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Abstract: Who does the law protect? Who needs laws protection? In the emergence of what is called by some the -risk society-, all branches of the criminal justice system have developed laws, guidelines and protocols specifically directed at the protection of the most vulnerable people or populations at risk. Some academic disciplines, legislation, policies and procedures fail to make the distinction between the concepts of vulnerability and -at risk- and both expressions are more often than not used as synonyms. However, a clear distinction should be made between the two. This paper first portrays a model which establishes a clear distinction between both concepts, making one the consequence of the other. The model helps refine the assessments of risks and resulting levels of vulnerability, therefore uncovering "new vulnerable populations which have not been identified as such in the past. The presentation of this model is followed by the legal repercussions of the emergence of these new populations. We will present case studies within which the model not only helps identify new security protocols or pinpoints breaches in protection or defence mechanisms, but also insists on how the law affects levels of vulnerability according to specific political and social criteria. We will conclude in answering the questions of who society tries to protect, how public policy influences this choice and if indeed, law succeeds in protecting everyone in society.

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Modelling risks and vulnerabilities: legal implications and protection of the law

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Who does the law protect? Who needs the protection of the law? One of the foundational principles deemed necessary for a state to be governed under the rule of law is the notion of equality for all citizens before the law. Legislatures (both federal and state) and the courts have recognised certain classes of citizens to be at increased levels of vulnerability when dealing with the criminal justice system (for example: indigenous persons, the mentally ill and children). In the emergence of what is called by some the ‘risk society’, all branches of the criminal justice system have developed laws, guidelines and protocols specifically directed at the protection of these most vulnerable people or populations at risk.

The study of these vulnerable populations from both the legal and policing perspectives raises interesting gaps in the provision of this much needed protection. First, some academic disciplines, legislation, policies and procedures actually fail to make the distinction between the concepts of vulnerability and ‘at risk’ and both expressions are more often than not used as synonyms. However, a clear distinction should be made between the two. The first part of this paper will argue that risk and vulnerability are different concepts that need to be properly defined before being
analysed from a discipline angle. It establishes a clear distinction between both concepts, making one the consequence of the other and critically examines whether all types and levels of vulnerabilities have been addressed in the current legislation. Our analysis of the legislation will introduce the idea of a new model in the assessments of risk and resulting levels of vulnerability and question whether there is a need for such a formula.

Our analysis of vulnerable population categorisation is followed by a discussion of the surfacing of new vulnerable populations and the impact this emergence has on legal and police practice. We will present case studies within which the model not only pinpoints breaches in the protection provided to vulnerable people, but also shows how the law caters for vulnerabilities according to specific criteria. We will conclude in answering the questions of who society tries to protect, how public policy influences this choice and if indeed, law succeeds in protecting everyone in society.

1. Definition and socio-linguistic adaptation of risk and vulnerability

Since most of the literature related to risk and vulnerability does not delimit semantics, it seems important, as a start to our argument to fill the gap and set specific guidelines as to how both expressions will be used in this paper\(^{\text{iii}}\).

The Oxford English dictionary states that the main definition of risk is one of an external danger, a danger factor, a peril that one might face. Risks will often be external factors coming from society or one’s physical or psychological environment. Being at
risk is a state or condition marked by a high level of risk or susceptibility, being exposed to harm, particular threats or to danger in general.

Vulnerability defines somebody as being defenceless in the face of potential risks. The etymology traces back the word to a Late Latin meaning of wound or injury (vulner-, vulnus). It highlights one’s capability of being physically or emotionally wounded, open to attack or damage, and/or assailable.

Although both terms are now used as synonyms, and although legal definitions might be similar, it appears that their initial definitions are quite different, which causes systemic problems from both theoretical and practical perspectives. In the light of the social adaptation of the terminology -“at risk people” are “vulnerable people”. However, this might be considered an easy shortcut which does not imply that within a particular grouping, all individuals might actually not be equally vulnerable to the same risks. A more critical approach is needed in order to properly analyse these phenomena.

Are we all at risk? Are all vulnerable? The answer to the first question is yes. The answer to the second question is yes and no. We are all at risk of something, on an everyday basis: car accident, viruses or bacteria, physical injury in the home or the workplace, simply because we are exposed to potential exterior dangers (minor or major). That does not mean that our exposure to these risks will cause us harm, or will equally cause us to be injured or wounded. One might have developed defences or coping mechanisms from training or practical experience to address these risks (driving skills training, vaccinations, medicine, peer support, education background, etc.). Anything that protects a person from a risk is a defence. The amount of defence(-s) a person has built in or
acquired through training or personal experience counteracts potential vulnerability factors (or exposure to risks) and therefore determines their overall or specific vulnerability. Consequently, one’s vulnerability in the face of risks is moulded according to potential defence or coping mechanisms one might naturally have or develop in time, once risks are identified\(^iv\).

![Fig 1 – Risk, defences/coping mechanisms and vulnerability](image)

### 2. Vulnerable populations: the protection of the law

Populations that are socially considered to be vulnerable or ‘at risk’ have been identified through social research, political inquiries and protective legislation...
implemented at State and/or Commonwealth levels. The categorisation of ‘vulnerable populations’ is an easy way to socially point at particular pockets of population which have a more important tendency (i.e.: are the most vulnerable) to becoming victims or criminals. For various reasons, these populations do not have or are lacking some defences in the face of the risks they face daily in society. However, within these pockets of populations, it does not mean that all individuals are equally vulnerable.

From a legal perspective, there are 4 official categories of vulnerable people under Part 9 of the *Law Enforcement (Powers & Responsibilities) Act 2002 (LE(P&R)A)* in New South Wales:

a) Persons under the age of 18 years, or
b) Aboriginal persons or Torres Strait Islanders, or
c) Persons of non-English speaking background, or
d) Persons who have a disability (whether physical, intellectual or otherwise).

This piece of legislation is particularly important to police. It is the legislative framework that defines the scope of police powers and sets specific standards as to police duties and the limitation of police action when dealing with the above mentioned people. Part 9 of *LE(P&R)A* sets explicit standards for dealing with these four social categories of people. It obliges police to unfold set in stone procedures and processes when in contact with victims or offenders who "qualify" for the vulnerable label and therefore need additional protection from the law.

*LE(P&R)A*, however, besides standard operating procedure, does not cater for additional social categories of people who might be considered at ‘such’ a risk that their vulnerability could be argued upon. What appears from what we might call this
‘vulnerability blanket coverage’, is the creation of a generalisation that seems to fail in
addressing case by case approaches and individual assessments of risks and vulnerability.
Neither does it clearly cater for other vulnerabilities (e.g.: women, victims of crime, etc.),
as we will show below, and presumes vulnerabilities that do not exist, especially from a
legal perspective.

Let’s have, as an illustration to our argument, three hypothetical case studies:

1. a 16 year old Aboriginal-Torres Strait Islander male from remote community
   arrested on assault charges
2. a 39 year old male practicing barrister, of Aboriginal-Torres Strait Island descent,
   arrested on fraud charges
3. an unemployed 39 year old white male from an urban area, who dropped out of
   school in year 10, arrested on drug charges

The first two individuals qualify as members of a vulnerable population according
to LE(P&R)A (aboriginal people), while the white male does not. It can be argued that the
young aboriginal male, who falls at the cross-section of two categories of vulnerability
(aboriginal and young people), will see multiple processes unfold for his protection (call
to guardians, possibly to the Department of Community Services, involvement of
Aboriginal Community Liaison Officer, contribution of Aboriginal Legal Services).
Some protocols will also be automatically initiated in the case of the aboriginal lawyer,
although it has to be observed that his legal background actually provides him with
defences that will generally lower his vulnerability. However, in the current state of
things, this may not be taken into consideration and regular automatic protocols will
unfold. At this stage, we should question whether this does not constitute an over-
catering for a need that might not be and add redundant protection to already existing
coping mechanisms. Extensive inquiry with police indicates that no specific protocol
does apply for the white male of our case study, besides standard operating police procedure, even though, from the point of view of this paper, this person seems to be more vulnerable than the aboriginal lawyer. What needs to be highlighted here is that what is being taken into account here is an automatic vulnerability categorisation which does not take into account individual vulnerability potential. This is crucial for our argument. Theoretically, every members of society is at risk and presents a certain level of vulnerability. However, current guidelines do not allow for such systematic in-depth assessment.

3. The notions of equality before the law and vulnerability: legal perspectives and emerging categories

For when equality is given to unequals the result is inequality, unless due measure is applied.
Plato, Laws, 757a.

It is beyond the scope of this paper to enter the debate on interpreting what constitutes a definition of the rule of law. But regardless of which formulation of the characteristics used to determine a society’s existence under the rule of law, one principle that is common to all is the notion of equality before the law. This principle is instrumental to our argument here: how does the principle of equality before the law apply to vulnerable populations?

The principle of legal equality is expressed by A V Dicey in his seminal work Introduction to the Study of the Law of the Constitution as being ‘…the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts…”’ (Dicey 2000). Like the rule of law from which it derives and is subordinate to, there has
been much debate about what constitutes the notion of legal equality (Smith 2005). So far as the legal situation is in Australia with the notion of legal equality, the nature of constitutional law in Australia leaves the citizen without any express guarantees of legal equality, such as would be contained in a bill of rights. Even the common law has been unable to find an implied constitutional guarantee of legal equality, arguably a very broad and encompassing guarantee (Kirk 2001) fundamental to our system of representative democracy, as put forward in the High Court by Justices Deane and Toohey’s dissenting judgement in *Leeth v. The Commonwealth* (1992) 174 CLR 455 and specifically rejected in later judgements of the Court, specifically in *Kruger v. The Commonwealth* (1997) 190 CLR 1: per Brennan CJ at pp.44-45; Dawson J at pp.63-68; Gaudron J at pp.112-113; Gummow J at pp.153-155; and McHugh J at p.142. Seeing the notion of legal equality as simply a formalised legal principle is far too restrictive and anti-democratic (Krygier 2007: 3-6), as the abstract notion of legal egalitarianism is such a high principle of jurisprudence, moral and political philosophy (Smith 2005: 2) that it finds meaning and application beyond formalistic legal interpretation. It is from this standpoint that our argument begins.

Legislative measures have sought to address vulnerabilities by creating a level playing field (as much as possible) and by granting increased rights to certain broad classes of vulnerable citizens, which regulate the actions of law enforcement in their interactions with members of this broad class. The degree of compliance, or otherwise, by law enforcement to these mandated requirements has a direct bearing on the admissibility of evidence gathered. The courts, on the other hand, have been limited to addressing the same imbalance on a case by case basis, applying judicial discretions to exclude
admissions and other evidence in individual cases, through the law of evidence, and with little certainty in outcome for either the prosecuting body or the accused due to the subjective nature of these discretions.

Although a legislative response is indeed one much needed method available to redress the imbalance of current and emerging vulnerable populations (or at least what seems to be newly emerged vulnerable groupings), does our civil society really want to create blanket coverage of any class of vulnerable persons? As previously shown, the main problem with blanket coverage of vulnerable groups is that such legislation does not deal with the many variable attributes of individual members in the group, seemingly discarding a potential for miscarriages of justice. This is particularly relevant in the current ‘war on terror’, where certain religious minorities or ethnic groups are being stigmatised in the post 9-11 world in popular and political discourse as the potential tools of sectarian violence and a threat to our society’s values.

An in-depth examination of this blanket coverage unveils gaps in the identification of vulnerable groups and uncovers new emerging vulnerable groupings. One should consider the effect domestic and world events are having on certain religious / ethnic groups in the post-9/11 war on terror. It seems that new vulnerable populations have arisen and that an additional balancing act has to be performed – between the rights of vulnerable groups and / or individuals to achieve equality before the law and the vulnerability of a nation as a whole to terrorist attack (Morawa 2003: 148). One needs look no further than the media to identify new emerging categories of persons vulnerable to prejudice, intolerance or discriminatory practices on the basis of religion, such as the followers of Islam and people of Middle Eastern birth or ancestry.
There has been considerable research and discussion on the portrayal of Muslims and those of Middle Eastern descent in the context of the war on terror. Although support or criticism for how Muslims are represented tends to be divided along political lines, the weight of opinion falls upon the demonisation of this religious / ethnic groupings. Like many other social groupings before them (see, for example, Brown 2005 and Elikan 1999 on the demonization of youth and the ‘superpredator’ labelling), the portrayal of Muslims in NSW was worsened by ‘media driven moral panic’ concerning ethnic youth gangs (Poynting, S & Noble, G 2004: 7) carrying out gang rapes, several murders, drive by shootings of police stations and the homes of other gang members as well as the initial reporting of the Cronulla race riots in late 2006. In this context of fear, it seems unlikely that religious groupings will anytime soon become a legal category of vulnerability. Once again, the case by case approach might be the best option to avoid judicial and/or discriminatory let downs.

4. Vulnerability and custody: the equal or unequal protection of the law

Realising the potential vulnerability of all persons in police custody, legislative safeguards have been enacted in various Australian jurisdictions to reduce the associated risk of those in police custody. In NSW, these safeguards can be found in Part 9 of the LE(P&R)A and include (ALRC 1990: 5.1 to 5.46):

- a limitation on the amount of time a person can be held prior to charging (Part 9, Division 2 of LE(P&R)A);
- confirmation of the accused’s understanding of their right to silence;
- the right to communicate with a lawyer;
the right to contact a friend or relative; and,
the right to medical assistance, rest and refreshment (ibid, s. 122, 123, 129, 123).

However, it has long been recognised that certain classes of people are at higher levels of vulnerability whilst in police custody, not able to either have equal access to nor the internal defence mechanisms to deal with the legal system, and are at a greater risk of harm in their dealings with police. In 1976 the landmark High Court decision in *R v. Anunga* (1976) 11 ALR 412 identified numerous factors which made aboriginals more vulnerable than the rest of the population and set out guidelines for the treatment of aboriginals during interview by investigating officials, guidelines which included measures to ensure that aboriginals, for example, in police custody (Ligertwood 2004: 659-661):

- are not intimidated by police interviewing;
- are properly treated in police custody;
- are aware and understand the right to silence;
- have access to legal advice which understands their cultural sensitivities; and,
- have access to an interview friend / support person, who may be able to provide independent and responsible advice during the police interview.

The rationale behind the common law’s ‘unequal protection’ of aboriginals in police custody was founded on a number of vulnerabilities (or categorised as *special problems*, see ALRC 1995 at [546]) requiring special protection. Although potentially seen as paternalistic and offensive to aboriginal people (Northern Territory Law Reform Commission, 2002), these additional shielding mechanisms ‘level the playing field’ for aboriginal people by “…*remov[ing] or obviat[ing] some of the disadvantage from which aboriginal people suffer in their dealings with police*” (*R v. Anunga*, op.cit.). These criteria insist on aboriginal people’s behavioural patterns and understanding of their right
to remain silent and not make self-incriminating statements (ALRC report 31) and have been identified as including:

- difficulties in language, communication and comprehension;
- differences in conception of time and distance;
- health problems leading to disadvantageous behavioural patterns;
- customary law inhibition; and,
- poor aboriginal – police relations (ibid.)

Acceptance of this position by the NSW legislature appears in Part 9 of LE(P&R)A which allows additional safeguards to be made in respect of aboriginals (S.112 of the LE(P&R)A), as well as other defined vulnerable persons, by regulation.

But how does this operate in practice and does this ‘blanket’ coverage of those falling within the coverage of a legislated definition as vulnerable provide real equality in their dealings with police? Taking the example of an aboriginal person in police custody, it is submitted that there will be manifest inequality before the law in certain cases where vulnerability with a defined group is the only determinant, without consideration of an individual’s unique circumstances.

Let us go back to our three case studies. Let us consider the vulnerability of our 16 year old aboriginal male, with only minimal education and living a traditional lifestyle on a remote community having few interactions with mainstream Australian society, in his dealings with police, and the special circumstances (ALRC Report 31) identified above as warranting the special consideration legislated for in Part 9 of the LE(P&R)A and attendant regulations. Contrast this with the vulnerability in police custody of our 39 year old aboriginal male, born and raised in Sydney, and a practicing barrister for the last 15 years. While both are entitled to the same degree of legislative protection whilst in police
custody, they are quite different in terms of vulnerability in understanding their right to silence and not to make incriminating statements. We could argue, on these facts, that if equality before the law for persons in custody is seen a value we as a society seek to uphold through prescriptive definitions and required conduct by law enforcement in legislation, then inequality will be found in consideration of an individual’s unique circumstances.

*Where rule-based decision making prevails, what increases is the incidence of cases in which relevantly different cases are treated similarly, and not the incidence of cases in which like cases are treated alike* (Schauer 1991:137)

The question then turns to the merits of conducting modelled assessments of an individual’s vulnerability on a case by case basis versus the acceptance of a legislative regime of ‘blanket’ coverage of vulnerable persons which can result in inequality. This is an important issue, not just on a philosophical level, but more importantly for possible implications on investigative practice. Considering issues such as cost implications, the ability of an organisation to adequately train custody and investigators in a process of individual vulnerability assessment, can a simplified process or model be developed to identify individual vulnerabilities? Is vulnerability an issue in all criminal matter or only the more serious of crimes? What are the practical issues to be considered when deciding on the preferred approach to addressing vulnerability whilst in police custody?

In terms of understanding the relationship between police investigative practice, the differing operational imperatives placed upon law enforcement and admissibility of evidence made in custody, it is helpful to draw a distinction between a person in custody for the purpose of conducting an evidence gathering interview and an intelligence
gathering interrogation as vulnerability impacts on differently. In intelligence gathering interrogation, the individual vulnerabilities of the person being questioned are assessed as part of the interrogation process and exploited by the interrogator to break the person down and coerce them into providing information (McCoy 2006: 89-91). In evidence gathering interviews, the individual vulnerabilities of the suspect are not really assessed subjectively until the question of admissibility of evidence is before the court and at that stage it is too late for the investigator to take action which may have negated an argument of inadmissibility due to unfairness.

It is submitted that individual assessments of persons in police custody, whilst acknowledged as being resource intensive, costly and unnecessary in the majority of matters where a plea of guilty is entered – so the prosecution case is not tested in an adversarial trial – is a valuable tool in the investigation and prosecution of serious criminal matters. Individual assessment of vulnerability should assist in balancing the goal of equality before the law with the legitimate security concerns of the vulnerable state, along with a greater chance for admissibility of vital evidence in court.

5. The blanket coverage of vulnerabilities: does it work?

Consider a scenario not uncommon in law enforcement – the arrest of a person from a culturally and linguistically diverse (CALD) minority. This specific CALD group member is from a region where citizens were persecuted by the government through its paramilitary police force, maltreatment and torture commonplace. It is simple logic to assert that more often than not, the arrestee might be unable to make informed, sound
judgements about what is the best course of action to take in dealing with law enforcement authorities, based on the person’s experience and legitimate fear of police. Compare this scenario with an average Australian male in similar circumstances, but armed with understanding and culture of a free western society such as ours, where the protection of the law is guaranteed by the social contract and the rule of law. Smith clearly makes the case that the rule of law either authorises or requires “…the differential treatment of those who are not identical in morally relevant respects” (Hurd 1999: 221). Governments are bound to take extra care and attention through affirmative action to reduce the vulnerability of those in need to their respective risks (Morawa 2003:139).

The traditional approach to vulnerability, not only in Australia but internationally as well, has been to legally categorise segments of society as being in need of extra care and attention (Morawa 2003:139). But while analysing the ‘blanket’ categorisation of vulnerability, it appears that many individuals or groups slip through the net of being classed as vulnerable (ibid.: 141).

Recognising that inequality has always existed, and continues to do so, this due measure in the form of affirmative action has been taken by both the courts and the legislature to try and redress imbalance. The notion of legal egalitarianism has been practically applied in both statute and the common law’s vigilance to ensure fairness in the adversarial context of a criminal trial. Through the development of well settled doctrines of law including the presumption of innocence, burden of proof, rules of evidence and, most importantly, the accused’s right to silence, the imbalance between parties should be properly addressed (Arenson & Bagaric 2005: p.xi ), at least in theory.
If equality in dealings with the law is sought, then positive measures need to be taken by government to reduce the potential risks to the vulnerable group of a miscarriage of justice. This is done through legislation which expresses certain requirements of the criminal justice system when dealing with members of an identified vulnerable group, for example in the case of a foreign national, Part 9 Division 3 of \( LE(P&R)A \) provides safeguards relating to persons in custody for questioning, with s.124 providing for access to consular support and s.128 requiring the provision of an interpreter. In the NSW Police Force, compliance with these requirements is carried out by the custody manager, or watch house keeper, applying the procedures set out in the *Code of Practice for Custody, Rights, Investigation, Management and Evidence (ibid.)*. This Code of Practice is a publication produced by the Commissioner of Police to assist Police in adhering to various legal requirements of people in custody.

Acting almost as a secondary line of defence where a suspect does not fall within an identified group, individual vulnerability is able to be reduced by court in application of the various legislative and common law discretions to exclude evidence, for instance the discretion under s.90 of the *Evidence Act 1995 NSW* to exclude evidence of admissions which states, having regard to the circumstances in which the admission was made, that it would be unfair to the accused to use the evidence. Although a legislated power, it still remains at the discretion of a court, bound by the law of precedent, to interpret and apply the legislation in a given fact situation. Going back to the case of the above mentioned CALD prisoner and (hypothetically) in the absence of any affirmative action legislation, such as Part 9 of *Law Enforcement (Powers & Responsibilities) Act 2002 NSW*, it is
submitted that the s.90 unfairness discretion in the Evidence Act 1995 NSW would be argued to have excluded any admission made during police custody.

The CALD prisoner’s individual circumstances may be compelling to a court if evidence could be tendered that the accused’s psychological state at the time of police custody was a state of vulnerability, regardless of whether or not ‘…the police have acted unfairly. [T]he question is whether it would be unfair to the accused to use his statement against him. Unfairness, in this sense, is concerned with the accused's right to a fair trial.’ (R. v. Swaffield; Pavic v. R [1998] HCA 1 (20 January 1998)) It can be said, then, that the common law acts as the final safeguard in our legal system’s attempts to address vulnerability and ensure equality before the law for the disadvantaged.

The conduct of individualised assessments of vulnerability for persons in police custody therefore seems a good option to redress imbalances and ensure due process. If individualised vulnerability assessment is conducted prior to any evidence gathering activity conducted by law enforcement agencies, the chances of ensuring the admissibility of evidence gathered is increased.

6. Modelling vulnerabilities: introducing a model for legal and police practices

For the domestic criminal justice system to achieve a balance between national security and equality of the individual before the law, the system needs to address the needs created by new emerging vulnerabilities, through either legislative reform or improved assessment practices by law enforcement. One of the questions to be asked at
this stage of our paper is how could a model to test individual vulnerability be designed
to be used by law enforcement in evidence gathering investigations?

The School of Policing Studies, Charles Sturt University, is in the process of
developing a mathematical model aimed at assessing individual vulnerabilities in front of
various risks. This model will be designed to act as a tool that law enforcement
authorities can use to assess individual vulnerabilities from a legal perspective. This
model stems from several considerations:

a) if people are not equally vulnerable, vulnerabilities should be quantifiable
b) if people in the same vulnerability category are less vulnerable than others, a new
   way to assess vulnerabilities is needed
c) vulnerabilities should be measured according to current risk assessment formula,
   factoring in defences and coping mechanisms

Although editorial limits prevent us from completely developing and describing,
this mathematical formula, an introduction seems important at this stage of the paper, as
the need for such a formula, from a legal perspective was argued in this document. Once
fully developed, the exact set up of the model will be fully explained elsewhere. The
following description needs to be understand as the preliminary stages of the model
development process.

This quantitative model builds in from the common risk assessment formula used in
public health assessment \((R_i = p L_i)\), where the risk \((R_i)\) is measured according to its
likelihood \((L_i)\) and potential loss \((p)\) factors. Once the risk established, defences or
coping mechanisms need to be factored in. Our model establishes a scale of defences that
measures one’s reaction to the risk according to our redefinition of what is known as the
"4Ts" (Dorfman, 1997) as defences or coping mechanisms \((\delta)\): tolerating, treating,
transferring or terminating the harm that results from an encounter with a risk. The resulting vulnerability (V) formula is hence as follows: \( V = \delta Ri \).

The model will evaluate the various existing risks and latent vulnerabilities of an individual throughout the justice process. The counter-effects of defence mechanisms will be measured on an individual basis and establish whether, under specific custody or investigative interview circumstances:

1. Risks are nullified (Terminated), in which case no specific protocol needs initiating
2. Risks are confirmed but can be shifted (Transfer), in which case special legal assistance and support protocols need to unfold
3. Risks are confirmed but can be endured (Toleration), in which case basic support protocol will apply
4. Risks are confirmed and need to be addressed (Treatment), in which case protection mechanisms need to be offered.

Used by law enforcement agencies in the course of all stages of the justice process, vulnerabilities will be assessed on an individual basis. The assessment will allow for a clearer indication of one’s vulnerability and will indicate assessors where defence mechanisms have to be unfolded to protect the individual. It will also help avoid redundancy in the allocation of resources when vulnerabilities, although implied through blanketing, do not actually exist.

Conclusion: stepping away from categories and net widening

Pre-empting vulnerabilities by establishing a specific classification of vulnerable population has been a tool designed by the criminal justice system to address specific needs and provide much needed additional defence mechanisms to unprotected people.
Although theoretically humanistic and a perfect example of democratic practice, this tool actually fails to effectively protect everyone in society, equally. One could argue that a vulnerability blanket coverage is, to some extent, discriminatory, as, although it caters for the needs of the most vulnerable, it does not seem to cater (or not enough) for people who don’t belong to these pre-determined groupings, while at the same time, through net widening, over-caters for members of these categories who are less vulnerable and benefit from already well-established defences.

Newly emerged vulnerable groups haven’t yet been the focus of reformist public policy and one could wonder, post 9/11, whether the war on terror will allow for some new categories to be made. It seems therefore important to us to stress the necessity of stepping away from blanketing and net widening effects and to design a systematic model for individual vulnerability assessment, which will take into account potential risk and vulnerability factors along with existing defence mechanisms. Used in the idea of improving law enforcement practice, ensuring the admission of evidence and individual assessments aim at Best ‘Equity’ – in the sense of justice, impartiality and fairness – Practices in the field of Justice.

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Endnotes

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2 For the purpose of this paper, vulnerability will be discussed specifically in relation to a person’s dealings with law enforcement, either as a witness or when in police custody for a criminal offence.

3 The use of italics for the expressions risk and vulnerability refers, throughout this paper, to the semantics of the expression. When not used in italics, the authors refer to the actual object of the research (exterior hazards or levels of vulnerability).

4 One’s vulnerability can be related to a range of significant characteristics. These include age, gender, sexuality, race, ethnicity, disability and mental illness, which can result in social inequality and unequal power relations. Yet, every person embodies a set of social characteristics, which means that factors of vulnerability can have a multiplying effect and may reinforce each other.
The various approaches to defining the term range from a broad liberal interpretation of the rule of law as: “A statement of constitutional and juridical principle, a juristic reserve, an idea of legal superiority, and possibly anterior to positive law” (Walker, 1988, 3); to much narrower interpretations focusing on government under law (ibid., 2), where the citizen is free from the government’s exercise of arbitrary power or as concisely stated by Hayek (1944, 72): “stripped of all technicalities this means that government is bound in all its actions by rules fixed and announced beforehand.”