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Article

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Hope's Relations: A Theory of the 'Right to Hope' in European Human Rights Law

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ABSTRACT

In recent years, the notion of a 'right to hope' has emerged in the jurisprudence of the European Court of Human Rights. This article offers an account of how this right has been constructed and of how hope is conceptualised in European human rights law. It examines the origins of the 'right to hope', the meaning of hope in this context and the relationship that is depicted between hope and dignity. It argues that hope is conceived of here as relational and that one way of thinking about the right to hope in this sense is as a right to recognition. This has two dimensions: one involving the recognition of the individual by others and another involving the recognition of the individual in and through law. The latter implies a certain relationship of dependency between the individual and European human rights law, with hope itself coming to be constructed as an individual responsibility.

KEYWORDS: hope, dignity, degrading treatment, atonement, life sentences, recognition

> '[E]ven those who commit the most abhorrent and egregious of acts . . . nevertheless retain their essential humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, some day, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. *To deny them the experience of hope would be to deny a fundamental aspect of their humanity and to do that would be degrading*.'
>
> ~ *Matiošaitis and Others v Lithuania (2017)*[1].

What does it mean, to experience hope? And how is this experience made the object of a right as a matter of European human rights law? These are the two questions that motivate this article, which takes as its starting point the idea, expressed in the extract above, that there exists in European human rights law a 'right to hope'. The emergence of this phrase in the jurisprudence of the Strasbourg court has attracted a notable degree of attention in the European human rights law scholarship of recent years, and much has been written recording the fact of this development (if it is a development) and examining the meaning of the right (if it is, indeed, a right).[2] What

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1 *Matiošaitis and Others v Lithuania* Applications Nos 22662/13 et al., Merits and Just Satisfaction, 23 May 2017 at para 180 (emphasis added).

2 E.g. Seeds, 'Hope and the Life Sentence' (2021) *The British Journal of Criminology* 1; Brownlee, 'Punishment and Precious Emotions: A Hope Standard for Punishment' (2021) 41 *Oxford Journal of Legal Studies* 589; Nußberger, 'Three Square Meters of Human Dignity?' in Sicilianos et al. (eds), *Regards croisés sur la protection nationale et internationale des droits de l'homme/Intersecting Views on National and International Human Rights Protection: Mélanges en l'honneur de/Essays in Honour*

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I am particularly interested in in this article, however, is *how* this 'right to hope' has come to be—in how, in short, hope has been constructed as a right. This is a puzzle that is in many ways inseparable from that of the meaning of the right, it being a question that asks about the articulation of the right within the context of European human rights law, and therefore within the context of European human rights law's framework of meaning. In what follows, these aspects will accordingly be treated together, with the contribution of this article being that it offers an account of the construction of the 'right to hope' in European human rights law. And, since we cannot examine this subject without thinking about the experience of hope itself, the account offered here will also speak to two broader questions. The first concerns how European human rights law engages with and imagines human experience.[3] The second concerns the meaning of hope: a question that will be primarily addressed with reference to meaning as it is constructed in European human rights law, but which cannot be seriously articulated or reflected upon at a more general level without acknowledging the urgency that accompanies questions of hope at any time, including our current times.

Those, then, are the questions and underpinning considerations of this article. But what of the 'right to hope' itself? If we look to the extract above in this respect, what we see is a conception of hope that is located squarely in relation to the individual—that casts it as something that is held at the level of the individual. As will be discussed in the pages that follow, this is consistent with European human rights law's form of law more broadly: a form of law that is claimed to be based on, and in existence for, 'the individual'.[4] But there are also two specific features of the conception of hope articulated in the extract above that are worth drawing out for immediate reflection. The first is the connection that is drawn between hope and atonement. Hope is presented in relation to atonement. This implies not only a certain way of thinking about the self in European human rights law (a way perhaps revealed, to an extent, in the notion of 'the capacity to change') but also that hope is relational. For insofar as the notion of atonement connotes a form of relationship with another,[5] then the effect of its linking to hope here is that hope, too, emerges in European human rights law as involving a type of relation.

The second notable feature of the conception of hope in question is the idea that denying a person the experience of hope would involve denying them 'a fundamental aspect of their humanity', which would be degrading. Hope is here associated with dignity, and it is this link that has been the focus of the literature, which more broadly suggests that hope is now conceived of as being bound up in the notion of dignity in European human rights law.[6]

In order to think through the question of the construction of the right to hope in this context, these broad ideas of hope's relations need to be explored more thoroughly, and that is what I am going to do in this article. In what follows, I set out a 'reconstructive theory'[7] of hope in European human rights law: a theory involving a reconstruction of the practice of European human rights

of Guido Raimondi (2019) 669; Vannier, 'A Right to Hope? Life Imprisonment in France', in Van Zyl Smit and Appleton (eds), *Life Imprisonment and Human Rights* (2016) 189; Dzehtsiarou and Fontanelli, 'Family Visits and the Right to Hope: Vinter is Coming (Back)' (2015) 2 *European Human Rights Law Review* 163.

3 See further Trotter, *On Coming to Terms: How European Human Rights Law Imagines the Human Condition* (PhD thesis, London School of Economics and Political Science, 2018; available at: http://etheses.lse.ac.uk/3946/) (forthcoming with Oxford University Press).

4 The Convention is described as having as its 'object and purpose . . . the protection of individual human beings' (*Soering v UK* Application No 14038/88, Merits and Just Satisfaction, 7 July 1989 at para 87) and as its 'very essence . . . respect for human dignity and human freedom' (*Pretty v UK* Application No 2346/02, Merits, 29 April 2002 at para 65).

5 See, e.g. Radzik, *Making Amends: Atonement in Morality, Law, and Politics* (2009).

6 See supra n 2.

7 Kai Möller distinguishes such a 'reconstructive theory' from 'a "philosophical" theory . . . which is insensitive to practice' and which 'will aim at providing the morally best account . . . while ignoring the question of the extent to which this account fits the practice'. A reconstructive theory, like a philosophical theory, 'aims at providing a theory which . . . is morally coherent, but unlike it, need not be the morally best ("the one right") theory, where "morally best" is understood as morally best independently of practice'. See Möller, *The Global Model of Constitutional Rights* (2012) at 20.

law, and one that is organised around the way in which the right to hope is imagined in the case law.[8] I make three arguments. The first is that hope in European human rights law is relational—a property of the relation between the individual and the world. The second is that the notions of hope and dignity are inseparable in European human rights law. The third is that the right to hope in European human rights law is, fundamentally, a right to recognition: a right to be recognised in the terms of European human rights law. This extends to recognition among individuals but also involves the establishment of a distinctive relationship between the individual and law itself.

The article is structured accordingly. I begin by examining the articulation of the 'right to hope' in European human rights law (Section 1). I then examine what hope is and means in this context (Section 2) and the relationship that is depicted between hope and dignity (Section 3). Finally, I suggest a way of thinking about the right to hope in European human rights law as a right to recognition: a right that is grounded in hope's relations (Section 4).

1. THE 'RIGHT TO HOPE' IN EUROPEAN HUMAN RIGHTS LAW

The idea that there exists a 'right to hope' in European human rights law stems from the jurisprudence on sentencing, and, in particular, the case law pertaining to life sentences. The European Court of Human Rights ('the ECtHR') has made it clear in this context that 'the imposition of an irreducible life sentence on an adult may raise an issue under Article 3 [of the European Convention on Human Rights]' (the prohibition on torture and inhuman or degrading treatment or punishment),[9] and that a fundamental question in this respect will be of 'whether a life prisoner can be said to have any prospect of release'.[10] For the purposes of Article 3, a life sentence must be reducible *de jure* and *de facto*: it must carry the prospect of release and the possibility of review of the sentence, 'with a view to its commutation, remission, termination or the conditional release of the prisoner'.[11]

The basis of this principle of reducibility was elaborated in *Vinter and Others v UK (2013)*, which concerned the compatibility of the whole life orders given to the applicants (who were each serving sentences of life imprisonment for murder) with Article 3 of the European Convention on Human Rights ('the ECHR'). The Grand Chamber explained that there were four main reasons as to why there needed to be 'both a prospect of release and a possibility of review' for a life sentence to be compatible with Article 3.[12] Firstly, it said, detention must always be underpinned by 'legitimate penological grounds' (including 'punishment, deterrence, public protection, and rehabilitation')—meaning that the life sentence must not only be justified by reference to one or more of these grounds at the time of its imposition, but that this justification must be subsequently reviewed.[13] Secondly, without any possibility of release or review of the life sentence, 'there is a risk that [the prisoner] can never atone for his offence', since 'whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable'.[14] Thirdly, the Court was influenced by German constitutional law and its position that irreducible life sentences are incompatible with human dignity.[15] This consideration, it stated, was also to be applied in ECHR law, bearing in mind that 'the very essence of [the Convention system] . . . is respect for human dignity'.[16] Fourthly, the Court observed that the context of contemporary European penal policy more generally was one

8 This is how Kai Möller defines a 'reconstructive' approach: ibid. at 20.
9 *Kafkaris v Cyprus* Application No 21906/04, Merits and Just Satisfaction, 12 February 2008 at para 97.
10 Ibid. at para 98.
11 Ibid. at para 98.
12 *Vinter and Others v UK* Applications Nos 66069/09 et al., Merits and Just Satisfaction, 9 July 2013 at para 110.
13 Ibid. at para 110.
14 Ibid. at para 112.
15 Ibid. at para 113.
16 Ibid. at para 113.

of an emphasis on rehabilitation (which was incompatible with the very notion of an irreducible life sentence).[17]

For these reasons, the Court said, life sentences must be reducible. They must involve a review that takes into account any changes in the life of the prisoner and the progress of that prisoner towards rehabilitation and that checks, in the light of this, whether continued detention remains justifiable.[18] Moreover, there is to be no uncertainty in the mind of the prisoner as to any of this: the prisoner 'is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought'.[19]

In the case in question, the life sentences could not be regarded as reducible in this sense, and there had, accordingly, been a violation of Article 3. Yet whilst the Court emphasised that this finding did not give the applicants 'the prospect of imminent release',[20] what it did, according to Judge Power-Forde in her Concurring Opinion, was secure the place of 'the right to hope' in Article 3.[21] She continued:

> The judgment recognises, implicitly, that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.[22]

With these words, Judge Power-Forde drew out a point that was subtly present in the Court's remarks about atonement and human dignity, particularly as these were framed in terms of the overriding aim and process of rehabilitation, and, therefore, in terms of time. As to atonement, the Court had expressed the view that in the case of a 'fixed and unreviewable' life sentence—a sentence that presented the possibility of the impossibility of atonement—'the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence'.[23] Its point about human dignity was meanwhile one about the effects of loss of chance: a point grounded in reference to the German Federal Constitutional Court's jurisprudence and its recognition that 'it would be incompatible with the provision on human dignity in the Basic Law for the State forcefully to deprive a person of his freedom without at least providing him with the chance to someday regain that freedom'.[24] It was this notion of the temporality of rehabilitation—and its implicit demands for a longer view, involving recognition of the possibility of change and the capacity to change—that Judge Power-Forde then forefronted and elaborated in her own analysis, where she recast it in terms of the prisoner's subjective experience of hope and then as a right to this. And that there really was a 'right to hope' being articulated here was confirmed a few years later, when, in another case concerning irreducible life sentences (*Matiošaitis and Others v Lithuania (2017)*), the words of Judge Power-Forde's Concurring Opinion in *Vinter*

[17] Ibid. at para 115 et seq.
[18] Ibid. at para 119.
[19] Ibid. at para 122.
[20] Ibid. at para 131.
[21] Ibid., Concurring Opinion of Judge Power-Forde.
[22] Ibid., Concurring Opinion of Judge Power-Forde.
[23] Ibid. at para 112.
[24] Ibid. at para 113. (Judgment of 21 June 1997, 45 BVerfGE 187.)

and Others were carried across into the majority's judgment and articulated as a statement of European human rights law.[25]

Thus, the idea of a 'right to hope' emerged in European human rights law, and since then, it has been both embedded in the case law of the ECtHR and drawn on more widely too.[26] The question that this poses is of what hope is and means here. Before we turn to this, there are two points worth bearing in mind. Firstly, the question of hope and its meaning—a question articulated here in the context of the jurisprudence concerning (irreducible) life sentences—is distinct from questions of the rationale, legitimacy or justifiability of these sentences.[27] It is also distinct from the question of the role that hope should play in lawful punishment practices: a subject that has been recently addressed in a fascinating article by Kimberley Brownlee.[28] My focus in this article is not on such normative questions about sentencing and punishment but rather on the notion of hope that has been articulated in European human rights law with reference to these sentences.

Related to this is the second point: that the question of the meaning of hope in European human rights law will be addressed here primarily in the context of the jurisprudence concerning irreducible life sentences. This is not to say that the term 'hope' itself has not arisen in other areas of the case law too. It has, of course,[29] as in references to the effects of hope (or the waning or loss of hope) on an individual or case more broadly;[30] in discussions of situations involving a lack of hope (of, for example, the improvement of prison conditions);[31] in evaluations of the legitimacy,[32] reasonableness,[33] realistic nature,[34] naturalness[35] or enforceability[36] of a given hope; in analyses of the meaning of—and enabling conditions for—the capacity to hope;[37] and in more descriptive discussions of that which has been done—or not been done—on the basis of hope.[38] But given that this is an article about the way in which the right to hope is imagined in European human rights law, the focus needs to be on the case law in which hope is constructed as such. The question of hope and its meaning needs, therefore, at least initially to be addressed in relation to the extract that sparked this article: an extract concerning the notion of an irreducible life sentence, and in which hope was articulated as a matter of right.

2. ''HOPE'' IN EUROPEAN HUMAN RIGHTS LAW

At the root of the objection to the very notion of an irreducible life sentence in European human rights law lies the fact that such a sentence involves no way out. The point made is that where the remainder of a life and the remainder of a sentence are synonymous, rehabilitation

25 *Matiošaitis and Others v Lithuania* Applications Nos 22662/13 et al., Merits and Just Satisfaction, 23 May 2017 at para 180.

26 See, e.g. in the Constitutional Court of Zimbabwe: *Makoni v Prisons Commissioner and Another* (CCZ 8/16 Const. Application No CCZ 48/15) [2016] ZWCC 8 (13 July 2016); and in the Supreme Court of Namibia: *Zedikias Gaingob and 3 Others v the State* [2018] NASC 4.

27 On which see, e.g. Van Zyl Smit and Appleton (eds), supra n 2; De Beco, 'Life sentences and Human Dignity' (2005) 9 *The International Journal of Human Rights* 411; Lippke, 'Irreducible Life Sentences and Human Dignity: Some Neglected and Difficult Issues' (2017) 17 *Human Rights Law Review* 383.

28 Brownlee, supra n 2.

29 The examples here stem from a review of all the ECtHR's judgments featuring the word 'hope' (last reviewed 24 August 2021, with 625 English results).

30 E.g. *Siliadin v France* Application No 73316/01, Merits and Just Satisfaction, 26 July 2005 at paras 128–129.

31 E.g. *Gorbulya v Russia* Application No 31535/09, Merits and Just Satisfaction, 6 March 2014 at para 94.

32 E.g. *I.B. v Greece* Application No 552/10, Merits and Just Satisfaction, 3 October 2013 at para 76.

33 E.g. *Mosendz v Ukraine* Application No 52013/08, Merits and Just Satisfaction, 17 January 2013 at para 108.

34 E.g. *Varnava and Others v Turkey* Applications Nos 16064/90 et al., Merits and Just Satisfaction, 18 September 2009 at para 170.

35 E.g. *Muñoz Diaz v Spain* Application No 49151/07, Merits and Just Satisfaction, 8 December 2009 at para 63.

36 This arises in particular with respect to property rights; e.g. *Gaischeg v Slovakia* Application No 32958/02, Merits and Just Satisfaction, 30 November 2006 at para 30.

37 E.g. *D v UK* Application No 30240/96, Merits and Just Satisfaction, 2 May 1997 at para 52.

38 E.g. *A.P., Garçon and Nicot v France* Applications Nos 79885/12 et al., Merits and Just Satisfaction, 6 April 2017 at para 126.

is undermined. It is undermined because progress towards it on the part of the prisoner has no effect: 'whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable'.[39] And if the actions of the prisoner cannot and therefore do not represent anything in relation to the possibility of review or release in this way—if they cannot, in other words, carry meaning beyond their fact; if they cannot make a difference to the course of the prisoner's sentence (and, therefore, life)—'there is the risk that he can never atone for his offence'.[40] The offender is treated, as Andrew Dyer puts it, as 'being beyond redemption'.[41]

It is worth pausing here and highlighting the use of the language of atonement in this context—atonement being a concept that '[tends] to refer to an action to make up for some misdeed' or 'the reconciliation ("at-one-ment") of two people or parties in some kind of conflict or estrangement',[42] but that of course also has theological connotations. Its deployment here is not insignificant: atonement is portrayed as being necessary, and this places the individual in a certain condition in which specific demands are made; indeed, and as we will later see, Ailbhe O'Loughlin has argued that it requires, in this specific context, the 'moral transformation' of the individual.[43]

Implicit in the logic of the passages quoted above is the sense that without being able to atone, the prisoner is in a terminal condition: the notion of the risk of the inability to atone implies both the need to be able to do so and the world of possibility that lies beyond that. Atonement is here taken to be both embedded in and expressive of a broader idea of possibility in this way: its possibility is dependent on everything that underpins (and includes) the prospect of release and the possibility of a review of the sentence, but beyond that possibility itself—and, more specifically, the sense of possibility—becomes contingent on atonement.

This is where the connection to hope is made, and it is made at two levels. Firstly, a specific notion of hope—a notion of a hope to atone—is expressed. Thus, as Judge Power-Forde initially put it in *Vinter and Others v UK* (and as the majority subsequently articulated it in *Matiošaitis and Others v Lithuania*), prisoners sentenced for life 'retain the right to hope that, someday, they may have atoned for the wrongs which they have committed'.[44] Secondly, this specific hope is connected to a more general point about the experience of hope: '[t]hey [prisoners sentenced for life] ought not to be deprived entirely of such hope [that someday they may have atoned for their wrongs]. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading'.[45]

This is a revealing statement in what it tells us about the fundamentality of hope as it is conceived of in European human rights law, but there is first a question to consider of the relationship that is depicted here between hope and possibility. By 'possibility' I mean not only that which is possible (and, on some accounts, can therefore be hoped for[46]), but also the idea of the sense of possibility alluded to earlier on in reference to the notion of atonement. For if, as was suggested above, atonement and possibility are intertwined in European human rights law, with possibility itself—and more specifically, the sense of possibility—being contingent

39 *Vinter and Others v UK* Applications Nos 66069/09 et al., Merits and Just Satisfaction, 9 July 2013 at para 112.

40 Ibid. at para 112.

41 Dyer, 'Irreducible Life Sentences: What Difference have the European Convention on Human Rights and the United Kingdom Human Rights Act Made?' (2016) 16 *Human Rights Law Review* 541 at 553.

42 Stevenson, 'Atonement in Theology and Literature' (2015) 39 *Philosophy and Literature* 47 at 47.

43 O'Loughlin, 'Risk Reduction and Redemption: An Interpretive Account of the Right to Rehabilitation in the Jurisprudence of the European Court of Human Rights' (2021) 41 *Oxford Journal of Legal Studies* 510 at 527–529.

44 *Vinter and Others v UK* Applications Nos 66069/09 et al., Merits and Just Satisfaction, 9 July 2013, Concurring Opinion of Judge Power-Forde; *Matiošaitis and Others v Lithuania* Applications Nos 22662/13 et al., Merits and Just Satisfaction, 23 May 2017 at para 180.

45 Ibid.

46 See, e.g. Van Hooft, *Hope* (2014) at 16–20.

on atonement, then hope also emerges as dependent on a sense of possibility. This is because a connection is made between hope and atonement, with the deprivation of the hope to atone being linked to a broader denial of the experience of hope itself. Put differently, an existence without the prospect of release or review of the sentence is cast as being one that is stripped of the experience of hope: an existence that is, in a way, concluded;[47] a state that is one of the production of hopelessness or despair.[48]

As Christopher Seeds has argued, this '[tethering of] hope to the opportunity to have one's release from prison officially considered'—a move that is represented in 'the claim that a whole life or life without parole sentence precludes hope'—sits at odds with the social science research that 'consistently finds that hope persists among lifers'.[49] There is, in this sense, a gap between accounts of the lived experience of hope in this context and its legal construction as impossible and absent. This raises the question of how the experience of hope is itself conceptualised in European human rights law. The case law comes at this negatively, approaching the question as one of the denial of the experience of hope: a notion that is interesting from the perspective of the literature on hope and agency, which mostly emphasises the individual activity and attention involved in hoping (and the hoping involved in action[50]),[51] and in so doing implies that to deny someone the experience of hope could only conceivably occur by reference to the point of the hope in question or the possibility of the experience of hope itself. This suggests two ways of thinking about the idea of 'the experience of hope'. On one interpretation, 'the experience of hope' would involve the experience of hoping for a specific object or state of affairs, in which case the denial of the experience of hope would involve the denial of the experience of hoping for that specific object or state (perhaps because of the elimination of the object or state or the viability of its attainment). The other interpretation—which would appear to be far more consistent with the more general way in which the notion of 'the experience of hope' is expressed in European human rights law—would be that 'the experience of hope' is the experience of the capacity to hope: a capacity dependent on a sense of possibility. In that case, the denial of the experience of hope would involve the denial of the sense of possibility required to exercise the capacity to hope.

Of course this latter interpretation raises a question as to the circumstances in which that sense of possibility would be denied (or indeed maintained), and it will later be suggested that what is in issue here in European human rights law is, fundamentally, a question of recognition, such that the denial of hope involves the denial of recognition. But that we are talking here at all of the denial of the sense of possibility required to exercise the capacity to hope is evident: turning back to the case of the irreducible life sentence, the point being made is that any possibility (indeed, the very notion of possibility) beyond the fact of the sentence is inconceivable. More specifically, if it is conceivable, its viability is dismissed in that same moment.

The idea that the capacity to hope is bound up in and contingent on a sense of possibility in this way suggests that hope in European human rights law is conceived of as a mode of being in and relating to the world: a form of orientation of the sort that we are perhaps familiar with

[47] In his ethnography of the category of hope in the context of life on remand in a Papua New Guinean prison, Adam Reed uses the phrase 'concluded subjects' to describe the way in which the convicts in his study knew of their fate, claimed to be 'shaped by the sentence handed down to them', and, fundamentally '[could not] find hope in their constitution as certain types of prisoners' (Reed, 'Hope on Remand' (2011) 17 *The Journal of the Royal Anthropological Institute* 527 at 530–531).

[48] This point about production comes from Graeber, 'Hope in Common' (2008), available at: https://theanarchistlibrary.org/library/david-graeber-hope-in-common [last accessed 10 June 2020] at 1: 'Hopelessness isn't natural. It needs to be produced.'

[49] Seeds, supra n 2 at 3–4.

[50] E.g. McGeer, 'The Art of Good Hope' (2004) 592 *The ANNALS of the American Academy of Political and Social Science* 100; Garrard and Wrigley, 'Hope and Terminal Illness: False Hope versus Absolute Hope' (2009) 4 *Clinical Ethics* 38.

[51] E.g. Shade, *Habits of Hope: A Pragmatic Theory* (2001); Bovens, 'The Value of Hope' (1999) 59 *Philosophy and Phenomenological Research* 667.

from more general notions of living for the hope of something, being sustained by hope and working to maintain hope. The resulting conception of hope is structured by two qualities: a form of relationality, expressed in the way in which hope here is about a mode of relating to the world, and a form of fundamentality, expressed in the claim that hope is an integral aspect of our humanity. And that, in turn, reveals two things: one about the character of hope in European human rights law, and the other about its temporality.

A. The Character of Hope in European Human Rights Law

In many respects, hope is portrayed as being deeply subjective in European human rights law. The reference in the case law is to an individual right to hope, an individual experience of hope; the point is of the right to hope of those who have committed the acts in question—of their experience of hope. And as we have seen, this experience seems to be conceived of as being that of the experience of the capacity to hope: a capacity dependent on a sense of possibility.

The effects of this subjective quality of hope in European human rights law have not gone unquestioned in the literature. Most notably, Marion Vannier, writing of the right to hope in the context of life imprisonment in France, raises it in considering 'whether a "right to hope", as possibly emerging from the European human rights case law, is an apposite concept when attempting to measure the humanity and legitimacy of life sentences'.[52] Hope, she emphasises, is 'a subjective human emotion', a feeling that can change; 'it is not a static experience'.[53] This, she suggests, raises an issue of the reconcilability of a right to hope that is 'tied to or interpreted in terms of de jure and de facto procedural reducibility' with 'the humane and subjective nature of hope', the question being '[i]f hope were to be construed in terms of the reducibility of life sentences, would it not distract attention from more subjective, and at times, inhumane experiences of incarceration?'[54] Or, to put it otherwise: could the right to hope in European human rights law eclipse the very experience of hope that it is seeking to protect?

This is an interesting question, but the first point to note about it is that whilst the articulation of the right to hope in European human rights law is tied to the matter of the reducibility of life sentences, reducibility and hope are not rendered synonymous. Rather, the denial of the prospect of release and the possibility of the review of a sentence is taken to be a denial of the sense of possibility on which the capacity to hope depends—a denial of the possibility of atonement and a denial of the sense of possibility that lies beyond that. Hope, as a mode of being in and relating to the world, is in other words conceived of as being affected by the impossibility of possibility in this way. It emerges as dependent on a sense of possibility: a position which is not quite reflected in the claim that it is 'construed in terms of the reducibility of life sentences'.[55]

This point reveals another: that what we are thinking through here is European human rights law's conceptualisation of human experience, and the meaning that this conceptualisation holds. From this unfolds a way of rearticulating Vannier's question as one of the gap (if such there is) between human experience as it is conceived of in European human rights law and lived experience. The question that presents itself is could European human rights law's conceptualisation of experience eclipse experience itself? The answer to this must surely be yes. But to an extent, that is a risk that is inherent in any attempt to write experience into law and to construct an according right. Law inevitably—and perhaps necessarily—makes assumptions about human experience; the task is to identify and account for these, and to ascertain their meaning within—and therefore beyond—law.

[52] Vannier, supra n 2 at 210.
[53] Ibid. at 210.
[54] Ibid. at 210.
[55] Ibid. at 210.

So hope itself is conceived of in European human rights law as being subjective, but that it is conceived of at all is the point that I am making. What we must next consider is the extent of this subjectivity, knowing as we already do of hope's relationality (that it is a mode of being in and relating to the world). This relationality is explicitly evident in the context of the specific right to hope to atone, grounded as it is in the aim of rehabilitation, and others have taken up this point, with Kanstantsin Dzehtsiarou and Filippo Fontanelli assessing its implications for prisoners more broadly. They argue that 'the notion of the right to hope implies *all* prisoners' right to benefit from rehabilitation programmes, and in particular to enjoy long-term family visits'.[56] Family visits are highlighted in their account due to 'their significance in maintaining the prisoners' social links and hope for re-socialisation';[57] in fact, Dzehtsiarou and Fontanelli further argue that 'the right to hope is not just of the inmate, but of anyone else who cares about him or her', with 'family members [being] the direct beneficiaries of long-visit programmes'.[58]

This latter claim needs to be qualified. As we have already seen, there is a general right to hope in European human rights law, and this is set out both explicitly in relation to the case law on life sentences and implicitly in the wider points that are made in those cases about the fundamentality of the experience of hope. To the extent that Dzehtsiarou and Fontanelli are making this point when they indicate towards a general right, their claim is correct. However, the claim that a relational right to hope exists as a matter of European human rights law—that hope is a right by relation—is not one that can be made out on the basis of the present case law. Although in other contexts relating to knowledge, the ECtHR has notably acknowledged the effects of certain situations on relatives and recognised that these may raise questions of the relatives' own rights on account of their relationship to the person in question,[59] there is no comparable conceptualisation of hope—or of the right to hope—in European human rights law. It is not a right that is held in relation to another, it is not a right that is conceived of as being affected or activated by the situation of another and it is not a right that flows out into others.

The relational character of hope in European human rights law emerges at a deeper conceptual level and one that can be traced to the conceptualisation of hope as dependent on a sense of possibility: a conceptualisation that, in turn, is grounded in the way in which atonement and possibility are here intertwined. In particular, the sense of possibility is conceived of as being contingent on atonement, and if at its core, atonement connotes a form of relationship and a series of relationships (between the wrongdoer and herself and between the wrongdoer and those affected by the wrongdoing),[60] then so also does the notion of possibility that is connected to it. The sense of possibility in question is a sense of possibility in relation to the world. Hope's relationality, then, derives from this basis. The idea of hope as a mode of being in and relating to the world implies that hope in European human rights law is not only subjective as an experience but that at some fundamental level it is a property of relations between the individual who holds the right and the world and, therefore, between individuals.

B. The Temporality of Hope in European Human Rights Law

The construction of hope in European human rights law as a mode of being in and relating to the world raises a question of the temporality of hope—of the form of time that structures this mode of being and relating.[61] For hope here is quite clearly a temporal notion: in presupposing a sense of possibility in relation to the world, it presupposes a certain perspective, imagination and sense

[56] Dzehtsiarou and Fontanelli, supra n 2 at 164.
[57] Ibid. at 164.
[58] Ibid. at 170.
[59] The case law concerning disappeared persons is an example. See e.g. *Varnava and Others v Turkey* Applications Nos 16064/90 et al., Merits and Just Satisfaction, 18 September 2009.
[60] This is forefronted in theories that conceive of atonement as being about reconciliation—see, e.g. Radzik's theory (supra n 5) (and esp. Ch.4).

of individual continuity. The latter is reflected especially in the way in which a notion of 'the capacity to change' is linked to hope in the cases in question. This could be read as expressive of what Linda Radzik describes as a conceptualisation of atonement as 'moral transformation'[62] — a process that, she adds, is often described in the legal literature as one of 'reformation' or 'rehabilitation'.[63] But in implying the potential for change, the idea of 'the capacity to change' also implies a way of thinking about the self as susceptible to change, and when we turn to the case law more broadly, we find this at the core of European human rights law's idea of individual identity. In particular, it is central to two underpinning accounts of self-development (as about the development of the self through time) and self-realisation (as about the realisation of one's potential and/or conception of self). To understand the idea of the 'capacity to change' that is linked to hope, therefore, we need to understand these two accounts.

The origins of European human rights law's notion of self-development lie in Article 8 of the ECHR, which includes, within the ambit of its right to respect for private life, 'a right to personal development'.[64] This has been variously conceived of from perspectives of personal identity,[65] personality[66] and personal autonomy,[67] but the essence of the issue in all three framings lies in the development of the self through time, and, moreover, in the conduct of one's development and life in a manner of one's own choosing.[68] This demands, on the part of the individual, a capacity to see and foresee herself through time and to develop and realise her potential; on the part of European human rights law, it demands the provision of guarantees that enable and protect this process. Hence, for example, the emphasis that the ECtHR places on the importance of safeguarding the 'mental stability' of the individual (this being 'an indispensable precondition' for the enjoyment of the right to respect for one's private life, and, therefore, for the pursuit of self-development at all),[69] and, separately, the significance that is attached in the case law to the child's personal development[70] and 'ability to reach [his or her] maximum potential'.[71]

If we can already see in this an idea of individual continuity being articulated, and therefore some form of context for the notion of 'the capacity to change', this tightens further still when we consider the connection that exists here between the processes of self-development and self-realisation. The two processes are conceived of as having a reflective and reflexive quality, which means that they advance with each other and are a means and an end for each other. For example, the end of self-development may be the attainment of self-realisation, but that self-realisation is, in turn, the means towards further self-development. Moreover, self-development and self-realisation are conceptualised as being related to a feeling of fulfilment, and 'the right to self-fulfilment' ('whether in the form of personal development . . . or from the point of view of the right to establish and develop relationships with other human beings and the outside world') has been included within Article 8 in this sense.[72] Dimensions of this that the ECtHR has specified include sexuality (which has 'physical and psychological relevance'

61 This is to take Jonathan Lear's definition of 'temporality' ('a name for time as it is experienced within a way of life'): Lear, *Radical Hope: Ethics in the Face of Cultural Devastation* (2006) at 40.

62 Radzik, supra n 5, Ch.3.

63 Ibid. at 55. And offering such an interpretation in this context, see O'Loughlin, supra n 43. See further the discussion in Section 4(B) below.

64 This can be traced back to *Bensaid v UK* Application No 44599/98, Merits and Just Satisfaction, 6 February 2001 at para 47.

65 E.g. *Odièvre v France* Application No 42326/98, Merits, 13 February 2003 at para 29.

66 E.g. *Reklos and Davourlis v Greece* Application No 1234/05, Merits and Just Satisfaction, 15 January 2009 at para 40.

67 E.g. *M. and M. v Croatia* Application No 10161/13, Merits and Just Satisfaction, 3 September 2015 at paras 170–171).

68 E.g. *Fernández Martínez v Spain* Application No 56030/07, Merits and Just Satisfaction, 12 June 2014 at para 126.

69 E.g. *Laduna v Slovakia* Application No 31827/02, Merits and Just Satisfaction, 13 December 2011 at para 53.

70 E.g. *Fürst-Pfeifer v Austria* Applications Nos 33677/10 and 52340/10, Merits, 17 May 2016 at para 45.

71 *Guberina v Croatia* Application No 23682/13, Merits and Just Satisfaction, 22 March 2016 at para 82. See further Trotter, 'The Child in European Human Rights Law' (2018) 81 *The Modern Law Review* 452.

72 *Fernández Martínez v Spain* Application No 56030/07, Merits and Just Satisfaction, 12 June 2014 at para 126.

for self-fulfilment),[73] freedom of expression (which is deemed a condition of individual self-fulfilment)[74] and freedom of thought, conscience and religion (the rights to which are treated as being important 'in guaranteeing the individual's self-fulfilment').[75]

Taken together, these strands of self-development, self-realisation and self-fulfilment generate a vision in which the focus is on individual continuity—specifically, on the individual moving forward in her life. This brings it close to the ideal of authenticity—the 'project of becoming who you are'[76]—except, as it is expressed in European human rights law, it carries a greater urgency, supplying a direction and a purpose: the right and need to develop one's own potential, and thereby one's own self. This way of conceiving of the self implies a certain capacity to abstract from oneself too. In particular, it implies a capacity to anticipate one's self and to conceive an image of one's future self—something that is, as Radzik points out, an essential part of the process of atonement.[77] The individual is consequently located in a rather ambiguous position: as being in transition (as always engaged in the process of striving towards and realising her self) and as bearing the capacity to transcend her (current) self and to take the long view of this. Notably, it is this latter notion of transcendence that subtly underpins the idea that prisoners sentenced for life 'retain the right to hope that, someday, they may have atoned for the wrongs which they have committed', for this right is one that is tied to 'the capacity to change',[78] and atonement here involves transcending the wrong.[79] The resulting conceptualisation of the individual's transition and transcendence comes close to a conceptualisation of a liminal stage: a stage of passage, in which the feeling of being 'betwixt and between' is experienced as one passes from one realm to the next.[80] Liminality here is fixed, however, as a more generalised state of openness to possibility: a state in which the essential pursuit is one of becoming.

This matters, from the perspective of our inquiry into hope, because firstly, this is the broader framework of meaning in which the notion of 'the capacity to change' needs to be understood, and secondly, because in the connection that is made between the notion of 'the capacity to change' and hope itself, hope emerges as the carrier of the vision of the future. It is directly linked to an innate potentiality ('the capacity to change'), and, consequently, to something that is already present and needs only to be developed.[81] It is the idea of continuity here that is conceived of as being disrupted and terminated by the denial of the experience of hope. This is reflected in the way in which, in the case of the irreducible life sentence, the denial of the prospect of release or possibility of review of the sentence is cast as generating a sense of finality and as bringing to an end the sense of possibility that things could be otherwise. In effect, it presents as a breakdown in the way of life envisaged in European human rights law: a way of life that supposes a form of temporal continuity and conceives of this as that of the continuity of the hoping individual.[82] The idea of hope in European human rights law—an idea of hope as a mode of being in and relating to the world—is thus integral to European human rights

[73] *Carvalho Pinto de Sousa Morais v Portugal* Application No 17484/15, Merits and Just Satisfaction, 25 July 2017 at para 52.
[74] This goes back to *Lingens v Austria* Application No 9815/82, Merits and Just Satisfaction, 8 July 1986 at para 41.
[75] *Vojnity v Hungary* Application No 29617/07, Merits and Just Satisfaction, 12 February 2013 at para 36.
[76] Guignon, *On Being Authentic* (2004) at 3.
[77] Radzik, supra n 5 at 13.
[78] *Vinter and Others v UK* Applications Nos 66069/09 et al., Merits and Just Satisfaction, 9 July 2013, Concurring Opinion of Judge Power-Forde; *Matiošaitis and Others v Lithuania* Applications Nos 22662/13 et al., Merits and Just Satisfaction, 23 May 2017 at para 180.
[79] I am grateful to Damian Chalmers for this point.
[80] Turner, *The Ritual Process: Structure and Anti-Structure* (1969) at 95.
[81] See, e.g. Tillich, 'The Right to Hope' (1965) 7 *Neue Zeitschrift für Systematicsche Theologie Und Religionsphilosophie* 371 at 373: '[w]here there is genuine hope, there that for which we hope has already some presence'.
[82] This notion of the 'hoping individual' comes from Fromm, *The Revolution of Hope: Toward a Humanized Technology* (1968) at 66–67.

law's underpinning idea of 'the individual'. And so a theorisation of hope in this context is, simultaneously, a theorisation of European human rights law's vision of the human condition.

3. HOPE, DIGNITY AND HUMANITY IN EUROPEAN HUMAN RIGHTS LAW

With this last point, we come to the question of what it means to be human in European human rights law. More specifically, we come to the idea that the denial of the experience of hope is the denial of a fundamental part of what it means to be human: an idea expressed in the words that 'to deny them [prisoners sentenced for life] the experience of hope would be to deny a fundamental aspect of their humanity and to do that would be degrading'.[83] We have already seen in the preceding pages that one way of understanding the way in which the experience of hope is conceived of in European human rights law is as the experience of the capacity to hope—a capacity dependent on a sense of possibility. We have seen further that this, in turn, is connected to a deeper vision of individual continuity, which is expressed in the case law in notions of self-development, self-realisation and self-fulfilment. From this, we already know that hope—as bound up in an idea of potentiality (which is itself presented as the underpinning of individual continuity)—is fundamental to the meaning of being in European human rights law. The second idea expressed in the statement above is that the denial of this would be 'degrading'. It is this second idea that now needs to be considered.

A. Degrading Treatment

The term 'degrading' treatment has a specific meaning in European human rights law, the reference being to the prohibition of degrading treatment set out in Article 3 of the ECHR. One of the leading cases on this is *Bouyid v Belgium (2015)*, in which two brothers alleged that they had been slapped in the face by police officers, and that this had constituted degrading treatment in violation of Article 3.

In giving its judgment in this case, the Grand Chamber of the ECtHR emphasised the connection between the notion of 'degrading' treatment and respect for human dignity, stating that 'the prohibition of torture and inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity',[84] and that 'there is a particularly strong link between the concepts of "degrading" treatment or punishment within the meaning of Article 3 of the Convention and respect for "dignity"'.[85] It went on to recall that as a general principle of European human rights law, 'where an individual is deprived of his or her liberty or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by the person's conduct diminishes human dignity and is in principle an infringement of . . . Article 3'.[86] Here, that strict necessity could not be established: it appeared that 'each slap was an impulsive act in response to an attitude perceived as disrespectful', and the applicants' dignity was accordingly undermined.[87] 'In any event', the Grand Chamber continued, 'a slap inflicted by a law-enforcement officer on an individual who is entirely under his control constitutes a serious attack on the individual's dignity'.[88]

The Court proceeded to describe the effects of a slap to the face: 'A slap has a considerable impact on the person receiving it. A slap to the face affects the part of the person's body

[83] *Vinter and Others v UK* Applications Nos 66069/09 et al., Merits and Just Satisfaction, 9 July 2013, Concurring Opinion of Judge Power-Forde; *Matiošaitis and Others v Lithuania* Applications Nos 22662/13 et al., Merits and Just Satisfaction, 23 May 2017 at para 180.

[84] *Bouyid v Belgium* Application No 23380/09, Merits and Just Satisfaction, 28 September 2015 at para 81.

[85] Ibid. at para 90.

[86] Ibid. at para 100.

[87] Ibid. at para 102.

[88] Ibid. at para 103.

which expresses his individuality, manifests his social identity and constitutes the centre of his senses—sight, speech and hearing—which are used for communication with others'.[89] What was especially significant here, therefore, was that a channel of expression—of communication and seeking recognition—was violated. The sense, moreover, was that not only was this channel violated, but that also at stake was the victim's own self-image and capacity to control that image: a point reflected in the Court's statement that 'it may well suffice that the victim is humiliated in his own eyes for there to be degrading treatment within the meaning of Article 3'.[90] A slap 'inflicted by law-enforcement officers on persons under their control' was described as having the potential to be particularly humiliating in this respect, because it involved and exploited a series of dynamics, namely 'the superiority and inferiority which by definition characterise the relationship between the [law-enforcement officers] and [persons under their control]' and the vulnerability of the latter.[91] The Court ultimately held that the applicants' dignity had been diminished in this way and that the slaps to their faces had constituted degrading treatment in violation of Article 3.

The analysis of the humiliation involved in degrading treatment in this case tells us something important about the way in which the individual is conceived of as establishing and communicating a self-image and about how European human rights law is conceived of as securing the capacity of the individual to project and control this image. Self-image is cast as serving a relational and communicative purpose—as signifying a social identity and representing a vital 'transaction' with the world.[92] This is not least because it operates at the boundary between 'concealment' and 'exposure'—'between what we reveal and what we do not'.[93] It involves a projection of an image of oneself and a taking in of responses to this image from the surrounding environment.

The concern expressed in *Bouyid v Belgium* is that in cases of humiliation, these channels of communication are fundamentally abused—that the infliction of humiliation sets in train a process of reducing the individual. The point has been put more starkly still in cases involving violations of Article 3 on account of humiliating strip-searches in detention[94] and the display of defendants in 'courtroom cages',[95] and it is this: there comes a point where the individual is reduced to such an extent that not only does she lack control over her self-image, but her position as a subject with a self-image is thrown into question.[96] Such is the reduction that is involved in 'degrading treatment' in European human rights law, and it is a reduction that is expressed as involving an erosion of dignity. This, further, is the idea that we must bear in mind in considering that the ECtHR has described the denial of the experience of hope as involving the denial of a fundamental aspect of humanity—a denial that would be degrading.

89 Ibid. at para 104.

90 Ibid. at para 105.

91 Ibid. at para 106.

92 This term comes from Nussbaum's discussion in *Upheavals of Thought: The Intelligence of Emotions* (2001) at 78.

93 Nagel, 'Concealment and Exposure' (1998) 27 *Philosophy and Public Affairs* 3 at 4.

94 E.g. *Lorsé and others v The Netherlands* Application No 52750/99, Merits and Just Satisfaction, 4 February 2003; *Frérot v France* Application No 70204/01, Merits and Just Satisfaction, 12 June 2007.

95 E.g. *Khodorkovskiy v Russia* Application No 5829/04, Merits and Just Satisfaction, 31 May 2011; *Piruzyan v Armenia* Application No 33376/07, Merits and Just Satisfaction, 26 June 2012.

96 See, e.g. *Frérot v France* Application No 70204/01, Merits and Just Satisfaction, 12 June 2007, in which Mr Frérot argued that the strip-searches in detention made the prisoners look 'like slaves or animals for sale' (at para 31), and *Khodorkovskiy v Russia* Application No 5829/04, Merits and Just Satisfaction, 31 May 2011, in which the ECtHR noted that Mr Khodorkovskiy's display in a metal cage in the courtroom 'aroused in him feelings of inferiority', and 'such a harsh appearance of judicial proceedings could lead an average observer to believe that an extremely dangerous criminal was on trial' (at para 125).

B. Dignity

The conceptualisation of degrading treatment as involving an erosion of dignity recalls the point made by the ECtHR about the close connection that exists between the concepts of degrading treatment and respect for dignity and calls for specification of the notion of dignity itself. The term 'dignity' does not explicitly feature in the text of the ECHR, but the ECtHR has, as we have seen, deemed respect for respect for human dignity to form its 'very essence'.[97] Furthermore, as Jean Paul Costa has suggested, '[i]t is likely that the drafters [of the Convention] . . . had the concept of dignity in their minds'.[98] An examination of the travaux préparatoires reveals repeated references to dignity: to the need to 'fortify the structure and widen the bases of [the] fundamental freedoms which form the veritable ramparts of human dignity';[99] to the aim of '[delimiting] the conditions in which alone the dignity of the human spirit will stand free, firm and unassailed';[100] to the need to 'make human rights and human dignity realistic and tangible'[101] and to the idea of '[bringing] Europe back to new concepts of human dignity'.[102]

It is worth noting in this context that the notion of dignity expressed in this way—'vague' as it perhaps was[103]—was associated in the travaux with hope, such that it was conceived of as representing 'the hope which Europe [could] and must hold out to the rest of the world',[104] with it also being thought that the Consultative Assembly 'could . . . by constant and remitting advocacy of human and political rights . . . inspire hope for the triumph of human dignity'.[105,106] The idea was that the Convention would not only preserve and secure dignity, but that it would also serve as an expression of the hope of this dignity. Dignity was, furthermore, portrayed as intricately connected to the idea of Europe: an idea reflected in references to 'the building up of a new Europe';[107] to Europe as having a common view on human dignity;[108] to 'a European Law of Human Rights';[109] to a Europe of the individual (as expressed in the creation of a court before which individuals could avail themselves of their human rights);[110] to making Europe 'a community of hope';[111] to the Court as 'the true bearer of our hopes';[112] to the Convention as a 'first step we shall be making in the direction of a European way of life'[113] and to a notion of a 'vision of creating a true European community'.[114] Subsequent descriptions of dignity as 'a value that is part of the European constitutional heritage' recall elements of this narrative.[115]

97 See supra n 4.

98 Costa, 'Human Dignity in the Jurisprudence of the European Court of Human Rights' in McCrudden (eds.), *Understanding Human Dignity* (2013) 393 at 394.

99 Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights, Volume I* (1975) at 56, per M. Antonopoulos (Greece).

100 Ibid. at 124, per Sir David Maxwell-Fyfe (UK).

101 Ibid. at 130, per Mr Norton (Ireland).

102 Ibid. at 132, per Mr Norton (Ireland).

103 See further Nußberger, supra n 2 at 676–677.

104 Council of Europe, supra n 99 at 102, per M. de la Vallée-Poussin (Belgium).

105 Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights, Volume V* (1979) at 278, per M. Norton (Ireland).

106 See also the idea of the Consultative Assembly itself as '[embodying] many hopes' (Council of Europe, supra n 99 at 100, per M. de la Vallée-Poussin (Belgium)) and the notion of 'the hope of a quiet life' potentially offered by a Convention guaranteeing human rights (Council of Europe, supra n 105 at 230, per Sir David Maxwell-Fyfe (UK)).

107 Council of Europe, supra n 99 at 64, per M. Kraft (Denmark).

108 Ibid. at 64, per M. Kraft (Denmark); at 102, per M. de la Vallée-Poussin (Belgium).

109 Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights, Volume II* (1975) at 162, M. Bidault (France).

110 Ibid. at 180, per M. Teitgen (France).

111 Ibid. at 256, per M. Schumann (France).

112 Ibid. at 262, per M. Philip (France).

113 Council of Europe, supra n 105 at 256, per M. Persico (Italy).

114 Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights, Volume VI* (1985) at 92, per Mr Roberts (UK).

115 Christos Giakoumopoulos, 'Opening Speech', in *The Principle of Respect for Human Dignity (Proceedings of the UniDem Seminar, Montpellier 2–6 July 1998)* (1999) 10 at 12.

Despite all this, and as noted above, the term 'dignity' did not subsequently make it into the text of the Convention, but respect for human dignity has nevertheless been conceived of by the ECtHR as grounding European human rights law. Beyond the ECtHR's stipulation that dignity is inherent to the individual and to the vision of life that is constructed in European human rights law, however,[116] the quality of dignity itself has gone unspecified in the case law. This means that the question of what it is that is special about human dignity[117] has not been explicitly addressed. I have elsewhere argued that what dignity appears to be protecting in European human rights law is a fluid notion of potentiality:[118] a latent capacity to become and therefore 'be' within the meaning of European human rights law.[119] The basis of this argument lies in the case law concerning the status of the embryo, and specifically in the Grand Chamber's statement that although 'there is no European consensus on the nature and status of the embryo and/or foetus . . . The potentiality of that being and its capacity to become a person . . . require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Article 2'.[120] The sense emerging from this case law is that the embryo is pulled into the language of dignity on account of its potentiality—that it is in terms of potentiality that individual being begins in European human rights law.[121]

This connection between potentiality and dignity tightens further still when we reflect on the question of the meaning of dignity in the light of *Bouyid v Belgium* and the earlier discussion of individual continuity. In *Bouyid v Belgium*, we saw the importance that is ascribed to self-image in European human rights law. The discussion of individual continuity meanwhile showed how a vision of this is expressed in the case law in notions of self-development, self-realisation and self-fulfilment and is underpinned by a conception of individual potentiality. If the conceptualisation of potentiality that is involved in the case law concerning the status of the embryo is one of vital potentiality—potential to become human—the conception of potentiality involved in relation to the notion of individual continuity is one that could be described in terms of ethical potentiality. By this, I mean that it is geared towards the continuous development and realisation of the self and derives an ethical orientation from the prescribed need to continually negotiate, within the context of the processes of self-development and self-realisation, the question of living a life that is good for the self. Hope, as we know, is cast as the carrier of this vision of the future, being conceived of as it is as intricately connected to the idea of the 'capacity to change'.

The ideas of self-image and individual continuity are inevitably bound up in each other; by definition, the idea of a right and need to develop one's potential and thereby one's own self implies a capacity to anticipate one's self and to conceive of an image of one's future self: both of which further imply a capacity to abstract from oneself too. On the one hand, this abstraction, in turn, implies that which we earlier saw: an individual who is constantly 'becoming', and who constructs, and identifies with, an idealised self. At the same time as the individual is conceived of as being in a process of becoming in this way, we also know from the discussion of the notion of degrading treatment that the need to be able to maintain and communicate the self-image that is formed in this context is cast as fundamental. Its reduction—by way of a reduction in the individual's control over this image—is conceived of as involving an erosion of dignity. Something of the self is lost, European human rights law suggests, in the loss of the capacity to

116 See supra n 4.

117 This comes from Etinson, 'What's So Special About Human Dignity?' (2020) 48 *Philosophy & Public Affairs* 353.

118 The association between potentiality and dignity has, of course, a long history in Renaissance humanism and in Catholic social thought. See esp. Pico della Mirandola, *Oration on the Dignity of Man* (1496 [1486]) at 6–8. It is also drawn in German constitutional law, where constitutional protection extends to 'all developing human life': *'First Abortion Decision'*, 39 BVerfGE 1 (1975, German Constitutional Court), Part C., I., paras.1(b)-2.

119 Trotter, supra n 3, Ch. 3.

120 *VO v France* Application No 53924/00, Merits, 8 July 2004 at para 84.

121 See also *Parrillo v Italy* Application No 46470/11, Merits and Just Satisfaction, 27 August 2015.

see a future self. The effect is that not only is self-image conceived of as being a matter of dignity but so also is the location of the individual in the state that is conducive to the formation of this image in the first place: the generalised state of openness to possibility that is presupposed by the notion of hope itself.

The conceptualisation arrived at is as follows. The experience of hope is conceived of as the experience of the capacity to hope—a capacity dependent on a sense of possibility. This, in turn, is connected to a vision of individual continuity, which is expressed in the case law in notions of self-development, self-realisation and self-fulfilment and is integral to the idea of what it means to 'be' in European human rights law. The denial of this experience of hope is cast as involving the denial of this fundamental element of being and as something that would be degrading in that it would involve a reduction of an individual's self-image. It is in relation to this self-image that a connection between hope and dignity is made, for hope is cast as carrying the vision of the future that underpins the sense of continuity that is necessary for the formation and maintenance of a self-image at all—a self-image that, in turn, is conceived of as being a matter of dignity.

4. THE RIGHT TO HOPE AS A RIGHT TO RECOGNITION

The account of the connection between hope and dignity raises a question of how to think about the intersubjectivity and relationality that it implies. The notion of dignity in European human rights law emerges as having an intersubjective quality, which is captured most clearly in the process of the formation and maintenance of self-image (which is itself cast as being a matter of dignity). An underpinning suggestion of this article has meanwhile been that hope, in European human rights law, is relational. This is not only in the sense that the concept of hope here is closely related to notions of atonement, possibility, potentiality, humanity and dignity, but also in the sense that hope here is a property of the relation between the individual who holds the right and the world. There are two dimensions to this: one involving the relations that are implied between individuals (which is ultimately a matter of the recognition of the individual by others) and another involving the relationship that is established between the individual and law (which is ultimately a matter of recognition in and through law). It is to these dimensions that I now finally turn.

A. Recognition by Others

The relationality of hope in European human rights law is implied not only at the general level of the conceptualisation of hope itself (a conceptualisation of hope as a mode of being in and relating to the world, and one that is dependent on a sense of possibility) but also in the connection that is drawn between hope and dignity, particularly in terms of the ascribed need of the individual to form, maintain and communicate a self-image. As we have already seen, self-image is both deemed fundamental to the sense of individual continuity and is an inherently relational and communicative project. In particular, it involves the establishment of a connection between the idea of individual continuity (reflected in and presupposed by the notion of the self-image) and a subtle sense that the individual is conceived of as needing to be recognised by others.

In a way, we have already seen traces of this in the context of the points that I have made about the fundamentality of the experience of hope in European human rights law, the need for the individual to maintain control over her self-image and the meaning of 'degrading treatment'. It is articulated more clearly still though in cases concerning bodily integrity, respect for which is cast as being about recognition. An example is *Price v UK (2001)*. Ms Price was four-limb deficient and also suffered from kidney problems. She was committed to prison for seven days for contempt of court following civil proceedings in which she refused to answer questions about her financial situation. The sentencing judge, however, took no steps to see whether there

were facilities available that could accommodate her, and Ms Price was subsequently detained in inappropriate conditions, in which she was 'dangerously cold, [risked] developing sores because her bed [was] too hard or unreachable, and [was] unable to go to the toilet or keep clean without the greatest of difficulty'.[122] When she complained about this before the ECtHR, the Court concluded that there was no evidence of 'any positive intention to humiliate or debase' Ms Price but considered that the fact of her detention in such conditions, and with such consequences for her, had constituted degrading treatment in violation of Article 3.[123]

In a Separate Opinion, Judge Greve elaborated the Court's reasoning, arguing that the 'compensatory measures' that are secured for a person with disabilities in a 'civilised country' 'come to form part of the disabled person's physical integrity'.[124] Consequently, any obstacle set up in the path of a person's access to these measures would constitute a violation of that person's physical integrity. All that was required in Ms Price's case was, Judge Greve argued, '*a minimum of ordinary human empathy*'[125]—a basic understanding and recognition of Ms Price's position. Instead, there had been a failure to see her situation and to treat her accordingly—a failure, in other words, of recognition. As Adam Etinson has pointed out elsewhere, it is precisely this form of recognition that is a basic requirement of human rights—which, on his account, 'do more than just ask us to respect the rights of all persons' but 'also ask us to *recognize* all persons as proper objects of respect, and bearers of rights, in the first place'.[126]

Axel Honneth, who has similarly noted that the categories that we use to express a sense of 'moral maltreatment' are often ones that are 'related to forms of disrespect, to the denial of recognition', suggests that this in itself invokes the sense that 'we owe our integrity, in a subliminal way, to the receipt of approval or recognition from other persons'.[127] The experience of disrespect means that 'the person is deprived of that form of recognition that is expressed in unconditional respect for autonomous control over his own body, a form of respect acquired just through experiencing emotional attachment in the socialization process'.[128] But what, according to European human rights law, is seen when individuals relate to and recognise each other in this way? Judge Greve's suggestion in *Price v UK* was that recognition is about empathy, so that the imagination is exercised to try to envisage and understand the experience of the other. But the case law pertaining to hope indicates a demand that is thinner than this, and one that consists in recognising the other as both capable of and needing to hope. The requirement is to recognise the need for and the fundamentality of the experience of (the capacity to) hope. This is reflected in the way in which the denial of the experience of the capacity to hope is conceived of as involving the denial of a fundamental aspect of humanity (involving a notion of individual continuity and the recognition of this continuity)—a denial that would be degrading. To put the point differently, the conceptualisation of the individual that emerges here is not only one of the hoping individual[129] but also of the individual who needs to be treated as capable of hoping in order to be constituted at all.

The right to hope in European human rights law can therefore perhaps be thought of as a right to recognition: a right that reflects the relationality of the concept of hope and demands that the individual be recognised as a subject capable of hope. As we have seen, this would be a subject who relates to the world in a way that is presupposed by the notion of hope here and who has a

122 *Price v UK* Application No 33394/96, Merits and Just Satisfaction, 10 July 2001 at para 30.
123 Ibid. at para 30.
124 Ibid. Separate Opinion of Judge Greve.
125 Ibid.
126 Etinson, supra n 117 at 380.
127 Honneth, 'Integrity and Disrespect: Principles of a Conception of Morality Based on the Theory of Recognition' (1992) 20 *Political Theory* 187 at 188–189.
128 Ibid. at 190.
129 See supra n 82.

sense of continuity across time: a subject who is, in other words, constituted as such in European human rights law.

B. Recognition in Law

There is yet another dimension to the relational quality of hope in European human rights law, however, and this pertains to the relationship that is established between the individual and law itself. This emerges in particular when we reflect a little further on the effects of the use of the language of atonement. As the Grand Chamber put it in *Vinter and Others v UK*, a life sentence involving no prospect of release and possibility of review entails 'the risk that [the prisoner] can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable'.[130] And as it was subsequently put by Judge Power-Forde and later by the Second Section of the ECtHR in *Matiošaitis and Others v Lithuania*, 'long and deserved' though the prison sentences of those who have '[committed] the most abhorrent and egregious of acts and who [have inflicted] untold suffering upon others' may be, 'they retain the right to hope that, some day, they may have atoned for the wrongs which they have committed'.[131]

As I suggested earlier, the notion of the risk of the inability to atone implies the need to be able to do so and the world of possibility that lies beyond that. This need is constructed as being both a psychological need (as is apparent in the description of this as being about the individual's 'right to hope that, some day, they may have atoned for the wrongs . . . committed'[132]) and a practical need (as is more apparent in the Grand Chamber's formulation, in which atonement is tied more explicitly to the prospect of release and the possibility of review). As Ailbhe O'Loughlin points out in relation to the Grand Chamber's passage about this, the implication is that 'if a prisoner sufficiently atones for his crimes by changing himself, he will no longer deserve to be detained for his whole life'.[133] There is a subtle step, in other words, from the articulation of a right to hope that one has atoned for the sake of atonement itself to the articulation of a requirement to atone for the sake of release. O'Loughlin further argues that atonement is conceived of in this context as 'moral transformation',[134] and 'rehabilitation as redemption'—the latter being reflective of an 'older idea that offending is a sign of bad character but that people can atone for their crimes by working hard to change themselves'.[135] The effect, she argues, is twofold: firstly, 'a heavy responsibility [is placed] on the prisoner to demonstrate a change in his personality that is so profound that he no longer deserves punishment regardless of the heinousness of his offence(s)', and secondly, '[w]hile *Vinter* does not condone forcible treatments or harsh punishments designed to reform prisoners' characters, it does legitimise a subtler form of coercion that places the burden on the prisoner to engage with rehabilitation in order to progress towards release'.[136]

The ECtHR's conceptualisation of atonement involves, in this way, an account of what it means to be a good prisoner. The demand placed on the prisoner is to seek recognition through law in the manner set out: as one who seeks to atone—and who wants to atone—in the terms dictated.[137] This reflects not only what O'Loughlin describes as a 'fundamental imbalance of

130 *Vinter and Others v UK* Applications Nos 66069/09 et al., Merits and Just Satisfaction, 9 July 2013 at para 112.
131 Ibid., Concurring Opinion of Judge Power-Forde; *Matiošaitis and Others v Lithuania* Applications Nos 22662/13 et al., Merits and Just Satisfaction, 23 May 2017 at para 180.
132 Ibid.
133 O'Loughlin, supra n 43 at 527.
134 Ibid. at 527–528 (and drawing on Radzik, supra n 5).
135 Ibid. at 512.
136 Ibid. at 532.
137 Ibid. at 511.

power between the prisoner and the state',[138] but also a distinctive relationship between the individual and law itself.

This becomes more apparent still when we consider the right to hope that is articulated in this context: a right that is intricately connected to the conceptualisation of atonement, involving as it does a specific notion of a hope to atone and a more general point about the fundamental nature of the experience of hope. The relationship that is established between the individual and law here comes to the fore when we consider the power that is ascribed to law in the saying, through law, that one has a right to hope. On the one hand, the appeal to law involves the construction of hope as a remainder: as something that must not be taken away from life and that warrants legal protection. On the other hand, there is something dominating about the dynamic that emerges here.[139] For the individual, in being told that she can still hope, despite everything, is both rendered dependent on law in a particular way (it is through law that this instruction—articulated as a right—is issued) and also made responsible for this hope. Hope is thus individualised and constructed as an individual responsibility. As in the case of the conceptualisation of atonement, then, the step from the right to hope to a requirement to hope is not a large one, which is to say that the right to hope itself is constructed as containing within itself the seeds of a reformulation as a responsibility to hope. Questions of structural conditions—including of the conditions of incarceration itself—fall away: a concern that is fully articulated by O'Loughlin in relation to the 'right to rehabilitation'[140] and is also implicit in Vannier's analysis to the extent that she poses the question (as we have already considered) of what it is that the right to hope detracts attention from.[141]

A comparable conceptualisation of hope emerged in the UK government rhetoric some months into the COVID-19 pandemic, when, in a context of profound loss of lives and livelihoods, Rishi Sunak, Chancellor of the Exchequer, said, in setting out his summer 2020 statement (and a series of measures aimed at protecting and supporting jobs), that 'no one will be left without hope'.[142] This phrase was subsequently reiterated on a number of occasions over the following months, the underlying sense apparently being that even in the midst of a crisis that had upended everything—including our prior notions of the 'possible'[143]—there was this thing that would not be taken away: hope. Hope, it was said, would remain. But it is worth pointing out that in neither this formulation (of hope that will not be taken away) nor indeed in the ECtHR's formulation (of hope that needs to remain) is the hope that we see here the hope that remains of, for example, Emily Dickinson's famous poem, in which '"Hope" is the thing with feathers—| That perches in the soul—| And sings the tune without the words—| And never stops—at all—. . . '.[144] And, of course, perhaps it is not intended to be. But Dickinson's poem illustrates an important point here: that the hope expressed in the political and legal formulations in question is not exclusively interior. Rather, in the saying that hope is held—in the saying that one has a right to hope, or that hope will not be taken away—hope is, in a way, conferred.

What I mean by this is that in the saying that hope remains in these contexts, a claim to be able to say this is simultaneously made, as is a more normative claim: that hope should

138 Ibid. at 511.

139 I am grateful to Joseph Weiler and Mattias Kumm, whose comments on an earlier draft caused me to think about this point.

140 O'Loughlin, supra n 43 at 538.

141 Vannier, supra n 2 at 210.

142 UK Parliament, 'Rishi Sunak: Government has Clear Goal to "Protect, Support and Create Jobs"', 8 July 2020, available at: www.parliament.uk/business/news/2020/july/summer-economic-update/ [last accessed 25 February 2021].

143 Solnit, '"The Impossible has Already Happened': What Coronavirus can Teach us About Hope', *Guardian,* 7 April 2020, available at: www.theguardian.com/world/2020/apr/07/what-coronavirus-can-teach-us-about-hope-rebecca-solnit [last accessed 25 February 2021]).

144 Dickinson, *'Hope' is the Thing with Feathers,* available at: www.poetryfoundation.org/poems/42889/hope-is-the-thing-with-feathers-314 [last accessed 25 February 2021].

remain. And so if we go back to the phrase that 'no one will be left without hope', the point is that this is something that has to be found within—it is something that people have to find within themselves, despite everything. As in the case of the formulation of the 'right to hope' in European human rights law, then, hope here is both individualised and conceptualised as a responsibility. Its depiction as something that will remain—as something that 'no one will be left without'—means that if it is not found, if it is not experienced, the problem is one at the level of the individual and not at the level of the collective. The latter indeed vanishes within this vision, even in the same moment that the rhetoric used in relation to hope appears to be one of collectivity and solidarity. Ironically, then, to the extent that hope is in fact connected to these notions at all,[145] the articulation of it here simultaneously undermines them. The resulting conceptualisation of hope—as an individual responsibility—carries a reductive quality.

The example of Sunak's phrase—that 'no one will be left without hope'—is an interesting one to reflect on, not only because it coloured the context of much of the writing of this article, but also because there are notable parallels in terms of the power dynamic that it implies and that which arises in the case of the right to hope in European human rights law. This involves, as we have seen, a relationship with the individual that is shaped by a conceptualisation of hope as a responsibility and a requirement. The effect in European human rights law is that the right to hope—which, as I have argued, is underpinned by a certain vision of the individual—makes a specific demand of the individual: to hope in the manner set out. It is in these terms that the individual is recognised as such in European human rights law.

5. CONCLUSION

The question we are left with is a stark one: is a requirement to hope compatible with hope itself? This is a question that would be fundamental to a critique of the conceptualisation of hope that has been reconstructed in this article—a reconstruction that stemmed from two prior questions: what does it mean, to experience hope? And how is this experience made the object of a right as a matter of European human rights law? In addressing these questions, the first section of this article examined the origins of the right to hope in European human rights law—a right originating in the case law pertaining to irreducible life sentences. We saw, in particular, how the ECtHR has stated that a life sentence must be reducible *de jure* and *de facto*—that it must carry the prospect of release and the possibility of the review of the sentence—and that this principle of reducibility is grounded in an idea of the individual's right to hope.

The second part analysed the meaning of hope in this context. I suggested that the idea of the experience of hope that emerges here is one of the experience of the capacity to hope: a capacity dependent on a sense of possibility. Hope itself is further cast as a mode of being in and relating to the world, and one that is structured by a form of relationality (expressed in the way in which hope here is about a mode of relating to the world) and a form of fundamentality (expressed in the claim that hope is an integral aspect of our humanity). I argued that from this, two further points come to light: one about the subjective and intersubjective character of hope in European human rights law, and the other about its temporality—namely, that it is bound up in a vision of individual continuity. This notion of individual continuity is treated as fundamental to the meaning of being in European human rights law, with its denial—by way of the denial of the experience of the capacity to hope—being conceived of as degrading.

The third section focused on this latter point, and specifically the question of what it means, in European human rights law, for treatment to be degrading. I suggested that degrading treatment is conceptualised as involving a reduction in the individual's control over her self-image (the

[145] On which, see, e.g. Kadlac, 'The Virtue of Hope' (2015) 18 *Ethical Theory and Moral Practice* 337.

formation and maintenance of which is deemed fundamental) and that this is expressed as involving an erosion of dignity. The notions of dignity, continuity, potentiality and self-image come together in this context: the idea of self-image—a matter of dignity, in European human rights law—presupposes a notion of individual continuity, and this, in turn, is underpinned by an idea of individual potentiality. I further suggested that a connection between hope and dignity emerges, in that hope is cast as the carrier of the vision of the future that underpins the sense of continuity that is necessary for the formation and maintenance of self-image at all.

In the final part of the article, I reflected on the relationality of hope in European human rights law. This is a relationality that is evident not only at a conceptual level (and captured in the way in which the concept of hope in European human rights law is related to notions of atonement, possibility, potentiality, humanity and dignity) but also at the level of the experience of hope itself, insofar as hope is conceived of as being a property of the relation between the individual who holds the right and the world. I suggested that one way of thinking about the right to hope in this sense is as a right to recognition. This has two dimensions: one involving the relations that are implied between individuals (a matter of the recognition of the individual by others) and another involving the relationship that is established between the individual and law (a matter of recognition in and through law). As became evident, the latter entails the seeking of recognition in a particular manner: as one who seeks to atone—and who wants to seek to atone—in the terms set out. Hope is constructed in this context as an individual responsibility, which is to say that the right to hope itself contains a responsibility to hope. It is a right that makes a certain demand.

In many ways, this brings us back to one of the earliest points that I made in this article: that we cannot consider—and could never have considered—the question of the meaning of hope in European human rights law as anything but grounded in its broader framework of meaning. In this case, the right to hope emerges as expressive of a deeper underlying vision of the individual, and the theorisation of the right to hope itself becomes a theory of European human rights law's vision of the human condition.

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