

Vulnerability, Care Ethics and the Protection of Socioeconomic Rights via Article 3 ECHR

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ABSTRACT

Vulnerability analysis serves a distinct purpose within adjudication of Article 3 of the European Convention of Human Rights ('ECHR'), in that it has been used by the European Court of Human Rights ('ECtHR' or 'the Court') to lower the threshold for a finding of ill-treatment from which positive obligations relating to socioeconomic rights have arisen. However, the group-based notion of vulnerability invoked by the Court is extremely limited, producing minimal protection from deprivation whilst equally paternalizing and essentializing the populations it deems vulnerable. In light of these failings, this article proposes a new element to be incorporated within the Court's vulnerability analysis which can deliver greater protection of socioeconomic rights via Article 3: the political theory of care. By highlighting care's potential to transform the concepts of vulnerability and state responsibility whilst empowering the care-receiver, it argues that care can overcome the limitations of the Court's current approach as a means of targeting destitution.

KEYWORDS: socioeconomic rights, Article 3 European Convention on Human Rights, destitution, vulnerability, care ethics

1. INTRODUCTION

Vulnerability is an increasingly invoked, yet contested, concept within human rights law, broadly construed as a state of being whereby one is 'open and exposed to hurts and harms of various kinds'.¹ Proponents of vulnerability as a heuristic tool highlight its potential to 're-interrogate the role of human rights as key constraints on State power and catalysts for social change'.² The lens of vulnerability can uncover the specific challenges which obstruct individuals' enjoyment of universal entitlements, augmenting the state's obligations as duty-bearer. One of the many functions of vulnerability in the jurisprudence of the European Court of Human Rights ('ECtHR' or 'the Court') concerns the state's duties under Article 3 of the European Convention on Human Rights ('ECHR' or 'the Convention').³ The Court has been willing to lower the threshold for a finding of ill-treatment under Article 3 where it has found the applicant to be

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¹ Neal, "Not Gods but Animals": Human Dignity and Vulnerable Subjecthood' (2012) 33 *Liverpool Law Review* 177 at 187.

² Timmer et al., 'The potential and pitfalls of the vulnerability concept for human rights' (2021) 39 *Netherlands Quarterly of Human Rights* 190 at 191.

³ European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS No. 5.

vulnerable,⁴ from which positive obligations to realize socioeconomic rights have emerged in exceptional scenarios.⁵ In this context, vulnerability acts a signal of the applicant's additional requirements which thereby establishes a sense of priority in regard to the allocation of the member state's resources.⁶ Nevertheless, the Court's group-based conception of vulnerability suggests a partial understanding of the term, whilst equally raising concerns of paternalism, essentialism and stigmatization. Thus, the aforementioned primary purpose of drawing upon vulnerability within the human rights context is undermined.⁷ Consequently, if the Court believes that certain individuals are worthy of socioeconomic protection, then its current use of vulnerability is inappropriate as a tool for determining the allocation of social provision.

In light of these findings, this article proposes a novel device to be incorporated in the Court's vulnerability analysis within Article 3 cases to help identify individual needs and tailor the socioeconomic assistance provided to applicant: care. Whilst the article exclusively focuses on the Court's socioeconomic case law under Article 3, it does so with the intention of encouraging others to consider care's potential to transform human rights protection more broadly. Though the Court does not explicitly engage with care as an ethical and political concept within its jurisprudence, this article will show how care ethics can inform the Court's approach to vulnerability analysis—offering an original perspective in regard to how the assessment of who is in need of socioeconomic support ought to be undertaken. Whilst there are many understandings of care ethics, central to each is the valuing of care and recognition of the interdependency of mankind.⁸ This article, however, explicitly proposes the adoption of Tronto's political theory of care to overcome the criticisms of the Court's application of vulnerability within its Article 3 jurisprudence.⁹ It will do so by highlighting Tronto's concern for totality of caring relations and the involvement of care-receivers in shaping care processes via the 'caring democracy'.¹⁰

The article will first provide an overview of how the Court's vulnerability analysis within its Article 3 jurisprudence has given rise to socioeconomic duties. It will outline three well-established critiques of the Court's current use of the vulnerability: its incomplete view of the concept, narrow construction of state responsibility and risks of paternalism and essentialism. Previous attempts to overcome the limitations of the Court's vulnerability analysis will be critiqued, concluding that vulnerability's potential to address structural inequalities remains untapped. The article will then present care as a complement to vulnerability analysis in order to overcome the latter's shortcomings as a means of establishing socioeconomic protections under Article 3. An introduction to care ethics will precede a summary of Tronto's political theory of care and its commonalities with vulnerability, most notably the recognition of exposure to harm as an innately human characteristic. This will be followed by an identification of their differences, emphasizing the political theory of care's pursuit of equality and inclusivity through democratic processes. Consideration as to how the Court's adoption of the proposed approach would alter socioeconomic protection under Article 3 will illustrate the value of care in this context, transforming the concepts of vulnerability and state responsibility and extending assistance to a broader range of circumstances. The article will lastly suggest some of the policy implications

⁴ *Ireland v United Kingdom* Application No 5310/71, Merits, 18 January 1978.

⁵ Bossuyt, 'Is the European Court of Human Rights on a Slippery Slope?' in Flogaitis, Zwart and Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (2013) 27 at 28–9.

⁶ Peroni and Timmer, 'Vulnerable groups: The promise of an emerging concept in the European Human Rights Convention law' (2013) 11 *International Journal of Constitutional Law* 1056 at 1084; Kagiros, 'Austerity Measures at the European Court of Human Rights: Can the Court Establish a Minimum of Welfare Protection?' (2019) 25 *European Public Law* 535 at 551.

⁷ Peroni and Timmer, *supra* n 6 at 1070.

⁸ Urban and Ward, 'Introducing the Contexts of a Moral and Political Theory of Care' in Urban and Ward (eds), *Care Ethics, Democratic Citizenship and the State* (2020) 1, at 1–17.

⁹ Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (1993).

¹⁰ Tronto, *Caring Democracy: Markets, Equality and Justice* (2013).

for ECHR state parties, concluding that care ought to be given commensurate attention as vulnerability within human rights discourse.

2. SOCIOECONOMIC OBLIGATIONS UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS - A MATTER OF VULNERABILITY

Whilst the ECHR primarily enshrines civil and political rights,¹¹ certain indirect challenges of violations of socioeconomic rights have succeeded within the Court.¹² An ‘inherent tension’ exists between the indivisibility of rights and the Court’s mandate to protect predominantly civil and political guarantees.¹³ Coupled with concerns that supranational courts are ill-placed to adjudicate polycentric issues, the ECtHR’s participation in the socioeconomic arena threatens the Convention’s operation.¹⁴ The Court has attempted to overcome this jurisdictional ‘puzzle’¹⁵ by grounding positive socioeconomic duties within vulnerability.¹⁶ In the broader context of the Convention, the ECtHR defines vulnerable groups as those ‘historically subject to prejudice with lasting consequences’.¹⁷ Accordingly, vulnerability relates to a handful of traits,¹⁸ including membership in the Roma community,¹⁹ impaired health²⁰ and asylum seeker status.²¹ Vulnerability serves a distinct purpose within Article 3; a finding of vulnerability imposes an exceptional demand upon the state to provide socioeconomic assistance arising from the prohibition of inhuman treatment.²² The source of vulnerability most often recognized is the exclusive control of the state—by way of detention, institutionalization or otherwise, extending to asylum seekers.²³ Claims of Article 3 violations due to destitution beyond these circumstances have been quickly dismissed by the Court;²⁴ whilst an applicant may theoretically allege a violation on account of inadequate welfare provision, the chances of the claim succeeding are poor.²⁵ Moreover, even where a vulnerable group is concerned, the state is not always under a duty to ensure minimal subsistence under Article 3—only where it is demanded by the applicant’s specific circumstances, for example where their illness is critical.²⁶

¹¹ Protocol No. 1 to the Convention extends protection to the rights to education and peaceful enjoyment of possessions.

¹² For example, see: *Selçuk and Asker v Turkey* Application Nos. 23184/94 and 23185/94, Merits, 28 November 1996; *D v United Kingdom* Application No 30240/96, Merits, 2 May 1997; *Paposhvili v Belgium* Application No 41738/10, Merits, 13 December 2016; *Savran v Denmark* Application No 57467/15, Merits, 7 December 2021.

¹³ Brems, ‘Indirect Protection of Social Rights by the European Court of Human Rights’ in Barak-Erez and Gross (eds), *Exploring Social Rights: Between Theory and Practice* (2007) 135 at 165.

¹⁴ Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (2018) at 9.

¹⁵ *Ibid.* at 1.

¹⁶ Kagiarios, ‘Vulnerability as a Path to a “Social Minimum”? An Analysis of ECtHR Jurisprudence’ in Kotkas, Leijten and Pennings (eds), *Specifying and Securing A Social Minimum in the Battle Against Poverty* (2019) 245, at 245–57; Brems, *supra* n 13 at 142, 166; Heri, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR* (2021) at 31–120.

¹⁷ *Kiyutin v Russia* Application No. 2700/10, Merits, 10 March 2011, at para 63.

¹⁸ Timmer, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’ in Fineman and Gear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (2013) 147, 160–161.

¹⁹ *D.H. and Others v the Czech Republic* Application No 57325/00, Merits, 13 November 2007; *V.C. v Slovakia* Application No 18968/07, Merits, 8 November 2011.

²⁰ *Kiyutin v Russia*, *supra* n 17; *Alajos Kiss v Hungary* Application No 38832/06, Merits, 20 May 2010.

²¹ *M.S.S. v Belgium and Greece*, Application No 30696/09, Merits, 21 January 2011.

²² Leijten, *supra* n 14 at 218; Kagiarios, *supra* n 16 at 254.

²³ *Stepuleac v Moldova* Application No 8207/06, Merits, 6 February 2008; *M.S.S. v Belgium and Greece*, *supra* n 21; *Kadiķis v Latvia* (no 2) Application No 19619/03, Merits, 4 December 2012; *Modârca v. Moldova* Application No 37829/08, Merits, 10 May 2007; *Dudchenko v Russia* Application No 37717/05, Merits, 7 November 2017; *R.R. v Hungary* Application No 36037/17, Merits, 2 March 2021. C.f. *Muršić v Croatia* Application No 7334/13, Merits, 20 October 2016, where the ECtHR held that Article 3 had not been violated where the food provided to the prisoners was routinely inspected by the prison doctor, despite the prisoners’ dissatisfaction.

²⁴ *Larioshina v Russia* Application No 56869/00, Admissibility, 23 April 2002; *Budina v Russia* Application No 45603/05, Admissibility, 18 June 2009.

²⁵ Leijten, *supra* n 14 at 270.

²⁶ *A.S. v Switzerland* Application No 39530/13, Merits, 30 June 2015, para 36; Leijten, *supra* n 14 at 241.

3. LIMITATIONS OF THE COURT'S APPROACH

A. Incomplete View of Vulnerability

In contrast to Fineman's appreciation of vulnerability as 'inherent in the human condition',²⁷ the ECtHR's vulnerability analysis within Article 3 is comparatively restrictive.²⁸ The Court's approach permits unequal treatment of claimants experiencing the same levels of deprivation; a homeless person would encounter a much greater hurdle challenging their destitution under the ECHR compared to an asylum-seeker experiencing equal destitution.²⁹ The Court's assessment of the latter's situation as significantly more pressing is problematic, for whilst the intersecting axes of oppression involved in the asylum seeker's case—namely their heightened dependency on the state and the traumatic experiences endured—certainly warrant additional socioeconomic protection,³⁰ this should not preclude a finding of vulnerability in the case of the individual sleeping rough also. Furthermore, the higher threshold imposed for the homeless applicant fuels deep-seated stereotypes regarding the deservedness of poverty for those who fail to embody the neoliberal, self-sufficient legal subject. If the Court believes that certain individuals are deserving of socioeconomic protections on the basis of need, its current 'selective model of vulnerability' is an unsuitable means of determining the allocation of such provisions.³¹

B. Narrow Construction of State Responsibility

State responsibility to provide basic socioeconomic assistance under Article 3 requires a nexus between the state (in)action and the deprivation,³² not unlike the duty of care requirement for a negligence claim under English tort law.³³ A presumption of state liability applies in instances of deprivation of liberty, reversing the burden of proof on the basis of detainees' vulnerability.³⁴ Where the applicant lies outside the state's exclusive control, a finding of such a duty becomes near impossible.³⁵ Moreover, when positive duties under Article 3 are engaged, the state must only demonstrate that it has taken 'reasonable steps' within the circumstances to prevent ill-treatment of which its authorities had, or ought to have, knowledge of³⁶—it is not required to succeed in doing so.³⁷ Whilst the state cannot be expected to 'deliver the impossible' with finite resources,³⁸ the Court's unduly permissive approach comes at the cost of the marginalized.

²⁷ Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1 at 1.

²⁸ *M.S.S. v Belgium and Greece*, supra n 21; Brandl and Czech, 'General and Specific Vulnerability of Protection in the EU: Is there an Adequate Response to their Needs?' in Ippolito and Sánchez (eds), *Protecting Vulnerable Groups* (2015) 247 at 249; Morochovic, 'The weight of vulnerability analysis of the significance of particular vulnerability attributes under ECtHR jurisprudence in situations of extreme vulnerability concerning migrants' (2017) 44 *Exeter Law Review* 85 at 93; Kagiarios, supra n 16 at 256–9.

²⁹ Kagiarios, supra n 16 at 255–6.

³⁰ *M.S.S. v Belgium and Greece*, supra n 21 at para 232.

³¹ Heri, supra n 16 at 88.

³² *Budina v Russia*, supra n 24 at para 6.

³³ A duty of care is established where the defendant and claimant are within a recognized relationship—such as one road-user to another (*Nettleship v Weston* [1971] 2 QB 691)—or, where the harm was reasonably foreseeable, there was a requisite degree of proximity between the parties and it is fair, just and reasonable to do so: *Caparo Industries plc v Dickman* [1990] 2 AC 605.

³⁴ Heri, supra n 16 at 62–3; *Tomasi v France* Application No 12850/87, Merits, 27 August 1992, paras 91, 102.

³⁵ *O'Rourke v United Kingdom* Application No 39022/97, Admissibility, 26 June 2001, at paras 5–6; Palmer, 'A wrong turning: Article 3 ECHR and proportionality' (2006) 65 *Cambridge Law Journal* 438 at 449; *Budina v Russia*, supra n 24, at para 6; Gerards, 'The ECtHR's Response to Fundamental Rights Issues Related to Financial and Economic Difficulties and the Problem of Compartmentalisation' (2015) 33 *Netherlands Quarterly of Human Rights* 269 at 285–6; Kagiarios, supra n 16 at 255.

³⁶ *Z v United Kingdom* Application No 29392/95, Merits, 10 May 2001, at para 73.

³⁷ Kagiarios, supra n 16 at 249–50.

³⁸ Kagiarios, supra n 16 at 250.

C. Paternalism and Essentialism

A notion as amorphous as vulnerability carries the risk of abuse in the absence of a clear definition within the law, nor a commitment to promote autonomy of the individual.³⁹ As an illustration, *Dudgeon v United Kingdom* is heralded as the first successful case before the ECtHR regarding the criminalisation of male homosexuality, yet frequently overlooked is the Court's brandishing of young men as vulnerable on account of their age and susceptibility to 'exploitation and corruption' into homosexual conduct.⁴⁰ Whilst the Court found the threat of prosecution on the basis of the applicant's homosexuality in violation of Article 8, the case exemplifies how its group-based approach can perpetuate harmful, paternalistic narratives.⁴¹ Though *Dudgeon* may be considered the product of its time, one can imagine a similar argument being made today in favour of prohibitions of certain religious clothing—for example, the burka—predicated on women's susceptibility to pressure to wear such attire.⁴²

4. ATTEMPTS TO OVERCOME VULNERABILITY'S LIMITATIONS

Vulnerability is, at present, a limited instrument for deriving an obligation for the state to ensure the socioeconomic rights under Article 3. To overcome these well-documented objections to vulnerability, scholars have proposed different understandings of who the Court should deem vulnerable—principally, one which corresponds with Fineman's analysis of vulnerability. Kagiros suggests that the Court should assess whether the applicant's experience of destitution is 'incompatible with human dignity'—invoking the terminology of *M.S.S.*—⁴³ in order to determine vulnerability, triggering the state's positive obligations.⁴⁴ Whilst a turn to dignity would conceivably extend protection to a larger pool of applicants, a proposal which seeks to restore individual agency must afford ample space for the voice of the vulnerable in the shaping of the provisions awarded. Such mechanisms are mandatory to buttress vulnerability against well-founded claims of paternalism which have the potential to undermine the theory in its entirety.

Conscious of the dangers of essentialism and disempowerment associated with vulnerability, Heri advocates a departure from the vulnerable/non-vulnerable binary, inviting the Court to examine why certain individuals are 'rendered' vulnerable as opposed to utilizing vulnerability as a stigmatizing label.⁴⁵ Heri's solution similarly involves a case-by-case assessment of the applicant's circumstances,⁴⁶ whereby an applicant's vulnerability and resilience 'is integrated into the Article 3 test so as to form one of several examinatory steps'.⁴⁷ The construction of vulnerability as a spectrum is more reflective of reality than the Court's rigid classification and, if adopted, could bring those with experiences of poverty or homelessness amounting to an Article 3 violation within the state's responsibility.⁴⁸ Yet, if vulnerability is to become the counterhegemonic tool needed to effect substantive equality, as Heri implies, then it must be

³⁹ Heri, *supra* n 16 at 227.

⁴⁰ Application No 7525/76, Merits, 22 October 1981 at para 62; Dubová, 'Genealogy of the concept of vulnerability in international human rights law—a case study' (Second Doctoral Seminar of the Siracusa International Institute for Criminal Justice and Human Rights, Siracusa, March 2023).

⁴¹ *Dudgeon*, *supra* 40 at 63; Heri, *supra* n 16 at 227; Dubová, *supra* n 40.

⁴² Heri, *supra* n 16 at 227.

⁴³ *M.S.S. v Belgium and Greece*, *supra* n 21, at paras 220–1.

⁴⁴ Kagiros, *supra* n 16 at 257.

⁴⁵ Heri, *supra* n 16 at 229.

⁴⁶ *Ibid.*

⁴⁷ Heri, *supra* n 16 at 211.

⁴⁸ Heri, *supra* n 16 at 225–7.

deployed by the Court to catalyze an ideological shift amongst ECHR member states which prioritizes overall wellbeing. Without this emphasis, Article 3 is likely to produce only negligible improvements in socioeconomic protection, failing to minimize future violations.

These attempts to overcome the limitations of the Court's utilization of vulnerability as a means of promoting protection against destitution are therefore lacking in their capacity to engender the significant transformation necessary to target structural inequalities via participatory processes. However, there remains a device which has yet to be explored as a complement to the Court's vulnerability analysis under Article 3, which could help understand why certain individuals are deserving of socioeconomic provision and, in such instances, what support the individual requires: care.

5. CARE ETHICS AND THE POLITICAL THEORY OF CARE

A. An Introduction to Care Ethics

Whilst care ethics encompasses a range of different perspectives, central to all understandings is an appreciation of care.⁴⁹ A principal tenet of care ethics is the recognition of care as a fundamental, if not supreme, value indispensable for the existence of mankind.⁵⁰ Care ethics begins with the premise that all humans are innately relational beings, not only relying on the care of others at the beginning of one's life, but remaining interdependent throughout their lifetime.⁵¹ Once the lens of care is adopted, complete autonomy is unveiled to be illusory, emphasizing the importance of creating caring environments which support all individuals in meeting their caring needs.⁵² Though the term was popularized within the field of developmental psychology,⁵³ the ethics of care has since been invoked in a variety of contexts⁵⁴ and has of late experienced a revival following the COVID-19 pandemic's demonstration of the criticality of care in manifold ways.⁵⁵ Care is simultaneously an epistemic lens and a practice, invaluable as a means of identifying the problem, invariably a caring deficit, and the requisite solution, that is the care to be provided.⁵⁶

B. The Political Theory of Care

Whilst there are a variety of interpretations of care ethics, Tronto's political theory of care boasts a coherent, versatile framework which unlocks the emancipatory potential of care. It is through an appraisal of these features that one begins to discover the value of including the political theory within the Court's vulnerability analysis under Article 3 as a means of generating bespoke socioeconomic obligations which respond to the individual's needs.

⁴⁹ Urban and Ward, *supra* n 8.

⁵⁰ Held, 'Care and Justice in Society' (Oxford Martin School, 15 October 2014) at 52:00, available at: www.youtube.com/watch?v=LCB1shK6iQo&ab_channel=OxfordMartinSchool [last accessed 14 April 2023].

⁵¹ Tronto, *supra* n 9 at 21; Held, *The Ethics of Care: Personal, Political, and Global* (2005) at 13–4.

⁵² Tronto, *supra* n 9 at 21; Slote, *The Ethics of Care and Empathy* (2007) at 62; Gilligan, *Joining the Resistance* (2011) at 17.

⁵³ Gilligan, *In a Different Voice: Psychological Theory and Women's Development*, ebook (2003).

⁵⁴ For example, see: Alcabes and Williams, 'Human Rights and the Ethic of Care: A Framework for Health Research and Practice' (2002) 2 *Yale Journal of Health Policy, Law and Ethics* 229; Engster, 'Care Ethics and Animal Welfare' (2006) 37 *Journal of Social Philosophy* 521; Lawson, 'Geographies of Care and Responsibility' (2007) 97 *Annals of the Association of American Geographers* 1; Robinson, *The Ethics of Care: A Feminist Approach to Human Security* (2011); Jarosz, 'Considering sovereignty, care ethics and policy in food politics' (2014) 4 *Dialogues in Human Geography* 229.

⁵⁵ Branicki, 'COVID-19, ethics of care and feminist crisis management' (2020) 27 *Feminist Frontiers* 872; Miller, 'The ethics of care and academic motherhood amid COVID-19' (2021) 28 (S1) *Gender, Work and Organization* 260; Tronto, 'Beyond Wealthcare: Caring Democratically as the Path to a Multi-Racial, Non-Imperial Caring', 7 May 2021, available at: www.youtube.com/watch?v=BJYuHd-rHvc&ab_channel=CERC2021 [last accessed 2 August 2023].

⁵⁶ Tronto, 'Care as the Work of Citizens: A Modest Proposal' in Friedman (ed), *Women and Citizenship* (2005) 130.

(i). *Care as radical*

The ethics of care was first explicitly used by Gilligan to highlight the ‘different voice’⁵⁷ concerned with the needs of others in contrast to the ‘formal logic of fairness’⁵⁸ of the ethic of justice traditionally valued within developmental psychology.⁵⁹ Though both voices may be simultaneously present, so Gilligan contends, one voice is likely to prevail.⁶⁰ Despite stating at the outset that the different voice is defined ‘not by gender but by theme’,⁶¹ Gilligan’s observations of women and girls more commonly expressing a relational approach in ethical decision making in comparison to men and boys has led to accusations of gender essentialism.⁶² The subtlety of Gilligan’s argument has been misconstrued as perpetuating the myth that women are innately more caring than men on account of their biological makeup, thus diminishing its emancipatory potential.⁶³

In contrast, Tronto situates the ethics of care within its ‘full moral and political context’ to transform care into a radical tool.⁶⁴ Discontent with discussions of ‘women’s morality’ distracting from a more holistic appreciation of care, Tronto’s political argument for an ethic of care begins with recognition of care as a ‘species activity’ and hence evades the same charge of essentialism made against Gilligan’s earlier formulation of the theory.⁶⁵ By identifying that ‘everything that we do to maintain, continue and repair our “world” so that we can live in it as well as possible’ is an act of care,⁶⁶ care escapes the ‘cult of domesticity’ and extends to the behaviour of state actors.⁶⁷ Whilst this revised understanding is extremely comprehensive, it has been reasonably suggested by Collins, a proponent of Tronto’s school of thought, that care which satisfies ‘a more vital, important or compelling interest’ is of greater moral value.⁶⁸ The eradication of deprivation—including through the meeting of essential nutritional needs and facilitation of access to basic health care—would therefore be a key concern of the political theory of care, signifying its suitability as a complement to vulnerability analysis in order to establish a more coherent account of the socioeconomic protection required by the state under Article 3 ECHR.

(ii). *Processes of care*

The political theory of care recognizes that care is a cycle, composed of distinct caring processes.⁶⁹ These processes were first outlined by Tronto and Fisher in 1990 and have since been expounded upon within Tronto’s later work, providing further clarity.⁷⁰ Each process of care is paired with an ethical element, which helps inform the actions and qualities expected of the care-giver throughout.⁷¹ The first stage, ‘caring about’, involves identification of the caring need

⁵⁷ Gilligan, *supra* n 53 at 16.

⁵⁸ *Ibid.* at 73.

⁵⁹ Kohlberg, *The Philosophy of Moral Development: Moral Stages and the Idea of Justice: Essays on Moral Development: 1* (1981) at 54–5, 166.

⁶⁰ Gilligan, ‘Mapping the Moral Domain: New Images of the Self in Relationship’ (1989) 39 *CrossCurrents* 50 at 54.

⁶¹ Gilligan, *supra* n 53 at 2.

⁶² Kerber, ‘Some Cautionary Words for Historians’ (1986) 11 *Signs* 304 at 309; Greeno and Maccoby, ‘How Different Is the “Different Voice”?’ (1986) 11 *Signs* 310 at 315; Senchuk, ‘Listening to a Different Voice: A Feminist Critique of Gilligan’ (1990) 10 *Studies in Philosophy and Education* 223 at 249.

⁶³ Kerber, *supra* n 62; Greeno and Maccoby, *supra* n 62.

⁶⁴ Tronto, *supra* n 9 at 125.

⁶⁵ *Ibid.* at 3.

⁶⁶ Fisher and Tronto, ‘Toward a Feminist Theory of Caring’ in Abel and Nelson (eds), *Circles of Care: Work and Identity in Women’s Lives* (1990) 35 at 40.

⁶⁷ *Ibid.* at 38.

⁶⁸ Collins, *The Core of Care Ethics* (2015) at 75.

⁶⁹ Fisher and Tronto, *supra* n 66 at 41–8; Tronto, *supra* n 10 at 22–3.

⁷⁰ Fisher and Tronto, *supra* n 66; Tronto, *supra* n 9 at 127; Tronto, *supra* n 10 at 22–3.

⁷¹ Tronto, *supra* n 9 at 127.

and hence requires attentiveness.⁷² The second, ‘taking care of’, consists of an assessment of how the caring need can be met and the imposition of the responsibility to act.⁷³ Following this is the process of ‘care-giving’, meaning the ‘direct meeting of the needs of care’.⁷⁴ This third stage demands competence to ensure that the care provided delivers in its desired outcome.⁷⁵ Whereas first-generation care ethicists have fixated upon dyadic relationships of care between a care-giver and care-receiver, predominantly that of the mother and child,⁷⁶ Tronto appreciates that caring relations invariably involve a range of actors. For example, the direct provider of care may be a separate entity from the identifier of the caring need, meanwhile providers of care may also rely on others to have their own needs met.⁷⁷ This understanding of care as a ‘triangulation’ contests the perceived dichotomy of the vulnerable versus invulnerable, presenting a more nuanced picture than that of the ECtHR within its Article 3 jurisprudence.⁷⁸

Whilst there may be a tendency to view ‘care-giving’ as the most important process with the cycle, the following stage of ‘care-receiving’ is equally, if not more, significant. The political theory of care emphasizes that it is only through the study of how the care-receiver responds to the care provided that one can determine whether the care needs have been suitably met or whether alternative strategies must be explored.⁷⁹ The ethical element tied to this stage is therefore responsiveness.⁸⁰ The ‘care-receiving’ phase is one of the one of the many elements Tronto incorporates within her framework to mitigate paternalism, a criticism as commonly made against care ethics as it is to group-based approaches to vulnerability.⁸¹ As Tronto stresses, ‘[b]y its very nature, care is rarely an activity engaged in by equals’; caring relations are governed by power imbalances, whereby the care-receiver, in many instances, is reliant upon the care-giver’s privileged position for the fulfilment of their needs.⁸² Yet, an assumption of superiority by the care-giver ignores the reality that the care-receiver is often the more appropriate judge of the suitability of the care provided given their lived experiences. Consequently, it is critical that the care is under constant review, involving regular conversations with the care-receiver to ascertain whether needs remain unmet and, if so, how the provision can be altered to improve the quality of the care provided.⁸³ This transformation in the care-receiver’s positioning within caring relations—from the object cared for to an active subject—distinguishes Tronto’s conceptual framework from others centred on care and/or vulnerability which disempower those cared for and hence is a critical stage within the cycle of care.⁸⁴

Invariably, a one off act of care is unlikely to satisfy the care-receiver’s needs in their entirety.⁸⁵ Hence, the processes of care form a cycle; new needs are to be identified, kickstarting the first stage of ‘caring about’ once more.⁸⁶ The construction of care as ongoing within Tronto’s

⁷² Fisher and Tronto, *supra* n 66 at 41–2.

⁷³ *Ibid.* at 42–3.

⁷⁴ Fisher and Tronto, *supra* n 66 at 43–4; Tronto, *supra* n 9 at 107.

⁷⁵ Tronto, *supra* n 9 at 133–4.

⁷⁶ For example, see: Ruddick, ‘Maternal Thinking’ (1980) 6(2) *Feminist Studies* 342.

⁷⁷ Tronto, *supra* n 10 at 152–3.

⁷⁸ *Ibid.* at 153, 156.

⁷⁹ Tronto, *supra* n 9 at 134–5.

⁸⁰ *Ibid.* at 134–5.

⁸¹ Tronto, *supra* n 9 at 170; Crigger, ‘The trouble with caring: A review of eight arguments against an ethic of care’ (1997) 13 *Journal of Professional Nursing* 217 at 220–1; Durmuş, ‘Care Ethics and Paternalism: A Beauvoirian Approach’ (2022) 7 *Philosophies* 1 at 9.

⁸² Tronto, *supra* n 9 at 146.

⁸³ *Ibid.* at 108.

⁸⁴ Tronto, ‘Caring Democracy: How Should Concepts Travel?’ in Urban and Ward (eds), *Care Ethics, Democratic Citizenship and the State* (2020) 181 at 186.

⁸⁵ Tronto, *supra* n 9 at 103, 141; Tronto, *Who Cares? How to reshape a democratic politics* (2015) at 7.

⁸⁶ Tronto, *supra* n 84; Lawson, *supra* n 54 at 6; Barnes, ‘Beyond the dyad: exploring the multidimensionality of care’ in Barnes et al., (eds), *Ethics of Care: Critical Advances in International Perspective*, ebook (2022) 31 at 41.

framework is highly significant, for it emphasizes the active role the care-giver must play in providing continuous support for the care-receiver.

(iii). 'Caring with' and the caring democracy

The addition of two further components has seen Tronto's framework evolve from a guide governing personal relations to a fully-fledged political theory of care. Whilst Tronto and Fisher's original cycle of care consisted of four processes of care, a fifth phase was later added which positions care as the primary organizing principle for society. Inspired by the work of Sevenhuijsen, who argues for the integration of care within conceptions of citizenship in the pursuit of 'caring solidarity' and 'collective responsibility',⁸⁷ Tronto's cycle of care now concludes with the process of 'caring with'.⁸⁸ This final stage is considerably more expansive than the earlier four, transforming Tronto's framework into a vehicle for societal change. Summarized by Tronto as the 'new democratic ideal', 'caring with' involves the creation of a more caring society whereby all individuals embark upon care and in turn have their own caring needs met.⁸⁹

Whilst the emergence of a culture of care is largely dependent on individuals being invested in the wellbeing of others beyond themselves and their immediate relations, the state's role in this proposed shift away from the individualism promoted by neoliberalism cannot be understated—particularly in recognition of the extensive action needed to level inequalities.⁹⁰ Though Tronto's early work left several questions answered regarding the theory's operation on the state level, she has from the outset emphasized that 'political life is ultimately about the allocation of caring responsibilities'⁹¹ and, as such, any deficits of care is inextricably linked to a democratic deficit.⁹² They are 'two sides of the same coin' and hence one cannot be solved without resolving the other.⁹³

The argument for the wider application of care ethics is sharpened within Tronto's more recent publications, in which the cycle of care is situated within the caring democracy.⁹⁴ The caring democracy refers to determinations surrounding the provision of care—including the assignment of responsibilities and the specific practices involved—being made through democratic politics.⁹⁵ The caring democracy is borne from the process of 'caring with'; whilst 'caring with' envisions all individuals undertaking reciprocal acts of care, it equally necessitates state action in order for the caring deficit to be targeted.⁹⁶ Following the introduction of the caring democracy and the process of 'caring with', the political theory of care now recognizes the principal role the state must play in the universal satisfaction of basic needs—much like the international human rights regime.⁹⁷ This shared vision provides the entry point for a consideration of how the incorporation of care within the Court's vulnerability analysis could modify its determinations regarding the socioeconomic provision required under Article 3, including to whom it is owed and the reasons why.

⁸⁷ Sevenhuijsen, *Citizenship and the Ethics of Care: Feminist Considerations on Justice, Morality and Politics*, ebook edn, (2004) at 113, 151.

⁸⁸ Tronto, *supra* n 84 at 14.

⁸⁹ *Ibid.*

⁹⁰ Tronto, 'The Value of Care' *Boston Review*, 1 February 2002, available at: www.bostonreview.net/forum_response/joan-tro-nto-value-care/ [last accessed 14 April 2023]; Tronto, *supra* n 10 at 38; Tronto, *supra* n 85 at 14; Ward, 'Caring for ourselves? Self-care and neoliberalism' in Barnes et al., (eds), *Ethics of Care: Critical Advances of International Perspective*, ebook, (2022) 45 at 56.

⁹¹ Tronto, *supra* n 9 at xiii.

⁹² *Ibid.* at 17.

⁹³ *Ibid.* at 17–8.

⁹⁴ Tronto, *supra* n 85 at 16.

⁹⁵ *Ibid.*

⁹⁶ Tronto, *supra* n 9 at 17–8.

⁹⁷ *Ibid.* at 135.

C. Care Versus Rights—An Unnecessary Dispute

Before examining the possible implications of the incorporation of care within the Court's vulnerability analysis under Article 3, the ostensible 'tension' between care and rights must be confronted.⁹⁸ Care/needs and rights are frequently perceived to be in opposition as an extension of the ethics of care versus ethics of justice debate.⁹⁹ The ethics of justice propounded by developmental psychologists, such as Kohlberg, in the twentieth century is predicated upon an appreciation of rights; an individual may only reach the final stage of Kohlberg's model of moral development once they display an understanding of the value of rights and allow rights to inform their responses to ethical dilemmas.¹⁰⁰ A consideration of needs, in comparison, has been associated with the ethics of care and its regard for relationships and togetherness.¹⁰¹ The apparent discord between rights and care has been sustained by feminist criticism of rights as androcentric, which is engendered by, and further perpetuates, the historic restriction of women to the private sphere.¹⁰² Consequently, many feminist scholars doubt rights as means of achieving gender equality and hence propose that energy should be channelled towards non-legal strategies instead.¹⁰³ In light of its feminist origins, the ethics of care may therefore seem at odds with rights discourse.

Yet, the conflict between rights and care has been overplayed and stifles progress in the social protection of the most deprived.¹⁰⁴ Whilst Tronto herself accuses 'rights-talk' of detracting from the consideration of care or needs,¹⁰⁵ it is civil and political rights in particular which have been prioritized within the West—typified by the contents of the ECHR. The insufficient attention paid to socioeconomic rights is arguably one and the same as the neglect of care/needs, in that they have both been cast aside in pursuit of negative liberty. Nonetheless, the construction of socioeconomic rights within human rights law has been legitimately criticized on account of the vague and meagre demands imposed upon the state, particularly the promotion of a minimum baseline instead of redistribution of resources,¹⁰⁶ as well as their potential for abuse within neoliberal projects.¹⁰⁷ A revised approach to socioeconomic rights through the lens of the political theory of care, in comparison, would impose more stringent obligations upon the state—extending to the specific governmental action necessary to rectify disparities in wealth.¹⁰⁸

Indeed, the political theory of care not only questions the supposed incompatibility of care and rights; it further contends that the values of the former can be extracted to overcome the other's limitations and vice versa.¹⁰⁹ Incorporating care within rights discourse would combat the 'moral indifference' within society propagated by the prevailing individualistic conception

⁹⁸ Gilligan, *supra* n 53 at 136.

⁹⁹ Tove Pettersen, 'The Ethics of Care: Normative Structures and Empirical Implications' (2011) *Health Care Analysis* 51 at 54.

¹⁰⁰ Kohlberg, *Collected Papers on Moral Development and Moral Education* (1973) at 29–30.

¹⁰¹ Gilligan, *supra* n 60.

¹⁰² Fisher and Tronto, *supra* n 66 at 36; MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 *Signs* 635 at 642, 658; Smart, *Feminism and the Power of Law* (1989) at 159; Baier, *Moral Prejudices: Essays on Ethics* (1994) at 26.

¹⁰³ Smart, *supra* n 102 at 138–59.

¹⁰⁴ Barnes, *Care in Everyday Life: An ethic of care in practice* (2012) at 33–4.

¹⁰⁵ Tronto, *supra* n 9 at 3–4; Tronto, *supra* n 10 at 163.

¹⁰⁶ Neier, 'Social and Economic Rights: A Critique' (2006) 13 *Human Rights Brief* 1; Moyn, 'Do Human Rights Increase Inequality?' *The Chronicle of Higher Education*: 26 May 2015, available at: www.chronicle.com/article/do-human-rights-increase-inequality/ [last accessed 14 April 2023].

¹⁰⁷ Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2014) 77 *Law and Neoliberalism* 147; Wills, *Contesting World Order? Socioeconomic Rights and Global Justice Movements* (2017) at 255; Salomon, 'Sustaining neoliberal capital through socio-economic rights', *Critical Legal Thinking*: 18 October 2017, available at: <https://criticallegalthinking.com/2017/10/18/sustaining-neoliberal-capital-socio-economic-rights/> [last accessed: 2 August 2023].

¹⁰⁸ Tronto, *supra* n 9 at 44; Wills, *supra* n 107; Ward, *supra* n 90.

¹⁰⁹ Tronto, *supra* n 9 at 167.

of rights, for it would uncover the relationality between human beings which underpins their existence.¹¹⁰ The adoption of the lens of care unveils the enjoyment of one's human rights to, in many cases, be inextricably linked to another's. For example, in the main, a child's right to food will be dependent on the right to work of their parent(s)/carer(s) in order to provide sufficient sustenance for the family. Yet, where food is economically and/or physically inaccessible, parents/carers often prioritize the nutritional needs of their children above their own—the child's right to food realized at the expense of their guardian's.¹¹¹ By bringing this reality to the fore, hitherto concealed by atomistic approaches to rights, the political theory of care initiates an inquiry into how caring relations on the national level can be reshaped in pursuit of universal realization of rights.

Proponents of care may question whether rights are necessary within this framework—if care is better able to capture needs and the degree of relationality between humans which impacts their fulfilment, why not substitute care for rights? Yet, rights serve their own distinct purpose within the political theory of care, in that they aim to ensure that support is provided to all, not just those most proximate to us.¹¹² As Tronto highlights, 'without strong conceptions of rights, care-givers are apt to see the world only from their perspective and to stifle diversity and otherness'.¹¹³ The human tendency to prioritize the caring needs of their immediate relations demands a framework of rights to ensure that support extends to those who currently stand outside of such informal communities of care.¹¹⁴ Furthermore, without the identification of the care-receiver as rights-holder, superficial care may be tolerated—or worse, further marginalization of minorities.¹¹⁵ As Fraser highlights, when it comes to socioeconomic entitlements, needs claims alone lack emancipatory force in comparison to those attached to rights and subsequently pose a greater risk of paternalism.¹¹⁶ Hence, a combination of care/needs and rights emerges as not only possible, but desirable in order for all members of society to benefit.

6. A COMPARISON BETWEEN CARE AND VULNERABILITY

The complementarity of Tronto's formulation of care ethics and Fineman's understanding of vulnerability is signified by their shared features. Underpinning both is an appreciation of the susceptibility to harm of mankind, including deprivation. Instead of suggesting inferiority, as it does within the Court's jurisprudence,¹¹⁷ dependency is recognized as attribute which unites humanity. Just as vulnerability theory recognizes that to be human is to be vulnerable,¹¹⁸ care ethics recognizes that 'all human beings require care, all of the time'.¹¹⁹ However, with care ethics, it is one's reliance upon others for the fulfilment of their caring needs which places one in a 'position of some vulnerability'.¹²⁰ In the same vein, Fineman emphasizes that amongst the human population, there are differences in resilience in the face of vulnerability on account of

¹¹⁰ Sevenhuijsen, *supra* n 87 at 108.

¹¹¹ For example, see: Knowles et al., "Do You Wanna Breathe or Eat?": Parent Perspectives on Child Health Consequences of Food Insecurity, Trade-Offs, and Toxic Stress' (2015) 20 *Maternal and Child Health Journal* 25 at 27; Harvey, "When I go to bed hungry and sleep, I'm not hungry": Children and parents' experiences of food insecurity' (2016) 99 *Appetite* 235 at 242; Shinwell and Defeyter, 'Food Insecurity: A Constant Factor in the Lives of Low-Income Families in Scotland and England' (2021) 9 *Front Public Health* 1, 9.

¹¹² Hankivsky, *Social Policy and the Ethics of Care* (2004) at 23.

¹¹³ Tronto, *supra* n 9 at 161.

¹¹⁴ Waldron, *Liberal Rights: Collected Papers 1981–1991* (1993) at 379; Hankivsky, *supra* n 112.

¹¹⁵ Tronto, 'Beyond Gender Difference to a Theory of Care' (1987) 12 *Signs* 644 at 662.

¹¹⁶ Fraser, *Fortunes of Feminism: From State Managed Capitalism to Neoliberal Crisis* (2013) at 81–2.

¹¹⁷ Fineman, 'Elderly as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20 *The Elder Law Journal* 71 at 116; Timmer et al., *supra* n 2 at 194–5.

¹¹⁸ Fineman, *supra* n 27 at 8; Heri, *supra* n 16 at 208.

¹¹⁹ Tronto, 'Creating Caring Institutions: Politics, Plurality, and Purpose' (2020) 4 *Ethics and Social Welfare* 158 at 163.

¹²⁰ Tronto, *supra* n 9 at 134.

resources, past experiences and support networks.¹²¹ The latter factor is where the connection with care ethics is most apparent, for there is implicit recognition of the interdependency of human beings.¹²² Care ethics is concerned with the ‘totality of the relations’ that exist between mankind,¹²³ recognizing that experiences of vulnerability change over time and thus there are some situations in which one may require greater assistance meeting their needs than others.¹²⁴ The understanding of vulnerability within care ethics is therefore more congruent with that presented by Fineman in comparison to the ECtHR’s typology, for it accepts the reality that vulnerability is highly circumstantial rather than being reserved for specific groups only.

Nevertheless, there are also key distinctions between Tronto’s and Fineman’s frameworks. It is through a study of these variations that the value of an approach which combines the two becomes apparent. The first point of difference concerns responsibility. Responsibility lies at the centre of the political theory of care,¹²⁵ requiring an examination of the array of actors involved in the provision of care, both directly and indirectly, as well as the role of societal and institutional processes.¹²⁶ As previously noted, the second process of care within Tronto’s cycle, ‘*taking care of*’ is predicated upon responsibility. Thus, under this conceptual framework, the state is prohibited from relying upon the typical ‘passes’ invoked to excuse itself from taking action to combat deprivation.¹²⁷ Arguments that an individual’s hunger can be resolved either by a stronger work ethic, termed the ‘bootstrap pass’ by Tronto, or through civil society’s efforts, known as the ‘charity pass’, are denounced by the political theory of care.¹²⁸ The invocation of such passes is deemed an act of ‘privileged irresponsibility’, referring to the ability of the advantaged to dismiss hardships that they do not face themselves.¹²⁹ As Tronto highlights, the solutions presented by these passes, that is reliance on the market and/or the third sector, are extremely unlikely to meet caring needs as effectively as an actor with comparatively greater resources and competence such as the state.¹³⁰ Consequently, according to the political theory of care, individuals are to expect more from their national governments by way of support to meet their needs than they currently receive, exemplifying one of the primary advantages of incorporating Tronto’s framework within vulnerability analysis. This has since been supplemented by reference to the ideal ‘caring government’ and its defining features, notably its offer of more comprehensive assistance than is available with the liberal welfare state.¹³¹ The political theory of care, therefore, is specifically designed to challenge and enhance existing relationships between individuals and the state through practical changes in the pursuit of improvements to wellbeing, signifying its greater capacity to appropriately respond to unmet, basic needs in comparison to that which can be achieved through vulnerability alone.¹³²

The political theory of care is also a worthy addition to vulnerability analysis on account of the equality it seeks to foster. The language of care has been met with similar criticisms as that of vulnerability, namely concerns of the infantilization of those in need of support. Much of this critique has emerged from within the disability rights movement, whereby care has been

¹²¹ Fineman, *supra* n 117 at 140.

¹²² Tronto, *supra* n 9 at 21.

¹²³ Pettersen, *supra* n 99 at 63.

¹²⁴ Tronto, *supra* n 9 at 135.

¹²⁵ Barnes et al., ‘Conclusion: renewal and transformation—the importance of an ethics of care’ in Barnes et al. (eds), *Ethics of Care: Critical Advances in International Perspectives* (2015) 233 at 235.

¹²⁶ Clough, ‘Disability and care: Theoretical antagonisms revisited’ in Clough and Herring (eds), *Disability, Care and Family Law* (2021) 13 at 25–6.

¹²⁷ Tronto, *supra* n 10 at 115–36.

¹²⁸ *Ibid.*

¹²⁹ Tronto, *supra* n 9 at 121.

¹³⁰ Stensöta, ‘Why the Publicly Funded Solution Is Better Equipped to Provide Democratic Care “For All” in Urban and Ward (eds), *Care Ethics, Democratic Citizenship and the State* (2020) 77 at 84.

¹³¹ Engster, *The Heart of Justice: Care ethics and Political Theory* (2007) at 93–4.

¹³² Lawson, *supra* n 54 at 8.

construed as a ‘byword for dependency’ with the effect of disempowering the care-receiver and contributing to the stigmatization of minorities.¹³³ Cognisant of the inherent danger of paternalism within any care-centred theory—particularly in light of the aforementioned power imbalance which produces the need for external provision of care in the first place—Tronto’s framework is deliberately designed to minimize the risk of ‘othering’ the care-receiver.¹³⁴ First, the cycle of care is predicated on processes of care, not people, shifting the emphasis away from stereotypical notions of who is vulnerable and towards the practical steps that can be taken to better meet caring needs.¹³⁵ A reorientation of this kind would imbue vulnerability analysis with a more liberative quality, providing a shield from accusations of paternalism.

The inclusivity of Tronto’s framework is further typified through the situation of the processes of care within the caring democracy. Under the caring democracy, all individuals are to be granted an equal right to participation in the shaping of caring practices on the state level.¹³⁶ This extends to instances where efforts are needed to remove barriers to communication, for example, due to intellectual disabilities, to ensure such individuals are not denied their voice.¹³⁷ The caring democracy therefore acts as a safeguard against paternalism, for the state is held to account by individuals for the satisfaction of their own caring needs and those of their relations.¹³⁸ A deliberative democracy of this nature is conceivably the key to delivering social justice and as such is worth incorporating within the ECtHR’s vulnerability analysis under Article 3 of the Convention to ensure the socioeconomic protection the Court demands of the state is tailored to the needs of the individual.

7. SOCIOECONOMIC OBLIGATIONS UNDER ARTICLE 3 DERIVING FROM THE LENS OF CARE

The preceding comparative exercise undertaken between care ethics and vulnerability suggests that the political theory of care can greatly enhance vulnerability analysis’ ability to target deprivation in light of its centrality of the responsibility of the state in meeting caring needs and inclusion of mechanisms to foster equal participation of all. The final substantive section of this article will now consider how an embrace of this care-centred approach by the ECtHR within its application of vulnerability may augment protection of socioeconomic rights under Article 3 of the ECHR.

A. Vulnerability

The incorporation of the political theory of care within the Court’s vulnerability analysis would first have profound implications in regard to who is considered vulnerable and, subsequently, the effect of this upon the extent of the state’s positive duty to provide socioeconomic assistance under Article 3. The adoption of the caring lens developed by Tronto would enable the Court to dispense with its paternalistic, group-based approach which only partially captures experiences of vulnerability, and instead recognize the vulnerability of applicants whose heightened exposure to harm it has hitherto glossed over. In this context, this would likely include, *inter alia*, low-income households, women, people with disabilities, single parent families and racialised

¹³³ Watson et al., ‘(Inter)Dependence, Needs and Care’ (2004) 38 *Sociology* 219 at 335.

¹³⁴ Tronto, *supra* n 9 at 170; Tronto, *supra* n 56 at 63; Tronto, *supra* n 119 at 161.

¹³⁵ Clough, *supra* n 126 at 24.

¹³⁶ Heier, ‘Democratic Inclusion Through Caring Together with Others’ in Urban and Ward (eds), *Care Ethics, Democratic Citizenship and the State* (2020) 53 at 68.

¹³⁷ Kittay, ‘The Ethics of Care, Dependency, and Disability’ (2011) 24 *Ratio Juris* 49 at 55.

¹³⁸ Tronto, *supra* n 10 at 44; Smiley, ‘Rethinking “Paternalism” for a Democratic Theory of Care’ in Urban and Ward (eds), *Care Ethics, Democratic Citizenship and the State* (2020) 93 at 108, 110.

minorities—all of whom are at a disproportionate risk of deprivation.¹³⁹ A move to a needs-based approach to vulnerability of this kind could theoretically impose upon the state innumerable socioeconomic demands owed to a sizeable pool of individuals, exceeding the Court's mandate under the Convention.¹⁴⁰ Given that the ECHR is geared towards civil and political rights, with only indirect protection of socioeconomic rights, state parties cannot necessarily be expected to provide assistance in every instance of need.¹⁴¹

That being said, there remains the possibility of the window of protection under Article 3 being extended to cover exceptional circumstances where the deprivation experienced is most extreme, yet the applicant is not within the state's exclusive control. A situational approach such as this, informed by care ethics' understanding that the degree one depends on others for the fulfilment of their basic needs is in a state of flux throughout one's lifetime, could conceivably give rise to a duty to provide a minimum level of socioeconomic assistance to those sleeping rough. Consequently, the asymmetrical treatment of the individual whose vulnerability derives from their identity and the individual whose vulnerability is circumstantial would be redressed, with both the asylum seeker and homeless person entitled to support from the state on account of their exposure to similar levels of destitution.

Currently, differential state responses to asylum seekers and persons sleeping rough alleging destitution contrary to Article 3 are authorized by the wide margin of appreciation the Court grants states in relation their positive socioeconomic duties in recognition of their 'diversity of situations . . . and the choices which must be made in terms of priorities and resources'.¹⁴² The political theory of care helps do away with the longstanding idea promulgated by the Court that there are not enough resources to protect both types of applicants, challenging its systemic refusal to make findings with welfare impacts. Notably, the Court has dismissed state objections regarding the cost of socioeconomic provision for detainees¹⁴³ and asylum seekers¹⁴⁴ in spite of arduous financial conditions existing within the nation. The caring government which lies at the core of Tronto's framework would be expected, wherever possible, to similarly take action in relation to homeless persons experiencing commensurate deprivation. In such cases, the state's resources would remain an important factor for determining the response required under Article 3, moreover an element of discretion would be preserved in how the state is to amend its policies to fulfil the unmet needs. However, under the proposed approach, the Court would no longer tolerate experiences of deprivation amounting to inhuman treatment as a result of the unwillingness of a state with a sizeable economy to implement basic socioeconomic protections, extending to the homeless. Thus, an application of the political theory of care could see the obligation to provide sustenance and shelter under Article 3 engaged more frequently that it is presently, working towards the elimination of socioeconomic inequalities whilst simultaneously remaining within the confines of the ECHR and the Court's legitimacy.

Whereas vulnerability's primary function within the context of the Article 3 ECHR is to signify certain applicants deserving of socioeconomic protection on account of their special requirements, the situation of care within the Court's vulnerability analysis would significantly improve the process of needs determination. Vulnerability, as is currently used by the Court

¹³⁹ Blom, Huijts and Kraaykamp, 'Ethnic health inequalities in Europe. The moderating and amplifying role of healthcare system characteristics' (2016) 158 *Social Science and Medicine* 43; Förster et al., *Understanding the Socio-Economic Divide in Europe*, OECD, 26 January 2017, available at: www.oecd.org/els/soe/cope-divide-europe-2017-background-report.pdf [last accessed 2 August 2023]; Böke, *Socio-economic inequalities in Europe: time to restore trust by strengthening social rights*, Council of Europe Doc No. 15365, 9 September 2021, available at: <https://assembly.coe.int/LifeRay/SOC/Pdf/TextesProvisiores/2021/20210909-SocialInequalities-EN.pdf> [last accessed 2 August 2023].

¹⁴⁰ Kagiarios, *supra* n 16 at 258–9.

¹⁴¹ *Ibid.*

¹⁴² *Ilaşcu and others v Moldova and Russia* Application No 48787/99, Merits, 8 July 2004, at para 332.

¹⁴³ *Poltoratskiy v Ukraine* Application No 38812/97, Merits, 29 April 2003, at para 148.

¹⁴⁴ *M.S.S. v Belgium and Greece*, *supra* n 21 at para 250.

within its Article 3 jurisprudence, offers little help in regard to how the needs of the specific applicant in question are to be best satisfied and, in turn, what action is required of the state to do so. In contrast, the political theory of care is able to deliver answers to these questions; both the process of 'care-receiving' and the caring democracy it is embedded in require a consideration of caring needs from the perspective of the care-receiver, in this context, the applicant, as opposed to solely what the care-giver, the state, is willing to offer. This change would first produce a more accurate account of the deprivation experienced, obliging the state to offer assistance in a broader range of circumstances. It also serves as a further means of addressing the paternalism associated with the Court's current approach to vulnerability by giving a voice to those in need. In future case law, the Court would be expected to place greater emphasis on the applicant's own account of their need when examining the alleged violation and discussing the response required of the state. Furthermore, the Court would need to be responsive to changes in need over time, reflective of the cyclical nature of care. It would therefore serve a critical role in leading the discussion regarding need across ECHR member states and emphasizing the importance of regular reviews of the state's provision of support via its policies. In sum, a consideration of the political theory care within the Court's vulnerability analysis under Article 3 would demand state action which suitably responds to the needs of the individual in question, informed by the care-receiver themselves.

B. State Responsibility

An embrace of the political theory of care by the ECtHR within its vulnerability analysis could also be the answer to the current narrow construction of state responsibility. In their analysis of the jurisprudence of the Court, Clements and Simmons identify two questions which currently determine the state's responsibility for deprivation; first, 'to what degree can it be said that the state is culpable' and, second, 'how severe is the destitution in issue?'.¹⁴⁵ The first component, that is the requirement for a nexus to be established between the state's act or omission and the applicant's destitution, has been demonstrated to be unsuccessful in situations other than where the applicant is being detained or otherwise wholly within the state's control and hence renders Article 3 a powerless tool for the majority of those living in deprivation.

The absence of a 'Convention-based "social minimum" of welfare protection'¹⁴⁶ is unsurprising in light of the ECHR's civil and political focus; however, this should not prohibit the Court from actively promoting the protection of socioeconomic rights of those who are facing destitution. Whilst a duty to provide universal socioeconomic protection is currently out of reach, there remains room for state responsibility under Article 3 to be engaged in instances of destitution beyond the detention context. Such an extension is necessary to achieve substantive equality, understood as 'the equality of opportunities to live a life of agency and dignity'.¹⁴⁷ By virtue of its absolute nature, Article 3 is a viable route for advancing socioeconomic rights, requiring states to provide a basic level of social protection under the freedom from ill-treatment where individuals are unable to secure this themselves.¹⁴⁸ Significantly, the Court has previously received praised for its statements regarding the insufficiency of benefits, warning states in regard to the influx of conditionality agreements affecting social welfare.¹⁴⁹ With the cost of living rising across Europe, it is high time that the Court takes a

¹⁴⁵ Clements and Simmons, 'European Court of Human Rights—Sympathetic Unease' in Langford (ed), *Social Rights Jurisprudence—Emerging Trends in International and Comparative Law* (2008) 409 at 412.

¹⁴⁶ Kagiros, *supra* n 6 at 558.

¹⁴⁷ Heri, *supra* n 16 at 175.

¹⁴⁸ Leijten, *supra* n 14 at 216.

¹⁴⁹ Kagiros, *supra* n 6 at 558.

more robust stance through the establishment of comprehensive obligations aimed at targeting destitution.¹⁵⁰

The notion of state responsibility constructed by the embedding of care within the Court's vulnerability analysis has the potential to be comparatively more extensive, whereby the state owes responsibility to all to ensure their fundamental needs are met and not just those exclusively under state authority. Evidently, the level of deprivation suffered by the applicant would still need to meet the threshold of ill-treatment for a violation of Article 3 to be found, meaning that the state will not incur responsibility under the ECHR for every instance of sleeping rough or missing a meal—only where the application has experienced serious deprivation or want incompatible with human dignity. Nonetheless, the shift to a situational approach to vulnerability would mean that the applicant's circumstances may lower the threshold if the circumstances result in a markedly heightened exposure to harm, informed by a holistic appreciation of need. Consequently, the incorporation of the political theory of care within the Court's vulnerability analysis would greatly improve the chances of success of a claim of ill-treatment under Article 3 by an applicant experiencing destitution outside of the detention context, such as by a family who have experienced severe food insecurity.

Whilst previous attempts to overcome vulnerability's limitations similarly envision a broader notion of vulnerability encompassing those living in poverty, the political theory of care is distinct in that it would further augment the actions expected of the state when its positive duties under Article 3 engaged. For the caring government Tronto proposes to be achieved, the standard to which the state is held to in such instances would need to be raised considerably—necessitating far more proactive measures than required under the simple due diligence test in operation today. Though it is recognized that the state may not be able to succeed in protecting individuals from all violations, an application of Tronto's framework would see the requirement for 'reasonable steps' to be taken to prevent ill-treatment which is known, or ought to be known, by state authorities replaced with a stipulation that states must take all measures possible within their resources to preclude a violation under Article 3. Consequently, the state would incur responsibility in instances where it cannot prove it has mobilized its resources effectively to prevent destitution amounting to ill-treatment, delivering far greater socioeconomic protection than is available under the ECHR at present.

C. Policy Implications on the National Level

The reconceptualization of both vulnerability and state responsibility informed by a political theory of care and the subsequent expansion to the socioeconomic obligations the contracting parties owe under Article 3 ECHR would require substantial policy changes on the national level. The Court's extension of Article 3 to the living conditions of asylum seekers in *M.S.S.* over a decade ago was met with concerns of a 'slippery slope' in regard to the raise in socioeconomic standards expected of state parties and the feasibility of these demands for states with fewer resources at their disposal.¹⁵¹ Protection of the civil and political rights contained within the ECHR incontrovertibly requires measures to be taken in pursuit of the realization of socioeconomic rights on account of the interdependency, indivisibility and interrelatedness of rights, thus the emergence of certain, albeit limited, positive duties to prevent deprivation under Article 3 should not come as a surprise.¹⁵² Indeed, such action is mandated on account of the severe

¹⁵⁰ Tsoulou Malakoudi et al., *European Parliament Eurobarometer: Parlemeter 2022*, European Parliament Autumn 2022 EB 98.1 (2022), available at: <https://europa.eu/eurobarometer/surveys/detail/2932> [last accessed: 2 August 2023].

¹⁵¹ Bossuyt, *supra* n 5 at 34–5.

¹⁵² UNFPA, 'Human Rights Principles', UNFPA (2005) available at: <https://www.unfpa.org/resources/human-rights-principles> [last accessed 2 August 2023]; Pribytkova, 'Protection from poverty in the European Court of Human Rights' in Gaisbauer, Schweiger and Sedmak, *Absolute Poverty in Europe: Multidisciplinary Perspectives on Hidden Phenomenon* (Bristol University Press 2019) 335 at 348–9.

humiliation extreme poverty afflicts upon the individual, as Tulkens asserts, amounting to ‘fear, anguish and inferiority’.¹⁵³

For vulnerability to fulfil its potential of delivering substantive equality between applicants necessary for the realization of the civil and political rights the Convention protects, there must be a targeting of the systemic causes of socioeconomic disparities.¹⁵⁴ The changes to domestic laws flowing from a shift to the political theory of care foreseeably be wide ranging, particularly in the field of welfare provision. Benefit sanctions and similarly punitive measures which perpetuate ‘ableist notions of citizenship’ are plainly incompatible with Tronto’s vision for a culture of care and hence would be called into question, meanwhile the amount of financial support available to low-income households would need to be reviewed to close wealth gaps.¹⁵⁵ Ultimately, what is required under the proposed conceptual framework are policies which see the state take greater responsibility for the fulfilment of unmet caring needs, reducing reliance upon markets and the third sector. Decisions as to the precise means by which these duties are exercised, however, are to remain with member states, striking a more appropriate balance between the protection of rights and national interests.¹⁵⁶

8. CONCLUSION

This article has demonstrated that the group-based approach to vulnerability adopted by the ECtHR is a limited tool by which state obligations can be established in relation to the realization of socioeconomic rights via the prohibition of ill-treatment protected within Article 3 ECHR. It has identified three significant failings of the Court’s current application of vulnerability in this context, namely, the incomplete view of the concept itself, the narrow construction of state responsibility it produces and lastly concerns of paternalism and essentialism. Whilst there have been credible attempts to rescue the concept of vulnerability through a return to Fineman’s understanding of the term, the effectiveness of these solutions as means of uprooting the systemic causes of inequality and fostering agency were called into question. As such, it is worth exploring other concepts which may complement vulnerability analysis to produce more comprehensive positive socioeconomic duties under Article 3, such as care.

The inclusion of the Tronto’s political theory of care within the Court’s Article 3 jurisprudence could bring the doctrine of vulnerability developed by the Court closer to Fineman’s conceptualisation through its recognition of susceptibility to harm as a characteristic amongst all humans. Yet, whilst there are commonalities between the two frameworks, to conceive the political theory of care as vulnerability theory packaged under a new name is a gross misunderstanding. Principally, Tronto’s framework places a stronger emphasis on both the state’s role in meeting needs and the involvement of care receivers within the provision of care. It is these elements which remain lacking within vulnerability theory, signifying its own distinct value in the identification and fulfilment of need.

If incorporated into the Court’s vulnerability analysis within its Article 3 jurisprudence, the political theory of care could produce a more complete notion of vulnerability and greatly enlarge the extent of state responsibility, thereby requiring more from national governments by way of socioeconomic assistance under this provision. Without such a powerful accompaniment, the Court’s doctrine of vulnerability will deliver little progress in relation to substantive

¹⁵³ Tulkens, *Implementing the European Convention on Human Rights in times of economic crisis*, Seminar to mark the opening of the judicial year of the European Court of Human Rights, 25 January 2013, at 6, available at: https://echr.coe.int/Documents/Speech_20130125_Tulkens_ENG.pdf [last accessed 2 August 2023].

¹⁵⁴ Heri, *supra* n 16 at 187.

¹⁵⁵ Rummary, ‘Ageing, disability and family life’ in Clough and Herring, *Disability, Care and Family Law* (2021) 66 at 68. See also Dean, ‘Human rights and welfare rights: contextualising dependency and responsibility’ in Dean (ed) *The Ethics of Welfare: Human rights, dependency and responsibility*, ebook (2022) 7 at 22.

¹⁵⁶ Pribytkova, *supra* 152 at 349.

equality and indeed reify existing negative stereotypes. Thus, if the Court believes certain individuals merit socioeconomic protection on the basis of need, its understanding of vulnerability within the context of Article 3 requires urgent reconsideration.

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