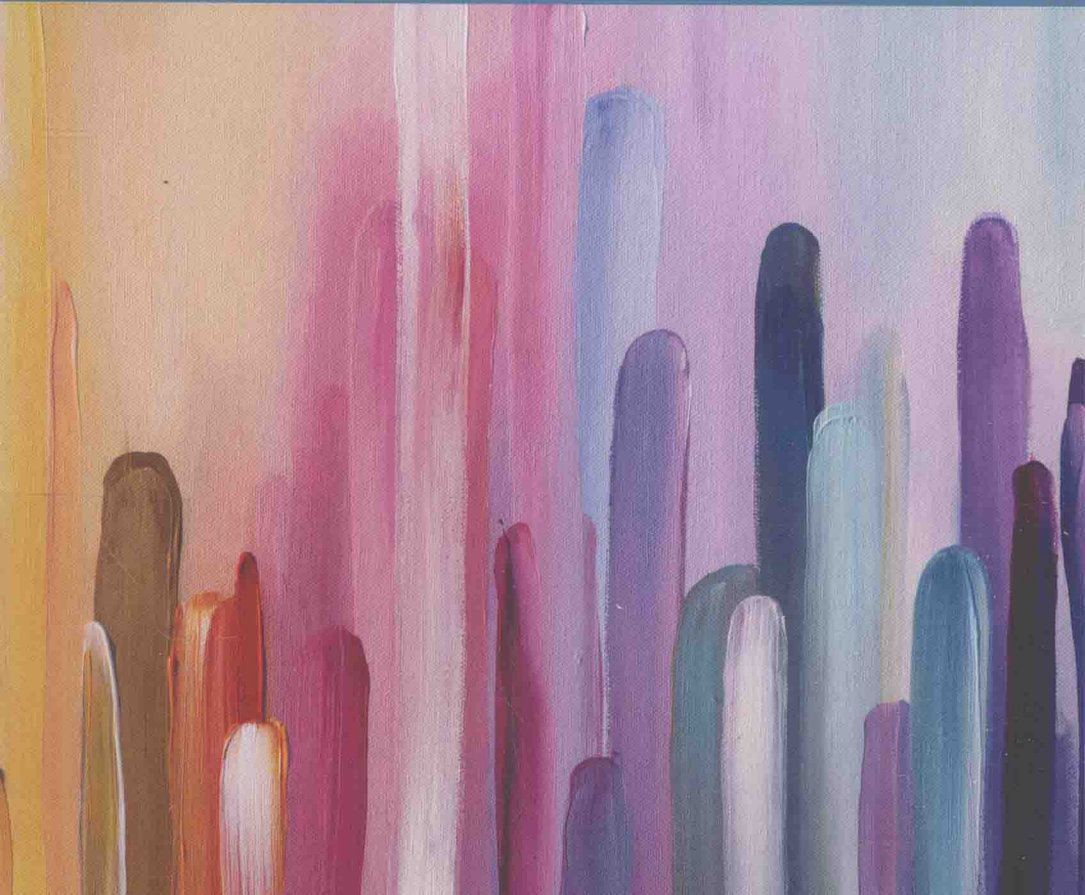


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VULNERABLE ADULTS AND THE LAW

JONATHAN HERRING



Vulnerable Adults and the Law

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VULNERABLE ADULTS AND THE LAW

To Kirsten

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Introducing Vulnerability

Let us rejoice in our vulnerability. That is, in short, the message of this book. It is a startling statement because vulnerability comes with so many negative connotations in our society. Vulnerability, we are told, is something to be avoided. We are encouraged to be independent, self-sufficient, autonomous, and free from reliance on others. The ideal that politicians urge us to aspire to is a person not dependent on state benefits, a burden to others, but to be self-reliant.¹ We are to save now so that we can fund our old age and do not become a drain on our children or the rest of our society. The response to changing demographics from the Government is to urge older people to be independent and exercise choice.²

The law, unsurprisingly, reflects these attitudes. The law is built around the ideal of legal personhood: a man who is autonomous, self-sufficient, in control, capacitous, and independent. For such a man the law gives the legal tools he needs to maintain his status: the rights of autonomy, privacy, liberty, and freedom from state interference. For him, legal rights are designed to keep him free from intrusion. Rights are designed to keep people apart, to give people their space.

This book will claim that this is all a dangerous fiction. In our nature we are deeply vulnerable. We are profoundly dependent on others and social provision to meet our bodily, emotional, and cultural needs. Our relationships are essential to our well-being; our sense of self; and our understanding of the world around us. We need a legal system that acknowledges our responsibilities to those we are in relationships with and others in our society, one which encourages and promotes caring relationships. A legal system that is designed around relational people, dependent on others to meet their needs and one whose key values are not autonomy, freedom, and privacy but mutuality, interdependence, and relational responsibilities.

¹ David Cameron, *Speech on Welfare Reform* (25 June, 2012).

² Department of Health, *Independence, Wellbeing and Choice* (Department of Health, 2005).

This book is designed to explore how the current law responds to the notion of vulnerability. It should not be read as an authoritative guide on everything the law has to say about vulnerable adults, but rather as an exploration of how the law uses vulnerability in a range of contexts and what a law which took the approach advocated above might look like.

In Chapter 2 I explore the concept of vulnerability and the difficulties in defining it. At the heart of the disputes is a disagreement between those who claim that vulnerability is universal and is an inevitable part of the human experience; and those who argue that it is more profitable to recognize that there are particular individuals or groups of individuals who suffer particular vulnerabilities. This book takes a middle path between these two options. It agrees that vulnerability is a universal condition. This is significant because it has profound effects on how we understand ourselves and what the values that underpin our legal system should be. It also agrees that there are particular groups of individuals who are rendered especially vulnerable by the lack of provision of social support and services. I put the argument that way to indicate the especial vulnerability that should be seen to result from social provision, rather than factors inherent in the individual. That indicates that the cause of, and therefore the response to, the vulnerability needs to be focused on the social support. This chapter also highlights the dangers that are associated with vulnerability. At the moment in political and legal discourse it is used as a concept to identify groups who can be a source of paternalistic interventions. Ironically this can operate to increase the vulnerability of these groups, by promoting individualistic interventions which promote values such as independence. It also fails to protect those who are vulnerable but do not fall within one of the recognized categories.

Chapter 3 examines the law's understanding of capacity. This is a central plank in the law's response to vulnerable adults. It draws a sharp distinction between those who have capacity and whose decisions require complete respect; and those who lack capacity and for whom decisions can be made by others based on an assessment of what is in their best interests. This chapter seeks to problematize that distinction. While capacity claims to be used to protect autonomy, I suggest six ways in which a person might have capacity under the current law, but, in fact, lacks autonomy. The chapter claims autonomy should be understood as scalar. It is not an all-or-nothing concept; rather we possess autonomy to a greater or lesser extent. The requirements for a richly autonomous decision are strict and few of us are able to reach them. The chapter advocates a more nuanced approach that enables the court to weigh up the harm that might result from a decision and the extent to which the decision is richly autonomous.