitigates or reduces the plaintiff's exposure to harm.

Stapleton's articulation of vulnerability in tort law resonates with Justice LaForest's description of vulnerability as 'the 'golden thread that unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation.'<sup>34</sup> In each case vulnerability arises and is intensified through the relationship context in which the parties are situated: relationships of reliance in the case of negligent misrepresentation and breach of fiduciary duty; relationships of power imbalance and oppression in the doctrines of equitable fraud (undue influence and unconscionability).<sup>35</sup> 'Vulnerable population' personal characteristics may contribute to, but do not comprise, the intensified quality of vulnerability required by each of these doctrines (the beneficiary is 'vulnerable' to the trustee by virtue only of the property or financial relationship in which they are enmeshed, for example, with no reference to her or his personal characteristics).

### III. THEORISING RELATIONAL AUTONOMY AND VULNERABILITY IN THE LAW: IMPLICATIONS FOR LEGAL RESPONSE

Biological processes are at the roots of the [many perplexing] problems [now attendant on old age] and of the methods of solving them, but the biological processes take place in economic, political and cultural contexts. They are inextricably interwoven with these contexts so that one reacts upon the other in all sorts of intricate ways. We need to know the ways in which social contexts react back into biological processes as well to know the ways in which the biological processes condition social life.<sup>36</sup>

---

<sup>34</sup> *Hodgkinson v Simms*, [1994] 3 SCR 377, 117 DLR (4th) 161, La Forest J. The first three of these are doctrines of equity; the fourth is a doctrine of tort.

<sup>35</sup> See, Margaret Isabel Hall, 'Law and Aging: An Equity Theory Approach' in I. Doron, ed. *Theories on Law and Ageing: The Jurisprudence of Elder Law* (Berlin: Springer Publications, 2008).

<sup>36</sup> John Dewey, 'Introduction' in Edmund Vincent Cowdry, ed, *Problems of Ageing: Biological and Medical Aspects* (Baltimore: Williams & Wilkins, 1939) xxiii-xxvi.

An understanding of human beings as embedded in the kinds of social contexts described above is central to both relational autonomy and the conceptualisation of vulnerability discussed in the previous section. In the analysis set out below, I suggest that both autonomy and vulnerability arise through, and are diminished by, the intersections between individuals and the various contexts in which they are embedded. The role for law in both promoting autonomy and responding to vulnerability is one of recalibrating that intersection. In this part, I set out my own understanding of autonomy and vulnerability as concepts with legal meaning, drawing on the theoretical insights discussed in the previous part.

### A *Autonomy*

I contend that the traditional accounts of autonomy and vulnerability in law are no longer believable- if they ever were. As public and legal discourse has become more inclusive, referring to and representing people of different ages, genders, ethnicities, abilities, and experiences, the invulnerable and independent normative liberal subject (outside and apart from context) has lost credibility. I suggest that the persistence of these traditional accounts in law, despite their unbelievability, can be attributed to their relative simplicity.

Defining autonomy in terms of decision-making is straightforward: law's role in maximising autonomy lies in ensuring that persons who are cognitively capable of decision-making enjoy the widest possible ability to act on those decisions without interference from others. The CRPD (Convention on the Rights of Persons with Disabilities) paradigm has modified this model, making this idea of autonomy more accessible by locating it in actions taken on the basis of will and preference (with or without the support and assistance of others). Within this new paradigm, the autonomy protection and maximisation remains equivalent to self-direction and "freedom from".

In relational accounts, in contrast, to 'be autonomous' is to practice the wider virtues of autonomy (not limited to self-sovereignty) in everyday life, taking into account the limits of the embodied self, the contexts in which one is situated, and the relationships between self and context. This broader range of autonomous virtues includes dignity, integrity, individuality, independence, responsibility, self-knowledge, self-assertion, critical reflection, absence of external causation, and knowledge of one's own interests; to these I would add kindness to self and others, absence of fear (and the emotional distortions caused by it) or security of the person,

and the consistent experience of respectful treatment (as an externally located constituent of what it means to be autonomous).

To 'be autonomous' does not require one to possess all of these virtues at once; indeed, that is unlikely. No one is completely autonomous, forever; but nor is any person completely non-autonomous. Rather, because autonomy is always dependent on both context and self, autonomy (in terms of both content and degree) is always in flux. The independent adult whose development of other aspects of autonomy was not supported in childhood, for example, may develop his autonomous practice later in life through relationship context (whether through interpersonal or professional relationships, or through the virtual relationships created through literature and art). Similarly, the person whose development of autonomous practice was supported through childhood may nevertheless have her autonomy impaired by subsequent oppressive relationship context, and her autonomy will remain impaired so long as that context remains unchanged.<sup>37</sup> The early experience of a fuller autonomy will not make her immune to oppressive relationship context, although it may assist in her recovery from it. Within this conceptual framework, to be intellectually capable of making decisions, to be supported in making decisions (whether or not one is decisionally capable), and to be able to express and act on one's will and preference are all part of what it means to be autonomous, but they are only one part of autonomous practice. We know this intuitively; we know that a 'capable' decision made in the context of a coercive control relationship is not truly autonomous, for example. The equitable doctrines of undue influence and unconscionability acknowledge and articulate this dimension of relational autonomy in private law; public law, including legislation, has struggled to articulate and respond to the relational self.

The nature of relational autonomy as a way of being that waxes and wanes and takes different forms over the life course, depending on situation-specific relationships between context and self (the same person may be more autonomous at work than at home, for example, or *vice versa*,)<sup>38</sup> means that autonomous practice will look very different across the life course. The classic individualist autonomy of the 'self-sufficient, independent... self-reliant, [and] self-realizing

---

<sup>37</sup> See, Natalie Stoljar, 'Autonomy and the Feminist Intuition' in Catriona Mackenzie and Natalie Stoljar, eds, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 1999).

<sup>38</sup> Hall (n 3) 28. See John Christman. *The Politics of Persons: Individual Autonomy and Socio-historical Selves* (Cambridge, UK: Cambridge University Press, 2009).

individual who directs his efforts toward maximizing his personal gains'<sup>39</sup> is not the only form that autonomous practice can take. This insight resonates with the 'care ethics' approach to relationality; the autonomous practice of the mother of young children will not look the same as the autonomous practice of the free and single youth but neither is necessarily less autonomous than the other. Whereas an individualist account would explain the mother's decision to put her children's interests first as, ultimately, motivated by her own self-interest (like all decisions made by 'rational actors'), a relational approach would instead understand her choice as autonomous in a way that draws upon other aspects of autonomous practice (rejecting the thin equation between autonomy and self-interest).

Displacing decision-making as the *sine qua non* of autonomy has the further implication of opening up other ways of being autonomous and developing autonomy for persons who are not capable of decision-making. The development of autonomy in this situation is not limited to supported decision making or to ascertaining will and preference; as one's decision making ability diminishes, it may be that other aspects of autonomy become especially important in terms of autonomous practice *for that person* at that point in time. Looking through a relational lens, we can start to see what autonomy without decision-making would look like (something more than choice or will and preference, however defined). De-linking autonomous practice from decision-making makes it possible to see that a person losing cognitive capacity in dementia, for example, may be more genuinely autonomous (with the appropriate contextual support) than her pre-dementia, non-supported self (in abusive relationship context, for example).

Finally, conceptualising autonomy as a way of being in the world that is dependent on the relationship between context and self allows us to see that some matters may require a different kind and degree of autonomy than others (as opposed to the all or nothing characterisation of individualist autonomy). The exercise of autonomy in relation to high stakes matters will generally require intellectual decision making ability (unlike 'everyday' choices about what to eat, what clothes to wear, etc.) *in addition to* the necessary context for a deep quality of

---

<sup>39</sup> Lorraine Code, *What Can She Know? Feminist Theory and the Construction of Knowledge* (Ithaca: Cornell University Press, 1991) 77. 'His independence is under constant threat from other (equally self-serving) individuals: hence he devises rules to protect himself from intrusion. Talk of rights, rational self-interest, expediency, and efficiency permeates his moral, social, and political discourse.' Ibid 77-78.

autonomous practice. The legal standard for autonomous practice in relation to medical assistance in dying (MAID), for example, should require both intellectual decision-making ability and a social, relationship and material context that supports autonomous practice.<sup>40</sup> That context would include availability of realistically achievable alternatives to MAID such as palliative care, home care, and long term care;<sup>41</sup> a request for MAID where MAID is the only available alternative to premature and traumatic suicide or the endurance of intolerable suffering will not be sufficiently autonomous (in the relational sense) to justify state sanctioned homicide. Autonomous decision-making also depends on supportive relationships that enable persons to acknowledge and articulate their own true wishes about MAID; a person's ability to act autonomously is diminished where family members express hostility towards the person, making her feel that she is a burden, and undermining her value. The individual's relationship with her or his medical provider, and the information and support that is provided to her or him through that relationship, will also be crucial to autonomous decision-making in this context.<sup>42</sup> From an individualist perspective, in contrast, maximising autonomous decision-making about MAID means maximising the decisionally capable person's ability to request MAID according to her or his will and preference or choice (except for exceptional circumstances in which duress, making the person's decisions involuntary, can be established). A right to MAID, in other words, includes a right to the context necessary for autonomous decision-making.

---

<sup>40</sup> According to Pierre Deschamps, MAID is 'inherently relational... act that inevitably involves both patient and healthcare practitioners, and will implicate family and others' and 'as such, should be conceptualized within the framework of relational, rather than individual, autonomy.' See discussion, Canadian Council of Academics. *The State of Knowledge on Advance Requests for MAID: The Expert Panel Working Group on Advance Requests for MAID* (Ottawa, Ont.: The Expert Panel Working Group on Advance Requests for MAID, Council of Canadian Academies, 2018); Pierre Deschamps, 'L'autonomie personnelle: Individuelle ou relationnelle? Regard sur l'aide médicale à mourir [Personal autonomy: Individual or relational? A look at medical assistance in dying]' (2016) 16(2) *Cahiers Francophones de Soins Palliatifs* 12.

<sup>41</sup> See discussion, *ibid* 49. See also, *Foley v. Victoria Hospital London Health Sciences Centre et al.* (Court File No. CV-18-592072), August 22, 2018, discussed in *The State of Knowledge on Advance Requests for MAID*, *ibid* 148.

<sup>42</sup> Canadian Council of Academies, 2018. *The State of Knowledge on Advance Requests for MAID: The Expert Panel Working Group on Advance Requests* (Ottawa, Ont.: 2019) [AR Report] 49 referring to Gastmans, C. and De Lepeleire, J. 'Living to the bitter end? A personalist approach to euthanasia in persons with severe dementia' (2010) 24(2) *Bioethics* 78 According to Pierre Deschamps, MAID is 'inherently relational... act that inevitably involves both patient and healthcare practitioners, and will implicate family and others' and 'as such, should be conceptualized within the framework of relational, rather than individual, autonomy.' See discussion, AR Report, *ibid.*, citing Deschamps, P. 'L'autonomie personnelle: Individuelle ou relationnelle? Regard sur l'aide médicale à mourir [Personal autonomy: Individual or relational? A look at medical assistance in dying]' (2016) 16(2) *Cahiers Francophones de Soins Palliatifs* 12 cited in the A Report, *ibid*.



It may be argued that this kind of relational autonomy approach is more restrictive, recognising fewer kinds of decisions as ‘autonomous enough’. Understanding autonomy as a continuum, however, means that not all decisions should require the same kind of deep autonomy as a request for MAID. As a high stakes decision that can only be carried out with the active involvement of the state, MAID is the exemplar of a punctuate decision in which law is justifiably engaged as gatekeeper and which should not be enabled without the context necessary to support deep autonomous practice. The relational lens described in this part instructs us on what that context looks like and how to construct it; with the exception of personal relationship context, each of these factors is within public control.

### B *Vulnerability*

I propose an approach to understanding vulnerability that acknowledges the ‘constant and universal’ nature of vulnerability for all persons, together with the potential for special or heightened vulnerabilities to arise throughout the life course in connection with changes in social, material and relationship contexts, changes in self, and the intersections between context and self. Neither the 80 year old, the five year old, or the 50 year old experiences any heightened or particular vulnerability by virtue of age alone; none is a member of an (age-identified) ‘vulnerable population.’ The baby, for example, *potentially* experiences an intense and heightened special vulnerability arising from her physiological self but where that potential vulnerability is absorbed by a responsive and supportive (relationship, social and material) context, the baby is in fact no more vulnerable than most adults, and less vulnerable than some (although she is not *invulnerable*). Where a baby’s material context cannot absorb her potentially heightened vulnerability, providing the baby’s family with housing and benefits will change her context in a way that absorbs that potential by recalibrating the relationship between context and self (although the baby’s physiological self remains unchanged). Where a baby’s (potential) special vulnerability is otherwise absorbed by her context but a medical condition (for which treatment is available) creates heightened vulnerability, that heightened quality of vulnerability may be ameliorated through treatment. In this example, the baby’s vulnerability is reduced through strengthening her physiological self- her context remains the same.

These simple examples show that heightened vulnerability arises in many different ways; that there are many different responses to vulnerability; and that the most appropriate response in the circumstances depends on the nature of that heightened vulnerability and its source. In each case, responding to heightened vulnerability involves a recalibration of the relationship between context and self; law may be (but is not necessarily or even usually) a part of that response. Universal social programs with the goal of improving the health and welfare of all babies are desirable and must be pursued; all persons would benefit from them. But it is just to respond to special heightened vulnerabilities (as exposure to or actualisation of harm) where we can reasonably expect that response to be effective. Just as (from a relational perspective) no person is non-autonomous, no human being is ever invulnerable and no person is ‘more vulnerable’ or even vulnerable in a particular way because of her or his membership in a certain group or population. Just as persons may be more or less autonomous on an individual level throughout the life course, however, vulnerabilities wax, wane, intensify or are absorbed together with changes in context, self, and the relationship between them.<sup>43</sup>

I have written elsewhere<sup>44</sup> about the special potential for vulnerability to financial exploitation created by ageist social attitudes constructing older adults as gullible and dim-witted, generating vulnerability to exploitation through the targeting of older adults irrespective of individual susceptibility or cognitive decline. This cultural stereotype of the older adult as an ‘easy mark’ intersects with the ‘greedy geezer’ meme (the old ‘boomer’ as the undeserving beneficiary of decades of relative prosperity, rising property values, and public benefits that less fortunate others are denied) in ways that further heighten vulnerability to exploitation. The ‘greedy geezer’ caricature may also provide the basis for a rationalising self-narrative (an additional source of potential vulnerability): she has so much; she doesn’t need it the way that I do; the world has changed in a way that, unfairly, now prevents me from making my own way.

Alongside these cultural stereotypes is the reality that (unlike persons with

---

<sup>43</sup> Prof. Fineman, in contrast, uses the term ‘vulnerable’ to ‘connote the continuous susceptibility to change in both our bodily and social well being that all human beings experience’; in her view, ‘to view some people as more or less vulnerable, or as differently or uniquely vulnerable... ignores the constancy and universality of vulnerability as I use the term and is merely another way of identifying bias, discrimination, and social disadvantage rather than focusing on structural arrangements that effect everyone.’ Fineman, M. ‘Vulnerability and Inevitable Inequality’ (2017) 3 (4) *Oslo Law Review* Art. 2.

<sup>44</sup> See, M I Hall ‘Situating Dementia in the Experience of Old Age: Reconstructing Legal Response’ (2019) 66(1) *Int. J. Law 7 Psych* <https://doi.org/10.1016/j.ijlp.2019.101468>.

developmental/intellectual disabilities) the person experiencing dementia will often have had the opportunity to accumulate assets during a long capable life, enjoying entitlements to private pensions and other benefits in addition to the public benefits available to all older adults. The accumulation and/or availability of assets is at once a source of potential strength and (where the person is experiencing the signs and symptoms of dementia) potential vulnerability to abuse and exploitation. The *potential* for exploitation created by these contextual factors may be absorbed by the robust self (in terms of autonomous practice, physiological strength and ability, intellectual knowledge, experience, and sophistication), and/or by supportive relationship, community<sup>45</sup> and social context. Conversely, social, material, and relationship contexts may themselves be a source of potential heightened vulnerability. This includes the ‘pathogenic’ vulnerability created by stigmatising or otherwise harmful legal and other forms of social response. Heightened vulnerability in each individual case will arise through the intersection of the self with these multi-faceted contextual factors.

An approach to legal response that incorporates this idea of vulnerability would enable social response while minimising the ‘pathogenic’ vulnerability caused by the stigma of identification as a vulnerable population member. As in the case of the baby, mere personal characteristics would not be sufficient to create heightened vulnerability (beyond the universal vulnerability attendant on embodiment). Similarly, impaired decision-making in itself would not justify legal response so long as the *potential* for heightened vulnerability was absorbed by a supportive (social, material, and relationship) context. The goal of legal response, together with other forms of social response, should be to absorb vulnerability and to increase resilience (*as per* Fineman) where possible. The appropriate response will be dependent on the circumstances in each case. For persons with more advanced dementia, the development of resilience alone will not be sufficient; the construction of social, material and relationship contexts that can absorb vulnerability is also needed. Law can play a role in that response, by enabling persons to construct their own contexts in advance (as part of advance planning) or by creating structures through which that context can be created by public actors (as in statutory guardianship) or by private actors with public support (private guardianship).<sup>46</sup>

---

<sup>45</sup> Religious, cultural, or neighbourhood communities e.g.

<sup>46</sup> Hall (n 44).

The degree of overlap between the kinds of contextual factors that exacerbate vulnerability and oppress autonomy, absorb vulnerability or facilitate autonomous practice, means that the same kinds of state responses which support autonomy will have the effect of absorbing or de-escalating vulnerability. The two are not synonymous, however. Vulnerability is the broader concept; one may enjoy deep autonomy yet be physically and materially vulnerable by reason of embodiment, natural disaster, or economic circumstances.

### III CONCLUSION: MAKING IT REAL

We cannot regard truth as a goal of inquiry. The purpose of inquiry is to achieve agreement among human beings about what to do, to bring consensus on the end to be achieved and the means used to achieve those ends. Inquiry that does not achieve co-ordination of behaviour is not inquiry but simply wordplay.<sup>47</sup>

In this concluding part, I suggest how the ideas of relational autonomy and vulnerability discussed in the previous part can be implemented or ‘made real’ in two inter-connected areas of law with particular (but not exclusive) application to older adults, advance planning and guardianship. The suggestions below are intended to open the conversation about what it looks like to re-construct legal response on the basis of the ideas of autonomy and vulnerability discussed in the previous Part.

The stated purpose and objective of advance planning instruments is to enable a person to appoint a substitute to make decisions for her in the event that she becomes decisionally incapable. Advance planning is rhetorically constructed in public discourse as an autonomy-protecting mechanism: because autonomy resides in and is exercised through decision-making, the story goes, choosing your own substitute decision-maker (rather than having one appointed for you) enables a next-best autonomy after the personal loss of decision-making ability. The emphasis placed on decisions and decision-makers in legislation and the public discourse around advance planning positions *decision-making* as the problem to be resolved through advance

---

<sup>47</sup> Richard Rorty, *Philosophy and Social Hope* (London: Penguin Books, 1999) xxv.

planning instruments: appoint the necessary decision-makers and you have prepared yourself for dementia or other conditions impacting the performance of thinking processes. In reality, of course, the decision of your substitute (whether appointed through an advance planning instrument or by a guardianship order) is not really *your* decision at all, although it might be consistent with decisions you have made or said you would make in the past. A focus on absorbing vulnerability and facilitating autonomous practice, as described above, can shift our understanding of the purpose and potential of both advance planning and guardianship in ways that impact the experience of both autonomy and vulnerability after the loss of decision-making ability.

Reframed through a vulnerability lens, advance planning instruments of different kinds (powers of attorney and representation agreements providing for personal care) allow individuals “in advance” to construct a supportive material, social and relationship context to absorb the potential for heightened vulnerability flowing from future changes in the performance of thinking processes.<sup>48</sup> What difference does this shift in perspective make? For the donor, understanding advance planning through a vulnerability lens fundamentally shifts the nature of the task: from appointment of a decision-maker (re finance or health care) to the broader task of constructing the kind of social, material, and relationship context that can effectively absorb the potentially heightened vulnerability caused by changes in the performance of thinking processes. Constructing context includes but is not limited to appointment of a decision-maker to effect high-stakes decisions. Other contextual factors - living arrangements, personal and home care (i.e. not health care), participation in community support services - will have a more direct impact on the individual’s experience of day-to-day life, including her experience of heightened vulnerability. The current focus on decision-making and decision-makers obscures this fact and shifts the focus towards punctuate decisions (such as health care decisions) and away from the circumstances of everyday life. A personal care decision-maker may be empowered to make decisions whether or not to seek out and organise these kinds of responses, but it is much more likely that the individual herself will be better placed to plan for them in a way that facilitates

---

<sup>48</sup> That language is both more accurate than ‘decision-making ability’ and applies to wider scope of autonomous practice than punctuate decision-making.

that person's autonomous practice. From this perspective, advance planning can be understood in terms of facilitating future autonomous practice *other than* decision-making.

Court appointed or statutory guardianship, where persons have not used advance planning or where advance planning has failed (as where the authority conferred been mis-used or exploited), may be reconceptualised/re-constructed on similar terms. Thinking about guardianship as a response to heightened vulnerability arising through problems in the performance of thinking processes in connection with that person's material, social and relationship context fundamentally changes the terms of the guardianship inquiry: from a question of whether the collapse of the 'sovereign self' requires a substitute to fill to the void to a question of whether and how and vulnerability may be absorbed by changes in the person's social, material and relationship context. Appointment of a decision-maker will be only *one aspect* of the response needed to recalibrate the relationship between context and self to absorb vulnerability, and will not be justified where the heightened vulnerability caused by problems in the performance of thinking processes can be absorbed by other kinds of available support. A guardianship response proceeding on this basis should take into account the potential for context change to support autonomous practice other than decision-making for the individual concerned. This kind of response is fundamentally different from the mere appointment of a substitute decision-maker, and will require public support to create that context (a task which will be beyond the ability and means of most private substitutes). A shift of this kind would return guardianship to its origins in public responsibility, before its delegation at the turn of the 20<sup>th</sup> century to private individuals.

These relational approaches to advance planning and guardianship acknowledge the importance of social, material and relationship contexts in both generating and absorbing vulnerability, and in promoting autonomous practice. Legal rules and structures have a crucial role to play in facilitating contextual change to promote autonomous practice and absorb vulnerability, especially where opportunities for strengthening of the self (through medical treatment e.g.) are limited. The papers collected in this volume describe and set out diverse approaches to vulnerability and autonomy as legal ideas, together with the challenges of making those ideas real through legal rules, practices and structures. It is my hope that this discussion will move the conversation forwards, and encourage new ways of thinking about old problems.