THE VULNERABLE SUBJECT ON TRIAL: ADDRESSING TESTIMONIAL INJUSTICE IN THE RULES OF EVIDENCE

HELENE LOVE*

Abstract

Witnesses are essential to the fact-finding mission of common law trials. This paper suggests that to reflect the inherent vulnerability of witnesses, the rules that control the admissibility of evidence during a trial should be organized around Martha Fineman's vulnerability theory. This argument begins by explaining how common law trials are based on the assumption of a liberal legal subject, a person who is able to appear in a courthouse and give in-person testimony months or even years after an initiating event gives rise to a legal dispute. In so doing, trials are failing to provide an equal opportunity to individuals who, because of their advanced age, may be unable to meet this standard. I then consider how vulnerability can be incorporated into rules of procedure and evidence by comparing Canada and the United States in their approaches to competence, hearsay, and cross-examination. For competence, incorporating vulnerability theory means moving away from age-based distinctions towards standards-based assessments of witnesses. Common law courts could build flexibility into determinations of admissibility to reflect vulnerability theory in hearsay analyses. In relation to the requirement of in-person cross examination, I advocate for testimonial accommodations to improve the resiliency of vulnerable witnesses. Allowing the rules of evidence to respond to vulnerability in these ways does not diminish the reliability of the fact-finding process of common law trials. Rather, by building resiliency in witnesses, the justice system is better equipped to deliver a just result on the basis of reliable evidence.

INTRODUCTION

Witnesses play a central role in common law trials.[1] All evidence, even real evidence, which exists independently of any statement of a witness, cannot be considered in a legal dispute at common law unless a witness identifies it and establishes its connection to the matters in dispute.[2] Given the central role that witnesses play, the common law trial is, at its core, a human process. As a human process, the rules that control the admissibility of evidence during a trial can, and should, be organized around the Martha Fineman's vulnerability theory.

*Helene Love, LLB, LLM, PhD, Lecturer, School of Criminology, Simon Fraser University
[1] *R v Schwartz*, [1988] 2 SCR 443, [59].
[2] Ibid.

Fineman's central thesis is that vulnerability is a "universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility."[3] All people are "vulnerable subjects" who are prone to dependency, to various degrees, across the lifespan.[4] While vulnerability is tied to dependency, not age, natural aging introduces physical and cognitive risks to the ability to give accurate testimony in person during a trial that may make older adults increasingly vulnerable along this spectrum. Conditions that are more prevalent with advanced age that increase the vulnerability of older witnesses include the increased risk of dying prior to a trial; changes to the sensory organs and the brain; mobility issues; and strokes and dementia.[5] These risks disproportionately interfere with older witness's ability to accurately share their knowledge in a common law trial setting.[6] By shifting the inquiry to the state's ability to respond to the vulnerability that is uniquely experienced by every human to different degrees, Fineman's theory improves upon traditional discrimination analyses by taking into account social inequality beyond recognized categories such as age, race, or gender.[7]

Incorporating vulnerability theory into the rules of evidence means recognizing that witnesses, the basis for fact finding in a trial, are vulnerable subjects and that their inherent vulnerabilities should not take away from the ability to meaningfully participate in a trial. In common law trials, the rules of evidence control whose stories are allowed to form the basis of fact finding in a legal dispute. These rules are based on the belief that the most reliable evidence comes from the in-person cross examination of a witness during a trial.[8] The problem with this assumption and the rules that are based around it is that it presumes that witnesses are "autonomous, independent, and full functioning adults" who Fineman defines as the "'iberal legal subject'.[9] If a witness cannot

[3] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law & Feminism* 1, 8.
[4] Ibid.12.
[5] See full discussion of these risks in Helene Love, 'Seniors on the Stand: Accommodating Older Witnesses in Common Law Trials' (2019) 97(2) *Canadian Bar Review* [forthcoming].
[6] Ibid. 1.
[7] Ibid. 3. See also Nina Kohn, 'Vulnerability Theory and the Role of Government' (2014) 26 *Yale Journal of Law & Feminism* 1, 24 – 25.
[8] James H. Chabourn, Ed., *John Henry Wigmore Evidence in Trials at Common Law* (Boston: Little Brown & Co, 1974), § 1367.
[9] Martha Albertson Fineman, 'Introducing Vulnerability' in Martha Albertson Fineman and Johnathan Fineman Eds, *Vulnerability and the Legal Organization of Work* (Abingdon, UK: Routledge, 2017), 3, also Fineman (n 3), 20 – 21: In the Western liberal tradition we have built our notions of what constitutes equality, as well as the appropriate relationship between state, institutional, and individual responsibility around the construct of a political subject who is fully capable and functioning and therefore able to act with autonomy… Competence is assumed and differences

attend a trial, or if they perform poorly during this in-court testing of their evidence, their testimony is either excluded or not given due weight. Through these rules of evidence, the trial process is privileging the voices of some, and discounting the voices of others, failing to provide meaningful equality of opportunity and access in terms of being able to participate, and have testimony heard, in a trial.

Participation in a trial involves more than the opportunity to be present in the physical space of the courtroom. Participation necessarily involves the opportunity to be heard and have evidence considered fairly by a judge. To have testimony considered fairly by a judge means that testimony should be accorded its due weight. This idea of having testimony considered fairly maintains judges' discretion to weigh evidence. Testimony that is unreliable because a witness is lying or has a poor memory of events should still not have probative value in a trial because that information does not advance the ability of the trial to uncover what actually happened when reconstructing past events. When unreliable information is lost, the loss does not frustrate the truth-seeking function of the trial, rather, keeping out poor sources of information advances it. But when a witness who possesses accurate knowledge of the events in dispute cannot attend court in person or when they perform poorly on cross examination because they are nervous or intimidated by the questioner or the process, the exclusion or discounting of testimony represents the loss of reliable information that could have assisted the judge in coming to a just resolution of a legal dispute.

Discounting the testimony of those individuals who, by reason of their inherent vulnerability, cannot make it to a trial or perform well at cross examination has serious personal and practical consequences. On a personal level, the ability to speak and have that testimony formally recognized is tied to human dignity because the validation of a person's knowledge is fundamental to social connectivity.[10] If vulnerability negatively impacts a person's ability to tell their story in court, or alternatively, results in any kind of credibility discount to individuals who give testimony in a trial then this is characterized as an injury to human dignity known as 'testimonial injustice'.[11]

---

in power, circumstances, or actual ability are ignored. Thus constructed, this ''liberal subject'' is at the heart of political and legal thought.'

[10] Lorraine Code, ''Incredulity, Experimentalism, and the Politics of Knowledge'' in *Rhetorical Spaces, Essays on Gendered Locations* (Routledge, 1985), 58 and Kay Pranis, 'Building Justice on a Foundation of Democracy, Caring and Mutual Responsibility' *Restorative Justice Planner* (Minnesota: Department of Corrections, 1998, 2001) 2.

[11] Recent work by philosopher Jennifer Lackey builds on Fricker's theory of testimonial injustice, terming the kinds of systematic disbelief that may be attributed to groups as a ''credibility deficit' or 'being treated as less worthy or

When testimonial injustice occurs, not only is the individual harmed but so too is the legal system that fails to take on that knowledge.[12] Without the knowledge that the speaker could have shared, common law trials are basing legal outcomes on a distorted version of the facts. The practical consequence is that it introduces the risk that legal disputes are decided without the benefit of the most complete set of facts possible, and that trial outcomes are unjust. Failing to deliver just outcomes adversely affects the operation and perception of fairness of the justice system.[13] As a result, vulnerable subjects who cannot participate in trials may not have the same access to the formalized dispute resolution system that liberal legal subjects do.

In order to ensure that citizens have the equal opportunity to participate in trials, the common law rules of evidence should consider vulnerability as an organizing principle. This argument proceeds in two parts. In Part I, I expand on the problem that common law trials are based on the assumption of the liberal legal subject. As a result, common law trials are failing to provide the equal opportunity to have testimony form the basis of fact finding in a legal dispute to individuals who may experience vulnerability. In Part II, I explore three examples of this issue: the rules governing competence, the rule concerning hearsay (out of court statements, which are generally inadmissible in common law trials), and the testing of evidence through cross-examination. Competency rules include age-based presumptions that perpetuate unhelpful stereotypes about witnesses. Incorporating vulnerability theory into competency rules means a shift away from age-based distinctions in these statutes to instead focus on standards-based assessments of competence. For the rule against hearsay, I suggest that common law courts build flexibility in their determination of when a statement should be admitted. For the requirement of in-person cross examination, I advocate for rules that provide for testimonial accommodations to improve the resiliency of vulnerable witnesses. I conclude that incorporating standards-based approaches and flexibility into

belief or trust than the evidence suggests.' Jennifer Lackey,"Norms of Credibility' (2017) 54(4) *American Philosophical Quarterly* 323,324.)

[12] Miranda Fricker, *Epistemic Injustice: The Power and Ethics of Knowing* (Oxford, UK: Oxford University Press, 2007) at 43 writes: 'There is of course a purely epistemic harm done when prejudicial stereotypes distort credibility judgements: knowledge that would be passed on to a hearer is not received. This is an epistemic disadvantage to the individual hearer, and a moment of dysfunction in the overall epistemic practice or system. That testimonial injustice damages the epistemic system is directly relevant to social epistemologies such as Goldman's 'veritism',12 for prejudice presents an obstacle to truth, either directly by causing the hearer to miss out on a particular truth, or indirectly by creating blockages in the circulation of critical ideas.'

[13] *Ibid*. Deborah Tuerkheimer, 'Incredible Women: Sexual Violence and the Credibility Discount' (2017) 166 *University of Pennsylvania Law Review* 1 provides a practical example of credibility discounting harming a system by arguing that the criminal justice system which systematically discounts the accounts of sexual violence survivors prevents the effective criminal prosecution of sexual assault.

the rules of evidence does not diminish the reliability of the fact-finding process of common law trials. Rather, by building resiliency in witnesses, we strengthen the ability of the justice system's ability to accomplish its broader objective of delivering a just result on the basis of reliable evidence.

I: The Adversarial Trial and the Liberal Legal Subject

In order to respond appropriately to the citizens it is meant to serve, the state is required to provide meaningful equality of opportunity and access to those systems that it has put in place.[14] In common law jurisdictions, the formalized system that has been put in place to resolve legal disputes is the adversarial trial. In this part, I explain how in setting up a system that is centered on the ability to be cross-examined in person during a trial, common law trials are failing to provide equal access to justice through the courts to vulnerable subjects. In the paragraphs that follow, I first describe the historical basis for the common law trial's preference for in person testimony. Then, I make the case for the application of vulnerability theory to the rules of evidence in a trial by outlining the ways the assumptions based on the liberal legal subject are problematic for individuals who fail to meet this standard because of their vulnerability. By discounting the stories of individuals who cannot effectively be cross examined in person, the common law trial may be failing to provide justice to those it is meant to serve.

A *The historical basis for the requirement of in-person testimony*

In the adversarial trial, the truth is thought to emerge through the competing arguments advanced by skilled legal advocates. The role of the judge is that of impartial arbiter, who is required to stay detached and unemotional throughout the process.[15] All of the evidence in a common law trial is admitted through witnesses, a requirement rooted in the 16th and 17th century trials by jury.[16] At that time, an animating concern was that juries would rely on rumors and other unreliable gossip as a basis for legal responsibility. The requirement that witnesses testify in person was introduced as a way of safeguarding the quality of information upon which juries based

[14] Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' *Emory University School of Law Public Law & Legal Theory Research Paper Series*, Research Paper No. 10-130, 17.
[15] Jeffrey M. Shaman, 'The Impartial Judge: Detachment or Passion?' (1996) 45 *DePaul Law Review* 605, 605.
[16] Mirjan Damaska 'Evidentiary Barriers to conviction and two models of criminal procedure: a comparative study' (1973) 121 *University of Pennsylvania Law Review* 506, 583.

their verdicts.[17]

Another justification for the common law trial's requirement for in-person testimony is the partisan nature of adversarial trials and the idea that the most reliable evidence is given by a witness, under oath, tested through cross-examination. [18] During examination in chief, witnesses are guided through their evidence by the party that called them to the stand, so their testimony may omit facts that are significant to the opposing party's position. There may have been gaps or unfavourable facts that were intentionally missed by a witness, which subsequently can be uncovered only by being cross-examined by the adverse party. That witnesses give their testimony in person is important because the ability of a judge or jury to see a witness's demeanour as they are cross-examined is thought to be key to assessing their credibility.[19]

A third issue that the in-person testimony requirement was meant to address was the risk of miscarriages of justice, where verdicts were based on unreliable out of court hearsay statements. This requirement stems from historical abuses of power, such as the 1603 trial and execution of Sir Walter Raleigh who was convicted of treason based on an *ex parte* affidavit as a justification for the requirement that witnesses against an accused be required to testify during a trial.[20] Having witnesses attend court in person was a way to prevent injustices based on falsified evidence and trumped up charges.[21]

Despite growing skepticism about the efficacy of the oath, demeanour, and cross-examination at ensuring the reliability of witnesses - testing witnesses through courtroom cross-examination continues to be thought of as the best tool for fact finding in a trial. [22] In the criminal context, the ability to see and hear a witness as they provide testimony has been tied to the constitutional right

[17] Sidney Lederman, Alan Bryant, Michelle Fuerst, *The Law of Evidence in Canada* (Toronto, Canada: LexisNexis Canada, 5th ed, 2018) 250.
[18] Jenny McEwan, *Evidence and the Adversarial Process* (Oxford, UK: Blackwell, 1992), 16.
[19] *R v NS*, 2012 SCC 72, 25 – 26.
[20] *Crawford v Washington*, 541 U.S. 36 (2004) [*Crawford*]. See also John Grimm, 'A Wavering Bright Line: How *Crawford v Washington* Denies Defendants a Consistent Confrontation Right' (2012) 48(1) *American Criminal Law Review* 185, 202.
[21] This historical basis underlying the preference for face to face confrontation are summarized in *Crawford*, Ibid
[22] For example, George Fisher, 'The Jury's Rise as Lie Detector' (1997) 107 *Yale Law Journal* 575, at 580 and Joseph Rand, 'The Demeanor Gap: Race, Lie Detection, and the Jury' (2000) 33(1) *Connecticut Law Review* 1 at 3 – 4, or even judges in decisions such as *R v Hemsworth*, 2016 ONCA 85 and *R v Rhayel* 2015 ONCA 377.

to a fair trial in Canada.[23] In the United States, the right to confront an adverse witness is arguably even more pronounced and is contained as an independent positive right in the confrontation clause of the *Bill of Rights*, which states that 'in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him.'[24]

The practical implications of the common law trial's preference for in person testimony is to diminish or exclude the voices of those who are unable to attend court and provide effective responses to cross examination. As will be explored in detail in Part II, when a witness cannot testify in a trial, the rule against hearsay makes their evidence presumptively inadmissible, which means that it is not supposed to be considered by a judge unless a legal exception applies.[25] If a witness does testify in person, but because of cognitive decline or other vulnerability, fails to communicate their evidence in a cogent or convincing way – their testimony will be discounted. The problem is that, in choosing the adversarial trial as the way to resolve legal questions, the state has sanctioned a mechanism that privileges the voices of some and discounts the voice of others. This bias perpetuates testimonial injustice in the system of dispute resolution it has imposed on its citizens.

B *The case for vulnerability theory*

The adversarial trial is the archetype of the western liberal legal tradition. Trials are built on the assumption of a certain type of witness, the 'autonomous, independent, and full functioning adult' that Fineman refers to as the liberal legal subject.[26] The preference for state non-interference is embodied by the judge, who assumes the role of the impartial arbiter in this competition between opposing sides.[27] As described in the previous section, the common law rules of evidence and procedure are built around this requirement of in person participation and the impartiality of judges. The problem that arises is that many people are not 'autonomous, independent, and fully functioning adults' and, because of the adversarial trial's basis in liberal western traditions, various rules of procedure and evidence have developed to prevent out of court statements from being

[23] *NS* (n 19) [21].
[24] *United States Constitution*, Amend. VI.
[25] *Crawford* (n 20).
[26] Fineman (n 9) 3.
[27] Shaman (n 15).

considered in a legal dispute. Among them are the rules relating to the competence to stand trial, the rule prohibiting the admission of any out of court statement for the truth of its contents (known as the rule against hearsay), and the use in-person of cross examination as a means of testing witnesses.

By requiring that its citizens resort to adversarial trial processes in common law systems such as Canada and the United States, the state has curtailed the ability of all citizens to participate equally in trials. People who cannot attend a trial and be effectively cross examined have their voices discounted, or excluded. While certain jurisdictions have provided rules to help to include testimony from certain types of vulnerable people (e.g. youth, disability, old age) by creating special rules for certain classes of people, these rules fail to be attentive to inequality beyond recognized categories.[28] As others have critiqued in the context of social policy more generally, statutes based on identity categories fail to achieve meaningful social justice because they treat vulnerability as limited to certain populations which obscures the fact that not all persons within protected populations are disadvantaged, while at the same time mistakenly treating as invulnerable people who are not members of groups that are recognized as deserving special

[28] For example, prior to *Crawford* (n 20) deemed such statutes unconstitutional, a number of states had passed special rules allowing for the admissibility of hearsay for children (Ala. Code. §15-25-32 (2014); Alask. Stat. §12-40-110 (2014); A.R.E. 804(a)(6) (2014); Cal. Evid. Code §1228, §1360 (2014), Colo. Rev. Stat. (2014) §13-25-129; Del. Cod. Ann. Tit. 11 §3513 (2014); Fl. Ev. Code, §90.803(23) (2014); O.C.G.A. § 24-3-16 (repealed by Laws 2011, Act 52, § 2, eff. January 1, 2013); 725 Ill. Comp. Stat. 115-10 (2014); Ind. Code. Ann. §35-37-4-6 (2014); Maryland Code, Criminal Procedure 11-304 (2014); Mass. Ann. Laws Ch. 233 §81; Minn. Stat. §595.02, Subd. 3 (2014); M.R.E. 83(25) (2014); Mo. Rev. Stat. §491.075; Mont. Code. Ann. §46-16-220 (2014); Nev. Rev. Stat. Ann. §51.385 (2014); N.J.R.E. 803(c)(27)(2014); N.D.R.E. 803(24) (2014); O.H.R.E. 807 (2014); Okla. Ann. Stat. Tit. 12, §2803.1 (2014); O.R.R.E. 803(18a) (2014); 42 PA. CONS. STAT. ANN. §5985.1 (2014); R.I. GEN. LAWS § 40-11-7.2 (2014); S.C. CODE ANN. §§ 17-23-175(2014); S.D. Codified Laws.§ 19-16-38 (2014); Tenn. Code. Ann. §24-7-123 (2014); Tex. Crim. Pro. Art. 38.071, 38.072 (2014); U.T. RCRP Rule 15.5 (2013); V.T.C.P. 26; V.T.R.E. 804a; Va. Code § 19.2-268.2 (2014); Wash. Rev. Code Ann.§9A.44.120 (2014); Wisc. Stat. Ann.§ 908.08 (2014). Connecticut, District of Columbia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, New Hampshire, New Mexico, New York, North Carolina, West Virginia, Wyoming, and the Federal jurisdiction do not have specific child hearsay exceptions. See also National District Attorneys Association, *Rules of Evidence or Statutes Governing Out of Court Statements for Children* (2011) online: <https://ndaa.org/wp-content/uploads/Competency-of-Child-Witnesses2011.pdf>. Other states created statutory hearsay exceptions for disabled adults (Fl. Ev. Code, §90.803(24); Minn. Stat. §595.02, Subd. 3 (2014); Or. Rev. Stat. §40.460; S.C. Code Ann. §§ 17-23-175(2014); V.T.R.E. 804a) or for 'elderly and infirm' individuals (Flo. Ev. Code, §90.803(24); Del. Code Ann. §3516; Cal. Ev. Code §1380; Illinois Comp. Stat. Annot., Crim. Pro. §5/115-10.3; Ind. Code. Ann. §35-37-4-6 (2014); Or. Rev. Stat. §40.460. Since Florida (in *Conner v State*, 748 So. 2d 950,959 (Fla. 1999) [*Conner*]) and California (in *People v Pirwani*, 14 Cal. Rptr. 3d 673, 694 (Ct. App. 2004) [*Pirwani*]) courts deemed these statutes unconstitutional, there have been no further provisions in other states or reliance on these statutes where they exist.

attention.[29] This critique of the over-and-under inclusiveness of identity based policies is equally applicable to evidence laws that targets certain classes of witnesses for special treatment.

The case for vulnerability theory in the laws of evidence focuses on the state's obligation to provide equal opportunity for all witnesses to participate in a trial. As mentioned in the first part, participation is more than just having access to the dispute resolution processes mandated by the state. Participation means having the ability to meaningfully participate in a trial and having due consideration given to testimony as a basis for fact finding in a legal dispute. By choosing the adversarial trial as the means of resolving legal disputes and creating rules of evidence based on the liberal legal subject, the state has conferred a relational advantage on individuals who are not vulnerable because they are able to attend a trial and provide effective responses to cross examination.

The relational advantages of being able to have testimony legally recognized during a trial are anchored in human dignity and power imbalances.[30] As Miranda Fricker and others have advanced, the ability to have knowledge recognized is connected to a person's feeling of self worth and dignity.[31] Kay Pranis elaborates how storytelling is a function of power, anchored in social connectivity:

> To feel connected and respected we need to tell our own stories and have others listen. For others to feel respected and connected to us, they need to tell their stories and have us listen. Having others listen to your story is a function of power in our culture. The more power you have, the more people will listen respectfully to your story. Consequently, listening to someone's story is a way of empowering them, of validating their intrinsic worth as a human being.[32]

[29] Fineman (n 3) 3 – 4; Margaret I. Hall, 'Mental Capacity in the (Civil) Law: Capacity, Autonomy and Vulnerability' (2012) 58(1) *McGill Law Journal* 1,29, and Kohn (n 7) 12.
[30] Termed 'relational authority' when a speaker is perceived as being trustworthy and credible they are provided with advantages not available to those who are perceived as being less credible. See for example, Miranda Fricker, 'Rational Authority and Social Power: Towards a Truly Social Epistemology' in Alvin Goldman and Dennis Whitcomb,eds. *Social Epistemology: Essential Readings* (Oxford, UK: Oxford University Press, 2011) 60.
[31] For example, Jennifer Andrus, *Entextualizing Domestic Violence: Language Ideology and Violence against Women in the Angle-American Hearsay Principle* (Oxford, UK: Oxford University Press, 2015); Code, above note 10; Fricker (n 12); Tuerkheime (n 13).
[32] Pranis (n 10) 2.

By controlling which stories are given legal recognition, the laws of evidence control the social transfer of information, creating and perpetuating power imbalances.[33] This relational advantage may easily translate to a material advantage as the privileging of the invulnerable voices allows invulnerable people to dictate the facts upon which a judge bases their decisions, and ultimately, the outcome of legal disputes.

Taken to its end point, knowing the challenges that providing testimony in a courtroom will present or knowing that they will not be believed may prevent vulnerable subjects from even engaging in with the legal system in the first place.[34] When this happens, vulnerable subjects do not avail themselves of the formal dispute resolution processes mandated by the state. The state is not providing equal opportunity or access to justice. The case for the incorporation of vulnerability theory exists in this failure. In the next part, I give practical examples of the shortcoming of the common law trial in addressing vulnerable subjects and suggest how rules can be developed in a manner that is consistent with vulnerability theory. In incorporating principles of vulnerability theory into the rules of evidence, common law trials will represent those people it is meant to serve more effectively and equitably.

II Vulnerability and the Law of Evidence

By requiring that all of the evidence in a trial be admitted through witnesses, and then further requiring that those witnesses testify in person and submit to cross examination, the adversarial trial privileges the voices of invulnerable people. In this part, I focus on how the rules concerning competence, the rule against hearsay, and the testing of evidence through in-court cross examination are all mechanisms through which this testimonial injustice is perpetrated in the adversarial trial. For each rule, I compare evidence law in Canada and the United States. While these close neighbours are both common law jurisdictions, their different approaches to applying these rules illustrate different ways the rules inherited from the UK common law tradition can be incorporated into trials. Canada's rules of evidence are consistent with vulnerability theory, the United States' are not.

Though it has been suggested that vulnerability theory is ineffective as a prescriptive tool to address specific vulnerabilities, I propose these rules as specific ways the laws of evidence can

[33] For example, Andrus (n 31) and Tuerkheimer (n 13).
[34] As discussed in Fricker (n 12), Chapter 7.

indeed be organized around vulnerability.[35] First, vulnerability theory can be implemented by shifting away from age-based presumptions in statutes governing the competence to testify at a trial. For the rule concerning hearsay, individual vulnerability can be addressed by building flexibility into the ways it can be applied by judges. Finally, I suggest that allowing witnesses to testify in a variety of ways, apart from in-court testimony, can incorporate vulnerability as an organizing principle and encourage resilience in all witnesses.

A *Competence to testify in a trial*

Competence determines whether or not a witness can give testimony in a common law trial. It is an admittedly low standard to meet in both Canada and the United States. In both countries, all that is required to be competent is that the witness 'appear capable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.'[36] The distinction, however, between the two countries is that in the United States, a number of states have specified an age before which a person is presumed to be incompetent.[37] Using age as a proxy for competence is problematic because it is both over and under inclusive in terms of capturing the population that needs to be assisted or scrutinized as sources of information.[38] Using age as a proxy for competency also triggers incorrect and paternalistic stereotypes about how a person is meant to behave, based on an arbitrary personal characteristic.[39]

While Canada makes an age-based distinction in its competency rules, the starting point is a presumption of competence, not incompetence.[40] Beginning the inquiry from a place of

---

[35] Kohn (n 7), 13.

[36] Fed. R. E. 601 and *Canada Evidence Act*, RSC 1985, c C-5 s 16.1 [*Canada Evidence Act*].

[37] For example, in Ohio, children younger than 10 years old are incompetent to testify if they 'appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.' Ohio Rule Evid. 601(A) (Lexis 2010) discussed in *Ohio v Clark*, 576 USSC Docket # 13-1352 (2015).

[38] Fineman (n 3) 3 – 4; Hall, (n 29), 29, and Kohn (n 7) 12 have all pointed out similar issues with policy distinctions based in identity categories. Kohn initially critiques Fineman's application of vulnerability theory (at 11 – 12) because Fineman has advocated for applying age-based policies as a means as addressing vulnerabilities. Though it is unrelated to drawing age-based distinctions in a statute, competency rules may still disproportionately exclude older witnesses from participating in trials because if an elder person suffers cognitive decline, judges can call a preliminary inquiry into competency under Federal Rule 401 or, in extreme cases, bar a witness from the stand under Federal Rule 403 when it is clear that the prospective witness lacks one of the testimonial abilities required at common law. Where a witness suffers a significant mental disorder or cognitive pathology such as dementia or Alzheimer's, they will lack the ability to perceive, remember, and recall an event – which may disqualify them from meeting this preliminary legal test contained in Federal Rules 601 – 603.

[39] This mirrors an argument against age distinctions in social policy made by Kohn (n 7) 14 – 16.

[40] *Canada Evidence Act*, s 16.1 states '16.1 (1) A person under fourteen years of age is presumed to have the capacity to testify.' This mirrors the language found in the federal rules of evidence in the US, Fed. R. E. 601.

competence, as opposed to incompetence, is a small but significant move towards incorporating vulnerability into the rules of evidence since the focus of the inquiry is not whether a witness is of a certain age, and therefore needs to prove their competence, but the opposite. Given that the concern of the competency inquiry is that a witness is able to understand and respond to questions during a trial, requiring an adverse party prove incompetence addresses the purpose of the rule more appropriately.

To fully reflect the vulnerability thesis, the rules governing competence to stand trial would not mention the age of a witness. Omitting age-based presumptions of competence or incompetence would prevent implicit stereotypes connecting age to competence.[41] In so doing, the state could show the ability to transcend identity categories and help to develop a legal system that moves away from 'the fragmentation of the legal subject to the creation of a vigorous universal conception' of what it means to be a competent witness.[42] Contrasting the competency rules in Canada and the United States illustrates one way that vulnerability theory may be incorporated in the rules of evidence: by shifting away from age-based distinctions towards a standards based approach.[43]

B *Hearsay*

Hearsay evidence is any out-of-court statement that is being tendered for admission at trial for the truth of its contents. At common law, hearsay statements are presumptively inadmissible because they have not been made under oath, and tested through cross-examination, with the ability of the trier of fact to observe the demeanor of the individual when the statement is made.[44] The underlying assumption is that, without these safeguards, there is a greater risk that these untested statements would compromise the integrity of the fact-finding process of the common law trial.[45]

The United States provides an example of a common law jurisdiction that has strictly adhered to the common law rule against hearsay. In the United States, the right to face an adverse witness in person during a trial is elevated to a constitutional right, through the sixth amendment of the *Bill*

[41] While Canadian and US rules of competence have not categorically barred witnesses on the basis of old age the way they have young age, senility has made older adults fail this preliminary test, see Ann Murphy, 'Vanishing Point: Alzheimer's Disease and Challenges to the Federal Rules of Evidence' (2012) *Michigan State Law Review* 1245.
[42] Martha Fineman, 'Feminism, Masculinities and Multiple Identities' (2013) 13 *Nevada Law Journal* 619, 636.
[43] Kohn (n 7) 25.
[44] *Crawford* (n n20).
[45] *R v Khelawon*, 2006 SCC 57, [42] [*Khelawon*].

of Rights known as the 'confrontation clause'. This positive right coupled with the originalist reading of its meaning in the 2004 Supreme Court decision *Crawford v Washington* results in an exclusion of any kind of out of court testimonial statement in a criminal trial.[46] The exceptions to hearsay are extremely limited, and include only those circumstances where a testimonial statement can be classified as a 'dying declaration' or where a witness was killed for the purpose of preventing their testimony.[47]

The practical effect of a strict adherence to the rule against hearsay is that crimes against vulnerable witnesses became more difficult to successfully prosecute. In particular, crimes involving children,[48] domestic violence survivors,[49] and older witnesses[50] became exceedingly difficult to prosecute because in those circumstances, the victim is often the only witness.[51] Further, these witnesses also present unique evidentiary issues. They tend to be involved in complicated relationships with their abusers, causing them to be more likely to recant testimony or refuse to participate in a prosecution against a loved one. [52] Elders presented the additional issue of being at greater risk of dying or experiencing cognitive decline prior to a trial. [53] For children, statutory presumptions of incompetency like those discussed in the previous section required prosecutors to resort to hearsay more frequently than for adults.[54] Prior to the *Crawford* decision, many states created statutory exceptions from the rule against hearsay for these kinds of witnesses. However, these rules became unconstitutional in the wake of the *Crawford* decision.[55] Without the ability

[46] *Crawford (n 20).*
[47] After *Crawford* , (n 20), only common law exceptions that existed at the time the Bill of Rights was drafted in 1791 can be used to allow a testimonial hearsay statement to be admitted in court, see *Davis v Washington* and *Hammon v Indiana*, 547 U.S. 813, 833 (2006) and *Giles v California*, 554 U.S. 353 (2008).
[48] Robert Mosteller, 'Testing the Testimonial Concept and Exceptions to Confrontation: 'A Little Child Shall Lead Them' (2007) 82 *Indiana Law Journal* 916,t 944.
[49] For example, Andrus (n 31).
[50] David Perkins, 'A Statutory Hearsay Exemption for Elderly Victims' Statements: Cases of Infant Law Mortality' (2010) 7 *Southwest Journal of Criminal Justice* 277.
[51] Jeanine Percival, 'The Price of Silence: The Prosecution of Domestic Violence Cases in Light of *Crawford v Washington*' (2005) 79 *Southern California Law Review* 213, 235.
[52] Lisa Ha & Ruth Code, *An Empirical Examination of Elder Abuse: A Review of files from the Elder Abuse Section of the Ottawa Police Service* (Ottawa: Department of Justice, 2013), 1 < http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rr13_1/rr13_1.pdf>; Tom Lininger, 'Prosecuting batterers after Crawford' (2005) 91 *Virginia Law Review* 747 at 769–771; Lisa Thielmeyer, 'Beyond *Maryland v. Craig*: Can and Should Adult Rape Victims Be Permitted to Testify by Closed-Circuit Television' (1992) 67 *Indiana Law Journal* 797,802.
[53] Howard Eglit, *Elders on Trial: Age and Ageism in the American Legal System* (Florida University Press, 2004); Sanford Finkel and Inez Macko, 'Impact of the Criminal Justice Process on Older Persons' in *Elders, Crime, and Criminal Justice System: Myths, Perceptions, and Reality in the 21st Century* (New York, USA: Springer, 2001) 105.
[54] *Clark* ,(n 37).
[55] Note 28.

to rely on these exceptions to hearsay, there was a dramatic reduction in the number of successful prosecutions of child abuse, elder abuse, and domestic violence in the United States.[56] The move towards a more stringent application of the hearsay rule illustrates how rules applied inflexibly causes the exclusion of the voices of vulnerable subjects.

In contrast, the Canadian approach to hearsay involves a contextual analysis of the circumstances in which the statement was made in order to determine if it is both necessary and sufficiently reliable to be admitted in a trial. The Supreme Court of Canada advocates moving away from a rigid approach to a "principled approach to hearsay" to avoid the "unwarranted loss of much valuable evidence." [57] The rationale underlying the principled approach to hearsay in Canada is the need for the courts to preserve valuable evidence to enhance their truth-seeking function.[58]

Canada's approach to hearsay aligns with vulnerability theory. In particular, the principled approach to hearsay approaches the application of the rule against hearsay in a way that looks "at the conditions, both internal to the individual and external to the individual that increase or decrease that vulnerability."[59] With the principled approach to hearsay, courts consider the circumstances that surround the making of a statement, and not the purpose of the statement. By looking at the circumstances in which the statement was made, the principled approach to hearsay addresses the reliability concerns that formed the basis of the common law rule without drawing arbitrary distinctions that tend to exclude certain types of witnesses. This analysis of the rule of hearsay in Canada and the United States shows how building flexibility into formal legal rules helps the state address its responsibility to respond to witnesses across the spectrum of vulnerability. In the following section, I shift the inquiry from the state's responsibility to respond

[56] Percival (n 51) 234. See also, Jonathan Clow, 'Throwing a Toy Wrench in the 'Greatest Legal Engine': Child Witnesses and the Confrontation Clause' (2015) 92 *Washington University Law Review* 793, 800, 815; Andrew Fisk, 'Prosecution of Domestic Violence Cases: The Practical Effects of the Ruling in *Davis v. Washington*' (2007) 32 *Illinois University Law Journal* 251,251; Mosteller (n 48) 944. Tom Lininger (n 52) 750 quantifies the chilling effect of *Crawford* writing, 'During the summer of 2004, half the domestic violence cases set for trial in Dallas County, Texas, were dismissed for evidentiary problems under Crawford. In a survey of 60 prosecutors' offices in California, Oregon, and Washington, 63 percent of respondents reported the Crawford decision has significantly impeded prosecutions of domestic violence. Seventy-six percent indicated that after Crawford, their offices are more likely to drop domestic violence charges when the victims recant or refuse to cooperate. Alarmingly, 65 percent of respondents reported that victims of domestic violence are less safe in their jurisdictions than during the era preceding the Crawford decision.'

[57] *Khelawon* (n 45) [42].

[58] Ibid.

[59] Kohn (n 7) 24.

to vulnerability to the state's responsibility to build resilience in vulnerable witnesses by considering the role of testimonial supports for witnesses.

C *Testing witnesses through in-court cross examination*

A third example of how the rules of evidence can incorporate vulnerability theory is in implementing alternatives to in-court cross-examination. Cross-examination is the way the adversarial trial uncovers the truth.[60] During cross-examination, counsel use leading questions in order to pull information from an opposing party.[61] Counsel attempt to discredit opposing witnesses by highlighting inconsistencies in a witness's story, and exploiting memory gaps. Though studies in psychology suggest that these questioning strategies reduce the chance of getting the most accurate testimony from a witness, common law countries like Canada and the United States both have a positive right for an accused to cross-examine a witness 'without significant and unwarranted constraint' on the part of the state.[62] Cross-examination is another example of the western legal tradition's preference for state non-interference and failure to consider the vulnerable legal subject.

By requiring that its citizens resort to an adversarial process as a means of resolving legal disputes, the state has a corresponding obligation to respond to witnesses across a spectrum of vulnerability and do ameliorate conditions for witnesses who, because of their vulnerability, may have difficulties being cross examined in the courtroom. Testifying alone at the front of a courtroom is intimidating for any witness. The trial is set up this way on purpose – to impose upon those who testify in a trial the solemnity of the occasion which is thought to encourage witnesses to tell the truth.[63] In contrast, social science finds that the most accurate testimony is pulled from witnesses who are in comfortable circumstances.[64] Incorporating vulnerability into the way witnesses give their evidence in a trial could help common law trials obtain the most accurate information from witnesses, at the same time as build resilience in witnesses.

---

[60] Clow (n 56).
[61] David Paccioco and Lee Steusser, *The Law of Evidence in Canada, 7th ed.* (Toronto, Canada: Irwin Publishing, 2015) 470.
[62] *R v Lyttle*, 2004 SCC 5, para. 2.
[63] See, for example, Graham Davies, 'The impact of Television on the Presentation and Reception of Children's Testimony' (1990) 22(3-4) *International Journal of Law and Psychiatry* 241.
[64] Alison Cunningham and Pamela Hurley, *A Full and Candid Account*, Vol. 1 (Centre for Children and Families in the Justice System, Vol. 1, 2007), 12.

An example of the way vulnerability theory can be incorporated into the practice of cross-examination is by allowing witnesses to use testimonial accommodations. Testimonial accommodations allow witnesses to testify in conditions that might be less intimidating and, in Canada, can include the exclusion of the public from a courtroom,[65] use of a support animal,[66] a screen,[67] a support person,[68] or even testifying from outside the courtroom.[69] Until 2006, these testimonial accommodations were only available for children in sexual assault cases and disabled persons, but amendments to the *Criminal Code* recognized the inherent vulnerability of all witnesses in different kinds of criminal disputes.[70] Since the amendments, any 'infirm' witness can apply for a testimonial accommodation.[71] In considering an application for a testimonial accommodation, the court may take into account a variety of factors that make it difficult for a witness to provide testimony, including: (a) the age of the witness; (b) the witness' mental or physical disabilities, if any; (c) the nature of the offence; (d) the nature of any relationship between the witness and the accused; (e) whether the witness needs the order for their security or to protect them from intimidation or retaliation or (f) any other factor that the judge or justice considers relevant.[72] This move away from identity categories to a contextual analysis of whether the accommodation is necessary to obtain a 'full and candid account' from a witness aligns with Fineman's concept of resilience.

While Canada's approach to testimonial accommodations is more aligned with vulnerability theory than that in the United States (where testimonial accommodations are unconstitutional),[73] more

[65] *Criminal Code*, RSC 1986, c C-46, s 486 [*Criminal Code*].
[66] *Criminal Code*, s 486.3.
[67] *Criminal Code*, s 486.2(2).
[68] *Criminal Code*, s 486.1(2) extends the availability beyond children and individuals with a disability, but to any witness who may require it
[69] *Criminal Code*, s 486.2(2). For older witnesses who die prior to a trial, s. 715.1 of the *Criminal Code* allows for the admission of videotaped testimony. As well, sections 709 – 711 of the *Criminal Code* allow for evidence to be taken by commissioner prior to a trial, if there is a risk that evidence would be lost by the time of the trial.
[70] Bill C-2, *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act* (coming into force January, 2006).
[71] For example, *Criminal Code* s 486.2(2).
[72] For example, *Criminal Code* s 486.2(3).
[73] Though *Crawford* makes CCTV unconstitutional, prior to its holding 32 states had allowed for the use of CCTV and 37 states allowed for child witnesses to give evidence by videotape, see Thielmeyer (n 52). In refusing to approve an amendment to the Federal Criminal Rules of Evidence that would have allowed for CCTV to be used in limited circumstances, Justice Scalia said: '[v]irtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.' Fed. R. Crim. Pro. 26 (Comm. Note to Proposed Amendment, 2002). The Supreme Court recently declined certiorari to a case that would have determined for certain whether CCTV

could be done. For example, in Sweden, vulnerable witnesses can be questioned by a neutral third party. The third party interviews the child using questions drafted by the defence, which is then videotaped and admitted into evidence. [74] In other inquisitorial countries, the judge takes on the role of questioner, who asks a witness questions after going through a dossier of the case in consultation with defence and prosecution.[75] In an adversarial tradition, this increased role for the judge is antithetical to their role of 'impartial arbiter', and this kind of state intervention in a trial is unlikely to be seen in common law trials.

Indeed, all three of the policy shifts discussed in this part represent incursions on an accused's right to cross examine a witness without restraint, and in the United States, the right to a face to face confrontation. These incursions would be serious if the social science on lie detection aligned with the common law assumptions. However, social science research finds the opposite: that in-court cross-examination is not the best way to elicit the most accurate recollection of a past event from a witness.[76] Studies find that witnesses provide more accurate testimony when they are allowed to provide testimony in more comfortable circumstances.[77] In so far as being able to assess the truthfulness of witnesses, recent studies find that being able to see a witness as they provide testimony does not improve the ability to detect a lie.[78] In light of this research, the limited incursions on the positive rights of an accused may be justified in order to facilitate an equal opportunity for vulnerable witnesses to participate in a trial.

CONCLUSION

The rules of evidence provide one mechanism through which common law trials perpetuate power imbalances: by privileging the voice of invulnerable witnesses and discounting the voices of vulnerable subjects. The practical implication of this silencing of vulnerable subjects is the under-prosecution of those crimes involving more vulnerable people. Former Minnesota Attorney

would violate an accused's confrontation right (*New Mexico v Schwartz*, 14-317 http://www.scotusblog.com/case-files/cases/new-mexico-v-schwartz).

[74] Alison Cunningham and Pamela Hurley, *A Full and Candid Account* (Centre for Children and Families in the Justice System, Vol. 4, 2007), 12.

[75] Ibid.

[76] Ibid.

[77] Ibid.

[78] Amy-May Leach et al., 'Less Is More? Detecting Lies in Veiled Witnesses' (2016) 40(4) *Law and Human Behavior* 401 find that mock jurors are more accurate at detecting truthfulness for veiled witnesses.

General Mike Hatch described it as a travesty of justice that "perpetrators of crime against vulnerable members of society cannot be held accountable for their conduct due to the very vulnerabilities that make their victims targets."[79] The failure of the law to address the vulnerability of witnesses makes the justice system itself vulnerable. Instead of delivering justice to the parties to a legal dispute, it becomes a mechanism through which testimonial, relational, and material injustices are perpetuated.

This paper explores a limited subsection of these rules that illustrate the ways current rules of evidence could be improved upon by organizing themselves around the concept of vulnerability. The rules of evidence can address vulnerability by moving away from identity categories in presumptions, not just in terms of competency or the need for testimonial accommodations – but in terms of any presumption that is based on an individual with a certain characteristic possessing (or not possessing) a vulnerability. Moving the inquiry to the purpose of the rules, and not the identity of the speaker, detaches the stereotype of vulnerability from specified groups thereby reducing stigma.[80] Adopting a contextual analysis towards the admissibility of out of court statements addresses vulnerability by legally recognizing statements made by individuals who, for a variety of reasons, cannot testify in a courtroom. By incorporating vulnerability theory, the rules of evidence have the potential to mobilize knowledge from vulnerable witnesses, ensuring participation and encouraging resilience.[81]

Organizing the rules of evidence around vulnerability theory is not only better for individual witnesses but for the administration of justice more broadly. When the rules of evidence inhibit the participation of vulnerable witnesses in trials the justice system loses the benefit of their knowledge. By building resilience in the abilities of witnesses, common law trials are better at fact-finding. The risk that a legal outcome is based on an erroneous reconstruction of the events at issue is reduced, improving the common law trial's objective to ensure that legal outcomes are just in the circumstances.

[79] Mike Hatch, 'Great Expectations - Flawed Implementation: The Dilemma Surrounding Vulnerable Adult Protection' (2002) 29 *William Mitchell Law Review* 9.
[80] Kohn (n 7) 10.
[81] Fineman (n 9) 5.