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Un-boxing vulnerability in protection of the credit consumer

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Abstract

Whilst policy is moving towards recognition of the complex nature of the vulnerable consumer in credit provision, vulnerability is still in essence viewed as a condition affecting specific groups in society. Using the vulnerability paradigm developed by Martha Albertson Fineman, the paper re-examines the concept of the vulnerable credit consumer, advocating a refined theoretical basis to consumer borrower protection.

Introduction

One pressing issue in discourse on protection of the consumer borrower is vulnerability, and detailed discussion, both academic and within financial services policy, has arisen in relation to this concept.[1] Whilst there is movement towards recognition of its complex nature,[2] there remains an underlying tendency to see vulnerability as something affecting narrow groups of society, viewed in terms of 'vulnerable populations'.[3] Policy in the UK for example has traditionally regarded vulnerability as synonymous with either heightened exposure (depending on particular circumstances) to detriment of a defined type, or the condition of having been exposed to such detriment. This approach, also reflected in financial services regulation, is relatively crude, in that it relies on 'boxing' vulnerability, into income, age, mental ability or particular life circumstances, such as illness. Wedded in fixed

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[1]E.g. P. Cartwright "Understanding and protecting vulnerable financial consumers" (2015) 38 J. of Consumer Policy 119-138; O. Akseli "Vulnerability and Access to low cost credit" in J. Devenney and M. Kenny (eds) Consumer Credit Debt and Investment in Europe (Cambridge University Press 2012); I. Ramsay "Access to credit in the Alternative Consumer Credit Market: Canada in a Global Context "(Ottawa, Ontario: Industry Canada, 2000); D. Capper "Protection of the vulnerable in financial transactions–what the common law vitiating factors can do for you" in M. Kenny, J. Devenney, L Fox O' Mahoney (eds) *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable* (Cambridge University Press, 2010); T. Wilson, N. Howell, G. Sheehan "Protecting the Most Vulnerable in Consumer Credit Transactions" (2009) 32(2) J. of Consumer Policy 117; M. K. Hogg, G. Howells and D. Milman "Consumers in the Knowledge-Based Economy (KBE): What creates and/or constitutes consumer vulnerability in the KBE?" (2007) 30(2) J. of Consumer Policy 151; S. M. Baker, J.M. Gentry and T.L.Rittenberg "Building understanding of the domain of consumer vulnerability" (2005) 25(2) J of Macromarketing, 1.

[2] Financial Conduct Authority FCA Business Plan 2017-18 (FCA 2017) pp.50-51

[3] M. A. Fineman '"Elderly" as Vulnerable: Rethinking the nature of individual and societal responsibility" (2012) 20 Eld. L. J. 71, 84

ideas of consumer need and persona, this entrenches constricted views of vulnerability, and undermines consumer protection in the credit market, by creating gaps in protection and inadvertently exposing consumer vulnerabilities in other ways.[4] Policy discussion therefore would benefit from engagement with a distinct theoretical view of vulnerability. Using the vulnerability paradigm developed by Martha Albertson Fineman, this paper examines the vulnerable credit consumer from a new perspective. The theory argues that vulnerability is a constant, ongoing aspect of the human condition; it is an inevitable consequence of our embodiment,[5] with our dependence on and in embeddedness within society and its institutions, being inherent to the life experience.

Concern with the nature of vulnerability, forms of resilience, and the intrinsicality with our very being, has grown in significance across a number of disciplines, for example the environment,[6] bioethics,[7] social welfare policy and social justice.[8] This paper will demonstrate, using the UK as an example, that by viewing current consumer credit policy through the lens of Fineman's theory, what is required is a different approach to the concept of the vulnerable credit consumer. It provides an example of how prevalent perceptions encourage misdirection in policy initiatives. Using vulnerability theory to re-define our understanding of the vulnerable, the paper explains why current initiatives, although vital, are struggling to provide the complete answer to protection of the borrower. The paper's argument is not to decry provision of credit as such, or to provide detailed discussion of regulatory theory, individual regulatory response and reform, or wider questions of state welfare. These of course all merit further separate individual detailed investigation. Neither will tools of debt relief be discussed in detail, these being rehabilitative, rather than preventative measures. Rather, as an initial and vital stage, the paper argues for a new theoretical justification that can take protection of the credit consumer forward in a meaningful way.

The paper will start with an overview of recent policy concerns in the context of consumer credit, and will outline the ways in which the UK system approaches these issues at present. The following sections will then provide a discussion of the vulnerable credit consumer, providing an analysis through the lens of vulnerability theory. The final section will then suggest ways in which this vulnerability should be addressed, concluding that those who frame policy must 're-think' vulnerability and re-assess responses to this critical issue.

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[4] E.g. restricting access to credit for those who in reality can afford it

[5] Fineman "Elderly" as Vulnerable: Rethinking the nature of individual and societal responsibility" p.89; M. A. Fineman "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008) 20 Yale J.L. & Feminism, 1, 9.

[6] E.g. B.Wisner, P. Blaikie, T. Cannon and I. Davis At Risk: Natural Hazards, People's Vulnerability and Disasters (London:NewYork:Routledge, (2014)

[7] E.g. W. Rogers, C. Mackenzie and S. Dodds "Why bioethics needs a concept of vulnerability" (2012) 5(2) Intl. J. of Feminist Approaches to Bio-ethics, 11

[8] E.g. C. Mackenzie, W. Rogers, and S. Dodds (eds) Vulnerability: new essays in ethics and feminist philosophy (Oxford University Press 2013)

UK policy and regulatory responses to vulnerability in consumer credit

Policy notions of vulnerability

Ideas of vulnerability within UK policy, particularly in relation to consumer borrowing, have developed over time. Vulnerable consumers have traditionally been categorised in terms of age, low income, the intellectually challenged, and, more recently, those who suffer from poor mental health.[9] Poverty and necessitous borrowing for basic requirements rather than social consumption have always featured.[10] However as financial services have become more sophisticated, concern has extended to limited access to credit, weak bargaining position (whether financial or intellectual), information asymmetry and exploitation. These are all seen as detrimental aspects to consumer borrowing, which lead to over-indebtedness and create, or exacerbate 'vulnerability'.

Exploitation can take many forms, and can be manifested in subtle creditor approaches. It has been found for instance that impulsive behaviour of UK borrowers, rather than directly exploitative creditor behaviour, may be linked to using particular types of borrowing. Easily accessible credit, for example mail order store cards and payday lending, allow creditors to 'tap' into this impulsiveness. Indeed research has shown some connection between consumer impulse and over commitment to debt (over-indebtedness), demonstrating it as a more significant factor than lack of financial literacy,[11] at present identified as a primary culprit. Alternatively products themselves may be designed for a particular customer demographic, such as door step lending where customers prefer the weekly payment and collection model, or products designed for the sub-prime market, appealing to those excluded from traditional banking and mainstream finance. Such products have been described as "a form of cultural exploitation resulting in redistribution from the poor and from minorities to creditors' investors" [12] in effect 'exploiting' consumer choice, by trading lower cost for easier accessibility.

These factors may lead to individuals taking on credit they cannot afford or do not need. This in turn leads to a drain on income, default and subsequent financial exclusion, where only costly or illegal credit is available. Financial exclusion can have a societal impact/cost, such as social exclusion, poor health, the break up of the family or loss of a home. Current concerns also centre on technology strategies and

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[9] M. Holkar "Seeing through the fog-how mental health problems affect financial capability" The Money and Mental Health Policy Institute (2017) http://www.moneyandmentalhealth.org/wp-content/uploads/2017/02/Seeing-through-the-fog-Final-report-1.pdf [Accessed 17 August 2018]

[10] S. Brown "European Regulation of Consumer Credit: enhancing consumer confidence and protection from a UK perspective?" in J. Devenney and M. Kenny Consumer Credit, Debt and Investment in Europe, (Cambridge University Press, 2012) ch 3

[11] J. Gathergood "Self-control, financial literacy and consumer over-indebtedness" (2012) 33(3) J. of Economic Psychology 590; cf research into American debtors undertaken by A. Lusardi and P. Tufano "Debt Literacy, Financial Experiences, and Overindebtedness" (2015) J. of Pensions Economics and Finance 332

[12] J. Braucher "Theories of Overindebtedness Interaction of Structure and Culture" (2006) 7 (2) Theoretical Inquiries in Law 323-346, 335

risk based pricing that may exclude certain sectors of the consumer community. [13] Indeed access to retail financial services more generally is now regarded as a "social necessity within contemporary capitalist economy".[14] It is difficult, even impossible to hold down a job, get housing, or conduct purchases through accepted channels such as the internet, if un-banked.

Policy's answer to these issues is seen in financial inclusion, a matter of some prominence in current UK government policy, and regulation of deleterious creditor behaviour. Regulatory policy in relation to supplier conduct and credit consumer protection (indeed all financial services) is delivered by the independent regulator, the Financial Conduct Authority ('FCA'). The FCA has its purpose set out in statute[15] and whilst the direction of FCA action is informed by government policy, it itself develops initiatives in order to achieve its objectives. These initiatives are clearly set within the context of a well-functioning market. The FCA is required, when performing its functions, to observe its strategic objective and advance at least one of its three operational objectives. The strategic objective is to ensure markets work well, and the three operational objectives are: an appropriate degree of protection for consumers, protection and enhancement of the integrity of the UK financial system, and promotion of effective competition in the interests of consumers. [16]

At the beginning of 2017 the FCA launched a mission paper looking at future themes, one of which was vulnerability.[17] Whilst vulnerable consumers are regarded as representing the minority, it has been made clear, both in earlier government policy initiatives, and in present policy aims, that protecting them is a priority. There have been numerous recent research and discussion papers on the issue, in 2014,[18] 2015,[19] and a thematic review in 2016.[20] These publications demonstrate that understanding of vulnerability has, in some respects, moved on. It is recognised that it can be 'unhelpful' to only view vulnerability in terms of specific categories such as the old and disabled, and that it is a more heterogeneous concept:[21] as the FCA itself states "People can become vulnerable at any time."[22] This approach is also apparent beyond state institutions. The British Bankers Association (BBA), the leading trade association for the UK banking sector, launched the Financial Services Vulnerability Task Force, together with charities and consumer groups. The BBA accepts that "no

[13] FCA FCA Business Plan 2017-18 p.27
[14] A. Leyshon and N. Thrift "Geographies of Financial Exclusion: Financial Abandonment in Britain and the United States" (1995) 20 Transactions of the Institute of British Geographers 312, 313
[15] Financial Services and Markets Act 2000, (FSMA) s 1B
[16] FSMA s 1B(2)-(4)
[17] FCA our Mission 2017 How we regulate financial services (2017)
[18] FCA Consumer credit and consumers in vulnerable circumstances (FCA April 2014); B. Rowe, J.Holland, A. Hann and T. Brown "Vulnerability exposed: The consumer experience of vulnerability in financial services" (FCA ESRO December 2014)
[19] M. Coppack, Y Raza, S. Sarkar and K. Scribbins 'Occasional Paper No 8 Consumer Vulnerability' (FCA February 2015) https://www.fca.org.uk/publication/occasional-papers/occasional-paper-8.pdf [Accessed 17 August 2018]
[20] https://www.fca.org.uk/publications/thematic-reviews/financially-vulnerable-customers-key-findings [Accessed 17 August 2018]
[21] FCA Mission Our Future Approach to Consumers p.9
[22] FCA Business Plan 2017-18 p. 51

two vulnerable customers are the same”.[23] Vulnerability is described as “a dynamic state, which is affected by personal factors, life events and wider circumstances or relationships, including those between customers and their bank or other financial service providers”.[24] Nevertheless rather than thinking of vulnerability as inherent and constant, there is reference to non-vulnerable consumers and ‘becoming’ vulnerable, and there is still some reliance on categorisation and ‘types’ of vulnerability, to which anyone is ‘potentially’ subject[25], such as low capability (literacy, numeracy or financial acumen), physical or mental disability, illness, age, change in circumstance or non-standard requirements for a product.

There is another notable element. This is the promotion of ‘consumer empowerment’. Consumer empowerment is seen as a ‘method’ of consumer protection,[26] and is predicated in strengthening the consumer’s position through tools designed for self-reliance.[27] These include information designed to facilitate rational choices and the necessary responsibility that ensues, providing changes in market behaviour,[28] and equilibrium in the consumer/creditor relationship.[29] It could be argued that with increasing emphasis on the vulnerable, the prominence of consumer empowerment in policy thinking is now less visible as a headline for credit consumer protection. Nevertheless recent government consumer rights policy still has some focus on “empowering and protecting consumers”[30] primarily through information, and the FCA has also placed some emphasis on consumer empowerment and responsibility, to be facilitated by better creditor communication.[31] Consumer empowerment, therefore, based in engagement with the market, and competition, still influences response to consumer protection issues.[32]

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[23]BBA “Improving outcomes for customers in vulnerable circumstances”(February 2016), 3 https://www.bba.org.uk/publication/bba-reports/improving-outcomes-for-customers-in-vulnerable-circumstances/ [Accessed 17 August 2018]

[24] BBA “Improving outcomes for customers in vulnerable circumstances”

[25] The FCA defines ‘potentially’ vulnerable consumers into categories of health, financial resilience (high outgoings to income ratio), life events and capability FCA FCA Mission Our Future Approach to Consumers p.30

[26] Fair Clear and Competitive The Consumer Credit Market in the 21st century (Dec 2003) (Cm 6040)

[27] In the context of financial education see T. Williams “Empowerment of Whom and for What? Financial Literacy Education and the New Regulation of Consumer Financial Services” (2007) 29 Law & Pol’y 226

[28] I. Ramsay “From Truth in Lending to Responsible Lending” in G Howells, A . Janssen, and R. Schulze (eds)Information Rights and Obligations: a challenge for Party Autonomy and Transactional Fairness (London:New York: Routledge, 2005) pp. 50, 61

[29] A suggested impossibility in terms of information–information asymmetries are inherent in the economic system- A. Oehler and S. Wendt “Good Consumer information: The Information Paradigm at its (Dead) End?” (2017) 40(2) J. Consum. Policy 179, 181

[30] Jo Swinson, Parliamentary Under-secretary of State for Employment Relations and Consumer Affairs, Written Ministerial Statement Draft Consumer Rights Bill (12 June 2013) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274789/bis-13-917-written-ministerial-statement.pdf [Accessed 17 August 2018]

[31] FCA Feedback Statement Smarter Communications (FCA, FS 16/10) https://www.fca.org.uk/publication/feedback/fs16-10.pdf [Accessed 17 August 2018]

[32] B.Williams, C. Bhaumik, A. Silk, and GfK NOP Social Research “Consumer Empowerment Survey Report: Report on a segmentation of the general public” (Dept for Business Innovation and Skills, March 2015) p. 1,3

Regulatory Responses

The regulation that controls suppliers' conduct in the consumer credit market is made up of legislative requirements in the Consumer Credit Act 1974 (the CCA), secondary regulation (statutory instruments) and a set of eleven fundamental obligations or High Level Principles (PRIN) and Rules to which each firm must adhere. Rules are made by the FCA, which together with PRIN, are contained in FCA Conduct rulebooks (for consumer credit this is the Consumer Credit Sourcebook (CONC)).[33] PRIN and Rules are binding, with disciplinary sanctions available where creditors do not comply. Beyond the mechanics of authorisation and supervision of creditors, protection is delivered primarily[34] through three bases of regulatory protection: transparency, responsible lending and fair treatment, all of which are seen as tools to protect the vulnerable consumer.[35] Transparency is delivered both pre and post contract through FCA Rules as well as secondary regulation and the legislative provision of the CCA. Responsible lending obligations are also contained in the Rules,[36] which require creditors to assess the creditworthiness of the consumer. The creditor must consider some factors, and is advised to consider others.[37] The aim essentially is to assess ability to pay and to ensure the borrower does not become over-burdened. In terms of recent FCA rule-making activity, examples include a cap (as a result of direct parliamentary action) on the cost of high cost short term borrowing, and review of the credit card sector, resulting in new Rules being introduced for borrowers in 'persistent debt'.[38]

Protection against unfair treatment of the consumer can be found in PRIN, including requirements to conduct business with due skill, care and diligence, to pay due regard to the interests of customers and treat them fairly, and to pay due regard to the information needs of customers and communicate in a way which is clear, fair and not misleading. In terms of vulnerabilities CONC gives specific guidance where a firm believes or has reason to suspect a customer lacks mental capacity in some way and in giving debt advice, appropriate policies for vulnerable customers must be in place.[39] Separately the CCA, under the unfair credit relationship provisions in sections 140A-C allow a court to assess the relationship between creditor and borrower, and give the court far reaching powers, for example changing agreement terms, or releasing the borrower from her/his obligations; the question of the vulnerability of the borrower

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/413511/BIS-15-208-consumer-empowerment-survey.pdf [Accessed 17 August 2018]

33 Lending on land (mortgages) is covered by the Mortgage Conduct of Business Sourcebook (MCOB). Credit unions by CREDS

34 There are also controls that affect the price of credit, if high cost short term, and that prohibit/restrict certain types of activity.

35 FCA Mission 2017 How we regulate financial services p. 6 FCA Thematic Review Embedding the Mortgage Market Review: Responsible Lending Review (FCA May 2016) p.10 https://www.fca.org.uk/publication/thematic-reviews/tr16-04.pdf [Accessed 17August 2018]

36 CONC Rule 5; MCOB Rule 11-11A

37 Through Guidance provided with the Rules

38 FCA Credit card market study: persistent debt and earlier intervention- feedback to CP 17/43 and final rules Policy Statement PS18/4 (FCA February 2018) https://www.fca.org.uk/publication/policy/ps18-04.pdf [accessed 23 August 2018]

39 CONC 2.10, 8.2.7

has had a part to play in court deliberation.[40] Enforcement and sanctions are diverse, from fines and disciplinary action for breach of FCA Rules, to temporary un-enforceability of an agreement, or indeed amendment of/setting aside terms of the agreement in its entirety under the CCA.

Difficulties with current approaches

(1) financial inclusion initiatives

As noted above vulnerability has been strongly linked to over-indebtedness. A response is found in financial inclusion initiatives, but arguably this is problematic. Indeed financial inclusion agendas have been challenged more widely by writers such as Susanne Soederberg, who regard such initiatives as a diversionary tactic from underlying factors driving poverty.[41] On the one hand, policy is concerned with over-commitment to debt, the exposure of defined groups to credit, and the disadvantages that can arise from this. It then however presents financial inclusion with access to credit as a goal. Of course, the vision of financial inclusion goes beyond borrowing. Encompassing access to all mainstream financial services, such as the ability to open a bank account, is a wider global issue, and a question that concerns sustainability, prosperity and competition. [42] It is also true access to credit is framed as access to 'affordable' credit. However the concept of affordable credit is aimed at those whose main barrier to access is low income. It concentrates on the price of the product, within a time frame, rather than the wider long term non-financial impact that may arise simply from being indebted (anxiety, effect on health and relationships, and resultant self-denial of other benefits) even if the debt, in practical terms, is manageable. It does not counter detriments linked to financial exclusion such as age or mental health, and does not account for the sudden onset of problems such as loss of income. No credit is affordable if there is no income to service the debt. The FCA has recognised this dilemma itself

> "Our regulatory approach is focused on how we help …ensure credit is available to those who need it without individuals falling into unsustainable debt that they will never be able to pay off, with the personal and social costs that brings."[43]

Furthermore, and perhaps more telling, the provision of affordable credit is inevitably linked with some assessment of risk. The price of a loan will always have an element of calculation of likely repayment: the greater the prospect of borrower default, the higher the cost. Inevitably therefore credit will be more expensive for those on low incomes or considered high risk because of their circumstances- i.e those financial

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[40] S. Brown "Consumer Credit Relationships – protection, self-interest /reliance and dilemmas in the fight against unfairness: the unfair credit relationship test and the underlying rationale of consumer credit law" (2016) 36 L.S. 230, 244

[41] S Soederberg Debtfare States and the Poverty Industry Money Discipline and the surplus population (London New York, Routledge 2014)

[42] http://www.worldbank.org/en/topic/financialinclusion/overview [Accessed 24 August 2018]

[43] T. McDermott (Acting Chief Executive, FCA) Credit Summit 2016 "Consumer credit regulation: the journey so far" (7 April 2016) https://www.fca.org.uk/news/speeches/consumer-credit-regulation-journey-so-far [acccessed 23 August 2018]

inclusion is supposed to assist.

(2) consumer empowerment

Notions of empowerment give importance to autonomy, choice and resultant responsibility. However it is regularly argued employment of ideologies of the 'liberal subject' or 'homo economicus' [44] with ability to make rational choices is misleading. This is certainly an attractive viewpoint when one considers potential external factors and/or the behavourial economic literature, which points to our susceptibility to making less than optimal choices.[45] This highlights problems in trying to create conditions for autonomous choice in the borrowing process.[46] This does not necessarily mean choice is not present at all. However what is called into question is the quality of that choice and therefore the nature of autonomy, and the basis upon which a credit agreement is made. Whilst at one level there may be choice as to whether to borrow money, in reality credit may be essential for life in our society, or indeed our practical existence. This illustrates problems thrown up by the active (living beyond one's means) and passive (debt through misfortune) distinctions in over-indebtedness discussed in detail by Ramsay in his comparison of policy approach to over-indebtedness in France and England. [47] Autonomy here therefore may have little to do with free choice but should be understood simply as an ability, that may or may not be present at any given moment, to act: a situational tool in a larger framework within which we order our activities with and responses to others.

It also raises the role of the nature of consent and freedom within the consumer credit relationship. This relationship is seen by the law as based in contract, and yet is often unequal- to what extent the sanctity of that contract should be respected, therefore is a difficult one.[48] Here Ian MacNeil's relational theory of contract law,[49] is helpful, which sees consumer/supplier contracting as part of a broader relationship, which must be taken into account in validity and enforceability of contracts beyond simply

[44] A concept shared by classical and neo-liberalism –J. Read "A Genealogy of Homo-Economicus: Neoliberalism and the Production of Subjectivity" (2009) Foucault Studies, 25, 27-28

[45] Brown "Consumer Credit Relationships – protection, self-interest /reliance and dilemmas in the fight against unfairness: the unfair credit relationship test and the underlying rationale of consumer credit law" p. 245

[46] Ramsay "From Truth in Lending to Responsible Lending" p. 62

[47] I. Ramsay "A Tale of Two Debtors Debtors: Responding to the Shock of Over-Indebtedness in France and England – a Story from the Trente Piteuses" (2012) 75(2) M.L.R. 212

[48] The academic literature surrounding the nature of contractual relations is vast. As examples of work that charts the freedom and sanctity of contract see e.g.: P.S. Atiyah The Rise and Fall of the Freedom of Contract (OUP1979); E. Posner "Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract" (1995) 24(2) J.L.S.283; J.N. Adams and R Brownsword "The Ideologies of Contract"(1987) 7 L.S. 205; K.M. Sharma "From Sanctity to Fairness: An Uneasy Transition in the Law of Contracts" (1998-1999) 18 N.Y.Sch.J.Int'l.& Comp.L. 95. For consumer welfarist and market individualistic theories see eg R. Brownsword Contract law theories for the twenty-first century, 2nd edn (OUP 2006); D. Campbell "Reflexivity and welfarism in the modern law of contract" (2000) 20(3) O.J.L.S. 477

[49] I. MacNeil The New Social Contract: An Inquiry into Modern Contractual Relations (New Haven : Yale University Press, 1980).

the reading of terms.[50] Macneil's approach treats this as an analytical and interpretive question, and it demonstrates a flexibility that is appropriate in considering consumer vulnerability. The CCA's unfair credit relationship test under ss 140A-C, with its wide provisions that allow the court to set aside an agreement where unfairness is present, already provides a framework for the adoption of this approach. Whilst judicial approach to this test, at the highest level, has recognized the contractual relationship is relevant, it is willing to deny agreed contractual rights where the circumstances under which the agreement was entered into, warrant it.[51]

This comes down to the extent of responsibility that arises from credit provision, both intrinsic (arising in relation to the parties and attaching to creditor and debtor as a result of the credit relationship) and extrinsic (arising in the context of consumer protection, and attaching to the state). In relation to both, despite ss 140A-C, the continuing adherence to tools of self-reliance such as transparency underline the ongoing importance attached to borrower responsibility, demonstrating Ramsay's argument of a responsibilisation of the consumer, designed to support market competitiveness.[52] This is further emphasised in the FCA's statutory consumer protection objective, which recognises a "general principle that consumers should take responsibility for their decisions",[53] as a factor to be considered by the FCA when deciding an "appropriate degree of protection for consumers".[54] The FCA, therefore, as supervisor and regulator, is driven by objectives set in market protection and a regulatory framework, supported by the state, which ascribes, in some measure, to borrower responsibility.

(3) Regulatory control

Exploitation, naturally, is seen in terms of creditor behaviour, and regulation of such behaviour is an aim of legal control of credit. Taking advantage of informational asymmetry and consumer avoidance of search costs,[55] is addressed through transparency provisions, aimed at empowering consumers. The limitations of information provision as a protective tool are, however, well documented and recognised,[56] and presuppose the consumer is a rational utility maximizing individual

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[50]E.J.Lieb "What is the Relational Theory of Consumer Form Contract in J Braucher, J. Kidwell and W. Whitford (eds) Revisiting the Contracts Scholarship of Stewart Macaulay On the Empirical and the Lyrical (Oxford and Portland: Hart Publishing 2013) ch 9. Lieb's discussion refers to standard form contracts- most credit agreements will be in this form.

[51] Brown "Consumer Credit Relationships – protection, self-interest /reliance and dilemmas in the fight against unfairness: the unfair credit relationship test and the underlying rationale of consumer credit law" p. 252

[52]I. Ramsay 'Consumer Law, Regulatory Capitalism and the 'New Learning' in Regulation' (2006) 28 Syd. L.R. 9,13; Brown "Consumer Credit Relationships – protection, self-interest /reliance and dilemmas in the fight against unfairness: the unfair credit relationship test and the underlying rationale of consumer credit law" p. 238

[53] FSMA s 1C(2) (d)

[54] FSMA s 1C(2)

[55] Such as time/energy taken to look for the best choice

[56] There is much literature, theoretical and empirical, discussing this e.g. G. Howells "The potential limits of consumer empowerment by information" (2005) 32(3) J.L.S. 349; O. Ben-Shahar and C E. Schneider More Than You Wanted to Know: The Failure of Mandated Disclosure (Princeton University Press 2014); C. Porras and W. Van Boom "Information Disclosure in the EU Consumer Credit Directive: Opportunities and Limitations" in Devenney and Kenny Consumer Credit, Debt and Investment in Europe, ch 2; L. Willis

who will use the information accordingly. This information paradigm shows inconsistency in that increasing information may have the capacity to confuse, overwhelm or encourage disengagement of the consumer, rather than provide protection. It does not take account of inherent problems with consumer decision-making,[57] or the underlying individual contexts of consumer borrowing. Consumers are diverse. Some for instance will be more educated than others, be more mentally able than others, and indeed may make 'optimal' choices using available information. Some consumers will experience externalities not suffered by others, and will have to deal with differing circumstances, whether better or worse. These are precarious conditions that can change though any combination of factors, and cannot be seen in isolation. Empowerment, through information will therefore only provide limited consumer protection.

In relation to the creditor's position within the credit relationship, responsible lending rules and assessment of creditworthiness requirements leave the industry with the responsibility of compliance. This can bring dangers where profit driven norms and problematic lending cultures dominate. Certainly the FCA has responded to this[58] and continues to do so in that it states a central aim of its supervisory role is challenging poor conduct and culture within the financial services industry. Yet it sees this as an issue to be tackled by the industry, and ultimately a means of reducing regulatory intervention;[59] 'proportionate' supervision continues as the underlying theme. This perhaps highlights the difficult balance that the FCA has to strike between its competing objectives of market and consumer protection, which inevitably 'hampers' a more robust approach.

Curbing cost and unfair behaviour are also seen as a powerful regulatory response. However these forms of control have their potential pitfalls. Interest rate controls, widely utilised for example across the US and recently reintroduced in the UK in response to the outcry over payday lending, carry risks of pushing the poor and high risk borrower into the arms of the illegal lender. Protection against unfair treatment highlights problems with defining what is unfair.[60] Recent case-law applying the CCA's unfair credit relationship test demonstrates that this is not an easy exercise.[61] This provision, whilst providing an important and essential safety net for the consumer has not been without difficulty, due to the powers it allows the court and

"Decision making and the limits of disclosure: the Problem of Predatory Lending: Price" (2006) 65 Md.L.Rev.707; W. C. Whitford "The Functions of Disclosure Regulation in Consumer Transactions" (1973) Wis.L.Rev.400

[57] Ramsay "From Truth in Lending to Responsible Lending" PP. 54-55

[58] Brown "Consumer Credit Relationships – protection, self-interest /reliance and dilemmas in the fight against unfairness: the unfair credit relationship test and the underlying rationale of consumer credit law" p. 251

[59] FCA FCA Business Plan 2017-18 p 6

[60] Brown "Consumer Credit Relationships – protection, self-interest /reliance and dilemmas in the fight against unfairness: the unfair credit relationship test and the underlying rationale of consumer credit law" pp. 242-245, 257

[61] Brown "Consumer Credit Relationships – protection, self-interest /reliance and dilemmas in the fight against unfairness: the unfair credit relationship test and the underlying rationale of consumer credit law" pp. 230-257

the widely drafted nature of the section. In contrast, the framing of FCA Rules, for example in terms of responsible lending and 'identification' of the 'particularly vulnerable' with specific reference to mental health and capacity, can also create problems for creditor interpretation of compliance.[62] It is no wonder it can be 'challenging' for creditors to identify vulnerability in this way,[63] when in reality, as will be argued below, vulnerability is always present, possibly exposed at any given moment.

What this demonstrates is that regulation that attempts to ensure customers are treated fairly, or are lent to responsibly, requires judgment calls that can be difficult to make and can create uncertainty. Uncertainty is the enemy of any well-functioning market, and regardless of any distaste for our neo-liberal construction of modern life, until there is a change in direction, a well-functioning market in a product as essential as credit plays an important role. The problem is that creditors, in their efforts to comply with the standards required in relation to treatment of defined categories of consumer, or the FCA in an effort to further guide creditors in this regard, construct rules of engagement that may impact on those who do not necessarily conform to consumer stereotypes, and their access to credit. This creates the paradox of potentially causing harm, in effect a form of financial exclusion, rather than providing protection. One answer to this contradiction, and indeed wider problems, lies in re-examining the 'essential' nature of who it is these rules are designed to protect- for if the approach to this question is misguided, the very rationale of policy and regulation may also be distorted.

Vulnerability theory and the credit consumer

There are two current issues. The first lies in the regulatory categorisation of consumers, and the gaps this produces in relation to those who do not conform to discrete identities. This is the 'perceived' vulnerability observed by Baker et al- a "misconception of what constitutes real vulnerability… muddies the waters".[64] Just because, for example, a person may be within a 'defined' vulnerable group, this does not mean they will necessarily suffer detriment,[65] perhaps particularly pertinent in relation to definitions of vulnerability based in age.[66]In other words boxing

[62] FCA Creditworthiness and affordability: common misunderstandings (26 June 2016) https://www.fca.org.uk/publication/consumer-credit-information/consumer%20credit-understanding-cc-creditworthiness-affordability-web.pdf, [accessed 23 August 2018] this has led to proposals for changes to the Rules and guidance FCA Assessing Creditworthiness in Consumer Credit Proposed Changes to our Rules and Guidance (CP 17/27, July 2017) https://www.fca.org.uk/publication/consultation/cp17-27.pdf [Accessed 24 August 2018]
[63] FCA Mission Our Future Approach to Consumers p.14
[64] Baker, Gentry and Rittenberg "Building understanding of the domain of consumer vulnerability" p. 129
[65] Baker, Gentry and Rittenberg "Building understanding of the domain of consumer vulnerability" p. 137- now recognised by the FCA- Financial Conduct Authority FCA Mission Our Future Approach to Consumers p. 8
[66] e.g. seen in recent problems with mortgage provision for older home-buyers: Brown "Consumer Credit Relationships – protection, self-interest /reliance and dilemmas in the fight

vulnerability is a blunt tool. The second is that understanding vulnerability in this way misses out an important stage in the analysis. For what is described as vulnerability is in fact susceptibility to the negative effects of credit, which may affect one consumer more than another at any given moment. Vulnerability, in contrast, should be understood in much wider terms: we are all vulnerable but this may only be exposed when these susceptibilities arise. These susceptibilities are not creators or identifiers of vulnerability[67] but rather simply reveal an underlying permanent condition.

Vulnerability theory

Fineman's work examines and presents the concept of vulnerability as a constant- something we all experience, being an inevitable consequence of our embodiment and "bodily fragility".[68] Vulnerability is a universal experience- we are not 'more' or 'less' vulnerable.[69] The theory therefore considers a sectored approach to the individual as two dimensional and inadequate. Vulnerability can even arise in the very social and state institutions that have been developed and created to support and engender resilience in the individual, including those created by the state to fulfil its responsibilities that arise from the individual-state relationship.[70] These are after all, human led organizations, open to capture and corruption. This can result in intensifying rather than alleviating individual vulnerability.

Vulnerability theory argues for the more "responsive state" that takes account of this vulnerability, providing assets or resources of resilience, seen as a partial solution to, and the means of recovery from, experiences triggered by vulnerability.[71] There must be a state response by providing access to these resources to enable individual response to detrimental experience.[72] The theory views the state as currently hampered by adherence to the prevalent view of the individual as autonomous and independent: a "contemporary political subject", based in self –reliance, rationality, responsibility and individualism.[73] It challenges the "autonomy myth" –what is required is a more inclusive and realistic legal subject.[74] The role of personal autonomy, where narrowly perceived as freedom from state interference or third party control, allows the state an excuse for non-intervention. [75] Vulnerability theory does not however dismiss autonomy, option and choice. Rather it rejects autonomy as a vehicle for egocentricity, advocating instead its cultivation through attention to the

against unfairness: the unfair credit relationship test and the underlying rationale of consumer credit law" p. 246

[67] cf Cartwright "Understanding and protecting vulnerable financial consumers" p.121

[68]M.A. Fineman "The Vulnerable Subject and the Responsive State" (2010) 60 Emory L.J. 251, 263

[69] Fineman "The Vulnerable Subject: Anchoring Equality in the Human Condition" 9.

[70] Fineman "The Vulnerable Subject and the Responsive State" p.273

[71] M. A. Fineman "Vulnerability and Inevitable Inequality" (2017) 4 Oslo L. Rev. 133, 146

[72] M.A. Fineman "Equality and Difference The Restrained State" (2014-15) 66 Ala.L.Rev. 609, p 624

[73] Fineman "Equality and Difference The Restrained State" p.617; Fineman "The Vulnerable Subject: Anchoring Equality in the Human Condition" pp.10-11

[74] Fineman "Vulnerability and Inevitable Inequality" p 149

[75] E.g. in the US the role of personal autonomy, so perceived, is utilized by policy in this way Fineman "The Vulnerable Subject and the Responsive State" pp.258-259

needs of others.[76]

Fineman's vulnerability analysis argues that we are all, as individuals, vulnerable. However, vulnerability is not a comparative concept, 'fixed' by particular circumstances or particular life stages.[77] Furthermore there are inevitable differences between individuals, arising from our embodiment and how, or the extent to which, we are "differently embedded in social relationships and within institutions".[78] Vulnerability, whilst universal, is also 'particular', something that is experienced through our relationships with each other, social institutions, such as the family, the market-including that of financial services, particularly pertinent to this paper's analysis- the state, and the resources distributed through them. [79] Indeed these relationships and institutions exist as an acknowledgement of human vulnerability and dependence.[80] Relationships therefore are key, and therefore some examination of the consumer credit relationship itself is required.

'Traits' of the consumer credit relationship

Regulatory provision in the UK primarily prescribes to the underlying belief of the average consumer as a rational and circumspect individual, with an ability to make considered choices (if given the necessary tools to do so) and engage successfully in the credit market- in other words 'homo economicus'- the 'average' consumer, as understood and adopted, for example, by European consumer protection law.[81] Such a test has been described as "overly simplistic" with little relevance in reality to consumer behaviour.[82] Yet it is in effect used as the comparative baseline from which vulnerability is gauged. Other parameters used to identify 'competent consumers', for example high net worth or small business borrowers, seen as in less need of protection, demonstrate this well.

If vulnerability theory's view of the human actor is to be adopted, this suggests a reformulation of the view of the individual. The theory provides a challenge to the construct of the liberal autonomous subject used by law and policy. As Fineman points out, any idealised stereotype misrepresents the 'actual' human being.[83] Policy's

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76 Fineman "The Vulnerable Subject and the Responsive State"p.261

77 Fineman "Vulnerability and Inevitable Inequality" p.142

78 Fineman "Equality and Difference The Restrained State" p 613;

79 Fineman "The Vulnerable Subject and the Responsive State" 268-269.

80 It is argued these relationships are socially constructed in response to dependence arising from our embodiment. Fineman "Equality and Difference The Restrained State" pp. 614, 622

81 E.g. Pippig Augenoptik GmbH & Co. KG v Hartlauer Handelsgesellschaft mbH and Verlassenschaft nach dem verstorbenen Franz Josef Hartlauer (C-44/01) [2003] ECR I-3095 see also Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive' OJ L 149 art 5

82 R. Incardona and C. Poncibo "The average consumer, the unfair commercial practices directive, and the cognitive revolution" (2007) 30 (1) J. Consum. Policy 21

83 Fineman '"Elderly" as Vulnerable: Rethinking the nature of individual and societal responsibility" p.88.

approach sidesteps the real context of debt for many consumers. It does not seem to account for the extent to which borrowing may or may not be a 'real' choice. It does not adequately recognise the tension and pressures created by our relationship with others, and the institutions with which we interact in order continue with our daily lives- in other words our social embeddedness. The contrasting experience of different consumers can starkly demonstrate the opportunities that may be enjoyed by some and the disadvantage experienced by others though lack of such opportunity. State mechanisms, such as the benefits system, which may fail to provide, effectively push some consumers into borrowing,[84] potentially at a very high price (due to perceived or real risk of default), in order to meet basic needs. Government supports market competition, yet the increased choice and market efficiency this may bring is only likely to benefit those who have access to lower priced products (i.e. those who satisfy creditors' risk assessment processes). This raises wider questions of distributive justice, an issue at the heart of Fineman's analysis, and demands a responsive state that formulates a framework of access and balanced opportunity for all. [85] Vulnerability theory requires state responsibility to ensure institutions do not foster undue privilege in some and disadvantage for others, by providing resilience building mechanisms for some and not others.[86] This requires balance of interests and needs and an effective understanding of what these interests and needs are.

An initial step lies in examining the borrowing process itself. Although much has been written, particularly in the field of behavioural economics, and in marketing literature about the factors that influence consumer interaction in markets,[87] there are essentially, at a basic level, three factors that influence borrower decision making: internal factors, externalities and motivations. Internal factors include thought processes, whether deliberated or impulsive, such as biophysical and psychosocial characteristics,[88] potential limitations due to bounded rationality and optimism bias, behavioural factors such as hyperbolic discounting, over confidence, and/or emotional response.[89] It may include issues particularly pertinent to borrowing behaviour in the culture of buy now- pay later, and the more negative aspects of human disposition such as laziness, carelessness, or inability to engage in delayed gratification. Managing borrowing may also be subject to consumer behavioural traits such as debt

[84] A criticism levelled at the waiting periods and move to monthly payments under the Universal Credit scheme-House of Lords Select Committee on Financial Exclusion Tackling Financial Exclusion: A Country that works for everyone? (HL Paper 132)March 2017

[85] House of Lords Select Committee on Financial Exclusion Tackling Financial Exclusion: A Country that works for everyone? p.99

[86] Fineman "Equality and Difference The Restrained State" p 625- the discussion here was in an educational context

[87] E.g. O. Bar-Gill "The behavioural economics of consumer contracts" (2007-2008) 92 Minnesota Law Rev. 749 ; R. A. Epstein, 'Behavioral Economics: Human Errors and Market Corrections' (2006) 73(1) U.Chi.L.Rev.111; J.D. Hansen and D.A. Kysar "Taking Behaviouralism Seriously: The problem of Market Manipulation" (1999) 74 N.Y.U.L.Rev.630; C. Jolls, C.R. Sunstein, R. Thaler et al "A Behavioral Approach to Law and Economics" (1998) 50 Stanford Law Rev. 1471; R. A. Posner "Rational Choice, Behavioral Economics, and the Law" (1998) 50 Stan.L.Rev.1551; Ramsay "From Truth in Lending to Responsible Lending" pp.52-53

[88] Baker, Gentry and Rittenberg "Building understanding of the domain of consumer vulnerability" p.129

[89] T. Wilson, N. Howell, G. Sheehan "Protecting the Most Vulnerable in Consumer Credit Transactions" pp.133-134

account aversion.[90] Externalities include real need, such as poverty, low income, or pressure, whether sub-conscious or apparent, and whether created by circumstances or third parties. Motivations are again need (whether perceived or real), investment, comfort or materialism.[91] Clearly these factors are connected: thought processes are required in any decision even if there is little choice, for example through need, and again motivation is often engendered through an external influence such as poverty, or by an internal influence such as impulse. However it is not always clear that one rather than another factor is more prevalent. Whilst it might be often argued that consumerism and unnecessary spending causes unmanageable household debt, this can also be triggered by other factors such as economic necessity or investment in residential property, rather than 'profligate spending'.[92]

Examining these factors through the lens of vulnerability analysis, two observations can be made. First the irrationality presented in our human thought processes demonstrates the vulnerability arising from our embodiment, in terms of our mental frailty. The second is that this demonstrates the dangers of regarding individuals as rational autonomous beings, and demonstrates the inevitable differences between individuals that arise from their situation within social institutions.[93] It provides a partial explanation as to why there is an inherent imbalance in the creditor/consumer relationship, usually, unless the consumer is particularly sophisticated, based in economic power or information asymmetry, which acts in the lender's favour.[94] It is this 'inequality' that fuels concerns about exploitation and unfairness in credit transactions and contributes to concerns about the vulnerable credit consumer.

This however is not the only relationship that may impact borrowing behaviour. Whilst the factors outlined above are connected to individualistic financial incentives, it has also been suggested that in fact motivation for credit extends to interaction with others and cultural norms within relationships with close friends and family. It has been argued that people may buy goods not just for physical need or self improvement or as a pure luxury or social pressure, but also to 'guarantee' relationships with others they are close to.[95] Goods bought on loans can strengthen social bonds.[96] In an interesting examination of a section of Brazilian families

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[90] M. Amar, D. Ariely, S. Ayal, C. Cryder and S.I.Rick "Winning the Battle but Losing the War: The Psychology of Debt Management" (2011) 48 J. of Marketing Research S38; This is where consumers pay off small debts first, giving a sense of achievement, even though they would be better off paying the more expensive larger debt cf Gal and McShane who advocate this as a useful approach for consumers-D. Gal and B. McShane "Can Small Victories Help Win the War? Evidence from Consumer Debt Management" (2012) 49(4) J. of Marketing Research 487

[91]E.g. in Iceland during economic boom, materialism was a stronger predictor of debt than income or money management skills R. B. Garðarsdóttir Har and H. Dittmar "The relationship of materialism to debt and financial well-being: The case of Iceland's perceived prosperity" (2012) 33(3) J. of Economic Psychology 479

[92] C. E. Weller "Need or Want What Explains the Run-up in Consumer Debt?" (2007) 41(2) J. of Economic Issues 583

[93] Fineman "Equality and Difference The Restrained State" p 613

[94] Recognised by the Supreme Court in Plevin v Paragon Personal Finance Limited [2017] UKSC 61; [2014] 1 W.L.R. 4222; [8] per Lord Sumption

[95] C. R. Pereira and S. Strehlau, "Social Bond through Continuous Development" (2016) 39(2) J. Consum. Policy 241, 242-243

[96] Pereira and Strehlau, "Social Bond through Continuous Development" p.250

Carolina Pereiera and Suzane Strehlau use the 'Theory of the Gift' to help explain why people may become indebted- more specifically what they term "continuous indebtedness". This is defined as "a sequence of loans to buy goods that although used for utility are purchased mainly for their symbolic meaning inside a "gifted relationship", a gifted relationship being the product of a "gifted cycle" (give-receive-reciprocate). [97] In a gifted relationship the expense of debt is justified by the debtor on the basis the loan allows "acquisition of a certain good that might be the trigger to change or maintain [or modify] a gifted relationship".[98] Their study showed that where there is reciprocation (and therefore a complete gifted cycle) deep debt is not seen as a problem by the debtor- it is 'worth it' because the positive relationship justifies the debt and the positive emotional return has more impact than the negative financial impact. It may be of course that this is cultural, and this does not easily translate into British society. However evidence of this phenomenon in the UK can surely be found in the spikes in borrowing before Christmas where family members may feel pressurised into buying gifts they cannot afford, or where parents provide financial assistance or take out or guarantee loans for children who cannot afford college/higher education fees, get on the housing ladder, rent property, have no credit rating.

The idea of a gifted relationship reflects the vision of the family, and social ties, as a primary societal institution, responsible for dependency,[99] here, primarily, in a financial context. It also demonstrates the privilege that can be created and fostered by the family entity, allowing those who benefit to sidestep disadvantage,[100] and lays bare the gaps left by withdrawal of the state. Just as pertinent is the finding that debt can be used to escape a relationship i.e. it can be used to weaken bonds.[101] Here, there is a positive aspect. Debt may be used to escape an abusive or unhappy relationship, or to break free from the grip of a controlling family environment, providing a response to a disadvantage. Indeed personal relationships may even have an impact on the access to credit. A recent study in the US by the Consumer Financial Protection Bureau found that 14.9 percent of borrowers became 'credit visible' though someone else, via joint accounts or as an 'authorised user' on another's credit account.[102] Nevertheless all these factors, even if having positive impact on the borrower, reveal vulnerability in that they illustrate emotional responses to which all human beings are susceptible.[103]

The credit consumer's vulnerability, exposed by the credit relationship, is arguably sustained by imposition of individual responsibility and the abrogation of responsibility by the more powerful. What is required therefore is a recognition of

[97] Pereira and Strehlau, "Social Bond through Continuous Development" p243
[98] Pereira and Strehlau, "Social Bond through Continuous Development" p244
[99] Fineman "The Vulnerable Subject and the Responsive State" p.263
[100] Fineman "The Vulnerable Subject: Anchoring Equality in the Human Condition" p. 16
[101] Pereira and Strehlau, "Social Bond through Continuous Development" p. 251, 255
[102] CFPB Office of Research 'CFPB Data Point: Becoming Credit Visible' (June 2017) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/BecomingCreditVisible_Data_Point_Final.pdf There seem to be no corresponding figures in the UK.
[103] Fineman '"Elderly" as Vulnerable: Rethinking the nature of individual and societal responsibility" p. 96

responsibility for (rather than of) the consumer, not only by creditor and supervisory institutions, but by the state.[104] It is not argued here that we should completely abandon notions of personal responsibility that may arise from contractual notions of our relationships with others or ideas of autonomy, although concepts of responsibility and (as discussed for example by Ramsay) ideas of autonomy, can be difficult to pin down.[105] However Fineman's theory explains why we cannot rely on these 'ideals' alone, and that we need to think afresh about how we approach consumer protection and the vulnerability of the credit consumer.

A response in resilience: a combined approach

Processes and circumstances surrounding personal credit provision demonstrate the embeddedness of the borrower in a web of relationships created by borrowing, which in turn exposes the inherent vulnerability of our basic condition. There is a need therefore to provide some focus on mechanisms that build resilience to mitigate this vulnerability, that is, resilience in the face of detriments triggered by credit provision. Whilst vulnerability remains a constant state, consumers, both in relation to each other, and themselves, will experience different levels of resilience at any given moment, regardless of any appointed category into which the law places them. Building resilience to ever present vulnerability may seem too ambiguous a goal. The term resilience has become a buzz word in recent policy documents and across contexts, whether science, the community or education, and has multiple definitions.[106] Indeed it has been argued the concept of resilience itself reinforces neo-liberal ideas of self-reliance self help and self-organisation.[107] However for the purposes of the argument here resilience should be seen in terms of resilient to the susceptibilities specifically created by consumer credit relationships, triggered by our vulnerability.

Fineman's theory regards vulnerability as something that may be more or less exposed depending on how resilient a person may be at any given moment- the response should therefore be in building this resilience. If we can identify how resilience to vulnerability is to be supported and developed within the consumer credit relationship, this can increase the effectiveness of protective measures, not just against over-indebtedness but unfairness and other detriments that arise around credit provision. This requires response and responsibility from the state, beyond regulatory control of credit and those who supply it, to state involvement in empowering the vulnerable subject. This however is not empowerment through simply providing information, as espoused by the current consumer protection and regulatory agenda.

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[104] see also Cartwright "Understanding and protecting vulnerable financial consumers" pp. 131-132

[105] Ramsay "From Truth in Lending to Responsible Lending" p.62;

[106]The only consistency being 'response to undesirable changes' B.J. Downes, F. Miller, J. Barnett, A. Glaister, H. Ellemor "How do we know about resilience? An analysis of empirical research on resilience, and implications for interdisciplinary praxis" (2013) 8(1) Environmental Research Letters, 2

[107] cf V. Mykhnenko "Resilience – A Right Winger's ploy" in S. Springer, K. Birch, J. Macleavy (eds) Handbook of Neo-liberalism (New York, London: Routledge 2016) ch 13

The tools of resilience should involve a more responsive state, which provides means of support through assets[108] that allow individuals to deal with disadvantage, available for all consumers beyond categorization of the 'average consumer' or specific types of vulnerability.

As a first step investment in financial education and creation of financial citizenship, as such an asset, is important.[109] Provided both in terms of school curricula and financial literacy initiatives, this should go beyond simple money management, to attitudes to credit[110] and consumption, and the encouragement of positive self-awareness,[111] as the market research literature shows that consumer's coping strategies with vulnerability can lead to negative responses such as "learned helplessness",[112] lack of self-worth or esteem, stigmatisation and a feeling of non-acceptance in society.[113] There are however good arguments for treating financial literacy and education, with caution.[114] Ramsay, for example, suggests education and information may be one part of a programme of "positive welfare",[115] but points out the success of these tools are uncertain based, as they are, in the consumer's ability to process market information.[116] Lauren Willis has argued that whilst there is little

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[108]Fineman refers to Peadar Kirby's analysis of assets and the importance of asset-conferring institutions as helpful in defining this responsibility, preferring it to, for example, the Senian focus on development of individual capabilities: Fineman "The Vulnerable Subject: Anchoring Equality in the Human Condition" p 13-14

[109] Leyshon and Thrift "Geographies of Financial Exclusion: Financial Abandonment in Britain and the United States" p.336; D.J. Ringold "Vulnerability in the Marketplace: Concepts, Caveats, and Possible Solutions" (2005) 25(2) J. of Macromarketing, 202

[110] E.g. not using credit is saving money rather than controlling spending- K. Wilcox , L. Block, E.Eisenstein "Leave Home Without It? The Effects of Credit Card Debt and Available Credit on Spending." (2011) 48, J. of Marketing Research S78-S91 at S80

[111] N.R. Adkins and J.L. Ozanne "Critical Consumer Education: Empowering the Low-Literate Consumer" (2005) 25(2) J. of Macromarketing 153, 160; Garðarsdóttir and Dittmar include awareness of effects of materialism and dominant cultural values on financial wellbeing Garðarsdóttir Har and Dittmar "The relationship of materialism to debt and financial well-being: The case of Iceland's perceived prosperity" p. 480.

[112]M. E. P. Seligman . Helplessness: On depression, development, and death 2nd edn (Freeman & Co 1992); R.P. Hill and D. L. Stephens "Impoverished consumers and consumer behavior: The case of AFDC mothers'" (1997) (17) J. of Macromarketing 32

[113] Baker, Gentry and Rittenberg "Building understanding of the domain of consumer vulnerability" pp. 128–139; providing coping strategies in some respect reflects a Senian capability approach measuring well being through the extent to which an individual has available access to resources, and their ability to utilise those resources, such that they deliver freedom to choose the life that individual regards of value- see generally A Sen Development as Freedom (OUP, 1999)

[114] L. Anderloni and D. Vandone "Risk of Overindebtedness and Behavioural Factors" in C. Lucarelli and G. Brighetti, (eds.) Risk Tolerance in Financial Decision Making, (Palgrave Macmillan, 2011) ch 4; Oehler and Wendt "Good Consumer information: The Information Paradigm at its (Dead) End?"p. 182

[115] in the context of over-indebtedness of low income consumers- Ramsay "From Truth in Lending to Responsible Lending" p.55. For discussion of the concept of positive welfare see A. Giddens The Third Way; the Renewal of Social Democracy (Cambridge, Polity Press 1998) ch 4

[116]Ramsay 'Consumer Law, Regulatory Capitalism and the 'New Learning' in Regulation' p.

evidence that financial education provides real benefit in terms of financial behaviour,[117] it is used as justification for resisting market regulation, and also brings the danger of consumer overconfidence in ability, whilst resulting in blame when the consumer gets it wrong.[118] Alternatively it has been argued financial literacy needs to be approached from a behavioural economics perspective.[119] Furthermore, education initiatives, will take time to 'bed in' and any aim of changing attitudes is a form of cultural shift that has a generational timeline, rather than being a 'quick fix'.

Financial education can be, therefore, only one aspect to a resiliency framework. It is vital that support should also be available at all stages of the process from decision making to repayment of the debt. State response therefore should also be framed in strong provision of assistance in financial matters through pre and post debt advice. Financial exclusion should be addressed through 'resistance' to it, via institutional alternatives, such as supporting savings schemes, strengthened credit unions, and alternative credit mechanisms through community initiatives and partnerships.[120] However, institutions currently in place demonstrate difficulties, and therefore require attention. Community Development Financial Institutions may not be able to help those most in need, and local welfare support schemes face uncertainty and are under-utilised. [121] Credit unions 'group' individuals, only offering their services to their members and may require opening a savings account to access the support. Immediately this potentially excludes those on very low incomes. Furthermore, as with any creditor, availability for credit is still inevitably based in assessing risk, especially as the rates allowed for credit unions are legally capped.[122] This will inevitably exclude some would-be borrowers, some of whom will be high risk due to income status or poor credit history, rather than cynical defaulters.

Financial advice and educational support for the consumer is an important part of UK government policy and the support networks in place do provide some bases of such resilience. Financial education is already a strategic goal, being part of the secondary school curriculum. However its current effectiveness is debatable;[123] there is evidence that detailed attention to quality and resources for delivery of financial education are

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[117] L. E. Willis, "The Financial Education Fallacy" (2011) 101(3) Am. Ec. Rev. 429

[118] L. E .Willis "Against Financial Literacy" (2008-2009) 94(1) Iowa L. Rev. 197 at 202

[119] M. Altman "Implications of behavioural economics for financial literacy and public policy" (2012) 41 J. of Socio-Economics 677

[120] See e.g. Step Change "The credit safety net: how unsustainable credit can lead to problem debt and what can be done about it" (2016) 32 https://www.stepchange.org/Portals/0/documents/Reports/StepChange_Debt_Charity_credit_safety_net_report.pdf {accessed 24 August 2018]

[121] Step Change "The credit safety net: how unsustainable credit can lead to problem debt and what can be done about it" 28, 29; also a problem in relation to Budgeting Advances (interest free loans available under Universal Credit),

[122] at 42.6% per annum

[123] All Parliamentary Group on Financial Education for Young People Report: Financial Education in Schools: Two years On- Job Done? (May 2016) https://www.young-money.org.uk/sites/default/files/APPG%20on%20Financial%20Education%20for%20Young%20People%20-Final%20Report%20-%20May%202016.pdf [accessed 24 August 2018]

lacking,[124] and therefore for this to be a meaningful addition to consumer support, these questions need to be prioritised and solved. The Financial Capability Strategy, with oversight from the Financial Capability Board, has been launched, with the aim of promoting and supporting financial well-being. In terms of advice, the Money Advice Service, ('MAS') an independent body with statutory function to deliver debt advice, funded by the levy collected by the FCA from regulated firms, provides both online and telephone services co-ordinating with other organisations in providing support and is open to all. There are also numerous charitable institutions that provide free debt advice and support in debt management, such as Step Change and the Citizens Advice Bureau. However these, due to their status, rely on grants, donations from creditors and others and are vulnerable to funding cuts.[125]

In 2016 the Government launched a consultation on government provision of debt and financial advice, and in response to the consultation, is replacing the MAS with a 'new single financial guidance body' (SFGB). Its remit will be to ensure provision of advice for those in problem debt, improve financial capability and provide information and guidance on wider consumer financial issues. The SFGB is being framed as a 'mixed delivery model': some services will be delivered directly and others commissioned from external, specialised bodies. 'Readily available debt advice' is seen as a priority and providers will be commissioned to deliver regulated debt advice.[126] These proposals however fall into the same trap of boxing need. There is an emphasis on a priority for "groups …most in need of support to improve their financial resilience"[127] with some reference to the 'protected' groups under the Equalities Act.[128] Whilst there is a stated commitment to ensuring adequate resources, the only provision of funding will remain the industry. The draw on this alone may create resource problems as there is no intention to raise the current levy. [129]

Regulation of creditors is of course also important. Control is still essential, responding to Fineman's call for "some form of prevailing power… to counter unfettered self-interest".[130] The creditor itself is vulnerable, affected by external factors, its raison d'etre (in most cases making profits for shareholders) and its very constitution. As Fineman explains, institutions can be vulnerable too.[131] As touched on above, vulnerability is not confined to the human actor but is inherent in the credit

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[124] The Money Charity Annual report for year ended 31 December 2016 3 http://themoneycharity.org.uk/media/Annual-Report-2016.pdf [Accessed 24 August 2018]

[125] See e.g. threat of cuts to Cornwall CABx BBC News http://www.bbc.co.uk/news/uk-england-cornwall-42293095 [Accessed 24 August 2018[]

[126] I.e. recommendation for a specific course of action based on the consumer's individual circumstances and requirements, HM Treasury Dept for Work and Pensions Public financial guidance review: consultation on a single body (December 2016) p. 9;

[127] HM Treasury, Dept for Work and Pensions Creating a single financial guidance body: response to the consultation pp. 3, 16

[128] HM Treasury Dept for Work and Pensions Public financial guidance review: consultation on a single body p. 7

[129] HM Treasury Dept for Work and Pensions Public financial guidance review: consultation on a single body p. 15

[130] Fineman "The Vulnerable Subject: Anchoring Equality in the Human Condition" p. 6

[131] Through exposure to corruptions (internal and external) and disruptions- Fineman "The Vulnerable Subject and the Responsive State" p.256

institutions themselves and state institutions created to support and protect the borrower. The creditor may be exposed, for example where a borrower gives incorrect or misleading information about their circumstances, leading to credit that will not be re-paid, and ultimately to creditor losses. Creditors may be subject to financial crime and fluctuations in the market, or over restrictive regulatory conditions that result in ultimate withdrawal. More pertinent here, their very constitution is of individuals who themselves are universally vulnerable. This vulnerability is exposed in profit driven norms, within a market place that may detract from acceptable behaviours and encourage questionable practices, through for example staff incentives.[132]

Control and statement of expected standards in treatment of the consumer is therefore required, through carefully crafted regulation, and is an essential element to effective protection. Current mechanisms such as sections 140A-C of the CCA provide essential flexibility yet establishment of a protective ethic.[133] Regulation, if gauged at the right level, with concomitant support from the state, can still assist in allowing a degree of choice and control for the borrower in decision-making. This allows reflection of the diverse nature of the consumer community, and provision and access to credit. However whilst proportionality is written into the FCA remit, this is designed to protect vulnerabilities of suppliers who operate within the market. As Ramsay explains, consumer credit 'mixes economic and social concerns', and has been treated, across countries, as a replacement for state support. [134]There therefore needs to be a recalibration of this approach, in favour of the vulnerability of the consumer in wider institutional response, both market and state.

As creditors take the benefits, so they must take responsibility for impact of their behaviour. However, the aim of changing the industry's approach to its customers and market culture will be a long and painful process, and success is not guaranteed, bearing in mind creditors' own vulnerability. Furthermore we live in a capitalist world, where creditors are businesses- their raison d'etre is to make a profit. Whilst some may regard any profit making at the expense of the borrower as undesirable, rather than attempting to completely stifle creditors' self interest for example through regulation, it would be better to instead harness this self—interest for the benefit of the consumer.[135] Creditors can be required to meet their responsibility in part, through a continuing, but meaningful industry levy that will contribute to consumer support, in the same way as MAS is currently (and SFGB will be) funded, but this cannot be the only answer.

[132]see e.g. FCA Staff incentives, remuneration and performance management in consumer credit – Feedback to CP17/20 and final rules (PS18/7 March 2018)
[133] Brown "Consumer Credit Relationships – protection, self-interest /reliance and dilemmas in the fight against unfairness: the unfair credit relationship test and the underlying rationale of consumer credit law" pp.238, 242
[134] Ramsay "From Truth in Lending to Responsible Lending" pp 47, 62
[135] For a discussion of the role of private industry in government policy aims in personal bankruptcy, see I. Ramsay "US Exceptionalism, Historical Institutionalism and the Comparative Study of Bankruptcy Law" (2015) Temple L. Rev. 947, at pp 956-957, 971-971

The emphasis therefore should be on a more balanced provision of support for the consumer, beyond reliance on regulation, with institutions of support being given a more visible role to play in all credit provision, being the first port of call in any borrower's decision process. This suggests a re-thinking of consumer empowerment, a concept rooted in transparency and choice. The concept should be understood as an allocation of resources that will help all consumers, without prioritisation, to cope with the detriments commonly associated with consumer credit provision. Of itself, the requirement for a more combined response, including across regulators and government is a well-versed argument,[136] and there is already evidence of such support networks in place. The most recent FCA aims recognize the importance of this.[137] Nevertheless a fuller and more coordinated response is still required, facilitated with support from the government and the market, in provision of funding, or indeed establishment and funding of further support institutions.

Vulnerability lens in the wider context

The study of vulnerability's meaning and context is providing a burgeoning body of literature. Theories espouse diverse approaches across different legal and political contexts, from ethics, moral responsibility and care[138] to climate change,[139] human rights[140] globalization,[141] and consumer protection[142]. Studies across the social sciences and law are increasingly embracing and applying the vulnerability lens to legal and regulatory problems.[143] In terms of Fineman's theory alone, there is wide discussion of its application, from housing, and employment, to equality, disability and discrimination.[144]

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136 E.g. National Audit Office "Vulnerable Consumer in Regulated industries"(March 2017)
137 FCA FCA Mission Our Future Approach to Consumers p. 10
138 Mackenzie, Rogers, and Dodds Vulnerability: new essays in ethics and feminist philosophy
139 E.g. R. Heltberg, P.B. Siegel, S.L. Jorgensen "Addressing human vulnerability to climate change: Toward a 'no-regrets' approach" (2009) 19(1) Global Environmental Change 70; W. N. Adger and P. M. Kelly "Social Vulnerability to Climate Change and the Architecture of Entitlements" (1999) 4 Mitigation and Adaptation Strategies for Global Change 253.
140Eg A. H. E. Morawa "Vulnerability' as a Concept in International Human Rights Law" (2003) 6 J. of Intl. Relations and Development, 139; B.S. Turner Vulnerability and Human Rights (Pennsylvania The Pennsylvania State University Press, 2006)
141 P. Kirby Vulnerability and Violence The Impact of Globalisation (Pluto 2006)
142 Kenny, Devenney, and Fox O' Mahoney Unconscionability in European Private Financial Transactions: Protecting the Vulnerable; Cartwright "Understanding and protecting vulnerable financial consumers"
143 E.g. C. MacKenzie and W. Rogers "Autonomy, vulnerability and capacity: a philosophical appraisal of the Mental Capacity Act" (2013) 9(1) Intl Journal of Law in Context 37; B. Clough "Vulnerability and Capacity to Consent to Sex - Asking the Right Questions" (2014) 26 Child & Family Law Q. 371; C.F. Stychin "The Vulnerable Subject of Negligence Law" (2012) 8(3) Int. J.L.C. 337
144 E.g. B. Clough "Disability and vulnerability: Challenging the Capacity/Incapacity Binary" (2017) 16(3) Social Policy & Society 469; H. Carr "Housing the Vulnerable Subject: The English Context" in M.A.Fineman and A.Grear (eds) Vulnerability: Reflections on a New Ethical Foundation for Law and Politics (London, New York Routledge 2013); B.V. Smith and M.C. Loomis "After Dothard: Female Correctional Workers and the Challenge to Employment Law" (2013) 8 FIU Law Rev. 469. For a fuller list see N. Kohn "Vulnerability Theory and the role of Government" (2014) 26 (1) Yale J.L. and Feminism 1 fn 9

This paper seeks to add another dimension to the vulnerability analysis, by applying Fineman's vulnerability theory to the specifics of consumer credit protection. Fineman's theory, concerned with market responsibility, legal and regulatory approaches to vulnerability has unarguable relevance to credit consumer protection. Growing recognition in the UK that vulnerability is a dynamic state demonstrates potential movement towards the theory's position. There has however been criticism of viewing financial services in this way. It has been argued for instance that regarding all citizens as vulnerable to financial exploitation does not provide meaningful assistance in identifying optimal intervention, and that identifying factors, both internal and external, that may heighten an individual's risk to exploitation, is a better approach.[145] Nevertheless this too, of itself, may create difficulties. Various initiatives, both nationally and globally have been promulgated to respond to external detriments such as over-indebtedness and unfairness, including financial inclusion, responsible lending, and 'consumer empowerment'. [146] However, concerns for the credit consumer persist, arguably due to policy's continuing neoliberal emphasis on markets, competition and information disclosure.[147] It is feared that protections do not go far enough to protect consumers, identified by policy makers and influential groups as the most vulnerable, against exploitation and unfair creditor behaviour. This has prompted calls for further regulatory action, but this may not be the answer.

UK policy has traditionally been entrenched in the 'boxed' approach of consumer 'populations'[148] and concepts of responsibility and consumer empowerment through transparency. This compartmentalisation of vulnerability produces consequences contradictory to the overall aim – that is, creates potential exclusion of opportunity, yet does not provide a comprehensive system of protection. Whilst there is evidence of a move from a restrictive approach in more recent FCA publications, there should be a paradigmatic shift in approach to vulnerability, based in a recognition that it is a constant and ever present condition. There should be a more symbiotic combined state response through advice and support before and throughout the credit/debt journey, to ameliorate the imbalance of disadvantage and privilege that credit can bring. Consumer empowerment should no longer seen in terms of promoting market efficiency, but rather as a consumer enablement through resilience, fostering equality of opportunity,[149] and the tools to deal with the susceptibilities that arise as a result of a state of continuing vulnerability. This resilience should be built not just through regulatory protections but from wider, greater support at state level outside the particulars of the credit agreement.

It is acknowledged that it may be easy to criticise market competition as a rationale for dealing with consumer transactions, without providing an economic alternative, a

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[145] Kohn "Vulnerability Theory and the role of Government" p 24

[146] E.g. OECD "G 20 High Level Principles for Financial Consumer Protection" (October 2011) https://www.oecd.org/finance/financial-education/49944916.pdf Accessed 24 August 2018]; The World Bank Group "Good Practices for Financial Consumer Protection" (2017 p xi) https://openknowledge.worldbank.org/bitstream/handle/10986/28996/122011-PUBLIC-GoodPractices-WebFinal.pdf?sequence=1&isAllowed=y [Accessed 24 August 2018]

[147] Ramsay and Williams, "The crash that launched a thousand fixes: Regulation of consumer credit after the lending revolution and the credit crunch"

[148] Fineman "The Vulnerable Subject: Anchoring Equality in the Human Condition" p.8

[149] Fineman "The Vulnerable Subject and the Responsive State" pp. 261-262

task that could not be attempted here. Vulnerability of consumers, of course, is also just as relevant to other areas of consumer contracting. However, what the application of vulnerability theory can do here is provide an explanation as to why current initiatives continue to struggle. It can inform a policy response to the particular problems experienced by the credit consumer, framing protection through both credit regulation and established and inclusive support systems. This approach is translatable beyond the UK, to any market in consumer borrowing, and should be an important consideration in the global push for financial inclusion initiatives.[150] It also provides a link to concerns across the spectrum of social welfare and justice, providing the basis for a more coherent approach. By rethinking vulnerability in relation to the credit consumer through the lens of vulnerability theory, it becomes clear that consumer credit regulation alone will never be the complete answer to protecting the consumer in this context,[151] and requires recognition of a wider state responsibility.

Conclusion

Protection of the credit consumer from detriments such as over-indebtedness and unfairness, once an issue that primarily influenced policy argument for further regulation of consumer credit across sophisticated consumer credit markets, has become a question of global significance.[152] Whilst in the consumer world, protection has traditionally been based in the 'average' consumer, in fact reality suggests a more mutable view of the human market participant. The policy in relation to consumer credit in the UK now embeds protection for those seen as suffering from vulnerability primarily through regulation, directly or indirectly connected to control of creditor terms, behaviour and procedure. The question is whether this approach is likely to make any real difference to the situation of consumers and their financial difficulties. Views may differ as to the extent of household or individual indebtedness at any given moment, this inevitably being to some extent an economic cyclical phenomenon, with added complexities of links to wider macro-economic concerns, such as consumer spending and confidence. Nevertheless, the view is that wherever there is debt, there may be evidence of consumer vulnerability that needs to be addressed.

According to vulnerability theory, all human beings are universally vulnerable. This is a constant state, but some may be more resilient than others at any given moment. Therefore in the context of the consumer, resilience lies in the consumer's ability to interact with the market successfully, provided by systems of support. This argument

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150 see e.g. https://www.worldbank.org/en/topic/financialinclusion [Accessed 24 August 2018]

151 cf K.C. Engel "Can Consumer Law Solve the Problem of Complexity in US Consumer Credit Products" Suffolk University Law School Research Paper No. 14-34 Legal Studies Research Paper Series RP 14-34 (Nov 2014) http://ssrn.com/abstract=2529148 [Accessed 24 August 2018]

152 World Bank "Good Practices for Financial Consumer Protection" .; G. Davel "Regulatory Options to Curb Debt Stress" CGAP, March 2013) http://www.cgap.org/publications/regulatory-options-curb-debt-stress [Accessed 24 August 2018]

is already well rehearsed, across policy and academic discussion. Examining the UK position shows us that policy makers are beginning to understand that vulnerability cannot be easily defined or pinpointed in time. There is a noticeable acceptance that 'boxing' vulnerability is not effective. We can see that UK initiatives already demonstrate a move in the direction of what is argued for in this paper. Vulnerability theory's approach is even observable in the language of 'embodiment' used by policy initiatives that talk of 'financial health' and 'financial wellbeing'. Yet policy is still wedded in ideas of 'potential' vulnerability rather than recognising it is already present. In essence it starts from an erroneous premise.

Consumer protection remains intertwined with protection of the market in policy and regulatory rationale. However this fundamental attitude is not something that should necessarily be opposed in its entirety, but rather it should be harnessed, allowing a recognition of, but not reliance on, personal autonomy. This can be delivered through a recalibration of the balance between regulation and institutions of support to facilitate resilience, using vulnerability theory as the justification for this approach. The tools of resilience should not be based solely in regulation of creditors, the current primary tool of borrower protection, but should involve a more responsive state, as advocated by vulnerability theory, providing means of support for consumers, beyond categorization. For the UK, there is already a perceptible shift in the right direction, demonstrating a recognition that other institutions of support are important to consumer protection and wellbeing. However at present these initiatives are seen as an addendum to market regulation, rather than a joint endeavour. Wherever this emphasis exists, it must change.