



The Gateway Function of Vulnerability in Public Law and Human Rights

Published in Public Law (2024), pp. 227–234

Luke D. Graham

The University of Manchester Legal Research Paper Series No. 24/05
[March 2024]

The full text of this paper can be downloaded without charge from the Social Science Research Network electronic library at: <
<http://ssrn.com>>

An index to the working papers within the University of Manchester Legal Research Paper Series is found at: <
<https://www.ssrn.com/index.cfm/en/u-manchester-leg/>>

Electronic copy available at: <https://ssrn.com/abstract=4772200>

The gatekeeping function of vulnerability in public law and human rights

Luke D. Graham*

The published version of this article is available at 'The gatekeeping function of vulnerability in public law and human rights' Public Law (2024) Apr, pp. 227-234 and can be accessed at

<https://uk.westlaw.com/Document/I39B1CD80E58C11EE89D3CD55953C2066/View/FullText.html>

*Lecturer in Public Law and Human Rights, University of Manchester, U.K.
luke.graham@manchester.ac.uk ORCID: <https://orcid.org/0000-0003-0678-2106>

Abstract: Explorations of the relationship between vulnerability and public law and human rights have largely focused on how individuals are empowered or disempowered through being recognised as vulnerable in law. However, when vulnerability has been used as the basis for some legal entitlements, the disconnect between “vulnerability in law” and “vulnerability in practice” means that some vulnerable people cannot use the legal entitlements that are formally available. This contribution examines the implications of the use of vulnerability as the basis of legal entitlements in the sphere of public law and human rights for people who are not recognised as vulnerable in law. In doing so, this contribution proposes a tri-partite taxonomy which captures the interaction between public law and vulnerability: it disempowers those deemed vulnerable in law; it empowers those deemed vulnerable in law; and it serves a gatekeeping function excluding those who are vulnerable in practice but who are not deemed vulnerable in law. This categorises how vulnerability can influence rights and duties and requires careful reflection on how vulnerability is understood and defined in public law and human rights.

Key Words: Vulnerability; Administrative law; Entitlement; Human rights; Jurisprudence; Vulnerable adults

Introduction

Explorations of the relationship between vulnerability and public law and human rights have largely focused on how individuals are empowered or disempowered through being recognised as vulnerable in law. However, when vulnerability has been used as the basis for some legal entitlements, the disconnect between “vulnerability in law” and “vulnerability in practice” means that some vulnerable people cannot use the legal entitlements that are formally available. This contribution examines the implications of the use of vulnerability as the basis of legal entitlements in the sphere of public law and human rights for people who are not recognised as vulnerable in law.

In doing so, this contribution proposes a tri-partite taxonomy which captures the interaction between public law and vulnerability: it disempowers those deemed vulnerable in law; it empowers those deemed vulnerable in law; and it serves a gatekeeping function excluding those who are vulnerable in practice but who are not deemed vulnerable in law. This categorises how vulnerability can influence rights and duties and requires careful reflection on how vulnerability is understood and defined in public law and human rights.

As to structure, the mismatch between vulnerability in law and vulnerability in practice is first explored. Attention then turns towards the disempowering and empowering impacts of recognition as vulnerable in law. This contribution then examines a lesser-explored issue: the implications of basing legal entitlements on vulnerability in law for those not legally recognised as vulnerable. Here it is argued that vulnerability in law has served a gatekeeping function to limit access to legal entitlements. Through this gatekeeping role, vulnerability in law excludes those who are vulnerable in practice from the support that is otherwise available to those deemed vulnerable in law.

A vulnerability mismatch

There has been a surge in engagement with vulnerability across disciplines.¹ Nonetheless, vulnerability “is a vague and nebulous concept,”² which possesses a wide range of different

¹ For an overview of academic engagement with vulnerability across disciplines see K. Brown *Vulnerability and Young People: Care and Social Control in Policy and Practice* (Bristol: Bristol University Press 2015), pp.27-46. See also: Vanessa E. Munro and Jane Scoular, “Abusing vulnerability? Contemporary law and policy responses to sex work in the UK” (2012) 20 *Feminist Legal Studies* 189; Elina Virokannas, Suvi Liuski and Marjo Kuronen, “The Contested Concept of Vulnerability—a Literature Review” (2020) 23 *European Journal of Social Work* 327, 335; Mary Assumpta Nalwoga Kiwanuka, “Institutional Vulnerabilities, COVID-19, Resilience Mechanisms and Societal Relationships in Developing Countries” (2021) 21 *International Journal of Discrimination and the Law* 288, 292.

² Kate Brown, “‘Vulnerability’: Handle with Care” (2011) 5 *Ethics and Social Welfare* 313, 314.

meanings.³ This is true within disciplines and the discipline of law is no exception. In law, vulnerability lacks concrete legal meaning and is used “without clear legal consequences”.⁴ Even when the concept of vulnerability is used in legislation, its meaning is “not statutorily defined”.⁵ This results in inconsistency in the interaction between law and vulnerability. This lack of definitional clarity further contributes to the inevitable disconnect between “vulnerability in law” and “vulnerability in practice” labelled by Rodgers as a “vulnerability mismatch”.⁶

Whilst the following sections examine vulnerability in law, at the outset, vulnerability in practice is first defined. In this contribution, Fineman’s “concept of vulnerability and the idea of a vulnerable subject”—which defines the discipline of vulnerability and law—is understood to mean vulnerability in practice.⁷ According to Fineman’s theory of human vulnerability, the state is “the legitimate governing entity” tasked “with a responsibility to establish and monitor social institutions and relationships that facilitate the acquisition of individual and social resilience”.⁸ Fineman’s vulnerability theory asserts that vulnerability is “universal and constant, inherent in the human condition”.⁹ This innateness means that no human being is invulnerable.¹⁰ Indeed, “Fineman resists absolutely the categorization of individuals or groups as “more vulnerable” or “differently vulnerable” by comparison with others”.¹¹ It is inaccurate to attribute vulnerability to “only some individuals or groups, who are referred to as ‘vulnerable populations’”.¹²

³ Munro and Scoular, “Abusing vulnerability? Contemporary law and policy responses to sex work in the UK” 189; Jeffrey Alwang, Paul B. Siegel and Steen L. Jørgensen, “Vulnerability: A View From Different Disciplines” [2001] *The World Bank: Social Protection Discussion Paper Series*, 2; C. Barry Hoffmaster, “What Does Vulnerability Mean?” (2006) 36 *Hastings Center Report* 38; Iniobong Enang and others, “Defining and Assessing Vulnerability within Law Enforcement and Public Health Organisations: A Scoping Review” (2019) 7 *Health & Justice* 1, 2.

⁴ C. Heri, *Responsive Human Rights: Vulnerability, Ill-Treatment and the ECtHR* (Oxford: Hart Publishing 2021), p.22.

⁵ Z. Nabi, “Vulnerability in Homelessness Cases—the Battle Continues” (*Legal Action*, 2019) <https://www.lag.org.uk/article/207280/vulnerability-in-homelessness-cases--ndash--the-battle-continues>

⁶ Lisa Rodgers, “Reimagining State Responsibility for Workers Following COVID-19: A Vulnerability Approach” (2021) 21 *International Journal of Discrimination and the Law* 191, 194.

⁷ Martha Fineman, “The Vulnerable Subject and the Responsive State” (2010) 60 *Emory Law Journal* 251, 255.

⁸ Martha Fineman, “Vulnerability and Inevitable Inequality” (2017) 4 *Oslo Law Review* 133, 134.

⁹ Martha Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition Essay” (2008) 20 *Yale Journal of Law and Feminism* 1, 2.

¹⁰ Fineman, “Vulnerability and Inevitable Inequality”, 142.

¹¹ Maeve O’Rourke, “The Manipulation of ‘Vulnerability’ State Responses to So-Called ‘Historical’ Abuses in Ireland” (2021) 43 *Human Rights Quarterly* 435, 436.

¹² Martha Fineman, “Introducing Vulnerability” in *Vulnerability and the Legal Organization of Work* (Abingdon: Routledge, 2017) 142.

Vulnerability in law: A tool of (dis)empowerment

Despite this inaccuracy, vulnerability in law is often understood restrictively.¹³ This approach results in only some individuals and groups being recognised as vulnerable in law. This is the key point of divergence between vulnerability in law and vulnerability in practice. Recognition as vulnerable in law may have a range of disempowering and empowering implications for individuals.¹⁴ Recognition as vulnerable in law may justify state interference and control, consequently disempowering individuals.¹⁵ The very label of vulnerable can “act to exclude and stigmatise” people, which, in turn, becomes the basis of broadening state power and greater interference with liberties and rights.¹⁶ Here, vulnerability legitimises state encroachment “as a mechanism of widening social control”.¹⁷ This has occurred in the criminal law context where vulnerability has been used to “facilitate, and justify” legal reform relating to prostitution.¹⁸ In the mental capacity context, the High Court may invoke its inherent jurisdiction to make “a decision on behalf of an adult judged to lack the mental capacity to make that decision autonomously”¹⁹ for “men and women defined as ‘vulnerable’”.²⁰ Not only has vulnerability been used to justify interfering with people’s lives but, vulnerability has also been used by states to elide human rights obligations by portraying groups as “uniquely vulnerable”.²¹ These examples illustrate the risks to good administration which stem from grounding legal entitlements and obligations on ill-defined vulnerability in law.

¹³ See, for example, Alexander H.E. Morawa, “Vulnerability as a Concept of International Human Rights Law” (2003) 6 *Journal of International Relations & Development* 139, 139; A. Marcos, “Vulnerability as a Part of Human Nature” in *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives* (Cham: Springer International Publishing, 2016), p.38, pp.29-44; A. Masferrer, “Taking Human Dignity More Humanely” in *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives* (Cham: Springer International Publishing 2016), p.225, pp.221-256; See also Alyson Cole, “All of Us Are Vulnerable, But Some Are More Vulnerable than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique” (2016) 17 *Critical Horizons* 260.

¹⁴ See Munro and Scoular, “Abusing vulnerability? Contemporary law and policy responses to sex work in the UK”, 189.

¹⁵ Kate Brown, Kathryn Ecclestone and Nick Emmel, “The Many Faces of Vulnerability” (2017) 16 *Social Policy and Society* 497, 501.

¹⁶ Brown, “‘Vulnerability’: Handle with Care” 316; Brown *Vulnerability and Young People: Care and Social Control in Policy and Practice*, p.64.

¹⁷ Brown, “‘Vulnerability’: Handle with Care”, 316.

¹⁸ Munro and Scoular “Abusing vulnerability? Contemporary law and policy responses to sex work in the UK”, 191; See also V. E. Munro and J. Scoular, “Harm, Vulnerability, and Citizenship: Constitutional Concerns in the Criminalization of Contemporary Sex Work” in *The Constitution of Criminal Law* (Oxford: OUP 2013), pp.30–52.

¹⁹ Michael C. Dunn, Isabel C.H. Clare and Anthony J. Holland, “To Empower or to Protect? Constructing the ‘Vulnerable Adult’ in English Law and Public Policy” (2008) 28 *Legal Studies* 234, 235.

²⁰ Dunn, Clare and Holland “To Empower or to Protect? Constructing the ‘Vulnerable Adult’ in English Law and Public Policy”, 236; See also Jonathan Lewis, “Safeguarding Vulnerable Autonomy? Situational Vulnerability, the Inherent Jurisdiction, and Insights from Feminist Philosophy” (2021) 29 *Medical Law Review* 306.

²¹ See O’Rourke, “The Manipulation of ‘Vulnerability’: State Responses to So-Called ‘Historical’ Abuses in Ireland” 435

At the same time as vulnerability has served to disempower, the notion that “‘vulnerable’ people deserve and require special assistance” has gained prominence.²² This special assistance stems from basing legal entitlement on vulnerability in law to justify “the right to receive certain benefits or to gain access to services or treatment”.²³ Vulnerability therefore empowers rights-based claims. As Xenos has observed, “the state’s assistance in circumstances of personal vulnerability is not claimed as a charity but as a right to which the individual is entitled by law”.²⁴ Here, vulnerability is the basis of legal entitlements for vulnerable people.²⁵ However, the lack of definitional clarity of vulnerability in law places an onus on decision-makers and affords discretion to determine whether individuals are vulnerable in law.²⁶ Here, there is potential that such classifications may “be especially prone to being shaped by personal preferences, values, commitments and the individual preoccupations of those who administer them”.²⁷ Thus, this may gatekeep individuals who should be regarded as vulnerable in law but who do not conform to expectations of vulnerability.²⁸

The gatekeeping function of vulnerability in law

Vulnerability also serves a broader gatekeeping function. By necessary implication, grounding eligibility to legal entitlements on recognition as vulnerable in law precludes access to those entitlements for those not recognised as vulnerable in law. Because vulnerability in law is understood restrictively, here vulnerability excludes those not recognised as vulnerable in law and through this exclusion serves a gatekeeping function to limit access to legal entitlements.²⁹

²² Brown *Vulnerability and Young People: Care and Social Control in Policy and Practice*, p.47; See also Kate Brown, “Re-Moralising ‘Vulnerability’” (2012) 6 *People Place and Policy Online* 41.

²³ Virokannas, Liuski and Kuronen “The Contested Concept of Vulnerability—a Literature Review”, 328 (emphasis added).

²⁴ Dimitris Xenos, “The Human Rights of the Vulnerable” (2009) 13 *The International Journal of Human Rights* 591, 592.

²⁵ For an overview of such entitlements see Brown *Vulnerability and Young People: Care and Social Control in Policy and Practice*, p.10; Brown, Ecclestone and Emmel, “The Many Faces of Vulnerability” 497.

²⁶ Helen Carr and Caroline Hunter, “Managing Vulnerability: Homelessness Law and the Interplay of the Social, the Political and the Technical” (2008) 30 *Journal of Social Welfare and Family Law* 293, 301.

²⁷ Brown, *Vulnerability and Young People: Care and Social Control in Policy and Practice*, p.64.

²⁸ Aoife O’Higgins, “Vulnerability and Agency: Beyond an Irreconcilable Dichotomy for Social Service Providers Working with Young Refugees in the UK” (2012) *New Directions for Child and Adolescent Development* 79, 80; See also L.R. Brown, *Full Planet, Empty Plates* (New York: WW Norton & Company Ltd, 2012), pp.315–316.

²⁹ Carr and Hunter have previously alluded to the “gatekeeping function” of vulnerability. See Carr and Hunter, “Managing Vulnerability: Homelessness Law and the Interplay of the Social, the Political and the Technical”, 304.

In human rights discourse “the term vulnerability is used to indicate a heightened susceptibility of certain individuals or groups to being harmed or wronged by others or by the state”.³⁰ For instance, it has been argued that whilst vulnerability “permeates” the case-law of the European Court of Human Rights (ECtHR),³¹ the court has emphasised an understanding of vulnerability “shaped by specific group-based experiences of prejudice, stigma, and social disadvantage”.³² Contrary to the universal vulnerable subject, “the Court’s vulnerable subject is a particular group member”.³³ Therefore vulnerability rests in part on an individual’s relationship to group membership. Heri has identified a typology of vulnerability understood by the ECtHR.³⁴ This typology may be understood as vulnerability in law in the context of the ECtHR and it is membership of these groups which may allow individuals to benefit from the empowering potential of vulnerability. Individuals who do not satisfy these requirements of particular group membership are unable to rely on the legal entitlements available to members of such particular groups even when both are in otherwise similar positions.³⁵

One Strasbourg judge has been reported as stating that “all applicants are vulnerable, but some are more vulnerable than others”.³⁶ This provides context to the ECtHR’s approach. Here, the ECtHR has neatly merged the universal understanding of vulnerability with group-based approaches. This may be justified because “we are not all vulnerable in the same ways or to the same degree, and some may be consistently more vulnerable than others”.³⁷ This

³⁰ R. Andorno, “Is Vulnerability the Foundation of Human Rights?” *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives* (Cham: Springer International Publishing, 2016), p.258, pp.257–272.

³¹ Heri, *Responsive Human Rights: Vulnerability, Ill-Treatment and the ECtHR*, p.124.

³² Lourdes Peroni and Alexandra Timmer, “Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law” (2013) 11 *International Journal of Constitutional Law* 1056, 1075.

³³ Peroni and Timmer, “Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law”, 1064.

³⁴ Heri, *Responsive Human Rights: Vulnerability, Ill-Treatment and the ECtHR*, p.38. This typology has eight strands; “dependency-based vulnerability, which concerns minors, the elderly, and those with psychosocial and cognitive disabilities (i.e. mental illness and intellectual disability); vulnerability due to state control, including that of detainees, military conscripts, and persons in state institutions; vulnerability due to victimisation, including by domestic and sexual abuse, other violations of Article 3, or because of a feeling of vulnerability; vulnerability in the migration context; vulnerability due to discrimination and marginalisation, which covers ethnic and religious minorities, LGBTQI people, and those living with HIV/AIDS; vulnerability due to pregnancy or situations of precarious reproductive health; vulnerability due to the espousal of unpopular views; and intersecting vulnerabilities”.

³⁵ For discussion of this point see Dimitrios Kagiros, “Vulnerability as a Path to a ‘Social Minimum’? An Analysis of ECtHR Jurisprudence” in *Specifying and Securing A Social Minimum in the Battle Against Poverty* (Place: Bloomsbury 2019), pp. 255-256.

³⁶ Peroni and Timmer, “Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law”, 1060–1061.

³⁷ Munro and Scoular “Abusing vulnerability? Contemporary law and policy responses to sex work in the UK” pp.196.

evokes a “‘vulnerability paradox’: that is, the need to recognize and ensure equitable state responses to people’s different positions”.³⁸ As can be seen in practice, however, such approaches restrict who is recognised as vulnerable in law which in turn restricts access to legal entitlements and/or rights-based remedies. This inconsistency has resulted, as illustrated in the case-law of ECtHR, in an inconsistent approach to vulnerability which has created uncertainty and “confusion about what vulnerability means and who will be considered vulnerable in any given case, and thus affects the predictability and credibility of the Strasbourg case law”.³⁹ This means that, despite being the “anathema” of vulnerability theory, vulnerability has been used to prioritise resources towards those recognised as vulnerable in law.⁴⁰ This prioritisation has operated to justify overall reductions in, and to ration, legal entitlements.⁴¹ This rationing focuses “resources selectively” to those recognised as vulnerable in law and in doing so fails “to tackle overarching structures and systems of marginalisation” which continue to fail to address vulnerability in practice.⁴² In this way, vulnerability is used to exclude those not recognised as vulnerable in law and to focus assistance towards narrow sub-sets of vulnerable populations.⁴³

Vulnerability has operated this prioritising function most prominently with respect to the interaction between Article 3 ECHR and material deprivation. Here, the ECtHR has lowered “the threshold for a finding of ill-treatment under Article 3” for those it recognises as vulnerable in law and in doing so imposed “an exceptional demand upon the state to provide socioeconomic assistance arising from the prohibition of inhuman treatment.”⁴⁴ In this way, vulnerability in law has been “used to create a special nexus between an individual and the state to limit the category of persons who can succeed in an Article 3 claim with respect to socio-economic harms and destitution”.⁴⁵ In *MSS v Belgium*, the Court attached “considerable importance to the applicant’s status as an asylum-seeker and, as such, a member of a

³⁸ O’Rourke, “The Manipulation of “Vulnerability:” State Responses to So-Called “Historical” Abuses in Ireland”, 436.

³⁹ Heri, *Responsive Human Rights: Vulnerability, Ill-Treatment and the ECtHR*, p.105.

⁴⁰ Nina A. Kohn, “Vulnerability Theory and the Role of Government” (2014) 26 *Yale Journal of Law and Feminism* 1, 14.

⁴¹ Brown *Vulnerability and Young People: Care and Social Control in Policy and Practice* p.173; See also Brown, “Re-Moralising ‘Vulnerability’”, 49.

⁴² Brown *Vulnerability and Young People: Care and Social Control in Policy and Practice* p.7; see also Brown, “Re-Moralising ‘Vulnerability’”, 48.

⁴³ Hande Sözer, “Humanitarianism with a Neo-Liberal Face: Vulnerability Intervention as Vulnerability Redistribution” (2020) 46 *Journal of Ethnic and Migration Studies* 2163, 2170.

⁴⁴ Katie Morris, “Vulnerability, Care Ethics and the Protection of Socioeconomic Rights via Article 3 ECHR” (2023) 23 *Human Rights Law Review* 1, 1-3.

⁴⁵ Luke D. Graham, “Book Review: Responsive Human Rights: Vulnerability, Ill-Treatment and the ECtHR, Corina Heri (Hart Publishing 2021)” (2022) *Law & Just-Christian L Rev* 60.

particularly underprivileged and vulnerable population group in need of special protection”.⁴⁶ As Heri has argued, the ECtHR used “vulnerability selectively and as a vehicle for exceptional findings”.⁴⁷

It is through the use of vulnerability in law that the ECtHR “permits unequal treatment of claimants experiencing the same levels of deprivation”.⁴⁸ This is despite the fact that it is well-accepted that the poor are more vulnerable.⁴⁹ This is because “poverty, extreme and protracted socio-economic deprivation or destitution” are structural vulnerabilities.⁵⁰ Vulnerabilities can also contribute to poverty. Indeed, not addressing existing vulnerabilities compounds them thereby affecting “all human rights, inducing wider and deeper poverty”.⁵¹ Yet, poverty has not been recognised as a vulnerability in law. Consequently, in the context of poverty, vulnerability-based approaches have in reality led to a two-tiered system whereby individuals experiencing poverty may or may not have legal means to address poverty depending on whether or not they have the pre-requisite group membership to be determined vulnerable in law. Whilst Heri is right to suggest that “taken all together, the many grounds for vulnerability recognised by the Court thus far create a patchwork that covers significant parts of every human individual’s life span”⁵² it must be recognised that these grounds serve a gatekeeping function. More so, the grounds identified by the courts can only be argued to cover “significant parts of every human individual’s life span” because we are all during our life course minors and one day—hopefully—elderly. The reality is that the majority of the years of an average life will not be covered by these grounds of vulnerability.

It so follows that some groups are disproportionately excluded from accessing legal entitlements grounded on vulnerability in law. Notably, s.189 of the Housing Act 1996 established a duty for local authorities to provide emergency accommodation to those with

⁴⁶ *MSS v Belgium and Greece* [2011] Grand Chamber of the European Court of Human Rights Application no. 30696/09 at [251].

⁴⁷ Heri, *Responsive Human Rights: Vulnerability, Ill-Treatment and the ECtHR*, p.144.

⁴⁸ Morris, “Vulnerability, Care Ethics and the Protection of Socioeconomic Rights via Article 3 ECHR”, 4.

⁴⁹ Alwang, Siegel and Jørgensen “Vulnerability: A View From Different Disciplines”, 27.

⁵⁰ Patricia Hynes, “Global Points of ‘Vulnerability’: Understanding Processes of the Trafficking of Children and Young People into, within and out of the UK” (2010) 14 *The International Journal of Human Rights* 952, 960; See also Jonathan Morduch, “Poverty and Vulnerability” (1994) 84 *The American Economic Review* 221; Ethan Ligon and Laura Schechter, “Measuring Vulnerability” (2003) 113 *The Economic Journal* C95, C95.

⁵¹ Amanda Cahill-Ripley and Luke D. Graham, “Using Community-Based Truth Commissions to Address Poverty and Related Economic, Social and Cultural Rights Violations: The UK Poverty Truth Commissions as Transformative Justice” (2022) *Journal of Human Rights Practice* 225, 229.

⁵² Heri, *Responsive Human Rights: Vulnerability, Ill-Treatment and the ECtHR*, p.143.

priority need. A person recognised as vulnerable in law in this context is owed this duty.⁵³ In all these instances vulnerability is narrowly understood so as to limit the scale of obligations and the ensuing resource implications.⁵⁴ This results in a “high bar for qualifying as ‘vulnerable’”.⁵⁵ Accordingly, despite being vulnerable in practice, homeless individuals may not have a priority need unless they are vulnerable in the more restrictive legal sense. Carr and Hunter trace the history of grounding priority need on recognition as vulnerable in law and suggest that this is designed to exclude “single homeless men” from access to this legal entitlement.⁵⁶ This is indicative of the fact that those grounding legal entitlements on vulnerability in law are cognisant of the gatekeeping function that vulnerability plays. It illustrates also how vulnerability can be deployed in exclusionary and discriminatory ways, thus necessitating a keener interrogation of the gatekeeping function of grounding legal entitlements on vulnerability in law.

Conclusion

In public law and human rights, vulnerability interacts with rights, entitlements and duties in a variety of ways. Vulnerability has been used to disempower and empower those recognised as vulnerable in law and to exclude those not recognised as vulnerable in law from legal entitlements. It has been argued here that the latter of these three uses should be understood as vulnerability serving a gatekeeping function. This gatekeeping function creates tiers of vulnerability which in turn prioritises state responsiveness towards those people recognised as vulnerable in law and excludes those who are not recognised as such. Consequently, this gatekeeping function hinders the use of vulnerability in law to “facilitate the acquisition of individual and social resilience”.⁵⁷ Yet the gatekeeping function of vulnerability pervades the

⁵³ For an overview of the development of the law relating to vulnerability in this context see Carr and Hunter, “Managing Vulnerability: Homelessness Law and the Interplay of the Social, the Political and the Technical” 297-299.

⁵⁴ See *Hotak (Appellant) v London Borough of Southwark (Respondent)* [2015] UKSC 30 and associated commentary; Jed Meers, “A Return to Purer Waters? ‘Vulnerability’ under s.189 Housing Act 1996” (2015) 37 *Journal of Social Welfare and Family Law* 473; Brown *Vulnerability and Young People: Care and Social Control in Policy and Practice*, p.50; Ian Loveland, “Changing the Meaning of ‘Vulnerable’ under the Homelessness Legislation?” (2017) 39 *Journal of Social Welfare and Family Law* 298; Ian Loveland, “Reforming the Homelessness Legislation? Exploring the Constitutional and Administrative Legitimacy of Judicial Law-Making” [2018] P.L. 299; Jed Meers and Helen Taylor, “Murky Waters: The Ongoing Evolution of Vulnerability under Section 189 of the Housing Act 1996” (2018) 21 *Journal of Housing Law* 76; Caroline Hunter and Carla Reeson, “Mental Health and Homelessness” (2022) 25 *Journal of Housing Law* 101.

⁵⁵ Kit Colliver, “Incoherent and Indefensible? A Normative Analysis of Young People’s Position in England’s Welfare and Homelessness Systems” [2023] *Journal of Social Policy* 1, 12.

⁵⁶ Carr and Hunter, “Managing Vulnerability: Homelessness Law and the Interplay of the Social, the Political and the Technical”, 298

⁵⁷ Fineman, “Vulnerability and Inevitable Inequality” 134.

relationship between vulnerability, public law and human rights. Vulnerability has been used restrictively meaning that a person experiencing vulnerability in practice is excluded from accessing legal entitlements grounded on vulnerability in law. Smith has argued that human rights law should “evolve to protect all people” including “members of vulnerable populations whose defining characteristics do not clearly or completely fit within an existing protected category”.⁵⁸ Towards this end, we must recognise and address the gatekeeping function of vulnerability which excludes individuals and groups who are vulnerable in practice. This should prompt us to think carefully about in what circumstances vulnerability is deployed as the legitimising basis of legal entitlements and to reflect on how vulnerability is defined in law.

Luke D. Graham

University of Manchester

⁵⁸ Raymond A. Smith, *Extending International Human Rights Protections to Vulnerable Populations* (Abingdon: Routledge, 2019), p.2.