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## Interrogating vulnerability: reframing the vulnerable suspect in police custody

### Abstract:

This article considers the definition of the term ‘vulnerability’ in relation to the suspect in police detention and more specifically in relation to the appropriate adult safeguard. Using Fineman’s vulnerability theory, this article argues that all suspects are ‘vulnerable’ and, rather, attention should be focussed on how resilience is depleted, reduced or removed. In doing so, it points towards the limitations of the focus of the current legislative provisions. It situates this discussion within the broader frame of the impact and very nature of police detention and the implications of the broader criminal process as mechanisms that reduce resilience (and possibly deliberately so). Further, it reflects on how the framing of vulnerability in legislation relating to the police detention does not fully capture the position of the suspect in police detention. It concludes then by urging that the definition of the vulnerable suspect is reconceptualised so as to more adequately capture the position of the suspect of the criminal investigation.

Keywords: police, vulnerability, appropriate adult, custody, voluntary interview

### Introduction

The Police and Criminal Evidence Act 1984 (PACE), implemented in 1986, introduced a legislative framework through which to regulate police powers and procedures, and suspects’ rights, including the introduction of the appropriate adult (hereafter AA) safeguard for vulnerable suspects. Prior to the implementation of PACE, the Judges’ Rules – which were, in essence, rules on how the police should collect evidence to secure its admissibility – governed the treatment of suspects in custody. However, a miscarriage of justice in 1972 highlighted the deficiencies with the Judges’ Rules (see Fisher Report, 1977/78 in combination with the Report of the Royal Commission on Criminal Procedure, 1981). The AA safeguard was introduced to protect those deemed ‘vulnerable’; failure to provide an AA to a vulnerable suspect could lead to exclusion of evidence (PACE ss 76 and 78) and/or a jury direction (PACE s 77).<sup>i</sup>

Until 2018, Code C recognised vulnerability to include young age (below 18), mental vulnerability’ (difficulty with understanding ‘the significance of what is said, of questions or of their replies’ due to issues with mental state or capacity (Home Office 2017: Note 1G), and ‘mental disorder’ (‘any disorder or disability of the mind’ (see Home Office 2017: Note 1G in combination with the Mental Health Act 1983, s 1(2))) (see Code C generally).<sup>ii</sup> However, in 2018 a functional test (see Dehaghani and Bath 2019) was introduced and the category of ‘mental vulnerability’ removed. This paper explores the new vulnerability criteria under the Code – which addresses understanding and communication in relation to rights, entitlements, procedures and processes, clarity of thought, and suggestibility and acquiescence ((Home Office 2019: 1.13d; see also Home Office 2018) – and whether these criteria improve the Code. Thereafter this paper examines the approach(es) to vulnerability that underpin(s) this (and the problems herein) and then explores whether vulnerability could be reframed, using Fineman’s (2008; 2010; 2013; 2017) vulnerability theory. Finally, it examines what this may mean for suspects in police custody. In doing so, this paper contributes to existing debates the protection of vulnerable suspects<sup>iii</sup> and the reach and utility of Fineman’s vulnerability theory.<sup>iv</sup> This paper neither explores the disparities between the law in books and the law in action (see Dehaghani 2016) or decision-making on the AA safeguard (see Dehaghani 2019) nor does it offer ‘solutions’ to the ‘vulnerability problem’. Rather, it exposes problems with the existing conceptualisation of vulnerability under Code C, urging that the provisions be entirely reworked. The insights contained herein, whilst directly applicable to England and Wales (and Northern Ireland under the Police and Criminal Evidence (NI) Order 1989), may also apply to other jurisdictions, and could also extend to detainees and to defendants, more broadly.

### Vulnerability under PACE Code C

As noted earlier, 2018 saw some changes to the definition of vulnerability, specifically geared towards adult suspects. The new Code C (Home Office, 2018; now Home Office 2019)

introduced a functional test (Dehaghani and Bath 2019), expanding on the previous definitions of ‘mentally vulnerable’ and ‘mentally disordered’ and replacing these categories with the term ‘vulnerable person’ (although mental disorder remains in the Code). According to the Code, a ‘vulnerable person’ is someone who, because of their mental health condition or mental disorder (1) may struggle to understand or communicate effectively about the implications of various procedures and process connected with their arrest and detention, voluntary attendance, or rights and entitlements (and the exercise thereof); (2) does not appear to understand the significance of what they are told, question asked, or their replies; and/or (3) is prone to becoming confused or unclear about their position, agreeing to suggestions of others without protest or question, or, without knowing or wishing to do so, providing unreliable, misleading or incriminating information or accepting or acting on suggestions from others (Home Office 2018: 1.13d).

These specific criteria expand upon a fuller definition of the term ‘otherwise mentally vulnerable’ and set out the risks to justice and evidence, beyond whether a suspect is able to understand the significance and implications of what is being said to them (Dehaghani and Bath 2019) or whether he or she is likely to provide unreliable evidence (Home Office 2017; 2018). The new Code C (as with the old) appears to connect vulnerability with certain deficiencies when being questioned by the police (during a voluntary interview or an interview conducted whilst in police detention) such as (a) an inability (or difficulty) in understanding rights and entitlements, procedures and processes, understanding the implications of what is said, and/or communicating, or (b) a propensity towards being suggestible or acquiescent. For one or more of these reasons, s/he requires and should be provided with additional help and assistance.

The changes to Code C (and indeed the previous versions of the Code) were heavily influenced by how vulnerability is said to manifest according to the discipline of psychology and law and are a marked improvement on the previous Code (which, in respect of the vulnerability provisions was limited in scope and had, from 1986 to 2018, been updated in a piecemeal fashion)<sup>v</sup> (although it is later argued that these changes do not go far enough). Within the section that follows the ‘psychology and law’ approach to vulnerability and its influence on Code C will be examined.

Psychology and Law: manifesting vulnerability

Whilst there has been no overall consensus on how psychological vulnerability is or should be defined (Gudjonsson 2010: 166), the psychology and law perspective identifies several different factors – intellectual abilities, personality, health (physical and mental), mental state, situational context – that may render an individual vulnerable. Generally, in the context of police custody, vulnerability can be understood as ‘psychological characteristics or mental states which render a [person] prone, in certain circumstances, to providing information, which is inaccurate, unreliable or misleading’ (Gudjonsson 2006: 68). That said, these characteristics (explored below) are potential risk factors for reliability rather than definitive markers of vulnerability (Gudjonsson 2010). This approach posits that suspects are vulnerable ‘because they may not fully understand the significance of the questions put to them or the implications of their answers [or] are unduly influenced by short-term gains (e.g. being allowed to go home) and by the interviewer’s suggestions’ (Gudjonsson 1993: 121). For example, those with a less than average intellectual ability may experience feelings of intimidation when interviewed by someone in a position of authority (St-Yves 2006: citing Gudjonsson and MacKeith 1994; Gudjonsson 1995). They may also answer questions in the affirmative, regardless of what is being asked and even if they disagree (O’Mahony, Milne and Grant 2012), doing so to avoid conflict or to maintain a level of self-esteem (Gudjonsson 2003). Moreover, they may be more suggestible (St-Yves 2006 citing Clare and Gudjonsson 1995), may behave in an acquiescent manner or may confabulate (Clare and Gudjonsson 1993: 295).<sup>vi</sup>

Even those with a mild learning disability can experience problems when communicating with others or can be awkward in doing so. They may have to make a concerted effort in order to be understood, particularly in unfamiliar situations; they may find it difficult to interpret questions and statements from others and/or handle information or regulate their behavior (i.e. attention, inhibition and planning); and they may struggle to problem-solve (Moonen, de Wit and Hoogeveen 2011). Behavioural problems – such as attention-deficit disorder or attention-deficit hyperactivity disorder – can also render someone vulnerable to falsely confessing (O’Mahony, Milne and Grant 2012), as can negative life events – such as bereavement, divorce or financial problems, and/or threatened death or serious injury (Kraaij, Arensman, and Spinhoven 2002) – which may lead someone to more readily accept misleading information or alter their answers when faced with interrogative pressure (Drake, Bull and Boon 2008: 306).

Situational factors – such as the nature and seriousness of the crime, and the pressure on the police to solve the crime – may also impact upon the propensity to falsely confess (Gudjonsson

and MacKeith (1997 cited by Gudjonsson 2010; Gudjonsson and Joyce 2011). Gudjonsson (2003: 61-75) has previously identified four categories of vulnerability in relation to suspects. The first is mental disorder, which includes mental illness, learning disability, and personality disorder. The second category – abnormal mental states – includes anxiety,<sup>1</sup> phobias, bereavement, intoxication, withdrawal and mood disturbance. The third category is intellectual functioning (discussed above) and the fourth is personality, which encompasses traits such as suggestibility, compliance, and acquiescence. Thus, innate characteristics – mental illness, learning disability, personality disorder, personality, and intellectual functioning – **and** circumstances – bereavement, negative life experiences, nature and seriousness of the offence, pressure on the police to solve the crime, as well as, potentially, the mental state that has been affected by situational factors – can impact upon whether someone is or could be vulnerable when undergoing criminal investigation. The psychology and law approach has greatly influenced the concept of vulnerability under Code C and was heavily drawn upon in the 2018 update, although the Code only explicitly recognises ‘mental health condition’ and ‘mental disorder’ (which includes learning disability) within its categories of (adult) vulnerability. For example, the term ‘mental disorder’ was explicitly contained within the previous Code, and the other factors, although not explicitly recognised, could arguably have fallen under the term ‘mentally vulnerable’. The ‘new’ Code retains the term ‘mental disorder’ and incorporates within the functionality test some aspects of vulnerability as according to the psychology and law approach (such as providing unreliable, self-incriminating or misleading information; suggestibility and acquiescence (although not compliance)).<sup>vii</sup> As will be argued below, however, the Code should move away from its focus on individual deficits and instead examine vulnerability more holistically, considering situational and individual factors within the frame of Fineman’s vulnerability theory (2008; 2010; 2013; 2017).

### Code C and manifesting vulnerability

As explained above, Code C has been influenced by the psychology and law literature, but in doing so focuses predominantly on individual factors (or deficits) when explaining why a suspect may be vulnerable. This particular manifestation has been termed ‘natural or innate’ by Brown (2015: 28) in her extensive review of the vulnerability literature(s). This approach sees vulnerability as something that is determined by physical and/or personal factors such as childhood, old age, disability, sensory impairment, and mental health problems (Brown, 2015: 29), although it may also be ‘used to refer to temporary biological states associated with

elevated fragility and which inspire protective responses, such as acute illness or pregnancy’ (Brown, 2015: 29; see also 29-31). This approach to vulnerability posits ‘individuals as “at risk” in a way that can be modified by action, but where some risk will always remain’ (Brown 2015: 29). Vulnerability can also be something which is situational (and this is, to an extent, recognised within Code C). According to Brown (2015: 31), the situational approach ‘draws attention to the situation of people who find themselves at elevated fragility or “risk of harm” due ‘to biological circumstances, situational difficulties or transgression’ (2015: 28). This particular form of vulnerability is, however, tied to notions of deservingness and tends ‘to be associated with the active input of a human third party or a structural force but [is] also imagined to contain elements of individual choice or agency’ (Brown, 2015: 31). Such individuals or groups of individuals ‘have experienced a degree of misfortune that generates a special social or statutory duty towards them’ (Brown, 2015: 31).

Both approaches can be seen within the psychology and law approach (noted above) and within current and previous iterations of Code C. For example, the use of the term ‘mentally disordered’ within Code C (both current and previous) would suggest that the Code recognises that innate factors (here, mental health conditions, learning disability, and neuro-diverse conditions) could render an individual ‘vulnerable’. The use of the term ‘mentally vulnerable’ could also be interpreted as something innate (and indeed it is when used by police custody officers – see Dehaghani 2019) but could also be interpreted to encompass situational factors (such as, but not limited to, bereavement, stress, or limited educational attainment). The new Code removed all references to ‘mentally vulnerable’ and introduced a new term ‘mental health condition’ (although provides no elaboration on what this means or indeed whether it is any different to ‘mentally vulnerable’ or ‘mental disorder’) whilst also retaining the reference to ‘mental disorder’. The ‘new’ Code C provisions seem to accept vulnerability as something that is predominantly innate, by requiring the reason for the vulnerability to relate to a mental disorder or mental health condition. This latter element could be interpreted to include situational vulnerability, however, the word ‘condition’ combined with the word ‘health’ would suggest that it is something innate. The Code also, as noted earlier, introduced a functional test, such that an individual with a ‘mental health condition’ or ‘mental disorder’ must also meet (at least) one of the ‘requirements’ set out in this test. To complicate matters slightly, the Code also seems to allow (albeit in a Note for Guidance – see Dehaghani 2016 for a discussion of the status) for an AA to be provided where someone is not known to have a ‘mental health condition’ or ‘mental disorder’ but nevertheless meets one of the requirements

of the functional test. Whilst the functional test allows for some recognition of situational vulnerability, the fact that the main body of the new Code premises vulnerability on having a mental health condition or mental disorder, would suggest that the recognised manifestation of ‘vulnerability’ under Code C is that of innate vulnerability. Yet, as will be illustrated below, the concept of vulnerability under Code C could be reframed and in doing so better reflect the vulnerability of the suspect.

### Reconceptualising vulnerability using Fineman

In contrast with the innate and situational accounts of vulnerability which conceptualise vulnerability as a special characteristic for some, Fineman’s (2008; 2010; 2013; 2017) thesis reframes vulnerability as something that is inherent to all individuals due to their embodiment and embeddedness. Rather than positing vulnerability as something that suggests the possibility of harm (whether physical or emotional), Fineman views vulnerability as inherent to the human condition – as human beings we are universally susceptible to harm, injury, and dependency. Our embodiment brings with it ontological strengths, weaknesses and abilities (Thomson 2018: 1219) and such strengths, weaknesses and abilities are important when considering our resilience. Yet this embodiment encompasses not simply the flesh and blood body, but also how material bodies interact with the world, and the body must be viewed in this context (Travis 2018).

Vulnerability theory runs counter to liberal legal thought, which suggests that humans are rational, autonomous and independent beings; it instead recognises that human beings, in addition to being embodied, are deeply embedded within society and are therefore dependant on various institutions, relationships, and interactions. Fineman then locates the ‘problem’ not in terms of individual or situational deficit(s), but instead in terms of how the state responds to inevitable and inescapable human vulnerability (and she further recognises that vulnerability can be a strength and a weakness – see also Thomson 2018 above). This is important to how Code C views vulnerability; Fineman’s thesis highlights that we are all vulnerable and instead the focus should be on how resilience is provided or removed by institutions. It thus provides a framing device through which to reconceptualise vulnerability under Code C.

Unlike innate (often, perhaps confusingly, referred to as inherent – see MacKenzie, Rogers and Dodds 2015: 7) vulnerability, Fineman’s vulnerability thesis does not suggest that some



individuals form part of a particular ‘vulnerable’ group or indeed that there are groups or individuals who are designated as ‘vulnerable’. Rather, Fineman argues that there is no such thing as invulnerability and, moreover, there are no individuals who are more vulnerable than others. Instead, there are individuals who are more or less resilient than others. In contrast with situational vulnerability, inherent vulnerability does not suggest that individuals are invulnerable at any point. Further, it does not suggest that it is a third party or structural force that renders someone vulnerable. Inherent vulnerability suggests that individuals are always vulnerable. It may be helpful to reconcile notions of situational vulnerability with the vulnerability thesis. One way of doing so would be to consider situations and circumstances as ways in which resilience is depleted, reduced, or removed by a third party or structural force. Similarly, individual or innate (or embodied) factors can serve to deplete resilience. Thus, for Fineman, it is not particular individuals or groups of individuals who are defective or lacking. The inevitable and inescapable vulnerability that we all experience can be ameliorated by resilience, which can give the vulnerable subject the resources to adapt to their (inevitable) vulnerability. This resilience can be provided by and within relationships and social institutions and, it can, similarly, be stripped away by relationships and social institutions.

Fineman thus argues that everyone is vulnerable, yet some are more resilient than others. She further argues that justice is more likely to be served if the state is ‘built around the recognition of the vulnerable subject’ (Fineman 2008: 10). The state should ‘act to fulfil a well-defined responsibility to implement a comprehensive and just equality regime that ensures access and opportunity for all’ (Fineman, 2010: 273-274). This resilience, as Fineman (2015: 2090) notes, is ‘produced within society... over time and within state-created institutions and in social, political and economic relationships.’ According to Fineman (2017: 146), ‘there are at least five different types of resources or assets that societal organisations and institutions can provide: physical, human, social, ecological or environmental, and existential’. These will be drawn upon in further detail, where applicable, later. Whilst most people benefit from the state and its institutions, some have better access to the resources than others. One example of the way in which resilience can be provided is through the provision of legal aid and access to legal advice and representation (see PACE 1984), whereby anyone can access the various components of a right to a fair trial (which extends to pre-trial procedures (see *Teixeira de Castro v Portugal*)). It also places, on the state, the obligation to provide legal advice and assistance to those suspected of committing a criminal offence (see *Salduz v Turkey*)), but some may be unable through, for example, lack of understanding to be able to do so. In situations

such as these the state should intervene and ensure that the differences between the advantaged and the disadvantaged are minimised. Within vulnerability theory, ‘the state is constituted for the general and “common benefit”, not for a select few’ (Fineman, 2010: 274). For this reason, the state has a responsibility to ensure that all individuals can realise their right to a fair trial. As Fineman notes, invulnerability is impossible to achieve. Instead, it is resilience that helps ‘address and confront misfortune’ (Fineman 2010: 269). This resilience can be provided by institutions, which are vital ‘in lessening, ameliorating, and compensating for vulnerability’ (ibid). Fineman (2017: 134) notes, however, that ‘the call for a responsive state does not dictate the form responses should take, only that they reflect the reality of human vulnerability’; Fineman (ibid) recognises that the ‘approach to law and policy [should allow] for the adaptation of solutions appropriate to differing legal structures and political cultures’. How resilience is to – or could – be built would therefore require further examination in a separate paper, whereby a full examination of the vulnerable suspect within the context of the English (and Welsh) politico-legal system.

Thus far the discussion on how Code C frames the ‘vulnerable’ suspect has largely centred on individual factors, with some minor consideration for situational factors. In the section that follows, it will be argued that vulnerability must be understood in the broader context of detention in police custody. That is, the particularities of detention in police custody or being the subject of a criminal investigation (and therefore being potentially subject to – or subjected to – the criminal sanction), and the various ceremonies and procedures that accompany it, serve to undermine the resilience of the suspect. In doing so, it draws upon the work of Fineman (as discussed above). It will be argued that all suspects are vulnerable, and it is the manner in which the various characteristics of the individual or the situation within which the individual is placed that can deplete, reduce or remove resilience.

### The manifestation of vulnerability during police investigation

As noted above, the purpose of PACE and the Codes is to advise the police on what evidence would or would not be accepted at court or to provide the suspect with various rights and safeguards. There are various ways in which Code C frames vulnerability but this framing is mainly connected with individual (or innate) factors, i.e. through the requirement of a ‘mental health condition’ or ‘mental disorder’ (and then the individual must meet the functional

criteria). Whilst the 'new' Code is undoubtedly an improvement on the 'old' Code (see Dehaghani and Bath 2019) in that it more clearly states the functional criteria, problems with the framing of vulnerability nevertheless remain (see *ibid*). Code C gives little consideration to what is particular about the police investigation that means that additional protection must (or should) be provided, whether that is to the suspect so that he or she provides evidence that is fair and/or can be relied upon at court or to the police so that they know what evidence will stand up to scrutiny and therefore be admitted at court. An AA is not provided to individuals at any other point (other than possibly an intermediary at trial – although see Fairclough 2017) so there must be something about undergoing police investigation that requires that the suspect is protected by an additional safeguard, i.e. individuals do not go about their daily lives with an AA. This section will examine who could be considered vulnerable in the context of being a suspect under police investigation. To do so, the particularities of the police investigation will be explored. Discussion will firstly examine the situation where the police investigation is held or commenced whilst the suspect is held in detention in police custody. In the discussion below, a number of different factors will be examined. The discussion, it should be noted, unfolds in a non-hierarchical sense, i.e. whilst isolation will be discussed first, it is by no means the most important factor.

The first factor to be addressed is that of isolation, which is the reality produced through the act of being detained. The suspect in custody is deprived of his or her liberty during the period of detention (for up to 24 hours in the first instance, although on average between 6 hours (Phillips and Brown 1997) and 10 hours (Skinns 2009)). Whilst deprivation of liberty can be justified on various grounds (see Article 5 ECHR; s 37 PACE), it nevertheless has serious implications on the individual. During his or her time in police custody, the suspect is kept away from his or her family and friends on what is often unfamiliar territory. Whilst the police cannot keep the suspect incommunicado, the suspect is not permitted to interact with family and friends, and although the police may allow him or her to make a phone call, the right to make a phone call does not exist. Instead, the suspect is permitted to have someone *informed* of his or her detention. This is not to say that the suspect has no human interaction during his or her period in police custody. The suspect *may* interact with a healthcare professional (HCP), a forensic medical examiner (FME), an approved mental health practitioner (AMHP), an appropriate adult, or a legal representative. The suspect will also interact with – or be forced to interact with – the police and other police staff such as custody detention officers (CDOs). For some, the reason that they are interacting with these individuals is because they have been

detained and are under police investigation. These types of interactions are also not necessarily voluntary. For example, a suspect may be sent to speak with an HCP, FME or AMHP, but may not necessarily want to do so. Whether willing or not, these conversations are often for a purpose – in relation to HCPs, FMEs and AMHPs, these matters relate to health. These interactions are necessitated because of the circumstances within which the suspect finds themselves. Where an AA is a parent, friend or family member, the interaction may alleviate feelings of isolation but such interactions may be fleeting, i.e. occurring only at certain fixed points of the process (above). Thus, the suspect has minimal human interaction during his or her detention; where interactions do occur, these interactions are either for specific purposes and/or are forced upon the suspect. Isolation may undoubtedly have an effect on the suspect's mental state but can also have more practical implications: as Rock (2007: 109) has highlighted detention can interfere with the suspect's ability to understand rights and entitlements because 'reading in detention ... necessitates reading alone'. Police custody therefore 'dismantles' the support networks upon which individuals may have previously relied in their day to day lives (ibid). Some suspects, whilst able to read independently in the 'outside' world, may feel unable to do so when detained in police custody. This is fundamentally why an individual may need assistance with communication. By removing the suspect from these social resources, resilience is depleted. It is important to remember that this is not the only effect of isolation and indeed isolation interacts with other factors, which will be explored below.

The second factor to be discussed is that of a lack of control. On a basic level, police custody, in addition to depriving the individual of his or her liberty and isolating him or her from family, friends and broader support networks, also removes the ability of the suspect to have control over his or her own life during the period of detention. The suspect is unable to eat and drink, go outside for fresh air or exercise, speak to his or her family or friends (as noted above), or even wash and clean when he or she wishes to do so. His or her bodily functions may also not be within her control (see s 55 PACE): those who are kept within a CCTV cell will have to use the toilet in the knowledge that someone will be watching and those who are not may nevertheless feel uncomfortable in the knowledge that someone can unlock their cell at any time. Those who smoke cigarettes, drink alcohol or use drugs, particularly those who are addicted to substances, may feel utterly out of control. Whilst prescription drugs are permitted within custody, illegal drugs are not. Moreover, prescription drugs are handed out by HCPs, subject to tight restrictions. This occurs within an environment that is wholly unpleasant (see Skins 2011). The cells, constructed so as to minimise the risk of self-harm and suicide (i.e.

ligature points, sharp corners), are dimly-lit, clinical and cold. The smell of the custody suite, and the cells, in particular, can only be described as hostile: the smell is an unusual amalgamation of urine, vomit, faeces, stale blood, (stale) alcohol, body odour, and disinfectant. Thus, the embodied experience in (or of) police custody is important, however, it may also be influenced by the 'environment in which it is embedded' (Thomson, 2018: 1225; see also Travis 2018).

Not only does the suspect experience a lack of control, he or she is also firmly under the control of – and dependant on – the police (and DCOs). For example, it is the custody officer (see PACE s 36 (3)) or the DCO who decides when the suspect obtains food and drink, if and when the suspect gets to make a telephone call, if and when the suspect is permitted to go outside for fresh air and/or exercise, and when the suspect is allowed out of the cell for interview. Power dynamics may also be linked to previous experiences of the police (Wooff and Skinns 2017), and even if control is not explicitly wielded by the custody officer and/or the DCO, it is nevertheless a practical reality. The suspect is *physically* controlled by the police (Hodgson 1994). Suspects must comply with the officer's requests (Holdaway 1983) and can be reprimanded for failing to comply. Detention in police custody can be used for social disciplinary measures and the procedures conducted within police custody, such as the risk assessment and search procedures conducted upon 'booking-in' (when the suspect is asked often intimate questions) can serve as a form of status degradation ceremony (Choongh 1997). One's experience of these mechanisms of social discipline can interact with the experience of embodiment and embeddedness to reduce resilience further. The procedures conducted as part of the custody process can often be intrusive, such the taking of photographs, fingerprints and DNA (ss 61-63 PACE) and testing for the presence of Class A drugs if arrested for a 'trigger' offence (s 57 Criminal Justice and Court Services Act 2000; s 63B PACE; Criminal Justice and Court Services Act 2000). The overarching *purpose* of detention in police custody could also be said to be about control because it places the individual firmly within the territorial control of the police (Hodgson 1994). Detention in custody is convenient for the police as it allows questioning to occur at a time that is convenient for the police, i.e. the police can call upon the suspect to be brought out for interview at practically any point. The police also maintain control over information (Hodgson 1994) and can largely decide what the suspect knows or sees and when. It is therefore no great surprise that police custody has been referred to as a 'mini prison' (Skinns 2011). Here the embodied being is captured and contained within

police custody. Again, that the police control the suspect – in various ways – allows resilience, in the form of social resource, to be depleted.

Police custody also brings with it a degree of uncertainty: uncertainty regarding the progress of the case, uncertainty regarding the length of detention, uncertainty regarding evidence, uncertainty regarding how the case may proceed, uncertainty regarding the legal sphere and around one's rights and entitlements, uncertainty regarding what is occurring on the 'outside' world, and uncertainty regarding one's movements such as when the suspect can eat, drink, be booked out for interview, etc. The suspect's perception may be worse than the 'reality', but his or her perception *is* his or her reality; how the embodied and embedded individual experiences detention is therefore important (rather than how this experience may objectively be rendered). The perceptions of what is happening may further exacerbate any existing feelings of isolation, desperation, and despair (and thus deplete existential resilience – Fineman 2017: 146). Together, dependence on the police and uncertainty regarding the process may reduce the suspect's resilience to the extent that he or she confesses (see Holdaway 1983: 104). It has been suggested that 'all evidence obtained while in custody, and particularly confession evidence, is inherently unreliable' (Nobles and Schiff 2002: 22). Although a confession may be 'explained away' (McConville and Baldwin 1981: 126) – and is therefore 'not nearly as crucial' (ibid: 130) as one may assume – it may be used to construct the case against the suspect (see McConville, Sanders and Leng 1991). Moreover, as it can result in a case not being contested at trial, it is therefore convenient for the police (McConville and Baldwin 1981: 141).

To become engaged in the criminal process is to become engaged in the legal sphere. The legal sphere is undoubtedly alien to most, if not all, suspects, at least in some way. Legal language is often inaccessible. For example, whilst an individual may be able to read the 'Notice to Detained Persons', they may not appreciate what the information herein contained means nor what the legal implications of the information contained herein are. Being brought into custody may disorientate a person so much so that he or she is unable to concentrate on what he or she reads or what he or she is told. Yet, without an in-depth psychological assessment, it may be difficult to ascertain whether someone really has understood the information being provided to them or whether they require additional support (Gudjonsson et al 1993). Even those who are not, at least on the surface, vulnerable according to Code C, may struggle to understand the legal requirements of very 'simple' and 'straightforward' offences such as criminal damage: an offence that can be committed recklessly or intentionally. McConville, Sanders and Leng

(1991: 70-1) highlighted an instance where, during police questioning, a suspect *defacto* admitted to committing the offence of criminal damage. He had been asked whether it might be said that he had hit the wingmirror of a car ‘recklessly’ and he had misunderstood the term to mean ‘accidentally’. In agreeing to hitting the wingmirror ‘recklessly’, he had admitted to committing the offence of criminal damage. Thus, resilience is depleted because of a lack of legal knowledge, something that could be provided through human – ‘education, training, knowledge and experience’ (Fineman 2017: 146) – and social – institutions such as the legal profession, funded by legal aid – capital.

As such, that the suspect does not understand the law is not entirely fatal: a suspect can avail of free and independent legal advice whilst at the police station. This right is provided by s 56 PACE and sought to ‘balance’ the police power to detain (Dixon 1995). Access to free and independent legal advice is important because it ensures that the suspect is aware of the legal nuances of the situation and the legal nuances that constitute criminal offences (see Home Office 1981). However, the uptake of legal advice in police custody remains low (Skinns 2009) and the right is ‘triggered only by a *positive* request’ (McConville, Sanders and Leng 1991: 50). Legal advice may be impacted upon by suspects’ perceptions: some were keen to leave custody and thought that accessing legal advice would delay their release from custody (although, as Skinns’ (2009) illustrated, these delays are often unconnected with legal advice); some believed that if the offence was less serious, they did not require legal advice (and conversations between the police and suspects certainly contributed to this); and those who were innocent declined legal advice because they felt that they had nothing to hide or because the police would infer guilt from the request for legal advice. The police would also use ploys, whether deliberate or not, to dissuade suspects from obtaining legal advice: some officers would omit important information; some would read the rights quickly or only once regardless of whether the suspect understood; and some only provided rights verbally (rather than also on paper, which PACE requires). These perceptions and ploys remove an important (social) resilience mechanism.

Yet, the law also depletes the resilience of suspects in other ways. It does so by not simply being complicated, alien and often impenetrable, but also by undermining legal advice and assistance in other way and by removing one remaining source of control for suspects. Legal advice and assistance have been undermined by various reductions in fees for legally aided work. Solicitors are now paid a fixed fee per police station visit (this includes travel costs and

time spent waiting at the police station). This may make solicitors less likely to want to attend the police station and may also result in more routinised provision of advice (see Newman 2013). The result of this is that suspects may either be unrepresented at the police station or may have access to advice via telephone only (see Dehaghani and Newman 2017). Cuts to criminal legal aid are also impacting upon a solicitor's ability to respond to the needs of their clients as less money results in less time and therefore forces solicitors to adopt a 'one size fits all' approach to their clients (see Dehaghani and Newman 2017).

As outlined above, when in custody, the suspect lacks control, even often-times over his or her most intimate bodily functions. The last remaining source of control was that of the right to remain silent. However, post-Criminal Justice and Public Order Act 1994, the court can draw adverse inferences from the suspect's silence (s 34). This provision does not typically disadvantage the 'professional' criminals (who will nevertheless remain silent), rather it is detrimental to the 'ordinary' suspect and those who are unfamiliar with custody or may struggle to understand processes and information. The most marked impact of the CJPOA was on the greatest source of resilience that a suspect had: legal advice. Lawyers are now, as Quirk (2017) highlights, damned if they advise silence and damned if they do not. As Gudjonsson (2003: 25) argues, even with markedly improved legal provisions, any type of custodial interrogation is coercive when viewed in terms of police power and control.<sup>viii</sup> Therefore, a suspect's willingness to exercise the right to silence in the face of adverse inferences may differ depending on who the suspect is (and, indeed, so too may one's knowledge of the broader process relating to the exercise of the right and how this plays out within the criminal process). Nevertheless, the intention of adverse inferences was to reduce the resilience of the suspect when asked questions within the investigative setting.

Thus far discussion has centred on detention in police custody; however, a number of these issues also arise with the 'voluntary' interview. 'Voluntary' interviews refer to those that are conducted when individuals attend the police station in order to help the police with their inquiries. 'Voluntary' attenders are permitted to leave unless placed under arrest. That said, refusal to attend 'voluntarily' can result in arrest, as can a refusal to answer questions whilst 'voluntarily' attending (PACE s 29). During the voluntary interview – which is anything but voluntary (Kendall 2018) – the 'suspect' is not locked-up but is nevertheless on police territory. Voluntary attenders may well be isolated, although they are not necessarily isolated for a long period of time. They may also lack some element of control: they may be allowed to come and



go as they wish but may also be arrested and detained if they fail to comply with an officer's questions or requests. They are also typically on police territory and are subject to the uncertainty of the criminal process. Whilst the safeguards that apply to the 'detained' interview also apply to the 'voluntary' interview (see Home Office 2018: para 3.21; Home Office 2019), the resilience of the 'voluntary' attender may be further depleted by the fact that little is known about voluntary attenders and it may be difficult to ensure compliance with the various safeguards that apply. This is because the process is not overseen by anyone other than the interviewing officer, i.e. there is no custody officer present such as when the suspect is detained. Thus, resilience is depleted due to a lack of independent oversight but also through the implications of the investigation (potential criminalisation) and the ability of the police to arrest a voluntary attender who does not comply with police requests.

Although in the context of daily life most individuals may be able to make choices that are advantageous to their long-term well-being (i.e. placing long-term implications over short-term gains), custodial detention has a detrimental impact on the ability of suspects to make decisions pursuant to their own interests (see also Irving and McKenzie 1989: 24). When in custody, the suspect is dependent on the police – the police are responsible for welfare, deciding when the suspect eats, when the suspect is interviewed, when he or she can leave his or her cell, when he or she can leave custody, and so on. Power dynamics between the police and the 'prisoner' are wholly unbalanced, with the scales tilted firmly in favour of the police. Upon entering police or criminal justice territory – whether this be for the 'detained' interview or the 'voluntary' interview – resilience is depleted. This particular sphere is not only an environment in which the suspect has no control over others, it is also a space where something (the State, the justice system, the criminal process, or circumstance) or someone (the custody officer, the detention officer, the arresting officer, the investigating officer, the Inspector, etc.) has control over the suspect. The control and power dynamics operate to further deplete resilience.<sup>ix</sup> Vulnerability, as it exists under Code C, does not take into account, at least explicitly, any of the factors discussed within this section. Rather, it locates vulnerability within the person rather than seeing vulnerability as the interplay between individual and circumstance or, put another way, vulnerability as something that is omnipresent and that individual factors and/or the circumstances interact in such a way so as to deplete resilience. Fineman's vulnerability theory alerts us to the ways in which the resilience of the embodied and embedded human being is depleted. Suspects, as human beings, are vulnerable. As an embodied human being, the suspect

is constantly susceptible to physical and emotional harm, something which is particularly pronounced in police custody.

That said, a suspect's embedded and embodied experience may also be a source of strength such as in the case of the 'professional criminal' who remains silent despite the possibility of adverse inferences. Thus, the suspect is also embedded within complex power dynamics and relationships; police custody, the voluntary interview, and the criminal process operate to deplete the suspect's resilience. In recognition of this, the Code could then suggest that all suspects are vulnerable and thereafter highlight the myriad ways in which resilience is depleted (discussed throughout this paper). Fineman's vulnerability analysis allows the debate to be reframed in a manner that is less stigmatising, highlighting that it is not one group or specific groups of individuals who are vulnerable, but rather that all suspects are vulnerable and that it is the circumstances of the police custodial process, investigative process and wider criminal process that deplete or decrease resilience. This reframing is key to interrogating state-citizen relationships within police custody (for further discussion on police powers and citizens' rights see Skinnis 2019) and for making the case that Code C must further – and explicitly – recognise the myriad ways in which a suspect's resilience is depleted. Thus, the starting point must be that all suspects are vulnerable, and thereafter Code C should consider the ways in which resilience is depleted through the various process. By doing so, the focus is not on individual deficits, but instead on a process that is inherently punitive, controlling and/or degrading.

#### Building and promoting resilience – considering the possibilities

The resilience of the suspect can be built in a number of ways. For example, the police custody setting could be made more public and thus remove or reduce the isolation faced by or experienced by the suspect. Further, police custody could only be used where absolutely necessary. This would require that s 37 of PACE (which relates to the necessity for detention) be strengthened and that monitoring and oversight of the use of police custodial detention be better improved (as Dehaghani (2017) has noted, police custody officers do not always consider whether detention is necessary; instead detention is often 'rubber-stamped' and officers may also assist those making arrests when establishing sufficient grounds to detain). Leading on from this, voluntary interviews could be used but their use must also be accompanied by better oversight, monitoring and recording. Where custody must be used, police forces should improve the material conditions (for example, see Skinnis' work on good police custody).

Access to legal advice should then also be bolstered through an increase in police station fees, where lawyers would be paid for the work done rather than at a fixed rate. Suspects could also be provided with an appropriate adult (or similar) to improve their resilience, although such a safeguard must also be effective and appropriate (see Dehaghani in progress). Improved safeguards may then also be accompanied by increased disclosure duties on the police. Such duties would remove or reduce at least some of the uncertainty associated with one's case and may also improve the provision of legal advice. Increased judicial oversight of the police investigative process and harsher penalties for non-compliance may also bolster the resilience of suspects (at present, most breaches of PACE and the Codes of Practice result in, at best, exclusion of evidence at trial, which is not always an effective remedy given that many cases are, in effect, tried at the police station (Jackson 2016)). More generally, public legal education regarding the criminal process and, more specifically, the police investigative process could further bolster the suspect's resilience, as it may remove some of the mystery surrounding these processes. The question remains, however, as to whether promoting the resilience of the suspect is possible within the vastly under-funded criminal justice system. As such, any mechanisms that seek to build resilience must also be accompanied by increased funding of – and commitment to the adequate functioning of – criminal justice institutions. Further, as Garland and Travis (2018: 591) have highlighted, state responsibility to provide resilience requires that the state 'actively monitor institutions in terms of their success at promoting resilience and to intervene where they are not operating in an egalitarian manner'. Thus, the process and its adequate functioning must also be monitored.

### Conclusion: reframing the vulnerability of suspects

Vulnerability typically 'has connotations of weakness and is generally applied by members of a powerful majority to oppressed groups' (Roulstone and Sadique, 2013: 33; see also Brown 2015; Munro 2017; Munro and Scoular 2012). Within the context of the criminal process, vulnerability can take on different meanings, purposes and forms, and is most certainly status dependant (see Singh 2017; see also, for example, Youth Justice and Criminal Evidence Act 1999, Chapter 1). Code C, whilst careful not to perpetuate negative notions of vulnerability (see Home Office 2018: Notes for Guidance 11C), does not properly interrogate (a) whether those falling outside the category of vulnerable may also produce unreliable evidence and act contrary to their own best interests, and (b) whether those within this category are always incapable of acting in their own best interests and providing reliable evidence. Further, the

current focus of Code C, i.e. predominantly on innate vulnerability, **can** disempower, condescend, and ‘other’ those classed as ‘vulnerable’, suggesting that they are somehow defective, weak, and unable to withstand scrutiny.<sup>x</sup> The term ‘appropriate adult’ is also problematic as it suggests that the suspect is neither appropriate nor adult. The acceptance of a universal, shared sense of vulnerability may be advanced to overcome this problem – it may ‘act as a unifying theoretical catalyst through which society could potentially be transformed’ (Brown, 2015: 36; see also Beckett 2006).

This reframing sees vulnerability as something that is inherent to the human condition and instead recognises and highlights how resilience is depleted or removed by the circumstances and, in particular, the interplay between the individual and the circumstances (i.e. the embodied and the embedded, which are inextricably bound together). Through accepting our shared vulnerability, we can move towards an accepted (or acceptable) reconceptualisation. Thus, the Code (and the wider debate on who is ‘vulnerable’ and why) should be reframed so as not to place the ‘problem’ with the individual but, rather, with the process; a process that is deliberately punitive (Feeley 1992). For example, someone with Autism Spectrum Disorder (ASD) may not necessarily lack resilience in his or her day-to-day life; he or she may lead a full life and be able to communicate his or her needs or wishes with those around him or her with relative ease and may be able to act in his or her own best interests (whether that means telling the truth, remaining silent, or providing misleading information). Rather, it is because the individual is placed in a situation that deliberately depletes him or her of various forms and sources of resilience that a safeguard (here, the AA safeguard) is (or may be) provided to ameliorate the reduction of resilience. Practically speaking, therefore, this may alert custody officers – who make the decisions on whether to apply the AA safeguard – to the fact that whilst a highly intelligent individual with ASD may act in his or her own best interests in the outside world, detention in custody (and all that goes along with it) may serve to undermine his or her resilience such that he or she may not act in his or her own best interests (see Dehaghani 2019).

It is necessary to understand the impact and effect of detention in police custody and, more generally (such as also the case in a ‘voluntary’ interview), the potentiality for criminalisation. Code C places great emphasis on individual factors (although does consider, at least to some extent, the situational). This paper has drawn attention to the myriad ways in which resilience is depleted through being an embodied and embedded human being who is the subject of –

and/or subjected to – the police investigation, the wider criminal process, and the criminal sanction. In doing so, it contributes to socio-legal debates which seek to understand the ways in which wider structural issues and the various mechanisms of legal procedure and process can reduce or deplete the resilience of the individual (in this case, the suspect).

Further, it has drawn attention to the peculiarities of detention and, more broadly, the police investigation (such as in the case of a ‘voluntary’ interview), which are, inter alia, isolation, deprivation of liberty, unbalanced power relations between the police and the suspect, the suspect’s lack of control, and the ability of the police to wield various forms of control over the suspect. A vulnerability analysis allows for recognition of the situational factors – and the ways in which resilience is depleted – and thus more accurately reflects what is happening within this sphere. Yet it also moves discussion away from the individual in a manner that is less stigmatising. It can, moreover, urge the state to be more responsive through the promotion of resilience mechanisms. As a note of caution, however, it is undoubtedly the *purpose* of an adversarial criminal justice process – such as that in England and Wales – to deplete, reduce or remove resilience of the suspect or defendant. Thus, perhaps vulnerability theory through its challenge of liberal legal notions of responsibility, can also offer a means through which to reconceptualise the criminal process. This paper has outlined how resilience is depleted in police custody and the voluntary interview and has suggested ways in which it can be bolstered. Further work could, however, centre on how the criminal justice process could be reconceptualised and/or provide a more detailed exploration of whether and how resilience can be provided or bolstered by the law within the criminal process or within the investigative setting.

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<sup>i</sup> Sections 76 and 78 may apply to all defendants. Section 77 is restricted to those deemed 'mentally handicapped' (see PACE).

<sup>ii</sup> Unlike PACE (which is legislation), Code C is 'soft law' and, as such, breach cannot give rise to criminal or civil sanction (see PACE s 67 (10)) (although ss 76-78 may provide a remedy for breach).

<sup>iii</sup> The focus is on 'suspects' rather than detainees more generally because the AA provision relate only to those detained for investigation rather than for other reasons such those

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detained under the Mental Health Act 1983 or for immigration purposes. The term suspect is, moreover, problematic (McConville and Hodgson, 1993: 168).

<sup>iv</sup> The implementation of the AA safeguard and the operationalisation of the safeguard in respect of adult suspects has been examined elsewhere (Bean and Nemitz 1995; Bradley 2009; Brown, Ellis, and Larcombe 1992; Bucke and Brown 1997; Gudjonsson *et al* 1993; Irving and McKenzie, 1989; Medford, Gudjonsson and Pearse 2003; National Appropriate Adult Network 2015; Palmer and Hart 1996; Phillips and Brown 1998; Dehaghani 2016 2017; 2019). For other/additional approaches to inherent vulnerability see Butler (2004); MacKenzie. Rogers and Dodds (2014); MacKenzie (2014); Turner (2006). See also MacKenzie (2014) for a detailed critique of Fineman.

<sup>v</sup> The author was heavily involved in these changes and the processes leading up to them – see Dehaghani and Bath 2019.

<sup>vi</sup> A high proportion of suspects have a low IQ (Gudjonsson 2010).

<sup>vii</sup> The author had suggested to the Home Office that the definition of acquiescence and compliance be included within the Code. The Home Office accepted that acquiescence should be included but did not believe that compliance was so sufficiently different from acquiescence so as to warrant its inclusion.

<sup>viii</sup> Gudjonsson (2003: 35) also suggested that coercion in police interviews might lead to Post-Traumatic Stress Disorder, however, a direct link has yet to be established.

<sup>ix</sup> Interestingly, custody officers also felt vulnerable by virtue of their role. Thus, even in a position of relative power, custody officers nevertheless felt under-attack and helpless, especially when dealing with situations that they felt were beyond their control. For detainees and suspects, this vulnerability is even more pronounced.

<sup>x</sup> Similarly, ‘vulnerable’ individuals may reject the label – see Bartkowiak-Theron and Asquith 2015: 95. See also Munro (2017) for a critique of vulnerability.