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Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context

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ABSTRACT

Article 3 of the European Convention on Human Rights (ECHR), which provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment', is considered to enshrine an absolute right. Yet it contains an under-explored element: inhuman and degrading *punishment*. While torture has been the subject of extensive academic commentary, and inhuman and degrading treatment has been examined to some extent, the prohibition of inhuman and degrading punishment has not been explored in significant depth, in spite of its considerable potential to alter the penal landscape.

This paper elucidates the key doctrinal elements of inhuman and degrading punishment 'and treatment associated with it', in the words of the European Court of Human Rights (ECtHR). It addresses a number of 'puzzles' or problems which arise in applying the absolute right enshrined in Article 3 of the ECHR to sentencing and imprisonment, clarifies ECtHR doctrine and highlights some of its key implications. Bringing a theoretically informed understanding to bear on the application of Article 3 of the ECHR in a penal context, the paper provides clarity and coherence to a complex and crucial intersection between human rights and penology.

KEYWORDS: Article 3 European Convention on Human Rights, inhuman and degrading treatment, inhuman and degrading punishment, dignity, penology, penal theory, *Vinter v UK*

INTRODUCTION

Article 3 of the European Convention on Human Rights ('ECHR')[1] provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment' and is considered to enshrine an absolute right: one that is not displaceable through consequentialist considerations.[2] The right's interpretation is thus the beginning and end of its delimitation – and sets a line between lawful and unlawful State behaviour. The significance of this interpretation cannot, therefore, be overstated. As this paper highlights, the ramifications of applying Article 3 in a particular context can be extensive.

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[1] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, ETS 5.

[2] See Mavronicola, 'What is an "absolute right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12(4) *Human Rights Law Review* 723. See, however, Addo and Grief, 'Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?' (1998) 9 *European Journal of International Law* 510.

In examining the parameters of Article 3 ECHR, commentators often subsume punishment within treatment;[3] but this can elide the particular conceptual issues which arise in relation to punishment, 'or treatment associated with it',[4] as aggregated in the words of the European Court of Human Rights ('ECtHR' or 'the Court'). Although principles applicable to inhuman and degrading treatment are largely applicable to inhuman and degrading *punishment*, there are nuanced variables which apply only in relation to punishment. Unfortunately, while torture has been the subject of extensive academic commentary and inhuman and degrading treatment has been explored academically to some degree, the prohibition of inhuman and degrading punishment and 'treatment associated with [punishment]' has not been examined sufficiently.[5] This has arisen, in part, due to the ECtHR's own lack of transparent taxonomisation;[6] yet the analysis below highlights that the ECtHR frequently employs special principles and reasoning methods in the context of punishment and treatment associated with it, which carry both significant implications and challenges for those seeking to understand Article 3 and apply it in a penal context.

After an outline of the principles underpinning Article 3 ECHR and its interpretation by the ECtHR, this paper illustrates the significance of inhuman and degrading punishment 'or treatment associated with it' as a distinct element of Article 3 ECHR. Addressing a number of 'puzzles' or problems which arise in applying the absolute right enshrined in Article 3 of the ECHR to sentencing and imprisonment, this paper elucidates ECtHR doctrine and highlights some of its key implications, bringing a theoretically informed understanding to bear on the application of Article 3 of the ECHR in a penal context. Penological perspectives are weaved into the substance of the legal principles emerging from key cases, notably the recent judgment of the Grand Chamber of the ECtHR in *Vinter v UK*.[7] The paper aims to bring clarity and coherence to this complex and crucial intersection between human rights and penology.

ARTICLE 3: ABSOLUTE NATURE AND SUBSTANTIVE SCOPE

Article 3's absolute nature and its implications

[3] See, for instance, White and Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 5th edn (2010) at 174; Erdal and Bakirci, *Article 3 of the European Convention on Human Rights: A Practitioner's Handbook* (2006) at chapter 10.

[4] *A v United Kingdom* Application No 3455/05, Merits and Just Satisfaction, 19 February 2009, at para 127. See also, among others, *Ramirez Sanchez v France* Application No 59450/00, Merits and Just Satisfaction, 4 July 2006, at para 119; *Kulikowski v Poland (No 2)* Application No 16831/07, Merits and Just Satisfaction, 9 October 2012, at para 61.

[5] Note, however, the extensive coverage of the protection Article 3 affords to prisoners in Cooper, *Cruelty – an analysis of Article 3* (2003) at chapters 4 and 7. Note also some of the coverage in Van Zyl Smit and Snacken, *Principles of European Prison Law and Policy* (2009).

[6] This is noted in Harris et al., *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights*, 2nd edn (2009) at 91, citing *Keenan v United Kingdom* Application No 27229/95, Merits and Just Satisfaction, 3 April 2001, of which see the finding at para 115.

[7] *Vinter and others v United Kingdom* Application Nos 66069/09, 130/10 and 3896/10, Merits and Just Satisfaction (Grand Chamber), 9 July 2013 (*Vinter* [GC]). See the case analysis in Mavronicola, 'Inhuman and Degrading Punishment, Dignity, and the Limits of Retribution' (2014) 77(2) *Modern Law Review* 292; and see the account and suggestions provided in Van Zyl Smit, Weatherby, and Creighton, 'Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?' (2014) 14(1) *Human Rights Law Review* 59. See, however, the UK government's reaction: Watt and Travis, 'Tory ministers condemn ECHR ruling on whole-life prison sentences', *Guardian*, 9 July 2013.

Article 3 of the ECHR has been described – often emphatically – as an 'absolute right' by the ECtHR,[8] consistently and over a significant length of time,[9] resulting in a rich body of case law dealing with Article 3's application in a range of situations.[10] Its absolute nature has often played a decisive role in addressing the issues arising in cases before the ECtHR.[11] Indeed, Mowbray recently referred to it as 'the most absolute right guaranteed by the Convention'.[12] Although suggesting that the absolute character of Article 3 ECHR is a matter of degree is in my view inapposite, this description reflects just how consistently the ECtHR has affirmed Article 3's absolute nature.

The absolute character of Article 3 ECHR forms the topic of analysis in my article titled 'What is an "absolute right"?',[13] which sets up a theoretical framework addressing two parameters of investigation: applicability and specification. The applicability parameter relates to whether and when a standard can be lawfully displaced; the specification parameter explores the way the standard characterised as absolute is 'specified', that is, concretised and delimited.[14] Looking at the applicability parameter, I suggest that the key structural implication of the absolute nature of a right is that the obligations it encompasses cannot be lawfully displaced by consequentialist concerns. This could be described as the essence of what it means for a right to be absolute. The absolute nature of Article 3 ECHR is broken down into the following three elements:
(1) Article 3 makes no provision for lawful exceptions; in contrast to other Articles within the ECHR, it cannot be infringed insofar as 'necessary in a democratic society' in pursuit of a legitimate aim.
(2) Article 15 of the ECHR, which governs the derogation from obligations under the ECHR in exceptional circumstances, does not allow for any derogation from Article 3.
(3) Protection from torture and inhuman or degrading treatment or punishment applies irrespective of the victim's conduct; thus, whether the victim or potential victim is an innocent child or a cold-blooded murderer, they enjoy the protection of Article 3 alike.[15]

These three elements highlight the significance of specification, which determines the *substantive* scope of the right. I suggest that the specification of Article 3 must remain faithful to the values underpinning it, while not amounting to implicit displacement of the right. On this account, Article 3 must be interpreted according to what it is meant to

[8] The wording used by the Court varies, with the oft-repeated statement being that '[t]he Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment' (*Ireland v United Kingdom* Application No 5310/71, Merits and Just Satisfaction, 18 January 1978, at para 163). The Court also refers to 'the absolute character of Article 3' (*Chahal v United Kingdom* Application No 22414/93, Merits and Just Satisfaction, 15 November 1996, at para 96) and to Article 3 as an 'absolute right' (*Al-Adsani v United Kingdom* Application No 35763/97, Merits, 21 November 2001, at para 59).
[9] The first finding of a breach of Article 3 by the Strasbourg Court was in 1978, in *Ireland v United Kingdom*, ibid.; but see also the Commission Report in *The Greek Case* (*Denmark, Norway, Sweden and the Netherlands v Greece)* Application Nos 3321/6, 3322/67, 3323/67 and 3344/67, Commission Report, 5 November 1969.
[10] This includes over 1458 findings of substantive violation of Article 3 by 2013, based on ECtHR Report on Violations by Article and by respondent State (1959-2013), at <http://www.echr.coe.int/Documents/Stats_violation_1959_2013_ENG.pdf > (last accessed 16 January 2015).
[11] See, for instance, *Chahal*, supra n 8.
[12] Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10(2) *Human Rights Law Review* 289, 307. Cf Battjes, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of *Refoulement* under Article 3 ECHR Reassessed' (2009) 22(3) *Leiden Journal of International Law* 583.
[13] Mavronicola, 'What is an "absolute right"?', supra n 2.
[14] Ibid. at 729.
[15] These are taken from Mavronicola, ibid. at 737 (citations omitted), citing – *inter alia* – *Chahal*, supra n 8.

safeguard.[16] The centrality of dignity as a value underpinning Article 3 has emerged repeatedly in many key judgments of the ECtHR, not least those involving the specification of inhuman and degrading *punishment*.[17] Some key implications of this are examined below.

Article 3's threshold(s)

The threshold which separates torture from other types of proscribed ill-treatment falling within the scope of Article 3 ECHR understandably attracts significant interest[18] and, in certain contexts, may carry special implications.[19] Nonetheless, it is the threshold between what amounts to inhuman or degrading treatment or punishment and what does *not* (and is thus outside the scope of Article 3 ECHR) which is key to drawing the line of conclusively unlawful treatment or punishment under Article 3 ECHR: this is, effectively, the Article 3 threshold.

Underpinning the Article 3 threshold is a statement originally found in *Ireland v UK*: 'ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3'.[20] The Court has asserted that '[t]he assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim…',[21] as well as the 'nature and context of the treatment'.[22]

Inhuman treatment has been described as '"ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering',[23] while degrading treatment has been described as treatment which 'humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'.[24]

Some academic commentary suggests that 'degrading' treatment (or punishment) represents the lowest level of ill-treatment caught by Article 3.[25] This view is not explicitly reflected in the case law of the ECtHR. Rather, the distinction between *inhuman* and *degrading* treatment (or punishment) is primarily qualitative. The terms 'inhuman' and 'degrading' encompass acts with distinct qualities, with potentially distinct effects on the victim, captured in the differing tests just outlined. Though the term 'inhuman' is linked primarily to the infliction of

[16] For an account of this method of interpretation, see generally Dworkin, *Law's Empire* (1986).
[17] See, for instance, *Keenan*, supra n 6 at para 112; *Selmouni v France* Application No 25803/94, Merits and Just Satisfaction, 28 July 1999, at para 99; *Rahimi v Greece* Application No 8687/08, Merits and Just Satisfaction, 5 April 2011, at para 60; and, recently on punishment, *Kafkaris v Cyprus* Application No 21906, Merits and Just Satisfaction, 12 February 2008, para 96; *Vinter* [GC], supra n 7 at para 113.
[18] See, for instance, Ze'ev Bekerman, 'Torture—The Absolute Prohibition of a Relative Term: Does Everyone Know What Is in Room 101?' (2005) 53 *American Journal of Comparative Law* 743.
[19] In *Gäfgen v Germany* Application No 22978/05, Merits and Just Satisfaction, 1 June 2010, the Grand Chamber of the ECtHR suggested that real evidence obtained by torture can never be used against someone in criminal proceedings without violating Article 6 ECHR, whilst the use of real evidence obtained by other Article 3 treatment *may* entail violation of Article 6 ECHR: see *Gäfgen* at para 167.
[20] *Ireland v United Kingdom*, supra n 8 at para 162.
[21] Ibid.
[22] *A v United Kingdom* Application No 25599/94, Merits and Just Satisfaction, 23 September 1998, at para 20.
[23] *Pretty v United Kingdom* Application No 2346/02, Merits, 29 April 2002, at para 52.
[24] Ibid.
[25] See Vorhaus, 'On Degradation. Part One: Article 3 of the European Convention on Human Rights' (2002) 31(4) *Common Law World Review* 374 at 375. See also Arai-Yokoi, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR' (2003) 21 *Netherlands Quarterly of Human Rights* 385 at 420-421.

suffering, the term 'degrading' can capture subjection to something whose severity stems from the humiliation or debasement caused.[26] The test of 'minimum level of severity' set up in *Ireland v UK* is overarching in the specification of 'inhuman' and of 'degrading' treatment.[27]

Though there are predictability concerns with the overarching 'minimum level of severity' test,[28] one method for elucidating it is identifying types of treatment which have resulted in a finding of inhuman or degrading treatment and to identify treatment that appears to lie at the very boundaries of Article 3. This method is followed, implicitly or explicitly, in a number of textbooks,[29] while practitioners' books and guides have emerged which set out the vast variety of circumstances in which breaches of Article 3 have been found.[30] Instances in which the threshold has been found to be crossed include, among many, unnecessary or excessive physical force used by police against protesters (inhuman and degrading treatment);[31] prolonged discriminatory practices (degrading treatment);[32] and the subjection of a disabled person to standard imprisonment (degrading treatment).[33]

INHUMAN AND DEGRADING PUNISHMENT: A DISTINCT FACET OF ARTICLE 3 ECHR

Punishment raises complications in the interpretation of Article 3 which can be missed in a more generic analysis, especially one which subsumes punishment within treatment. These must be addressed in order to confront fundamental questions on how the determination of what is Article 3-(in)compatible punishment relates to the absolute character of Article 3 ECHR – particularly, whether it can undermine the absolute character of Article 3.

In my view a number of elements distinguish *punishment* from treatment in a theoretically and doctrinally significant manner:

1) its punitive character: although the point is tautological, it is significant that punishment is not a neutral term in the same way that treatment is. It carries the implication of a penalty for particular behaviour and entails that someone is being subjected to something undesirable or unpleasant in response to a behaviour perceived as unacceptable.[34]

[26] This is highlighted by Vorhaus, ibid. at 395.
[27] *Campbell and Cosans v United Kingdom* Application Nos 7511/76 and 7743/76, Merits, 25 February 1982, at para 28; see also *Costello-Roberts v United Kingdom* Application No 13134/87, Merits and Just Satisfaction, 25 March 1993, paras 30-32; *Raninen v Finland* Application No 20972/92, Merits and Just Satisfaction, 16 December 1997, at para 50.
[28] See the criticism in Mavronicola, 'What is an "absolute right"?', supra n 2 at 742-752.
[29] See, for instance, *Harris, O'Boyle and Warbrick*, supra n 6 at chapter 3.
[30] See, in particular, Erdal and Bakirci, supra n 3; Cooper, supra n 5.
[31] *Güler and Öngel v Turkey* Application Nos 29612/05 and 30668/05, Merits and Just Satisfaction, 4 October 2011.
[32] *Cyprus v Turkey* Application No 25781/94, Merits, 10 May 2001.
[33] *Price v United Kingdom* Application No 33394/96, Merits and Just Satisfaction, 10 July 2001. See also instances outlined in the analysis below.
[34] See, generally, the nuanced account in Duff, *Punishment, Communication, and Community* (2001). Interestingly, the ECtHR uses the term 'punishment' (rather than retribution) in its outline of the four penological grounds on which imprisonment may legitimately be based: 'punishment, deterrence, rehabilitation

2) its institutional nature: punishment entails a treatment meted out by State institutions in an institutional setting.[35]

3) its pre-conceived legitimacy: the distinct category of 'punishment', encompassing as it does retributive and institutional qualities, does not only carry the implication of a penalty vis-à-vis a particular action, but one which is *prima facie* legitimately punitive – that is, legitimately undesirable or unpleasant and inflicted in response to behaviour deemed to be unacceptable.

These characteristics can impact not only on what quintessentially falls under the label 'punishment', but also on what the ECtHR describes as 'treatment associated with it'.[36] A vast array of actions and situations may be caught within these terms, including sentencing and conditions of imprisonment or acts or omissions pertaining to those in custody.

These three characteristics carry significant implications for the way the prohibition on inhuman and degrading punishment is interpreted. What degree of unpleasantness involved in punishment – and incarceration in particular – is legitimate, falling short of inhumanity or degradation? And how does the notion of acceptable or deserved suffering interact with the *absolute* prohibition on treating individuals in an inhuman or degrading manner? The two central puzzles which arise in applying the absolute right enshrined in Article 3 ECHR in a penal context can be labelled *the legitimacy loop* and *the justification/absoluteness puzzle*.

THE LEGITIMACY LOOP

The pre-conceived legitimacy characterising 'punishment' emerges forcefully in the ECtHR's doctrine on the subject. Given Article 3's absolute character, it would seem that in dealing with the question whether a particular punishment crosses the Article 3 threshold, the Court must determine what is proscribed by Article 3, and is thus conclusively *illegitimate*, and what is not. Yet the Court evokes legitimacy as a criterion on the basis of which a punishment is *not* to be found inhuman or degrading: 'In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must go *beyond* that inevitable element of suffering or humiliation *connected with a given form of legitimate treatment or punishment*'.[37] The Court thus propounds a circular test, through which what is conclusively illegitimate is to be delimited by considering whether it goes beyond what is legitimate.[38] The quantitative aspect of the test ('must go beyond') is indelibly tied to the question of what amounts to 'a given form of legitimate treatment or punishment'.[39] The latter question requires investigation.

The Court's concrete approach in contexts other than imprisonment transpires from cases such as *Chember*[40] and *Tyrer*.[41] *Chember* concerned the imposition of military discipline on

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and protection of the public' – see *Vinter* [GC], supra n 7 at para 40. Note the wider critical discourse on punishment, traced in Simon and Sparks, 'Punishment and Society: The Emergence of an Academic Field' in Simon and Sparks (eds), *The SAGE Handbook of Punishment and Society* (2013) at 1-20.

[35] See the 'five rules of punishment': Scott, *Penology* (2008) at 18.

[36] See supra n 4.

[37] *A v United Kingdom* (2009), supra n 4 at para 127 (emphasis added).

[38] Consider also Article 1 of the UNCAT, which provides that torture 'does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'. This issue is discussed in Wouters, 'Editorial: How Absolute is the Prohibition on Torture?' (2006) 8(1) *European Journal of Migration and Law* 1 at 2-3.

[39] *A v United Kingdom* (2009), supra n 4 at para 127.

[40] *Chember v Russia* Application No 7188/03, Merits and Just Satisfaction, 3 July 2008.

[41] *Tyrer v United Kingdom* Application No 5856/72, Merits, 25 April 1978.

the applicant, consisting of performing a number of knee bends, in the knowledge of the applicant's severe knee-related health problems, bringing the applicant to the point of physical collapse. Although strenuous physical exercise was recognised as a *prima facie* legitimate element of military discipline,[42] the Court also emphasised that 'the State has a duty to ensure that a person performs military service in conditions which are compatible with respect for his human dignity'.[43] In light of the circumstances of the applicant and the knowledge of the officials imposing the penalty, it was found by the Court to constitute inhuman punishment contrary to Article 3.[44] This highlights that the particular circumstances of an individual may, in exacerbating the suffering or debasement caused to him or her, render a 'given' form of 'legitimate' treatment or punishment (here within the military context) inhuman or degrading.

On the other hand, the sheer institutionalisation of violence was central to the Court's finding of degrading punishment in *Tyrer*. The element of pre-conceived legitimacy was absent in the reasoning of the Court.[45] Rather, the Court highlighted that State-sanctioned physical punishment is intrinsically degrading.[46] *Tyrer* exposes the dehumanising character of violence as punishment.[47]

The imposition of imprisonment, aspects of imprisonment, and measures related to imprisonment, constitute the most prominent field of application of the ECtHR's principles on punishment 'or treatment associated with it'. Imprisonment raises a number of complications with respect to the legitimacy 'loop'. Returning to the idea of 'legitimate treatment or punishment', would compatibility with the requirements of Article 5 ECHR, which governs the right to liberty, render incarceration 'legitimate'? The Court's doctrine indicates that the suffering and humiliation associated with Article 5-compatible institutional incarceration can *prima facie* be taken to constitute a 'given form of legitimate treatment or punishment'.[48] This emerges from the Court's approach to detention:

> The Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. In accordance with Article 3 of the Convention the State must ensure that a person is detained under conditions which are compatible with respect for his human dignity and that the manner and method of the execution of the measure do not subject him to *distress or hardship exceeding the unavoidable level of suffering inherent in detention*...[49]

Thus a key question arises: what is 'the unavoidable level of suffering *inherent* in detention'? This raises penological issues of considerable significance and controversy, which the Court

[42] *Chember*, supra n 40 at para 52.
[43] Ibid. at para 50.
[44] Ibid. at paras 48-57.
[45] White and Ovey, supra n 3 at 175.
[46] *Tyrer*, supra n 41 at paras 33-35. See also *Artyomov v Russia* Application No 14146/02, Merits and Just Satisfaction, 27 May 2010, at para 169; *Jabari v Turkey* Application No 40035/98, Merits, 11 July 2000.
[47] In the face of *Tyrer* and much subsequent case law, however, see the current plans for corporal punishment in the UK: Travis, 'Grayling gives green light for staff to use force against inmates in new jail', *Guardian*, 16 October 2014.
[48] This does not mean that Article 5-incompatible incarceration will necessarily also be contrary to Article 3.
[49] *Kafkaris*, supra n 17 at para 96 (emphasis added). See also *Ramirez Sanchez*, supra n 4 at para 119.

has not addressed holistically. Nonetheless, key elements of the Court's approach can be discerned through a theoretically informed reading of the case law.

One strand of conceptual analysis which addresses a related question through the lens of liberty is Lazarus' thesis regarding 'residual liberty'.[50] On this theory, the prisoner's legal position must rest on a 'divisible conception of liberty', which distinguishes clearly between the liberty lost and restriction of rights which is inherent to the imposition of the custodial sentence on the one hand, and the further requirements of prison administration on the other hand.[51] This is based on the premise that the only rights-compatible approach to imprisonment is one which rejects the outdated idea of 'forfeiture' of rights.[52]

Adapting Lazarus' analysis towards addressing the question of what constitutes unavoidable suffering or humiliation inherent in detention, it can be said that whilst a degree of suffering inevitably stems from the deprivation of liberty, which is the essence of incarceration,[53] other elements above and beyond the deprivation of liberty may operate to cause additional distress or hardship. It is through such 'extra' distress and/or hardship that the Article 3 threshold may be reached.

Elements which may exacerbate the suffering or humiliation experienced in detention so as to cross the Article 3 threshold may simply comprise actions of State agents taken in the context of detention. To begin with, violent treatment of detainees, including physical, sexual and mental abuse, is clearly *not* inherent in detention and is likely to cross the Article 3 threshold.[54] Similarly, invasions of bodily integrity which occur in a way disrespectful to dignity are also likely to reach the Article 3 threshold.[55]

Factors relating to the individual may also exacerbate the suffering inherent in detention, for instance the individual's state of health, age, or other circumstances.[56] In *Farbtuhs*,[57] the Court concluded that the detention of a disabled seventy-nine-year-old applicant breached Article 3 on account of his age, infirmity and state of health.[58] The Court has recognised that 'detention *per se* inevitably affects prisoners suffering from serious disorders'.[59] In *Mouisel*, the Court found on the facts of the case at issue that, after a certain point, the continued

[50] Lazarus, 'Conceptions of Liberty Deprivation' (2006) 69(5) *Modern Law Review* 738.
[51] Ibid. at 740-743.
[52] The idea that imprisonment involves rights-forfeiture has been emphatically rejected by the ECtHR in *Golder v United Kingdom* Application No 4451/70, Merits and Just Satisfaction, 21 July 1975 and *Hirst v United Kingdom (No 2)* Application No 74025/01, Merits and Just Satisfaction, 6 October 2005. For a critical assessment of the forfeiture argument, see Lippke, 'Criminal Offenders and Right Forfeiture' (2001) 32(1) *Journal of Social Philosophy* 78.
[53] The suffering involved is deemed acceptable (though not by all) in accordance with the goal(s) of imprisonment; see the analysis in Duff and Garland, *A Reader on Punishment* (1994) at 2-6. Note, however, the critical stance in Mathiesen, *Prison on Trial* (3rd edn, Waterside Press 2006); Irwin and Owen, 'Harm and the contemporary prison' in Liebling and Maruna (eds), *The Effects of Imprisonment* (2005) at 94.
[54] See, for instance, *Selmouni*, supra n 17.
[55] For a discussion on the acceptable uses of physical force against individuals vis-à-vis Article 3 ECHR, see Mavronicola, '*Güler and Öngel v Turkey*: Article 3 of the European Convention on Human Rights and Strasbourg's discourse on the justified use of force' (2013) 76(2) *Modern Law Review* 370; and Smet, 'The "absolute" prohibition of torture and inhuman or degrading treatment in Article 3: truly a question of scope only?' in Brems and Gerards (eds), *Shaping Rights in the ECHR - The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2014) at 272.
[56] See the variables outlined in text to n 22.
[57] *Farbtuhs v Latvia* Application No 4672/02, Merits and Just Satisfaction, 2 December 2004.
[58] *Farbtuhs*, ibid. at para 61.
[59] *Yermolenko v Ukraine* Application No 49218/10, Merits and Just Satisfaction, 15 November 2012, at para 59.

detention of a cancer sufferer 'undermined his dignity and entailed particularly acute hardship that caused suffering beyond that inevitably associated with a prison sentence and treatment for cancer', and thus that his continued detention was inhuman and degrading.[60]

A similar assessment takes place in relation to disability,[61] which lay at the heart of the issue in *Price*,[62] where a thalidomide victim's incarceration without special facilities was found to amount to degrading treatment. In *Zarzycki*, the Court affirmed that '[w]here the authorities decide to place and maintain in detention a person with disabilities, they should demonstrate special care in guaranteeing such conditions as correspond to his special needs resulting from his disability'.[63]

Addressing predictability concerns to some extent, the Court has given guidance on the factors it examines in determining whether the detention of an individual may be incompatible with Article 3 in light of the individual's state of health: '(a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention and (c) the advisability of maintaining the detention measure in view of the state of health of the applicant'.[64] Cases in which the state of health of an individual has rendered the particular (usually standard) form of detention incompatible with Article 3 abound.[65]

The above examples provide some guidance regarding how the Court determines the compatibility of detention with Article 3 in light of all relevant circumstances, notably factors impacting on the dignity of the detainee in the sense of fundamental respect for his or her sense of integrity, but also his or her physical and mental well-being.[66] What emerges is that 'standard' detention can exceed the suffering *inherent* in detention and reach the Article 3 threshold on account of the detainee's particular circumstances. This entails that the State must ensure that detainees who face significant vulnerability in a prison setting are either not subject to detention, or that their detention is adapted in numerous and context-specific ways to ensure that their dignity is respected.[67]

Beyond problems specific to individual detainees, the Court has frequently found a violation of Article 3 on account of a lack of personal space afforded to detainees,[68] with the

[60] *Mouisel v France* Application No 67263/01, Merits and Just Satisfaction, 14 November 2002, at para 48.
[61] See *Grori v Albania* Application No 25336/04, Merits and Just Satisfaction, 7 July 2009, at para 126.
[62] *Price*, supra n 33 at para 33.
[63] *Zarzycki v Poland* Application No 15351/03, Merits and Just Satisfaction, 12 March 2013, at para 102.
[64] *Kulikowski*, supra n 4 at para 64, citing *Mouisel*, ibid. at paras 40-42.
[65] See, among many examples, *Barilo v Ukraine* Application No 9607/06, Merits and Just Satisfaction, 16 May 2013, at paras 78-84; *Khudobin v Russia* Application No 59696/00, Merits and Just Satisfaction, 26 October 2006, at paras 90-97; *Raffray Taddei v France* Application No 36435/07, Merits and Just Satisfaction, 21 December 2010, at paras 52-63.
[66] Further guidance can be found in Council of Europe, *Factsheet: Detention conditions and treatment of prisoners* (2013), at <http://www.echr.coe.int/Documents/FS_Detention_conditions_ENG.pdf> (last accessed 16 January 2015); and Council of Europe, *Factsheet: Prisoners' health rights* (2013), available at <http://www.echr.coe.int/Documents/FS_Prisoners_health_ENG.pdf> (last accessed 16 January 2015). See, further, Foster, 'Prison Conditions and Human Rights: the development of judicial protection of prisoners' rights' [2009] 1 Web JCLI, at <http://www.bailii.org/uk/other/journals/WebJCLI/2009/issue1/foster1.html> (last accessed 16 January 2015).
[67] The interplay between dignity, vulnerability and health is highlighted in Bedford, 'MS v United Kingdom: Article 3 ECHR, Detention and Mental Health' (2013) *European Human Rights Law Review* 72, analysis of the notable case of *MS v United Kingdom* Application No 24527/08, Merits and Just Satisfaction, 3 May 2012.
[68] See, among many, *Generalov v Russia* Application No 24325/03, Merits and Just Satisfaction, 9 July 2009, at para 103; *Khudoyorov v Russia* Application No 6847/02, Merits and Just Satisfaction, 8 November 2005, at paras 105-109; *Labzov v Russia* Application No 62208/00, Merits and Just Satisfaction, 16 June 2005, at paras

recognition on some occasions that these problems are of a 'structural nature'.[69] Other elements which are not considered 'inherent' in detention and may breach Article 3 ECHR include conditions such as those exemplified in *Peers v Greece*, where 'for at least two months, the applicant had to spend a considerable part of each 24-hour period practically confined to his bed in a cell with no ventilation and no window which would at times become unbearably hot' and 'had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cellmate'.[70]

In addition, the Court has often paid close attention to restrictive detention regimes imposed on applicants. It has indicated that '[i]n assessing whether a restrictive regime may amount to treatment contrary to Article 3 in a given case, regard must be had to the particular conditions, the stringency of the regime, its duration, the objective pursued and its effects on the person concerned'.[71] The legitimacy loop is less prominent here: instead of attributing a pre-conceived legitimacy to certain prison regimes such as solitary confinement, the Court is inherently sceptical of these – hence necessitating justificatory reasoning from Government. The issue is addressed under the *justification/absoluteness puzzle* below.

Lastly, the Court has asserted that 'when assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant'.[72] The Court in *Ahmad* used the context-specific nature of the analysis which occurs in the interpretation and application of Article 3's terms to suggest that it renders prospective judgment on, in this case, the likely incarceration of the applicants in supermax security prisons after extradition, unreliable.[73] There is force to the argument that the Court's specification of Article 3's threshold tends to be of an individualised, *ex post facto* nature.[74] However, erring on the side of caution should rather be called for in prospective assessments, in light of the absolute bar on certain forms of ill-treatment which Article 3 enshrines.[75]

Erring on the side of caution is apposite not only in relation to deportation or extradition, but also in the formulation of prison policy and in prison management and oversight. In light of the growing body of case law on inhuman and degrading punishment (or treatment associated with it), States subject to the ECHR – and States which wish to maintain effective extradition

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44-49; *Novoselov v Russia* Application No 66460/01, Merits and Just Satisfaction, 2 June 2005, at paras 41-46; *Mayzit v Russia* Application No 63378/00, Merits and Just Satisfaction, 20 January 2005, at paras 39-43; *Kalashnikov v Russia* Application No 47095/99, Merits and Just Satisfaction, 15 July 2002, at paras 97-103.

[69] *Generalov*, ibid. at para 103.

[70] *Peers v Greece* Application No 28524/95, Merits and Just Satisfaction, 19 April 2001, at para 75.

[71] *Gavazov v Bulgaria* Application No 54659/00, Merits and Just Satisfaction, 6 March 2008, at para 104, citing *Kehayov v Bulgaria* Application No 41035/98, Merits and Just Satisfaction, 18 January 2005 at para 65, and *Iovchev v Bulgaria* Application No 41211/98, Merits and Just Satisfaction, 2 February 2006, at para 128.

[72] *Ramirez Sanchez*, supra n 4 at para 119.

[73] *Ahmad v United Kingdom* Application Nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Merits and Just Satisfaction, 10 April 2012, at para 178; see the criticism of this judgment in Mavronicola and Messineo, 'Relatively Absolute? The Undermining of Article 3 ECHR in *Ahmad v UK*' (2013) 76(3) *Modern Law Review* 589.

[74] Mavronicola, 'What is an "absolute right"?', supra n 2 at 742-752.

[75] Such caution was shown in *Aswat v United Kingdom* Application No 17299/12, Merits and Just Satisfaction, 16 April 2013, at paras 52-57.

processes with States subject to the ECHR[76] – must ensure that their prison practices adopt Article 3-compatible standards.[77]

As the analysis above highlights, the legitimacy loop can be addressed through unpacking the Court's punishment-specific doctrine. The ECtHR's doctrine indicates that whilst lawfully ordained imprisonment and the attendant suffering it entails may be seen as *prima facie* legitimate, a number of factors may augment the severity involved so that imprisonment in the particular circumstances crosses the Article 3 threshold. These factors broadly reflect the variables cited by the Court in its test regarding the Article 3 threshold of severity.[78] Similar approaches pertain to other punishment, such as military discipline. On the other hand, institutional corporal punishment does *not* enter the legitimacy loop as it is not seen as *prima facie* legitimate. Moreover, as elaborated below, some treatment associated with punishment may be seen as *prima facie* suspect, triggering justificatory reasoning.

THE JUSTIFICATION/ABSOLUTENESS PUZZLE

The justification/absoluteness puzzle refers to the ECtHR's use of justificatory reasoning in determining what amounts to inhuman or degrading punishment. Justificatory reasoning arises because certain actions, including the imposition of a custodial sentence itself or a restrictive security measure within prison, may not be inhuman or degrading insofar as they remain strictly tied to appropriate grounds on which such measures can be taken without undermining the dignity of the individual subjected to them. On the other hand, if such action exceeds or otherwise fails to correspond to such justificatory premises, it may amount to an attack on human dignity which falls foul of Article 3.

The two chief conceptual challenges arising from the use of justificatory reasoning are: first, that justificatory reasoning may appear equivalent to justified displacement of the right enshrined in Article 3 ECHR, contradicting its absolute character; and secondly, establishing the appropriate contours of justificatory reasoning in the determination of what is inhuman or degrading in a penal context requires engagement with complex, contentious principles tied to penology and increasingly associated with the contested value of dignity. To address these challenges, I explore the use of justificatory reasoning by the Court, with particular attention paid to the Grand Chamber judgment in *Vinter v UK*.[79]

Penal proportionality

The proportionality of a sentence – that is, proportionality as a penal principle[80] – can determine whether it amounts to inhuman or degrading punishment. The Court has made the point that a grossly disproportionate sentence may cross the Article 3 threshold.[81] This

[76] See, on this, Mavronicola, 'Submission to Independent Review of Deportation with Assurances' at 6-11, at <https://www.academia.edu/6021435/Submission_to_Independent_Review_of_Deportation_with_Assurances> (last accessed 16 January 2015).
[77] The recent ECtHR judgment in *Trabelsi v Belgium* Application No 140/10, Merits and Just Satisfaction, 4 September 2014, is likely to bring this issue to the fore of the USA's pursuit of the extradition of individuals from States subject to the ECHR. It found the extradition of a terror suspect to the USA to face life imprisonment without parole contravened Article 3 ECHR following *Vinter* [GC], supra n 7.
[78] See text to n 21 above. See also Mavronicola, 'What is an "absolute right"?', supra n 2 at 749-751.
[79] *Vinter* [GC], supra n 7.
[80] For an overview of proportionality in penology, see Ristroph, 'Proportionality as a Principle of Limited Government' (2005) 55 *Duke Law Journal* 263; Ashworth, *Sentencing and Criminal Justice*, 5th edn (2010) at chapter 4.
[81] See, for instance, *Vinter* [GC], supra n 7 at para 102.

approach can be traced back to the assessment, pre-*Al Saadoon*,[82] of the compatibility of imposition of the death penalty with Article 3:

> As the Court has previously noted in connection with Art.3, the manner in which the death penalty is imposed or executed, the personal circumstances of the condemned person and a *disproportionality to the gravity of the crime committed*, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Art.3.[83]

At the same time, the Grand Chamber in *Vinter* emphasised that a finding of 'gross disproportionality' resulting in a breach of Article 3 would only be made 'on rare and unique occasions'.[84]

A puzzle arises: does the criterion of 'gross disproportionality', which encompasses justificatory reasoning and focuses on the offence committed by the alleged victim, not contradict the key principles of absoluteness as affirmed in multiple ECtHR cases? After all, Article 3 protects everyone *no matter what* – irrespective of reprehensible conduct or any public interest considerations in favour of displacing its protection; this is the essence of its absolute nature.

The answer to this puzzle, however, lies in the fact that Article 3 is made up of terms such as 'inhuman' and 'degrading', whose attribution to a particular treatment or punishment is context-sensitive. The (in)humanity or degradation involved in an act hinges on the way the act relates to the dignity of the individual subjected to it. Respect for dignity entails a minimum level of respect for one's exercise of agency and choice. The application of the 'gross disproportionality' criterion is tied to the retributive 'desert theory' of punishment, which is premised on the principle that those who consciously commit criminal acts deserve censure in the form of 'hard treatment' but that 'the amount of hard treatment should remain proportionate to the degree of wrongdoing, respecting the offender as a moral agent'.[85] As such, the criterion of penal proportionality is an appropriate means through which to delineate the boundaries of inhumanity or degradation, in the sense that it upholds respect for an individual's exercise of agency.

Justificatory reasoning on measures taken within the prison regime

Justificatory reasoning is an implicit feature of the 'legitimacy loop': since punishment – notably imprisonment – is generally seen as a warranted ill when inflicted in accordance with the law, the suffering and humiliation 'inherent' in such imprisonment is acceptable while anything beyond it may be suspect. Yet additionally, the Court utilises justificatory reasoning

[82] See *Al Saadoon and Mufdhi v United Kingdom* Application No 61498/08, Merits and Just Satisfaction, 2 March 2010, at para 120. See Van Zyl Smit, 'Punishment and Human Rights' in Simon and Sparks (eds), *The SAGE Handbook of Punishment and Society* (2013) at 395. See also Protocol No 6 and Protocol No 13 to the ECHR.

[83] *Öcalan v Turkey* Application No 46221/99, Merits and Just Satisfaction, 12 May 2005, at para 168 (emphasis added), citing *Soering v United Kingdom* Application No 14038/88, Merits and Just Satisfaction, 7 July 1989, at para 104.

[84] *Vinter* [GC], supra n 7 at para 102.

[85] Ashworth and Roberts, 'Sentencing: Theory, Principle, and Practice' in Maguire, Morgan, and Reiner, *The Oxford Handbook of Criminology*, 5th edn (2012) at 867; see further Von Hirsch and Ashworth, *Proportionate Sentencing* (2005).

to determine whether particular measures taken *within* the prison regime ('treatment associated with [punishment]') are inhuman or degrading.

An area of 'treatment associated with [punishment]' in which justificatory reasoning has featured prominently is solitary confinement. The Court has affirmed, in cases such as *Öcalan*,[86] that *total* sensory and social isolation is incompatible with Article 3 *per se*: 'Complete sensory isolation coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason.'[87] On the other hand, '[o]ther forms of solitary confinement which fall short of complete sensory isolation *may* also violate Article 3'.[88] The latter types of solitary confinement call for a more fact-specific assessment: '[w]hile prolonged removal from association with others is undesirable, whether such a measure falls within the ambit of Article 3 of the Convention depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned…'.[89]

Justificatory reasoning emerges as follows. The Court has found that prohibiting or preventing contact with other prisoners 'for security, disciplinary or protective reasons' will not in itself amount to inhuman treatment or punishment.[90] Indeed, the Court frequently acknowledges that stringent security measures, which are intended to prevent the risk of escape, attack or disturbance of the prison community, exist for dangerous prisoners.[91] Yet it has tended to pay close attention to such restrictions being placed on prisoners who are not dangerous or disorderly;[92] restrictions which cannot be reasonably related to the purported objective of isolation;[93] and restrictions which remain in place after the applicant no longer poses the relevant risks.[94] In relation to such restrictive measures within imprisonment, according to the Court, 'the measures taken must…be necessary to attain the legitimate aim pursued'.[95]

On a study of the Court's reasoning, it becomes clear that the 'legitimate aims' involved are narrow. The Court does not appear to espouse in any way the idea of being sent to prison 'for' punishment, such that unpleasant restrictions on social interaction within prison may be readily accepted. Instead, the Court closely polices restrictive measures and appears to reject further punishment as a legitimate aim; even its reference to a 'disciplinary' objective must be read in light of its primary focus on *protection* – either of self or others – as the central criterion capable of justifying such restrictive conditions of imprisonment. This is reflected in cases such as *AB v Russia*, where the Court deplored the imposition of solitary confinement on an individual suspected of a non-violent economic crime who 'had no record of disorderly conduct' while in prison and regarding whom the Government had 'not claimed that [he] was

[86] *Öcalan*, supra n 83.
[87] *Öcalan*, ibid. at para 191; *Onoufriou v Cyprus* Application No 24407/04, Merits and Just Satisfaction, 7 January 2010, at para 69; *Ahmad*, supra n 73 at para 206.
[88] *Ahmad*, ibid. para 207 (emphasis added).
[89] *Onoufriou*, supra n 87 at para 69.
[90] *Ramirez Sanchez*, supra n 4 at para 123; *Ahmad*, supra n 73 at para 208.
[91] *Ramirez Sanchez*, supra n 4 at para 138; *Alboreo v France* Application No 51019/08, Merits and Just Satisfaction, 20 October 2011, at para 110.
[92] See, for example, *AB v Russia* Application No 1439/06, Merits and Just Satisfaction, 14 October 2010, at para 105; *Csüllög v Hungary* Application No 30042/08, Merits and Just Satisfaction, 7 June 2011, at para 36.
[93] *Csüllög*, ibid. at para 34.
[94] See, for example, *Khider v France* Application No 39364/05, Merits and Just Satisfaction, 9 July 2009, at paras 118-119.
[95] *Ramirez Sanchez*, supra n 4 at para 119.

in any manner dangerous, either to himself or to others'.[96] The Court tends to refer to the security risk posed by the prisoner and assess whether the relevant measures are designed for the purpose of containing the risk and going no further than that; hence the Court's strict proportionality-based reasoning.[97]

Whilst the Court's openness to dangerousness-based restrictions is not irreproachable, it is clear that the particular nature of solitary confinement, causing as it does significant distress, renders it a *prima facie* suspect measure in the view of the Court.[98] The Court accepts that a *degree* of restrictive incarceration may be applied in a way which remains respectful of the dignity of the individual, insofar as it is applied solely and only to the extent necessary to avert risks posed by the acts of the individual subjected to it, with due safeguards for the individual's health and well-being; and the onus of showing this rests on the government.[99] This signifies that the Court distinguishes restrictive measures which are tailored to what is necessitated by the individual's own conduct from restrictive measures which are aimed at creating further suffering (and thus further punishment), finding the latter to be contrary to Article 3. Addressing a similar issue – the use of shackling – in his seminal book on torture, Waldron suggests that while the latter imposition of such measures would be an affront to dignity, the former would not.[100]

The Court has gone so far as to set out procedural safeguards designed to ensure that the imposition of restrictive detention measures is narrowly delimited and robustly overseen, requiring such decisions to take into account the prisoner's particular circumstances, set out extensive reasons and allow for independent judicial review of prolonged confinement.[101] In this way the Court has sought to narrow the circumstances in which solitary confinement regimes are imposed and their duration, to safeguard the core of respect for both personhood and personality-development of prisoners. Moreover, following *Vinter*,[102] as indicated below, the principle of rehabilitation is set to be a central consideration in this assessment.

Beyond solitary confinement, justificatory reasoning features in other contexts associated with punishment. In *Yankov*[103] the Court found that Article 3 was violated on the basis that the forced shaving of a detainee's hair and beard as punishment imposed on him for writing critical remarks about prison warders 'constituted an unjustified treatment of sufficient severity to be characterised as degrading within the meaning of Art.3'.[104] The forced shaving was an invasion of bodily integrity which lacked a motive related to hygiene. *Yankov* involves justificatory reasoning in determining the severity of the treatment inflicted vis-à-vis

[96] *AB v Russia*, supra n 92 at para 105.
[97] See critique of this in Smet, 'Truly a Question of Scope Only?', supra n 55 at 280-281. See also the critique of proportionality reasoning within Article 3 in Palmer, 'A Wrong Turning: Article 3 ECHR and Proportionality' (2006) 65 CLJ 438. But cf Mavronicola, '*Güler and Öngel v Turkey*', supra n 55 at 375-381.
[98] Regarding the problematic nature of solitary confinement more generally, see, among many works on the subject, Shalev, *A Sourcebook on Solitary Confinement* (2008), at <http://eprints.lse.ac.uk/24557/1/SolitaryConfinementSourcebookPrint.pdf> (last accessed 16 January 2015); Grassian, 'Psychiatric Effects of Solitary Confinement' (2007) 22 *Washington University Journal of Law & Policy* 325.
[99] See, for instance, *Ramirez Sanchez*, supra n 4 at para 139.
[100] See, on this, Waldron, *Torture, Terror and Trade-offs: Philosophy for the White House* (2012) at 297-298.
[101] *Ahmad*, supra n 73 at para 212; *AB v Russia*, supra n 92 at para 111; *Onoufriou*, supra n 87 at para 70.
[102] *Vinter* [GC], supra n 7.
[103] *Yankov v Bulgaria* Application No 39084/97, Merits and Just Satisfaction, 11 December 2003.
[104] Ibid. at para 120.

the dignity of the applicant.[105] Such cases exemplify the context-sensitive analysis required to establish whether the minimum level of severity has been reached; they also reflect the ECtHR's recognition of the vulnerability of those in custody, which amplifies its vigilance over restrictive or invasive measures they are subjected to.

Justificatory reasoning and whole life orders of imprisonment

Justificatory reasoning has also been relevant in assessing the compatibility of Article 3 ECHR with the imposition of life imprisonment without parole ('LWOP').[106] The most recent Grand Chamber judgment on the matter, *Vinter v UK*,[107] involves justificatory reasoning in the context of LWOP but also furnishes important principles on the interpretation of inhuman and degrading punishment, which are likely to impact on other questions relating to prison administration.

A key case prior to *Vinter* on LWOP was *Kafkaris*, in which the Grand Chamber suggested that 'the imposition of an irreducible life sentence on an adult may raise an issue under Article 3'.[108] The requirement of reducibility was clarified by the Grand Chamber in *Vinter*. The case concerned Article 3's compatibility with the imposition of whole life orders – formerly known as 'tariffs', and signifying the period before an individual can be considered for release on parole – on individuals who had been convicted of murders with significant aggravating factors. In the Grand Chamber, the UK government argued that neither a life sentence without parole nor the serving of such a sentence were in principle incompatible with Article 3, submitting that the penal policy on LWOP reflected the view of domestic authorities and Parliament 'that there were some crimes so grave that they were deserving of lifelong incarceration for the purposes of *pure punishment*'.[109]

On the basis that the applicants were not arguing that their whole life orders were grossly disproportionate, the Grand Chamber sought to examine whether they breached Article 3 'on other grounds'.[110] The general principles guiding the Grand Chamber's examination of LWOP's compatibility with Article 3 were outlined as follows. According to the Court, the imposition of a life sentence on adult offenders for particularly grave crimes is not in itself incompatible with Article 3 or any other Convention Article,[111] yet such a sentence must be reducible *de jure* and *de facto*. The reducibility requirement, which demands that prisoners have a prospect of release, entails the possibility of 'review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner'[112] if there remain no legitimate penological grounds for detention.[113]

The Court indicated that legitimate penological grounds for detention 'will include punishment, deterrence, public protection and rehabilitation'.[114] Yet it criticised the fact that

[105] See also the ECtHR's reasoning in relation to shackling in *Hénaf v France* Application No 65436/01, Merits, 27 November 2003, at paras 49-53.
[106] See, for instance, *Kafkaris*, supra n 17.
[107] *Vinter* [GC], supra n 7, on which see Van Zyl Smit, Weatherby and Creighton, supra n 7.
[108] Ibid.
[109] *Vinter* [GC], supra n 7 at para 92 (emphasis added). See the historical analysis of minimum terms (tariffs) in Shute, 'Punishing murderers: release procedures and the "tariff", 1953–2004' [2004] *Criminal Law Review* 873. For wider analysis of tariff and release systems (noting that it is an area of fast-paced change) in the UK, see Padfield, *Beyond the Tariff: Human rights and the release of life sentence prisoners* (2002).
[110] *Vinter* [GC], supra n 7 at para 103.
[111] Ibid. at para 106. See also *Kafkaris*, supra n 17 at para 97.
[112] *Vinter* [GC], supra n 7 at para 109. The Court cited *Kafkaris*, supra n 17 at para 98.
[113] *Vinter* [GC], ibid. at para 119.
[114] Ibid. at para 111.

the denial of a review entailed 'a 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'.[115] Through this statement, the Court in fact appears to establish that *purely retributive* whole life sentences will violate Article 3, given that they extinguish the goal of rehabilitation, or at least any incentive towards it, as they leave no real hope of release back into society.

The Grand Chamber referred with approval to the Bundesverfassungsgericht's (Germany's Federal Constitutional Court) finding in the *Life Imprisonment Case* that it would be incompatible with human dignity for a person to be deprived of freedom without any chance to regain it one day, a case which also established the principle of rehabilitation firmly into the German penal system.[116] For the Bundesverfassungsgericht, dignity requires enabling the prospect of rehabilitation and reintegration into society – in other words, 'resocialisation'; the prospect of compassionate release only for the infirm or terminally ill is not considered sufficient.[117] According to the Grand Chamber, '[s]imilar considerations must apply under the Convention system, the very essence of which…is respect for human dignity'.[118] Finally, the Court indicated that European and international sources on the issue supported the principle that all prisoners, including those under life sentences, should be offered the possibility of rehabilitation and the prospect of release if rehabilitated, noting that 'the emphasis in European penal policy is now on the rehabilitative aim of imprisonment'.[119]

The Court further added that it makes little sense to expect a prisoner under a whole life order to work towards rehabilitation without knowing whether he or she would be considered for release; thus, a breach of Article 3 would arise at the moment of *imposition* of the whole life sentence if it is imposed without a mechanism for review.[120] Applying these principles to the case at hand, the Grand Chamber was not persuaded that the Secretary of State's discretionary power to release whole life prisoners, in exceptional circumstances and on compassionate grounds, created a meaningful prospect of release; and it found for the applicants.[121]

The affirmation of the procedural requirement of review by the Grand Chamber cements the idea that respect for the dignity of incarcerated individuals entails the prospect, though not the guarantee, of eventual release: in essence, a 'right to hope'.[122] Moreover, in contrast with the UK government, the Court does not accept that the retributive (and deterrent) purpose of

[115] Ibid. at para 112.
[116] BVerfGE 45, 187; *Vinter* [GC], supra n 7 at para 113. On dignity in German constitutional law, see Benda, 'The Protection of Human Dignity (Article 1 of the Basic Law)' (2000) 53 *SMU Law Review* 443. Benda notes, at 449, that '[c]riminal law and criminal procedural law are major fields for the defense of human dignity'.
[117] Ibid. Lazarus elaborates on the 'constitutional resocialisation principle' in 'Conceptions of Liberty Deprivation', supra n 50 at 746-752. For an illuminating analysis of the development of prisoners' rights in Germany, see Lazarus, *Contrasting Prisoners' Rights* (OUP 2004) at chapters 2-4. But see the more critical analysis in Dollinger and Kretschmann, 'Contradictions in German Penal Practices: The Long Goodbye from the Rehabilitation Principle' in Ruggiero and Ryan (eds), *Punishment in Europe: A Critical Anatomy of Penal Systems* (2013) at 132.
[118] *Vinter* [GC], supra n 7 at para 113.
[119] Ibid. at para 115.The Court referred to a vast number of sources for guidance – see ibid. at para 99.
[120] Ibid. at para 122. See Padfield, 'Law in Focus: *Vinter v UK* – the right to hope and the whole life tariff' (video), 17 July 2013, at <http://www.law.cam.ac.uk/press/news/2013/07/law-in-focus-vinter-v-uk--the-right-to-hope-and-the-whole-life-tariff--nicola-padfield/2291> (last accessed 16 January 2015).
[121] *Vinter* [GC], supra n 7 at paras 125-126. See also *Magyar v Hungary* Application No 73593/10, Merits and Just Satisfaction, 20 May 2014, at paras 57-59.
[122] See Padfield, supra n 120; and *Vinter* [GC], supra n 7, Concurring Opinion of Judge Power-Forde.

imprisonment[123] can in itself justify whole life imprisonment. This is important as concerns the contours of the Court's justificatory reasoning in relation to punishment under Article 3 ECHR. The Court's emphasis on atonement and rehabilitation does not simply adjust the balance of penological grounds during the course of imprisonment, though the Court appears to suggest that at some point.[124] The Court's stance defeats the possibility of Article 3-compatible purely retributive LWOP.[125]

Moreover, *Vinter* places human dignity at the centre of Article 3 but also the Convention more broadly.[126] Evidently, *Vinter* does not provide us with an exhaustive or straightforward definition of dignity. Yet it amounts to a concrete application of it and an affirmation of a core of respect for both personhood and personality-development, in the preservation of hope and the potential for resocialisation respectively.[127]

The emphasis on rehabilitation has broader implications: following *Vinter*, the treatment of prisoners must be guided primarily by principles of rehabilitation and the goal of social reintegration. At the same time, the ECtHR's emphasis on rehabilitation raises the neglected issue of the contentious character of the rehabilitation ideal:[128] rehabilitation may, as the Court sees it, be seen as a legitimate penological ground for imprisonment, and in that sense potentially as a component of the sentence of imprisonment;[129] but it can also be seen as an outward-looking 'resocialisation' goal,[130] barring prison terms capable of extinguishing it and requiring its active pursuit by the relevant bodies. To add to the contentious nature of the concept, the ECtHR appears to equate rehabilitation with alleviation of the risk the offender poses to the public,[131] equating it to some form of 'cure' of the 'pathology' of crime – a perspective which is not uncontested.[132] The Court's consequent emphasis in its account of the '*Vinter* review' on the risk the prisoner may pose raises additional concern regarding *Vinter*'s potential impetus for buttressing dangerousness-based detention and indeterminate

[123] This broadly encompasses the 'desert' theory of punishment – see Ashworth and Roberts, supra n 85; and Von Hirsch, Ashworth and Roberts (eds), *Principled Sentencing*, 3rd edn (2009) at 102-162 (various authors).
[124] *Vinter* [GC], ibid. at para 111.
[125] Cf Van Zyl Smit, Weatherby and Creighton, supra n 7.
[126] *Vinter* [GC], supra n 7 at para 113.
[127] See Maurer, *Le principe de respect de la dignité humaine et la Cour européenne des droits de l'homme* (1999) at 50-51. But see Riley, 'Human Dignity: Comparative and Conceptual Debates' (2010) 6(2) *International Journal of Law in Context* 117 at 120.
[128] The seminal work on the birth and evolution of the 'rehabilitative ideal' is Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (1981).
[129] See the discussion in Raynor and Robinson, *Rehabilitation, Crime and Justice* (2009) at 9-11.
[130] See Ashworth and Roberts, supra n 85 at 869.
[131] The Court has applied a connection in this regard in *James, Wells and Lee v United Kingdom* Application Nos 25119/09, 57715/09 and 57877/09, Merits and Just Satisfaction, 18 September 2012, notably at para 209. See Duffy, 'When indefinite becomes arbitrary: James, Wells and Lee v UK', UK Human Rights Blog, 24 September 2012, at <http://ukhumanrightsblog.com/2012/09/24/when-indefinite-becomes-arbitrary-james-wells-and-lee-v-uk/> (last accessed 16 January 2015). See also Bettinson and Dingwall, 'Challenging the Ongoing Injustice of Imprisonment for Public Protection: *James, Wells and Lee v The United Kingdom*' (2013) 76(6) *Modern Law Review* 1094.
[132] For critique of this, see – among many – Scott, supra n 35 at 19-21. See also the general critique of rehabilitation as repair in Mathiesen, *Prison on Trial*, 3rd edn (2006) at chapter 2. For a more nuanced analysis of rehabilitation, see Ward and Maruna, *Rehabilitation: Beyond the Risk Paradigm* (2007). Consider also the tensions between 'strengths-based' reintegration and risk-based policies, analysed in Burnett and Maruna, 'The kindness of prisoners: Strengths-based resettlement in theory and in action' (2006) 6(1) *Criminology and Criminal Justice* 83.

sentences.[133] It is important for the Court to develop its doctrine concerning rehabilitation and reducibility with these concerns in mind.

Evaluating the justification/absoluteness puzzle

What can one make of the Court's justificatory reasoning in the case law outlined above? One could argue that the Court is determining the compatibility of State action with Article 3 in light of legitimate aims akin to those applicable in the context of qualified rights – such as protecting the public; and that it also seems like the protection conferred by Article 3 very much hinges on the good or bad character of the (alleged) victim. Considering that the key elements of absoluteness are the lack of exceptions and the unconditionality of Article 3 protection,[134] commentators may be inclined to conclude that the Court is undermining the absolute nature of Article 3.[135]

This should be reconsidered. Attributing the adjective 'inhuman' or 'degrading' to punishment or treatment associated with it is dependent on a complex assessment to which the crime committed by the individual or the particular risk of harm he or she poses at a given time to self or others *may* be relevant. This is in line with human dignity, which requires a minimum level of respect for our mutual humanity,[136] including as regards our exercise of agency. Punishment which 'matches' the offence committed by the individual can be viewed as respectful of the individual's dignity in reflecting an appropriate response to conceptions of individual responsibility, and the limits of individual autonomy embodied in the criminal law and criminal justice system more broadly.[137] Punishment which does *not*, if falling significantly foul of penal proportionality, may undermine dignity sufficiently to amount to a breach of Article 3. Similarly, actions which are strictly targeted towards resisting a risk posed by an individual's exercise of agency – for instance, through their violent behaviour – and do not go beyond it, can also be respectful of dignity.[138] At the same time, certain types of punishment undermine dignity *per se*, irrespective of the purpose with which they are pursued, a point which clearly emerges in ECtHR doctrine in cases such as *Tyrer* (on corporal punishment),[139] *Öcalan* (on total sensory and social isolation),[140] and *Al Saadoon* (on the death penalty).[141]

Lastly, it is clear that the individual's 'bad character' does not operate to *displace* Article 3 protection. The vast array of findings of breach of Article 3 regarding individuals in detention illustrates that Article 3 protection pertains truly to *all*. Additionally, whilst imprisonment involves 'some loss of basic human rights',[142] it also clearly amplifies the scope of positive obligations owed under Article 3 by the State to the incarcerated individual. The

[133] On the link between such rationales of rehabilitation and indeterminate sentences, see Ashworth, *Sentencing and Criminal Justice*, supra n 80 at 86-87. See critique of such detention in, among others, Scott, supra n 35 at 19-20. See the extensive consideration of the links between rehabilitation and risk in Garland, *The Culture of Control* (2001) at 12; Raynor and Robinson, 'Why Help Offenders? Arguments for Rehabilitation as a Penal Strategy' (2009) 1(1) *European Journal of Probation* 3 at 12-13.
[134] See text to n 15.
[135] See, for instance, Smet, 'Truly a question of scope only?', supra n 55 at 280-281.
[136] The idea of dignity as minimum respect can be extracted from Dworkin, *Justice for Hedgehogs* (2011) 335-336; Maurer, supra n 127 at 50; see also the ECtHR's reasoning in *Raninen*, supra n 27 at para 55.
[137] See the analysis in Tasioulas, 'Justice and Punishment' in Skorupski (ed), *The Routledge Companion to Ethics* (2010).
[138] See Mavronicola, '*Güler and Öngel v Turkey*', supra n 55 at 375-381.
[139] See supra n 41.
[140] See supra n 83.
[141] See supra n 82.
[142] Lazarus, *Contrasting Prisoners' Rights*, supra n 117 at 2.

powerlessness of the individual, on the one hand, and the control and proximity of State authorities, on the other, entail that stringent duties to provide for the individual's 'living conditions', health and welfare arise under Article 3 in this context.[143]

The recent *Vinter* judgment of the Grand Chamber also signals an emphasis on prisoner rehabilitation as a direct implication of dignity's centrality in Article 3,[144] a point which has the potential to have a considerable impact on the way prison policies will fare under Article 3 in future, for instance in relation to the imposition of solitary confinement, the impact of prison administration measures on mental health, or socially and educationally sterile prison conditions.

It would be beneficial if the Court reasoned more transparently and with a view to providing guidance to States on Article 3-compatible sentencing and prison regimes and, substantively, with greater commitment to penology. Moreover, it is likely that the Court will have to defend its principled stance in the face of significant challenge by certain Contracting States, notably the UK, which may resist what they perceive to be the rigid implications of an absolute right such as Article 3 ECHR in the penal context.[145]

Dignity

Dignity features in much of the Court's reasoning on the Article 3 threshold.[146] Yet dignity's meaning within Article 3 ECHR is not explicitly unpacked.[147] In the context of inhuman treatment or punishment the Court appears to evoke it in conveying concern for the individual's bodily integrity and physical and mental well-being.[148] In the context of degrading treatment or punishment, the Court appears to place emphasis on individuals' sense of integrity and self-worth, as well as their mental well-being.[149]

Maurer's two conceptions of 'dignity' – an essential conception linked to inherent respect for personhood and a more experiential one tied to human flourishing and personality-

[143] See, for instance, Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (2004) at 48-59; Palmer, 'Protecting Socio-economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) 2(4) *Erasmus Law Review* 397 at 410-412.

[144] See *Vinter* [GC], supra n 7 at paras 112-114.

[145] *Vinter* has not been applied in the UK to date whilst judgments such as *Trabelsi*, supra n 77, are likely to attract considerable criticism. On the latter, see Laurens Lavrysen, 'Belgium violated the ECHR by extraditing a terrorist to the USA despite an interim measure by the Strasbourg Court: Trabelsi v. Belgium', *Strasbourg Observers*, 12 September 2014, available at <http://strasbourgobservers.com/2014/09/12/belgium-violated-the-echr-by-extraditing-a-terrorist-to-the-usa-despite-an-interim-measure-by-the-strasbourg-court-trabelsi-v-belgium/> (last accessed 16 January 2015); cf Natasa Mavronicola, 'Mavronicola on *Trabelsi v Belgium*', *Human Rights in Ireland*, 7 October 2014, available at <http://humanrights.ie/criminal-justice/mavronicola-on-trabelsi-v-belgium/> (last accessed 16 January 2015).

[146] The ECtHR's broad references to dignity are noted, with a critical eye, in Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (2009) at 142-145.

[147] On the generally elusive character of dignity, see See also McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655. But see Carozza, '"My Friend is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights' (2003) 81 *Texas Law Review* 1031.

[148] See Feldman, 'Human Dignity as a Legal Value: Part 1' [1999] *Public Law* 682 at 691.

[149] For an in-depth consideration of these issues, see Webster, *Exploring the Prohibition of Degrading Treatment within Article 3 of the European Convention on Human Rights*, Thesis (University of Edinburgh, 2010).

development ('la dignité actuée')[150] - appear to both be at play in the Court's reasoning in the context of punishment or treatment associated with it; as can be discerned through the analysis offered above, the Court appears to be protecting both a core of personhood and fundamental facets of personality-development by zealously overseeing the degree, manner and contextualised experience of punishment and treatment associated with punishment under Article 3 ECHR. The Court therefore interprets dignity in a way which respects agency and individual choice (and the lawful sanctions such choice might entail), while placing limits on punishment or associated treatment which vitiates such respect or undermines personality-development, such as grossly disproportionate sentences, irreducible life sentences, or the inappropriate imposition of isolation. In addition, the Court interprets dignity as demanding certain fundamentals which are key to personhood, thus barring corporal punishment and prison conditions occasioning profound suffering or debasement.

CONCLUSION

The ECtHR's interpretation of inhuman and degrading punishment 'or treatment associated with it' delimits a boundary between lawful and unlawful State behaviour in the penal context. As such, its significance cannot be overstated. The analysis above highlights that, in case law relating to Article 3 ECHR and punishment, the ECtHR addresses complex questions of penal theory – though not always overtly – and has tended to answer them with an emphasis on dignity, and a clear denouncement of the notion of being sent to prison for punishment rather than as punishment.[151] Though puzzles arise out of the Court's delimitation of the loaded terms 'inhuman' and 'degrading' in the context of punishment, the analysis above indicates that the Court's doctrine does not undermine the absolute nature of Article 3 ECHR, and that the contextual factors impacting on its assessment are defensible in their connection to the value of dignity underpinning Article 3 of the ECHR.

Moreover, though the precise implications regarding the type and timing of review required are likely to be the subject of a continuing legal saga,[152] the broader landmark principles emanating from the ECtHR's Grand Chamber judgment in *Vinter* are inescapable and likely to be pervasive: as of the *Vinter* judgment, rehabilitation occupies centre stage in the ECtHR's delimitation of dignity-respecting and Article 3-compatible sentencing, imprisonment, and release mechanisms.

As such, the retributive aim of minimum terms of imprisonment must make way for rehabilitation's dominance and operate in a finite manner, allowing reducibility not only *de jure* but also *de facto*, the latter indicating that the prospect of release must arise within an individual's foreseeable lifetime. It is also clear that the primacy of rehabilitation will seep into the way the ECtHR assesses prison conditions, the imposition of restrictive prison measures, and the scope of positive obligations under Article 3 ECHR, so that undermining rehabilitation, depriving individuals of rehabilitation opportunities, or even denying some basic means towards such rehabilitation, may raise an Article 3 issue. Indeed, the

[150] Maurer, *Le principe de respect de la dignité humaine et la Cour européenne des droits de l'homme* (La documentation Française, 1999) at 50-51.
[151] See the famous line by in Paterson, 'Why Prisons?' in *Paterson on Prisons* (1951) at 23.
[152] The Court of Appeal (England and Wales) has differed from Strasbourg in its assessment of the Article 3-compatibility of the relevant law in *Attorney-General's Reference No 69 of 2013* [2014] EWCA Crim 188; see the commentary in Elliott, 'Whole life tariffs: Court of Appeal differs from, but does not defy, Strasbourg', 18 February 2014, at <http://publiclawforeveryone.wordpress.com/2014/02/18/whole-life-tariffs-court-of-appeal-differs-from-but-does-not-defy-strasbourg/> (last accessed 16 January 2015).

acknowledged status of human dignity as being 'the very essence' of the Convention, combined with rehabilitation's ties with dignity, entails that the emphasis on rehabilitation is likely to filter through to the interpretation of other Convention rights in the prison context, not least Article 8 of the ECHR. Moreover, both the dual reducibility requirement (*de jure* and *de facto*) and the link between rehabilitation and release established in *Vinter* are set to be significant in addressing the operation of indeterminate sentences and the treatment of those subject to these, including the rehabilitation opportunities they are offered.[153]

Lastly, the Court's evolving stance on punishment, culminating in *Vinter*, is likely to hold significant ramifications with respect to extradition cases. Many extradition requests from the United States often carry the prospect of whole life imprisonment, as was the situation in cases such as *Harkins*[154] and *Ahmad*,[155] as well as the UK case of *Wellington*.[156] The outcomes of these cases, in which expulsion to face such a prospect was found not to be contrary to Article 3 of the ECHR, appear problematic after *Vinter*. The Court's finding in *Trabelsi*[157] affirms that the incompatibility of purely retributive whole life terms with Article 3 of the ECHR *will* operate to bar a number of extraditions to the US and elsewhere, under the *Chahal* and *Saadi* principles.[158] Moreover, the Court's rehabilitative focus will inevitably be applied to its assessment, in extradition-related cases, of penal systems outside the ECHR; this carries the potential for the doctrine to permeate foreign penal terrain and ultimately the transnational and global arena.[159]

From an academic perspective, the ECtHR's interpretation of the absolute prohibition on inhuman and degrading punishment under Article 3 ECHR creates an intersection between penology and human rights which carries considerable significance for both fields. Given the ECtHR's readiness to elaborate the principles surrounding the application of Article 3 ECHR to 'punishment or treatment associated with it' in a way which carries the potential to alter Contracting States' penal landscapes, critical and constructive input in this process is vital and urgent.

[153] See *James, Wells and Lee*, supra n 131; and *R (on the application of Robinson) v The Governor of HMP Whatton and Another* [2014] UKSC 66; [2015] 2 WLR 76, concerning the availability of rehabilitative programmes linked to parole board release decisions – though Article 3 ECHR was not mentioned.

[154] *Harkins and Edwards v United Kingdom* Application Nos 9146/07 and 32650/07, Merits and Just Satisfaction, 17 January 2012.

[155] See supra n 73.

[156] *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72; [2009] 1 AC 335. The case is noted in Milanovic, 'Extradition and Life Imprisonment' (2009) 68(2) *Cambridge Law Journal* 248.

[157] See supra n 77.

[158] See *Chahal*, supra n 8 at paras 79-80; *Saadi* v *Italy* ECHR Application No 37201/06, Merits and Just Satisfaction, 28 February 2008, at paras 127, 138-139.

[159] The impact of ECtHR jurisprudence vis-à-vis US practice on the death penalty has been noted in Clarke and Whitt, *The Bitter Fruit of American Justice: International and Domestic Resistance to the Death Penalty* (2007) at 31-49.