Heri, Corina. "Vulnerability Deciphered – Human Dignity, Substantive Equality and Judicial Empathy." *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR*. Oxford: Hart Publishing, 2021. 161–203. Modern Studies in European Law. *Bloomsbury Collections*. Web. 26 Apr. 2023. <<http://dx.doi.org/10.5040/9781509941261.ch-007>>.

Downloaded from Bloomsbury Collections, www.bloomsburycollections.com, 26 April 2023, 14:12 UTC.

Copyright © Corina Heri 2021. Released under a CC BY-NC-ND licence (<https://creativecommons.org/licenses/by-nc-nd/4.0/>). You may share this work for non-commercial purposes only, provided you give attribution to the copyright holder and the publisher, and provide a link to the Creative Commons licence.

Vulnerability Deciphered – Human Dignity, Substantive Equality and Judicial Empathy

Chapter Summary

The concept of vulnerability relates to a number of other core concepts of the Court's jurisprudence, especially the ideas of human dignity and of equality. The present chapter will take up these ideas and deepen the analysis of vulnerability in light of these underlying themes. It will also invoke interrelated concepts, such as a capabilities approach and the idea of judicial empathy. This discussion fits the Court's practical approach to vulnerability into the theoretical debates that underpin and surround it, and explores the significance of vulnerability in relation to and in light of these concepts. It is argued that vulnerability is inseparable from ideas of human dignity and substantive equality. It is, in fact, related to the very foundations of the ECHR, and can revitalise debates about the meaning of justice. This strengthens the idea of a responsive state that is evoked by a vulnerability approach.

Keywords: human dignity; substantive equality; social justice under the ECHR; judicial empathy; judicial emotion; foundations of human rights; capabilities approach.

I. On Human Dignity and Vulnerability

To determine whether a given treatment is compatible with Article 3 ECHR, the Court often uses compatibility with human dignity as a metric. In other words, both vulnerability and human dignity inform the Court's evaluation of ill-treatment cases. These two concepts also inform each other: the principles ensconced in human dignity – the intrinsic value of every individual human being and the importance of respect and support for the autonomy of the individual – are important for any cogent account of vulnerability.¹ However, while vulnerability

¹ Luís Roberto Barroso, 'Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse' (2012) 35(2) *Boston College International and Comparative Law Review* 331–93, 334.

is used by the Court to indirectly address the impact on human dignity generated by particular scenarios and traits, reference to human dignity directly entails a universalist approach.

The following will explore the meaning of human dignity, first in a general sense and then in the context of the Court's case law. It will contrast the idea of dignity as an objective and universal metric for ill-treatment with the special protection granted to vulnerable applicants by the Court.

A. Main Principles of Human Dignity

The concept of dignity is both a pervasive and an evasive one under international human rights law. It is not mentioned in the text of the ECHR, although Protocol No 13 to the Convention mentions 'the inherent dignity of all human beings' in its preamble.² The ICCPR, ICESCR and UDHR all contain numerous mentions of the concept,³ and it also features in the American Convention on Human Rights⁴ and the African Charter on Human and Peoples' Rights.⁵

The concept of human dignity did not end up in these instruments by accident. Instead, the concept has a long history as a hierarchical or official status akin to 'worthiness' and as a term for the worth accorded to humans by virtue of being human, beginning in Roman law.⁶ A religious idea of dignity arose during the Middle Ages, when the idea of the 'inherent dignity of man' came to mean that humanity, having been created in God's image, was different from beast.⁷ Pre-Enlightenment thinkers, including Pico della Mirandola, cemented the idea of dignity as a characteristic of all humanity and linked it with the possession of reason.⁸ In the late 1700s, Immanuel Kant formulated his famed and secular idea of dignity when he argued that, given their human dignity, individuals should be treated as ends, and not as means to an end.⁹ Dignity later became the rallying

² Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances, adopted on 3 May 2002, CETS 187, in force since 1 July 2003, ratified by 44 Member States, preamble, first recital.

³ Preamble and Art 10 of the ICCPR; preamble and Art 13 of the ICESCR; Arts 1, 22 and 23 UDHR.

⁴ American Convention on Human Rights, adopted on 22 November 1969, entered into force on 18 July 1978, OAS Treaty Series No 36, 1144 UNTS 123, 25 States parties, Arts 5, 6, 11.

⁵ Organization of African Unity, African Charter on Human and Peoples' Rights, 27 June 1981, entered into force on 21 October 1986, CAB/LEG/67/3 rev 5 (1982) 21(1) *International Legal Materials* 58–68, 53 states parties, Art 5.

⁶ Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655–724, 656–57, with further references.

⁷ *Ibid.*, 658.

⁸ *Ibid.*, 659, citing Giovanni Pico della Mirandola, *On the Dignity of Man* (Charles Glenn Wallis, Paul JW Miller and Douglas Carmichael trs, Hackett Publishing Company, 1998), 5.

⁹ *Ibid.*, citing Immanuel Kant, *Metaphysics of Morals* (Mary J Gregor tr, CUP, 1996), section 38 of Part II. See also Roberto Adorno, 'Human Dignity and Human Rights as Common Grounds for Global Bioethics' (2009) 34(3) *Journal of Medicine and Philosophy* 223–40, 230–31.

cry for a variety of movements seeking social reform, for example in the fight for women's suffrage and for the abolition of slavery.¹⁰

The concept also has its critics. Arthur Schopenhauer, for example, argued that the idea of human dignity, 'once it was uttered by Kant, became the shibboleth of all perplexed and empty-headed moralists. For behind that imposing formula they concealed their lack, not to say, of a real ethical basis, but of any basis at all which was possessed of an intelligible meaning'.¹¹ Others have qualified the concept of dignity as a merely rhetorical one or as a placeholder for the rationale behind human rights.¹²

Despite criticism, references to the concept of human dignity continued to grow on the national and international plane. After the fall of the Third Reich, the concept of innate human dignity found entrance into many of the national constitutions of countries that are now Member States of the Council of Europe. In the international arena, two particular developments stimulated the inclusion of human dignity in a multitude of human rights instruments. First, the UN General Assembly's 1986 guidelines for new human rights instruments recommended that such instruments be 'of fundamental character and derive from the inherent dignity and worth of the human person'.¹³ Since then, the major UN human rights instruments have referred to human dignity.¹⁴ Secondly, the 1993 Vienna World Conference on Human Rights adopted dignity as its central organising principle.¹⁵ The Vienna World Conference, which was discussed above in light of its emphasis on the protection of the vulnerable, recognised and affirmed that 'all human rights derive from the dignity and worth inherent in the human person'.¹⁶

Despite this plethora of references to the concept, the exact definition of human dignity remains elusive. Christopher McCrudden has interpreted this to mean that human dignity allowed the drafters of human rights instruments to proceed on the basis of their agreement that human rights norms are necessary despite their 'embarrassing' inability to agree on one theoretical foundation for human rights. As he puts it, '[dignity's] utility was to enable those participating in the debate to insert their own theory. Everyone could agree that human dignity was central, but not why or how'.¹⁷ However, though it serves as a placeholder, he argues, dignity is not devoid of its own content: it 'carried an enormous amount of content, but different content for different people'.¹⁸ McCrudden identifies three aspects of a

¹⁰ McCrudden (n 6), 660–61, with further references.

¹¹ Arthur Schopenhauer, *The Basis of Morality* 2nd edn (Arthur Brodrick Bullock tr, Dover Publications, 2005), 51; McCrudden (n 6), 661.

¹² McCrudden (n 6), 675–77, 722.

¹³ General Assembly Resolution A/RES/41/120 of 4 December 1986 on setting international standards in the field of human rights, Art 3 para 4 lit b; McCrudden (n 6), 669, with further references.

¹⁴ Compare, for example, the preambles of the CRC (first and second recital) and the UNCAT (second recital).

¹⁵ McCrudden (n 6), 670.

¹⁶ World Conference on Human Rights, Vienna Declaration and Programme of Action of 25 June 1993, UN Doc A/CONF.157/23, 12 July 1993, preamble, second recital.

¹⁷ McCrudden (n 6), 678.

¹⁸ *Ibid.*

minimum core of dignity: (i) the intrinsic worth every human possesses in light of his or her humanity, (ii) the need for recognition and respect of this intrinsic worth by others and (iii) the idea of a limited state that exists for the sake of human individuals, and not vice versa.¹⁹

The placeholder aspect of human dignity denotes the vacuum left by the move away from religious or natural law considerations as the underpinning values of rights. Taken as an innate condition of the human that pre-exists authority, and thus in the sense of ‘human dignity as empowerment’, human dignity gives individuals the right to have rights and frees them to pursue the goals that they autonomously choose.²⁰ Human rights as understood today can thus be understood as entitlements that protect the underlying, fundamental value that is human dignity – as opposed to understanding the right to dignity as a human right.²¹

Even if not strictly understood as a right, the concept of human dignity guarantees an equal moral status to all members of the human race.²² While human dignity, like humanity, cannot be lost – at least not by a living²³ human being – it is in itself a vulnerable ideal in that it can be subjected to harms.

B. Dignity and the ECtHR

Human dignity can be understood as a ‘thick’ or as a ‘thin’ concept. A thin understanding of dignity sees the concept as synonymous with a human rights catalogue, meaning that it does not assist in the interpretation of that catalogue, while a thick understanding of dignity gives the concept independent meaning and uses it as an interpretative tool for identifying the content of human rights.²⁴ In the context of the ECtHR, dignity has both ‘thick’ and ‘thin’ connotations. However, the ECtHR does not understand dignity as an independent, justiciable, and enforceable human right – at least not directly. Instead, human dignity has garnered a place in the Court’s evolutive interpretive technique as a guiding principle underlying the Convention.

As indicated above, one notable effect of the concept, and one that is of particular relevance to the present analysis, is that it has helped the Court to clarify and expand the reach of Article 3 ECHR. This began in 1973, in the *East African Asians*

¹⁹ Ibid, 679.

²⁰ Beyleveld Deryck and Brownsword Roger, *Human Dignity in Bioethics and Biolaw* (OUP, 2001), 1–28; Adorno (n 9), 232.

²¹ Nikolaidis Charilaos, *The Right to Equality in European Human Rights Law: The Quest for Substance in the Jurisprudence of the European Courts* (Routledge, 2015), 12, with further references.

²² Natasa Mavronicola, ‘Torture and Othering’, in Benjamin Goold and Liora Lazarus (eds), *Security and Human Rights*, 2nd edn (Hart, 2019), 42–43.

²³ The question of posthumous dignity is more challenging: in the Strasbourg case law, it ‘enjoys only temporary protection’ (*Jäggi v Switzerland* App no 58757/00, Judgment of 13 July 2006, Reports 2006-X, para 41).

²⁴ McCrudden (n 6), 680–81.

case, when the Commission adopted the applicants' definition of degrading treatment as that which lowers the sufferer in 'rank, position, reputation or character, whether in his own eyes or in the eyes of other people', albeit narrowing that definition to 'interferences with the dignity of man of a particularly serious nature' by introducing the threshold of severity.²⁵

Four years later, in addressing the merits of the Article 3 complaint concerning corporal punishment in *Tyrer v United Kingdom*, the Court held that the applicant's punishment '– whereby he was treated as an object in the power of the authorities – constituted an assault on precisely *that which it is one of the main purposes of Article 3 ... to protect, namely a person's dignity and physical integrity*'.²⁶ This equates dignity with psychological or mental integrity, and therefore frames it as an antonym of suffering and a complement of pain, which describes attacks on *physical integrity*.²⁷

Since the late 1970s, the Court has occasionally seemed to conflate dignity and the scope of Article 3.²⁸ For example, regarding detainees, the Court has held that 'any recourse to physical force which has not been made strictly necessary by [their] own conduct diminishes human dignity and is *in principle* an infringement of the right set forth in Article 3'.²⁹ The meaning of dignity – and of the words 'in principle' here – became even clearer with the 2015 *Bouyid v Belgium* judgment.³⁰ There, the Court included a section on dignity – along with a section on the vulnerability of minors – in its comparative materials, and emphasised the strong ties between human dignity and the essence of the ECHR, as well as Article 3 and degrading treatment or punishment in particular.³¹ The Court stated that ill-treatment reaching the threshold of severity for a violation of Article 3 need not necessarily involve 'actual bodily injury or intense physical or mental suffering'. Where these aspects are absent, but an individual is nonetheless treated in a humiliating or debasing manner showing 'a lack of respect for or diminishing his or her human dignity, or [that] arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance', this can constitute degrading treatment, whereby humiliation in the victim's own eyes suffices.³²

²⁵ *East African Asians (British Protected Persons) v United Kingdom* App nos 4403/70 ..., Report (Commission) of 14 December 1973, para 189.

²⁶ *Tyrer v United Kingdom* App no 5856/72, Judgment of 25 April 1978, Series A26, para 33, emphasis added.

²⁷ Bryan S Turner, *Vulnerability and Human Rights* (Pennsylvania State University Press, 2006), 27 and 35.

²⁸ *Kudla v Poland* App no 30210/96, Judgment (GC) of 26 October 2000, Reports 2000-XI, para 94; *Svinarenko and Slyadnev v Russia* App nos 32541/08 and 43441/08, Judgment (GC) of 17 July 2014, Reports 2014 (extracts), para 138.

²⁹ *Ribitsch v Austria* App no 18896/91, Judgment of 4 December 1995, Series A336, para 38, emphasis added.

³⁰ *Bouyid v Belgium* App no 23380/09, Judgment (GC) of 28 September 2015, Reports 2015; Natasa Mavronicola, 'Bouyid v Belgium: The "Minimum Level of Severity" and Human Dignity's Role in Article 3 ECHR' (2020) 1(1) *The European Convention on Human Rights Law Review* 105–24.

³¹ *Ibid.*, paras 45–47, 81, and 87–90.

³² *Ibid.*, para 87.

The words ‘in principle’, the Court held in *Bouyid*, need not indicate that some interferences with dignity fall below Article 3’s threshold of severity. In other words: ‘[a]ny interference with human dignity strikes at the very essence of the Convention’, meaning that ‘any conduct by law-enforcement officers *vis-à-vis* an individual which diminishes human dignity constitutes a violation of Article 3 of the Convention. That applies in particular to their use of physical force against an individual where it is not made strictly necessary by his conduct, *whatever the impact on the person in question*.’³³

This controversial finding, which was strongly criticised in particular by three minority judges,³⁴ equates protection of human dignity and the scope of Article 3. This, as the minority judges point out, represents a change in the Court’s case law. In *Ireland v United Kingdom*, the Court accepted that there could be ‘violence which is to be condemned both on moral grounds ... but which does not fall within Article 3’.³⁵ The Court’s finding in *Bouyid* accordingly shows an evolution in the Court’s understanding of the relationship between dignity and Article 3.

The *Bouyid* judgment, although using dignity in a novel way, was not entirely unprecedented. In *Svinarenko and Slyadnev v Russia*, for example, the Court had previously recognised objective incompatibility with human dignity as a violation of Article 3. There, the Court held that ‘the very essence of the Convention is respect for human dignity’.³⁶ It had regard to the ‘objectively degrading nature’ of holding the applicants in metal cages during trial, ‘which is incompatible with the standards of civilized behaviour that are the hallmark of a democratic society – an affront to human dignity in breach of Article 3’.³⁷

In short, it emerges from cases like *Bouyid* and *Svinarenko and Slyadnev* that Article 3 is violated whenever judges consider that a given treatment disrespects the innate dignity of an applicant as a human being endowed with intrinsic value. The account of *Bouyid* – and of dignity in the Article 3 case law more widely – offered by Natasa Mavronicola is a rather convincing one in this context. She argues that the harm addressed by the Court in *Bouyid* is the harm of being treated like an object: the provision, she argues, ‘is not there purely to protect human beings from suffering certain forms of harm – rather, it proscribes certain forms of absolute wrongs, including but not isolated to wrongs which result in significant human suffering and other forms of harm’.³⁸

At the same time, concerns remain. First, there is the idea that, like suffering, wrongs may be to some degree subjective, context-dependent or socially constructed. Then, too, there is the argument that – if dignity is the foundation of

³³ Ibid, para 101, emphases added.

³⁴ Ibid, Joint Partly Dissenting Opinion of Judges de Gaetano, Lemmens and Mahoney.

³⁵ Ibid, para 5, citing *Ireland v United Kingdom* App no 5310/71, Judgment of 18 January 1978, Series A, No 25, para 167.

³⁶ *Svinarenko and Slyadnev* (n 28), para 138, emphasis added.

³⁷ Ibid.

³⁸ Natasa Mavronicola (n 30).

all human rights³⁹ – an Article 3 that protects against all violations of dignity would leave little or no room for the application of other ECHR rights and turn Article 3 into a catch-all. This would undermine the article's ability to adequately capture and sanction the very worst abuses, or in fact any abuses at all. Dignity-related harms, for example the use of racial slurs, would then either fall under Article 3, thereby extending the provision's scope, or would not fall under the provision, thereby implying that they are compatible with human dignity and therefore legitimising them. In other words, Article 3 is likely not a panacea for all dignity-related harms, and references to dignity as an explanation for finding violations of Article 3 without further discussion of the nature of state and especially police power may be problematic in the long run.

A further and related matter of concern is the unspecified content of dignity. In this regard, Christopher McCrudden's understanding of human dignity as a placeholder carries some truth. Dignity serves as a rallying cry for rights protection, but it is also very evident from the Court's judgments – *Bouyid* in particular⁴⁰ – that it is not willing to clarify the content of that concept. This may be due to a lack of agreement within the Court, or to the leeway that vagueness leaves the Court for future decisions. In *Bouyid*, this vagueness – together with the Court's emphasis of the fact that the ill-treatment in question was administered to what it considers to be a particularly significant body part, namely the applicants' faces⁴¹ – may also be strategic, to limit future reliance on the judgment. Whatever the reasons for this lack of explanation, the definition of dignity is thus left to the intuition of the user.⁴²

However elusive the concept of dignity may be, an additional element of the relevant case law requires discussion. This is the fact that, in both *Svinarenko and Slyadnev* and *Bouyid*, the applicants were particularly dependent on and exposed to the state. In this context, dignity allows the Court to find a violation of Article 3 where it considers that the state has not met baseline standards for the treatment that all human beings deserve. This relates to Natasa Mavronicola's concept of 'absolute wrongs'.⁴³ From this perspective, dignity reasoning allows the Court to give a straightforward negative answer to questions such as whether it is permissible for police officers to hurt detainees⁴⁴ or whether persons on trial for criminal charges may be humiliated in court.⁴⁵ These findings should not be taken as an indication

³⁹ *Svinarenko and Slyadnev* (n 28), para 118; *Pretty v United Kingdom* App no 2346/02, Judgment of 29 April 2002, ECHR 2002-III, para 65; Jean-Paul Costa, 'Human Dignity in the Jurisprudence of the European Court of Human Rights', in Christopher McCrudden, *Understanding Human Dignity* (OUP, 2013), 393–402, 402.

⁴⁰ *Ibid.*, Joint Partly Dissenting Opinion of Judges de Gaetano, Lemmens and Mahoney, para 4.

⁴¹ *Ibid.*, para 104.

⁴² Schachter Oscar, 'Human Dignity as a Normative Concept' (1983) 77(4) *The American Journal of International Law* 848–54, 849.

⁴³ Mavronicola (n 38); Mavronicola Natasa, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart, 2021).

⁴⁴ *Bouyid* (n 30), paras 3, 10–11, 15.

⁴⁵ *Svinarenko and Slyadnev* (n 28), paras 48–49.

that just any modicum of humiliation or distress will violate Article 3: these cases concerned dependence and state control. In other words, there is – or at least, if these findings are to be reconciled with the preservation of an enforceable Article 3, there should be – an implicit connection to vulnerability reasoning here.

In this regard, vulnerability addresses those cases in which a unitary standard of treatment that is acceptable for human beings in an objective but abstract sense fails to adequately capture particular situations. The Court has addressed dignity reasoning as ‘objective’, which seems to imply that vulnerability reasoning, as its complement, is subjective. In any event, the two concepts are inextricably linked: vulnerability means ensuring equal protection of dignity, and there can be no respect for dignity without an understanding of human beings’ vulnerability to dignity-related harms. The following section will delve into this to examine whether there is truly a division between objective and subjective tests for ill-treatment and, if this is the case, whether this is a workable approach.

C. The Objectivity of Assessing Ill-treatment

The human dignity standard under Article 3 allows the Court to evaluate a given form of treatment and determine whether it can be reconciled with the intrinsic worth of individuals as humans. This is independent of whether the particular individual concerned actually perceived a treatment as degrading or humiliating. In other words, it is not permissible under the ECHR for any criminal defendant to be caged in the courtroom, no matter if they are hardened criminals or they do not mind the cage, because such treatment is objectively incompatible with the standards of a civilised democratic society.⁴⁶ This is, in other words, an objectively verifiable wrong. In this sense, human dignity recognises the shared humanity that is also part of Martha Albertson Fineman’s approach to universal human vulnerability.

Compared to this objectively verifiable and universal standard, the vulnerability reasoning used by the Court has the opposite effect. Instead of allowing the Court to find that a given treatment is objectively impermissible, vulnerability lets the Court take the experience of particular applicants and their conditions of life, specific traits, experience of fear or subjugation, marginalisation and dependency into consideration. Consequently, an adult’s experience of a given treatment – for example, immigration detention – may not constitute a violation of Article 3, whereas a young child’s experience of the same treatment may violate that provision.⁴⁷ This relates to the relativity of Article 3’s threshold of severity and its dependence on all the circumstances of the case.⁴⁸

⁴⁶ Ibid, para 138.

⁴⁷ *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03, Judgment of 12 October 2006, Reports 2006-XI, esp paras 55 and 58.

⁴⁸ *Ireland* (n 35), para 162.

Given that the human dignity approach is considered an objective one by the Court, vulnerability considerations could be considered to be a pendant to this, and a more subjective test. In this regard, an analogy to former ECtHR judge Françoise Tulkens's statement that '[e]quality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them' is possible.⁴⁹ This recognises the importance of taking the views and experiences of the marginalised and discriminated into account. However, the process of establishing a human rights violation, particularly one as grave as a violation of Article 3 ECHR, should be described as subjective only with caution. Such language may imply that the violation in question is not particularly grave or somehow justifiable or relative.

Dignity and vulnerability-based approaches can certainly be used in a complementary manner, as the Court's combination of the two concepts in past cases has shown.⁵⁰ *Bouyid* was a prime example of this. However, in that judgment, separate paragraphs concerning each of these concepts led to a somewhat disjointed result.⁵¹ It may ultimately not be clear from the text of a judgment whether human dignity considerations, vulnerability, both, or other factors led to the finding of a violation of Article 3. This ambiguity may do more harm than good, with the Court appearing to throw a wide array of possible arguments into a judgment in order to reach the desired result. This 'everything but the kitchen sink' style of argumentation may result from a lack of agreement among judges, the struggle to unite various strains of case law, or a push by a particular judge to have a pet issue incorporated into a judgment. The unfortunate result is that it is not possible for the reader – and thus the scholar, the national judge, the domestic authorities executing the judgment, or the potential applicant – to know which particular arguments led to the final outcome in a case.

In order to harmonise these approaches in theory and, subsequently, in practice, it can be contended that vulnerability reasoning explores certain structural causes of dignity harms. If human dignity is a universal claim to respect for 'the intrinsic importance of human life', meaning that 'people never be treated in a way that denies the distinct importance of their own lives',⁵² then it serves to distinguish the human from the non-human. That which is identified as human is consequently seen as deserving of protection. At the same time, there is not only one way of being human and thus no standard-issue archetype of human possessed of dignity.

⁴⁹ *Leyla Şahin v Turkey* App no 44774/98, Judgment (GC) of 10 November 2005, Reports 2005-XI, Dissenting Opinion of Judge Tulkens, para 12.

⁵⁰ *Bouyid* (n 30), esp paras 45–47, 52–53, 83, 87–90, 100–03, 107, 109–11, where both human dignity and vulnerability reasoning entered into play.

⁵¹ *Ibid*, contrasting paras 45–47 and 52–53; see also paras 81–113, where the relation of the two concepts goes unexplained as they never appear in the same paragraph.

⁵² Ronald M Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia and Individual Freedom* (Random House, 1994), 236; Adorno (n 9), 231.

Vulnerability, taken in this context, can refine the understanding of any one human's dignity by taking other identity-relevant traits into account, such as age, gender, race, belief, ethnic background, sexual orientation, gender expression, experiences of victimisation and dependency, and so forth. This would respond to the fact that, while humanness creates a blanket dignity-based entitlement to rights protection, not all human individuals experience humanness in the same way; vulnerability therefore creates specific entitlements linked to specific variations on humanness. In other words, those who experience dependency or a particular risk of or exposure to ill-treatment require special protection so that their human dignity is protected to the same extent as that of other individuals who do not experience this type of vulnerability to the same extent. This can be rationalised via the equality component of human dignity: every human is, by nature of being human, endowed with an equal right to respect for human dignity, but not every human individual can live out that dignity in the same ways. Ensuring equal, practical and effective respect for dignity means counteracting, to the extent that this is possible, the structural limitations caused by the traits or situations that cause vulnerability.

This informs how the description of vulnerability as a 'subjective' standard must be understood. Vulnerability should not – and, for practical reasons, cannot – mean that Article 3 is violated whenever a person risks any morally impermissible treatment or feels humiliated. This should also not mean that any violation of Article 3 can ever be considered trivial or justifiable.

Focusing on vulnerability as a manner of tailoring the threshold of severity without thereby abolishing or necessarily lowering it may help to assuage concerns about a subjective Article 3. The threshold of severity's responsiveness to concrete situations is only logical if we consider the diversity that exists among the people protected by Article 3: for example, children need particular care, discriminated minorities face difficulties in accessing remedies, and people who are dependent on others for their wellbeing need certain safeguards to prevent abuse. When the Court finds a violation of Article 3 in one of these contexts, it thereby finds that special attention and care are required in order to ensure equal protection.

In the context of the Convention in general, Alexandra Timmer has argued that '[b]y underpinning dignity with vulnerability considerations, the Court creates a holistic picture of the sufferings of the applicant: a picture that includes contextual factors such as embodiment, location, mental state and material realities.'⁵³ Certainly, the Court uses vulnerability to understand the mental and material realities of certain applicants. However, the Court's approach to vulnerability, at least in the Article 3 context, is much too selective to be seen as addressing all of the diverse realities of human embodiment and experience.

⁵³ Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2013) 147–70, 166.

D. Formulating an Account of Vulnerability and Dignity

Vulnerability can be seen as both a complement and an antonym to human dignity. In the latter sense, and to paraphrase Hannah Arendt, it can be understood as a manner of describing those who are deprived of human dignity: still technically human, but stripped of all of the associated qualities and protections, they are vulnerable to horrific treatment.⁵⁴

Vulnerability here addresses constellations in which individuals are othered because they are perceived to differ from the majority in some way, and therefore lose – in the eyes of that majority – their human dignity and the protections associated with it.⁵⁵ Recognition of universal human dignity serves to prevent such othering and dehumanisation, and thus ensures a sort of formal baseline equality among all humans. However, as the below will argue, the reach of this type of equality is limited, and it fails to address systemic disadvantages that compromise the freedom, agency, and integrity that human dignity arguably entails.

Given the existence of a universal guarantee of human dignity in the ECHR system, there is limited value to understanding vulnerability as the absence of dignity as per the Arendtian understanding. Here, the concept does something different: it fine-tunes protections based on human dignity by facilitating special consideration that compensates for particular disadvantages. So, while respect for human dignity protects ‘the right to have rights’, respect for human vulnerability in some sense protects the right to effectively enjoy rights in practice. Understood in this way, vulnerability can be used to identify elements of individuals’ identities and situations that entitle them to special protection so as to ensure substantive equality and preserve their human dignity. In this regard, and despite the Court’s tendency to consider them separately,⁵⁶ vulnerability and dignity are inextricably linked.

The above has mapped the response that dignity and vulnerability evoke before the Court, which uses vulnerability as a tool allowing it to identify specific instances where the equal application of general rules may result in an unfair or unrealistic result for particular individuals. However, the ‘subjective’ standard incarnated by the vulnerability heuristic need not mean that the Court’s judges are partial or biased when deciding cases. The subjectivity described here does not mean that their decisions are subject to their own personal tastes and whims, but describes the attention paid to the particular situation and characteristics of a given applicant. Perhaps a better way to express this would be to leave the language of objectivity and subjectivity aside entirely, and to consider the human dignity standard an abstract test and the vulnerability heuristic a more concrete one.

⁵⁴ Hannah Arendt, *The Origins of Totalitarianism*, 2nd edn (Harvest/Harcourt, 1973), 297. See also Jeffrey C Isaac, ‘A New Guarantee on Earth: Hannah Arendt on Human Dignity and the Politics of Human Rights’ (1996) 90(1) *The American Political Science Review* 61–73, 64.

⁵⁵ Mavronicola (n 22), for example at 34.

⁵⁶ See the approach taken in *Bouyid* (n 30), comparing paras 87–90, 100–03 and 111 (concerning dignity) with paras 83, 107, 109–10 (concerning vulnerability).

II. On Vulnerability, Justice and Equality

Vulnerability reasoning has been lauded as a mechanism for advancing equality under the ECHR.⁵⁷ This appears self-evident when the concept is applied under Article 14 ECHR, which guarantees freedom from discrimination on the basis of a list of proscribed grounds.⁵⁸ Under Article 3 ECHR, it is perhaps less directly evident how the concept of vulnerability can contribute to equality. However, and as indicated in the previous section, there is in fact a strong connection here.

The universality of human dignity – the idea that we all equally crave and deserve societal recognition of our intrinsic worth as individuals – provides a strong basis for fighting inequality, and a foundation for formal equality.⁵⁹ In addition, it is argued below that the Court's vulnerability reasoning may promote a certain vision of justice. This, in turn, may help to trouble or disturb the idea of the independent liberal legal subject.

A. The Demands of Equality

i. Theoretical Beginnings of Equality Theory

Equality and inequality are complex concepts, and are best understood as a system of principles that, together, provide a theory of social justice.⁶⁰ For millennia, beginning with the Aristotelian conception of equality, these concepts have been seen as interrelated. In simple terms, Aristotelian equality means treating like cases alike and unlike cases not alike; where these principles are respected, the outcome will be perceived as just.⁶¹ In other words, unjustified unequal treatment is incompatible with justice.

From this starting point, with its formal take on equality, understandings of equality and its counterpart, non-discrimination,⁶² have evolved over time. Thus, while the equality theories of antiquity did not take issue with societies which distributed wealth, freedoms, rights, and power heterogeneously among their members – understanding this disparity as the just deserts of the inferior – the

⁵⁷ Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) *International Journal of Constitutional Law* 1056–85, esp 1074–76, 1079–80; Samantha Besson, 'La vulnérabilité et la structure des droits de l'homme: L'exemple de la jurisprudence de la Cour européenne des droits de l'homme', in Laurence Burgogues-Larsen (ed), *La vulnérabilité saisie par les juges en Europe* (Editions Pedone, 2014), 63.

⁵⁸ Peroni and Timmer (n 57), 1080–82.

⁵⁹ Nikolaidis (n 21), 12–13.

⁶⁰ Stefan Gosepath, 'Equality' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford University, 2011).

⁶¹ Aristotle, *Aristotle's Nicomachean Ethics* (Robert C Bartlett and Susan D Collins trs, University of Chicago Press, 2012), Book V.3.

⁶² Oddný Mjöll Arnardóttir, *Equality and Non-Discrimination Under the European Convention on Human Rights* (Martinus Nijhoff, 2003), 6–9.

modern idea of universal human dignity created a minimum standard of treatment that is deserved equally by all humans.⁶³ Consequently, equality today means that individuals are entitled to be treated equivalently with regard to certain conditions of life, even if they are not identical, because, despite their differences, all humans are alike in certain fundamental respects.⁶⁴ In other words, because we all crave societal recognition of our intrinsic worth (and thus, of our human dignity), we must all be entitled to the same respect.⁶⁵

ii. Substantive Equality, Binaries and the Liberal Legal Subject

Moving away from the Aristotelian understanding of formal equality, it has today been widely recognised that a formal take on equality alone does not suffice to guarantee justice. Diversity between individuals, the difficulty of ensuring comparability, and the need to address structural disadvantage mean that a formal take on equality must be supplemented by a substantive one to even come close to providing equality.⁶⁶ Or, in the sense of Ronald Dworkin's theory, all individuals deserve to be treated with equal concern and respect.⁶⁷ Put differently, although absolute equality may not be practicable, the idea of justice-as-fairness-as-impartiality requires that individuals are not treated differently on the basis of their immutable personal traits or elementary choices in life.⁶⁸

A guarantee of substantive equality may require action in order to compensate the disadvantaged for the impacts of unfavourable societal dynamics.⁶⁹ Substantive equality can mean a reaction to context in order to engage with asymmetrical power structures.⁷⁰ Beyond the lowest common denominator of equality – the principle of granting equal treatment in equal situations – it is thus necessary to ensure equality in substance in order to address 'the most invidious form of inequality; the one that results from social norms and attitudes.'⁷¹ In this regard, equality is inextricable from ideas of human dignity and autonomy, and represents an end in itself.⁷²

To Catharine MacKinnon, Aristotelian equality is really 'no equality rule at all', given the abstractions it entails in practice.⁷³ She has made an eloquent plea for

⁶³ Gosepath (n 60), 2.3. On the development of the concept of human dignity, see in this chapter.

⁶⁴ Nagel Thomas, *Equality and Partiality* (OUP, 1995), *passim*, and esp at 64–65 and 105.

⁶⁵ Nikolaidis (n 21), 10–12.

⁶⁶ Arnardóttir (n 62), 23.

⁶⁷ Ronald M Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), xii, 227, 229, 355–56, 370; Gosepath (n 60), 2.3.

⁶⁸ Nikolaidis (n 21), 2–3, 9, 11.

⁶⁹ *Ibid.*, 15.

⁷⁰ Arnardóttir (n 62), 23.

⁷¹ Nikolaidis (n 21), 3.

⁷² *Ibid.*, 4–5, 13.

⁷³ Catharine A MacKinnon, 'Substantive Equality: A Perspective' (2011) 96 *Minnesota Law Review* 1–27, 2–3, 5.

substantive equality regarding gender discrimination, arguing for recognition of the ‘realities’ that impede certain people from being full and equal citizens.⁷⁴ In doing so, she has railed against conventional approaches to gender equality on the premise that ‘because sex is conceived as a difference, and equality is understood as based on sameness in the Aristotelian approach of “likes alike, unlikes unlike”, the worse the inequality gets, the more disparate its social reality becomes, the less this legal approach can do about it.’⁷⁵ Substantive equality’s core insight, she argues, is that inequality entails a social relationship that orders groups or categories by rank, including ‘better and worse, clean and dirty, served and serving, appropriately rich and appropriately poor, superior and inferior, dominant and subordinate, justly forceful and rightly violated or victimized.’⁷⁶ However, justifying inequality by means of these binaries is an error, because no social group is more valuable than another.⁷⁷

MacKinnon’s arguments concern the binary approach to gender, where the male side of the binary entails advantages. A critique of maleness and femaleness as monolithic, disparate categories that inherently justify the exclusion of women from full legal subjectivity is represented in the writings of other feminist scholars, as well. For example, Simone de Beauvoir’s *The Second Sex* argues that women are othered because they are objectified and attributed an otherness that legitimates their oppression.⁷⁸ A related but opposite concept is Luce Irigaray’s idea of ‘saming’, which ‘denies the objectified other the right to her difference’, ie the right to be recognised as an equal despite failing to fit a predominant and oppressive archetype.⁷⁹

In short, these feminist accounts recognise the need to re-evaluate the exclusions of the liberal legal subject and its binary categorisations. This is, in other words, a claim for substantive equality. By contrast, formal equality requires a comparison, and when that comparator is an exclusionary one – for example, as it often is, the liberal legal subject, which represents an abstracted, decontextualised, and disembodied ‘everyman’ who is considered rational over all else⁸⁰ – then it follows that many concrete and contextualised human individuals are conceived as ‘other’ or as deviant or, thus, as ‘unlikes’.⁸¹

Of course, however, the male-female binary is not the only dichotomy that needs to be challenged in this context. A wide variety of traits are ordered into

⁷⁴ Ibid, 22.

⁷⁵ Ibid, 6.

⁷⁶ Ibid, 11–12.

⁷⁷ Ibid, 12.

⁷⁸ Simone De Beauvoir, *The Second Sex* (Constance Borde and Sheila Malovany-Chevallier trs, Random House, 2011) as explored in Naomi Schor, *Bad Objects: Essays Popular and Unpopular* (Duke University Press, 1995), 51.

⁷⁹ Schor (n 78), 51, referring to Luce Irigaray, *Speculum of the Other Woman* (Gillian C Gill tr, Cornell University Press, 1985), 118–20.

⁸⁰ Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave Macmillan, 2010), 43–44.

⁸¹ Sandra Fredman, *Discrimination Law*, 2nd edn (OUP, 2011), 3.

an oversimplified binary model, including traits that cause discrimination – for example, the distinction between whiteness and non-whiteness, autonomy and dependency, ability and disability, straightness and queerness, and cisgender and transgender individuals.

Beyond the idea of an in-group and an out-group, the idea of binaries made up of two monolithic categories underlies the structure of (neo-)liberalism: the binary distinctions between public and private and between reason and emotion are emblematic of the liberal order that shapes capitalistic, patriarchal and hierarchical modern Western European societies.⁸² While none of these binaries reflect the complex, interconnected, and diverse nature of human life and experience, they have become more set with the passage of time, and as a result they structure our perception of reality even if they do not reflect that reality.⁸³ Often these binaries are interlinked, with the suggestion being that the female, emotional, physical, and private sides are connected, as are the male, rational, mental, and public ones. As these groupings suggest, such dichotomies entail an attribution of value and can entail exclusions from full subjectivity.⁸⁴

The fact that women were once considered unfit for political life because of the nature of their female brains and because of their emotionality helps to understand the nature and harmful effect of these binaries.⁸⁵ Such expectations may, to a certain extent, be self-perpetuating, by preventing women from accessing education, through the workings of confirmation bias, and by bringing out negatively valued traits in the face of disrespect, but – needless to say – they are by no means grounded in reality. Nevertheless, given the binary understanding of gender, it was long accepted that women were so different from men that they existed outside of the idealised legal subject.

Substantive equality, in this context, means ensuring equal subjectivity and thus the equality of opportunities to live a life of agency and dignity. This does not mean extending the fiction of the liberal legal subject, but doing away with it entirely. Taken against this background, it is possible to identify four separate claims of substantive equality. These are the claim to *recognition* of equal universal human dignity, the claim to *redistribution* in order to remedy social disadvantages,

⁸² Roberta G Sands and Kathleen Nuccio, 'Postmodern Feminist Theory and Social Work' (1992) 37(6) *Social Work* 489–94; Andrew Edgar and Peter Sedgwick, *Cultural Theory: The Key Concepts*, 2nd edn (Routledge, 2008), 27–28.

⁸³ Edgar and Sedgwick (n 82), 27–28.

⁸⁴ Martha Albertson Fineman, 'Beyond Identities: The Limits of an Anti-Discrimination Approach to Equality' (2012) 92 *Boston University Law Review* 1713–70, 1751; Catriona Mackenzie, Wendy Rogers and Susan Dodds, 'Introduction: What is Vulnerability and Why Does It Matter for Moral Theory?' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP, 2014) 1–29, 5–6.

⁸⁵ Compare, on this, Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right* (Allen W. Wood ed, HB Nisbet trs, CUP, 1991), 207, para 166, who wrote that '[w]omen may well be educated, but they are not made for the higher sciences, for philosophy and certain artistic productions which require a universal element ... When women are in charge of government, the state is in danger, for their actions are based not on the demands of universality but on contingent inclination and opinion.'

the claim to *participation* in political decision-making, and the claim to *transformation* into a society that is accepting and accommodating of diversity.⁸⁶ A vulnerability approach can facilitate all four of these claims.

iii. Advancing Equality through Vulnerability Reasoning

In her work on vulnerability, Martha Albertson Fineman has argued that pure sameness of treatment does not suffice to address ‘persistent forms of subordination and domination.’⁸⁷ Writing from the United States context, Fineman accordingly finds it ‘perplexing’ when a non-discrimination rule ‘ignores existing inequalities of circumstances and presumes an equivalence of position and possibilities.’⁸⁸ Fineman’s work calls for an enrichment of this understanding of equality by departing from the liberal legal subject that underpins it. Like Luce Irigaray, who argues for the reversal of ‘saming’ by injecting the feminine into legal subjectivity,⁸⁹ Fineman thus argues for the injection of *vulnerability*. Because the liberal subject is decontextualised and disembodied, and therefore in some sense invulnerable, the vulnerable subject seems like a more realistic alternative.⁹⁰ By focusing on our shared vulnerable embodiment, we can transcend binary and exclusionary models of subjectivity that generate modern inequalities, and transcend the public-private divide and assumptions about the ‘deservedness’ of poorer treatment.⁹¹

To some extent, Fineman’s arguments concern the libertarian tendencies present in United States politics. However, her approach to equality-through-vulnerability is salient beyond that context, including to address the binaries that plague liberalism, like the one that overly prizes autonomy and devalues dependency and care.⁹² The most fundamental binary for present purposes is the one between vulnerability and invulnerability. Often, when reference is made to vulnerability in law and politics, it serves as a method for identifying victimhood and dependency. This implies that invulnerability is a separate condition, and placed at the more highly valued side of a binary.⁹³ In other words, this leaves the stigmatising idea of vulnerability-as-other intact. However, if vulnerability is understood not as a form of deviance but as a trait inherent to human embodiment and thus to human life, it can serve

⁸⁶ Carolina Yoko Furusho, ‘Uncovering the Human Rights of the Vulnerable Subject and Correlated State Duties under Liberalism’ (2016) 5(1) *UCL Journal of Law and Jurisprudence* 175–205, 183.

⁸⁷ Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20(1) *Yale Journal of Law and Feminism* 1–23, 3.

⁸⁸ Martha Albertson Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010) 60(2) *Emory Law Journal*, 251.

⁸⁹ Irigaray (n 79), beginning at 13.

⁹⁰ Fineman (n 87), 2, 10–12; Wilcox Lauren B., *Bodies of Violence: Theorizing Embodied Subjects in International Relations* (OUP, 2015), 32; Grear (n 80), 97; Furusho (n 86), 178–80. See also Dianne Otto, ‘Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law’ in Anne Orford (ed), *International Law and Its Others* (CUP 2006) 318–56, esp 331, 341, 347–48.

⁹¹ MacKinnon (n 73), 11–12; see also Fineman (n 88), 251.

⁹² Fineman (n 87), 17.

⁹³ Furusho (n 86), 184–85.

as a lens through which these binaries and resulting stigmas can be examined and inequality addressed. This allows for a re-examination of the demands of equality – as well as autonomy, dignity, and the foundation of human rights in general – in order to counteract the ossified binaries that affect their application.⁹⁴

Recognising our universal vulnerability does not in itself represent a substantive approach to equality, however. It does not account for the fact that some lives are more precarious than others. While we are all equally vulnerable, in short, we are all also differently vulnerable, and the diversity of human experiences necessarily means that the specific forms, sources and expressions of vulnerability faced by each human individual vary. Vulnerability, if taken as a heuristic device serving the purpose of identifying inequalities, is a tool for context-sensitivity and for responding to the various manifestations of disadvantage.⁹⁵ It is, in other words, a way to consider the specific exclusions generated by the various axes of a person's identity in order to fully address systems of oppression.

To ensure substantive equality, attention to the vulnerable subject must have regard for the specific issues generated where various sources of disadvantage intersect. Intersectionality is a concept coined by critical race scholar Kimberlé Crenshaw, and it means that the experiences of those who are situated at the juncture of two or more grounds for marginalisation or discrimination are different from those of people who fall under one of these traits.⁹⁶ Crenshaw's intersectionality concept requires the user to 'look beneath the surface and beyond the prevailing norm paradigm that leaves various synergetic vulnerabilities unnoticed in the margins'.⁹⁷ Only by taking all sources of privilege and disadvantage into account, including intersectional ones, can the demands of substantive equality be met.

While social justice theories have moral and philosophical appeal, they are also informative for human rights purposes because they relate not just to the foundational principle of equality, but also to human dignity, to the equality of all before the law and to the prohibition of arbitrariness.⁹⁸ But what, precisely, is the relevance of equality and social justice for understanding the Court's approach to vulnerability under Article 3 ECHR? This lies in the fact that vulnerability addresses an equality problem – a problem that states, if they are to display equal concern for all individuals in their territory, must address. While the Court's approach to Article 3 is to some extent already informed by equality considerations, vulnerability reasoning enhances this by incorporating regard for applicants' context,

⁹⁴ Ibid, 184, 186–87.

⁹⁵ Ibid, 185–86.

⁹⁶ Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43(1241) *Stanford Law Review* 1241–99, *passim* and esp at 1244–45.

⁹⁷ Oddný Mjöll Arnardóttir, 'Multidimensional Equality from Within: Themes from the European Convention on Human Rights' in Dagmar Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish, 2009) 53–71, 55.

⁹⁸ Nikolaidis (n 21), 14–15.

ie realities of dependence and disadvantage, and the power structures that reinforce these situations.⁹⁹

By using Article 3 to address certain disadvantages facing applicants because of their vulnerability – such as a child’s difficulty in being understood and believed when making allegations of rape, a disabled prisoner’s problems in bringing timely submissions to Strasbourg, or the issues facing a Roma person when interacting with the police – the Court is building on this case law. Using vulnerability like this can open up the Court’s reasoning to context-sensitivity, drawing on the lived disadvantages facing applicants. In this way, Article 3 develops the potential to acknowledge and deal with some of the inequalities that affect individual and group wellbeing by addressing certain of the factors that accentuate the precariousness of human existence.¹⁰⁰

B. Imagining a Socially Just Polity

The preceding sections have referred to various social justice theories. In fact, vulnerability theory itself represents a theory of justice. But what, then, do these theories – or does justice – require? For present purposes, a particularly relevant concept is the idea of substantive equality as an equal ability to exercise certain fundamental human ‘capabilities’, which together allow the autonomous pursuit of a life in dignity. This capabilities approach, which builds upon ideas of what a just society should look like and has had a profound impact in the development context, has been the subject of extensive work by Amartya Sen in the field of economics and Martha C Nussbaum in the philosophical context.¹⁰¹ The following prefaces an analysis of the capabilities theory and of the ways in which the Court’s Article 3 jurisprudence could bring the Strasbourg case law closer to the relevant understandings of justice and equality.

i. *A Primer on Social Justice Theories*

Much has been written about what a just polity would look like. Ideas about equality, advantage, and distributive and social justice mark the work of some of modern legal philosophy’s most eminent thinkers. Ideas of social justice build on the concept of equality, and can be understood as addressing ‘issues of equity,

⁹⁹ Arnardóttir (n 97), 63.

¹⁰⁰ On poverty, precariousness and precarity, see Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso, 2004).

¹⁰¹ Amartya Sen, *Inequality Reexamined* (OUP, 1992); Amartya Sen, *Development as Freedom* (OUP, 1999); Martha C Nussbaum, ‘Capabilities as Fundamental Entitlements: Sen and Social Justice’ (2003) 9(2–3) *Feminist Economics* 33–59; Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (Belknap Press, 2011); Rosalind Dixon and Martha C Nussbaum, ‘Children’s Rights and a Capabilities Approach: The Question of Special Priority’ (2012) 97(3) *Cornell Law Review* 549–94.

power relations, and institutionalized oppression' and as seeking to 'establish a more equitable distribution of power and resources, so that all people can live with dignity, self-determination, and physical and psychological safety'.¹⁰² This focuses on a number of specific goods or, more precisely, capabilities – such as the right to be free from prejudice and stereotyping and to have one's differences reasonably accommodated.¹⁰³ It also specifies a minimum of wellbeing as the just deserts of all human individuals. Ultimately, it aims to address the differences between individuals that affect their equal ability to pursue their conceptions of a good life and individual happiness.¹⁰⁴ This can include conceptions of socio-economic or distributive and global justice. In short, these approaches focus on holistically describing the injustice presented by inequality, and on ways of overcoming that injustice.

In order to understand some of the claims made by social justice theories today, it is helpful to take a look at the theory of justice posited by John Rawls. His work aims to identify the minimal structure of a morally just hypothetical society, and has been reimagined to fit a more nuanced equality argumentation by Martha Nussbaum.¹⁰⁵ Rawls theorised an alternative to utilitarianism that showed inequality and poverty to be irreconcilable with the greater good.¹⁰⁶ To hypothesise a just polity, Rawls tried to identify the rules that the future members of that polity would choose if they were unaware of their own societal position in that society. This aims to identify the societal structures that individuals would design from behind a 'veil of ignorance'.¹⁰⁷

Social inequality can also be illustrated in an ultimately rather similar way through a thought experiment designed by Ronald Dworkin. Dworkin, who conceived of equality as equal welfare for all,¹⁰⁸ was committed to the idea that polities must have equal concern and respect for all of their members, famously arguing that '[e]qual concern is the sovereign virtue of political community'.¹⁰⁹ He postulated, via an anecdote about the survivors of a shipwreck who find themselves on a desert island, that if the stranded survivors divide up the island's resources among themselves, that division would not be equal if any of the survivors would have preferred another bundle of resources than the one they received.¹¹⁰

Although neither of these two experiments leads to a full-fledged theory of socio-economic and global justice, both Rawls's veil of ignorance and the

¹⁰² Diane J Goodman, *Promoting Diversity and Social Justice: Educating People from Privileged Groups*, 2nd edn (Routledge, 2011), 4.

¹⁰³ Nikolaidis (n 21), 5, 10.

¹⁰⁴ Sen, *Inequality Reexamined* (n 101), 2–6 and throughout.

¹⁰⁵ *Ibid.*

¹⁰⁶ John Rawls, *A Theory of Justice*, revd edn (Belknap Press, 1999).

¹⁰⁷ *Ibid.*, 53, 130–31.

¹⁰⁸ Ronald M Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2002).

¹⁰⁹ *Ibid.*, 1.

¹¹⁰ *Ibid.*, 66–71.

Dworkinian desert island scenario represent starting points for identifying the injustice of inequality.¹¹¹ Rawls in particular does not exclude the existence of certain socio-economic inequalities, gives liberty priority,¹¹² and has received his fair share of criticism in this and other regards¹¹³ What is relevant here is that Rawls's theory relates to egalitarian principles,¹¹⁴ arguing that the measure of equality is an assessment of whether individuals can enjoy certain primary social goods – including basic freedom and property rights and a social basis of self-respect – which allow them to pursue their own ends.¹¹⁵

At the same time, Rawls allows variations between individuals – thus, diversity in the distribution of abilities and talents according to what he describes as the 'natural lottery' – to result in 'natural inequalities'.¹¹⁶ Indeed, Rawls's theory was meant to focus on 'the relative position of individuals with standard needs and endowments'.¹¹⁷ This excludes, for example, people living with a disability. Still, some scholars have argued in favour of Rawls's experiment because individuals in the original position would presumably address the inequalities arising from disability.¹¹⁸ Others have questioned whether these inequalities can be considered 'natural', and have instead recast them as social constructs.¹¹⁹

The Rawlsian model is a product of its time in various ways.¹²⁰ At the same time, a modernised approach to Rawls's work can help to push back against some of the harms and deprivations that plague the current political era,¹²¹ and his theory provides a jumping-off point for the capabilities theory set out below.

ii. Casting Vulnerability as a Matter of Justice

The Rawlsian exercise can be used to trigger a discussion about the requirements for ensuring justice in the face of vulnerability. Perhaps those behind the veil of ignorance would design a utopian polity in which variation in innate traits, health,

¹¹¹ Charles R Beitz, *Political Theory and International Relations*, revd edn (Princeton University Press, 1999), 126–76.

¹¹² Rawls (n 106), 53, 130–31.

¹¹³ See, for example, Amartya Sen, 'Equality of What?' (Tanner Lecture on Human Values, Stanford University, 22 May 1979), http://tannerlectures.utah.edu/_documents/a-to-z/s/sen80.pdf, 201.

¹¹⁴ John Rawls, *Justice as Fairness: A Restatement* (Erin Kelly ed, Belknap Press, 2001), 124, 129–30.

¹¹⁵ Ibid, 58–61. See also Ingrid Robeyns and Harry Brighouse, 'Introduction: Social Primary Goods and Capabilities as Metrics of Justice' in Harry Brighouse and Ingrid Robeyns (eds), *Measuring Justice: Primary Goods and Capabilities* (CUP, 2010) 1–13, 1–2.

¹¹⁶ Lorella Terzi, 'What Metric of Justice for Disabled People?: Capability and Disability' in Harry Brighouse and Ingrid Robeyns (eds), *Measuring Justice: Primary Goods and Capabilities* (CUP, 2010) 150–73, 153.

¹¹⁷ Ibid, 153. See also Rawls (n 106), 64–65, 89.

¹¹⁸ Thomas W Pogge, *Realizing Rawls* (Cornell University Press, 1989), 44–47.

¹¹⁹ Kasper Lippert-Rasmussen, 'Are Some Inequalities More Unequal than Others? Nature, Nurture and Equality' (2004) 16(2) *Utilitas* 193–219.

¹²⁰ Katrina Forrester, *In the Shadow of Justice: Postwar Liberalism and the Remaking of Liberal Philosophy* (Princeton University Press, 2019), 279.

¹²¹ Ibid.

or situation in society would not exclude anyone from legal subjectivity. However, for present purposes, this exercise has some significant, but illuminating, flaws. First of all, the utopian result described here is not necessarily what Rawls – given his acceptance of ‘natural inequality’ – would have predicted. In addition, focusing on purely distributional questions does not necessarily entail a critical examination of the societal structures that cause discrimination, nor trigger a shift to an inclusive society or to community-based models. In addition, this experiment tempts the veiled designers to create a polity in which traits linked to disadvantage simply do not exist. This issue is hard to overstate here: also in the context of vulnerability, the relevant traits and situations should not be seen as pejorative in and of themselves, because doing so reiterates the dehumanisation and othering that underlie them and negates not only the fact that these traits are constitutive of identity and culture, but also the legitimate and equal worth of the individuals currently bearing them. In other words, the experiment cannot and must not be a eugenic one. Instead, it should be about ensuring equal real-world enjoyment of dignity and agency. Thus, if this experiment serves any purpose here, it is to test for and mediate the disadvantage or inequality that vulnerability-related traits entail as constructs that affect life in society.

It can be argued that the existence of vulnerability is not an injustice in and of itself, for it is an inextricable element of human life. Instead, the injustice lies in the fact that differences in vulnerabilities entail differences in the quality and autonomy of individual lives. Examined in this way, the traits that give rise to vulnerability can be seen as connected to limitations on the ability to pursue one’s own and unique conception of the good life¹²² that are imposed or reinforced by society. The above experiments may not be indispensable for finding that disadvantage exists or for deeming it morally problematic. However, they highlight the ways in which trait-dependent variations in the distribution of access to resources and opportunities constitute structural disadvantages and place individuals in unequal positions. This discussion may also be helpful in overcoming ‘pluralism anxiety’¹²³ and the cognitive barriers that obstruct less vulnerable individuals from recognising the existence of the systems that accord them this status.

This perspective also helps to clarify the inadequacy of the rational liberal subject, tying into the work of Martha Albertson Fineman. Fineman’s two-part vulnerability paradigm emphasises the universality of vulnerability by virtue of human embodiment as well as the differences among individuals that arise from embodiment’s various manifestations and social structures.¹²⁴ This sort of thinking

¹²² Variation in the conception of the good life is one aspect of human diversity that is, in fact, taken into account by Rawls to some extent (John Rawls, *Political Liberalism*, expanded edn (Columbia University Press, 2005), 184, 186–87); Terzi (n 116), 153.

¹²³ Yoshino Kenji, ‘The New Equal Protection’ (2011) 124(3) *Harvard Law Review* 747–803, as discussed in Timmer (n 53), 168.

¹²⁴ Martha Albertson Fineman, ‘Equality and Difference: The Restrained State’ (2015) 66(3) *Alabama Law Review* 609–26, 613–14, 618–19.

about vulnerability reinterprets the Rawlsian original position by – instead of imagining that we might be vulnerable once the veil is lifted – lifting the veil and showing us that we are in fact already vulnerable.

Both Fineman's responsiveness to vulnerability as described here and Rawls's access to primary social goods are, in the end, metrics for injustice. However, neither of these two approaches seems to generate genuine care for the other, as they both relate to warding off risks to oneself (or persons close to oneself). Neither approach means that the particularly vulnerable deserve special protection in their own right; instead, they mean protecting everyone to the same standard – even if that takes a variety of measures tailored to differences among us – because we all face more or less the same risks in the course of our lives. In this sense, both approaches are based on the needy self and the risks to which it is exposed. Genuine empathy and care for the other is, of course, something else altogether, and will be explored later on in this chapter.

First, however, the following section will continue the exploration of vulnerability as a question of injustice by exploring an alternative to Rawls's primary social goods. This alternate account provides a different metric for justice, namely whether individuals have the 'capabilities' to exercise particular real 'functionings' in the world.¹²⁵

iii. Understanding the Capabilities Approach

Rawls's idea of justice as fairness is, ultimately, a social contract-based construction that is removed from real-world context. It assumes that the individuals concerned are rational adults possessed of moral faculties and fully aware of their own need for material things, as Amartya Sen and Martha Nussbaum accurately identified¹²⁶ and Rawls himself acknowledged to a degree.¹²⁷ In addition, for such experiments to translate into real-world equality for the hypothetical participants, it would be necessary for these individuals to have an understanding of the evolution of their own needs over the entire course of their life span.

Building on criticisms of the just world theories outlined above and based on Amartya Sen's critique of the incompleteness of a Rawlsian approach to equality,¹²⁸ Martha Nussbaum has poignantly argued that Rawlsian equality ignores the realities of many extremely dependent individuals, and in fact cannot be reconciled with the existence of people with cognitive disabilities.¹²⁹ She argues that a liberal

¹²⁵ Nussbaum, *Creating Capabilities* (n 101), 24–25.

¹²⁶ Sen (n 113), 215–17; Nussbaum, *Fundamental Entitlements* (n 101), 51.

¹²⁷ John Rawls, 'Kantian Constructivism in Moral Theory' (1980) 77(9) *The Journal of Philosophy* 515–72, 546, as mentioned in Nussbaum, *Fundamental Entitlements* (n 101), 53, and noting that his theory relates to those who are 'directly or indirectly associated together throughout a complete life,' whereas the situations of those who do not meet these criteria must be left aside until a polity has been constituted and can address them.

¹²⁸ Sen (n 113), 217–19.

¹²⁹ Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Belknap Press, 2007), 135.

emphasis on freedom and autonomy fails to respect plurality in the conceptions of the good life and to recognise that not only autonomous lives are worthwhile.¹³⁰

In other words, Nussbaum integrates the realities of care and dependence – and thus also the realities of diverse vulnerability – into theories about what a just world should look like. Nussbaum's capabilities approach can thus be understood as a critique of moral theory as not taking human vulnerability sufficiently into account. She understands human dignity as enmeshed with vulnerability, arguing that the 'dignity of the human being is the dignity of a needy enmattered being'.¹³¹ Indeed, our dignity is the 'animal sort of dignity, and that very sort of dignity could not be possessed by a being who was not mortal and vulnerable'.¹³² She thus takes her argument back to the Kantian distinction between personhood and animality, which she describes as deeply problematic.¹³³ She argues that it suggests that 'the core of our personality is self-sufficient rather than needy, and purely active rather than also passive'.¹³⁴ She identifies this as the source of a negation of our own vulnerability, which makes us wrongly imagine our dignity as atemporal and not susceptible to the growth and decline that accompany human life, with its periods of dependency.¹³⁵

The resulting capabilities approach – as created by Sen and developed by Nussbaum – responds to realities of dependence by focusing on a list of specific capabilities needed to ensure that individuals are able to live in a manner conforming to human dignity.¹³⁶ Nussbaum has described capabilities as 'the answers to the question "[w]hat is this person able to do and to be?"'.¹³⁷ Sen has similarly described them as what gives one 'the freedom to achieve actual livings that one can have reason to value'.¹³⁸

These capabilities can be divided into three categories: basic, internal and combined capabilities. These describe, by turn, a person's innate faculties, the traits and abilities that they train or develop through interaction with their environment, and the 'substantial freedoms' made up of their internal capabilities and their socio-political and economic conditions, which together allow for an understanding of their opportunities for choice and action in their specific situation.¹³⁹ Nussbaum has also been more specific about what the required capabilities could look like in a particular context. For example, together with Rosalind Dixon, she has written regarding children that their physical, emotional and cognitive

¹³⁰ Nussbaum, *Fundamental Entitlements* (n 101), 49–50.

¹³¹ Nussbaum (n 129), 278.

¹³² See both Nussbaum, *Fundamental Entitlements* (n 101), 51–52, and Nussbaum (n 129), 132.

¹³³ Nussbaum (n 129), 131–33.

¹³⁴ *Ibid.*, 132.

¹³⁵ *Ibid.*, 132–33.

¹³⁶ Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (CUP, 2001); Nussbaum (n 129), esp at 155–57; Dixon and Nussbaum (n 101), from 552. See also Sen (n 113).

¹³⁷ Nussbaum, *Creating Capabilities* (n 101), 20.

¹³⁸ Sen, *Development as Freedom* (n 101), 73, discussed in Robeyns and Brighouse (n 115), 2.

¹³⁹ Nussbaum, *Creating Capabilities* (n 101), 20–24.

immaturity and their reduced agency mean that the state has a special responsibility to ensure that they enjoy certain capabilities which are essential for a life in human dignity.¹⁴⁰ In other words, instead of imagining what individuals – in this particular case, children – would demand of the polity if they were the rational, sentient actors behind the veil of ignorance, Nussbaum herself takes on this role and creates a minimum list of capabilities – such as health, bodily integrity, self-respect and the ability to design one's own conception of the good life – that must non-negotiably and cross-culturally be guaranteed to all human individuals in order to guarantee the equal ability to enjoy a life in dignity.¹⁴¹

In a sense, Nussbaum thereby creates her own catalogue of fundamental human rights. She argues that a just society should treat every person as an end, and ensure universal enjoyment of a minimum threshold level of each relevant capability.¹⁴² Although Nussbaum acknowledges that her list of capabilities may not be final,¹⁴³ any unitary and Western understanding of capabilities should be subjected to critical analysis, and the risk of essentialism is certainly present here, the idea of capabilities has been employed plentifully in the development context, with numerous actors – notably the UN – utilising the approach.¹⁴⁴

iv. Interlacing Vulnerability and Capabilities

The question now, of course, is to determine the use of a capabilities approach for practical and theoretical approaches to vulnerability. First, it should be noted that a capabilities approach fosters a context-responsive understanding of autonomy – understood as 'the capacity to lead a self-determining life and the status of being recognised as an autonomous agent by others'¹⁴⁵ – and thus bolsters a theory of vulnerability with a much-needed understanding of the 'freedom to choose'.¹⁴⁶ It sheds light on the demands of substantive equality for real human individuals

¹⁴⁰ These central capabilities are (i) life, (ii) bodily health, (iii) bodily integrity, (iv) senses, imagination, and thought, (v) emotions, (vi) practical reason, which means the ability to design one's own conception of the good and reflect critically about one's life, (vii) affiliation, which contains both elements of being able to live with and toward others and empathy towards others as well as living with self-respect and without humiliation, (viii) living with concern for and in relation to animals, plants, and the world of nature, (ix) play and recreation, and (x) political and material control over one's environment. For more detail, see Nussbaum, *Fundamental Entitlements* (n 101), 41–42; Dixon and Nussbaum (n 101), 558, fn 37.

¹⁴¹ Nussbaum, *Fundamental Entitlements* (n 101), 48.

¹⁴² Nussbaum, *Creating Capabilities* (n 101), 33–40; Nussbaum, *Fundamental Entitlements* (n 101), 40; Catriona Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability', in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP, 2014) 33–59, 50.

¹⁴³ Nussbaum, *Fundamental Entitlements* (n 101), 41.

¹⁴⁴ Robeyns and Brighouse (n 115), 2; OHCHR, 'Human Rights and Poverty Reduction: A Conceptual Framework', 2004, HR/PUB/04/1, 3, 6–8.

¹⁴⁵ MacKenzie (142), 41.

¹⁴⁶ Ibid, 51–52; Mackenzie, Rogers and Dodds (n 84), 9.

engaged in relationships of giving and receiving care, whose dignity is constant even as their level of vulnerability varies and evolves. In some sense, an emphasis on capabilities also answers the controversial question concerning the 'equality of what?' that substantive equality demands.¹⁴⁷

Martha Albertson Fineman considers Martha Nussbaum's capabilities approach dangerous, given what she sees as a focus on the 'base level of human worth', which in turn facilitates definitions of 'what does and does not constitute a valuable life'.¹⁴⁸ Indeed, it is inherently problematic to list what capabilities should be important to all people. However, Nussbaum's capabilities are not about forcing or expecting any one individual to do any one particular thing. Thus, to take a relatively innocuous example, 'lying peacefully in the grass' is a 'functioning', according to Nussbaum,¹⁴⁹ and its enjoyment is therefore dependent on a range of capabilities that put individuals in a situation to choose to lie down and be able to enjoy nature. However, this does not mean that all individuals should be forced to spend any particular time in the grass, nor that they will all enjoy this activity. The essential element here, as Nussbaum herself has argued, is the freedom to choose.¹⁵⁰

This emphasis of the freedom to choose is, of course, evocative of the independence and autonomy of the liberal legal subject, and not all that different from the conception of the good life pursued by the unveiled citizens of Rawls's utopian polity. But it can also be understood differently, as a question of ensuring individual agency. Nussbaum's ideas about capabilities offer an alternative to the liberal subject especially when read alongside vulnerability theory and its universalising force. Capabilities-related thinking thus enriches the understanding of universal vulnerability by drawing attention to the effects of particular individual sources of vulnerability, including social, economic, legal and political structures, as well as interpersonal and social relationships.¹⁵¹ In this sense, it highlights not only the vulnerabilities that arise from physical embodiment, but provides a way of addressing the deprivation of capabilities and autonomy that results from all types and sources of vulnerability.¹⁵²

Capabilities theory – which, when contrasted to the Rawlsian vision of justice as the distribution of a standardised, homogeneous package of resources – is responsive to variations in individuals' needs, abilities and situations, in a manner comparable to vulnerability theory.¹⁵³ In other words, as Elizabeth Anderson has

¹⁴⁷ MacKenzie (n 142), 48; Sen (n 113).

¹⁴⁸ Fineman (n 87), 14, fn 39.

¹⁴⁹ Nussbaum, *Creating Capabilities* (n 101), 25.

¹⁵⁰ *Ibid.*

¹⁵¹ MacKenzie (n 142), 38.

¹⁵² *Ibid.*, 37–38.

¹⁵³ Elizabeth Anderson, 'Justifying the Capabilities Approach to Justice' in Harry Brighouse and Ingrid Robeyns (eds), *Measuring Justice: Primary Goods and Capabilities* (CUP, 2010) 81–100, 87.

argued, if capabilities are understood to create a ‘sufficientarian’ standard, or one that ‘provide[s], to each person, access to a package of resources adjusted to that person’s ability’,¹⁵⁴ then the capabilities approach becomes one that incorporates and responds to vulnerability.

This sufficientarian approach means, for example, that persons with physical disabilities are entitled to public assistance, ranging from wheelchair ramps to support in obtaining appropriate employment or accommodation; individuals who do not speak the local language are entitled to translations of vital public documents; and women who suffer domestic abuse are entitled to access counselling and safe-houses.¹⁵⁵ By providing each individual with a tailored package of resources, equal and effective access to a life in dignity is guaranteed; while this does not per se guarantee the functionings of a life in dignity, and must be dynamic as needs change, it nonetheless gives all individuals equal standing to pursue such a life.¹⁵⁶

From this perspective, the responsive state evoked by a vulnerability heuristic and the support required under a capabilities approach are, to a certain extent, two ways of bringing about the same or at least a similar result. In the words of Carolina Yoko Furusho, ‘convergences between vulnerability and capability theories stem from their common understanding of human beings as subjects who build resilience over time, in a context-sensitive approach that rejects the understanding of the liberal legal subject as *a priori* invulnerable’.¹⁵⁷ As a result of this common understanding, the responsibility for addressing harms is shifted from those who suffer them to the entity that is best able to address them – the state.¹⁵⁸

These two theories are, in other words, not only similar: they also inform and improve each other. An emphasis on the universality of human vulnerability may improve the foundational account of human rights under the capabilities approach.¹⁵⁹ Furthermore, the identification of the various types and forms of vulnerability builds on the various ways in which individuals need support in order to compensate for their ‘capability deficits’. If a just society eradicates ‘compounded capability deficits or corrosive disadvantage’, this also means addressing the flawed social policies that fail to respond to vulnerability and simultaneously cause capability failures.¹⁶⁰ Lastly but very importantly, capability theory can improve a vulnerability-based approach in that it compensates for some of its failures, including the propensity for paternalism that it can entail.¹⁶¹

¹⁵⁴ Ibid.

¹⁵⁵ Ibid, 92–93, as interpreted in MacKenzie (n 142), 53.

¹⁵⁶ MacKenzie (n 142), 53.

¹⁵⁷ Furusho (n 86), 193.

¹⁵⁸ Ibid, 195.

¹⁵⁹ Ibid, 193–95.

¹⁶⁰ MacKenzie (n 142), 54.

¹⁶¹ Ibid, 55–56.

Ensuring that all human rights subjects benefit from equal opportunities to live a life of agency and dignity goes beyond mere recognition of equality and the possibility of equal participation, but also entails a degree of redistribution to make that participation effectively possible as well as a transformation of society.¹⁶² Thus, achieving substantive equality in the exercise of civil and political rights may require measures that more typically fall under the socio-economic heading, including material support, education and ensuring an adequate standard of living. For the purposes of the ECHR, combatting inequality requires effective protection of every person's basic human dignity by ensuring that all individuals have a minimum level of certain capabilities; this includes socio-economic measures.

At the same time, this does not necessarily mean that Article 3 ECHR should be used to protect every capability related to human functioning. Vulnerability reasoning, like 'sufficientarian' capabilities-based demands, is based on identifying specific problem areas and fundamental deprivations of the building blocks of autonomy and dignity. In this regard, vulnerability has been described as a 'limiting rather than a limitless principle'.¹⁶³ While vulnerability does sieve cases and may thus have a limiting function, however, the interdependence of different human rights means that vulnerability and capabilities theories can transform the application not just of a particular provision, but of the human rights framework as a whole.

Under Article 3 specifically, a combined vulnerability-capabilities approach allows for a normative conclusion, namely that extremes of suffering, degradation and ill-treatment should continue to be captured by the Court, but in a manner that does not try to force variable human vulnerability into a monolithic standard. Here, too, agency – in the sense of an equal ability to exercise capabilities¹⁶⁴ – must be a guiding principle. While vulnerability alone can emphasise the victimhood of applicants, a capabilities approach shifts the focus to building resilience.

Understanding variable but universal human vulnerability is essential for creating a system that can be described as ensuring substantive equality. An appropriate ethical-legal imperative thus requires the recognition that human beings are 'essentially social, relational, and interdependent' and that their 'ability to exercise freedom and agency cannot be conceived apart from socio-material reality'; in order for all humans to be able to lead self-guided meaningful lives and flourish equally, a certain institutional environment is needed.¹⁶⁵ Employing a vulnerability-based approach thus not only makes socio-economic obligations more plausible under Article 3 and other Convention provisions, but helps to develop the positive obligations of states.¹⁶⁶

¹⁶² Furusho (n 86), 183, citing Fredman (n 81), 25–33.

¹⁶³ Peroni and Timmer (n 57), 1084.

¹⁶⁴ Furusho (n 86), 190.

¹⁶⁵ Ibid, 185, 189 and 191.

¹⁶⁶ Ibid, 204; Timmer (n 53), 165–67.

III. On the Court's 'Legitimacy' and Judicial Empathy

At some level, it can be argued that vulnerability is a placeholder for the level of empathy that the Strasbourg judges – and, by association, Member State governments and European societies overall – are willing to exercise vis-à-vis individual human rights subjects. That is because, when considering whether an applicant experienced sufficient suffering to violate Article 3, the Strasbourg judges often use vulnerability to select those cases in which they engage in depth with applicants' feelings and experiences. On the surface, this does not seem fair to those applicants who are deemed not vulnerable, and it also does not provide the Court with a methodologically sound approach for consistently identifying the cases where suffering was particularly acute. However, the utility of vulnerability from a cognitive standpoint is that it reframes the questions facing the Strasbourg judges: it permits them to reinterpret the facts of the case and the applicable rules under the Convention in a manner that nudges both the judges and those who read and implement their judgments towards a certain outcome.

Ultimately, the utility of vulnerability in the Court's jurisprudence lies in its role as an equaliser. It compensates for shortcomings in individuals' abilities to complain about violations of their rights, provides recognition for particular ways in which they suffer and helps draw attention to the ways in which state authorities fail to respond to their special needs. It does this by causing a shift from a presumably neutral perspective to a victim-based one. In doing so, when it comes to the applicants considered vulnerable by the Court, helps to identify the stereotypes or expectations that disadvantage vulnerable individuals in claiming their rights and having their voices heard, and replaces them with others that, albeit likely still stereotyping those concerned, provide advantages from a substantive and procedural point of view.

Vulnerability reasoning, applied in this way, can be portrayed as relying on empathy with the situation of victims to overcome the Court's tendency to see individual cases as part of the huge and seemingly endless mass of present and future applications before it. Vulnerability reasoning thereby allows the Court to overcome its fears of opening the floodgates to an unmanageable number of applications or setting a precedent¹⁶⁷ with unintended consequences, at least in the individual case. In some way, therefore, it helps the Court do what it was set up to do – assess compliance with its interpretation of the ECHR without caving to political and societal pressures – albeit not optimally. This idea, of vulnerability as a vehicle for empathy, is explored in the following sections.

¹⁶⁷ In the sense of a *res judicata* or *res interpretata*, although not a binding precedent (Oddný Mjöll Arnardóttir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the ECtHR', 28(3) *European Journal of International Law* (2017) 819–43).

A. Challenges to the Court's 'Legitimacy'

Any theory that potentially entails tangible socio-economic dictates for states is generally met with resistance under international human rights law. In this regard, it must be noted that, while the Court's vulnerability heuristic helps to identify injustice, it has also been part of progressive judgments in controversial areas. In such instances, the Court exposes itself to challenges regarding its legitimacy to impose on domestic decision-making. How, then, can the Court respond to the moral and philosophical demands of equality-through-vulnerability under the consent-based ECHR system?

Dimitris Xenos, in an early analysis of the Court's vulnerability jurisprudence, noted the importance of the Court's subsidiarity when it comes to requiring the Member States to take measures to protect vulnerable people, especially when this concerns material assistance.¹⁶⁸ He argued that there is a 'democratic limit on the Convention in relation to issues that can potentially put an unnecessary and impossible burden on the limited resources of the state.'¹⁶⁹ The Court has indeed shown a lack of willingness to impose a burden on finite state resources.¹⁷⁰ In some cases, too, the Court takes a utilitarian and conservative approach by applying its European consensus jurisprudence: it allows the majority of states to determine the standard of human rights protection to be applied.¹⁷¹ By contrast, the vulnerability and human dignity argumentation strategies it has employed in other cases allow it to emphasise the humanity, suffering and need for protection of the agency of applicants and to thus make findings contrary to that majority opinion.

It could be argued that – given its role as a human rights adjudicator tasked with interpreting and applying a vitally important human rights treaty – the Court should take the latter approach in all cases. In this vein, former ECtHR judge David Thór Björgvinsson has rightly criticised the deference exhibited in certain areas by the Strasbourg jurisprudence, arguing that it is 'highly questionable if a human rights court can hide behind the moral preferences of the majority in one country in its understanding of rights of individuals holding different moral views. This may appease some of the Court's critics, but it also puts the Court's "moral capital" at risk in the long run.'¹⁷² That moral capital, he argues, is safeguarded by

¹⁶⁸ Dimitris Xenos, 'The Human Rights of the Vulnerable' (2009) 13(4) *International Journal of Human Rights* 591–614, 605.

¹⁶⁹ *Ibid.*, 610.

¹⁷⁰ *N. v United Kingdom* App no 26565/05, Judgment (GC) of 27 May 2008, Reports 2008, paras 44–45.

¹⁷¹ Under Art 3, this effect can for example be seen, albeit implicitly in the *Tyrer* case (*Tyrer* (n 26), paras 31 and 38), where the Court relied on the fact that a majority of Member States prohibit birching as a form of punishment.

¹⁷² David Thór Björgvinsson, 'The Role of Judges of the ECtHR as Guardians of Fundamental Rights of the Individual', in Martin Scheinin, Helle Krunke and Marina Aksenova (eds), *Judges as Guardians of Constitutionalism and Human Rights* (Edward Elgar, 2016), 329–51.

coherent, cogent argumentation and a Court that holds fast to its progressive case law despite criticism.¹⁷³

Björgvinsson's approach evokes – and, in fact, bases on – the theory of interpretation advanced by George Letsas.¹⁷⁴ This account argues that the Court's 'living instrument' doctrine jettisons traditional forms of treaty interpretation, including the opinion of the Convention's drafters and the public and authorities in the Member States,¹⁷⁵ and instead searches for the 'truth' of Convention rights.¹⁷⁶ Letsas considers a moral reading of the ECHR indispensable if the Court is to perform its function of protecting the human rights that the citizens of the Council of Europe Member States 'really' have (as opposed to the ones that states consider them to have).¹⁷⁷

Protection of individuals' human rights is the Court's core function. Nevertheless, its progressive interpretation of the ECHR exposes it to criticism, particularly from states.¹⁷⁸ In this regard, and although the present volume is reluctant to describe the Court as vulnerable, as other commentators have done,¹⁷⁹ it is possible to argue that the Court, like certain types of applicants considered in the previous chapter, exhibits a dependency that constrains its agency. The reluctance to describe the Court as vulnerable here stems from the fact that this use of the term does not relate to the effects of embodiment, which it lacks, or to its marginalisation or powerlessness, but simply to the fact that it, like any system, is not unassailable. While this is quite different from the imbalances of power and privilege that characterise human vulnerability, in any event, it is certainly true that the Court depends on the continued collaboration and goodwill of states.

Strong arguments have been made for the Court's democratic legitimacy as an institution and its functional legitimacy as an influence on domestic law.¹⁸⁰ Among other things, it has been noted that courts are counter-majoritarian by nature and that the process of electing the Strasbourg judges involves democratically chosen parliamentarians.¹⁸¹ Regarding the 'legitimacy' of the Court's interpretative ethic, in contrast to its institutional legitimacy, Article 32(1) ECHR designates the ECtHR as the master of the Convention's interpretation. As such,

¹⁷³ Ibid.

¹⁷⁴ See George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, 2007), as discussed in chapter one of this volume.

¹⁷⁵ George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP, 2013) 106–41, 123.

¹⁷⁶ Letsas (n 174), from 74, esp 75.

¹⁷⁷ Letsas (n 175), 124.

¹⁷⁸ See, for example, the response in the United Kingdom to the judgment in *Hirst v United Kingdom* (No 2) App no 74025/01, Judgment (GC) of 6 October 2005, Reports 2005-IX.

¹⁷⁹ Timmer (n 53), 167–69.

¹⁸⁰ Michael O'Boyle, 'The Future of the European Court of Human Rights' (2011) 12(10) *German Law Journal* 1862–77, esp 1866–67; Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14(3) *Human Rights Law Review* 487–502, 488, with further references.

¹⁸¹ Spano (n 180), 488.

it is 'the falsest of false dawns' to imagine replacing the Court's creativity and its occasionally quasi-legislative character with a mechanical application of rules that will not conflict with decisions made in the domestic sphere.¹⁸² Nonetheless, its judgments overall will certainly have more traction and garner less criticism and better results regarding implementation if they are well-reasoned and coherent.

For his part, former Judge Pinto de Albuquerque has criticised the Court for failing to offer legal certainty to states or clear guidance to potential vulnerable applicants. He criticises the exceptionalism currently practiced by the Court in this area, arguing that

By not providing clear and general criteria, and by linking its finding to the 'extraordinary circumstances' of the case, the [Court] not only weakens the authority of its reasoning and restricts the scope of its findings and their interpretative value, but also provides less guidance, or no guidance at all, to States Parties and interested institutions and persons who might be willing to intervene in favour of helpless, vulnerable victims of human rights violations.¹⁸³

Certainly, it is not enough for the Court to reach 'the right results by unconvincing, awkward means'.¹⁸⁴ While Judge Pinto de Albuquerque criticises the lack of guidance provided by the Court – justifiably, given that states cannot prevent violations of standards that they do not understand – this lack of clarity may be a method of self-preservation. In a political climate of backlash and reform, the Court may be protecting itself via its demure approach to progressive interpretation. Still, it remains debatable whether this approach is the right one.

While some of the judgments issued in the vulnerability context may be utilised by those who criticise the Court's 'judicial activism', there is also a strong case to be made for the legitimacy of a principled case law that uses vulnerability not to trigger an automatic violation judgment but instead as a factor that encourages the allocation of scarce state resources where they are needed most.¹⁸⁵ There are also some steps that the Court can take to limit critiques of its vulnerability heuristic. This would mean that, in addition to the issue of predictability, the Court should concern itself with the consistency and inclusiveness of its vulnerability case law. The above has described in detail how the Court has interpreted and applied vulnerability in a number of Article 3 cases, across a variety of procedural and substantive points.

To display the consistency that will cement vulnerability's role in the case law, the concept should guarantee substantive equality among all applicants, and thus be mainstreamed consistently into the Strasbourg jurisprudence. In short, the Court needs to determine how and why each and every applicant is vulnerable or resilient. In this vein, for example, the Court seems inconsistent if it finds that

¹⁸² See Richard A Posner, *How Judges Think* (Harvard University Press, 2010), 15.

¹⁸³ *CLR on behalf of Valentin Câmpeanu v Romania* App no 47848/08, Judgment (GC) of 17 July 2014, Reports 2014, Concurring Opinion of Judge Pinto de Albuquerque, para 11.

¹⁸⁴ *Ibid*, para 16.

¹⁸⁵ Peroni and Timmer (n 57), 1084.

Roma applicants are vulnerable in one judgment and not in the next,¹⁸⁶ or if it offers special protection to one marginalised group but not another – for example if it protects those who are disadvantaged because of their dependency on provision by the state in detention but not those who find themselves in situations of extreme poverty. In addition, to ensure that it does not reduce applicants to their vulnerability, the Court should recognise not only their vulnerability, but also their resilience.¹⁸⁷ In this regard, a degree of self-awareness – thus, the recognition that the Court itself is part of the liberal order – would be indicated.¹⁸⁸

There should be limits to the kinds of pressures that the Court is willing to accommodate in its case law. In particular, it should stop short of catering to the ‘us-against-them’ idea voiced by some critics.¹⁸⁹ Criticism of human rights in the current socio-political climate also means rejection of increased attention to vulnerable groups and individuals and their rights.¹⁹⁰ Described by Kenji Yoshino as ‘pluralism anxiety’, a fear-based reaction to the plurality and diversity of ‘new’ or ‘newly visible’ sorts of people is not uncommon.¹⁹¹ Courts shying away from equality-based claims on the basis of pluralism anxiety may try to compensate by emphasising liberty, and politics may experience ‘impatience with the seemingly endless proliferation of identities and identity politics’.¹⁹²

Yoshino has considered the use of argumentation that relies on general rules – for example, emphasising the right of all adults to marry the consenting adult of their choosing, as opposed to promoting same-sex marriage specifically – as a way to make equality-based claims more convincing. This appeals to the cognitive longing for simplicity, and is also an appeal to empathy.¹⁹³ These strategies could potentially have salience as concerns the reception of the Court’s jurisprudence, as well. So, if vulnerability were to be presented as a universal human trait instead of way to accord special treatment to some, it might retain its current effects with broader appeal. At the same time, there is a risk of erasure implicit in this style of argument.

B. Understanding Empathy and Otherisation

Human vulnerability is inextricably linked with human emotion. Only an invulnerable being has no reason to fear, to feel anger or to suffer.¹⁹⁴ Vulnerability can

¹⁸⁶ See, for example, *Balogh v Hungary* App no 47940/99, Judgment of 20 July 2004, where no mention of vulnerability is made, presumably because of the absence of a submission to that effect. See also *Boacă v Romania* App no 40355/11, Judgment of 12 January 2016.

¹⁸⁷ On resilience, see Fineman (n 87), 13–15; see also Peroni and Timmer (n 57), 1074.

¹⁸⁸ Timmer (n 53), 169.

¹⁸⁹ Ibid, 168, for more details.

¹⁹⁰ Ibid.

¹⁹¹ Yoshino (n 123), as discussed in *ibid*.

¹⁹² Ibid, 750–52.

¹⁹³ Ibid, 793–94.

¹⁹⁴ Martha C Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton University Press, 2004), 6.

also evoke disgust and shame by reminding us of our animalistic defencelessness and mortality.¹⁹⁵ However, it likewise reminds us that all humans share this defencelessness and a mortal form, and can stimulate empathy and create communities of compassion.¹⁹⁶ As Bryan Turner has written, vulnerability gives rise to a collective sympathy and a range of rights.¹⁹⁷ Our 'collectively held recognition of individual frailty' thereby provides human rights with emotive force as a 'system of mutual protection'.¹⁹⁸ The importance of sympathy has been subject to philosophical studies that see in this concept the antidote to the 'bourgeois coldness' that made the Holocaust possible¹⁹⁹ or as a necessary element of morality and driver of solidarity.²⁰⁰

As the jurisprudence of the Court summarised in this volume shows, vulnerability as pure emotion is also relevant for the purposes of the case law under Article 3 ECHR, and indeed its presence makes a convincing case for finding a violation of that provision.²⁰¹ In this regard, the Court increasingly gives vulnerable applicants the space to describe how they felt under given circumstances, displays understanding for the psychological effects of marginalisation and trauma, and even presumes the presence of anguish and fear in specific cases. It also seems that – by responding to the circumstances of individual lives, recognising advantage and disadvantage and having regard to the lived experience of applicants – the ECtHR's judges demonstrate a significant degree of empathy with vulnerable individuals' struggles.²⁰² In this sense, there seems to be some link between the idea of vulnerability and emotion, both on the part of the victim of an ECHR violation and of the adjudicator tasked with determining whether there has been such a violation.

The idea of judicial emotionality seems, at first view, difficult to reconcile with judicial impartiality and the principle of legal foreseeability, and describing judging as empathetic evokes an air of illogicality or sentimentality. Indeed, arguing for the moral 'legitimacy' of the Court's judgments on the basis of their emotional appeal threatens to open a Pandora's box of criticisms and problems, including the issue of privileging emotions over facts. On the other hand, of course, individual judges are human individuals who are shaped by their backgrounds, context and

¹⁹⁵ Ibid, 89–90, 94.

¹⁹⁶ Ibid, 50; Furusho (n 86), 197.

¹⁹⁷ Turner (n 27), 9; Bryan S. Turner, 'Outline of a Theory of Human Rights' (1993) 27(3) *Sociology* 489–512, 502.

¹⁹⁸ Turner (n 27), 507.

¹⁹⁹ Theodor W Adorno, 'Erziehung nach Auschwitz 1966', in Gerd Kadelbach (ed), *Erziehung zur Mündigkeit: Vorträge und Gespräche mit Hellmuth Becker 1959–1969* (Suhrkamp, 1970) 92–109 from 106.

²⁰⁰ Compare the interpretation of the work of Max Horkheimer in José Manuel Barreto, 'Ethics of Emotions as Ethics of Human Rights: A Jurisprudence of Sympathy in Adorno, Horkheimer and Rorty' (2006) 17(1) *Law and Critique* 73–106, from 93.

²⁰¹ See *Govedarski v Bulgaria* App no 34957/12, Judgment of 16 February 2016, para 62; *Nasr and Ghali v Italy* App no 44883/09, Judgment of 23 February 2016, para 286.

²⁰² The term empathy has been used here – as opposed to sympathy – because the emotion in question relates to judges imagining themselves in the position of applicants.

audience, and who display the same cognitive responses to stimuli as any other person; an emotionless judge is thus illusory.²⁰³ In this regard, it is possible to understand emotional engagement – and particularly empathy – as an antonym of judicial apathy, and as a necessary vehicle for context-engagement. Emotion in general and empathy in particular are by no means alien to adjudication: the question is rather whether and to what extent they should explicitly inform the outcomes of cases. The following will explore the proper role of emotion in judging in more detail, and then turn to the meaning of empathy for vulnerability reasoning. This serves, first of all, to examine and ultimately debunk the idea that judicial empathy is necessarily incompatible with impartial judging, and, secondly, to preempt criticisms of the Court's approach to vulnerability-based and empathy-based judging.

i. The Place of Emotion in Legal Reasoning

The desire to recognise vulnerability, as well as resistance to this same recognition, can both be described as emotion-based reactions: one based on empathy, and one on fear.²⁰⁴ As noted above, emotions and the law may seem, at first sight, incompatible: emotions are easily labelled as biased, erratic or irrational, while the law should aspire to neutrality, rationality and impartiality. This reflects the entrenched dichotomy between reason and emotion, and touches on the debate concerning the appropriateness of emotional elements in the context of morality. The idea that emotion is irrational can be traced to the Stoic philosophers, who advocated the end of emotion – that is to say, the abolishment of ties to the world – in the pursuit of rationality and invulnerable self-sufficiency.²⁰⁵ According to Immanuel Kant, too, emotions taint moral thinking,²⁰⁶ and Thomas Hobbes argued that the ideal judge should be 'able in judgement to divest himself of all fear, anger, hatred, love, and compassion'.²⁰⁷

Nevertheless, the idea that the law can and should operate without ties to the real world is a strikingly problematic one. It is difficult to conceive of a judge's mind as pure reason free from human emotions, including such basic functions as anger, trust and pity. This inability to set aside emotion is part of the reason why

²⁰³ For more in this area, see among others Posner (n 182), 111–12, 106, 174; Adam N Glynn and Maya Sen, 'Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?' (2015) 59(1) *American Journal of Political Science* 37–54.

²⁰⁴ Yoshino (n 123), 751–59.

²⁰⁵ Compare the work of Martha Nussbaum, who has traced the rationalist approach through history and seeks to vindicate emotions, at least in part, from the realm of irrationality (Martha C Nussbaum, 'Beyond the Social Contract: Capabilities and Global Justice – An Olaf Palme Lecture, Delivered in Oxford on 19 June 2003' (2004) 32(1) *Oxford Development Studies* 3–18, 6–7 and *passim*).

²⁰⁶ Immanuel Kant, *Anthropology from a Pragmatic Point of View* (Mary J Gregor tr, Martinus Nijhoff 1974), *passim* and particularly at 118, 121, 133–34, 138–39.

²⁰⁷ Thomas Hobbes, *Leviathan: Parts I and II* (Aloysius P Martinich ed, Broadview, 2005), 210, para 28, referred to in Terry A Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (2011) 99(2) *California Law Review* 629–81, 630–31.

judges in all kinds of jurisdictions must recuse themselves if they have a particular emotional attachment or involvement in a case. Like all of the dichotomies discussed above, the rationality-emotion binary is easily exposed as an oversimplification that artificially splits interconnected categories into monolithic concepts.²⁰⁸ Under the right circumstances, emotions are a non-negligible element of the law. In fact, the study of law and emotion is emerging as its own discipline, with scholars seeing emotions as 'engagements with the world, not mere reactions or instincts',²⁰⁹ and disaggregating emotions in order to study them individually.²¹⁰ That does not mean, of course, that all emotions are equal or equally constructive, or should be attributed equal significance, or that emotions should be given free reign.²¹¹ It simply means that law is unthinkable without emotion, to which it must appeal and which it must take into account.²¹²

In this regard, Martha Nussbaum has indicated that emotion and vulnerability together are the very reason for certain legal protections, arguing that '[w]ithout appeal to a roughly shared conception of what violations are outrageous, what losses give rise to a profound grief, what vulnerable human beings have reason to fear – it is very hard to understand why we devote the attention we do, in law, to certain types of harm and damage'.²¹³ In her analysis, emotions represent a natural consequence of vulnerability in that they represent a response to actual, potential or fortunately avoided damage.²¹⁴

In this regard, it is interesting to conduct a short excursus into the United States context, where the place of empathy in the courtroom has been the subject of protracted discussion. That debate began when former President Barack Obama declared his intention to nominate judges on the basis of their empathy, stating even before his election that he would select individuals who had 'the heart, the empathy, to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old'.²¹⁵ Statements like this stirred an academic debate on the place of empathy in judging, with proponents of the President's approach lauding the merits of responsiveness to inequality and bias, and opponents arguing that the idea of empathy in judging in itself constitutes bias and a cover for liberal activism that threatens the impartiality of the courts.²¹⁶ The partisan debate that resulted, described by

²⁰⁸ Emily Kidd White, 'Till Human Voices Wake Us: The Role of Emotions in the Adjudication of Dignity Claims' (2014) 3 *Journal of Law, Religion and State* 201–39, 204–05.

²⁰⁹ Robert C Solomon, *The Passions: Emotions and the Meaning of Life* (Hackett, 1993), ix.

²¹⁰ White Emily Kidd (n 208), 205.

²¹¹ Solomon (n 209), x.

²¹² Nussbaum (n 194), 6.

²¹³ *Ibid.*, 6.

²¹⁴ *Ibid.*

²¹⁵ As reported in Whelan Edward, 'Obama's Constitution: The Rhetoric and the Reality' (*Weekly Standard*, 17 March 2008), www.weeklystandard.com/obamas-constitution/article/15945.

²¹⁶ Lithwick Dahlia, 'Once More, Without Feeling: The GOP's Misguided and Confused Campaign Against Judicial Empathy' *Slate* (11 May 2009), www.slate.com/articles/news_and_politics/jurisprudence/2009/05/once_more_without_feeling.html.

one commentator as the ‘empathy wars’, presented an image of conservatives as impartial and progressives as biased and activist.²¹⁷

Variation in the way judges decide cases is, of course, inevitable: this stems from the existence of judicial discretion, differences between cases and the fact that judges do not mechanically apply absolutely clear-cut rules to absolutely proven facts.²¹⁸ In addition, it may also have something to do with the traits of the individual judge: proponents of judicial diversity – both as gender and as race are concerned – see variations in the backgrounds and experiences of judges as a way to enrich judging and to tackle problems created by what has been described as the ‘myth’ of judicial impartiality.²¹⁹ At the same time, the idea of emotional judgments based on the feelings of a particular judge at a particular time evoke concerns about partiality and arbitrariness.

Research on the impact of the emotions, especially empathy, on adjudication has identified them as a source of guidance that anchors judicial interpretation, and not as the enemy of reason.²²⁰ This research has disaggregated emotions from momentary moods and subjective feelings, and has begun to see them instead as a method for understanding evaluative legal concepts, such as dignity, cruelty or the best interests of the child.²²¹ Empathy, in particular, has been identified as important for understanding human dignity.²²² Law and emotion scholars understand emotion as a way of focusing on individual cases and fastening on to those where intervention is required.²²³ Judicial empathy has also been advanced as a manner by which judges can, in discrimination-related cases, see a treatment or harm from the perspective of a ‘reasonable member’ of the affected group, and identify subtle inequalities.²²⁴ In other words, it may allow judges to transcend a majoritarian perspective that reflects and reproduces entrenched discrimination and imbalances of power.

Even so, the idea of judicial empathy continues to ring alarm bells. For example, there is a risk that empathy as an openness to understanding individuals’ struggles will turn into a blind emotional preference for some applicants, and mean that justice is not done for less likable individuals. In this regard, researchers have shown a link between particular experiences and empathy with certain types

²¹⁷ Mary Anne Franks, ‘Lies, Damned Lies, and Judicial Empathy’ (2011) 51(1) *Washburn Law Journal* 61–72, 62.

²¹⁸ Posner (n 182), 5.

²¹⁹ Sherrilyn A Ifill, ‘Racial Diversity on the Bench: Beyond Role Models and Public Confidence’ (2000) 57(2) *Washington and Lee Law Review* 405–95, 405, 457; Feenan Dermot, ‘Women Judges: Gendering Judging, Justifying Diversity’ (2008) 35(4) *Journal of Law and Society* 490–519. For the international plane, see Freya Baetens (ed) *Identity and Diversity on the International Bench: Who is the Judge?* (OUP, 2021).

²²⁰ Emily Kidd White (n 208), 204–06.

²²¹ Ibid, 205, fn 15.

²²² Ibid, 207–209.

²²³ Sherman Nancy, ‘The Place of Emotions in Kantian Morality’ in Alix Cohen (ed), *Kant on Emotion and Value* (Palgrave Macmillan, 2014) 11–32, 12.

²²⁴ Godsil Rachel D, ‘Expressivism, Empathy and Equality’ (2003) 36(2) *University of Michigan Journal of Law Reform* 247–304.

of claims. In particular, researchers in the United States have found that conservative male judges who have daughters are more likely to decide cases in favour of women's rights and equality than those who do not, arguably because the fact of having daughters – and thus only that fact – causes the judges to learn and care about women's issues.²²⁵ There is also a risk that empathy is finite, that compassion will be exhausted and that judges will no longer be able to understand and respond to the situation of individual applicants. In the sense of such 'compassion fatigue', Hannah Arendt has argued against compassion and empathy in judging, considering that these emotions are 'innermost motives which are not for public display' and which are corrupted in the public sphere.²²⁶

Given these risks, and in order to render it a usable concept in adjudication, judicial empathy should be separated from the idea of compassion or pity. It should be understood not as a fleeting feeling, but as a consistent willingness of judges to treat individuals whose life experiences and situations are different from their own with the same level of understanding, tolerance and – to evoke Dworkin²²⁷ – equal concern. In other words, as one commentator so pithily put it, '[e]mpathy in a judge does not mean stopping midtrial to tenderly clutch the defendant to your heart and weep'.²²⁸ Instead, it is useful to understand empathy as an antonym of apathy²²⁹ and as a tool for seeing humans as means and not as ends.²³⁰ In other words, it recognises that applicants feel the same feelings as a judge, and thereby humanises applicants and can be one of a number of factors that judges take into account in the process of interpreting and applying the law.²³¹

Empathy, when reserved to those who are most like one's self, can certainly lead to bias. However, empathy as described above is more of a general and constant mind-set than an emotion, and represents an openness to understanding the effects of disadvantage, marginalisation and inequality in any human individual, including those who are unlike one or not particularly sympathetic. Thus understood, empathy permits the recognition that inequality-based 'extreme disadvantages, loss of agency and deprivation of necessary resources' are unacceptable.²³²

ii. Empathy and the ECtHR's Vulnerability Case Law

A succinct instrument like the ECHR requires interpretation, and the application of various interpretative techniques and approaches necessarily leaves a certain

²²⁵ Glynn and Sen (n 203).

²²⁶ Hannah Arendt, *On Revolution* (Viking Press, 1963), 91.

²²⁷ Dworkin (n 67), 227, 355.

²²⁸ Lithwick (n 216).

²²⁹ Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen*, 3rd edn (University of Pennsylvania Press, 2011), 40.

²³⁰ Alluding here to the Kantian imperative not to use people as mere means to one's ends (Immanuel Kant, *Practical Philosophy* (Mary J Gregor tr, CUP, 1996)), 80, 4:430).

²³¹ Posner (n 182), 19.

²³² Furusho (n 86), 197.

discretion to the interpreting judge. It could be argued that the Court uses vulnerability to interpret the Convention and to respond with empathy – as an antonym of apathy – to the particular plight of specific applicants. If this is the case, it is not necessarily clear that an empathetic response is misplaced in the Court's approach.

Interpretation necessarily means that the interpreting judge's life experience and understanding of morality enter into play. This includes the degree to which the judge identifies with or has understanding for the predicament of the applicant in a given case. In the context of the Convention, the judges' degree of empathy with the perspective of the applicants, with their particular reaction to trauma or with their difficulty in dealing with the authorities could potentially make a difference regarding whether they find that an application is well-founded, that there has been an interference with the invoked provisions or even, in extreme cases, that the application constitutes an abuse of the right of individual petition under Article 35§3(a) ECHR; all of these aspects of a case – along with many others – depend to no uncertain extent on the judges' appraisal of the situation.

Certain cases from the Article 3 context show that, where applicants face hurdles in bringing a case to Strasbourg, empathy can help ensure effective individual access to the Court. For example, in *Neshkov and Others v Bulgaria*, one applicant's claim for just satisfaction was only declared admissible due to the judges' understanding for the problems caused by his physical disability and the resulting delay in filing his claim.²³³ In *M.S. v Croatia (No 2)*, the Court empathised with the applicant's difficulty in exhausting the domestic remedy available before the Constitutional Court given her mental illness.²³⁴ In this regard, empathy is less a synonym to emotionality and more an antonym to excessive formalism. Similarly, in *Mocanu*, the Court showed understanding for the feeling of powerlessness of victims of ill-treatment and thus allowed applications that may otherwise have been considered out of time.²³⁵

As concerns the substance of Article 3 ECHR, the willingness of the Court to find violations of that provision where an individual experiences humiliation, anxiety, or a sense of vulnerability also depends significantly on the empathy of the judges for the experiences concerned and their effects on the applicants. The idea that a sense of vulnerability can violate Article 3 means that the Strasbourg judges must explore and have some understanding for how the applicants felt in a given situation; this is far from a rote application of fixed rules. In *Aydin v Turkey*, for example, the Court delved deep into the feelings of the applicant during and after

²³³ *Neshkov and Others v Bulgaria* App nos 36925/10 ..., Judgment of 27 January 2015, paras 69 and 302.

²³⁴ *M.S. v Croatia (No 2)* App no 75450/12, Judgment of 19 February 2015, para 123.

²³⁵ *Mocanu and Others v Romania* App nos 10865/09 ..., Judgment (GC) of 17 September 2014, Reports 2014 (extracts), para 275.

her rape by state officials.²³⁶ In a series of later cases, too, the Court has extrapolated what applicants 'must have felt' given their ill-treatment.²³⁷

In this regard, it is useful to note that empathy with victims of ill-treatment is in fact recommended by the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, also known as the Istanbul Protocol. This document recommends that experts, in responding to alleged ill-treatment, should 'attempt to relate to mental suffering in the context of the individual's beliefs and cultural norms' given that 'a sensitive empathic attitude may offer the victim some relief from the experience of alienation'.²³⁸ This does not necessarily mean finding a violation of human rights, but it does mean engaging and showing understanding for the experiences of the victims, as this can already contribute to dismantling, to some extent, the feelings of vulnerability and powerlessness facing them.

To some extent, the concept of empathy in judging and the idea of substantive equality overlap here. Thus, the willingness and ability of judges to ensure substantive equality is dependent on the extent to which they recognise the existence and impact of the differences that engender inequality and disadvantage. In this context, at least, the Court's vulnerability paradigm is related to the idea of judicial empathy, understood as a willingness and openness to engaging with context.

However, it is clear that the idea of empathy and, in a broader sense, of emotion as influential concepts in the ECtHR's case law have their limits. In this regard, it seems apparent from the Court's previous case law that the fruits of empathy end where the Court's willingness to impose its own standards over domestic political will does. For example, the Court has shown its lack of willingness to go against the 'profound moral values' of the Irish people as concerns the topic of access to abortion.²³⁹ A similar result can be observed where medical claims against expulsion are concerned.²⁴⁰ In situations such as this, vulnerability and judicial empathy thus seem reserved to exceptional cases or at least to less-than-universal application.

Another relevant issue is the question of when empathy-based context-sensitivity ends and bias begins. Put differently, when does reliance on judicial intuition, a gut feeling or understanding for an applicant represent bias in that applicant's favour, unintentional as it may be? It is important, in answering this second question, to recall that vulnerability is per se relational and subjective, but that this does

²³⁶ *Aydin v Turkey* App no 23178/94, Judgment (GC) of 25 September 1997, Reports 1997-VI, para 83.

²³⁷ *Aleksejeva v Latvia* App no 21780/07, Judgment of 3 July 2012, para 36; *El-Masri v former Yugoslav Republic of Macedonia* App no 39630/09, Judgment (GC) of 13 December 2012, Reports 2012, para 202; *Nalbandyan v Armenia* App no 9935/06 and 23339/06, Judgment of 31 March 2015, para 106.

²³⁸ OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', revised edn (2004) HR/P/PT/8/Rev 1, www.ohchr.org/Documents/Publications/training8Rev1en.pdf, 46).

²³⁹ *A., B. and C. v Ireland* App no 25579/05, Judgment (GC) of 16 December 2010, Reports 2010, as discussed in Björgvinsson (n 172), 20.

²⁴⁰ *N. v United Kingdom* (n 170), paras 44–45.

not make it less helpful in focusing the authorities' and the Court's attention.²⁴¹ In addition, it is helpful to understand the Court's interpretation of the Convention as a complex process that involves a variety of factors and considerations. In this vein, it is useful to recall the theory of judging advanced by Richard Posner.²⁴² His research indicates that, though boxed in by textual law as well as the requirement of impartiality and the need for foreseeability, differences among the attitudes, experiences, allegiances, convictions and styles of reasoning of judges, along with other factors, may lead different judges to different outcomes in a given case.²⁴³ Empathy for an applicant's plight – in the sense of context-sensitivity and a victim-oriented perspective – can, from this point of view, be seen as one of many elements that inform the Court's analysis. The idea of privileging the experiences and struggles of the disadvantaged over those of applicants in more advantageous positions does not, therefore, exhaust the content of the Court's approach to vulnerability: this is one of a large number of influences on the way a case is decided, and a corrective to automatism, formalism, apathy and concern about the response to a judgment.

But what, precisely, is the place of this factor in the Court's jurisprudence? In the words of Carolina Yoko Furusho, '[a]cknowledging vulnerability means stepping down from any pedestal or tower of hierarchical superiority conferred to judges and lawyers by society's institutions'.²⁴⁴ In other words, the concept provokes empathy and allows the user to transcend 'it-could-have-been-me'-style reasoning, which lends itself to bias and assumptions concerning the 'deservedness' of suffering, and therefore does not guarantee effective protection of the rights of the marginalised.²⁴⁵ Such reasoning ties into the just-world fallacy, which is the belief that one's environment is just, and therefore that each individual person's fate is deserved; this can lead to victim-blaming.²⁴⁶

In this sense, empathy is a way of describing the decauterisation of the other – cauterisation meaning the comprehensive exclusion of the other by legal, philosophical and political rights thinking.²⁴⁷ Cauterisation brands others as inferior and rightless and deadens one's feelings for the suffering of the other.²⁴⁸ The development of empathy represents a way for judges to break through this cognitive bias. It allows judges to restore the other's voice and to respond concretely to the other in order to affirm his or her life, dignity, rights and agency.²⁴⁹

²⁴¹ Joanna Pétin, 'Exploring the Role of Vulnerability in Immigration Detention' (2016) 35 *Refugee Survey Quarterly* 91–108, 97.

²⁴² Posner (n 182).

²⁴³ Ibid, 13–14.

²⁴⁴ Furusho Carolina Yoko, in an unpublished paper on file with the author.

²⁴⁵ Hein FM Lodewijckx, Erik W de Kwaadsteniet and A Nijstad Bernard, 'That Could Be Me (or Not): Senseless Violence and the Role of Deservingness, Victim Ethnicity, Person Identification, and Position Identification' (2005) 35(7) *Journal of Applied Social Psychology* 1361–83, *passim*.

²⁴⁶ Ibid, 1364.

²⁴⁷ Simmons William Paul, *Human Rights Law and the Marginalized Other* (CUP, 2011), 10–13.

²⁴⁸ Ibid, 11.

²⁴⁹ Ibid.

Decausterising the other is particularly important in the context of Article 3, as dehumanisation and otherisation can be at the root of ill-treatment.²⁵⁰ The Court's vulnerability jurisprudence allows the Strasbourg judges, by seeking to understand the experience of the affected applicants, to reverse these processes and to reincorporate affected persons into the rights dialogue. In fact, the traits recognised by the Court as engendering vulnerability are largely also those that facilitate dehumanisation and otherisation. The prison context, for example, is one that frequently leads those in a position of authority to see inmates as less than fully human.²⁵¹ Disability and mental illness can have a similar effect. Dehumanisation is also facilitated by surface differences between the self and the other, such as differences in culture, skin colour and language, or by an other perceived as threatening, such as the influx of migrants who pose a supposed risk to economic wellbeing and cultural integrity.²⁵²

In this context, vulnerability-as-empathy is a tool for rediscovering the humanity and individuality of applicants. In addition, judicial empathy may be a way to relativise the importance of extraneous considerations that would otherwise sway judges. Concretely, for example, focusing on the experience of the applicant may allow the Court to shift its focus away from inhibiting factors such as the anticipated response of Member States and the cost of its rulings for states' coffers, and soften the fear of opening the floodgates to an influx of applications. The Court walks a line in this sense. While it depends on states' support and must issue judgments that render rights practical and effective, meaning that considerations of states' costs and practicability do enter into play in some regard, it should not lose sight of the fact that Article 3 is an absolute right, and thus does not leave room for considerations about the preferences of government actors. Vulnerability understood as an expression of empathy can help to rebalance this equation by underscoring the importance of what is at stake in the individual case.

iii. Designing an Empathetic Approach to Vulnerability

For present purposes, the importance of empathy lies in the fact that it may lead judges to formulate criteria and an approach to adjudication that leave room – in a standardised, consistent fashion – for considering what applicants have actually experienced. In other words, it is not about bending the rules for particularly pitied applicants, but about formulating the rules in such a way that the actual experiences – fear, humiliation, helplessness, exclusion, dependency and suffering – of applicant individuals are able to enter into play in a significant way when judges

²⁵⁰ Costanzo Mark A and Gerrity Ellen, 'The Effects and Effectiveness of Using Torture as an Interrogation Device: Using Research to Inform the Policy Debate' (2009) 3(1) *Social Issues and Policy Review* 179–210, especially 196–97.

²⁵¹ *Ibid.*, 197.

²⁵² *Ibid.*, 196–97.

are deciding a case. This has multiple benefits, not least that it bolsters applicants' perception of having been treated fairly, and thus of procedural justice.²⁵³ Thus, while empathy is not an end in and of itself, it may be of significant importance in fostering a judicial culture of understanding that allows individuals to voice their complaints and issues and really be heard.

In this sense, the identification of vulnerable groups and individuals – ie the recognition that some individuals are more exposed to ill-treatment than others – provides a significant first step. Vulnerability reasoning must strike a balance between two opposing poles, namely between the universality of rights and the diversity that requires special attention for certain situations. In other words, vulnerability should not mean disregarding the fear, humiliation, helplessness, dependency or suffering of individuals who do not fall into pre-set categories. Neither can vulnerability automatically tip Strasbourg's scales in an applicant's favour in a given case: the Court's jurisprudence must maintain its respect for the principles of fairness, impartiality and coherence, which means that there can be no automatic trumps in its examination of an alleged violation of Article 3. Furthermore, the fact that an individual displays a trait that engenders vulnerability does not, in and of itself, encapsulate that individual's entire life experience, and the Court – and domestic actors – should heed the risk of essentialising the experiences of all vulnerable individuals or a subset thereof into one, and should be wary of creating additional stigma of these often already stigmatised groups. Likewise, emphasising the inability of vulnerable applicants to use and understand their rights may lead to a paternalistic result that disregards the existing capabilities of these individuals.²⁵⁴

If indeed 'the Western body is constituted through a fear of lack and loss', as one author has argued,²⁵⁵ and we experience our embodiment as a flesh among flesh, then given our cognitive limitations empathetic judging may simply mean transposing one's fear of catastrophe on the other. Doing so robs the other of the opportunity to be heard and understood, in a manner that negates diversity and, in its end result, is akin to cauterisation. Ultimately, we need both universal and particular vulnerability: it is necessary to understand that while we are all vulnerable to lack, loss, and suffering, we are differently vulnerable to these calamities given our different identities, backgrounds, personalities, cultures, traits and situations. It is necessary to explain to those immunised by power that their privilege only masks their vulnerable flesh, and to counteract the effects of disadvantage

²⁵³ See Lind E Allan and R Tyler Tom, *The Social Psychology of Procedural Justice* (Springer US, 1988); Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35(1) *Human Rights Quarterly* 176–200, 180–82.

²⁵⁴ See Peroni and Timmer (n 57), 1072–73, discussing *D.H. and Others v Czech Republic* App no 57325/00, Judgment (GC) of 13 November 2007, Reports 2007-IV, Dissenting Opinion of Judge Borrego Borrego, para 14.

²⁵⁵ Lara Merlin, 'Perverse Ethics: The Body, Gender and Intersubjectivity' (2003) 4(2) *Feminist Theory* 165–78, 165–67.

where it impacts individual dignity and equal access to rights protection. Emphasis of common vulnerability on its own does not provide adequate recognition of the diversity of human experience. So, while the existence of universal European human rights protections speaks to the shared vulnerability that accompanies embodiment, focusing only on what we universally share negates diversity and exacerbates or immunises individual or group vulnerability.

IV. Interim Conclusion: Synthesising a Coherent Theory of Vulnerability

For the moral, ethical and social justice-related reasons discussed in the preceding sections, the account of a responsive State created under a vulnerability approach emerges as a strongly convincing one. As a vehicle for empathy, vulnerability provides an antidote to judicial apathy and formalism and a mechanism for context-engagement and a victim-oriented perspective. At the same time, the above has indicated a number of things that vulnerability is not, or should not be. Thus, the concept should not reduce human rights subjects to their bodily fragility, nor to a state of victimhood. It should not constitute a negation of autonomy, or represent an invitation for paternalistic interventions or coercion.²⁵⁶

Instead, a vulnerability approach should put individuals in a position to pursue their own conception of the good – in other words, it should foster their autonomy. In this regard, it is necessary to move away from the undifferentiated libertarian claim for non-intervention, which is flawed in the sense that it conflates a state that encroaches on individual rights with one that constructively engages with individuals' vulnerability in order to ensure a minimum of equal protection and equal opportunities to all.²⁵⁷ That said, vulnerability is neither a panacea for all inequalities, nor a rationale for introducing a holistic welfare state. Instead, vulnerability as a trait of all human individuals serves as a force both to strengthen the foundational arguments of human rights, by highlighting the universality of both the exposure to harm and the dignity that accompany embodiment in human physical form, and by evoking empathy and solidarity through the recognition that we are all social beings inextricably embedded in complex relationships of need and care. Vulnerability in its particular form – thus, the special vulnerability that results both from certain inherent traits or from harms suffered by individuals, as well as from societal systems of misrecognition and maldistribution that disadvantage certain individuals, serves to identify and provoke a response to situations requiring particular attention in the interest of equality, dignity, and social justice.

²⁵⁶ Furusho (n 86), 198–99.

²⁵⁷ Ibid, 200.