

Resilience-building in adversarial trials

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Resilience-building in Adversarial Trials: Witnesses, Special Measures and the Principle of Orality

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journals.sagepub.com/home/sls**Samantha Fairclough** *University of Birmingham, Birmingham, UK*

Abstract

Using Fineman’s vulnerability theory, this paper argues that the traditional adversarial approach to examining witnesses in criminal trials – premised on the principle of orality – reduces the resilience of those giving evidence. This is because the adversarial setting often leaves those testifying in a heightened state of stress, reducing the quality and reliability of their evidence as a result. In turn, this traditional approach to securing oral witness testimony in criminal trials loses resilience, in that it becomes more difficult to justify as the general approach. The use of special measures – to adjust the way testimony is given and ameliorate some of the associated stressors – provides resilience to the individual testifying, the robustness of their evidence, and the safety of consequent criminal verdicts. The positive effects special measures yield therefore lend additional resilience to our commitment to the principle of orality and the principles upon which it rests. This article concludes that the State should maximise such resilience-building through more generous special measures provision.

Keywords

special measures, adversarialism, principle of orality, vulnerable witness, resilience

Introduction

Criminal trials in England and Wales are characterised as adversarial in nature. A key feature of adversarialism is the commitment to the principle of orality, which marks an official

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preference for witness evidence in criminal trials to be oral and live before the court. As this article shows, the appropriateness of this traditional way of receiving and testing witness evidence has been called into question in light of a plethora of findings that suggest it is not the most conducive method to securing accurate evidence. Indeed, it was largely against this backdrop that special measures were introduced for ‘vulnerable and intimidated witnesses’ (see Home Office, 1998); to counteract some of the issues arising out of the requirement that witnesses testify in court. These special measures include provisions to allow certain witnesses – such as children, those with mental health conditions, learning/physical disabilities or complainants in sexual and modern slavery offence cases – to give evidence from behind a screen, via live link, with the assistance of an intermediary, or via a pre-recorded video (Youth Justice and Criminal Evidence Act (YJCEA) 1999, s.23–s.30).

The available evidence suggests that the use of special measures improves the treatment of vulnerable and intimidated witnesses in court and the resulting quality of their evidence (see Fairclough, 2020). If we view this through the lens of Fineman’s (2008) vulnerability theory, we can see that special measures are an asset that builds the resilience of these witnesses (and defendants)¹ testifying in criminal trials. This means that they help such individuals to do the best job of giving their evidence possible, while causing minimal harm to their wellbeing in the process. This article addresses the perceived tension that exists between special measures and the principle of orality, where the (unfettered) use of special measures would be seen as a potential threat to our adversarial tradition (Roberts, 2022: 525). It argues that by building the resilience of those testifying, through improved treatment and the production of more reliable evidence, the use of special measures also builds the resilience of the principle of orality itself. This means that the State’s commitment to oral evidence (and thus adversarial justice) is in fact much more defensible when special measures are (more frequently) used than when they are not.

This argument about the compatibility of special measures and the principle of orality is not confined to their current legal provision. What Fineman’s vulnerability theory further sensitises us to is the existence of individuals who may lack resilience in the face of testifying in open court absent additional support, but who do not legally qualify for any such support. And further still, the detrimental effect that this then has on the resilience of our commitment to oral evidence in a more general sense. Fineman (2008: 1) advocates for a starting position that recognises, as applied in this context, that all lay people in contact with the criminal trial system are vulnerable, because vulnerability is ‘universal’. Vulnerability theory then holds that it is the State’s responsibility to provide sufficient resources to citizens to build their resilience (Fineman, 2008), which translates here to their resilience in the witness box. In adopting this approach, this article concludes that special measures provisions should be more readily available from the State to build the resilience of all witnesses, including defendants, in criminal trials who need such support to build their resilience in this setting.

Furthermore, this article argues that such an increased provision (and use) of special measures will, in turn, bolster the resilience of our commitment to the adversarial principle of orality. This conclusion is reached following an examination of the principle of orality and its substance that acknowledges it is about more than just evidence that is ‘oral’. Instead, we see that the principle of orality is tied up with other foundational principles that link to the public’s acceptability of the process and its outcome (and

thus its legitimacy). The argument here is that, while the increased use of special measures narrows our commitment to the principle of orality as it is traditionally understood, it does not erode it. Instead, oral evidence obtained from witnesses who are properly supported enhances the legitimacy of the process such that our commitment to the principle of orality and all that it represents is enhanced rather than undermined. This requires us to think differently about how we uphold the principle of orality and what is required of the criminal process – and specifically the oral tradition – as societal expectations change.

The use of Fineman's vulnerability theory to expose the limitations of approaches to the allocation of resources that centre on 'vulnerable groups' is not in itself new.² With that said, there has been only little engagement with vulnerability theory in the context of criminal justice (Dehaghani and Newman, 2017, 2021; Dehaghani, 2021; Porter, 2021) and specifically with regards to witnesses in adversarial criminal trials (Love, 2019; Cowan and Hewer, 2020; Heffernan, 2021). There has not been a comprehensive critique of the definitions of vulnerability adopted for the purposes of special measures eligibility in England and Wales. The application of vulnerability theory in this article fills these gaps. It shows the deficiencies of the current legal provision of special measures, highlighting that there may be a number of lay participants compelled to take part in the criminal trial who are not currently recognised as vulnerable for special measures purposes (but perhaps ought to be) and so are left unassisted when testifying. This is significant because it calls into question the appropriateness of aspects of the paradigm version of the criminal trial, which place oral testimony at its centre, but without sufficient regard for the resilience of those who testify.

Where this article is particularly novel is in its application of vulnerability theory to the tradition of orality in adversarial criminal trials. Using Fineman's theory as a lens through which to examine the vulnerability and resilience of a principle underpinning the criminal trial marks an innovative extension of its reach beyond individuals, groups, and institutions that enables us to undertake a fuller analysis of the effects of special measures (and of not using them more frequently) on our traditional adversarial commitments. Since variations of the special measures scheme of England and Wales are adopted in several common law jurisdictions (Northern Ireland, Scotland, South Africa, Australia, New Zealand, to name but a few) – and in civil as well as criminal cases³ – the arguments made here are widely relevant.

The structure of the article is as follows: The first section outlines the key aspects of Fineman's vulnerability theory as the heuristic device through which to look at the criminal trial and those required to give evidence within it. The second section introduces the adversarial principle of orality and the adversarial trial setting; a spatial context where oral evidence is superior but the very process of securing oral evidence often strips those testifying of their resilience. It then shows how special measures are an asset that helps to build the resilience of the witnesses who use them. It further argues that the resilience-building work that special measures do for witnesses under the current legal provision simultaneously build the resilience of the principle of orality itself, showing that special measures are not only compatible with the principle of orality but supportive of it.

The third section then uses Fineman's vulnerability theory to more holistically evaluate the current legal provision of special measures and to re-imagine a more inclusive

approach outside of the existing legislative framework. The potential consequences of this enhanced provision for the principle of orality and its relationship with other foundational principles of criminal evidence, such as open justice, fairness and legitimacy are unpacked and evaluated. The article argues that a more generous provision of special measures to witnesses and defendants in criminal trials will maximise the resilience of both individual witnesses and our commitment to the principle of orality in England and Wales, despite altering the traditional way in which evidence is given and tested in more than just exceptional cases.

Finally, the fourth section of the article shows why – conceptually speaking – moving away from eligibility based on ‘vulnerability’ and instead considering a witness’ resilience is a better approach to the provision of special measures support. This is demonstrated through an examination of the shortfalls of the YJCEA definitions of ‘vulnerable’ that presuppose eligibility for special measures, as well as an overview of more general concerns relating to the terminology of vulnerability and its often-negative connotations.

This article provides the conceptual legwork that is necessary to precede and underpin any substantive changes to the law itself. The detail of that reform – fleshing out exactly what the new special measures provision, based on resilience, might look like in law and how it might work in practice – falls outside of the scope of this paper. But an agreement that such reform is necessary, in line with the principled position set out here, will mark a significant and important step-change in the approach to special measures and orality.

Vulnerability Theory

Fineman argues that vulnerability is ‘universal’ and ‘inherent in the human condition’ (Fineman, 2008: 1). In other words, vulnerability is not a ‘special characteristic for some’ (Dehaghani, 2021), but instead everyone is vulnerable. She states that the ‘vulnerable subject’, is ‘embodied’, which carries with it the ‘ever-present possibility of harm, injury, and misfortune ... whether accidental, intentional, or otherwise’ (Fineman, 2008: 7). This means that while everyone is vulnerable, there is also recognition of the differences in how that vulnerability may manifest among individuals. Some of these differences in embodiment are shared biological and developmental stages experienced – in some way – by all. Fineman calls these ‘vertical differences’ in embodiment, that occur ‘within each individual over the course of life as we move from infancy to elderly’ (Fineman, 2019: 357). Fineman also highlights horizontal differences in embodiment, such as race, gender, ability, social standing and status. She notes that these differences can ‘provoke profound social advantage or disadvantage’ but that they do not take away from the ‘fundamental vulnerability that marks all bodies’ (Fineman, 2019: 357). This leaves room to recognise the vulnerability we all share as part of the human condition, as well as particular vulnerability resulting from differences such as age, race, class, gender, disability, etc (Gilson, 2014).

Embodiment, then, is about the form of the body itself, which varies between individuals and at different times in one’s life. It reflects the reality that we ‘all live and die within a fragile materiality that renders us constantly susceptible to both internal and external forces beyond our control’ (Fineman, 2014: 310). But more than this, it is

also about the role of institutions in shaping and constructing our embodiment and delimiting the ways that we understand bodies, identities and responses to particular embodiments (Travis, 2019).

The vulnerable subject is also ‘embedded’ within social, economic and institutional relationships (Fineman, 2008). This means that, while vulnerability is inherent in our embodied state, it also ‘reflects our position within, and in relation to, wider social, political, economic and institutional arrangements’ (Oakley and Vaughan, 2019: 92). Vulnerability, therefore, is universal, but also particular, since ‘it is experienced uniquely by each of us and this experience is greatly influenced by the quality and quantity of resources we possess’ (Fineman, 2008: 9). Fineman rejects the popular notion that some people are ‘more or less vulnerable’ than others. Instead, vulnerability remains a constant (though with recognised difference), and ‘resilience is what provides an individual with the means and ability to recover from harm, setbacks and the misfortunes that affect our lives’ (Fineman, 2016: 146). What this means is that:

[T]he basis for distinguishing some individuals from better-positioned *but equally* vulnerable individuals in the first instance would revolve around questions of access to sufficient resources, with a deficit indicating they lacked the resilience that is necessary to address human vulnerability. (Fineman, 2016: 147)

Resilience is not inherent within the human condition in the way that vulnerability is. Instead, resilience builds gradually, within state-created institutions and in social, political and economic relationships (Fineman, 2014). Some resilience will come from personal relationships, such as friendships, romantic relationships, and family. Other sources of resilience are institutional, such as education and employment. This renders the vulnerable subject a ‘unique and relational being’ who is dependent on resources available to them to build resilience (Mboya, 2018: 86).

Importantly, vulnerability theory places the burden on the State to be responsive to the needs of its inherently vulnerable legal subjects (Fineman, 2019: 357). The duty is thus on the State to provide ‘assets’ to build resilience among vulnerable subjects. Different types of assets that societal organisations and institutions can provide include physical, human, social, environmental and existential (Fineman, 2016: 146). This approach runs counter to neo-liberal responses to vulnerability, which centre on self-responsibility, self-care and the continued individualisation of the subject, and fit with the broader criminal justice trend of responsabilisation (Garland, 2002: 125). What Fineman’s theory enables us to do is to reframe this response to individualised vulnerability so that it is the State’s responsibility to build the resilience of all and not something that should be delegated to individual subjects.

The spatial context in which we consider the resilience of an individual then becomes very important. As Clark (2020: 2) emphasises, vulnerability is not fixed and the context in which a person is required to act is vital to assessing how they experience their vulnerability, their level of resilience in that setting, and the assets they might need to increase their resilience. The situational vulnerability (see Brown, 2015) of an individual in the courtroom – a site that is usually unfamiliar, alienating and centres on the reconstruction of events that may be traumatic – is thus an important factor when considering how an individual *experiences* their vulnerability with a view to the resilience they have in

that spatial context specifically. The strength of vulnerability theory here, therefore, is its nuance in recognising that there are differing levels of need for resources, in different settings, notwithstanding our inherent vulnerability as human beings (see Newman, Mant and Gordon, 2021: 234). This requires that the response to vulnerability is ‘directed, proportionate and free from stigma’ towards those with the most need in a particular setting (Harding, 2020).

Fineman’s vulnerability theory has also been applied outside of human vulnerability to examine the vulnerability of institutions and the State (see Fineman, 2008; Kuo and Means, 2013; Dehaghani and Newman, 2017; Mboya, 2018). It enables us to recognise, therefore, that the courts as an institution and the practices adopted within them are vulnerable and may lack resilience. This article takes this further, applying vulnerability theory to the principle of orality; a key principle that underpins the adversarial tradition in England and Wales. The State’s resilience (or lack of) – and therefore its vulnerability in terms of the way it approaches matters of criminal justice – becomes apparent where the approach itself is called into question.

As becomes clear, resilience for witnesses and defendants that is garnered from the use of special measures works ‘in two directions’ (see also Kuo and Means, 2013) to simultaneously build the resilience of the principle of orality and ultimately our commitment to the adversarial tradition.

Having outlined the key aspects of Fineman’s vulnerability theory, the paper now moves on to examine the factors culminating in the introduction of special measures in adversarial criminal trials. While vulnerability theory was not the driving force behind this change (special measures pre-date the inception of vulnerability theory) section two shows how the provision of special measures nevertheless builds the resilience of those who use them while testifying. It also shows how this has a positive knock-on effect on the resilience of our preference for oral evidence in the adversarial trial. It is not until section three that we use Fineman’s vulnerability theory to suggest an overhaul to the approach to special measures eligibility, moving away from categories of vulnerability and instead favouring a more inclusive approach. This means that the following section is replete with references to ‘vulnerable’ witnesses in a way that is incompatible with Fineman’s theory, but that this is unavoidable in a discussion that centres on the current formulation of the law.

The Development of Special Measures Provision: Applying Fineman

Adversarial Context – The Principle of Orality

Criminal trials in England and Wales are adversarial in nature.⁴ Roberts (2022: 58) characterises the adversarial proceedings in England and Wales according to four key features: (1) party dominated proceedings; (2) continuous, oral and public trials; (3) the existence of rules and principles that redress the power imbalance between the parties (the defendant and the State); and (4) the overriding objective to achieve a legitimate verdict that dispenses justice. On the point of orality, adversarial proceedings are designed so that evidence is heard live and orally from individuals who possess first-hand knowledge about the material issues in the case. The premise of adversarial truth-finding theory is that the process of hearing and vigorously testing such oral evidence through cross-examination, in a stressful environment

(the courtroom), in the presence of the accused, will best elicit the truth (Doak, McGourlay and Thomas, 2018: 29). Indeed, Lord Devlin remarked that ‘the centre piece of the adversarial tradition is the oral trial’ (Devlin, 1979: 54).

Adversarial theory also holds that oral testimony and specifically cross-examination are important mechanisms for the generation of *new* evidence. This is not simply in the form of admissions of dishonesty or mistake in the course of questioning, but through the jury’s observation of the witness’ and defendant’s demeanour. The belief is that the ‘performance of a witness in court provides valuable clues as to his or her sincerity and reliability’ (Ellison, 1999: 34). As such, the non-verbal cues a witness provides in the witness box are commonly thought of as vital to the jury assessing the truthfulness of a witness and their testimony to reach a verdict.

Our commitment to the principle of orality is historic and interlinked with our commitment to trial by jury. The oral tradition thus holds a symbolic or ideological significance in Anglo-American procedure. Jury trials originated in times when jurors would not have been able to read and write and the reproduction of documents was costly, making oral evidence before jurors the best approach (Devlin, 1956: 5). Traditional adversarial criminal proceedings in England and Wales thus constitute a ‘mini-drama’ that is played out live and in ‘real time’ in the presence of the factfinder (Roberts, 2022: 311). That all of this is done in a public and open courtroom has intrinsic links to the right to confrontation, which provides for defendants to be confronted face-to-face by those who accuse them, and cross-examined in this arena to test their sincerity (see Dennis, 2010).⁵ Roberts (2022: 311) notes that this conception of criminal trials has ‘taken deep root in the common law psyche, and . . . remains embedded within the legal and broader social conventions underpinning criminal justice’. The requirement that witnesses give evidence orally, under oath, in public, and that we test it through vigorous cross-examination, are thus important symbols of open justice and contribute to the overall legitimacy of the system.

In sum, we know that the principle of orality is about more than the court receiving oral evidence. It is also a mechanism through which to uphold the other principles and rights on which it rests or represents. These include: (a) open and public justice; (b) confrontation – and the ability to observe the demeanour of the witness as a result; (c) factual accuracy and protection of the innocent; (d) public acceptability of the process and its outcome; and thus, ultimately, the trial’s legitimacy. The traditional adversarial story tells us that our commitment to the principle of orality, as it is upheld through our traditional approach to securing evidence, also upholds the legitimacy of the verdict. This is because it is the publicly accepted and most transparent way in which to do justice. Roberts notes that the live oral tradition will retain its legitimacy – which is rooted in public confidence and trust in the integrity of officials – for as long as it retains its cultural authority as the best way to test evidence in criminal trials (Roberts, 2022: 521–522).

Mounting Concerns About (‘Vulnerable’) Witnesses in the Spatial Context of Adversarial Trials—Losing Resilience

Despite this deep-rooted commitment to oral evidence, the past three decades have seen concerns emerge about this traditional way of testing evidence in criminal trials. In particular, the view is that it is especially unsuited to the needs of ‘vulnerable’ witnesses,

particularly children, those with learning disabilities and complainants of sexual offences (Pigot Report, 1989; Sanders et al., 1997; Home Office, 1998; *T v United Kingdom*). In Fineman's terms, this reflects vertical (age) and horizontal (learning disability) differences in vulnerability. The problems for these groups were seen to arise from a myriad of reasons. These include the negative effects of delay on the memory of a vulnerable witness (Ellison, 2002: 23–27) and the deleterious effects of the stressful courtroom environment on the quality of a witness' testimony (Ellison, 2002: 12–23). This is problematic when adversarial proceedings (particularly at present) are characterised by delay and the process of cross-examination is designed to be stressful to elicit the truth.

Mulcahy (2011: 7–8) argues that the architecture of the courts is designed to 'convey a sense of importance or foreboding' where participants can 'reflect on the gravity of law and proceedings' (Mulcahy, 2007: 387; Carlen, 1976). To testify in a criminal trial is often 'alienating and stressful, particularly if [the witness] is not used to speaking before an audience' (Mulcahy, 2007: 387). The grand architecture and courtroom hierarchy, combined with the official court dress and formalities, make giving evidence in person, and under oath, an inherently daunting experience. The archaic language used and the court users' typical absence of specialist knowledge while within these alien spaces intensifies this (McKeever, 2013). Indeed, even barristers who give evidence as witnesses in the course of their civic duty may find it a difficult task, despite their 'insider' status (Rock, 1991: 273). The tradition of vigorously testing oral evidence through cross-examination is an additional source of anxiety for many (Ellison, 2002: 19) and can render all witnesses and defendants 'vulnerable'. This is borne out in empirical research. Jacobson, Hunter and Kirby (2015; Kirby, 2017) show how the system creates or exacerbates 'vulnerability' through procedures and traditions that make the criminal trial difficult, stressful and confusing. The adversarial criminal trial then, and the buildings in which it takes place, can be understood as a space in which all individuals are vulnerable and lack or lose resilience, meaning that they find it challenging or impossible to weather the demands of the adversarial system to deliver reliable and useful testimony.

This spatial context leads to further problems with the principle of humane treatment where the stress of the process causes a witness or defendant heightened suffering in the system to that which is proportionate and necessary to secure their evidence (Fairclough, 2021b). This is a further loss of a resilience relating more directly to the personal well-being of the individual and then its knock-on effect on the quality of their evidence. Further concerns relate to abusive cross-examination by advocates who treat vulnerable witnesses inhumanely using inappropriate questioning techniques to make them appear deceitful and untrustworthy (Roberts, 2022: 315–318). Additionally, behavioural science research warns us that the perceived benefits of observing a witness' demeanour are uncertain at best, particularly when witnesses have vulnerabilities that may present in particular ways in the courtroom (Ellison, 2002: 23). For instance, the behaviour of an autistic witness who fails to make eye contact may be interpreted incorrectly as 'shifty' and dishonest. Collectively, these amount to grave concerns for 'vulnerable' individuals giving evidence. Put in Fineman's terms, the requirement that 'vulnerable' witnesses and defendants give their testimony live in court strips them – and the reliability of their evidence – of resilience in this setting.

The combination of these findings about the effects of the oral adversarial tradition on the treatment and ability of ‘vulnerable’ witnesses to give good-quality evidence was a key driving force⁶ behind several reviews into the treatment of victims and witnesses in the criminal justice system (e.g. Home Office, 1998). In sum, we can see that confidence was generally lost in the traditional approach to obtaining and testing evidence of such vulnerable individuals in criminal trials. This was because it was no longer considered suitable or capable of routinely securing factually accurate evidence. It was also because we learned (and cared) more about the effects of the process on the wellbeing of individuals subjected to it. The net effect of these factors serves to ‘diminish or exclude the voices’ of those who find the courtroom setting – and giving oral evidence – particularly challenging (Love, 2019: 8). This all serves to undermine the legitimacy of the oral tradition in this context. In Fineman’s terms, the principle of orality – a key principle underpinning our approach to criminal trials – was losing resilience in the face of concerns about its effect on ‘vulnerable’ witnesses and their testimony. It was increasingly becoming a less accepted – and less legitimate – method of securing evidence from ‘vulnerable’ witnesses.

Special Measures: A State Provided ‘Asset’

The solution reached was the provision of special measures to ‘vulnerable’ and ‘intimidated’ witnesses (YJCEA, s.23–s.30). These measures provide a series of adaptations to the traditional way in which evidence is given – live in court – to reduce witness stress and improve evidence quality. In Fineman’s terms, we can conceive of special measures as a State provided ‘asset’ to build the resilience of those who need them. They permit witnesses (and sometimes defendants – see note 7) to give evidence from behind a screen, via live link, with the assistance of an intermediary (communication specialist), with the assistance of communication aids, via pre-recorded video (including pre-recorded ‘Section 28 hearings’ for cross-examination), in a courtroom closed to the public, and/or with the removal of official court dress (wigs and gowns). These measures were deemed necessary adaptations to the system but have been the subject of concern regarding their supposed dilution of the principle of orality (Ellison, 2002) such that their legal provision remains narrow and exceptional to certain categories of witness.

The YJCEA sets out the parameters of ‘vulnerable’ and ‘intimidated’. Vulnerable witnesses, *excluding the accused*, are eligible for special measures on the grounds of ‘age or incapacity’ (YJCEA, s.16). Children (under the age of 18 at the time of the hearing) are prima facie vulnerable and eligible for special measures assistance (YJCEA, s.16(1)(a)). A vulnerable adult witness is one whose quality of evidence is likely to be diminished (YJCEA, s.16(1)(b)) because they have ‘a mental disorder ... a significant impairment of intelligence and social functioning ... a physical disability or ... a physical disorder’ (YJCEA, s.16(2)). References to evidence quality pertain to its completeness, coherence and accuracy (YJCEA, s.16(5)).

Section 17 of the YJCEA houses the ‘intimidated’ witness provision. It states that special measures are available to witnesses, *excluding the accused*, whose evidence quality is likely diminished because of ‘fear or distress on the part of the witness in connection with testifying in the proceedings’ (YJCEA, s.17(1)). The legislation lists several

factors for consideration, including the nature and circumstances of the alleged offence; the witness' age, social background, ethnicity, domestic circumstances, religious and political beliefs; and any behaviour of the defendant or their supporters towards the witness (YJCEA, s.17(2)). Section 17 also provides automatic eligibility for special measures to complainants testifying in respect of an alleged sexual, modern slavery or domestic abuse offence (YJCEA, s.17(4)).

While the YJCEA excludes the accused from eligibility for the full special measures scheme, a separate route to secure defendant special measures has developed.⁷ The closest approximation to a comprehensive definition of defendant 'vulnerability' for special measures purposes is under Section 33A of the YJCEA, an amendment to the Act that permits some defendants to give evidence via live link. Child defendants (under 18) are 'vulnerable' (and eligible to give their evidence via live link) if their 'level of intellectual ability or social functioning' will compromise their 'ability to participate effectively in the proceedings as a witness' (YJCEA, s.33A(4)). Adult defendants are vulnerable (and thus eligible for live link) if they have 'a mental disorder ... or ... a significant impairment of intelligence and social function' and for this reason are 'unable to participate effectively in the proceedings as a witness' (YJCEA, s.33A(5)). To be unable to participate effectively in the proceedings *as a witness* is understood to mean that the defendant is unable to give their 'best evidence' (Criminal Practice Direction 3D.2).

Special Measures in Action: Building Witness Resilience

Fineman's vulnerability theory places the burden on the State to help build resilience among those it compels to give evidence or whom it accuses of committing a criminal offence. This duty is particularly potent with regards to defendants given the amount that they stand to lose in the event of a conviction and even because of a criminal accusation (Brooks and Greenberg, 2021). Additionally, the very fact that most witnesses other than the accused are compellable (see YJCEA, s.53) and can be prosecuted if they refuse to testify (Contempt of Court Act 1981, s.14) further strengthens the State's duty to build, what Cumming (2011) calls, 'spatial resilience'. Special measures can be understood as a partial fulfilment of this duty. The available research overwhelmingly shows that special measures generally work to improve the treatment of witnesses and to facilitate the collection of the best quality evidence (see Fairclough, 2020 for a full review). What this means is that the current special measures provision (re)builds the resilience of 'vulnerable' witnesses who qualify for their use by adapting the way in which they give evidence so that stress and anxiety is minimised and, on occasion, evidence can be secured earlier in the process. The existing provision of special measures recognises, to some extent, differences in vertical and horizontal embodiment that render some such individuals less resilient in the context of testifying in the criminal trial. For instance, the YJCEA 'vulnerable' and 'intimidated' witness categories highlight age (vertical embodiment), physical and mental health issues, other cognitive impairments, race, socioeconomic status, religion, political beliefs, etc (horizontal embodiment) as relevant factors for special measures eligibility.

In Fineman's terms, then, special measures are State provided 'assets' that help to build the resilience of these categories of witnesses by altering the standard way in

which evidence is given. Witnesses (and defendants) who use special measures will give evidence in an environment that is intentionally less stressful than was envisaged in adversarial truth-finding theory, and sometimes not in open court before the accused. At times, evidence-in-chief will be pre-recorded and played in lieu of live testimony, though this will still be subject to challenge through cross-examination either via an additional pre-recording (if a Section 28 hearing is carried out) or at the trial itself (perhaps with the witness on a live link or behind a screen). Intermediaries may assist with the communication challenges that arise between the court and a witness or defendant with a communication difficulty, by suggesting alternate phrasing of questions and recommending additional breaks and changes to the court environment. This all serves to build the resilience of the witness in this setting, in line with their individual needs, and thus improve the quality and reliability of their evidence.

The fact that the current legal provision of special measures to witnesses and defendants is the exception rather than the norm – and only available where it is seen as essential to protect these finite categories of witness – has kept major concerns about the status of the principle of orality under these altered evidential conditions at bay (Roberts, 2022: 525). But these concerns have existed – and perhaps continue to – nonetheless. This is because of the fundamental way in which the delivery and testing of evidence is altered through the provision of special measures adaptations. What this article considers next is whether maintaining a preference for oral evidence but securing evidence through special measures necessarily marks a dilution of the principle of orality itself. If this different approach to oral evidence upholds the foundational principles that the principle of orality represents, or with which it is associated, then we do not need to conceive of this departure from tradition as a departure from our commitment to the principle of orality itself. In effect, this requires us to separate out the principle of orality and all that it represents from the *way in which we give effect to it* in adversarial criminal proceedings.

One way to do this is to consider the status of the principle of orality if we *do not* make adjustments for ‘vulnerable’ witnesses and defendants. Subjecting ‘vulnerable’ witnesses and defendants to the requirement that they testify in open court (in the presence of the accused) and undergo cross-examination without assistance – when we know how damaging this is to such individuals, and we know that it undermines the reliability of their testimony – makes this approach much less defensible. The very fact that the traditional approach erodes the resilience of the witnesses and defendants testifying in turn negatively affects the resilience of the approach itself. It risks undermining the legitimacy of the system as the public loses confidence in it as a fair, effective and acceptable way to test (‘vulnerable’) witness/defendant evidence. This may result in failures to report offences and a decreased willingness to participate in the process at all, affecting both individual access to justice and the general workability of the system. Approaching the issue this way – and thinking about the impact of sticking with the status quo – shows that *not* making adaptations for ‘vulnerable’ witnesses and defendants risks undermining the principles and rights upon which the principle of orality rests.

Instead of viewing special measures adaptations as a potential threat to our commitment to orality (but conceding them as a necessary compromise for ‘vulnerable’ witnesses), we can therefore reframe special measures as an asset that bolsters the resilience of individual witnesses and the systemic approach to their examination (see

also Love, 2019). This is because we are ultimately able to retain our preference for oral evidence, despite changing the precise format of the examination of witnesses (as opposed to, say, hearsay evidence where the ability to test the evidence and the witness is significantly reduced and the orality feature lost entirely). It finds a mid-ground that still permits cross-examination and an open and publicness to the proceedings that is acceptable to society. It thus maintains public confidence in the process and protects its legitimacy.

To summarise, what we can see is that the use of special measures builds the resilience of 'vulnerable' witnesses and defendants testifying in criminal trials. As well as this, the provision and use of special measures additionally builds the resilience of our preference for securing oral evidence within the adversarial tradition. This shift means that instead of seeing special measures and the principle of orality as in competition or conflict, and so the provision of the special measures as a policed exception, we should view special measures as enhancing the principle of orality. This makes their relatively narrow application look problematic, since the power of special measures to build resilience in these ways is confined to the instances where witnesses and defendants qualify as 'vulnerable' under their respective special measures schemes. This limits the State's provision of these assets in the adversarial criminal trial, excluding many other witnesses and defendants giving evidence who may also lack resilience in this spatial context.

Taking It Further: The Untapped Potential of Special Measures

This section uses Fineman's vulnerability theory to reimagine the provision of special measures to all individuals testifying in adversarial criminal trials (if they want them⁸). It starts from the premise that the spatial context of the criminal trial renders all witnesses and defendants in criminal trials vulnerable in this setting. Compounding this is the fact that witnesses are compellable, meaning that they do not have a choice about whether to testify if they are called. Defendants are not compellable, and so gain some resilience from their right to silence, but will often still (have to) testify in their defence nonetheless to avoid the negative consequences that may otherwise await them.⁹

Our embodiment and embeddedness – and specifically the assets at our disposal as a result – affect our resilience in criminal trials whether we are there as the accused or a witness. Furthermore, our resilience as witnesses/defendants differs because of our embeddedness in informal social relationships, including whether we have a supportive network of family and friends; the local community; and employment and education networks, all of which can provide resilience in the form of better comprehension of the process, money and personal support systems.

Recognition of these facts gives rise to concerns about the suitability of our preference for oral evidence extending beyond the 'vulnerable' witnesses that the YJCEA constructs. This may lead us to question whether adversarial oral tradition 'really merits the esteemed position it has traditionally enjoyed' (Doak, McGourlay and Thomas, 2018: 30). As discussed, the adversarial criminal trial is characterised by long delays and artificial evidence collection through examination-in-chief and cross-examination in a stressful courtroom setting. Behavioural scientists highlight that, in actuality, all witnesses (not only the 'vulnerable') perform best when recalling recent events with minimal prompting, in a stress-

free environment (see Spencer and Flin, 1993: ch 10–13; Roberts, 2022: 318). The ability of jurors to accurately read demeanour is highly doubted, despite its importance in adversarial theory (see Chalmers, Leverick and Munro, 2022). Plus, there are issues more generally with the reliability of witness testimony where individuals may have honestly but inaccurately perceived something and recall such in their testimony (Roberts, 2004). As Roberts (2022: 319) notes, '[i]t is almost as if the architects of adversary proceedings had studied the findings of modern psychological research and then perversely created a trial system founded on diametrically opposite principles'. The adversarial approach to oral evidence, therefore, loses resilience as a direct result of its negative effects on the resilience of those required to testify and the quality of the resulting evidence.

But it is not so simple. The adversarial tradition generally gains some resilience from the fact that, while it is not always geared up to be the most accurate fact-finding method, it is still arguably the best placed model to ensure outcomes are fair as a dispute resolution process that is legitimate and accepted in society (see Damaska, 1973). Adversarial justice is not a 'truth at all costs' approach, but instead places specific emphasis on the fairness of the proceedings that lead to a verdict, bringing with it various evidential rules to safeguard the accused. The oral tradition also gains resilience against the critiques relating to demeanour given the limitations of those studies, including the identity of those recruited to act as mock jurors (usually students, though not always, see e.g. Ellison and Munro, 2014 who used self-selecting members of the public) and the difficulties replicating the gravity of a jury trial in an artificial setting (Bagshaw, 2007).

Additionally, but in a slightly different vein, Atkinson and Drew (1979) argue that the formalities of rules and tradition around evidence giving in criminal trials are needed to ensure 'shared attentiveness' in the multi-member single conversation that plays out in the courtroom when a witness testifies before the jury. And as an extension of this, there is perhaps something to be said for the 'ritual' of the in-person examination of witnesses that contributes to ensuring the interaction between the witness, lawyer(s) and jury 'works' (Collins, 2004; Rossner, 2011). Against the backdrop of the legal profession's insistence that live link interferes with the impact of witness evidence, and that it is more effective and powerful when given in court, this is a significant sticking point (Temkin, 2000: 237; Roberts, Cooper and Judge, 2005: 285–286; Burton, Evans and Sanders, 2006: 404; Fairclough, 2018b: 571–472).¹⁰

With all this said, however, the principle of orality – or rather the traditional way in which it is upheld – still loses resilience in the wake of real concerns about its appropriateness as the way to examine *all* witnesses and obtain evidence. This is in part due to the significant doubts raised about the ability of witnesses to give good evidence in this setting, the readability of demeanour, and jurors' false beliefs in their ability to do so accurately. But it is more than this. The principle of orality's intrinsic links with perceptions of fairness, the principle of open justice, and ultimately the legitimacy of the system play an important role here. We have remained committed to testing evidence through cross-examination, live in court, in the presence of the accused, because of its role in serving these overriding principles. However, when we attempt to uphold fairness and legitimacy through our commitment to the oral tradition, but this is causing undue distress to witnesses (and not garnering the best evidence from them either), the fairness of the process and the system's legitimacy are ultimately called into question. As we have

discussed, the system's legitimacy is predicated on the public's acceptance of the process and its outcomes. This paper argues that this is undermined when witnesses are treated poorly and their ability to give accurate evidence in the courtroom is jeopardised by the setting and associated formalities that it imposes. What this requires, then, is for us to view the trial as 'a dynamic institution of sociological power' that allows us the flexibility to alter our approach to adversarialism to reflect the views of (and in turn be accepted by) society more generally (Kirchengast, 2010: 9).

The arguments made in the previous subsection (in relation to witnesses and defendants who receive special measures under the current legal provision) then become more widely applicable to *all* witnesses in the criminal trial. According to Fineman's theory – which rightly considers all those who testify in the criminal trial as vulnerable – the State has a duty to provide assets to build the resilience of all witnesses in this context. This article argues that a more generous provision of special measures can address some of the issues specifically relating to the testimonial aspect of a witness' role (including a defendant's role as a witness in their defence). Special measures are therefore one of several building blocks of resilience for witnesses and defendants who testify in the trial.¹¹ All importantly, the evidence received is still *oral* evidence. The evidence is still tested through cross-examination and this is seen to be done (if not always actually done, because the cross-examination is pre-recorded but then played in the open courtroom) in an open and public setting.

To summarise, a direct application of Fineman's theory to this context then looks like this. All witnesses and defendants testifying in criminal trials are vulnerable. We know from the above discussion that the oral approach to evidence in the adversarial trial often strips witnesses and defendants of their resilience in this context. This, in turn, reduces how defensible the principle of orality is (and the principles – open justice, fairness, legitimacy – that it upholds). What this means, is that the principle of orality itself, as it is traditionally recognised, loses resilience. It follows, then, that special measures should be available as assets to all of those who testify in the adversarial criminal trial who find the court process unduly daunting, stressful and difficult (and therefore lack resilience). This increased use of special measures will improve the resilience of more witnesses and defendants testifying in the adversarial trial and will simultaneously strengthen the resilience of our commitment to the principle of orality. This is because special measures neutralises some of the negative effects that the adversarial preference for oral evidence has on those testifying – and thus builds their resilience in this space – while retaining the system's overriding commitment to oral evidence. This is different to the rise of remote hearings (see Fairclough, 2022), which includes allowing for witnesses and defendants to give evidence from outside of the courtroom, a phenomenon that increasingly emerged during the COVID-19 pandemic but has since found permanence in the Police, Crime, Sentencing and Courts Act 2022. The suitability of remote links in this different circumstance, where it is not about increasing witness/defendant resilience but about efficiency and cost-cutting, requires evaluation in light of the adversarial tradition in its own right (see Jackson, 2023).

While coming up with a blueprint of the legislative reform required to facilitate this approach is not the aim of this article, some preliminary thoughts on what this might look like include dispensing with the discrete 'vulnerable' and 'intimidated'

witness categories and instead starting from the premise that all witnesses and defendants testifying are vulnerable in the adversarial trial setting. A non-exhaustive list of the factors that might mean that the adversarial context negatively affects a person's resilience (and thus signpost that they are in need of additional support to build resilience in this context) could then be provided, to include many of the 'categories' already in the YJCEA (age, mental health, disability, sexual offence complainant, etc) as well as considering how well connected the individual is socially and the support network they have around them. The witness'/defendant's views and their free and informed choice should be paramount to avoid an overly paternalistic approach.

Benefits of Moving Away From 'Vulnerability' as Qualifying Criteria for Support

The recognition of all individuals testifying in the criminal trial as vulnerable, and a new focus on their resilience, naturally moves us away from the 'vulnerable' and 'intimidated' categories the YJCEA constructs. This paper argues that this is beneficial since it avoids three significant issues that currently arise from the YJCEA definitions of 'vulnerable' and 'intimidated' witnesses/defendants and their role as gatekeeper to special measures to support. These are: the potential for over-inclusiveness and under-inclusiveness, definitional inconsistencies and in-built instrumentalism.

Problem 1 With YJCEA Definitions: Over-inclusiveness and Under-inclusiveness

Fineman criticises fixed vulnerability categories as 'both over-inclusive and under-inclusive' (Fineman, 2008: 4). What this means in the special measures context is that the set parameters of the vulnerable groups contained in the YJCEA may exclude some vulnerable individuals who do not meet the specific thresholds/definitions (and thus be under-inclusive), or may include individuals who really should not be categorised as vulnerable for these purposes (and so are over-inclusive).

The risk of over-inclusiveness is, in theory, minimised in the YJCEA due to the way that eligibility for special measures is constructed. This is because 'belonging' to one of the vulnerable groups specified in the Act is not (usually) sufficient alone to be eligible for special measures. In most cases, a witness or defendant must fall into one of the Act's vulnerable categories, and there must also be a risk that their evidence is diminished in quality. This means that a person who falls within an 'over-inclusive vulnerability category' can still avoid the use of special measures if their evidence will still be of sufficiently good quality. The witness' views are an overriding consideration in this regard (YJCEA, s.19(3)(a); Code of Practice for Victims, 2015; Ministry of Justice, 2013). This should protect against over-inclusiveness and is an important aspect to be retained under any reform to the law along the lines suggested in this article, that renders everyone vulnerable and focuses on resilience. The automatic provision of special measures to some categories of witness – such as children and complainants in sexual and modern slavery offences – carries with it increased risks of over-inclusiveness, as there is potential for vulnerability to be 'imposed' in a paternalistic or stereotypical way (Cowan and Hewer, 2020: 353). While there are in-built provisions to permit such witnesses to opt-out of special measures

if the quality of their evidence is not at risk, we do not know whether this is actually a viable option for these witnesses in practice.

More pressing are concerns centring on the under-inclusive construction of vulnerability under the YJCEA. For instance, Burton et al. (2007) found that 45% of witnesses surveyed, who fell outside of witness categories with automatic entitlement to special measures (i.e. children and complainants of sexual offences), self-identified as vulnerable or intimidated, but only 24% actually met the statutory criteria for such. Furthermore, Ellison and Munro (2017) have criticised the YJCEA special measures provisions for failing to recognise and account for individuals with post-traumatic stress disorder (PTSD). The introduction of an automatic entitlement to special measures for complainants of domestic abuse indicates that these individuals may not consistently receive the special measures support they need (Domestic Abuse Act 2021, s.62). This is strong evidence of the under-inclusive nature, or at least application of the YJCEA's existing vulnerability categories (see Hansard HC Deb, 11 June 2020).

Another stark marker of the YJCEA's under-inclusiveness is evident from the exclusion of the accused from the definitions of 'vulnerable' and 'intimidated' under Sections 16 and 17. As a result, vulnerable defendants were statutorily barred from using special measures and left with only restricted entitlement under the common law (see *R v Waltham Forest Youth Court*). Some, albeit limited and separate, statutory provisions have since been added to the YJCEA for defendants, for live link (YJCEA, s.33A) and intermediary use (YJCEA, s.33BA, though this has still not been implemented and is only available under the courts' inherent power, *R v Sevenoaks*). The under-inclusive definition of vulnerability in the YJCEA has thus resulted in a dual scheme of special measures for non-defendant witnesses and defendant witnesses.

The defendant provision that does now exist in the YJCEA is narrower than that vis-à-vis a non-defendant witness (without valid justification, Fairclough, 2018a), which is further evidence of the under-inclusive nature of the vulnerability categories contained in the Act. For instance, defendants with physical disabilities or disorders are not recognised as 'vulnerable' under the Act. Nor are defendants with any of the markers of situational vulnerability that are contained within the 'intimidated witness' provision for non-defendant witnesses (e.g. 'fear or distress'). The under-inclusive nature of the legal definition of vulnerability for the accused in this context thus prevents some such defendants from accessing the support they may need. Eligibility is further constrained by the requirement that their qualifying vulnerability must render them unable, or at least compromise their ability, to participate effectively as a witness in the proceedings (as per YJCEA s 33A(4)(a) and s 33A(5)(b)).

What is clear, then, is that preconceived categories of vulnerability in the special measures context carry a real and material risk of under-inclusivity in both law and practice. Fineman's approach – centring on the assumption that anyone required to give evidence is vulnerable – naturally protects against this and enables us to consider the resilience of all individuals in the context of testifying and the assets needed to bolster said resilience.

Problem 2 of YJCEA Definitions: Inconsistencies in Definition of 'Vulnerable'

The second criticism this article presents is around inconsistent definitions of vulnerability. This is both within the special measures context between different individuals as well

as across different stages of the process and different official bodies. First, as we have just seen, the definition of vulnerability is inconsistent within the YJCEA itself in respect of witnesses and defendants. As well as this, there are also notable discrepancies in the way that vulnerability is defined (or mentioned without definition) in appellate decisions from the Court of Appeal relating to cross-examination (see *R v Baker*; *R v Lubemba*), as well as in the Criminal Procedure Rules and the Criminal Practice Directions with regard to case management, ground rules hearings and other necessary reasonable adjustments. Drew and Gibbs (2019) undertake an extensive review of these differences and it is not repeated here. The existence of these variations between ‘vulnerable witnesses’, ‘vulnerable defendants’, ‘vulnerable people’ and witnesses who are ‘young or otherwise vulnerable’ shows that the finite categorisation of vulnerability and the various references made to it in relation to making reasonable adjustments lack consistency and clarity. Cooper (2017) has also commented on the blurred lines between determinations of ‘vulnerability’ and ‘intimidation’, both in terms of their interpretation and application, despite their enactment over 20 years ago.

Further inconsistencies exist between the way vulnerability is conceived for suspects in the police station (under Revised PACE Code C, see Dehaghani, 2021), versus the accused preparing for and at trial. Through constructing vulnerability in this finite (yet inconsistent) way, people who need additional help may find that they must shoehorn themselves into particular – and different – categories of vulnerability to be eligible for support at different stages of the criminal process. Again, adopting Fineman’s approach and acknowledging our inherent vulnerability in the context of the criminal trial (and process generally) avoids these issues around terminological and definitional consistency. We are, instead, able to focus on the resilience of individuals at different stages of the process and to look to the State to provide assets, including special measures, to build resilience where it is lacking or lost.

Problem 3 of YJCEA Definitions: Instrumental Formulation of ‘Vulnerable’ Witnesses

Another issue specific to the YJCEA categorisations of ‘vulnerable’ witness relates to its instrumental formulation. Most witnesses (leaving aside children and adult complainants of sexual or modern slavery offences) are only considered as ‘vulnerable’ or ‘intimidated’ if the quality of their evidence is likely to be diminished because of their ‘vulnerability’ (whether due to their age, mental/physical/cognitive health and ability, or because of situational factors). Similarly (but more restrictively), the accused can only qualify for special measures if their ability to participate in the proceedings as a witness is, at minimum, compromised. This means that individuals who have a mental health issue, or a physical or learning disorder or difficulty, are not deemed vulnerable for those reasons alone, and nor do they qualify for special measures support on this basis. The same is true of an individual who is in fear or distress in connection with testifying in the proceedings due to their cultural background, their advanced age or the behaviour of the accused. The additional hurdle, relating to evidence quality, renders the provision of special measures (and securing their status as a vulnerable or intimidated witness or defendant) instrumental in nature.

The instrumental definition of vulnerability and the resulting eligibility for special measures is particularly problematic given that special measures were born out of twin concerns for the humane treatment of the vulnerable in the criminal justice system and the quality of their evidence (Fairclough, 2021b). A witness is only legally vulnerable in this context if the quality of their evidence will be diminished, and only then will they become eligible for special measures support. This means that we do not provide special measures support to witnesses for the deontological reason of humane treatment, a foundational principle of criminal evidence (Roberts, 2022: 22–23), that should be upheld in this context for its own sake (Fairclough, 2021b). This is a further example of the potentially under-inclusive nature of the definitions of vulnerability under the YJCEA.

General Issues With Language of ‘Vulnerability’

As well as these reasons that are specific to the YJCEA, moving away from the language of ‘vulnerability’ – and focusing instead on resilience – is also beneficial in light of the plethora of existing research that highlights the general issues with the concept of ‘vulnerability’ and the allocation of resources to individuals on this basis. For instance, the concept of vulnerability is criticised as ‘ambiguous’ (Fineman, 2008: 9), ‘vague and nebulous’ (Brown, 2011: 309), ‘elastic’ (Cole, 2016: 263) and opaque and complex (Munro and Scoular, 2012: 195). It is criticised as a concept that it is ‘deficit-orientated’ (Brown, 2011: 319) – in other words, vulnerability often denotes ‘a range of negative conditions, disabling qualities and diminishing capacities’ (Cole, 2016: 264). Additional concerns stem from vulnerability as a ‘feminized concept’ and more generally for its associations with ‘weakness’ (Gilson, 2016: 71) and ‘victimhood’ (Cowan and Hewer, 2020: 353).

Brown (2015: 86) also highlights the tendency for vulnerability status to be linked with deservingness, which can prevent some individuals – who are deemed to have transgressed in some way – from attaining the vulnerability status at all or result in its withdrawal at a later date. Indeed, evidence from a small-scale empirical study into the use of special measures indicates that the legal profession is less likely to recognise defendants as vulnerable and that this is at least partly because of the criminal accusation against them (see Fairclough, 2017, 2018b). The vulnerability concept is thus ‘value-laden’ (Brown, 2011: 318) and has close links with ‘choice, responsibility, blame and legitimacy’ (Brown, 2011: 319). It is often conceived of as inherently negative and relatively fixed (Gilson, 2014). ‘Vulnerability’ is also criticised as reductive, risking the dichotomous categorisation of people as either vulnerable or not vulnerable, and assuming a level of homogeneity within vulnerability categorisations that does not exist in reality (Gilson, 2014: 74; Luna, 2009: 123). Grouping individuals together based on shared characteristics ‘masks’ the significant differences between those individuals as well as overlooking the similarities that exist between them and society in general (Fineman, 2014: 316).

As well as problems with the scope of the concept, vulnerability is also criticised for its often-damaging effects on those to whom the label is attached. On the one hand, the status of vulnerability can trigger access to enhanced support and resources (Brown, 2011: 318). However, it is often criticised as paternalistic and oppressive, a mechanism of widening

social control, and as excluding and stigmatising individuals classed as vulnerable (Brown, 2011: 316). Fineman (2014: 315), for example, discusses the way in which responses to vulnerability can be either 'punitive and stigmatising' (as with say prisoners or single mothers needing welfare support) or 'paternalistic and stigmatising' (as with what she refers to as 'the "deserving" poor', such as the elderly, or children). In either case, she notes that the typical response to any vulnerable population is increased state surveillance and regulation (Fineman, 2014: 315). What this means is that the very categorisation of some individuals as 'vulnerable' – which is intended to ameliorate vulnerability – can conversely exacerbate existing vulnerability or generate new vulnerability. Mackenzie (2013: 9) refers to this as 'pathogenic vulnerability' and states that often it 'undermines autonomy or exacerbates the sense of powerlessness engendered by vulnerability in general'.

With these generally negative connotations of the vulnerability status in mind, it is perhaps little wonder that some individuals may choose to hide their vulnerability when in contact with the criminal justice system. Home Office research highlights that 'the pride of witnesses sometimes leads them to conceal their difficulties' (Burton et al., 2016: 25). They may also be concerned that an admission of some form of vulnerability may undermine their perceived reliability as a witness, or even rule them incompetent to give evidence at all. Where the accused is concerned, there is also some evidence that defendants may try to hide their vulnerability for fear of ridicule or embarrassment (Talbot, 2012: 17; Wigzel et al., 2015: 34). Depending on an individual's experiences more generally, the associations between vulnerability and 'risky populations' may also deter many individuals from disclosing their vulnerability and accessing the available support. The benefits of recognising that we are all vulnerable in the criminal justice system – and additionally acknowledging the ways in which the spatial context of the adversarial criminal trial and its evidential requirements strip many individuals of resilience in this setting – may help us to overcome these barriers to individuals' securing support.

Conclusion

This article uses Fineman's vulnerability theory to re-examine the provision of special measures to 'vulnerable' and 'intimidated' witnesses. It argues that our traditional commitment to the principle of orality in criminal trials in England and Wales often strips witnesses and defendants of their resilience when they come to testify. This causes such individuals to be more stressed, more forgetful, less convincing, and less accurate as witnesses. Further to this, the article argues that this loss of witness resilience, that occurs due to our preference for oral evidence, leads to our preference for orality itself losing resilience too. This is because it is increasingly less acceptable to the public for witnesses to be treated in this way in the criminal justice process, which undermines the legitimacy of the system.

Through the application of Fineman's vulnerability theory, this article argues for the expansion of eligibility for special measures to all witnesses and defendants who lack resilience in the context of giving evidence in criminal trials. The starting point is that we are all vulnerable in this spatial context, and that it is the duty of the State (particularly

given that the State compels us to participate in the process) to build our resilience. Special measures are thus ‘assets’ that can help towards this end. What this provision of special measures looks like in practice – and how it operates on a practical level – are topics that fall outside of the scope of this paper. It seems likely, however, that intermediaries and pre-recorded testimony should be reserved for those with very little resilience due to specific horizontal vulnerabilities around communication and memory. Less intrusive (and less expensive) measures, such as screens, live link, and the removal of wigs and gowns are more appropriate for more general consumption where a witness lacks resilience while testifying and needs some support. This does not mean that every person testifying in a criminal trial will lack resilience to the extent that they need (or want) special measures assistance. The assessment should be individualised and consider what other assets are available to them (e.g. education, family support, etc) which may render special measures unnecessary for some.

This article further argues that by building the resilience of those testifying through a more inclusive special measures provision, we will simultaneously build the resilience of the principle of orality in England and Wales. While it is true that the exact way in which evidence is heard from witnesses using special measures is altered (i.e. from behind a screen/via video link/with a communication expert), the general oral tradition to which we are committed remains intact. The symbolic importance of oral testimony and cross-examination is retained (albeit adapted), while making it more likely that the resulting evidence will be of good quality, lead to accurate outcomes, and that witnesses will be treated humanely in the process. The more frequent use of special measures therefore lends resilience to individuals required to testify within the adversarial process. This then helps to insulate the principle of orality from several of the well-founded criticisms relating to the appropriateness of the traditional approach to upholding it, thus building its resilience as a result. This paper maintains that this simply narrows the applicability of the principle of orality *in its traditional form*, but does not erode it per se. The process of evidence collection is likely to be regarded as fairer and more acceptable to the public when adjustments are made for those who lack resilience. This serves to bolster the legitimacy of the process.

The application of Fineman’s vulnerability theory to the act of testifying in a criminal trial – a spatial context in which individuals are inherently vulnerable – highlights the difficulties individuals often face in this situation. This article further marks an extension of the use of this theory to examine the resilience of traditional adversarial principles underpinning the criminal trial system to which we are committed. Examining the trial and the associated principles in this way enables us to see the flaws in arguments routinely made that pit adjustments to the way evidence is given (special measures) and the principle of orality against each other. At a macro-level, this allows us to separate the principle of orality and everything it stands for from the way we give effect to that principle. What we can then see is the need for a paradigm shift to acknowledge that we can alter the way we *do* oral evidence without jeopardising our commitment to the principle of orality itself, and in fact that it is sometimes *necessary* for us to do so to justify our commitment to this overall approach. The use of Fineman’s theory on a micro-level in this context also sensitises us to more instances where witnesses giving evidence in the traditional way is not the best or appropriate approach because they otherwise lack the necessary resilience to do so well and without incurring personal harm.

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Notes

1. The accused's provision of special measures is inferior to that for witnesses and operates under a separate scheme to the YJCEA provision (see note 7).
2. Fineman's vulnerability theory has been applied in a vast range of areas, including – but not limited to – precarity in academia (Lieberwitz, 2021); to corporate lawyers (Oakley and Vaughan, 2019); in bioethics (Thomson, 2018); in relation to disability (Clough 2017); polygamy and same sex marriage (Marvel, 2014).
3. Special measures are increasingly available in civil settings such as family courts and employment tribunals, see Civil Practice Direction 1A – Participation of Vulnerable Parties or Witnesses.
4. Historically, we have categorised criminal trials as either adversarial or inquisitorial in nature, though Choo reminds us that no jurisdiction conforms fully or 'purely' to either one of these models and that they are not diametrically opposed (see Choo, 2018: 54). Recently, we have seen the 'rise of managerialism', a possible candidate for a third model of criminal justice, but more likely one which has in some ways diluted adversarialism in England and Wales but not entirely shifted our approach (see Johnston, 2020).
5. It is important to note that we do not have a right to face-to-face confrontation in England and Wales (as noted by Baroness Hale in *R v Camberwell Green Youth Court*) but we do have a right to challenge. Dennis speaks of the right to confrontation as a 'bundle of rights', the right to challenge being one of them (see also Doak, 2000).
6. The introduction of special measures for witnesses is more complex than simply this – it is also bound up in the victims' rights movement (see Fairclough, 2018b; Jackson, 2003).
7. A late insertion into the YJCEA – s33A – permits live link use for vulnerable defendants (inserted by Police and Justice Act 2006, s47). The Coroners and Justice Act 2009, s104 also inserted a defendant intermediary provision into the YJCEA – s33BA – but this has still not been implemented and authority for defendant intermediaries resides under the common law (see Fairclough, Taggart and Backen, 2023). Screens are available under common law, and the removal of wigs and gowns, closure of court to the public and communication aids via the court's inherent power (see Fairclough, 2021a).

8. The witness' views and preferences should remain paramount in special measures decisions to protect their autonomy (see Fairclough and Jones, 2017: 218–219).
9. Inroads to the defendant's right to silence mean that adverse inferences can now be drawn from silence that can be used to infer guilt (Criminal Justice and Public Order Act 1994, s.35). Furthermore, in some cases the defendant has no real choice about whether to testify, perhaps because of evidential presumptions such as in the Sexual Offences Act 2003, s.75, or just because the court simply needs to hear their version of events.
10. There is no conclusive empirical evidence to support this (see Ellison and Munro, 2014: 8) but this does not invalidate it as a concern.
11. As well as pre-trial familiarisation visits and other rules of evidence that exclude unfairly prejudicial evidence (bad character, past sexual history), unreliable evidence (hearsay evidence), improperly obtained evidence, rules that prevent the accused cross-examining a complainant of sexual assault directly, etc. It should be noted, however, that inroads have been made into several of these protections and so resilience provided on these fronts may be inferior to what it once was – particularly for the accused (see Jackson, 2003).

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