

# LEGAL INTERVENTIONS TO PROTECT VULNERABLE ADULTS: CAN RELATIONAL AUTONOMY PROVIDE A NEW WAY FORWARD?

\*JOAN BRAUN

## Abstract

This article examines vulnerability and autonomy in the context of elder abuse and adult protection legislation. It argues that relational autonomy provides a better framework for understanding older adult choices in situations of abuse than traditional theories of autonomy. The article examines current approaches to protecting older adults deemed to be vulnerable and argues that a new approach is needed. This will require reconceptualizing vulnerability and developing a more fulsome understanding of relational autonomy and how to apply this theory to practice situations in elder abuse response. The article provides examples based on preliminary findings from a study on elder abuse response in British Columbia Canada.

## I. INTRODUCTION

In this article I examine vulnerability and autonomy in the context of elder abuse and adult protection legislation. Autonomy and vulnerability have received considerable recent attention from scholars, but the focus has been on theory rather than how these theories apply in practice. One limitation of the emerging literature on relational autonomy “is the lack of definitional interrogation of what relationality means in the everyday, situated, lives of individuals”.<sup>1</sup> This article focuses on the situated lives of older adults at risk of harm and asks how society should protect vulnerable adults if they do not want state assistance. This situation raises the question of how to address vulnerability without overriding autonomy. I examine this issue through a discussion of adult protection legislation and argue that new approaches are needed. New approaches will require reconfiguring current understandings of autonomy and vulnerability and identifying ways to incorporate these understandings into life situations. I argue that this endeavor should be informed by relational understandings of autonomy rather than

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<sup>1</sup> Rosie Harding, ‘Legal Constructions of Dementia: Discourses of Autonomy at the Margins of Capacity’ (2012) 34 *Journal of Social Welfare and Family Law* 425, 431.

traditional liberal understandings of autonomy.<sup>2</sup> I conclude that empirical research is required in order to examine practical applications of these issues in the context of state response to elder abuse.

This article proceeds with five sections. In the next section (section two) I describe adult protection legislation. In the third section I discuss autonomy and vulnerability and introduce relational autonomy theory. In the fourth section I explore how relational theories of autonomy apply in situations where elder abuse is occurring. In that section I use British Columbia's *Adult Guardianship Act (AGA)* as the context for the discussion with reference to emerging themes from a current study about the *AGA*.<sup>3</sup> The final section (section five) is the conclusion.

## II. ADULT PROTECTION LEGISLATION

Most jurisdictions have laws that protect adults who society deems to be vulnerable although there is great variation across jurisdictions in regard to who is protected and the specifics of that protection. In this article I use the term 'adult protection legislation' to describe this type of legislation although I recognize that this term is more commonly used in some jurisdictions than others.<sup>4</sup> Adult protection legislation has one common feature which is to fulfill state responsibility to care for those unable to care for themselves (a responsibility rooted in the *parens patriae* jurisdiction). The differences in scope reflect policy choices about autonomy, vulnerability and protection.

### A. *Adult Protection Legislation and Older Adults*

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<sup>2</sup> The term 'liberal' as used in this article, refers to the meaning in philosophy, associated with enlightenment thinking, as evidenced in the works of John Locke, Jonathan Rawls and many others, rather than its meaning in the current political sphere. See Philip Rich, 'What Can We Learn from Vulnerability Theory?' *Bowling Green University Honors Projects*, Spring 4-30-2018.

<sup>3</sup> *Adult Guardianship Act* RSBC 1996, c 6.

<sup>4</sup> For example, this term is commonly used in the United States, where the agencies tasked with responding to reports of abuse are often called Adult Protective Services. The term 'safeguarding' is used in the United Kingdom.

Older adults and adults with disabilities are two groups commonly viewed as vulnerable and in need of protection.<sup>5</sup> Some jurisdictions have statutes that extend protection to all adults above a certain age which is in keeping with a common perception that older adults are a vulnerable population.<sup>6</sup> In other jurisdictions protective provisions only apply when a specific standard is met or only apply to adults in specific life circumstances. For example, a statute may apply to persons with intellectual disabilities, impaired mental capacity, or specifically to persons residing in care facilities. Even when adult protection laws do not contain age-based criteria older adults may fall within their purview for other reasons such as health and capacity issues that meet statutory criteria (there is a higher prevalence of dementia in the older adult population, for example).<sup>7</sup>

The elder law field in Canada and beyond has been rife with debate about how to balance competing policy objectives of protection and autonomy. As the authors of one legal research project explain:

A consistent and challenging issue is how to balance the two values of protection and independence. ... Canadian jurisdictions vary greatly in their approaches. Protection requires some compromise of independence for the sake of an adult's well-being; the challenge is to devise a framework that sacrifices as little independence as possible.<sup>8</sup>

When the scope of an adult protection law is narrow, applying to a small percentage of the population only, the state can fulfill its *parens patriae* duty while minimally intruding into the

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<sup>5</sup> See Martha Albertson Fineman, 'Elderly as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20 *Elder Law Journal* 71 ('Elderly as Vulnerable').

<sup>6</sup> This is very common in American jurisdictions and in some states these laws contain provisions requiring members of the public to report elder abuse. Mandatory reporting laws have been criticized by scholars as paternalistic, and a violation of civil liberties. See, eg, N Kohn, 'The Lawyer's Role in Fostering a Civil Rights Movement' (2010) 37 *William Mitchell Law Review* 37.

<sup>7</sup> The Canadian Alzheimer's Society estimates that the prevalence among females age 64 to 74 is 2.8% and men in the same age 1.9%. The prevalence for women age 75 to 84 increases to 11.6% and men the same age 10.4%. The prevalence for women over age 85 is 37.1% and men 28.7%. Mindy Katz et al, 'Age Specific and Sex Specific Prevalence and Incidents of Mild Cognitive Impairment, Dementia and Alzheimer's in Blacks and Whites: A Report from the Epstein Study' (2012) 26 *Alzheimers Disease and Associated Disorders* 335.

<sup>8</sup> British Columbia (BC) Abuse and Neglect Prevention Collaborative, *Provincial Strategy Document* (BC Abuse and Neglect Prevention Collaborative, 2009).

lives of its citizens.<sup>9</sup> However, even when adult protection laws are narrowly drafted, they still give the state the authority to intrude. Further, a law may be drafted narrowly but interpreted broadly by the state agents who implement the law; a broadly drafted law may also be interpreted narrowly. There are many explanations for why this might occur including ambiguities about how to apply the legislation in complicated practice situations. This issue is discussed in more detail in the fourth section of this article.

### *B. Example of Adult Protection Legislation*

In Canada adult protection laws do not use age as the criteria for determining application of the statute but rely on other standards.<sup>10</sup> Part 3 of British Columbia's *AGA* illustrates this point.<sup>11</sup> Part 3 of the *AGA* authorizes intervention when the criteria in s. 44 are met:

- S. 44 The purpose of this Part is to provide for support and assistance for adults who are abused or neglected and who are unable to seek support and assistance because of
- (a) physical restraint,
  - (b) a physical handicap that limits their ability to seek help, or
  - (c) an illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect.

When a designated agency<sup>12</sup> receives a report of abuse or neglect of an adult who is unable to seek support and assistance it must ascertain whether the adult is abused or neglected and whether the adult is able to seek support and assistance. If the answer to these questions is no the designated agency must close the matter or refer it to the Public Guardian and Trustee. If the answer to these questions is yes, the following provision applies:

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<sup>9</sup> *Parens Patriae* is the doctrine that grants inherent power and authority of the state to protect persons who are legally unable to act on their own behalf. This doctrine has its roots in English common law.

<sup>10</sup> For example, in Ontario it is mandatory to report abuse of an adult who lives in a long-term care home. See *Long-Term Care Homes Act, 2007*, SO 2007, c 8.

<sup>11</sup> Part 3 refers to sections 44 through 60.1 of the *AGA*, which is the section dealing with response to abuse and neglect.

<sup>12</sup> The agencies that have been designated to respond to reports of abuse under the *AGA* are the five health authorities and *Community Living BC*. These agencies were designated by the *Public Guardian and Trustee* pursuant to B.C. Reg. 38/2007.

S. 47(3) If the designated agency determines that the adult needs support and assistance, the designated agency may do one or more of the following:

- (a) refer the adult to available health care, social, legal, accommodation or other services;
- (b) assist the adult in obtaining those services;
- (c) inform the Public Guardian and Trustee; or
- (d) investigate to determine if the adult is abused or neglected and is unable, for any of the reasons mentioned in section 44, to seek support and assistance.

Under Part 3 of the *AGA* the designated agency has authority to pursue various interventions including obtaining a court order enforcing a support and assistance plan, entering into a residence to investigate a report, arranging capacity assessments and obtaining a court restraining order. Typically, the first step is to offer the abused adult a support and assistance plan. If an adult refuses the plan a secondary question is asked: does the adult have the legal capacity to make this decision? If not, the designated agency may decide to impose more intrusive interventions to protect the adult.

### *C. Autonomy and Adult Protection*

Questions about vulnerability and autonomy arise within the context of adult protection legislation in three ways. First, if the state intervenes when an adult does not want intervention this infringes the adult's right to make autonomous decisions. The exception is if that adult lacks legal capacity. If so, the state has the legal justification to over-ride the adult's wishes. Regardless, this interferes with autonomy even if there is legal justification for it.

Second, in jurisdictions where protective provisions apply when adults lack the ability to make decisions on grounds broader than legal incapacity, this may result in the state intervening contrary to the adult's wishes even when the adult is legally capable.

Third, when a state agent receives a report of abuse of a vulnerable adult the state agent must evaluate that adult's ability to make decisions. This raises questions about whether the adult is able to exercise autonomy. For example, the state agent may ask questions such as: 1) does the adult have the ability to choose how to respond to the abuse and 2) does the adult have the ability

to take action to protect him or herself.<sup>13</sup>

### III EXISTING LITERATURE - AUTONOMY AND VULNERABILITY

In this section of the article, I briefly describe theories of autonomy and vulnerability and discuss why relational theories fit the life experience of older adults better than traditional theories of autonomy.

#### A. *Vulnerability, Autonomy and Protection*

I begin by discussing autonomy and then proceed to a discussion of vulnerability and an exploration of these concepts in the context of abuse and protection.

##### 1. *Autonomy*

There are many theories of autonomy each having different criteria for determining whether a decision is autonomous. Theories can be categorized into procedural theories which are content neutral but require a specific (intellectual or reasoning) procedure to be followed for a decision to qualify as autonomous, and substantive theories which require the decision to have specific content relating to beliefs, values or desires in order to qualify as autonomous.<sup>14</sup>

Although this is a useful distinction, I believe that the more important distinction is between traditional theories of autonomy and relational theories of autonomy. The former theories are based on the liberal paradigm and emerge out of enlightenment thinking. Traditional theories of autonomy share a central theme which is that self-determination or self-government

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<sup>13</sup> There are different theories that add definition to the concept of autonomy. Holroyd argues that there are three types of autonomy. This example reflects autonomy as choice and autonomy as action, which are two of her three categories. The three are: *choice*, *action* and *agency*. Jules Holroyd, 'Relational Autonomy and Paternalistic Interventions' (2009) 15 *Res Publica* 321.

<sup>14</sup> C Mackenzie and N Stoljar, 'Introduction: Refiguring Autonomy' in Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford University Press, 2000).

as the defining characteristic of free moral agency.<sup>15</sup> Autonomy, as per liberal thought, is the ability to make decisions independently and self-sufficiently without reference to context, relationships or other factors. This perspective has been critiqued extensively by feminist scholars who argue that autonomy must be considered within the context of social structures and relational connections.<sup>16</sup> Feminist legal theorists have reconceptualized autonomy to incorporate these considerations within a “relational” theory of autonomy.

## 2. *Relational Autonomy*

Relational autonomy theory incorporates an understanding of social location, social and political structures and the effect of discrimination and social context on decision-making.

McKenzie and Stoljar explain the term ‘relational autonomy’ as:

[A]n umbrella term, designating a range of related perspectives. These perspectives are premised on a shared conviction 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.<sup>17</sup>

Social context can empower or impede the ability to make autonomous decisions.

Although social supports and relationships can enable the exercise of autonomy, they also can impede autonomy. Examples include causing impairments to attitudes about self, interfering with the development of competencies necessary to express autonomy and interfering with the ability to act on autonomous desires and make autonomous choices. Impairment is not solely caused by overt restrictions but also by social norms, institutions, practices and relationships that limit the range of acceptable options available.<sup>18</sup>

Relational autonomy theories have recently been applied in relation to issues impacting

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<sup>15</sup> Ibid.

<sup>16</sup> Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1 (‘Vulnerable Subject’); McKenzie and Stoljar, (n 14).

<sup>17</sup> McKenzie and Stoljar (n 14) 14.

<sup>18</sup> Ibid.

older adults. Sherwin and Winsby have applied a relational autonomy lens in the context of care settings for older adults.<sup>19</sup> Laura Pritchard-Jones has explored the effect of ageism on older adults' ability to make autonomous decisions in health care contexts.<sup>20</sup> McLeod and Sherwin have applied relational autonomy theory in healthcare and caregiving contexts, explaining how oppression in those settings can impair autonomy.<sup>21</sup>

The recent application of relational autonomy theory to the experiences of older adults is a beneficial development. Relational understandings of autonomy provide a better foundation for explaining older adult decision-making than traditional theories. Older adult decision-making does not fit within the framework of traditional autonomy which requires decisions to be made in isolation without consideration to social context. Older adults are impacted by the social environment and often place great value on relationships. For example, studies have shown that older adults are reluctant to report elder abuse and may not take action when the perpetrator is a family member out of a desire not to harm the relationship.<sup>22</sup>

Even though relational understandings of autonomy are emerging the legal system continues to frame autonomy as the ability to act rationally and independently. Consequentially, if an adult is perceived to lack autonomy this can justify state intervention including overriding

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<sup>19</sup> S Sherwin and M Winsby, 'A Relational Perspective on Autonomy for Older Adults Residing in Nursing Homes' (2010) 14 *Health Expectations* 182.

<sup>20</sup> Laura Pritchard-Jones, 'Ageism and Autonomy in Health Care: Explorations Through a Relational Lens' (2017) 25 *Health Care Analysis* 72.

<sup>21</sup> C McLeod and S Sherwin, 'Relational Autonomy, Self-Trust, and Health Care for Patients Who Are Oppressed' in C Mackenzie and N Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford University Press, 2000).

<sup>22</sup> See, eg, Lisa Ha and Ruth Code, *An Empirical Examination of Elder Abuse: A Review of Files from the Elder Abuse Unit of the Ottawa Police Services* (Department of Justice Canada, 2013); See, eg, Yvonne Craig, 'Elder Mediation: Can it Contribute to the Prevention of Elder Abuse and the Protection of the Rights of Elders and Their Carers?' (1994) 6 *Journal of Abuse and Neglect* 83.



the adult's wishes.<sup>23</sup> This is particularly problematic for older adults because of stereotypes that associate older adults with forgetfulness and diminished cognition.

### 3. *Vulnerability*

There are many different theories about vulnerability. However, these can be categorized into two perspectives. One perspective is that vulnerability can be attributed to ontology. The other is that there are particularized harms that specific groups or individuals are susceptible to. McKenzie, Rogers and Dodds use the terms 'inherent vulnerability' and 'situational vulnerability' in reference to the two perspectives. In their taxonomy, *inherent* and *situational* vulnerability can be *dispositional* (where a person is at risk of becoming vulnerable but is not yet vulnerable) or *occurrent*, where a person is presently vulnerable. The third category of vulnerability in this taxonomy is *pathogenic* vulnerability,<sup>24</sup> referring to "situational vulnerabilities that occur because of adverse social phenomena" including "vulnerabilities caused by injustice, domination, and repression, and also those that occur when actions intended to alleviate vulnerability actually make it worse."<sup>25</sup>

Herring argues that, although these categories may be presented as distinct, in actuality they are not. Although everyone is vulnerable some people are additionally situationally vulnerable.<sup>26</sup> Similarly, Lindsay argues that pathogenic vulnerability – a particular form of situational vulnerability – exacerbates other vulnerabilities. She gives the example of a woman in an abusive relationship who may become less able to act autonomously over time and less able to

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<sup>23</sup> See, eg, Fineman "Elderly as Vulnerable" (n 5).

<sup>24</sup> C Mackenzie, W Rogers, and S Dodds, 'Introduction: What Is Vulnerability and Why Does It Matter for Moral Theory?' in C Mackenzie, W Rogers, S Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press) 2014.

<sup>25</sup> W Rogers and M Meek Lange, 'Rethinking the Vulnerability of Minority Populations in Research' (2013) 103(12) *Am. Journal of Public Health* 2141, 2144.

<sup>26</sup> Jonathan Herring, *Vulnerable Adults and the Law* (London: Oxford Press, 2016).

make the decision to leave. In this situation legal responses that directly address the situation are required to remove the source of the pathogenic vulnerability. According to Lindsay legal responses to abuse should “shift their response away from the individual woman towards the harmful places and circumstances within which she is situated”.<sup>27</sup>

Martha Fineman’s influential theory of universal vulnerability is centred on the concept of ontological or inherent vulnerability as a universal condition of humankind (as opposed to the special characteristic of certain persons or groups of persons). Humans are frail and subject to episodic dependency and, consequentially, vulnerability is an ongoing part of the human condition. Fineman argues that the state must be more responsive by recognizing the universality of vulnerability and by providing mechanisms to build resilience in order to mitigate vulnerability.<sup>28</sup> Fineman describes her theory in the following words:

The vulnerability approach recognizes that individuals are anchored at each end of their lives by dependency and the absence of capacity. Of course, between these ends, loss of capacity and dependence may also occur, temporarily for many, and permanently for some, as a result of disability or illness.... On an individual level, the concept of vulnerability (unlike that of liberal autonomy) captures this present potential for each of us to become dependent based upon our persistent susceptibility to misfortune and catastrophe.<sup>29</sup>

In 2012 Fineman applied her theory of the universal vulnerable subject to older adults.<sup>30</sup>

The strength of the argument in this article is that it normalizes vulnerability which counters society’s tendency to associate it with age. However, the weakness of her argument can be found in her proposal that protections should be granted to older adults based on age. Kohn critiques

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<sup>27</sup>Jaime Lindsay, ‘Developing Vulnerability: A Situational Response to the Abuse of Women with Mental Disabilities’ (2016) 24 *Feminist Legal Studies* 295, 311.

<sup>28</sup> Martha Fineman, ‘New Legal Realism: Empirical Law and Society’ (2015) *New Legal Realism Conversations* <<https://newlegalrealism.wordpress.com/2015/11/30/fineman-on-vulnerability-and-law/>>.

<sup>29</sup> Fineman ‘Vulnerable Subject’, (n 16) 12.

<sup>30</sup> Fineman ‘Elderly as Vulnerable’ (n 5).

the article and argues that this proposed approach is paternalistic and contradictory to the premise of Fineman's theory that vulnerability is universal.<sup>31</sup>

Kohn's critique aligns with concerns that elder law scholars have raised about laws that offer protection to adults above a specific age. These laws often restrict the right of older adults to make decisions that place them at risk of harm. Stereotypically vulnerability is associated with weakness and fragility, which mirrors a common stereotype about older adults. Scholars have argued that this formulation of vulnerability provides a rationale for adult protection laws that are paternalistic or overly broad.<sup>32</sup>

Adult protection laws can adversely impact older adults even when laws are not specifically age-targeted. For example, a law may offer protection to adults who lack legal capacity. Because of a common stereotype that older adults have compromised cognitive ability a state agent may interpret forgetful behavior by an older adult as an indication that a cognitive deficit exists where there is none. Negative stereotypes persist despite the fact that most older adults have intact mental capability. When a state agent's interpretation of adult choices in situations of abuse is colored by the agent's personal biases about aging it may result in an expansion of the scope of the statute. For example, a state agent may investigate a report of abuse of an older adult who has a mild cognitive disability when legislators intended the statute to only apply to adults who are legally incapable.

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<sup>31</sup> Nina A Kohn, 'Vulnerability Theory and the Role of Government' (2014) 26 *Yale Journal of Law & Feminism* 1 ('Vulnerability Theory'). Kohn provides examples of existing age-targeted protections that are similar to what Fineman proposes and are paternalistic. For example, laws that enable the state to seek to overturn fraudulent transactions when an older adult is regarded as having been taken advantage of, with remedies that can be sought by the state rather than initiated by the older adult.

<sup>32</sup> See, eg, Margaret Hall, 'Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability' (2012) 58 *McGill Law Journal* 61.

Some scholars have argued that it is time to develop a new understanding of vulnerability.<sup>33</sup> I concur with this argument and I add the comment that when developing new understandings of vulnerability an effort should be made to ensure that new conceptualizations avoid furthering paternalistic protective measures.

#### *4. Vulnerability and Autonomy and the Older Adult*

Older adult decision-making can best be understood from a relational autonomy perspective. This includes acknowledging that there are impediments to the exercise of autonomy for older adults experiencing elder abuse. For example, an older adult experiencing abuse may lack confidence to take action due to ageism. When oppression or discrimination impairs an older adult's exercise of autonomy the social condition causing the impediment must be addressed. Relational autonomy recognizes the influence of dynamics, structures and relationships between and within groups. Where these impair the exercise of autonomy by persons within the group this can only be addressed by changing society.<sup>34</sup>

The goal for social change should not be limited to enabling the exercise of autonomy but should extend to ameliorating vulnerability where there is a risk of harm to older adults. Kohn provides an important insight about how to reconfigure vulnerability and develop mechanisms for extending protections in these situations. She agrees that Fineman's theory of universal vulnerability is valuable but does not agree with Fineman's proposal of providing protections based on age. Instead, she advocates refining Fineman's theory so that it has the specificity necessary to support targeted interventions. In her words:

[I]f vulnerability is to be an effective and appropriate trigger for special protection or intervention, it must be defined in relation to the particular threat being addressed. Under this approach, policies would target people based on their vulnerability to a particular threat or problem. This would be consistent with a conceptualization of vulnerability not as an innate quality of a person but rather as

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<sup>33</sup> Ibid.

<sup>34</sup> McLeod and Sherwin (n 21).

a result of a relationship between an individual and his or her environment. This conceptualization would thus be aligned with the modern understanding of disability as reflecting a relationship between an individual and his or her environment.<sup>35</sup>

Kohn's argument that vulnerability theory be refined complements McLeod and Sherwin's argument that societal change is needed to enable the expression of autonomy.<sup>36</sup> The exercise of autonomy requires a safe space free from oppressive influences that undermine it.<sup>37</sup>

Reconfigured approaches to addressing vulnerability should include tailoring state interventions to specific situations of vulnerability. Creating new mechanisms for creating supportive structures is a key strategy for enabling the expression of autonomy. These endeavors are complementary because autonomy and vulnerability intersect and impact on each other. I provide an illustration: Theories of relational autonomy highlight how the ability to exercise autonomy is related to social context and relationships; relationships have the potential to increase vulnerability, such as due to dependency or toxicity, or alternatively to decrease vulnerability when relationships are healthy and protective.

#### IV RELATIONAL AUTONOMY AND ELDER ABUSE

It is insufficient to reconceptualize vulnerability or develop new understandings of how relational autonomy can be applied to practice situations if this remains theoretical. This must result in new approaches that can be incorporated into the real world and applied to situations where vulnerable older adults are experiencing abuse. That is the focus of this section of the article, which uses elder abuse response in British Columbia as an illustration.

##### *A Elder Abuse and Autonomy*

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<sup>35</sup> Kohn 'Vulnerability Theory' (n 31).

<sup>36</sup> McLeod and S Sherwin (n 21).

<sup>37</sup> Lindsay (n 27).

BC's *AGA* provides the background for this discussion. I focus specifically on abuse of older adults although the *AGA* applies to vulnerable adults of all ages. Part 3 of the *AGA* outlines interventions and processes for investigating and intervening when a vulnerable adult is abused and is unable to seek support and assistance. S. 44 lists reasons why an adult may not be able to seek help and assistance. I focus specifically on s 44(c), which describes adults who are unable to seek help and assistance because of "an illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect".

Section 44(c) applies in two situations: 1) where the adult's ability to make decisions about the abuse is impaired due to "an illness, disease or injury" or 2) where there is an "other condition". The meaning of "other condition" is not specified. This provision could be interpreted narrowly to apply to conditions that cause cognitive impairment, or it could be interpreted more broadly to also apply to psychological impairments. Conceivably a responder could interpret "other conditions" to include conditions such as fear or intimidation when these are preventing the older adult from making a decision about the abuse.

Under the *AGA*, the first step that a responder must take upon receiving a report of abuse is to determine whether the matter falls within the mandate of the *AGA*. This requires an informal assessment of whether the adult is able to seek support and assistance. Questions of autonomy inevitably arise during this assessment. At law an adult's right to make autonomous decisions can only be terminated if the adult is legally incapable. This determination occurs after a medical assessment and through some type of legal process.<sup>38</sup> However, when responding to abuse under the *AGA* responders must determine if the case falls with the mandate of the designated agency at the outset. This includes assessing whether the adult has an impairment that affects adult's ability

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<sup>38</sup> For example, through a court order or by a person given authority to make that determination under statute.

to make a decision about the abuse. If the responder believes this to be the case, then the responder has statutory authority to continue with the investigation or offer support and assistance even if the adult does not want state involvement and where there has been no legal determination of incapability.

There is the possibility that a responder will misunderstand an older adult's behavior. For example, the responder may misinterpret an older adult's choice to remain in an abusive situation as an indication that the adult lacks the ability to exercise autonomy. However, there are many other explanations for the older adult's behavior. For example, an older adult may decide not to seek help because he or she prioritizes issues other than safety such maintaining a relationship with an abusive adult child. Alternatively, an older adult may have reviewed other options before determining that remaining in the situation is the preferred alternative.

Sometimes, if ending the abuse would require reporting it, an older adult may demur because of lack of confidence in the legal system. Previous attempts to report may have been unsuccessful because of an ageist justice system.<sup>39</sup> Fleishman, a former police officer, describes how ageism impedes the process of investigation and the outcome of investigation.<sup>40</sup> Spencer explains how ageism prevents seniors from receiving a legal remedy. In her words:

Ageism affects financial abuse in other ways too. Seniors' credibility or the reliability of their memory is often thrown into question. Much of financial abuse occurs "behind closed doors" in the privacy of family life. Often there are no witnesses other than the two individuals and it becomes a matter of a younger person's word against an older person's ... [word].

As a specific example of how context explains choice, Spencer interviewed 200 older adults about financial abuse and the law. Based on her interviews, she concluded that older adult

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<sup>39</sup> For a discussion of ageism within the legal system, in relation to elder abuse, see Patricia Fleishman, 'Elder Abuse: An Ontario Criminal Justice Response' in G Gutman and C Spencer (eds), *Ageing, Ageism and Abuse* (Elsevier, 2010); for a discussion of ageism and the law, see M Hall, *Developing an Anti-Ageist Approach to the Law* (Law Commission of Ontario, 2009).

<sup>40</sup> Fleishman, *Ibid.*

financial abuse victims who declined to pursue legal avenues were making a rational choice. As she explains, “based on the findings from ... [this] study, older people often simply see pursuing the abuser as a poor use of what limited time and resources they have left, i.e. legal pursuit of the abuser may diminish their quality of life.”<sup>41</sup>

Questioning why an older adult abuse victim does not take action is similar to questioning why women do not leave situations of domestic violence. Many of the same answers apply. Issues include oppression, discrimination and social obstacles to exercising autonomy. Nedelsky describes obstacles a battered woman must overcome to exercise autonomy. She may have feelings of worthlessness and learned helplessness that prevent her from trusting herself. She may decide to remain in the relationship, due to a very realistic assessment that there are no viable options available to help her. Further, it may be difficult for her to exercise autonomy due to social structures that maintain her oppression.<sup>42</sup> When the victim of abuse is an older adult, the adult must overcome obstacles relevant to his or her situation. For example, the older adult may be dependent on the abusive family member for care.

Context makes all the difference when assessing situations of abuse. The older adult may be unable to change the situation because of lack of resources. In the case of alleged financial abuse, the older adult may genuinely want to give money to adult children or alternatively may not recognize subtle manipulation. These issues are very complex and difficult for outsiders to assess accurately. As explained by one expert on financial exploitation:

FE [financial exploitation] has been defined as the illegal or improper use of a vulnerable older adult’s funds or property for another person’s profit or advantages. ... Differentiating FE from legitimate transactions is challenging in that there may be indications of consent by the older adult, for example, a signed document or a gift when in fact the perpetrator has used

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<sup>41</sup> C Spencer, *Diminishing Returns: An Examination of Financial Abuse of Older Adults in BC* (Simon Fraser Centre on Gerontology Research, 1996) 14.

<sup>42</sup> J Nedelsky, ‘The Multidimensional Self and the Capacity for Creative Interaction’ in *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2011).



psychological manipulation or misrepresentation. .... Differentiating FE from legitimate gift giving is especially difficult when an older adult is not a reliable reporter because of cognitive impairment, coercion or concern about what will happen to the suspected abuser.<sup>43</sup>

Relational autonomy provides a potential paradigm for understanding how relationships and social structures support or undermine the older adult's autonomy in situations of elder abuse. However, there is no simple answer about how to incorporate this understanding into practice settings or how relational autonomy can guide the development of new approaches to elder abuse response.

### *B Rationale for Empirical Study of These Issues*

There is a paucity of relevant empirical research on elder abuse and the law. In the absence of empirical research, it is difficult to know how older adults understand relationality in the context of elder abuse. Research is also needed to guide the development of new approaches that tailor intervention towards the issues older adults identify. The goal should be to enhance older adult autonomy not undermine it.

An extensive review of articles on elder abuse and the law revealed only four Canadian empirical studies in the past twenty-five years. Two of these were qualitative studies using survey method. Both of these are more than twenty years old. The 1992 study compared adult protection laws in two Canadian jurisdictions and found that responders interpreted identical laws differently depending on professional background.<sup>44</sup> The 1996 study was carried out in BC and examined how older adults understand and experience financial abuse. In that study, Spencer provided older adults with scenarios that described incidents of financial exploitation that fit the

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<sup>43</sup>KJ Conrad et al, 'Self- Report Measure of Financial Exploitation of Older Adults' (2005) 50 *Gerontologist* 758, 759.

<sup>44</sup> D Poirier, 'The Power of Social Workers in the Creation and Application of Elder Protection Statutory Norms in New Brunswick and Nova Scotia' (1992) 4 *Journal of Elder Abuse and Neglect* 113. For an example of an American study with similar findings see B Payne and B Berg, 'Perceptions About the Criminalization of Elder Abuse Between Police Chiefs and Ombudsmen' (2003) 49 *Crime and Delinquency* 439.

criteria for breaches of the criminal or civil law and asked participants if they had experienced similar events. She found that one in twelve study participants had experienced financial exploitation in amounts of over \$20,000.<sup>45</sup>

The other two empirical studies used case review method. Grant and Benedet reviewed sexual assault court cases and contrasted depictions of older women who were sexual assault victims in the literature and in court cases.<sup>46</sup> Ha and Code reviewed police files at the Ottawa police elder abuse unit, examining 531 cases, and identifying trends and characteristics.<sup>47</sup> It is worth noting that the study by Grant and Benedet was the only one that applied relational autonomy theory to study results.

### *C The Current Study*

An empirical study is underway in BC that addresses this gap in research.<sup>48</sup> This study is still in progress and, therefore, it is too soon to report on the results. However, because the emerging themes are relevant to the issues discussed in this article I briefly explain the preliminary findings to illustrate issues that arise in practice settings.

#### *1. Background to the Study*

The study examines how professionals with a statutory mandate to respond to abuse under the AGA (“responders”), interpret and apply the law. It is a qualitative study comprised of one focus group and a minimum of twenty interviews with responders. In accordance with grounded theory methodology data is being coded as it is collected so that later interviews can be

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<sup>45</sup> Spencer (n 41).

<sup>46</sup> Isabel Grant and Janine Benedet, ‘The Sexual Assault of Older Women: Criminal Justice Responses in Canada’ (2016) 62 *McGill Law Journal* 41.

<sup>47</sup> Ha and Code, (n 22).

<sup>48</sup> The author of this article is conducting this study for her PhD dissertation at the Peter A. Allard School of Law. The study is entitled ‘Protecting Vulnerable Persons: A Grounded Theory Socio-Legal Examination of Elder Abuse Laws and Response in BC’.

used to clarify themes that emerge in earlier interviews.<sup>49</sup> This study began with a focus group that had eight participants who are responders with extensive experience in the elder abuse field. Thirteen of twenty subsequent interviews have also been completed.

S. 44(c) of the *AGA* authorizes the designated agency to intervene in situations of abuse when adults are unable to seek help and assistance because of cognitive impairment or conditions that affect the ability to make decisions about the abuse or neglect. Part 3 of the *AGA* gives authority to investigate, to provide support and assistance, and for other interventions. However, responders must act in accordance with the guiding principles in s. 2. That section states that capable adults are entitled to refuse assistance and that the method of intervention must be the “least intrusive and restrictive”.

When carrying out their work, responders must be mindful of the adult’s right to autonomy (as set out in s. 2) while at the same time offering support and assistance to older adults who meet the mandate in s. 44. When an adult refuses support and assistance more intrusive interventions may be indicated.

## *2 Emerging Themes*

Participant responses from the focus group were categorized into four different themes: 1) *Connecting Law to Practice*, 2) *Balancing Safety and Autonomy*, 3) *Social Context*, and 4) *Navigating the Justice System*. The second and third of these emerging themes relate to autonomy and vulnerability and are preliminary findings related to these themes are discussed in this section of the article.

### *(a) Balancing Safety and Autonomy*

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<sup>49</sup> See J Cresswell, *Qualitative Inquiry and Research Design: Choosing Between Five Approaches* (Thousand Oaks, Calif.: Sage Publications, 2013).

Participants discussed safety and autonomy. They explained that the *AGA* creates a balance between safety and autonomy and makes room for less restrictive protective measures, especially in contrast to other legislation such as the *Mental Health Act*.<sup>50</sup> However, they acknowledged that responder understandings of autonomy and protection vary. In the words of one participant:

[E]ach concept on its own is really influenced by your own values, your professional, your personal values and also the culture of your practice setting, as well as the organization. So ... within the context, there is a lot of variation. And it's sometimes hard to find the right answer, a straightforward answer when there's so many variables.

In the absence of clear guidelines, some responders are “very intrusive and protective, and other people ... [are] about respecting autonomy”.

Participants stated that the *AGA Part 3* is difficult to interpret in complex or crisis situations. In times of crisis it is not possible to slow down and check processes and procedures against the principles and presumptions of the legislation. “In those extreme cases, when push comes to shove, and you have to take some more protective measures, because we're talking about our emergency or potential court scenarios, I think that's where the legislation falls short”.

Another participant explained that, given the complexity of the cases and the extreme risk of harm, “it's quite easy as human error to start looking at only the risk and then thinking that intervention has to move from supporting to protection because of those risks.” Another expressed the following concerns about legal rights issues:

I feel a little bit concerned for these older people who also are not automatically getting representation when they're starting to be having these interventions happen to them. So especially the ones that are sort of borderline with capacity or not. And sometimes in the hospital we go to capacity quite quickly, and that's ... that can be ... it's hard to watch.

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<sup>50</sup> S. 22 provides for persons to be involuntarily committed to a designated health facility if the admission criteria set out in this legislation are met and a physician completes a medical certificate confirming a mental disorder. *Mental Health Act*, RSBC 1996, c 288.

Despite the challenges responders face when implementing the legislation, study participants agreed with the intent of the legislation. For example, one participant described the legislation as fostering a move from paternalism towards a more maternalistic approach. Participants also appreciated the guiding principles in s. 2 and pointed out that these can be used to provide guidance in grey or ambiguous situations, and “help drive the direction of intervention”.

*(b) Social Context*

Participants observed that social context provides an important backdrop to how they interpret and apply the law as well as how they respond to a report or disclosure of abuse. They identified a number of strategies and approaches that they have utilized to provide support with the goal of reducing the risk of harm. This includes employing older adults’ existing social networks in new ways.

They also described considering social context when assessing whether allegations of abuse had any validity. Several study participants described considering the history of the family and the relationship between the older adult and the alleged abuser when ascertaining whether abuse is actually occurring. If, for example, an elder has given money to a drug addicted son for many years it is more likely that giving money now reflects the older adult’s wishes rather than providing evidence of financial exploitation.

One contextual issue identified by participants is lack of resources. Some adults are at risk of harm unless supports are put in place. Unfortunately, there are very few free resources and some older adults cannot afford to pay for support. In that situation responders may be forced to proceed to more intrusive means of protection than would have been required if supports had been available. One participant explained that, “I think it’s not just a housing

resource issue. ... I think it's also kind of psychosocial support and personal care support. ... [W]e have to go to a higher level of intervention because the supports aren't available. And that doesn't sit well with me.”

Participants described dealing with myriad factors in these cases with each factor introducing different considerations. Consequentially, responders take different approaches, when offering support or escalating to more intrusive interventions, depending on the context of the case. One participant commented that the culture and expectations of the responder's work environment also influences decisions made about elder abuse response.

### *3 Discussion*

In sum, when responders receive a report of elder abuse and proceed to an informal assessment of whether an older adult fits the mandate of the *AGA*, and the type of support and assistance needed, they take social context into account. This includes the older adult's support network, social structures and existing resources. Social context influences whether responders deem an adult to be in need of intervention. Participants also explained that responders' personal beliefs about abuse, family relationships, autonomy and safety influence decisions about how to proceed and how to balance policy objectives of autonomy and protection. One challenge responders face when implementing Part 3 of the *AGA* in practice settings is that, in some situations, it is not clear how to interpret or apply the legislation. Responders find the guiding principles to be helpful but in crisis situations, or where social supports are unavailable, responders may proceed to more intrusive means of protection than they would if supports were available or if there was more time to consider how to proceed.

The fact that participants identified the importance of supports and social context when intervening is very interesting. This contextual approach enables them to develop targeted

strategies to change situations that create vulnerability. Participants explained that positive social support can reduce vulnerability. It is possible that future research will show that there is a secondary benefit to this strategy, namely that changing the older adult's social context may also relieve restrictions that prevent the older adult from exercising autonomy. This is worth exploring in future interviews.

It also is interesting that participants reported considering social context when interpreting older adult decisions in situations of alleged abuse. For example, participants reported weighing whether an older adult's decision to give money to a family member indicates financial exploitation or reflects a family dynamic that has existed for a long time. By assessing the older adult's decision-making within the social context responders can avoid misinterpreting the older adult's behavior as an indication that the adult is unable to exercise autonomy and is acquiescing to exploitation.

Study participants described a connection between targeted supports for victims of elder abuse and reducing the risk of harm. This approach – focusing interventions on the situation rather than placing restrictions on the vulnerable individual – concurs with what has been discussed and recommended by some scholars.<sup>51</sup>

Participants identified that resources may be necessary to lessen situational vulnerability and that the older adults may lack the resources to obtain these supports on their own. In that circumstance, unless free resources are available, the responder may be forced to proceed to more intrusive protections. Social change is needed to address this problem. This situation represents social values that undervalue seniors and reflect discriminatory beliefs about aging that prevent acknowledgement of the needs of this population. It is interesting to consider this in

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<sup>51</sup> Kohn 'Vulnerability Theory' (n 31); see Lindsay (n 27).

the context of comments by authors such as Nedelsky and McLeod and Sherwin who observed that social structures can impair the ability to act autonomously.<sup>52</sup> When that occurs social change is needed to address oppressive social structures and to enable the exercise of autonomy.<sup>53</sup> This includes changing social structures that withhold support and institutions that hold discriminatory beliefs that blind policy makers to these social dynamics.

Conceptions of autonomy and vulnerability within the context of BC's AGA illustrate the importance of relational perspectives and speak to the need to change the social environment to lessen vulnerability and to increase capacity to exercise autonomy. Future research may provide additional valuable information about older adult autonomy and vulnerability, including how to develop more effective targeted interventions and how to build capacity for expressing autonomy.

## V CONCLUSION

In this article I argued that relational autonomy provides a good foundation for understanding older adult decision-making in situations of elder abuse. Relational autonomy has been receiving increased attention in the literature. However, much of the discussion has been theoretical rather than an exploration of how relational autonomy can be incorporated in the situated lives of individuals.<sup>54</sup> The purpose of this article was to begin to address that gap.

In this article I highlighted Kohn's argument that Fineman's theory of universal vulnerability needs to be refined to enable the development of targeted interventions for situations where older adults are at risk of harm.<sup>55</sup> I concur with Kohn's argument and offer suggestions, such as interventions that target situations that create pathogenic vulnerability. It is

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<sup>52</sup> Nedelsky, above note 42; McLeod and Sherwin (n 21).

<sup>53</sup> McLeod and Sherwin (n 21).

<sup>54</sup> Harding (n 1) 433.

<sup>55</sup> Kohn 'Vulnerability Theory' (n 31).



important to recognize that the existence of universal vulnerability does not preclude the existence of situational vulnerability. As Lindsay argues, pathogenic vulnerability can exacerbate vulnerabilities that already exist and make it difficult for the victim to exercise autonomy.<sup>56</sup> Therefore, a response that is specifically targeted to ameliorating the situational vulnerability would be strategic.

In this article, I also explained how relational theories of autonomy are better suited to explaining older adult behavior in situations of abuse than traditional theories of autonomy and argued that empirical research is needed to determine how to incorporate relational understandings into practice situations. Research is also needed to inform the development of new approaches that tailor interventions to points of vulnerability with more specificity.

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<sup>56</sup>Lindsay (n 27).