

Hope, Atonement, and Human Rights behind Bars: A Critical Re-examination of the "Right to Hope"

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In loving memory of my grandmother, Belinda "Nim". You gave hope to so many, and will always be an inspiration to me.

Abstract

The "right to hope" (RtH) was first invoked by Judge Power-Forde in *Vinter and Others v. UK* (2013), in the context of the European Court of Human Rights' ruling that "irreducible" life sentences contravene Article 3 ECHR's prohibition on "inhuman or degrading treatment or punishment." This dissertation re-examines the RtH's normative and legal grounding, as well as some of the critiques raised against it.

Chapter 1 provides an introductory account of this dissertation's scope, interdisciplinary approach, and context. As part of this contextualisation, I suggest that "sites of hopelessness"—specifically, the Bastille of 18th century France and the concentration camps of 20th century Europe—catalysed the international human rights movement, and therefore provide an indirect historical backdrop to the RtH.

Against this backdrop, Chapter 2 examines whether depriving prisoners of their hope for release should be considered "inhuman or degrading treatment" under Article 3 ECHR. This is done, in part, by expanding upon Judge Power-Forde's statement that prisoners' experience of hope constitutes a "fundamental aspect of their humanity", and providing a possible account of hope's connection to human self-determination and agency. I argue that this framing of the RtH, despite its initial appeal, faces a substantial legal critique from Article 3's thresholds for "inhuman or degrading treatment."

In Chapter 3, I proceed to consider the RtH's relation to Article 3's prohibition on "inhuman or degrading" *punishment*. After first arguing that hope's subjectivity represents particular difficulties for advocating a RtH from "gross" disproportionality under Article 3, this chapter maintains—again, following Judge Power-Forde's lead—that the RtH is best understood as stemming from human beings' inherent "capacity to change" and the possibility of prisoners' "atonement." In doing this, critiques concerning society's interest in retributive punishment are addressed. Lastly, I conclude by reflecting on why a right specifically to *hope* remains valuable.

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Article 3	Article 3 of the European Convention of Human Rights
ECHR	European Convention of Human Rights
ECtHR/the Court	European Court of Human Rights
LWPP	Life without the possibility of parole
RtH	Right to Hope
UDHR	Universal Declaration of Human Rights
USSC	United States Supreme Court

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Chapter 1: Introductory and Historical Considerations

The subject of hope has often captured the imaginations of poets, revolutionaries, philosophers, and theologians. In Dante Alighieri's *Divine Comedy*, the words "ABANDON EVERY HOPE, YOU WHO ENTER [HERE]" are inscribed upon the gates of hell.[1] It is only recently, however, that hope may have become legally relevant for defendants entering the courtroom. Specifically, the European Court of Human Rights (ECtHR or the Court) has spoken of a "right to hope" (RtH) under Article 3 of the European Convention on Human Rights (ECHR), which states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." This dissertation will explore the RtH's normative and legal grounding, as well as some of the conceptual and legal critiques raised against it. Within this remit, the present chapter will outline this project's interdisciplinary approach and justification, together with historical connections which may be drawn between hope(lessness), and advocacy for human rights.

i. The Interdisciplinary Approach of this Dissertation

With a view to understanding and contextualising the RtH's theory and critique, this dissertation pursues an interdisciplinary approach. This methodology follows from the project's twin foci: Article 3 of the ECHR (Article 3), and human hope. To begin with Article 3, David Brink observes that interpreting this Article requires "sound moral reasoning."[2] This is because, Natasa Mavronicola explains, the terms "inhuman" and "degrading" in Article 3—the "words themselves",[3] as Jeremy Waldron puts it—are already "morally loaded" prior to any legal analysis.[4] Article 3 also entails applying notions such as human "dignity", which further indexes the Article's meaning to a particular moral and anthropological "universe."[5] Understanding Article 3 therefore requires an "interpretative exercise" which is not only

[1] Dante Alighieri, *The Divine Comedy of Dante Alighieri: Inferno*, ed and tr Robert Durling and Ronald Martinez (OUP 1996), 55.
[2] DO Brink, 'Legal Interpretation, Objectivity, and Morality' in B Leiter (ed), *Objectivity in Law and Morals* (CUP 2007), 55.
[3] Jeremy Waldron, 'Inhuman and Degrading Treatment: The Words Themselves' (2010) 23 *CJLJ* 269.
[4] Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR*: *Absolute Rights and Absolute Wrongs* (Bloomsbury 2021), 29.
[5] Robert Spano, 'Deprivation of liberty and human dignity in the case-law of the European Court of Human Rights' (2016) 4 *BJCLLCJ* 150.

descriptive in nature, but also *evaluative*,[6] and as such may include extra-legal frames of reference.

This contention may be further illustrated with reference to a brief sideward glance to Article 3's antecedents at the United Nations. Article 3 derives its wording from the slightly earlier text of the Universal Declaration of Human Rights (UDHR) (1948), Article 5. At the same time as Article 5 UDHR was being drafted, parallel preparatory discussions were taking place at the United Nations for a legal Covenant, Article 6 of which—in notably similar terms to Article 5 UDHR and Article 3 ECHR—stated that "[n]o person shall be subjected to torture or to cruel or inhuman punishment or to cruel or inhuman indignity." In the *Travaux Préparatoires* for Article 6, Lebanese delegate Charles Malik repeatedly defends the terms "inhuman" and "indignity", against accusations that such words are insufficiently precise, or "somewhat vague," for a legal document.[7] Malik argues that including these terms was necessary because the Nazi concentration camps had recently "shaken" the "conscience of mankind."[8] Moral shock, for Malik, constituted part of human rights' *raison d'etre*: consequently, Article 6's terms, as well as those of Article 5 UDHR and subsequently Article 3 ECHR, arguably carry a moral dimension that is perhaps absent from other legal texts.

The second reason for this dissertation's interdisciplinary approach is that the subject of hope itself necessarily invites perspectives from outside law and criminology. As Jason Warr notes, "[h]ope is a difficult concept to describe, and as such is limited in the literature on prisons."[9] Hope's conceptual difficulty and legal awkwardness has also been noted inside the courtroom. In his dissenting opinion in *T.P. and A.T. v. Hungary* (2016), Judge Kūris opines that hope is not primarily a "category of law", and therefore seems inappropriate to invoke when considering life sentences' compatibility with Article 3.[10] The core of this concern, however, can arguably be conceded without having to expel hope from the courtroom. Extra-legal dimensions such as psychology and morality are indeed integral to hope—but so too, as noted above, are these disciplines integral to Article 3. Understanding hope therefore requires

[6] Ibid.
[7] United Nations Digital Library, 'Summary Record of the 23rd meeting, 2nd session, of the Commission on Human Rights Drafting Committee, 5 May 1948', accessible at https://digitallibrary.un.org/record/611974?ln=en#record-files-collapse-header (accessed 01/02/23).
[8] Ibid.
[9] Jason Warr, 'The Deprivation of Certitude, Legitimacy and Hope: Foreign National Prisoners and the Pains of Imprisonment' (2016) 16 *CCJ* 301, 313.
[10] *TP and AT v Hungary*, App Nos 37871/14 and 73986/14 (ECtHR, 4 October 2016), para 21.

a wide-angle interdisciplinary lens, capable of appreciating the various dimensions of hope as a *concept* before being able to ascertain whether hope might belong to Article 3 as a *right*.

As the contexts of international human rights, the ECHR, and hope are both legal *and* non-legal in nature, this dissertation utilises the latter in order to more comprehensively understand the former. This is not to deny that conclusions about the RtH must ultimately conform with the interpretative pressure of legal text—in this case, the ECHR—and its judicial interpretation. As Ailbhe O'Loughlin notes, however, judges themselves are "socially situated agents who draw, sometimes unknowingly, on extra-legal considerations (beliefs, traditions, values, assumptions) in constructing, interpreting and applying legal rules and principles."[11] Stated simply, non-legal contexts matter, and—following the argument of this chapter—this is perhaps particularly true in relation to Article 3 and hope.

ii. From the Bastille to Auschwitz: Human Rights and Sites of Hope(lessness)

In *Hope: A Literary History,* Adam Potkay traces the emergence of socio-political hope to the late eighteenth century.[12] Specifically, Potkay claims that the French Revolution (1789) heralded a new chapter in the history of human hope.[13] It is important to note, however, that what precipitated the French Revolution and its 1789 "Declaration of the Rights of Man and of the Citizen" was not political *hope*, but experiences of oppression and *hopelessness*. Specifically, a significant focus of the French Revolution's defenders was the suffering of those imprisoned, often for an indefinite time, within the monarch's *Maisons de Force*, the most notorious of which was the Bastille.

Writing in *The Rights of Man*, Thomas Paine lambasts Edmund Burke and his *Reflections on the Revolution in France* (1790) by remarking that "[n]ot one glance…has he bestowed on those who lingered out the most wretched of lives, a *life without hope, in the most miserable of prisons*."[14] Paine identifies the Bastille as the focal point and central "prize" of the French Revolution, such that the prison's downfall represented "the downfall of Despotism" itself.[15]

[11] Ailbhe 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 *OJLS* 510, 519.
[12] Adam Potkay, *Hope: A Literary History* (CUP 2022), 18.
[13] Ibid 115.
[14] Thomas Paine, *The Rights of Man* (OUP 1995), 101-102 (emphasis added).
[15] Ibid 102.

In an instructive aside, Paine symbolically likens the Bastille to Doubting Castle, a fictitious dungeon in John Bunyan's *Pilgrim's Progress* where a giant named Despair imprisons Bunyan's pilgrims, Christian and Hopeful.[16] The escape from Doubting Castle was a victory for "Hopeful" and a defeat for (spiritual) Despair, just as, for Paine, the storming of the Bastille represented a defeat for (political) despair, and victory for a new hopeful spirit in "the rights of man."

The hope surrounding the French Revolution, along with the "rights of man" that accompanied it, was not unambiguously successful. Due in part to the violence which followed the revolution, William Wordsworth describes a disenchanted sense of "utter loss of hope itself/And things to hope for."[17] During the nineteenth century, both the socio-political hope and "rights of man" discourse sparked by the French revolutionaries faded considerably. In *Politics and Human Rights,* Andrew Vincent argues that this recess in rights discourse correlates with the State becoming the default "vessel" for human beings' "hopes and expectations" in socio-political progress.[18] Humanity's hopes—along with humanity's rights—were not abandoned on this view, so much as *sublimated* to the State.

This situation was abruptly challenged during the twentieth century by another site of hopelessness: the 1941–45 Jewish holocaust (the Holocaust), in which approximately six million Jews were murdered in concentration camps in an attempt to eliminate all Jewish people. Vincent argues that the Holocaust fundamentally exposed and subverted the State's normative standing. Rather than a conduit for humanity's hopes and guardian of the latent "rights of man", the State was revealed as a vehicle through which the most extreme conditions of hopelessness and disregard for humanity's rights could be brought about.[19] This revelation, according to Vincent, catalysed the emergence of international human rights.

Some support for Vincent's argument may be found in the ECHR's *Travaux Préparatoires*. During the preparatory drafting discussions on Article 3 in September 1949, UK representative Mr. Cocks advanced an amendment which would have singled-out for

[16] Ibid; John Bunyan, *Pilgrim's Progress* (Ginn and Company 1890), 93-98.
[17] William Wordsworth, *The Prelude: The Four Texts (1798, 1799, 1805, 1850),* ed Jonathan Wordsworth (Penguin Classics 1995), 464.
[18] Andrew Vincent, *The Politics of Human Rights* (OUP 2010), 107.
[19] Ibid.

prohibition "all forms of physical torture".[20] Torture, Mr. Cocks explained, amounts to "a crime against high heaven and the holy spirit of man" which is "incompatible with civilisation" to such an extent that "if a State…must be built upon a torture chamber, then that State should perish…as Nazi Germany perished."[21] Such comments align with Vincent's contention that Nazi Germany's actions fatally undermined the State's normativity, and catalysed international human rights.

In order to further appreciate the impact of the Holocaust, it will be instructive to turn to the experiences of those who survived these events. In his account from Mauthausen concentration camp and reflection of the hopelessness he encountered there, Joseph Drexel cites Dante's inscription upon hell's gates:

> Before entering a concentration camp, one does well to draw a line under the previous chapters of one's life…and to begin a new page, preferably with the words: *Lasziate* [sic] *ogni speranza* – Abandon all hope.[22]

With these words, Drexel incapsulates the desperate situation of those confined within the concentration camps, from which very few escaped during the war. A similar tone is struck by Nobel Prize laureate Elie Wiesel, who poignantly describes the moment at which those entering the Auschwitz concentration camp were separated into two groups:

> 'To the right'; 'To the left'…It was the difference between night and darkness, between…hope and despair. One moment later, and everything had changed: the victims were already in another universe…Two words marked the frontier: too late.[23]

Whether "abandon all hope" (Drexel), or the equally chilling "too late" (Wiesel), these accounts paint a stark picture of the deprivation and degradation experienced within the Nazi concentration camps, which forced their victims into a state of hopeless separation from the rest of humanity—reminiscent, perhaps, of a Dantean hell. It was arguably in response to this

[20] Council of Europe, *Collected Edition of the "Travaux Preparatoires" of the European Convention on Human Rights: Volume 2* (Nijhoff 1975), 36-38.
[21] Ibid 40.
[22] Joseph Drexel, *Reise nach Mauthausen* (DVA 1980), as translated in Andrea Reiter and Patrick Camiller, *Narrating the Holocaust* (Bloomsbury 2004), 183.
[23] Elie Wiesel, *The Six Days of Destruction: Meditations Toward Hope*, tr Albert H Friedlander (Paulist Press 2008), 45.

engineered damnation of particular groups that the post-war human rights movement conversely predicated itself upon the complete *inclusion* of all humanity.[24] In *Faith and the Future*, former Chief Rabbi Jonathan Sacks observed that "[t]here is such a thing as an ecology of hope. There are environments in which it flourishes and others in which it dies."[25] With reference to the Bastille and the Holocaust, this chapter has suggested that the ecology of hope and the ecology of rights are interconnected. The Bastille and the Holocaust both constituted sites of hopelessness, in which the indefinite confinement of human beings—ending, particularly in the case of the Holocaust, in death—prefigured new forms of hope in the "rights of man" (the Bastille) or "international human rights" (the Holocaust). Such an account provides a broad historical backdrop to the ECtHR's RtH.

iii. Hope comes to the ECtHR: *Vinter v. United Kingdom*

The RtH debuted at the ECtHR in *Vinter and Others v. United Kingdom* (2013). *Vinter*'s three applicants were serving mandatory life sentences for murder, and under Section 30(1) of the Crime (Sentences) Act 1997 would only be eligible for early release by the UK Secretary of State under "exceptional circumstances" on "compassionate grounds." It was successfully argued before the Court that such a penal regime violated Article 3's prohibition on "inhuman or degrading treatment or punishment."

The Grand Chamber held that although life sentences were not *per se* incompatible with Article 3, a violation would occur if sentences were *de facto* or *de jure* "irreducible".[26] This follows *Kafkaris v. Cyprus*, in which the Court held that "the imposition of an irreducible life sentence [i.e., one without any "prospect of release"]…may raise an issue under Article 3."[27] In *Kafkaris*, the possibility of executive clemency was found to be an acceptable "prospect of release". As commentators have noted, this "did not mandate a particularly high level of scrutiny…[i]t would seem that the Court was reluctant to find a breach of Article 3 so long as it could identify any potential avenue for release".[28] In *Vinter*, by contrast, the Court required a far more substantive standard of sentence reducibility, based upon three interconnected

[24] See Johannes Morsink, *The Universal Declaration of Human Rights and the Holocaust: An Endangered Connection* (Georgetown UP 2019), 283.
[25] Jonathan Sacks, *Faith in the Future* (Longman and Todd 1995), 150.
[26] *Vinter and others v UK* (2013) ECHR 645, paras 110-113.
[27] *Kafkaris v Cyprus* (2009) 49 EHRR 35, para 97-9.
[28] Lewis Graham, 'From Vinter to Hutchinson and Back Again? The Story of Life Imprisonment Cases in the European Court of Human Rights' (2018) 3 *EHRLR* 258.

considerations: firstly, the need to ensure (by way of review) that penal sentences remain grounded in legitimate and proportionate penal goals;[29] secondly, drawing upon Germany's domestic *Life Imprisonment* case (1977), the fact that life sentences without a "chance" of release are an indignity for human beings;[30] and thirdly, the importance of not precluding prisoners from being able to "atone" for what they have done.[31] From these, the Court held that there must be a realistic legal avenue by which prisoners can finish their punishment, and the path to this exit—that is, the conditions required for its use—must be *knowable* by the prisoner "at the outset of his sentence."[32] In her concurrence, Judge Ann Power-Forde surmised that the Court had gone "no further" than to say that "Article 3 encompasses what might be described as the 'the right to hope'."[33] Judge Power-Forde *does*, however, go further than this, proceeding to explain that:

> 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.[34]

Judge Power-Forde's framing of the RtH particularly recalls the Court's emphasis on prisoners retaining the possibility to "atone" for their offence. The concurrence also goes further, however, in providing an additional moral-anthropological underpinning for the Court's view. Hope is not simply an auxiliary facet or attribute human beings may possess; it is something integral to who they are. Judge Power-Forde suggests that to deny prisoners the experience of hope is to undermine or deny their "capacity to change" *qua* human beings, and thereby to deny something which is "fundamental" to their "humanity."

[29] *Vinter* (n 26) paras 111-13.
[30] Ibid, citing *Life Imprisonment case (lebenslange Freiheitsstrafe)*, 21 June 1977, 45 BVerfGE 187.
[31] *Vinter* (n 26) paras 112-113.
[32] Ibid para 122.
[33] Ibid Concurring Opinion of Judge Power-Forde.
[34] Ibid.

In *Graham v. Florida* (2010) the United States Supreme Court (USSC) ruled that sentences of "life without the possibility of parole" (LWPP) for juveniles convicted of non-homicidal crimes constituted "cruel and unusual" punishment, in violation of the U.S. Constitution's Eighth Amendment.[35] Although not cited or given explicit consideration in *Vinter*, the USSC's reasoning in *Graham* deserves mention here for two reasons: firstly, because of its invocation of hope as relevant to the constitutionality of life sentences; and secondly, because the proceedings in *Graham* mentions two concepts which would subsequently take centre stage in Judge Power-Forde's *Vinter* concurrence: the "capacity to change", and the RtH itself.

In the official Proceedings before the USSC in 2009, the lawyer for the plaintiffs in *Graham*, Mr. Gowdy, submitted that in contrast to LWPP, sentences of life *with* the possibility of parole afford "some hope to the adolescent" who, as a juvenile, "has an inherent capacity to change."[36] Shortly afterwards, Justice Kennedy asks Mr. Gowdy "[w]hy does a juvenile have a constitutional right to hope, but an adult does not?", to which Mr. Gowdy reiterates that what differentiates juveniles from adults is their "inherent capacity to change."[37] In his opinion for the USSC, Justice Kennedy subsequently returns to these themes of change and hope. He cites the earlier case of *Naovarath*, in which the Nevada Supreme Court had ruled that a sentence of life without parole:

> [M]eans denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.[38]

As this citation of *Naovarath* highlights, Justice Kennedy holds that juveniles are capable of moral or spiritual change, such as to make the impossibility of parole an inappropriate punishment. While the character of adults may be relatively fixed when they are convicted, juveniles retain an intrinsic plasticity to their nature. Justice Kennedy concludes that LWPP "gives no chance for fulfilment outside prison walls, no chance for reconciliation with society, no hope." [39]

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[35] *Graham v Florida*, 560 US 48 (2010).
[36] *Graham v Florida*, official transcript of Proceedings before the USSC, 9 November 2009, lines 11-12.
[37] Ibid lines 16-25.
[38] *Naovarath v State*, 105 Nev 525, 526, 779 P 2d 944 (1989).
[39] *Graham v Florida*, 560 US 48 (2010), at 2032.

Judge Power-Forde's concurrence in *Vinter* is analogous to the USSC's reasoning in *Graham*, but with two important distinctions: firstly, unlike Justice Kennedy, Judge Power-Forde asserts that human beings of *all* ages, *qua* human beings, retain an inherent "capacity to change"; secondly, whereas in *Graham* only life sentences without parole for non-homicidal offenses violated the Eighth Amendment, Judge Power-Forde (and the ECtHR) held that irreducible life sentences for *all* crimes violated Article 3. These may appear differences of degree, but it could be argued that they are actually differences in *kind*. While the judgment in *Graham* rests upon empirically verifiable claims about juveniles' plasticity relative to adults, Judge Power-Forde's concurrence concerns moral beliefs about human nature itself; in the RtH, questions of "fundamental humanity" are implicated.[40] Here again, the inescapably evaluative and interdisciplinary nature of the RtH deserves to be underlined.

In *Matiošaitis and Others v. Lithuania* (2017), the ECtHR subsequently reiterated Judge Power-Forde's justification of the RtH under Article 3 ECHR.[41] Prior to this, and just a year after the Grand Chamber's judgment in *Vinter*, the Court's Second Section concluded in *Öcalan v. Turkey (No.2)* (2014) that "[p]risons should not be like the gates of Hell, where the words of Dante come true…'Abandon all hope, ye who enter here'".[42] Despite this affirmation, however, the RtH has not been without its dissenters, with some speculating that it might be "too soon" to confer hope with legal status,[43] while others question whether—if hope *were* to be a procedural right under Article 3—this might in fact undermine prisoners' interests, by distorting the fundamentally subjective and experiential nature of their hopes.[44]

Much of the current ambiguity over hope's legal status further stems from the case such as *Hutchinson v. United Kingdom* (2017), in which the ECtHR's Grand Chamber held that the UK's penal framework no longer violated Article 3 of the ECHR.[45] The Court's judgment drew upon *R v. Newell; R v. McLoughlin* (2014), wherein the UK Court of Appeal held that, contrary to the Court in *Vinter*, life sentences under UK law were *not* "irreducible" in the

[40] *Vinter* (n 26) para 54.
[41] *Matiošaitis and Others v Lithuania*, App nos 22662/13 et al (ECtHR, 23 May 2017).
[42] *Öcalan v Turkey (No 2)* (2014) ECHR 286, para 24.
[43] Natasha Simonsen, 'Too Soon for the Right to Hope? Whole Life Sentences and the Strasbourg Court's Decision in Hutchinson v UK' (2015) *EJIL Talk*, available at https://www.ejiltalk.org/too-soon-for-the-right-to-hope-whole-life-sentences-and-the-strasbourg-courts-decision-in-hutchinson-v-uk/ (accessed 01/02/23).
[44] Marion Vannier, 'A Right to Hope? Life Imprisonment in France,' in D Van Zyl Smit and C Appleton (eds), *Life Imprisonment and Human Rights* (Hart 2019), 210.
[45] *Hutchinson v UK* (2017) ECHR 65.

manner prohibited by Article 3. Rather, the Court of Appeal held that the Secretary of State was able to consider all the circumstances "relevant" to a prisoner's early release on compassionate grounds, including his/her obligation to interpret Section 30(1) of the Crime (Sentences) Act 1997 in light of Article 3.[46] In *Hutchinson*, the ECtHR was satisfied that *McLoughlin* had "dispelled the lack of clarity identified in *Vinter*" concerning the scope and procedure of the Secretary of State's review power, and that therefore "the whole life sentence can now be regarded as reducible, in keeping with Article 3 of the Convention."[47]

The decision in *Hutchinson* is significant, not only because it has been regarded as a tacit reversal—or at the very least a "retreat"—of the Court's post-*Vinter* trajectory,[48] but also because it introduces an ambiguity in the Court's reasoning that has particular significance for the RtH. As noted above, the *Vinter* Court held that to comply with Article 3, prisoners' conditions for release should be substantive and clear, as well as knowable "from the outset" of their sentences. In *Hutchinson*, however, the Court did not explicitly affirm that persons must know the conditions for their future release. Rather, it seems to have been enough that these conditions objectively *existed* in the Secretary of State's obligation to consider Article 3. In other words, unlike in *Vinter*, it is not necessary under *Hutchison* for prisoners to be subjectively aware of the conditions—and therefore, to possess "hope"—of their future release.[49] This aspect of *Hutchinson*, which has been characterised as an outright contradiction of *Vinter,* or (perhaps more charitably) as an "oversight",[50] thereby casts doubt on the RtH's prospects. Hope may be a precondition for staying out of Dante's hell, but legally speaking it appears, post-*Hutchinson*, to be in a state of limbo.

Such ambiguity is arguably compounded by the fact that neither Judge Power-Forde in *Vinter*, nor the Court in *Matiošaitis*, provides much explicit detail on how the RtH is normatively constructed, or indeed what the value of its inclusion under the ECHR would be. In light of this, the remaining chapters of this dissertation will explore how the RtH might be normatively grounded and legally framed, together with possible critiques. Accordingly,

[46] *Regina v McLoughlin; Regina v Newell* [2014] EWCACrim 188.
[47] *Hutchinson* (n 45) paras 70-72.
[48] See Mark Pettigrew, 'A Vinter retreat in Europe: Returning to the issue of whole life sentences in Strasbourg' (2017) 8 *NJECL* 128; Andrew Beetham, 'Whole Life Orders and Article 3' (2017) 81 *JCL* 236.
[49] Indeed, it has been observed that *Hutchinson*'s applicant received his sentence before the 1998 UK Human Rights Act came into force, and therefore could not have been cognisant of any (future) Article 3 obligations the Secretary of State would have. See Graham (n 28) 263.
[50] See Daron Tan, 'Whole Life Orders in Hutchinson v UK: A Counter-Revolution, or Evolution to Vinter' (2017) 5 *LIJ* 143, 165.

Chapter 2 will investigate whether prisoners' hopelessness might be considered "degrading treatment" under Article 3, before proceeding, in Chapter 3, to consider Article 3's prohibition on "inhuman and degrading punishment". Given the scope of these topics, this dissertation does not purport to be exhaustive, but rather to offer a potential prolegomenon on the RtH's conceptual and legal dimensions. I will conclude by observing (based on the preceding discussion) how and why the RtH is best conceived.

Chapter 2: Hopelessness, Inhumanity and "Degrading Treatment"

One way in which the RtH might fit within Article 3's scope is insofar as depriving persons of their subjective sense or experience of hope through State incarceration constitutes "inhuman or degrading treatment." As noted in the previous chapter, Judge Power-Forde's *Vinter* concurrence claims that to deny someone the experience of hope is to deny a "fundamental aspect of their humanity."[51] In order to further substantiate this claim, this chapter will draw on an account of hope and its connection to human agency, personal identity and meaning. Despite the appeal of this account, it will also be noted that framing life sentences without hope of release as "inhuman or degrading treatment" faces substantial *prima facie* conceptual and legal critiques.

i. Life imprisonment and the (im)possibility of hope

As mentioned above, the RtH has not been without detractors, many of whom have raised important critiques. To begin with, the assumption that those facing life imprisonment do not retain a sense of subjective hope may be challenged. Writing in reference to the American legal context, Marie Gottschalk argues that those sentenced to LWPP do, in fact, exhibit optimism about their situations, and that, consequently, "denial of hope does not appear to be a fruitful way to challenge [life] sentences".[52] Drawing upon this work, Richard Lippke maintains that there is no necessary conceptual connection between life imprisonment and a psychological loss of hope.[53] Even if someone receives a life sentence with no apparent possibility of leaving prison, it does not follow that he *cannot* hope for future release. Indeed, according to Lippke, even a probabilistic claim that those sentenced to life imprisonment are *unlikely* to have hope is highly contestable.[54] If there is no necessary or probabilistic connection between serving a life sentence and losing hope, then this would seem to greatly undermine the alleged need for a "right" to hope.

[51] *Vinter* (n 26) Concurring Opinion of Judge Power-Forde.
[52] Marie Gottschalk, 'Sentenced to life: Penal reform and the most severe sanctions' (2013) 9 *Annual Review of Law and Social Science* 353, 358. See also Steve Herbert, *Too Easy to Keep: Life-Sentenced Prisoners and the Future of Mass Incarceration* (University of California Press 2019).
[53] Richard Lippke, 'Irreducible Life Sentences and Human Dignity: Some Neglected Issues' (2017) 17 *HRLRev* 383, 389-90.
[54] Ibid 390.

One response to this critique might be that although prisoners serving irreducible life sentences may express hope, and even consciously believe themselves to be hopeful, this does not constitute authentic hope. In *Prisoners, Solitude, and Time*, Ian O'Donnell thus writes that:

> Often these men and women continue to hope that they will again experience life outside the prison before they die. This is part self-delusion, part irrepressible optimism, and it remains inchoate; were it to have concrete plans attached it would serve as a seedbed for despair.[55]

The hope of prisoners who lack any objective prospect of being released, according to O'Donnell, necessarily remains abstract and nondescript, as were this apparent hope to be expressed concretely, it would instead become "a seedbed for despair." Although this usefully highlights a qualitative difference between authentic and inauthentic hopes, it might be argued that O'Donnell's primary focus upon conditions of solitary confinement might render his observations less applicable to other life prisoners. Another possible response takes a more nuanced approach. Rather than denying the authenticity of hopes entertained by those imprisoned for life, different *types* of hope behind bars may be distinguished. In 'Hope and the life sentence', Christopher Seeds draws a distinction between (shallow) "institutional" hopes orientated towards future opportunities, and "deep" or "transformative" hopes which concern personal moral, educational or spiritual reformation.[56] Those serving life sentences, Seeds observes, may possess, or lack, "institutional" hopes of release, without this necessarily bearing upon whether they have deeper "transformative" hopes.[57]

Seeds' typology of hopes here may be further illustrated by an (admittedly extreme) example from Viktor Frankl's well-known concentration camp account, *Man's Search for Meaning*. Speaking to colleagues in the camp, Frankl advises that "[t]hey must not lose hope", even amidst their objectively "hopelessness" situation.[58] Although this advice might at first seem paradoxical, Frankl's hope is not for external outcomes *per se*, but for self-transformation and change *despite* otherwise hopeless circumstances. Frankl goes on to write that "even the

[55] Ian O'Donnell, *Prisoners, Solitude, and Time* (OUP 2014), 201.
[56] Christopher Seeds, 'Hope and the life sentence' (2022) 62 *BritJCriminol* 234, 235-36.
[57] Ibid.
[58] Viktor E Frankl, *Man's Search for Meaning* (Beacon Street 1992), 90.

helpless victim of a hopeless situation, facing a fate he cannot change, may rise above himself, may grow beyond himself, and by so doing change himself."[59] This sentiment, one may suggest, captures the essence of Seeds' "transformative" hope.

If it was possible for those in Nazi concentration camps to retain this kind of "transformative" hope, an objector to the RtH might insist that *ipso facto* it is also retainable by those serving life imprisonment today. Seeds, however, draws a different conclusion. Just as different types of hope he identifies have different objects—release from prison (institutional hope) on the one hand, personal growth or transformation (transformative hope), on the other—so too the denial of these respective hopes corresponds to distinct affronts to human dignity. Seeds writes that:

> In other words, denying a possibility for release (and thereby an institutional hope) is one indignity; refusing to witness…self-reflective processes of re-narration and ethical selfhood (deep hope) is another.[60]

Seeds concludes from this that "[t]he indignity of the whole life sentence, then, is not only that prisoners lose hope, but that when they hope, the acts and accomplishments that result will not be considered or even known."[61] On this view, the RtH might be conceived as pursuant to prisoners' interests in their internal, psychological, and conscientious efforts of self-determination being externally *recognised* through a real "prospect of release." Locating the RtH in prisoners' "transformative" hopes coheres with Judge Power-Forde's conceptual connections between the RtH, human beings' inherent "capacity to change", and "atonement". The meaning and relevance of these concepts will be further explored in Chapter 3. For now, however, it suffices to note that Seeds' distinction between different kinds of prisoner hopes provides a possible answer to Gottschalk and Lippke's conceptual challenge.

[59] Ibid 147.
[60] Ibid.
[61] Seeds (n 56) 247.

ii. Hope, Goals and Self-determination

Judge Power-Forde's *Vinter* concurrence boldly states that hope is "fundamental" to a person's "humanity"—but how, exactly, might this claim be understood? One possible starting point might be Jonathan Lear's *Radical Hope*, which argues that hope is fundamental to human beings *qua* animals that have desires, at least some of which cannot be actualised because of human finitude. Due to this combination of wanting and limitation, hope is essential to how human beings psychologically and ethically navigate the world.[62] Similarly, according to the "hope theory" developed by C.R. Snyder, hope is intrinsic to conceptualising goals, developing "pathways" to achieve these goals, and sustaining the motivation required for this achievement.[63] Within the philosophy of hope, Snyder's theory has been supplemented by highlighting an interconnectedness between hope, self-determination, and agentic or goal-orientated behaviour.[64] In this way, it may be argued that, as William Lynch puts it, "[h]ope comes close to being the very heart and centre of a human being."[65]

From this standpoint, any punishment which deprives the individual of hope can therefore be expected to inflict serious psychological harm, as it implicates the individual's sense of self-determination and *modus operandi* within the world. In a semi-biographical work from his time in a Siberian prison, Fyodor Dostoyevsky poignantly makes this point: "[w]ithout some goal and some effort to reach it no man can live. When he has lost all hope, all object in life, man often becomes a monster in his misery."[66] Such an outlook is at least partially reflected in Germany's *Life Imprisonment* case, which was influential upon the Court's ruling in *Vinter*. In its ruling against life sentences in this case, the German court records expert testimony, as well as the research of jurist Moritz Liepmann, as evidencing that life imprisonment can cause *permanent* damage to an individual's personality and all facets of his mental life.[67] In this, it might be suggested that to deprive the life prisoner of hope is inherently "degrading", within the rubric of Article 3, because it clearly can be said to have an "adverse effect" on the prisoner's "personality."[68]

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[62] Jonathan Lear, *Radical Hope: Ethics in the Face of Cultural Devastation* (Harvard UP 2009), 121.
[63] CR Snyder, 'Hope Theory; Rainbows in the Mind' (2002) 13 *PI* 249.
[64] See generally JJ Godfrey, *A Philosophy of Human Hope* (Nijhoff, 1987); JM Waterworth, *A Philosophical Analysis of Hope* (Palgrave MacMillan 2004).
[65] William Lynch, *Images of Hope: Imagination as Healer of the Hopeless* (Notre Dame UP 1974), 31.
[66] Fyodor Dostoevsky, *House of the Dead and Poor Folk*, tr Constance Garnett (Barnes and Noble 2004), 257-58.
[67] *Life Imprisonment Case* (n 30), para 91.
[68] *Albert and Le Compte v Belgium*, App No 7299/75 (ECtHR, 10 February 1983), para 22.

Although at first appealing, this framing of the RtH faces a *prima facie* challenge that prisoners' degradations may result from contingent prison conditions, rather than the hopelessness of lifelong incarceration *per se*. In 'Irreducible Life Sentences and Human Dignity,' Lippke aptly summarises the central contention this current chapter has attempted to flesh-out: namely, that enduring irreducible life sentences (i.e., sentences without hope for release) "more or less inevitably wears offenders down, so that they become shells of their former selves….something other than the kinds of self-determining beings within moral constraints that is the ground of their dignity."[69] The suggestion Lippke goes on to make, however, is that such degradation could be sufficiently ameliorated through adequate and humane prison conditions, without the need for earlier-than-death release dates. Prison conditions could be enhanced, for instance, by providing meaningful opportunities for prisoners to exercise their own self-determination (within limits), thereby facilitating a sense of meaning, purpose, and moral agency within the confines of lifelong incarceration.[70] Consequently, it might be argued that the prisoner incarcerated on an irreducible life sentence need not become a "monster in his misery", *à la* Dostoyevsky, or that such a sentence will necessarily lead to any adverse effects on his personality such as to constitute "inhuman or degrading treatment" under Article 3.

iii. Article 3 Thresholds on "Degrading Treatment"

A related obstacle to this justification of the RtH as a subsidiary right of Article 3 concerns the legal threshold, or "boundary",[71] which must be reached for "degrading treatment" under Article 3 to be found. In *Vinter*'s sole dissenting opinion, Judge Mark Villiger bemoans that although the Court references "the 'standards' and 'requirements' of Article 3…nowhere in the judgement are these standards and requirements explained, analysed and applied."[72] In particular, Judge Villiger later notes, the Court "makes no reference as to whether the minimum severity of treatment has been attained" under Article 3.[73] A parallel critique might be levelled against the RtH invoked in Judge Power-Forde's concurrence. Two linked questions arise here: firstly, does the hopelessness of prisoners entail experiences

[69] Lippke (n 53) 392.
[70] Ibid 393.
[71] John Cooper, *Cruelty – An Analysis of Article 3* (Sweet & Maxwell 2003), 27.
[72] *Vinter* (n 26) Partly dissenting opinion of Judge Villiger.
[73] Ibid.

characteristic of those that would ordinarily be prohibited by Article 3; and, secondly, are these experiences (insofar as they do follow from hopelessness) of sufficient severity to cross the threshold necessary to engage Article 3?

Following *Ireland v. UK* (1978), the ECtHR considers treatment degrading where it evokes "feelings of fear, anguish and inferiority capable of humiliating and debasing [victims] and possibly breaking their physical or moral resistance".[74] As Elaine Webster points out,[75] while *Ireland* uses the conjunctive "and" in its list of subjective states which evidence degrading treatment ("anguish *and* inferiority", "humiliating *and* debasing"), the Court subsequently employs the disjunctive "*or*" instead.[76] As this prepositional change indicates, the Court does not require that all of the experiences noted in *Ireland* must be present to find that treatment violates Article 3, but it will ordinarily require at least *one* of them.[77] In addition, the Court in *Ireland* made clear that in order to fall within Article 3's scope, "ill-treatment must attain a minimum level of severity."[78] This standard, which John Cooper describes as a "boundary" between practices that violate Article 3 and those that do not,[79] excludes much treatment that might otherwise be considered immoral or psychologically detrimental; actions that are "discreditable and reprehensible",[80] or "distressing and humiliating",[81] for instance, do not necessarily satisfy Article 3's boundary-standard of requisite severity.

This Article 3 jurisprudence would seem to pose some *prima facie* legal difficulties for a RtH. Even if one assumes—contrary to Lippke and Gottschalk—that irreducible life sentences are likely to lead to the sentenced person being experientially deprived of hope, an objector might further ask: does this necessarily or conceptually entail an experience of anguish, inferiority, humiliation or debasement? As Waldron has observed, at the conceptual level, these experiences of degradation seem to be inherently relational: the victim is made to feel inferior, humiliated or debased *in relation to others*, such as prison authorities, who are responsible for the treatment.[82] Seen thus, degradation is not about the effect something has

[74] *Ireland v UK* (1978) 2 EHRR 25, para 167.
[75] Elaine Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights* (Routledge 2018), 25.
[76] See *Pretty v UK* (2002) ECHR 427, para 52; *Campbell and Cosans v UK* (1982) ECHR 1, para 28.
[77] Webster (n 75), 25.
[78] *Ireland* (n 74) para 162.
[79] John Cooper, *Cruelty – An Analysis of Article 3* (Sweet & Maxwell 2003), 27.
[80] *Ireland* (n 74) para 181.
[81] *Smith and Grady v UK* (1999) 29 EHRR 493, para 121.
[82] Waldron (n 3) 283.

per se, but about the way in which it makes someone feel *relative* to others. This, it would seem, sits uneasily with the RtH.

While initially promising, the Article 3 threshold of having an "adverse effect" on someone's "personality" (*Albert and Le Compte*) also appears, on closer inspection, unable to reliably support a RtH. Although the ECtHR's caselaw on this dimension of Article 3 is not extensive, it appears to suggest that a certain attitude or intention on the part of the perpetrator is necessary for adverse effects on personality to constitute degrading or inhuman treatment. In *Albert et Le Compte*, the question asked by the Court was whether the State's treatment *"aimed"* at "debasement" of an individual's personality (emphasis added).[83] Additionally, in the subsequent case of *Abdulaziz, Cabales and Balkandali v. UK*, the Court asked whether treatment showed "contempt" or "lack of respect" for the victim's personality.[84] While the absence of hope experienced by those serving life sentences without hope for release may have highly destructive effects on their personalities, it seems difficult to argue that the State's actions are "aimed" at this debasement, or expressive of "contempt" for, prisoner's personalities *per se*.

The extent of severity in the treatment required to meet Article 3's "personality" threshold might also be questioned, insofar as the Court has not previously considered the personality benchmark to have been met except in circumstances of extreme physical deprivation. In *Ireland v. UK*, for instance, the Court found that the UK government had violated Article 3 with its use of the "five techniques", which included extended periods of sensory and/or sleep deprivation, as well as deprivation of food and water. In consideration of these combined methods, the Court ruled that to "prevent the use of the senses, especially the eyes and the ears, directly affects the personality", in violation of Article 3.[85] In subsequent cases involving extended periods of solitary confinement, the ECtHR has ruled that "complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment".[86] Article 3's threshold of treatment having an "adverse effect" on the victim's personality was met in such cases, but notably on the grounds that applicants had been subjected to periods of *complete* isolation, and in physical

[83] *Albert et Le Compte* (1983) 5 EHRR 533, para 22.
[84] *Abdulaziz, Cabales and Balkandali v UK*, App nos 9214/80 et al (ECtHR, 28 May 1985), para 91.
[85] *Ireland* (n 74) para 13.
[86] *Onoufriou v Cyprus*, App no 24407/04 (ECtHR, 10 December 2009), para 69.

conditions which often included other severe physical hardships, such as the State providing just one meal a day.[87]

In summary then, while there may be good philosophical grounds for claiming (with Judge Power-Forde) that hope is a "constitutive" and "fundamental" aspect of human personhood, both conceptual and legal difficulties remain for connecting these grounds to a RtH under Article 3's prohibition on "inhuman or degrading treatment." In what follows, I will consider whether Article 3's prohibition on inhuman or degrading *punishment* might provide a more fruitful legal framework for this right.

[87] See ibid para 79.

Chapter 3: Hope, Punishment, and "Atonement"

The preceding chapter examined the RtH in relation to ECHR Article 3's prohibition on "inhuman or degrading treatment". This chapter turns to the related question of Article 3's prohibition on "inhuman or degrading" *punishment.* Although treatment and punishment are often considered together in Article 3 commentary and jurisprudence, Mavronicola points out that there are significant features which distinguish non-penal treatment from legal punishment, including the latter's pursuit of penal aims, its intrinsic connection to the State's institutional apparatus, and the *prima facie* legitimacy which punishment enjoys.[88] These differences between punishment and treatment have resulted in different kinds of analysis being applied to each. While Article 3's prohibitions confer an "absolute right" for both,[89] the Court's determination of whether something is degrading or inhuman *punishment* engages with "justificatory" questions, such as whether the State's measures are a proportionate pursuit of penal aims.[90]

The ECtHR has reiterated on several occasions that if a sentence is found to be "grossly disproportionate", this *ipso facto* entails "inhuman or degrading" treatment under Article 3.[91] In *Vinter*, however, the Court did not assess whether life sentences were grossly disproportionate. Since "the applicants have not sought to argue that their whole life orders are grossly disproportionate," the Court determined it would adjudicate whether life sentences were compatible with the ECHR "on other grounds": namely, the importance of including rehabilitation or atonement as goals of a penal sentence.[92] After first discussing a possible conceptual objection to hope in the context of punishment, this chapter will examine the invocation by the Court and Judge Power-Forde's *Vinter* concurrence of prisoner "atonement", before exploring how this piece of the RtH's conceptual puzzle interacts with concerns about retributive "just desert."

[88] Natasa Mavronicola, 'Crime, punishment and article 3 ECHR: puzzles and prospects of applying an absolute right in a penal context' (2015) 15 *HRLRev* 721.
[89] Mavronicola notes an apparent tension here between "absolute" and "justificatory" frameworks being simultaneously applied to Article 3; further exploration of this issue, however, unfortunately lies outside this dissertation's scope.
[90] Mavronicola (n 88).
[91] *Vinter* (n 26) para 83.
[92] Ibid para 103.

i. Punishment, Subjectivity, and the Psychological Ambiguity of Hope

As noted above, the Court's current jurisprudence does not consider whole-life sentences to be "grossly disproportionate". In *Vinter*, the Court stressed States' "margin of appreciation" on criminal justice measures, further noting that "issues relating to just and proportionate punishment are the subject of rational debate and civilised disagreement".[93] In this section, I will highlight two additional complications which attend life sentences without *hope* and questions of proportionality: namely, the psychologically ambiguous nature of hope, and the caution expressed by both theorists and the Court towards weighing individual subjectivity on penal proportionality's scales.

In many countries today, life imprisonment has assumed the mantle of most severe punishment following the death penalty's abolition. It is relevant to note, however, that when both punishments were on the same statute books, life imprisonment was considered by some to be the psychologically severer punishment. In a speech before the UK House of Commons on the Capital Punishment Within Prisons Bill (1868), John Stuart Mill contrasts "the short pang of a rapid death" with "immuring [criminals] in a living tomb…cut off from all earthly hope."[94] This view echoes criminologist and jurist Cesare Beccaria, who in *An Essay On Crime and Punishment* (1764) opines that even an apparently heavier punishment can be endured "if attended with the hopes of escaping; for hope, the best gift of Heaven, hath the power of dispelling the apprehension of a greater [punishment]."[95] Although arguing for opposite conclusions—Mill supports capital punishment, while Beccaria advocates its near-total abolition—for both theorists, the presence or absence of hope makes a qualitative difference to how penal severity is experienced.

In response to these perspectives, appeal might again be made to Lippke's observation that prisoners' experiences can be significantly enhanced through improvements inside a penitentiary's walls, without necessarily offering hope of going beyond them.[96] The conditions enjoyed by many life prisoners today may seem very different to the "living tomb" Mill describes. More significantly for our purposes here, however, is the psychological ambiguity of hope. Historically, hope has not always been viewed positively. In Hesiod's

[93] *Vinter* (n 26) para 105.
[94] HC Deb 21 April 1868, vol 191, col 1049.
[95] Cesare Beccaria, *An Essay On Crime and Punishment* (WC Little & Co 1872), 94.
[96] Lippke (n 53) 392.

Works of Days, for instance, hope (or, in some translations, expectation) is numbered amongst the curses within Pandora's box,[97] while in Boethius' *The Consolations of Philosophy*, Lady Philosophy cautions Boethius against hope, lest his mind become "shackled", "blind" and "lost".[98] Notably, Boethius' context here is one of imprisonment, awaiting execution. Together with Hesiod, the thrust of Boethius' warning is that, insofar as the events for which one hopes are unlikely to transpire, hope may in fact *compound* its possessor's suffering.

To an extent, this perspective may also be countered with reference to contemporary conditions. As previously noted, the post-*Vinter* Court has insisted on the *de jure* possibility and *de facto* prospect of actual release for prisoners.[99] In these circumstances, where the prospect of release is real and tangible, hope might be much less psychologically burdensome. This is arguably only a partial solution, however. For some prisoners, hope may still be phenomenologically unpleasant, despite—or perhaps even *because* of —its promise being objectively realisable. Speaking of inmates who might be continually denied release, Lippke thus speculates, "will not dangling the possibility of release before them…be cruel?...Hope, or continued hope, can be painful…Sometimes, finality is better."[100] While some may experience imprisonment without hope as a "living tomb", for others it may represent a sense of relief. For the latter prisoners, perhaps a right to be free *from* hope (or to closure) might even be preferable.

Hope, in other words, can be a blessing or a curse, depending on one's subjective state. An observation by John Milton (speaking on the "prison" of hell) seems apropos here: "[t]he mind is its own place, and in itself/Can make a heaven of hell, a hell of heaven."[101] Given hope's varying and contrastive psychological effects on individual minds, how can its significance for penal proportionality be evaluated? If hope would lessen punishment's severity for many prisoners, but conversely compound the suffering of others, positing a RtH from "gross" disproportionality would seem particularly difficult. This dilemma is particularly reinforced once it is recalled that since *Vinter*, the Court (admittedly, as Chapter

[97] Hesiod, *Hesiod's Works and Days*, tr David W Tandy and Walter C Neale (University of California Press 1996), 63.
[98] Boethius, *The Consolations of Philosophy*, tr HR James (Elliot Stock 1897), 39.
[99] *Vinter* (n 26) paras 110-113.
[100] Lippke (n 53), 391.
[101] John Milton, *Milton: Paradise Lost*, ed Alastair Fowler (Routledge 2006), 76.

1 noted, with some ambiguity post-*Hutchinson*) has held that the possibility and conditions for prisoners' release (i.e., their hope) must be subjectively knowable to them from the "outset" of their sentences.[102] If hope represents a blessing to the defendant, then the *Vinter* Court's requirement will accentuate his relief; if however hope represents a burden, then this *too* will be accentuated. How, then can hope's effect on penal proportionality be objectively ascertained?

The question of proportionality is further complicated by debate amongst legal theorists over how sentence severity should be measured. Some argue that this measurement should be at least partly subjective, as different defendants are liable to experience the same sentence differently.[103] Against this, however, a strong objection is that subjective measurements would result in unfair sentencing outcomes. Kenneth Simmons, for instance, argues that using subjective metrics for penal proportionality would mean that "Sensitive should be punished less than the typical offender, while Insensitive should be punished more."[104] While deliberating on the issue of corporeal punishment in *Campbell and Cosans v. UK*, the Court makes a strikingly similar point, noting that an "incontrovertibly degrading" act may "have no significant effect" on an "insensitive person", while "an exceptionally sensitive person" might conversely be "deeply affected" by an action that is "degrading only by a distortion of the ordinary and usual meaning of the word."[105] Consequently, individual subjectivities—and hence, the positive or negative effects of individual *hopes*—should not be determinative for whether "inhuman or degrading treatment or punishment" has taken place.

Applied to the present discussion, it might therefore be argued that the RtH is greatly weakened, both by hope's psychologically ambiguous nature, and by subjectivity's lack of weight for the question of whether punishment is "inhuman or degrading" under Article 3. Fortunately, the Court in *Vinter* provides an alternative avenue: the need to ensure that, to remain justifiable on "legitimate penological grounds" over time, punishment must not exclude the possibility of prisoners' rehabilitation or atonement.[106] This dimension of the RtH will now be explored further.

[102] *Vinter* (n 26) para 122.
[103] For instance, Adam J Kolber, 'The subjective experience of punishment' [2009] *CLR* 182.
[104] Kenneth W Simmons, 'Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment' (2009) 109 *CLRSidebar* 1.
[105] *Campbell and Cosans* (n 76), para 30.
[106] Ibid paras 111 and 119.

ii. Hope, Atonement, and "Capacity to Change"

The RtH inaugurated in *Vinter* is often framed as a RtH for *release* from prison. In Judge Power-Forde's concurrence, however, the RtH is perhaps more accurately construed as a RtH for *atonement,* facilitated through the possibility of release. As briefly alluded to in Chapter 2, this aligns with Christopher Seeds' conception of "transformative" (rather than merely "institutional") hope. The prisoner's hope is not primarily of being outside prison—which could hypothetically be actualised while still a criminal, by escaping—but in re-joining society as someone who has "atoned" for his criminality.

Before looking in greater detail at Judge Power-Forde's concept of atonement and its connection to human beings' inherent "capacity to change", it is instructive to note the Court's antecedent use of atonement in *Vinter*, as well as where this language is drawn from. Just as the RtH was first invoked by the ECtHR in *Vinter,* so too the Court draws here for the first time on prisoners being able to "atone" for what they have done. Atonement is linked to (although not necessarily identical with) the end of punishment: a sentence without the possibility of review is one where, "however exceptional his progress towards rehabilitation", the prisoner's punishment is unchangeably fixed to cover his life, thereby ensuring that it is impossible for him to "atone for his offence."[107] Additionally, the Court goes on to note that:

> If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in *Wellington* – a poor guarantee of just and proportionate punishment.[108]

As this aside reveals, the genealogy of the Court's atonement language is traceable to Lord Justice John Laws' opinion in the UK High Court case of *Wellington* (2007), which the Court earlier cites at length.[109] In the relevant passage of *Wellington*, Justice Laws begins by comparing life imprisonment to the death penalty: both punishments, Justice Laws writes,

[107] *Vinter* (n 26) para 112.
[108] Ibid.
[109] Ibid para 54.

render it impossible for prisoners to "atone."[110] Justice Laws goes on to elaborate that life imprisonment denies prisoners the possibility of an "amendment of life" because its punishment extends to, and covers, their "last breath."[111] Due to the indeterminacy of how much time will elapse between prisoners' sentencing and their final breaths, moreover, life sentences carry a danger of disproportionality or arbitrariness: the length—and therefore severity—of any given life sentence depends upon the unknown and contingent variable of how long a particular prisoner will live.[112]

Justice Laws' conceptualisation of atonement is carried forward in *Vinter*, although the significance which the Court attaches to atonement is arguably subtly different. To illustrate this, the Court's "paraphrase" of Lord Justice Laws is worth noting again. In *Wellington*, Justice Laws opines that even if a whole-life sentence is appropriate at sentencing, over time it becomes a "poor guarantee of proportionate punishment."[113] In its nearly identical "paraphrase" of this dictum, the *Vinter* Court says that irreducible life sentences are liable to become "a poor guarantee of *just and* proportionate punishment" (emphasis added). The addition of the word "just" could be said to represent the Court's very subtle shift, from Justice Laws' concern that any given life sentence is arbitrary or disproportionate in its severity, to the Court's emphasis in *Vinter* that due to the absence of rehabilitation or atonement, whole-life sentences over time unjustly lack a legitimate penological purpose.

In her concurrence, Judge Power-Forde follows the Court's perspective by affirming that "[l]ong and deserved though their prison sentences may be" those serving life sentences should "retain the right to hope that, someday, they may have atoned for the wrongs which they have committed."[114] Unlike the Court, however, Judge Power-Forde precedes this statement with an anthropological justification for her view, which stresses that inherent in every human being is a "capacity to change" which is part of their "fundamental humanity."[115] As to what this "capacity to change" represents and how it connects with the RtH's object of "atonement", further insight can be gleaned from a keynote address which Judge Power-Forde gave at the International Centre for Law and Religion Studies' 2018

[110] *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72, para 39.
[111] Ibid.
[112] Ibid.
[113] Ibid; For similar arguments by a legal commentator, see Spano (n 5).
[114] *Vinter* (n 26) Concurring Opinion of Judge Power-Forde.
[115] Ibid.

Annual Symposium on religious freedom and human dignity.[116] In her address, Judge Power-Forde recalls that prior to writing her concurrence for the *Vinter* case, a particular scene from the film *The Shawshank Redemption* played heavily on her mind. In the scene that Judge Power-Forde quotes, the convict (Ellis Boyd "Red" Redding) pushes back against his parole board's definition of "rehabilitation" as simply being "ready to re-join society", and proceeds to answer their question of whether he has been "rehabilitated" by saying that:

> There's not a day goes by I don't feel regret…I look back on the way I was then, a young, stupid kid who committed that terrible crime. I wanna talk to him…But I can't. That kid's long gone and this old man is all that's left. I gotta live with that.[117]

This scene, Judge Power-Forde reports, "brought home" to her that all human beings—even the "hardest of hearts"—possess an inherent "capacity to change."[118] From this, the ability of persons to "atone" is not simply an ability to "re-join society" (the definition of Redding's parole board), but to do so having knowingly become, in a sense, a different person from the one who committed the crime. As O'Loughlin argues, *Vinter* likewise represents what Linda Radzik calls a "moral transformation" model of atonement,[119] which emphasises people's abilities to change their moral personality.[120] O'Loughlin makes a distinction between "risk reduction" and "redemption" models of rehabilitation which is relevant here: while the former understands rehabilitation in terms of minimising offenders' future likelihood of risk to society, rehabilitation as "redemption" aims at offenders' personal, moral and relational betterment. It is the latter model, O'Loughlin argues, which we find in the *Vinter* Court's judgement.[121] On the basis of Judge Power-Forde's concurrence—which speaks of an inherent human "capacity" to change, rather than a likelihood or proclivity of any individual to change—as well as her subsequent remarks in 2018, it is also this paradigm of redemptive rehabilitation or atonement which undergirds the RtH.

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[116] See Ann Power-Forde, 'Human Dignity in Difficult Times: Our Shared Imprint in a Fractured Family', ICLRS Symposium, October 7, 2018, audio recording available at: https://classic.iclrs.org/event.php/2018+Annual+Symposium/Presentations/English (accessed 01/02/23).
[117] Ibid.
[118] Ibid.
[119] See Linda Radzik, *Making Amends: Atonement in Morality, Law, and Politics* (OUP 2009), 55-74.
[120] O'Loughlin (n 11) 527-28.
[121] Ibid 532.

iii. Considerations from Retributive Punishment

At this point, a cluster of objections may be raised to prisoners' atonement that are based upon a perceived tension with retributive punishment. Some of these objections are briefly alluded to by the Court in *Vinter*,[122] but will now be considered in greater detail.

a. Does Atonement "miss the point" of Retribution?

A preliminary objection which supporters of the RtH must address is that atonement is simply not relevant to the retributive aims of life imprisonment. In his dissenting opinion in *Wellington*, Lord Scott remarks that the Court's invocation of "atonement or redemption" in the context of punishment "seem to me to miss the point of the sentence."[123] Lord Scott casts the prisoner's atonement, or "redemption", as "a matter between him and his Maker" which is irrelevant to whether Article 3 requires the prospect of a reduced penal sentence.[124] Atonement, on this view, is simply immaterial to whether a practice or measure constitutes a legitimate punishment. Lord Scott's association of "atonement" with a vertical process of "redemption" between the prisoner and "his Maker" suggests that, for him, the concept of atonement primarily belongs to the domain of personal spirituality or religion, rather than the (horizontal) socio-political and legal domain of retributive punishment.

One may take issue here with Lord Scott's framing of atonement. As described above, the Court's understanding of atonement (as well as that of Justice Law in *Wellington*) is fundamentally social and relational in nature. In her recent article on the RtH, Sarah Trotter highlights this relational aspect further, by arguing that the Court's concept of "atonement" implies that the human self is conceived as a self-in-relation-to-others, whose RtH consists, at least partly, in a right for one's "capacity to change" to be recognised by others.[125] In this context, atonement is not primarily a matter between the prisoner and "his Maker"; instead, it is a socio-political process between him and society. This may arguably be conceded, however, without necessarily addressing an adjacent objection, which is that the "just desert" of a prison sentence and the social "redemption" of a prisoner's atonement represent two

[122] See *Vinter* (n 26) para 57.
[123] *Wellington* (n 110) para 46.
[124] Ibid.
[125] Sarah Trotter, 'Hope's Relations: A Theory of the "Right to Hope" in European Human Rights Law' (2022) 22 *HRLRev* 1, 2.

fundamentally different orientations and goals: akin, perhaps, to two separate, non-overlapping spheres on the same Venn diagram. From retribution's standpoint, it might still be argued that atonement does indeed "miss the point."

One initial response to this is that "the point" of a penal sentence may shift its emphasis over time. As the Court notes in *Vinter*, "the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence."[126] With regards to the background of this stance, it will be recalled that the *Vinter* Court drew upon the German domestic *Life Imprisonment* case, which in turn drew on the principles of the German "Basic Law." In her insightful comparison of German and non-German sentencing regimes, Liora Lazarus notes how German jurisprudence and scholarship displays particular nuance in distinguishing between different stages of a prisoner's punishment, with a shift in penal purpose occurring at each stage.[127] One might therefore answer Lord Scott that even if retributive punishment and atonement belong to different and non-overlapping spheres, the prominence of these spheres is not a fixed constellation. The sphere of retributive punishment diminishes over the course of an individual's sentence, while atonement or rehabilitation conversely grows more prominent.

As a standalone reply, however, this perhaps too readily concedes that retributive punishment and atonement are exclusive paradigms. Instead, it might be argued that atonement has a place within the internal logic of retributive sentencing regimes. To begin with, it is observable that in many jurisdictions, a criminal's genuine repentance is considered relevant to his sentencing—that is, to what he retributively "deserves." In his writing on repentance, John Tasioulas argues that this follows from a view that crime alienates perpetrators from the rest of society.[128] Put simply, a criminal who expresses no regret for what he has done is demonstrably more alienated from society—and so deserves greater punishment—than one who is repentant. As Stephen Garvey notes, however, retribution without atonement is backward-looking in its temporal orientation; its focus is solely upon the crime that was committed and/or the criminal's culpability during its commission. Consequently, retributive punishment *per se* would seem to have "a hard time accounting for the law's well-established

[126] *Vinter* (n 26) para 111.
[127] Liora Lazarus, 'Conceptions of liberty deprivation' (2006) 69 *MLR* 738. For another argument that retributive "desert" should be understood as dynamic rather than static, see Netanel Dagan and Julian V Roberts, 'Retributivism, Penal Censure, and Life Imprisonment without Parole,' *CJE* 38 (2019) 1.
[128] See John Tasioulas, 'Repentance and the liberal state' (2006) 4 *OSJCRL* 487, 493.

'discount' for repentance."[129] This contrasts with atonement which, due in part to its forward-looking orientation, at least possesses the capacity to acknowledge the normative import of a criminal's post-crime repentance. From this, one might broadly argue that insofar as crime entails alienation between the criminal and society, a retributive punishment which seeks to address this crime-induced alienation must include at least the possibility of atonement.[130]

This issue might additionally be approached by reconsidering the nature of retributive punishment. A useful interlocutor here is Avishai Margalit. In *The Decent Society,* Margalit asks how it is possible for punishment, *qua* punishment, to be nonhumiliating. The dilemma here is that while to respect human dignity is to ensure that criminals are not humiliated,[131] there is an intrinsic relationship between punishment, suffering, and the communication of judgment or "social dishonour"; without these elements, imprisonment would not be *punishment*.[132] Given this, how can punishment communicate social dishonour, without *also* resulting in personal "humiliation"?[133] Margalit's puzzle here aligns with the task in Article 3 rulings of discerning the fault-line between features which are inherent to retributive punishment, and those which are "inhuman or degrading". In *Tyrer v. United Kingdom*, the Court confirmed that for Article 3 to be engaged, the "humiliation or debasement" must be "other than the usual element" inherent in judicial punishment.[134] When should punishment be judged to have crossed the line from its "usual element," to humiliating treatment? For Margalit, the answer hinges upon whether punishment communicates "respect" for individuals as human beings, and a central way in which this is done is through affirming human beings' inherent "capacity to change."[135] Margalit writes that:

> Even the worst criminals are worthy of basic human respect because of the possibility that they may radically re-evaluate their past lives. . .Respecting people preserves the idea that their future is open, and that they can change their lives for the better.[136]

[129] Stephen P Garvey, 'Punishment as Atonement' (1999) 46 *UCLALRev* 1801, 1824.
[130] See Christopher Bennett, 'The Varieties of Retributive Experience' (2002) 52 *PhilQ* 145.
[131] Avishai Margalit, *The Decent Society* (Harvard UP 1996), 262.
[132] Ibid 266-67.
[133] Ibid 269.
[134] *Tyrer v UK* (1978) 2 EHRR 1, para 30.
[135] Margalit (n 131) 75.
[136] Ibid 70-72.

Just as punishment *qua* punishment involves some aspect of suffering and social censure, so too, Margalit argues that punishment requires communicating respect to those being punished through a recognition of their capacity for moral change. This resonates with John Vorhaus's perspective on degrading treatment and punishment under Article 3.[137] Vorhaus argues that degradation constitutes a "symbolic dignitary harm", by which he means that punishment is degrading when it communicates a certain message. Life imprisonment without hope thus amounts to "inferiorizing treatment that is a feature of degrading punishment", because the message it sends to criminals is that they—unlike *other* human beings—lack the capacity for moral change and improvement: "there is no hope for you…to atone for your crime."[138] Such framings provide another response to the objection that the RtH in atonement "misses the point" of retributive punishment. If punishment is to communicate the value of human beings within society, then it must also communicate this value with respect to those being punished.[139] From this perspective, retributive punishment without consideration for atonement would miss its own point.

b. Does Atonement neglect *Society's* "right to hope"?

Even if the prisoner's RtH in atonement does not necessarily "miss the point" of retributive punishment, an auxiliary objection is that it nevertheless neglects, or minimises, society's interests in criminals receiving due punishment by remaining permanently behind bars. In his dissent in *T.P. and A.T.*, Judge Kūris opines at length about the insufficient attention which he believes the Court has paid to "[t]hat 'other' hope…the hope of society, including those of its members on whom the perpetrators inflicted unspeakable suffering and whose lives they made (yes!) *hopeless*".[140] On Judge Kūris' view, consideration of this "other" hope leads to a less asymmetrical focus on the prisoner's RtH, by ensuring that the ECtHR balance this apparent right with the interests, expectations, and hopes of the offender's victims and society in general. He further chides that "[f]or some reason, the Court does not speak of *their* crushed hopes in terms of a 'human right'".[141] The following year, in his concurrence in

[137] John Vorhaus, 'Bringing People Down: Degrading Treatment and Punishment' (2021) 24 *NCLR* 433.
[138] Ibid 461-62.
[139] See also Emma Dore-Horgan, 'Do Criminal Offenders Have a Right to Neurorehabilitation?' [2022] *CLPH* 1, 11.
[140] *TP and AT* (n 10) para 22 (emphasis original).
[141] Ibid (emphasis original).

Matiošaitis, Judge Kūris, (while now conceding that the Court's jurisprudence was more settled), again returned to this point:

> [T]he State – let it not be forgotten – also represents the victims of the crimes of life prisoners, including those whose lives were deprived of *any hope* when their dear ones were murdered by those who claim their 'right to hope'…What about some balancing of these two hopes?[142]

Does a RtH centred upon atonement minimise or neglect the "hopes" of those within society in retributive punishment? In response to this critique, two related arguments may be made. Firstly, it may be argued that atonement, far from side-lining crime's victims, in fact considers them as important to the criminal justice process in a way which purely retributive punishment does not. In *Making Amends*, Radzik notes that despite the intuitive appeal of retributive reciprocity—just as they made others suffer, so now *they* will suffer—retribution in fact possesses a significant blind-spot: in focussing upon punishing crime's *perpetrators*, retribution (at least as practiced in many countries today) actually neglects any meaningful post-crime role for the *victims*.[143] The important aspect of punishment, for advocates of retributivism, is that the criminal receives his "just desert" from the State; for this desert to be served, however, victims need not be anywhere near the table.

A second, complementary argument to this is made by Garvey in his work on "atonement as punishment."[144] In his defence of atonement and its centrality to punishment, Garvey invites his reader to consider what each of the traditional aims of state punishment, such as deterrence and retribution, implies about the nature of civic society if pursued without atonement in view. Deterrence, Garvey observes, "best suits a society of strangers, not a community of citizens," while retribution, similarly, "cares little about reconstituting communal bonds."[145] Only the goal of atonement, Garvey argues, attends to the healing of relational harm within society. It may therefore be argued that far from neglecting the interests and rights of society, only atonement represents a concern for civic "society" at all.

[142] *Matiošaitis* (n 41) Dissenting Opinion of Judge Kūris, para 19 (emphasis original).
[143] Radzik (n 119) 39.
[144] Garvey (n 129).
[145] Ibid 1830.

In response to this, a stronger society-based objection against the RtH in atonement might be advanced. Rather than focussing on retributive punishment in general, this critique focuses on crimes which are of such gravity that, from society's perspective, considerations of atonement are eclipsed. Social atonement is not unilateral, but necessarily involves an element of consent from societal stakeholders in the process. In certain extreme cases, however, it may be argued that no such consent can be expected. A position adjacent to this was represented by the UK government's submission in *Vinter* that some crimes were "so grave that they were deserving of lifelong incarceration for the purposes of pure punishment."[146] The Court did not adopt this perspective, instead (as noted above) holding that rehabilitation or atonement must be present as a penal purpose, and paraphrasing Justice Laws' dictum in *Wellington* that whole-life orders are liable to become a "poor guarantee of proportionate punishment" over time.[147] Directly following this remark, however, Justice Laws himself qualifies, "*unless, of course, the death penalty's logic applies: the crime is so heinous it can never be atoned for*."[148] Perhaps, it might be held, some crimes are too heinous for atonement, and therefore void any *hope* for atonement.[149]

The perspective that some crimes are "so heinous" they "can never be atoned for" is connected by Justice Laws to "the death penalty's logic." To better perceive this logic, it will be useful to turn to those who (unlike Justice Laws) endorsed capital punishment. Just as Chapter 1 of this dissertation drew upon the hopelessness of the Nazi concentration camps as precipitating the advent of the international human rights law, it seems relevant here to return to this context. In *Eichmann in Jerusalem*, Hannah Arendt describes the post-war trial of Otto Adolf Eichmann, a lieutenant colonel in the Nazi SS and a central figure in facilitating the Holocaust. Following his trial in Jerusalem, Eichmann was found guilty of war crimes and put to death. In her 'Epilogue', Arendt explains why Eichmann's death sentence was necessary. Speaking as if addressing Eichmann himself, Arendt writes that:

> [J]ust as you supported and carried out a policy of not wanting to share the earth with the Jewish people…no member of the human race…can be expected to want to share the earth with you. This is the reason…you must hang.[150]

[146] *Vinter* (n 26) para 92.
[147] *Wellington* (n 110) para 39.
[148] Ibid (emphasis added).
[149] See also Lippke (n 53) 396.
[150] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Faber & Faber 1963), 255–56.

The unwillingness of anyone to "share the earth" with Eichmann is presented by Arendt as a normative reaction by human society ("you *must* hang"). While we need not follow Arendt in supporting capital punishment, an analogous argument could be made for permanent exclusion from society through irreducible life sentences. Parsed in terms of the present discussion, those who commit paradigmatically heinous crimes, through their own actions and culpability, render atonement with society impossible. In such a situation, the criminal's RtH would arguably be society's despair.

At this point, the discussion seems to reach an *aporia*. Lippke observes that in response to horrendous offenses, "[a]t best, opponents of [irreducible life] sentences might be able to force a stalemate of sorts…concerning how the worst crimes should be punished".[151] While one side might insist that no criminal loses their RtH, the other could conversely insist that the most egregious crimes override this right, due to what is punitively "deserved." The result is a standoff between two sets of conflicting moral intuitions. One might suggest, however, that the impasse here is wider than Lippke anticipates; a *third* position maintains that "punishment" is an incorrect category. Arendt herself occasionally represents this view, writing that insofar as certain acts are beyond forgiveness, they are also beyond punishment.[152] Similarly, Antony Duff argues that perpetrators of atrocities are not, *stricto sensu*, punishable.[153] For punishment to be "a morally appropriate response to criminal wrongdoing…it must address the person punished as a fellow member of a normative community."[154] To say, with Arendt, that criminals such as Eichmann have normatively excluded themselves from human society is therefore also to say that they are inappropriate recipients of punishment. A conceptual relationship between atonement and retributive punishment is here again evident: where the former is ruled out, so too is the latter. Recognising individuals' RtH, "long and deserved though their sentences may be" (in Judge Power-Forde's words), conversely preserves both.

[151] Lippke (n 53) 397.
[152] Hannah Arendt, *The Human Condition* (University of Chicago Press 1998), 241.
[153] Antony Duff, 'Can we punish the perpetrators of atrocities,' in Thomas Brudholm and Thomas Cushman (eds), *The Religious in Responses to Mass Atrocity: Interdisciplinary Perspectives* (CUP 2009), 79-104.
[154] Ibid 80.

Concluding Reflections: Why a Right to *Hope*?

Chapter 1 of this dissertation ended by surmising that the RtH, as first posited by Judge Power-Forde in *Vinter*, might currently reside in a state of conceptual and legal limbo. Following the discussion of chapters 2–3, is this still a fair characterisation? In some ways, it may appear so. As Chapter 2 noted, although hope may—as Judge Power-Forde holds—be a "constitutive aspect of the human person," it is difficult to see how its absence necessarily translates to "inhuman or degrading treatment" under Article 3. In a similar vein, Chapter 3 began by noting how the subjective nature of hope significantly problematises the issue of whether a prisoner's hopelessness could constitute "gross" disproportionality, contrary to Article 3's prohibition on inhuman or degrading "punishment." In spite of these critiques, however, the RtH does seem to have a robust grounding *qua* RtH in *atonement*. This was examined in Chapter 3, along with the contours of its conceptual apparatus in human beings' inherent "capacity to change". In conceptualising the RtH, therefore, the *object* of this hope matters. When the RtH is conceived as a prisoner's RtH in atonement and grounded in human beings' "capacity to change", it yields a much more conceptually and legally robust foundation than hope merely for a future beyond institutional walls. In the former, then, there remains hope for the RtH.

A further final question arises here, however: is a right to *hope* for atonement necessary? Indeed, given atonement's robustness, and hope's subjectivity (as highlighted in Chapter 3), would it not be better to posit (without reference to hope) a right to atonement?[155] Why continue to attend to the RtH? Although a more extensive answer to this question remains the remit for a larger project, I submit that a right to hope for atonement avoids some significant difficulties that a right to atonement potentially faces. To begin with, as a state of moral transformation or redemption in relation to society, one may argue that atonement cannot be a right *per se*, as there cannot reasonably be a *duty* upon the State to bring such a moral-relational transformation about. Furthermore, even if such a duty were to be executable by State authorities, this would risk intruding into prisoners' freedom of thought or conscience. Radzik thus notes that in instituting a penal policy and using institutional resources for individuals' redemptive atonement, the State exerts its monopoly of force to affect a change

[155] For a scholar suggesting a "right to atonement", see Tasioulas (n 128) 314.

in offenders' internal dispositions, beliefs, or psychological-moral conditions, thereby risking "a gross overstepping…into the realm of private conscience."[156]

Recently, this danger of State intrusion into "the realm of private conscience" has conceivably become even more acute, due to an emerging potential for "moral enhancement" and neuro-rehabilitation technologies. In particular, Elizabeth Shaw highlights how the State's use of these technologies may implicitly *deny* offenders' moral agency and (independent) "capacity to change",[157] upon which redemptive rehabilitation (as well as the Court's post-*Vinter* RtH) is normatively predicated. Although a right to atonement might at first affirm respect for human beings' capacities for moral and conscientious change, therefore, there are significant concerns that this affirmation would not survive the right's implementation as a duty by the State.

While seemingly less straightforward, the right to *hope* for atonement may, by contrast, evade the abovementioned difficulties, by virtue of hope centring upon a subjective sense of *possibility*.[158] In this, the RtH in atonement is conceivably more modest than a right to atonement *simpliciter*. In order to fulfil its duty to guarantee the RtH, the State must ensure that it does not render the prisoner's atonement impossible (i.e., through imposing a irreducible prison sentence), but its duty does not necessarily extend much further than this, as would foreseeably be the case in a "right to atonement." More positively, the RtH can be construed as entailing an assurance to those convicted that imprisonment's punishment is not lacking in a sense of possibility for atonement, and that an anti-Dantean inscription would not, therefore, be out of place above prison's gates: "retain hope, all those who enter here."

[156] Radzik (n 119) 162.
[157] Elizabeth Shaw, 'Neuroscience, Criminal Sentencing, and Human Rights' (2021) 63 *WMLR* 1409, 1437.
[158] See Trotter (n 125).

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