The London School of Economics and Political Science

On coming to terms:

How European human rights law imagines the human condition

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– DECLARATION –

I certify that the thesis that I have presented for examination for the MPhil/PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

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– ABSTRACT –

This thesis offers an account of how European human rights law – the law of the European Convention on Human Rights ('the ECHR') – imagines the human condition. It argues that the ECHR legal order is an order that is constituted upon, and structured by, a vision of 'the individual', and that to understand European human rights law we need to understand the mode of being – the vision of life – that underpins this order. The argument I make is that a series of assumptions about the human condition structure European human rights law, in that they underpin the six things that European human rights law relies on for its significance: its interpretive vision; its modes of reasoning; its integration of values; its expression of a vision of emancipation; its therapeutic potential; and its form of accountability. Assumptions are made about the way in which 'the individual' develops an identity in European human rights law, about her need for a sense of continuity across time, about her need for recognition by others, about her agency in managing reality and her capacity to detach from reality, and about the way in which she is attached to material circumstances and is also able to extend herself beyond material circumstances. I argue that these assumptions are broadly oriented towards a notion of individual continuity through time and that they are underpinned by a vision of the human condition in which the fundamental question to be negotiated is a question of coming to terms – a question of coming into the terms of European human rights law and of coming to terms with all that which must be brought to terms according to European human rights law.

To my parents:

to my wonderful mother, Allyson

and in loving memory of my father, David (1957-2015)

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– INTRODUCTION –

"[T]he object and purpose of the [European Convention on Human Rights] as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective…" (*Soering v UK* (1989), para.87)

"The very essence of the [European Convention on Human Rights] is respect for human dignity and human freedom." (*Pretty v UK* (2002), para.65)

Giving an account of European human rights law

This is a thesis about the European Convention on Human Rights ('the ECHR'): a Convention that is described as having as its "object and purpose…the protection of individual human beings"[1] and as its "very essence…respect for human dignity and human freedom".[2] The former claim, expressing the object and purpose of the Convention, is one about the style of interpretation implied and indeed necessitated here; the latter claim, stipulating the 'essence' of the Convention, is one about its form and structure. Taken together, the two claims offer a profound insight into the constitution and structure of the legal order that is founded by the ECHR. For through these claims, we are introduced to the idea that what we have here, in European human rights law, is a form of law that is based on and exists for 'the individual'. More specifically, we are introduced to the idea that European human rights law is underpinned by an account of what it means to be an 'individual human being' who is the subject of the protection of the ECHR – and, therefore, to the idea that European human rights law presupposes and produces a vision of being.

On the one hand, the idea that European human rights law expresses a vision of being is unsurprising. After all, the centrality that European human rights law appears to grant to 'the individual' would tend to imply the articulation of an

[1] 14038/88, *Soering v UK* (1989), para.87.
[2] 2346/02, *Pretty v UK* (2002), para.65.

account of this 'individual being'. Furthermore, the ECHR legal order must in any case, and by virtue of its nature as a legal order, set out a vision of being. This is because, as a legal order, the ECHR order is a lived order, which is to say that it necessarily presupposes and expresses a mode of being – a vision of life – such that the order is itself lived. We might further fairly presume that this vision of being would be fundamental to European human rights law's whole operation, since to be at all effective European human rights law must be able to relate to the lives and experiences of those within its jurisdiction, so that they can rely on, appeal to, and fundamentally assume the existence of the rights and freedoms set out in the ECHR. European human rights law must, in other words, be able to engage with the self-understanding of its individual subjects and objects so that they can understand themselves as such: as subjects and objects of European human rights law.

And yet while there may therefore be something unsurprising about the idea that European human rights law articulates a vision of being, the implications of this are nevertheless far-reaching in what they suggest. This is that to understand European human rights law – as a legal order, and as a lived order – we need to understand the mode of being that underpins its conception of order. We need to understand, in other words, its vision of life.

This thesis offers an account of that vision; and, as such, it suggests a way of thinking about and understanding European human rights law. The principal argument that I make is that a series of assumptions about the human condition are made in European human rights law. I argue that these assumptions are *ordering assumptions*. They underpin the terms of European human rights law and they therefore underpin the six things that European human rights law relies on for its significance: its interpretive vision; its modes of reasoning; its integration of values; its expression of a vision of emancipation; its therapeutic potential; and its form of accountability.

1. The ordering assumptions about the human condition underpin the *interpretive vision* of European human rights law, in that they structure the ECtHR's interpretation of the ECHR. Ordering assumptions inform

specific assumptions. Specific assumptions are the assumptions that structure the interpretation of specific provisions of the ECHR. For example, the assumption that "an individual's interest in discovering his parentage does not disappear with age, quite the reverse" is one of the assumptions that structures the Court's construction of "the right to know one's parentage" (which is included within the right to respect for private life),[3] and the assumption that the destruction of a natural swamp in the vicinity of an individual's home would have a lesser effect on their well-being than the destruction of a forest is one of the assumptions that structures the Court's interpretation of what constitutes "environmental deterioration" capable of directly affecting the rights to respect for private and family life.[4] Such specific assumptions are products of the more general ordering assumptions that cut across European human rights law – assumptions about the meaning of identity and about the form that attachment takes, for example, and assumptions about what constitutes an individual's sense of place and what 'well-being' means and entails.[5]

2. European human rights law's ordering assumptions underpin the *modes of reasoning* of the ECtHR – the modes by way of which interferences with rights are tested and conflicting interests are brought into terms with each other. For example, in recent years, the ECtHR has accepted that the principle of "living together" (which is essentially about a State's conception of "the minimum requirements of life in society") "can be linked" to 'the protection of the rights and freedoms of others', which is specified as one of the legitimate aims for possible interferences with qualified rights like the rights to freedom of religion and to respect for private life.[6] This acceptance – like the principle of 'living together' itself – is, in turn, underpinned by assumptions not only about what it means to

[3] 58757/00, *Jäggi v Switzerland* (2006), paras.40, 37. See further Ch.4, part 4.4.2.
[4] 41666/98, *Kyrtatos v Greece* (2003), para.53. See further Ch.6, part 6.3.2.
[5] See further Chs.2, 4, and 6.
[6] 43835/11, *S.A.S. v France* (2014), para.121. See further Ch.4, part 4.3.

'live together' in society but about the way in which individuals relate to each other and, more fundamentally, about the construction of the self in relation to the other.[7]

3. The ordering assumptions underpin the *integration of values* in European human rights law. This integration is reflected in the way in which the provisions of the ECHR are related to each other:[8] a relation that is enabled – or so I argue in this thesis – by a vision of the human condition that runs across these provisions. For example, significant weight is attached in European human rights law to the capacity to hope. The assumptions that are made about the importance of "the experience of hope" and about what hope itself entails run across the interpretation of the ECHR provisions and underpin the notion of 'human dignity' that is the more explicit expression of the integration of values in European human rights law.[9]

4. European human rights law's ordering assumptions underpin its *expression of a vision of emancipation*. This is not only in the sense that being in the terms of European human rights law and making claims through the language of these terms is deemed emancipatory in itself, but in that European human rights law sets out its own vision of what constitutes emancipation. For example, in *Leyla Şahin v Turkey (2005)* the ECtHR accepted that one of the grounds on which a prohibition on wearing the Islamic headscarf in a Turkish university was based was the ground of 'gender equality', such that, as Judge Tulkens pointed out in her Dissenting Opinion, "the principle of sexual equality" was conceived of as a justification for a "[prohibition on] a woman from following a practice which, in the absence of proof to the

[7] See further Ch.4.
[8] On this notion of integration see S. Baer, 'Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism' (2009) *University of Toronto Law Journal* 59(4), 417-468.
[9] 22662/13 et al., *Matiošaitis and Others v Lithuania* (2017), para.180. See further Ch.3, part 3.2.3. The notion of 'dignity' is an explicit expression of the integration of values in European human rights law in that as we saw above, "[t]he very essence of the Convention is respect for human dignity and human freedom" (2346/02, *Pretty v UK* (2002), para.65). See further Ch.3, part 3.2.

contrary, she must be taken to have freely adopted".[10] The Court subsequently conceded in *S.A.S. v France (2014)* that "a State party cannot invoke gender equality in order to ban a practice that is defended by women…in the context of the exercise of the rights enshrined in [Articles 8 and 9 of the Convention]".[11] But the dropping of the argument is not itself the point, which is rather that the ECtHR conceives of itself as having this function of setting out a vision of what constitutes emancipation at all, and that certain assumptions (such as about the meaning of equality) underpin the exercise of this function.

5. The ordering assumptions underpin European human rights law's expression of its *therapeutic potential*, which is about the way in which European human rights law is conceived of as supplying a language and a means for recounting and containing experiences. For example, European human rights law is conceived of as being able to pull traumatic experiences – which would otherwise be usually taken to resist meaning and interpretation[12] – within a narrative form and to thereby impose some order upon these experiences.[13] This move is in itself a reflection of a broader assumption that is made in European human rights law about the need for a sense of continuity and, more specifically, about the role of narrativisation in the construction of this continuity.[14]

6. European human rights law's ordering assumptions underpin the expression of its *form of accountability*, which is about the way in which the ECHR places a constraint on State power that involves bringing power to its terms. The ordering assumptions underpin, for example, the account that is constructed of what would be required, in a context of alleged

[10] 44774/98, *Leyla Şahin v Turkey* (2005), Dissenting Opinion of Judge Tulkens, para.12.
[11] 43835/11, *S.A.S. v France* (2014), para.119.
[12] See, e.g., M. S. Roth, *Memory, Trauma, and History: Essays on Living with the Past* (2012, Columbia University Press), p77 et seq.
[13] See further Ch.3, parts 3.4.1 and 3.4.2.
[14] See further Ch.3.

> medical negligence, to "call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life".[15] This is because they underpin European human rights law's vision of what roles like 'health professional' mean and entail; and they also underpin a vision of the relationship between these roles and the State.[16]

Over the course of Chapters 2-6 of this thesis, we will see that we can classify the ordering assumptions that structure European human rights law in this way into five main categories that are all broadly oriented towards the persistence of (a conception of) 'the individual' through time. Assumptions are made about the way in which 'the individual' develops an identity in European human rights law (Chapter 2), about her need for a sense of continuity across time (Chapter 3), about her need for recognition by others (Chapter 4), about her agency in managing reality and her capacity to detach from reality (Chapter 5), and about the way in which she is attached to material circumstances and is also able to extend herself beyond these (Chapter 6). The thesis offers an account of the vision of the human condition that underpins and emerges from the notion of individual continuity that these assumptions give rise to. This vision, I argue, is one of the human condition as a condition in which the fundamental question to be negotiated is a question of coming to terms – a question of *coming into the terms* of European human rights law and of *coming to terms with* all that which must be brought to terms according to European human rights law.

In giving an account of how European human rights law imagines the human condition in this way, an account of the lived order of European human rights law necessarily also emerges in my thesis. This is because European human rights law's vision of the human condition (its vision of a mode of being) is inseparable from its mode of order of individuation – an inseparability that is a consequence of the nature of the ECHR legal order as a lived order. The mode of being that is in question in this thesis is, in other words, one that is presupposed

[15] See, e.g., 56080/13, *Lopes de Sousa Fernandes v Portugal* (2017), para.187 et seq.
[16] See further Ch.2, part 2.3; Ch.5, part 5.4.1; Ch.6, part 6.3.1.

and expressed by European human rights law's mode of order of individuation, such that this order is itself lived. And so my account of how European human rights law imagines the human condition is also an account of how this vision is lived; and the underpinning question of this thesis – the question of *'how does European human rights law imagine the human condition?'* – emerges as being inseparable from the further questions of *'how is life lived when this vision is lived?'* and *'what does it mean for life to be lived in this way?'*

Methodology

(i) The practice-dependent approach

Methodologically, the guiding questions of my thesis imply a practice-dependent approach. More specifically, they demand a reconstruction of the practice of European human rights law, and one that is organised around the way in which European human rights law imagines the human condition.[17] Kai Möller distinguishes such a "reconstructive theory" from "a 'philosophical' theory…which is insensitive to practice" and which "will aim at providing the morally best account…while ignoring the question of the extent to which this account fits the practice".[18] A reconstructive theory, like a philosophical theory, "aims at providing a theory which…is morally coherent, but unlike it, need not be the morally best ('the one right') theory, where 'morally best' is understood as morally best independently of practice".[19]

As the question here is one of how European human rights law imagines the human condition, the object of the reconstruction must be European human rights law's vision of the human condition. The aim must be to account for this aspect of the practice of European human rights law. But since this vision has already been identified as being inseparable from European human rights law's mode of order of individuation (an inseparability that derives from the constitution of the ECHR legal order as a lived order), the account must also have explanatory

[17] This is how Kai Möller defines a "reconstructive" approach in *The Global Model of Constitutional Rights* (2012, Oxford University Press), p20.
[18] *Ibid.*, p20.
[19] *Ibid.*, p20.

value as such. In other words, there is a methodological consequence to the inseparability of the questions of being ('how does European human rights law imagine the human condition?') and meaning ('how is life lived when this vision is lived?' and 'what does it mean for life to be lived in this way?') and this consists in the way in which the reconstructive account must be able to speak to both aspects.

This is where the insights of philosophical anthropology can be usefully brought in. Philosophical anthropology is a discipline that deals specifically in questions of meaning. It forefronts "conceptual life", and particularly, the question of "the concepts with which we understand ourselves and the world we inhabit".[20] It deals, in other words, with how concepts "are part of a certain way of being";[21] it addresses our frameworks of understanding – the frameworks of "intelligibility" that we use and rely on to make sense of our lives.[22] Here, it suggests a framing for the reconstructive inquiry, because it implies that the vision of being in question cannot be considered in abstraction from the lived order within which it is grounded.

This conceptualisation of the ECHR legal order as a lived order is elaborated in Chapter 1, which unpacks the concept of 'lived order' and as such establishes the conceptual framework that underpins the thesis entirely. It suggests that a lived order has three features: it is governed by an ethos, which functions to support the mode of being of the order; it is internalised by those within it; and it sets out a vision of five sites of life and order (which are, accordingly, five sites of inquiry): space, time, body, wisdom, and things. Any lived order, I suggest, must be able to account for these five sites; and critically, it must be able to account for the subject from their perspective, so that it can sustain its claim of a capacity to

[20] J. Lear, *The Idea of a Philosophical Anthropology (Spinoza Lectures)* (2017, Koninklijke Van Gorcum), p15, p13.

[21] Nigel DeSouza, in an interview with Charles Taylor: 'Philosophy as Philosophical Anthropology: An Interview with Charles Taylor', in A. Waldow and N. DeSouza (eds.), *Herder: Philosophy and Anthropology* (2017, Oxford University Press), 13-29, p23.

[22] Thus in a "loss of intelligibility…the concepts and categories by which the inhabitants of a form of life have understood themselves…cease to make sense as ways to live": J. Lear, 'What Is a Crisis of Intelligibility?', in *Wisdom Won from Illness: Essays in Philosophy and Psychoanalysis* (2017, Harvard University Press), 50-62, p50-51. See also J. Lear, *Radical Hope: Ethics in the Face of Cultural Devastation* (2006, Harvard University Press).

relate to the self-understanding of its subjects. It must, therefore, have some conception of the space (and spatial boundaries) of its order and of the place of the subject within it. It must have some notion of time within the order – a notion of the temporality of being within the order. It must have some conception of the body within the order, so that it can produce a vision of embodiment within the order. It must have some conception of the reflexive capacity of the subject and of the interaction of this capacity with the normativity of the order. And finally, it must have a material dimension – a dimension which treats, at the very least, how material things are related to within it.

The coupling of the conceptualisation of the ECHR legal order as a lived order with the reconstructive approach that is demanded by my research question suggests that what is necessitated here is an account that reconstructs European human rights law's vision of the human condition in the light of – and with a view to accounting for – the constitution of the ECHR legal order as a lived order. What is called for is a reconstruction that takes place through the lens of the concept of lived order. The demand is not, therefore, for a "moral reconstruction" that "aims at finding moral value in a practice"[23] or a normative reconstruction that seeks to find purpose in the practice.[24] Rather, the demand is for a reconstruction that is aimed at the questions of being and meaning within the practice: a reconstruction that has as its object the vision of the human condition that is articulated within the context of European human rights law's lived order.

The question, then, is of the value of such an account. This is a question that we can assess by reference to its utility, and there are two measures that we may wish to employ to this end: (i) the degree to which the account enables us to better understand European human rights law; and (ii) the degree to which the account can serve as groundwork for future research. Whether or not the account offered in this thesis fulfils these measures (and whether, indeed, these measures

[23] *Ibid.*, p21.

[24] This does not mean that question of the morality or purpose of the practice of European human rights law can be eliminated from the inquiry entirely; the thesis after all opened with reference to the ECtHR's conception of the purpose of the ECHR. The point is rather that the question does not demand a moral or purposive reconstruction.

are the correct ones to use in assessing the utility of the account) is ultimately a matter to be determined by the reader. But I would offer two reasons in support of the claim that an account of how European human rights law imagines the human condition could be useful.

Firstly, an engagement with European human rights law's vision of the human condition is an engagement with the very basis of European human rights law. This is in two senses: in the sense that it is an engagement with the underlying vision of European human rights law (a vision that is often only captured in references to the way in which the ECtHR conceives of the "very essence" of the ECHR as being "respect for human dignity and human freedom"[25]) and in the sense that it is an engagement with the nature of the ECHR legal order as such (an order that is a lived order, in which the vision of being is inseparable from the order itself). And to the extent that what is in question here is, in this way, the basis of European human rights law – in terms of the essence of European human rights law, and the constitution of its order as such – an account of European human rights law's vision of the human condition could conceivably enable us to better understand European human rights law. The underpinning claim in this regard would be that to understand a system, we need to understand its basis. Its employment here would rest on three further empirical assumptions: that we have not hitherto engaged sufficiently with European human rights law's underlying vision; that engagement with this vision would enable us to better understand European human rights law's basis; and that understanding this basis would enable us to better understand European human rights law.[26]

Secondly, an account that is focused on how European human rights imagines the human condition could usefully serve as a basis for future research. There is currently a relative lack of literature in the field of European human rights law that tackles the question of the construction of the subject, let alone the question of the construction of a vision of the human condition.[27] This is despite

[25] 2346/02, *Pretty v UK* (2002), para.65.
[26] All three assumptions are, of course, open to contestation.
[27] For notable exceptions on the construction of the subject in European human rights law (albeit ones that focus on particular dimensions of the subject), see P. Johnson, *Homosexuality and the*

the fact that the ECHR legal order constructs a vision of 'the individual' that it posits as central to its order and despite the fact that it also sets out a vision of being – a vision of life – such that it can engage with the self-understanding of its subjects and objects and be lived as a legal order at all. An account of how European human rights law imagines the human condition could usefully serve in this context as the starting point for work that engages with the institutional, social, political, economic, and cultural context in which this vision is produced; work that critiques the way in which European human rights law imagines the human condition (or the way in which it has been recounted as doing so); work that engages in questions of the morality and/or normativity of European human rights law's vision of the human condition; and work that puts this vision into comparative perspective.[28] Any of these projects would require an account with which to begin, and a reconstruction such as that offered here could provide this starting point.

As indicated above, these questions of utility must, in the end, be determined by the reader. My point here is merely that it is possible to imagine that a reconstruction of the sort that is offered in this thesis – a reconstruction of the practice of European human rights law that accounts for how European human rights law imagines the human condition within the context of the constitution of the ECHR legal order as a lived order – could be a useful contribution.

(ii) The focus on European human rights law

But why reconstruct the practice of European human rights law at all? Why is the question here one of how European human rights law imagines the human condition and not one of international human rights law, or domestic human rights law, or some other system of regional human rights law? And why consider the

European Court of Human Rights (2013, Routledge) and D. A. Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (2019, Hart Publishing). See further Ch.1, part 1.2.2. Notably more has been written on this subject in the context of international human rights law. See esp. J. R. Slaughter, *Human Rights, Inc.: The World Novel, Narrative Form, and International Law* (2007, Fordham University Press).

[28] An interesting starting point for such a comparative inquiry would be Floris de Witte's work on the way in which different regional organisations construct the subject: 'Integrating the Subject: Narratives of Emancipation in Regionalism' (2019) *European Journal of International Law* 30(1), 257-278.

ECHR legal order in isolation, and not in relation to these other legal systems? These questions emerge as particularly acute when we consider the interaction that occurs between the ECtHR and national legal systems,[29] between the ECtHR and the Court of Justice of the EU ('the CJEU'),[30] and between the ECtHR and other international instruments.[31] Why, then, focus on the ECHR legal order?

The reason is that the ECHR legal order is a wholly distinctive legal order. This is not only in the sense that its court, the ECtHR, is "the single most active and important rights-protecting body in the world"[32] and that it has a notably enormous span, covering 47 member states with a population of 820 million people. Rather, the form of the legal order presented here is unique in the way in which it is oriented entirely around 'the individual'. Of course, all legal orders presuppose and express some conception of their subject. But what is notable about the ECHR legal order is the way in which it forefronts a process of individuation in this respect: a process of the delineation (and simultaneous articulation) of 'the individual', and one which here involves the elevation of 'the individual' out of the order of the state[33] and the instatement of this same 'individual' as the organising principle of a new form of order: the ECHR legal order.

The constitution of the process of individuation in European human rights law presents a challenge to the idea of individuation itself, which would usually be taken (and was always so taken in histories of the idea of 'the individual' in

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[29] See esp. H. Keller and A. Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008, Oxford University Press); P. Popelier, C. Van De Heyning and P. Van Nuffel (eds.), *Human rights protection in the European legal order: the interaction between the European and the national courts* (2011, Intersentia).

[30] This is partly a consequence of the interpretive obligation laid down by Article 52(3) of the Charter of Fundamental Rights of the EU. For a useful overview of the relationship between the ECtHR and the CJEU, and one addressing this specifically in the context of the question of EU accession to the ECHR, see F. Fabbrini and J. Larik, 'The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights' (2016) *Yearbook of European Law* 35(1), 145-179.

[31] The ECtHR regularly draws on other international instruments in interpreting ECHR rights. See, e.g., 23459/03, *Bayatyan v Armenia* (2011), para.102 *et seq*.

[32] A. Stone Sweet and C. Ryan, *A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the European Convention on Human Rights* (2018, Oxford University Press), p2.

[33] A. W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001, Oxford University Press), p157.

European thought[34]) to involve the delineation of 'the individual' from all forms of order. But what European human rights law's conception of individuation claims to secure is the protection of 'the individual' *within* and *beyond* the state: a process that was consolidated by Protocol No. 11 of the ECHR (1998), which created a right of individual petition to the (then newly-permanent) ECtHR, once domestic remedies had been exhausted.

In fact the combination of the effects of Protocol No. 11 and the incorporation of the ECHR into national legal systems led, according to Alec Stone Sweet and Clare Ryan, to the emergence of the ECHR legal order as a "*cosmopolitan legal order*", defined as "a multi-level, transnational legal system in which (i) justiciable rights are held by individuals; (ii) all public officials bear the obligation to fulfil the fundamental rights of every person within their jurisdiction, without respect to nationality or citizenship; and (iii) both domestic and transnational judges supervise how officials do so".[35] What is recognised in this depiction – and this is the vital point that we need to consider here – is that what we are presented with in European human rights law is a legal order that is intensely focused on – and owes its existence and purpose to – a conception of 'the individual'. The ECHR legal order exists, as I will elaborate in Chapter 1, as an *order of individuation*.[36] It is based entirely around a vision of 'the individual'.

Such an order, with "the oldest and most important international tribunal in the world dealing with human rights issues and cases"[37] at its helm, offers the potential to tell us a great deal about human rights law and about the idea of human rights. In particular, it has the potential to tell us about the construction of 'the individual' as the subject and object of the ECHR legal order, as well as about the meaning of the concepts of 'human dignity' and 'human freedom' that motivate the practice of European human rights law.[38] From the perspective of an inquiry into the idea of human rights, then, as well one into questions of legal culture, a

[34] See further Ch.1, part 1.2.
[35] Stone Sweet and Ryan (2018), above n32, p1.
[36] See Ch.1, part 1.2.
[37] J.-P. Costa, 'Human Dignity in the Jurisprudence of the European Court of Human Rights', in C. McCrudden (eds.), *Understanding Human Dignity* (2013, Oxford University Press), 393-402, p393.
[38] 2346/02, *Pretty v UK* (2002), para.65, discussed above.

focus on how European human rights law imagines the human condition appears to be both an important and valuable exercise.

In addition to offering us insights about the idea of human rights and questions of legal culture, the ECHR legal order also promises to tell us something about the idea of Europe. This stems, not least, from the way in which the ECHR is interpreted by the ECtHR as calling for direct engagement with 'modes of being' in Europe. A central doctrine of interpretation in European human rights law is, therefore, that the ECHR be interpreted dynamically, as "a living instrument" and "in the light of present-day conditions".[39] As Guido Raimondi, the then President of the ECtHR, put it, in explaining this doctrine in a speech in January 2019: "Europe in the 1950s and the world we now live in are very different places. Our ways of life and moral standards are no longer the same."[40] This statement points to two important ideas. The first is that European human rights law necessarily engages with the question of 'being' in Europe.[41] The second is the notion of the 'our': "our ways of life and moral standards are no longer the same". This 'our' performs an identifying (and therefore exclusionary) function. It signals to a shared framework of understanding that enables the "ways of life" and "moral standards" in question to be understood not just as belonging but as making sense at all.[42] It signals, in other words, to a vision of the human condition through which meaning is generated and life is understood. That vision – which we can now understand as containing within it an idea of Europe – is the object of my research question.

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[39] 5856/72, *Tyrer v UK* (1978), para.31.

[40] Guido Raimondi (President), *Opening speech at the solemn hearing for the opening of the judicial year of the European Court of Human Rights* (25 January 2019, Strasbourg) (available at: https://www.echr.coe.int/Documents/Speech_20190125_Raimondi_JY_ENG.pdf) (last accessed 19 July 2019).

[41] Incidentally, this notion of 'being' in Europe – and law's engagement with it – is gradually acquiring increased attention in the European law literature more broadly. See esp. Editorial comments, 'EU law as a way of life' (2017) *Common Market Law Review* 54(2), 357-367; L. Azoulai, S. Barbou des Places, and E. Pataut, 'Being a Person in the European Union', in L. Azoulai, S. Barbou des Places, and E. Pataut (eds.), *Constructing the Person in EU Law: Rights, Roles, Identities* (2016, Hart Publishing), 3-11.

[42] On such questions of "the concepts with which we understand ourselves and the world we inhabit" see further Lear (2017), above n20, p13.

(iii) The delineation of the scope of the inquiry

The nature of the vision that is in question in this thesis – a vision of the human condition – is not one that is explicit in European human rights law. That much has already been made clear in the discussion of the way in which the question here is one of the underlying vision of European human rights law and one that calls for a reconstructive approach. But what we therefore need to give special consideration to is the question of the material that is to fall within the scope of the inquiry here.[43] We need, in other words, to consider what will be constructed as the 'practice' of European human rights law in this context.

The starting point in this respect must surely be the ECtHR. This is the court that rules on applications alleging violations of the ECHR and is responsible for authoritatively interpreting the ECHR. If a vision of the human condition exists in European human rights law at all, we would presumably expect to find it in the work of this body – that is, in the jurisprudence of the ECtHR.

The corpus of European human rights law is enormous, however, for since the ECtHR was set up, it has decided on hundreds of thousands of applications and it has handed down judgments in thousands of cases.[44] I accordingly decided, and early on in my research, to specify the scope of the inquiry in terms of the range of jurisprudence that would fall within it. Given that the question of this thesis is one of the underlying vision of European human rights law, the obvious point of focus seemed to be the jurisprudence pertaining to the provisions of the ECHR that the ECtHR itself identifies as being closest to its claims about the "essence" of European human rights law. After all, if this 'underlying vision' does not appear in reference to the most fundamental, most vital, most *essential* aspects of European human rights law, then where would it appear?

[43] This would always be a question but its urgency is arguably heightened when it concerns a vision that needs to be identified as such.
[44] See European Court of Human Rights, *Overview: 1959-2018, ECHR* (2019, European Court of Human Rights) (available at: https://echr.coe.int/Documents/Overview_19592018_ENG.pdf) (last accessed 19 July 2019).

Articles 2, 3, and 4 have, in particular, been identified by the Court as "[enshrining] one of the basic values of the democratic societies making up the Council of Europe",[45] and the idea that "the very essence of the Convention is respect for human dignity and human freedom" has been articulated most commonly in the context of Articles 3 and 8 (and especially 3[46]).[47] Such claims are significant, for they reveal what the Court itself conceives of as the underlying vision of European human rights law. And since the objective of this thesis is to uncover and dig down into this vision, much of the analysis presented in the following chapters is focused on Articles 2, 3, 4, and 8 (although reference is at times also made to jurisprudence under the other provisions, for reasons that are explained below).

Within this focus on Articles 2, 3, 4, and 8, my analysis further concentrates on those aspects that the ECtHR has deemed most fundamental to these provisions. These are the 'general principles': principles that the ECtHR has identified and developed in relation to each of the Convention provisions. They involve fundamental statements about the provision in question, such as about its scope and meaning. For instance, in relation to Article 3 (which prohibits torture and inhuman or degrading treatment or punishment), the general principles elaborate the meaning and implications of each of these terms. An example is the well-established principle that "[i]ll-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3" and that "[t]he assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim".[48]

When the Court assesses purported breaches of ECHR provisions in any given case, the relevant general principles are typically set out in a passage on the provision in question prior to the Court's assessment of the case in their light. As such, the general principles are easily identifiable and traceable within the

[45] 73316/01, *Siliadin v France* (2005), para.82.
[46] Costa (2013), above n37.
[47] 2346/02, *Pretty v UK* (2002), para.65.
[48] 7334/13, *Muršić v Croatia* (2016), para.97.

jurisprudence of the ECtHR, as they are embedded in, and developed within, that jurisprudence. That does not negate the need to begin somewhere in analysing these principles, of course; and my first sweep of the case law involved tracing the chronological development of each provision's principles through the jurisprudence of the Grand Chamber and also through the cases categorised as importance level '1' in the database of the ECtHR. Importance level '1' cases are described in the database as "[a]ll judgments, decisions and advisory opinions not included in the Case Reports which make a significant contribution to the development, clarification or modification of its case-law, either generally or in relation to a particular State".[49] They are judgments where fundamental questions of principle are at stake. I supplemented my analysis of these cases with analysis of the cases featured in the Case Reports[50] and in the wider case law. Cases falling into the latter category included cases that were referred to in the judgments that featured in the Case Reports or in the level '1' list. They also included cases that I encountered in searching for specific lines of case law or concepts that had emerged from my first sweep of the case law – such as the case law on the 'right to hope', which is discussed in Chapter 3.

(iv) The reading of European human rights law

The practice-dependent approach called for by the research question – an approach involving, as discussed, an examination of how European human rights law imagines the human condition through the lens of the concept of lived order – suggests a way of reading and interpreting the ECHR jurisprudence. This centres on reading it with a view to ascertaining how the five sites of lived order – space, time, body, wisdom, and things – are constructed in European human rights law. It is to the method of this that I now turn.

The specified cases[51] were read chronologically (in terms of the development of the general principles in question) and in relation to each other (which enabled comparisons to be drawn across provisions, such as about how the

[49] See https://hudoc.echr.coe.int (last accessed 19 July 2019).
[50] These are described in the HUDOC database as 'key' cases.
[51] See part (iii) above.

ECtHR conceives of 'hope' in and across different contexts). My initial reading focused on the interpretation and construction of concepts that have been articulated by reference to the terms of – and in the light of – the ECHR. For example, Article 8 provides for a right to respect for one's 'private life', 'family life', 'home', and 'correspondence'; and I began by looking at how these notions have been interpreted by the ECtHR. I then examined the concepts that have been constructed by the Court in articulating the meaning of these provisions. So, for example, the Court has elaborated the right to respect for 'private life' as follows:

> "[T]he concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person… It can sometimes embrace aspects of an individual's physical and social identity… Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8… Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world… Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees."[52]

We can see from this passage that a number of questions arise and have to be addressed by reference to the Court's jurisprudence. What is meant by 'physical and psychological integrity', for instance? What about the notions of 'physical and social identity', 'a right to personal development', 'the right to establish and develop relationships with other human beings and the outside world', 'self-determination', and 'personal autonomy'? How and why do these notions come to be constructed and included here? What does this process of construction mean and indeed tell us about European human rights law? And, to draw these questions together: what assumptions underpin this construction of 'private life'?

Over the course of my research, the initial focus of my reading of the cases – a focus on the interpretation and construction of concepts of European human

[52] 2346/02, *Pretty v UK* (2002), para.61.

rights law (such as those noted above in relation to Article 8) – gradually developed into a deeper focus on the assumptions that underpin these concepts. Of course, to posit such a point of focus presupposes an empirical claim, which is that such assumptions are made in European human rights law at all. This is, in fact, the argument that is pursued and drawn out across the thesis, and it takes the form that European human rights law makes a series of assumptions about the human condition. It poses a prior methodological question that requires engagement here, however. This is the question of how to read for assumptions.

To read for assumptions in European human rights law is to bring to the fore and to analyse the assumptions that underpin the interpretation and construction of the concepts that have been articulated by reference to the terms of – and in the light of – the ECHR. As noted above in relation to Article 8, these include concepts that appear in the terms of the ECHR, such as 'private life', but also those that have been articulated in elaborating that idea, such as 'physical and psychological integrity', 'physical and social identity', 'personal development', 'self-determination', and 'personal autonomy'. Two types of assumptions can be found in the case law: *explicit assumptions* and *implicit assumptions.* An example of an *explicit* assumption would be the assumption that access to information about one's genetic origins or childhood has "formative implications for [one's] personality" (the consequence of which is that "an individual's entitlement to such information is of importance" from the perspective of the ECHR).[53] The notion of an *implicit* assumption meanwhile points to the assumptive work that underpins the claim of a connection between information about one's origins or childhood and the formation of personality itself.

The reconstruction of European human rights law that is presented in this thesis involves the identification and systematisation of a series of (explicit and implicit) assumptions that are made in European human rights law about the human condition. Drawing on Colin Murray Parkes' seminal theory of the psycho-social 'assumptive world' that we each individually create and carry – a world

[53] 53176/99, *Mikulić v Croatia* (2002), para.54.

formed "[o]ut of the 'total set of assumptions which we build up on the basis of past experience in carrying out our purposes'"[54] – I examine how the assumptions that are made in European human rights law about the human condition relate to each other and generate an imaginary 'assumptive world' that is internal to European human rights law. The argument that I ultimately make in this respect is – and as I noted earlier – that the assumptions that are made about the human condition in European human rights law underpin and give rise to a notion of individual continuity that is focused on the persistence of 'the individual' through time.

This argument is one that emerges from an exercise of identifying, analysing, and systematising assumptions – an exercise that involves the ascription of meaning to these assumptions. But such an exercise poses a stark question of positionality: what of my own assumptions in reading and seeking to interpret the assumptions that I am claiming to identify in European human rights law? This is an inevitable and intractable problem. It is inevitable because assumptions are inevitable, and it is intractable because assumptions, by their nature, are not straightforwardly malleable. We build up assumptions and rely on these in going about our lives; and their totality forms a framework of beliefs – an outlook on life – which is what is captured by the concept of the "assumptive world".[55] This is not to say that these assumptions cannot be reflexively engaged with, but rather that the starting point for any such engagement must involve an acknowledgement of the inevitability of assumptions and their effects. For if we form an 'assumptive world', then in an important way, our assumptions shape our world and our interpretation of the world. And in another way, too, assumptions are a necessary part of the process of interpreting in the first place. As Ronald Dworkin argues, interpretation not only presupposes but requires assumptions of a certain kind: one "needs assumptions or convictions about what counts as part of the practice

[54] C. Murray Parkes, 'Psycho-social transitions: A field for study' (1971) *Social Science and Medicine* 5(2), 101-115, p103. (For further developments, see R. Janoff-Bulman, *Shattered Assumptions: Towards a New Psychology of Trauma* (1992, The Free Press); J. Kauffman (ed.), *Loss of the Assumptive World: A Theory of Traumatic Loss* (2002, Routledge).)
[55] *Ibid.*

in order to define the raw data of his [or her] interpretation at the preinterpretive stage".[56]

If our assumptions are an inevitable and potentially necessary part of any act of interpretation, then no interpretive account can ever be fully divorced from the interpreter's own assumptions and situation. Interpreters may acknowledge and be alive to their assumptions and situations; and they may try to isolate their assumptions from that which they are interpreting. But ultimately, an act of interpretation – as an act of ascribing meaning – cannot be separated from the interpreter, which means that accounts are always only ever possible accounts. Thus this thesis offers only *an* account – my account – of European human rights law: an account based on my reading and interpretation of the assumptions that are made in European human rights law about the human condition.

(v) The nature of the account

What then, and finally, is the nature of the account that is generated in this thesis? The account offered is one that is borne of a combination of a practice-dependent reconstructive approach and a philosophical anthropology that is guided by the concept of 'lived order'. It can be described as a practice-dependent account of how European human rights law imagines the human condition.

It is important to add to this description that whilst the account offered here aims at being a coherent account of the practice of European human rights law, it can only be a general account. This is because it engages in a general inquiry of European human rights law's vision of the human condition and generates an account that is grounded in that which is deemed most fundamental and essential to European human rights law on the ECtHR's own terms. The reasoning behind the grounding of the account in this way derives, as we have seen, from the sense that if an 'underlying vision' exists in European human rights law at all, then it must surely be reflected in references to the ECHR's 'essence'. But its consequence is that the account produced here necessarily has a certain generality about it: it has general applicability as an account of how European human rights law imagines

[56] R. Dworkin, *Law's Empire* (1998, Hart Publishing), p67.

the human condition, but it is also at its most intense in the areas that are most integral to the ECHR legal order (and that are identified by the ECtHR as such).

This qualifies our definition of the nature of the account that is set out in this thesis as follows: it is a general and practice-dependent account of how European human rights law imagines the human condition. Furthermore, whilst the thesis offers a comprehensive engagement with the question of how European human rights law imagines the human condition, it does not offer (and nor does it claim to offer) a comprehensive account of the practice of European human rights law entirely. In particular, it addresses the practice of European human rights law by reference to a specified range of case law only. It does not treat the institutional context within which European human rights law's vision of the human condition is produced, and nor does it address its social, economic, political, and cultural context. And even in terms of the engagement with the case law, the focus is not on the legal concepts that are the more frequent target of the European human rights law scholarship (such as the concepts of 'proportionality', 'European consensus', 'living instrument', and 'margin of appreciation'). This is because this is a project about the concepts with which being is understood and articulated in European human rights law. These are not the legal concepts – which operate on the surface of European human rights law's vision of the human condition and come into play in the context of operationalising the vision in specific instances – but rather the concepts with which European human rights law appeals to the self-understanding of its subjects and objects: the appeal that it must make for its legal order to be lived. The project here is one that is concerned with questions of how European human rights law imagines the human condition and the meaning of this vision as such. It is, accordingly, an account of this vision – and one that is framed by a conception of the ECHR legal order as a lived order – that emerges across the thesis.

The structure of the thesis

The structure of the thesis is as follows:

Chapter 1 develops the conceptualisation that has been presented in this Introduction: the conceptualisation of European human rights law as a lived order of individuation. It begins with an analysis of how and why the ECHR legal order can be thought of as an order of individuation. It argues that the ECHR legal order is notable in the way in which it forefronts a process of individuation: a process of the delineation (and simultaneous articulation) of 'the individual', and one which here involves the elevation of 'the individual' out of the order of the state and the instatement of this same 'individual' as the organising principle of the ECHR legal order. This is the vision, I suggest, that underpins the claim of the ECHR legal order to protect 'the individual' within and beyond the state; and it is the constitution of the ECHR legal order around 'the individual' in this way that brings us to a conceptualisation of the ECHR legal order as an order of individuation.

The chapter then moves on to consider what it means to think of the ECHR legal order in these terms. It does so by examining the concept of 'order'; and I argue, through an analysis of two 'ideal types' of order,[57] that the question here must be one of the mode of being that underpins a conception of order that has, as its basis, 'the individual'. This is a question of the ECHR legal order as a lived order – as an order that presupposes and expresses a mode of being, such that the order is itself lived – and in the final part of the chapter I examine what it means to think of European human rights law in these terms. I suggest that a lived order has three main features: it is governed by an ethos, which functions to support the mode of being of the order; it is internalised by those within it; and it sets out a vision of space, time, body, wisdom, and things. It is in these terms that the subsequent chapters of the thesis analyse European human rights law. Each chapter is structured around a different sphere of lived order: space (Chapter 2), time (Chapter 3), body (Chapter 4), wisdom (Chapter 5), and things (Chapter 6).

[57] I further argue that the order of individuation sits alongside and draws on these types of order.

Chapter 2 examines the idea of space that structures European human rights law. I argue that space is conceptualised here by reference to two visions: a phenomenological vision of the sense of place of the individual, which I describe as an idea of individual *presence*, and a more functional or instrumental vision of the position of the individual – of the representation of the individual through the lens of some social role or status – which I describe as an idea of individual *presentation*. The main question addressed in this chapter is of how these two visions are mediated. Together, they supply the terms through which the individual is articulated and presented in European human rights law; but the visions that they each set out are at odds with one another. For whereas the notion of presence originates in an account of the sense of place and sense of orientation of the individual, the notion of presentation focuses on the social function that she is performing or the activity that she is engaged in. I argue that although the splitting of the individual between the terms of presence and presentation in this way gives rise to the possibility for presentation to submerge presence, there is also a productive quality to this tension. This consists in the way in which it opens up a space for the negotiation of individual identity in European human rights law. I suggest that what this means, from the perspective of our consideration of European human rights law as an order of individuation, is that the individual is not only granted a sense of place and a position in this order, but that she is given an identity in it too.

Chapter 3 argues that the idea of individual identity that emerges in this way is structured by a notion of individual continuity across time. I locate the origins of this notion in European human rights law's conception of human dignity – a conception which, I argue, is about the protection of potentiality: a latent capacity to become and therefore 'be' within the meaning of European human rights law. Two forms of potentiality are articulated: *vital potentiality*, which marks the beginning of time and being in European human rights law and is about the potential (of an embryo, for example) to develop into a human being; and *ethical potentiality*, which is about the continuous development and realisation of the self. Taken together, vital potentiality and ethical potentiality make for an account in

which being is about becoming. They articulate a vision of self-continuity: a continuity that is cast as being promised by the fact of being in a continuous process of development.

The notion of 'self-continuity' is, however, quite abstract; and the chapter goes on to argue that it is substantiated by two conditions: habituation (which is about what the individual is habituated to) and narrativisation (which is about the construction of narrative as a means through which to organise life and to accord it a sense of coherence and continuity). Whilst these conditions appear to be about a 'sense of feeling habituated' and a 'sense of continuity', however, I argue that they carry a normative hue that problematises this appearance entirely. The condition of habituation contains an account of what it means to be habituated – of what it means to be situated – which is articulated by reference to such notions as of the 'roots' of the individual and of the 'degree' of her 'integration' and thereby enables a pinning down of the individual. The condition of narrativisation meanwhile involves a series of choices that shape the construction of the narrative itself and therefore the experience of continuity that is grounded upon it, with the effect that the notion of 'becoming' in European human rights law is about becoming in a particular way. The consequence of this, I argue, is that the idea of individual continuity in European human rights law acquires a double function: it is at once about the individual's sense of continuity and at the same time a means of pinning down this individual in the terms of European human rights law. This, I suggest, is enabled by a vision of the human condition in which we are assumed to have a need to assume our self-continuity across time.

Chapter 4 argues that the assumption that we have a need to assume our self-continuity is bound up in the way in which European human rights law conceives of us as having a need to be recognised by others: a need that is concretised in European human rights law's vision of the body. This is a vision that hinges on two ideas: the idea that our fundamental assumptions about the world and about our place in the world are bound up in our sense of our body; and the idea that the right to respect for bodily integrity (which is the fundamental underpinning of relations between living bodies in European human rights law) is

about recognition, so that respect for the bodily integrity of another is a matter of recognition of that other. The chapter maintains that a theory of recognition is articulated in this context, and one that conceives of a mutual dependence of self on other, such that we are conceived of as being dependent on the other to see and be seen. I argue that this vision finds two principal expressions in the case law. Firstly, the need for recognition is cast as exposing us to our vulnerabilities and insecurities, since these are portrayed as being managed and confronted with and through the other. Thus the projection of insecurities onto the body of the other is cast as involving the use of that other to gain access to those feelings (a possibility indicated, I argue, in the case law concerning the exposure of the body). Secondly, the need for recognition is conceived of as being essential not only to self-knowledge but also to the sustenance of the self. This is such that in the face of the loss of specific others, the focus is on renegotiating the specificity of that lost recognition, in order to reconstitute its effects. European human rights law's account of loss and mourning is accordingly structured by a vision of what this reconstitution consists in; and this vision is a restatement of the centrality that is attached in European human rights law to the notion of a need to sustain individual continuity.

Chapter 5 builds on this account of the assumptions that European human rights law conceives of us as making (such as about our self-continuity and our capacity to be recognised) by examining how an interaction is envisaged between our fundamental assumptions and our experiences. I argue that a normative account of the management of reality is elaborated in European human rights law, and that this account forefronts a particular manner of integrating experience, understanding, and knowledge that constitutes European human rights law's conception of wisdom.

At the basis of this account is, I suggest, a conception of us as having two needs: a need to preserve our fundamental assumptions, the object of which is the preservation of our sense of identity, and a need to integrate experiences into our frameworks of assumptions, including those experiences that are at odds with our fundamental assumptions. In the course of the struggle that takes place between

these needs, two conclusions are drawn in European human rights law about the nature of the integration of experience. The first is that the act of striving to preserve assumptions that run counter to reality can sometimes be taken to signal a need to adapt to that reality. The second is that we are portrayed as taking a while to integrate experiences that require an adaptation in our fundamental assumptions. A vision of what it means to integrate experience (and therefore to adapt our assumptive frameworks) is in this context articulated; and the integration of experience is presented as having three stages: a stage of understanding the experience in question by reference to the reasons for it and its causes; a stage of ascribing meaning to the happening; and a stage of locating the self in relation to the experience, which involves tolerating the experience and coming to live with it. I argue that this vision presupposes a conception of what it means to be capable of integrating experience. In particular, it presupposes a capacity on the part of the individual to accept responsibility, to overcome emotion, and to withstand influence. The development of these capacities – and the development, therefore, of the ability to integrate experience in the manner depicted – is, at the same time, I suggest, the development of an outlook on life in which these capacities are forefronted and towards which the individual is oriented. This outlook supplies a moral orientation to the notion of individual continuity specified in Chapter 3. But it also implies that this notion of individual continuity has to accommodate a sense of detachment, and this is because the outlook articulated here involves a degree of detachment from reality.

Chapter 6 picks up this last point about detachment and examines the vision of the present that is bound up in the conception of the capacity of the individual to stand at a certain distance from life itself. It argues that the individual is envisaged as being attached to the present and as extending beyond the present, and that this comes to light when we examine how the individual is conceived of as relating to material things in European human rights law.

The first part of the chapter argues that things are cast in European human rights law as standing for something in time. This is partly a function of the way in which things are treated as being embedded in narratives (for example, the things

that go to make up an individual's home are envisaged as containing the memories of the past, the familiarity of the present, and the hopes of the future); but it is also about the way in which things are cast as pointing to some conception of time that lies beyond the thing and is materialised in it (as when, for example, a thing is taken to represent a forthcoming risk). I argue that in materialising time in this way – in pointing to that which is to come – things also materialise that which has already happened (a present that has come to be in a particular way), such that the account of things in European human rights law is also an account of the condition of the present: an account in which the present is conceived of as being about containing the future.

The chapter then examines how the individual is located in this vision. It suggests that the conceptualisation of the present as containing the future makes for an account in which the individual is located between present and future. On the one hand, she is conceived of as being attached to material things. On the other hand, these material things are taken to reveal that which is to come as well as that which has already happened; and so in being attached to material things, the individual is also pushed beyond them. This account, I argue, is underpinned by a way of seeing which emphasises foresight, a way of relating to material things which is based on a notion of the material extent of the individual (of how far she extends in her material environment), and a way of representing the individual in her relations with material things which involves an abstraction from life itself to deal in the language of forms (a form being the image of the relationship that links the individual to the thing).

The final part of the chapter addresses the implications of this vision. I argue that the form's logic of abstraction has a reflexive quality, such that the possibility arises for the form itself to become a thing, with the relationship between the individual and the thing then being rendered material and pursued for its own sake. This entails a shift from the practice of the thing (a practice originally represented in the form, in that the form is an image of the relationship between the individual and the thing) to the practice of the form (a practice of a representation). I argue that the overall effect of this is that stability in European

human rights law comes to be located beyond the present, with the individual conceived of in terms of that which is to come. This means that the notion of individual continuity in European human rights law has to accommodate a notion of alienation, because in the moment that stability is located beyond the present, individual continuity is relocated at the level of the representation of the individual, and a mode of being emerges that is located between present and future and in terms of that which is to come.

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Taken together, the six chapters of my thesis develop an account of how European human rights law imagines the human condition. The account is one of how this vision of the human condition – which is expressed in, and underpinned by, a series of ordering assumptions – structures European human rights law; and it is an account, also, of the construction of European human rights law as a lived order of individuation. In the Conclusion, I outline the overall vision of the lived order of individuation that is articulated here and consider its implications. I argue that what binds the ordering assumptions of European human rights law together – that what constitutes the vision of the human condition that underpins and emerges from the notion of individual continuity that these assumptions give rise to – is a vision of the human condition as a condition in which the fundamental question to be negotiated is a question of coming to terms. This is a question of coming into the terms of European human rights law and of coming to terms with all that which must be brought to terms according to European human rights law.

The vision of the human condition as a condition of coming to terms makes for a mode of being that is about becoming. This, I suggest, is the mode of being that structures European human rights law as a lived order of individuation: an order that has an ethos of individual continuity that structures and supports this mode of being as becoming; that is internalised insofar as those within the jurisdiction of ECHR law rely on, appeal to, and fundamentally assume the existence of the rights and freedoms set out in the ECHR; and that structures life within it by reference to a series of assumptions that underpin (and are articulated in terms of) its vision of space, time, body, wisdom, and things.

– CHAPTER 1 –

European human rights law as a lived order of individuation

1.1 Introduction

This chapter develops the conceptualisation of European human rights law that was presented in the Introduction: the idea of European human rights law as a lived order of individuation. The ECHR legal order presents us, I suggest, with an *order of individuation* because it is constituted upon and structured by a vision of 'the individual'. And as a legal order, it is a *lived order*, because it necessarily presupposes and expresses a mode of being – a vision of life – such that the order is itself lived. These are the two principal ideas that are addressed in this chapter.

To begin, I examine the way in which 'the individual' is forefronted in the ECHR legal order such that we can think of this order as an order of individuation at all (*1.2*). The chapter then moves on to consider what it means to think about European human rights law in this way. It does so by examining the notion of order; and I argue, through this analysis, that the fundamental question must be one of the mode of being that underpins a conception of order that has, as its basis, 'the individual' (*1.3*). This is a question of the nature of European human rights law as a *lived order* of individuation – as an order that presupposes and expresses a mode of being such that the order is itself lived – and the final part of the chapter sets out a way of accounting for European human rights law in these terms. I argue, in particular, that a lived order has three main features: it is governed by an ethos, which functions to support and structure the mode of being of the order; it is internalised by those within it; and it structures life by setting out a vision of space, time, body, wisdom, and things (*1.4*). These are the features, I suggest, that we need to examine in European human rights law in order to account for it as a lived order of individuation.

1.2 The ECHR legal order as an order of individuation

To speak of a form of law that is based around 'the individual' is to beg many questions: what – and who – is 'the individual'? What does it mean for a form of law to be based around this figure? How does this come about, and what are its implications? These are some of the questions that are invited by the depiction of 'the individual' as the central figure of the European project today. This depiction takes the following form: in the case of the European Union ('the EU'), 'the individual' is cast as being "at the heart of its activities",[58] whilst in the case of the Council of Europe ('the COE'), "[t]he object and purpose" of its principal Convention – the ECHR – is described as being "as an instrument for the protection of individual human beings".[59]

In order to think about what it means to speak of 'the individual' in this way, this section begins with the idea of 'the individual' itself. It offers a brief account of the three strands of the idea of 'the individual' that have shaped the trajectory of this idea in European thought (*1.2.1*). These strands are *individuality* (envisaging 'the individual' as a bearer of distinct qualities), *individualism* (involving an assertion of individual liberty and entitlement), and *identity* (focusing on the identification of each individual); and what they reveal is a narrative of the individuation of 'the individual' – of the delineation (and simultaneous articulation) of 'the individual' – from all kinds of orders and institutions. When we turn to consider the scholarship on 'the individual' in the European project in this light, we see that it too addresses questions of the claims about individuality, individualism, and identity that are made in this context. However, the more notable feature about 'the individual' in the European project is the way in which it exemplifies and problematises the narrative of individuation that underpins these

[58] Charter of Fundamental Rights of the European Union, Preamble para.2. As Azoulai et al. note, the precise term used in this statement depends on the language of the version being read (individual, person, human being...); but the point, they suggest, is the same one: a reference "to an individual endowed with moral significance and legal protection" (L. Azoulai, S. Barbou des Places, and E. Pataut, 'Being a Person in the European Union', in L. Azoulai, S. Barbou des Places, and E. Pataut (eds.), *Constructing the Person in EU Law: Rights, Roles, Identities* (2016, Hart Publishing), 3-11, p3).

[59] E.g., 32541/08 and 43441/08, *Svinarenko and Slyadnev v Russia* (2014), para.118.

strands (*1.2.2*). I suggest that European human rights law, as the form of law headed by the ECHR, in particular pushes us beyond tracing the elements of the idea of 'the individual' or seeing how the narrative of individuation pans out; rather, it constitutes a legal order that is generated around 'the individual'. It constitutes, I suggest, an order of individuation: an order that is constituted upon and structured by 'the individual' (*1.2.3*).

1.2.1 The idea of 'the individual' in European thought

If we are to think in any detail about 'the individual', we ought really to have some sense of that which we are thinking about – whilst being wary of presupposing that which we then go to look for – and one way of coming to this is to draw on the three strands of the idea of 'the individual' that have structured the history of this idea in European thought: individuality, individualism, and identity. A good place to focus on in unpicking these is European humanist thought, which is accredited with having made a significant contribution to the idea of 'the individual' in Europe. Humanist thinkers articulated a vision involving the individuation of 'the individual' from socio-political ordering, the instatement of 'the individual' as a site of value distinct from such ordering, the elaboration of values such as 'dignity' and 'potentiality', and a passion for the active civic life as the prime mode of being. This informed the development of the three strands of the idea of 'the individual' that are noted below. To be clear, my point in this respect is not to imply that these strands were articulated in a linear fashion; and nor is it to claim that the account below is anything approaching a comprehensive account. Rather, the purpose is to highlight some formative dimensions of the idea of 'the individual' – my suggestion being that in each strand of humanist thought, we see one or the other of these dimensions prevailing – as a starting point towards thinking about the idea of 'the individual' in the European project today.

(i) Individuality

The first strand of the idea of 'the individual' that we can discern is that of individuality. This envisages the individual as a bearer of distinctive qualities, and

its origins have been dated to the twelfth century,[60] during which period an idea of the 'self' emerged and came to flourish.[61] Colin Morris, in *The Discovery of the Individual 1050-1200*, describes, in particular, how ideals of self-knowledge and self-cultivation (in terms of the Delphic 'Know thyself') and practices of self-expression and self-examination developed during this period.[62] The latter were especially influenced by – and expressed in – cultural and religious turns such as to the practice of annual confession for Church members, a notion of individual intentionality,[63] the practice of autobiographical writing, and the practice of depicting individuality (as opposed to office) in portraiture.[64]

The notion of individuality that emerged in this way depicted a process of individuation from office and emphasised the distinctive qualities of the individual. It was subsequently taken up during the fourteenth-century Italian Renaissance;[65] and the humanist writings of this period reflected a passion for the active civic life as the prime mode of being, found self-cultivation to lie in literature and education, emphasised the power of human intellect as being no longer determined by religious or divine edict, accorded primacy to the earthly search for self and identity, and articulated a vision of the ontological condition of the individual.[66] In addition, much emphasis was placed on the status and innate potentiality of the individual, and this was exemplified by the conception of dignity that came to the

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[60] For a long time, the origins of the notion of 'the individual' (in terms of individuality) were located – namely by Burckhardt – in the fourteenth-century Italian Renaissance (J. Burckhardt, *The Civilization of the Renaissance in Italy: An Essay* (2010 [1860], Dover Publications, p81-87). Burckhardt's thesis was later superseded by a body of work which dated the appearance of 'the individual' to the High Middle Ages.

[61] C. Morris, *The Discovery of the Individual 1050-1200* (1972, SPCK), p52-54, 121-138.

[62] *Ibid.*, p65-79.

[63] See esp. P. Abelard, *Peter Abelard's Ethics* (ed. D. E. Luscombe) (1971 [c.late.1130s], Oxford University Press).

[64] Morris (1972), above n4, p65-120. This movement from representations of typology has also been described by Ullmann, who further argued that this form of individuality underlay the ecclesiological and cosmological ordering all along, such that it was less the emergence of individuality that occurred, and more its re-emergence. See W. Ullmann, *Medieval Foundations of Renaissance Humanism* (1977, Elek Books), p68-88.

[65] See n3 above.

[66] D. Hay, *The Italian Renaissance in its Historical Background* (Second Edition) (1977, Cambridge University Press), Chs.4, 5; E. Garin, *Italian Humanism: Philosophy and Civic Life in the Renaissance* (transl. P. Munz) (1975 [1947], Greenwood Press), Chs.1, 2.

fore at this time: a conception of dignity as being about the realisation of innate potentiality[67] and the consequent acquisition of (dignified) status.[68]

(ii) Individualism

The second strand of the idea of 'the individual' is that of individualism, which involves an assertion of individual liberty and entitlement. This can be traced to the political theology of the Reformers, many of whom identified as humanists or were at least schooled in humanism.[69] Predominant among the methodological and thematic affinities of the two movements was an emphasis on the status of the individual. This was partly fuelled by the humanists' longstanding critique of Church corruption,[70] but its cause was furthered by Martin Luther's political theology and, in particular, by his attack, in *To the Christian Nobility*, on the papacy.[71] Underpinning Luther's message were the Reformation doctrines of the primacy of the authority of Scripture, justification by faith, and the priesthood of all believers.[72] In particular, a claim of (the equality of) individual entitlement was articulated through the concept of the 'common man',[73] through the elevation of the individual above institutions,[74] through the attribution of fault to individuals as opposed to divinely-ordained institutions,[75] and through the reasoning which underpinned the doctrine of the priesthood of all believers: that the only difference between the laity and the clergy was the office of the latter; their status was equal.[76] Within this vision, individual entitlement was founded as latent and therefore

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[67] See esp. G. Pico della Mirandola, *Oration on the Dignity of Man* (transl. A. R. Caponigri) (1956 [1486], Henry Regnery Company).
[68] See, e.g., E. F. Rice, *The Renaissance Idea of Wisdom* (1958, Harvard University Press), Ch.4.
[69] Notably Luther. See L. W. Spitz, *The Religious Renaissance of the German Humanists* (1963, Harvard University Press), Ch.10; V. H. H. Green, *Luther and the Reformation* (1964, B. T. Batsford), p29; R. W. Scribner, *The German Reformation* (1986, MacMillan Publishers), p49-50.
[70] Spitz (1963), above n12, p238.
[71] M. Luther, 'To the Christian Nobility of the German Nation Concerning the Reform of the Christian Estate' (1520) (transl. C. M. Jacobs), in M. Luther, *Luther: Selected Political Writings* (ed. J. M. Porter) (1974, Fortress Press), 37-49, p39.
[72] J. M. Porter, 'Introduction: The Political Thought of Martin Luther', in Luther (ed. J. M. Porter) (1974), above n15, 1-21, p4.
[73] Scribner (1986), above n12, p18-19, 49-50.
[74] Porter (1974), above n15, p6-7.
[75] See W. D. J. Cargill Thompson, *The Political Thought of Martin Luther* (ed. P. Broadhead) (1984, The Harvester Press), p6.
[76] Luther (1520), above n14, p41.

always present. In an argument which strikingly parallels Carl Schmitt's later thinking on the exception as revealing the truth of the norm,[77] Luther reasoned that the truth of all believers being priests was revealed by the exceptional force of necessity ("in cases of necessity anyone can baptize and give absolution"[78]). This conception of the realisation of (latent) individual entitlement later went on to be asserted in the modern scientific method, having been adopted by the scientific revolution which marked the beginning of the Enlightenment.[79]

In many ways, the Reformers' ideals continued into the Enlightenment; it too promoted scholarship and rationalism. It was characterised, or so Immanuel Kant argued, by "man's release from his self-incurred tutelage",[80] and the idea of 'the individual' articulated here emphasised rationality and individuation from forms of traditional authority, such as Church doctrine. This vision was developed with the aid of two ideas which were advanced during the French Revolution: individualism and the abstract man of rights.[81] The political philosophy that underpinned these ideas was significantly at odds with the conception of individuality that had been expressed by Renaissance humanists. For example, the French Declaration of the Rights of Man and of the Citizen conceived of an abstract individual – an individual stripped of the scope for individuality that had characterised the trajectory of the idea of 'the individual' from the twelfth century onwards.[82] It set out a representation of a form, a type – a 'what' as distinct from the singular 'who', to use the distinction later drawn out by Hannah Arendt and Adriana Cavarero and that casts the 'what' as a quest for the universal, the

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[77] C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (transl. G. Schwab) (1985 [1922, 1934], MIT Press), Ch.1.
[78] Luther (1520), above n14, p40.
[79] Cf. and for discussion, T. K. Rabb, 'Religion and the Rise of Modern Science' (1965) *Past & Present* 31, 111-126.
[80] I. Kant, 'What is Enlightenment?', (1784) in I. Kant, *On History* (ed. and transl. L. W. Beck) (1963, Macmillan), 3-10, p3.
[81] Whilst the term 'individualism' derives from the nineteenth century, its doctrines (deemed by Swart to be political liberalism, economic liberalism, and Romantic individualism: K. W. Swart, "'Individualism" in the Mid-Nineteenth Century (1826-1860)' (1962) *Journal of the History of Ideas* 23(1), 77-90, p77) have earlier roots. See R. R. Palmer, 'Man and Citizen: Applications of Individualism in the French Revolution', in M. R. Konvitz and A. E. Murphy (eds.), *Essays in Political Theory presented to George H. Sabine* (1972 [1948], Kennikat Press), 130-152.
[82] See also C. Douzinas, 'Human Rights, Humanism, and Desire' (2001) *Angelaki: Journal of the Theoretical Humanities* 6(3), 183-206, p188.

anonymity of which poses a threat to the 'who'.[83] The paradox underlying the concept of the rights of the abstract man was, then, that the structure established for his articulation had inherent in it the seeds of his alienation.

(iii) Identity

The third strand of the idea of 'the individual' is that of identity, and this is about the identification of *each* individual (as opposed to *the* individual). Its origins can be traced to the Romantic thought of the late-eighteenth to nineteenth centuries, where it was born of a tension between the notions of individualism and individuality. The Romantics, reacting to the "'quantitative,' 'rationalistic,' 'optimistic,' and 'democratic'" elements of Enlightenment individualism, articulated a conception of individualism which was "'qualitative,' 'irrationalistic,' 'pessimistic,' and 'aristocratic'" in form.[84] It praised the distinctive qualities of each individual; Georg Simmel, describing it in terms of "the new individualism", "the individualism of uniqueness",[85] saw it as consisting in the quest of the individual, in the aftermath of "thorough liberation" from "the rusty chains of guild, birth right, and church", to "distinguish himself *from other individuals*".[86] Thus whereas Enlightenment humanists had articulated individuation in terms of the liberation of the individual (qua abstract man) from traditional authority, focusing on the innate equality and universality of each (recognised) individual, Romantic humanists articulated individuation in terms of an ideal of identity, emphasising the unique potentiality and particularity of each individual.[87]

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[83] H. Arendt, *The Human Condition* (Second Edition) (1998 [1958], University of Chicago Press); A. Cavarero, *Relating Narratives: Storytelling and Selfhood* (transl. P. A. Kottman) (2000, Routledge); A. Cavarero, *Horrorism: Naming Contemporary Violence* (transl. W. McCuaig) (2009 [2007], Columbia University Press), p44-45.

[84] Swart (1962), above n24, p83.

[85] G. Simmel, 'Individual and Society in Eighteenth- and Nineteenth-Century Views of Life', in G. Simmel, *The Sociology of Georg Simmel* (transl. and ed. K. H. Wolff) (1950, The Free Press), 58-84, p81.

[86] *Ibid.*, p78.

[87] *Ibid.*, p64-69, p78. Romantic humanists envisaged a relation between this particularity and the greater totality. See E. N. Anderson, 'German Romanticism as an Ideology of Cultural Crisis' (1941) *Journal of the History of Ideas* 2(3), 301-317; E. Troeltsch, 'The Ideas of Natural Law and Humanity in World Politics' (1922), in O. Gierke, *Natural Law and the Theory of Society 1500 to 1800 – Volume I* (transl. E. Barker) (1934, Cambridge University Press), 201-222.

1.2.2 Thinking about 'the individual' in the European project

From this brief account of the three strands that underpinned the articulation of the idea of 'the individual' in European thought, we can draw out three stances that we might want to consider in thinking about 'the individual' in the European project. And indeed, when we turn to the literature to consider how 'the individual' has been thought about in this context, we find accounts dealing with questions of the notions of individuality, individualism, and identity that emerge in the terms of the CoE and the EU. For example, Catherine Dupré's analysis of the place of human dignity in the EU and in the ECHR highlights the question of individuality (a question of what is distinctive about the individual), insofar as dignity is conceived of in the context of European constitutionalism as being a distinctive human quality that is shared by all.[88] Alexander Somek's analysis of the way in which the EU legal order presupposes an individualistic citizen is an argument about the way in which EU regulatory authority appeals to a type of individualism (involving the assertion of individual liberty and entitlement).[89] And Jill Marshall's analysis of how human rights law relates to personal identity brings to the fore the way in which ECHR law works to create and protect personal identity (involving the identification and self-identification of each individual).[90]

The focus of this literature is on the way in which EU law and ECHR law engage with and articulate notions of individuality, individualism, and identity, and on what this tells us about these legal orders and their representation of 'the individual'. Critically, this representation is only ever that: it is about 'the individual' as distinct from 'each' 'individual'. This makes for a space between 'the individual' and subjectivity itself; and the effect of this space, whether conceived of in terms of the construction of 'the individual' or in terms of the effects of legal

[88] C. Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (2015, Hart Publishing).
[89] A. Somek, *Individualism: An essay on the authority of the European Union* (2008, Oxford University Press).
[90] J. Marshall, *Human Rights Law and Personal Identity* (2014, Routledge) and *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (2009, Martinus Nijhoff Publishers).

constructions of subjectivity on individual subjectivity itself has also been explored in literature on the EU and the ECHR.[91]

Alongside these questions of the formation (and effects) of 'the individual', there is also a question of the origins of 'the individual' to consider. One of the most notable things about the historiography of the idea of 'the individual' in this respect is the extent to which the trajectory of 'the individual' in European thought is cast as being borne of a narrative of the individuation of 'the individual' – of the delineation (and simultaneous articulation) of 'the individual' – from all kinds of normative orders and institutions.[92] This process of individuation is coupled with a problematisation of these structures of order and authority, and this is represented in the three strands of the idea of 'the individual' that were noted above. The notion of individuality (envisaging 'the individual' as a bearer of distinct qualities) emphasises individuation from office; the notion of individualism (involving an assertion of individual liberty and entitlement) emphasises individuation from structures of traditional authority; and the notion of identity (focusing on the identification of each individual) emphasises individuation in terms of self-definition.

The European project, in both its EU and CoE instantiations, in many ways exemplifies this narrative of individuation, insofar as it seeks to lift 'the individual' out of the order of the state. Two of the most interesting concepts that have come to the fore in recent literature as tools to think about this are the concepts of emancipation and justification. Floris De Witte has theorised EU law in terms of the former. He argues that EU law can be understood, albeit not unproblematically, "as an instrument for emancipation"[93] (with 'emancipation' understood here as being about creating "a negative space *for* freedom – a space in

[91] On EU law, see esp. the essays in Azoulai et al. (eds.) (2016), above n1; P. Neuvonen, *Equal Citizenship and its Limits in EU Law: We the Burden?* (2016, Hart Publishing). On ECHR law, see esp. P. Johnson, *Homosexuality and the European Court of Human Rights* (2013, Routledge) and *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights* (2016, Oxford University Press).

[92] See, e.g., L. Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (2015, Penguin); W. Ullmann, *The Individual and Society in the Middle Ages* (1967 [1966], Methuen & Co Ltd.).

[93] F. de Witte, 'Emancipation Through Law?', in Azoulai et al. (eds.) (2016), above n1, 15-33, p21.

which choices can be internalised privately and freely expressed or acted upon publically without the risk of domination"[94]). There are three reasons, he suggests, for this. Firstly, EU law "amplifies the capacity of individual citizens to publically realise their private aspirations and ambitions".[95] Through the free movement provisions, in particular, EU law "[makes] available to citizens not only choices that exist on the territory of her own State, but also those available in 27 other States";[96] and it accordingly "allows citizens to vault over normative, administrative, economic or cultural values imposed within their own State".[97] Secondly, it "[includes] more citizens in the conditions that allow for emancipation"[98] by "[guaranteeing] the availability of positive rights…to an increasing number of individuals".[99] In particular, "the obligation of non-discrimination based on nationality can be understood as a process of gradual inclusion of non-nationals within domestic structures of positive rights".[100] Thirdly, it "problematises the domination that results from a source that the nation State cannot tackle: the nation State itself".[101] More specifically, it problematises the nation state's limited "conception of the individual as being first and foremost a *national*".[102]

None of this is without problem, as De Witte goes on to show. He argues that the norms and dynamics that can be taken as an expression of emancipation at the EU level also carry the potential to destabilise emancipatory projects and institutions at the national level, and that the account of the emancipatory potential and project of EU law does not sufficiently engage with (and in fact "glosses over") "the structures of domination that the EU itself perpetuates".[103] But setting aside the critique of this account, and focusing instead on the vision that is elaborated in its terms, what is highlighted is the way in which EU law enables the individual

[94] *Ibid.*, p20.
[95] *Ibid.*, p21.
[96] *Ibid.*, p21.
[97] *Ibid.*, p22.
[98] *Ibid.*, p23.
[99] *Ibid.*, p21.
[100] *Ibid.*, p23.
[101] *Ibid.*, p25.
[102] *Ibid.*, p27.
[103] *Ibid.*, p27.

to conceive of herself as apart from her 'home' state: something which enables a form of self-realisation (the realisation of "innermost and private aspirations and desires"[104]) and a form of self-articulation (the articulation of 'this is who I am'). EU law, on this account, presupposes that the individual may not find and realise herself within her state, and it enables her to look elsewhere. In so doing it "aims to allow the individual to live a life that more closely realizes his or her idea of 'self'".[105] And to the extent that the dialogical processes of self-realisation and self-articulation that are implied here occur in relation to and against the backdrop of the individual's 'home' state, we can read De Witte's reconstruction of EU law as an account of EU law's vision of individuation: as an account of the way in which EU law envisages itself as lifting the individual up and out of her state.

Turning next to the ECHR, as "the cornerstone" of the CoE,[106] we see that this, too, involves a problematisation of the relationship between 'the individual' and the state, being produced as it was of a theory which located "future salvation in restoring the primacy of the individual against the over powerful state, in establishing civil and political freedom, and in restoring and safeguarding democracy".[107] The way in which individuation has been most notably theorised in this context is in terms of justification, with the ECHR being taken to be a part of a "culture of justification". That term was coined by Etienne Mureinik[108] and it is now claimed by Moshe Cohen-Eliya and Iddo Porat to depict an "emerging global legal culture"[109] in which the state must justify its action to the individual. Kai Möller defines it more precisely: "in a culture of justification *it is the role of the courts to ensure that every act of the state that affects a person is substantively justifiable to him*

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[104] *Ibid*., p22.
[105] F. de Witte, 'Integrating the Subject: Narratives of Emancipation in Regionalism' (2019) *The European Journal of International Law* 30(1), 257-278, p267.
[106] This is how it is described by the CoE: https://www.coe.int/en/web/human-rights-convention (last accessed 19 July 2019).
[107] A. W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001, Oxford University Press), p157.
[108] E. Mureinik, 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal of Human Rights*, 31-48.
[109] M. Cohen-Eliya and I. Porat, *Proportionality and Constitutional Culture* (2013, Cambridge University Press), p7.

or her".[110] The related right to justification "expresses the same idea in moral terms; it insists that every citizen has a *moral* and, ideally, *constitutional right* to the kind of justification envisaged by the culture of justification".[111]

Cohen-Eliya and Porat argue that a culture of justification is fostered by the following principal characteristics of post-War "Western constitutional systems": "a broad conception of rights; a constitutional interpretation approach that emphasizes fundamental principles and values rather than text; few barriers to substantive review; and no legal 'black holes' (areas and actions with respect to which the government is not required to provide justification)".[112] The most critical feature of a culture of justification, however – the one that springs from it and "epitomizes" it[113] – is its doctrine of proportionality, which "basically [requires] that any interference with rights be justified by not being disproportionate".[114]

The ECtHR relies heavily on the doctrine of proportionality in its reasoning;[115] and it forms part of the culture of justification in this sense. The position that is accorded to the individual in this regard has been brought out most clearly by Möller in his analysis of the moral basis of the culture of justification. Drawing on Rainer Forst's analysis of human beings as justificatory beings (as beings with a basic right to justification), and Mattias Kumm's analysis of reasonable disagreement, Möller argues that the moral basis of the culture of justification lies in the fundamental status of every person as "a justificatory agent" ("as an agent who has a right to justification").[116] Möller argues that it follows from this status that any act on the part of the state that burdens the individual must be substantively justifiable to him or her as a "reasonable" act.[117] This right to

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[110] K. Möller, 'Justifying the culture of justification' (forthcoming, 2019) *International Journal of Constitutional Law*, p1.
[111] *Ibid.*, p1.
[112] Cohen-Eliya and Porat (2013), above n52, p7-8, Ch.6.
[113] *Ibid.*, p7.
[114] *Ibid.*, p2.
[115] See K. Möller, *The Global Model of Constitutional Rights* (2012, Oxford University Press), esp. Ch.7. Cohen-Eliya and Porat argue that it has been one of the most influential courts in the global spread of the doctrine: Cohen-Eliya and Porat (2013), above n52, p10-14.
[116] Möller (forthcoming, 2019), above n53, p10 et seq., p18.
[117] *Ibid.*, p14, and p10-14.

justification is, furthermore, judicially protected: "every person has the right to challenge any act or policy that imposes a burden on [him or her]".[118]

Möller's analysis of the conception of the person that underlies the culture of justification in this way (and that, Möller argues, supplies its moral basis) points towards something significant about individuation in European human rights law. For it cannot only be that the relationship between the conception of the person at issue here and the right to justification works in one direction, such that the conception of the person as a justificatory agent is what gives rise to the right to justification at all. The relationship must be more reflexive and fluid than this.[119] This is not least because the act of addressing someone as having a right to justification – an act of addressing which precedes but is not wholly separable from the act of justifying itself – involves an assumption that the addressee is capable of challenging what is being done or said. The act of addressing is, in this way, an act of seeing, and an act of constituting the addressee as such: as a singular individual to whom justification is owed by the state. Justification is not only, then, about accounting for the exercise of state power in terms of the individual. It also implies the delineation and articulation of the individual as against and in relation to state power. In other words, it is also about individuation. We accordingly arrive at a way of understanding its apparent significance in European human rights law from the perspective of the ECHR itself – a Convention which, it will be recalled, is in part about "restoring the primacy of the individual against the over powerful state".[120]

1.2.3 From the idea of 'the individual' to an order of individuation

The European project has not only been taken to set out a vision of individuation (involving the delineation – and simultaneous articulation – of 'the individual' from structures of order) in this way. It also challenges the notion of individuation by instating the individual that it elevates out of the order of the state as the organising

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[118] *Ibid.*, p14.
[119] On the reflexive nature of the constitution of the subject see J. Butler, *Giving an Account of Oneself* (2005, Fordham University Press), Ch.1.
[120] Simpson (2001), above n50, p157.

principle of a new vision of order: the European order. The EU and the CoE form two sides of the same post-War 'European order' in this sense, but the way in which 'the individual' is presented as the organising principle in each case is different.

In the case of the ECHR, 'the individual' is conceived of as the end source of value and as the objective of its vision. As the ECtHR now emphasises, therefore, "[t]he object and purpose of the Convention" is "as an instrument for the protection of individual human beings",[121] and its "very essence…is respect for human dignity and human freedom".[122] In the case of the EU, by contrast, 'the individual' is envisaged in terms wholly delineated by and consonant with the vision of EU integration articulated through EU law.[123] Thus 'the individual' in the EU legal order is an individual placed into the terms of the EU; or, to put it differently, EU law's way of envisaging and representing 'the individual' is formed by, and extends only as far as, the vision of the activities with which it engages. This makes for an episodic representation of 'the individual' – a vision that cuts across and invokes only particular life stages, at particular times, under particular conditions, and in particular contexts – which explains why much of the scholarship on 'the individual' in EU law takes as its starting point specific categories (such as of the citizen and the worker).[124] And if this episodic representation nevertheless derives a coherence from a distinctive "EU legal persona" that underpins it – a normative and normalising vision "used to make sense of EU law"[125] – then the fact that this is a 'persona' at all (a term which has

[121] E.g., 32541/08 and 43441/08, *Svinarenko and Slyadnev v Russia* (2014), para.118.
[122] E.g., 2346/02, *Pretty v UK* (2002), para.64.
[123] It was to this end of integration that 'the individual' was not only granted a position within the EU legal order but was also accorded agency to operate within that order: C-26/62, *Van Gend en Loos v Administratie der Belastingen* (1963) ECLI:EU:C:1963:1.
[124] This happens even with respect to specific categories. E.g., the definition of 'child' in EU law fluctuates depending on the area of law and policy: H. Stalford, *Children and the European Union: Rights, Welfare and Accountability* (2012, Hart Publishing), p25. As a general point, it does not follow, of course, that reference to categories in itself makes for an episodic account. In ECHR law, for example, I have argued that it is possible to draw out an account of how the self is imagined from the construction of the category of the child in 'The Child in European Human Rights Law' (2018) *Modern Law Review* 81(3), 452-479.
[125] D. Chalmers, 'The Persona of EU Law', in Azoulai et al. (eds.) (2016), above n1, 89-108, p93.

its origins in the 'mask'[126]) serves as a reminder of the difficulty in ascertaining the nature of the vision of 'the individual' now relocated beneath it.

This conceptualisation of 'the individual' as placed into the terms of the EU has been most recently affirmed by the Charter of Fundamental Rights of the EU (EUCFR), which stipulates, in its Preamble, that 'the Union…places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice'.[127] It is worth noting in this respect that there is a degree of interaction between the ways in which the EU legal order and the ECHR legal order conceive of 'the individual' expressed here, because the idea of 'the individual' that emerges from the EUCFR to guide EU law is shared and primarily shaped by the ECHR.[128] At the same time, however, EU fundamental rights law has a very different scope and nature to ECHR law. It is limited to the EU legal order,[129] and so even if it takes on certain qualities of ECHR law, it can only be fully understood in reference to the vision of EU law around which it is constituted.[130] This makes for a difference between the idea of 'the individual' that is articulated in EU law and that which is articulated in the context of ECHR law that can be quite simply put. In the case of the EU, 'the individual' is conceived of as being placed into the terms of the EU and as forming part of a legal order that is oriented towards integration. The EU legal order is, in this way, *an order of integration*. In the case of the CoE, the ECHR is conceived of as existing for 'the individual'. The form of legal order constructed here is an order that is built around 'the individual' and the problematisation of the relationship between the state and 'the individual'. It is *an order of individuation*: an order that is constituted upon and structured by 'the individual'.

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[126] See further Ch.2, part 2.3.1.
[127] EUCFR, Preamble para.2.
[128] This is due to Article 52(3) EUCFR.
[129] The EUCFR only applies to the EU institutions and bodies and to the Member States when they are implementing, derogating from, or acting in the scope of EU law. Outside the scope of EU law, fundamental rights are guaranteed by national constitutions and by the ECHR – both of which inform the interpretation of the EUCFR when it actually applies in the first place.
[130] See D. Chalmers and S. Trotter, 'Fundamental Rights and Legal Wrongs: The Two Sides of the Same EU Coin' (2016) *European Law Journal* 22(1), 9-39.

Although both sides of the post-War European order conceive of 'the individual' as an organising principle then, they do so in quite different ways. The ECHR legal order presents itself as an order that is based on and exists for 'the individual'. This renders its interaction with and conception of 'the individual' different from projects of regional integration, like the EU, which necessarily imply some conception of their subject (and one that is inseparable from the project of regional integration itself).[131] It also renders its notion of 'the individual' different from those of the post-War national constitutional orders that have forefronted a conception of 'the individual' in their specific national contexts.[132] And not only is the ECHR legal order distinctive among legal orders in this way. It is also distinctive from the perspective of the history of the idea of 'the individual'. For whereas that history is underpinned by a narrative of individuation from order, the ECHR legal order is generated upon a vision of individuation. It constitutes an order of individuation: an order that is constituted upon and structured by 'the individual'.

1.3 Order

The question that we need to think about, then, is the question of what it means to think about the ECHR legal order as an order of individuation. To do this, we need to think about the concept of order itself; and to this end, this section examines two types of order that have been central in European thought and history and that developed alongside the idea of 'the individual'. These are the orders of incorporation and association. The order of incorporation is based on a form of enclosure (a term which alludes to the articulation of the boundaries that any form of order requires) and it is governed by an ethos of stability (which is often taken to entail permanence of place – the stability for the individual of remaining in a place, and the stability, for the order, of the individual's so

[131] On which see De Witte (2019), above n48.

[132] E.g., Article 66 of the French Constitution describes the judicial authority as "the guardian of individual freedom" (*[la] gardienne de la liberté individuelle*), whilst the Italian Constitutional Court has conceived of the Italian legal order as being "orientated towards recognising the fundamental value of the person as an individual" (*orientato a riconoscere valore fondamentale alla persona come individuo*). (Judgment 118/1996 (Italian Constitutional Court), para.5).

remaining) (*1.3.1*). The order of association is based on a practice of cooperation (which is about acting together to some end) and it is governed by an ethos of sociality (which is about the norms of relating between members) (*1.3.2*). My suggestion is going to be that the order of individuation represented in European human rights law constitutes a third type of order that draws on the traditions of the orders of incorporation and association. The focus of this section, however, is on the way in which each order is inseparable from the mode of being that it presupposes and expresses: an inseparability, I suggest, that leads us to a conception of order as lived (*1.3.3*).

1.3.1 Orders of incorporation

Our first form of order is the order of incorporation, the defining feature of which is that it intertwines a form of enclosure with an ethos of stability. The terms 'enclosure' and 'stability' require immediate specification. The term 'enclosure' alludes to the articulation of the boundaries that any form of order requires. These boundaries are not only spatial; as Hans Lindahl has emphasised, in his analysis of legal orders, the boundaries of an order are also temporal, material, and subjective.[133] What is distinctive about enclosure in an order of incorporation is both its extent and its coincidence with the notion of incorporation. We see this most strikingly where enclosure emerges in the process of the formation of some body and represents the moment of incorporation itself. In ancient Rome and Greece, for example, the enclosure of the hearth, which contained a sacred fire, was at the same time the constitution of the family.[134] This was because the sacred fire "represented the ancestors; it was the providence of a family, and had nothing in common with the fire of a neighbouring family, which was another providence".[135] Those around it were bound, by its existence, to their ancestors; and at the same time, the fire constituted all those outside this realm as strangers.[136]

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[133] H. Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013, Oxford University Press), Ch.1.
[134] F. de Coulanges, *The Ancient City: A Study on the Religion, Laws, and Institutions of Greece and Rome* (1916 [1864], Simkin), p45-46.
[135] *Ibid.*, p45.
[136] *Ibid.*, p45.

The enclosed sacred hearth was accordingly not only an expression of the single body of the family, but it was also the moment, the reason, and the ethic of its incorporation.

The second term, 'stability', is about the ethos of stability that the enclosure in an order of incorporation is bound up with. This is often taken to entail permanence of place – the stability for the individual of remaining in a place, and the stability, for the order, of the individual's so remaining. This interpretation of stability and of its relationship with enclosure dates back to and is typified by the form of monasticism that was established under the Rule of St. Benedict ('the Rule') in the sixth century and that went on to become the most significant monastic Rule in European history.[137] We will examine this model of monasticism here in order to further understand the incorporation that it exemplifies and to focus our discussion of the notion of the order of incorporation itself.

At the core of the Benedictine model of monasticism is a particularly stringent vision of enclosure, involving a "completely self-contained and self-sufficient" monastery.[138] The monastery envisaged in the Rule is one in which "everything necessary – in other words, water, the mill, the garden and the various crafts practised" is to be, "[i]f possible", contained within it, "so that the monks do not need to go wandering outside for that is not at all good for their souls".[139] Any form of exit from the monastery is thoroughly discouraged, and if the monks have to go outside their monastery, they are to keep quiet about what they have seen upon their return.[140]

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[137] Gregory the Great, upon his consecration as Pope, strengthened the Benedictine model as a model for monasteries, and Charlemagne, in keeping with his more general quest for uniformity, imposed it as the common code for monasteries across the Empire. See e.g. H. B. Workman, *The Evolution of the Monastic Ideal: From the Earliest Times down to the Coming of the Friars – A Second Chapter in the History of Christian Renunciation* (1913, Charles H. Kelly), p170; D. Knowles, *From Pachomius to Ignatius: A Study in the Constitutional History of the Religious Orders* (1966, Clarendon Press), p7-9.
[138] G. Moorhouse, *Against All Reason* (1969, The Trinity Press), p24.
[139] St. Benedict, *The Rule of St Benedict* (transl. C. White) (2008 [c.540], Penguin Books) [hereafter, *RSB*], Ch.66. This total nature of the Benedictine enclosure was later famously depicted in the Plan of St Gall (c.820). See http://www.stgallplan.org/en/index_plan.html (last accessed 19 July 2019).
[140] *RSB*, Ch.67.

This makes for a strict division between life within the monastery and the world outside the monastery. The gate of the monastery symbolises this division. It represents not only a threshold that leads to a physical and mental "relocation"[141] and a change in status[142] but it is also taken to convey an unimaginable distance "between two modes of being" – between "two worlds".[143] The world that lies beyond the gate is cast as a potential pollutant of the monastic order itself; and the constitution of the outside world as such further reinforces the internal organisation of order.[144] Even visitors to the monastery, welcome as they may be,[145] are kept at some distance to minimise disruption.[146] The Benedictine enclosure depends, in this way, on the exclusion of the outside world.

This vision of enclosure is coupled with an ethos of stability, the origins of which lie in the vow of stability (*stabilitas*), which commands a series of commitments to the way of life of the monastic community, to remain within the monastery until death, to the maintenance of the stability of the community, and to the authority of the monastery as established by the abbot. The extent of this commitment is reflected in the sense that stability itself is a way of life; "[t]he workshop" in which the monk is to perform his life and task is "the enclosure of the monastery and stability in the community".[147] *Stabilitas* thus supplies the ethos of the Benedictine life, in that it functions to support and structure the mode of being of its order. This mode of being is a mode of common being: a mode of being that is characterised by homogeneity and simultaneity. All activities – such as eating, working, praying, and sleeping – are to occur in this way; and they derive the dignity granted to them in the Rule from the fact of being done in common. More than this, the Benedictine idea of order implies that it ought to be possible

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[141] A. Sennis, 'Narrating Places: Memory and Space in Medieval Monasteries', in W. Davies, G. Halsall, and A. Reynolds (eds.), *People and Space in the Middle Ages, 300-1300* (2006, Brepols Publishers), 275-294, p278.
[142] This ultimately underlies the vow of conversion of life.
[143] See, on this notion of 'threshold', M. Eliade, *The Sacred and the Profane: The Nature of Religion* (transl. W.R. Trask) (1950, Harcourt, Brace & World Inc.), p25.
[144] This is the nature of the concept of pollution: see M. Douglas, *Purity and Danger: An analysis of concepts of pollution and taboo* (1966, Routledge & Kegan Paul Ltd.).
[145] *RSB*, Ch.53.
[146] *RSB*, Chs.53, 61.
[147] *RSB*, Ch.4.

to look at the monastery and see everything moving in common.[148] To realise this, the monks are not to be distinguishable from each other. They shed their identity and individuality upon admission to the monastery;[149] thereafter, each holds only the status of monk.[150] The ethos of stability that lies at the origin of this form of uniformity functions, in this way, to secure common being, which is the mode of being of the order of incorporation.

1.3.2 Orders of association

Whereas an order of incorporation is based on a form of enclosure and is governed by an ethos of stability, an order of association is based on a practice of cooperation and is governed by an ethos of sociality. An order of association will, of course, have its own notions of enclosure and stability too; as was noted above, any form of order requires an articulation of boundaries and it must also be stabilised as an order. The critical difference between an order of incorporation and an order of association is, then, this: whereas an order of incorporation is defined by the way in which it constructs and relates its visions of enclosure and stability, an order of association is defined by the way in which it constructs and relates its visions of cooperation and sociality.

In an order of association, the notion of a practice of cooperation alludes to three things: to the teleological nature of cooperation (the way in which a practice of cooperation has an objective); to those who are doing the cooperating (and who have, apparently, an interest in cooperating); and to interpersonal ties

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[148] On how this is furthered by the architecture of the monastery, see W. Braunels, *Monasteries of Western Europe: The Architecture of the Orders* (transl. A. Lang) (1972, Thames and Hudson Ltd.), p10-11.

[149] This renunciation of individuality and total alienation of difference is a unique feature of the order of incorporation. Cf., e.g., structures of assimilation (where the individual comes to resemble, or becomes a part of, a corporation, such as the Hegelian corporation) or identification (where the individual is to fully adopt and identify with some form, such as the Soviet *kollektiv*). Such structures involve an action upon an individual, consisting in the eclipsing or changing of individuality. See further (and respectively on assimilation and identification), G. W. F. Hegel, *Elements of the Philosophy of Right* (ed. A. W. Wood; transl. H. B. Nisbet) (1991 [1820], Cambridge University Press), p270-271; O. Kharkhordin, *The Collective and the Individual in Russia: A Study of Practices* (1999, University of California Press), p75-88.

[150] This equal formal status is supported by a vision of humility that is itself cast as leading to a substantive equality. See esp. *RSB*, Ch.34 on "distribution according to need" (and more generally Chs.35-37 on helping the weak).

(which are expressed in the practice of cooperation itself). These three elements – teleology, interest, and ties – underpin the practical quality of cooperation that Richard Sennett has elsewhere labelled "a craft".[151] As a craft, cooperation "requires skill",[152] and it especially requires "the skill of understanding and responding to one another in order to act together".[153] It is this notion of action together that is key here. For whereas 'action together' in the context of an order of incorporation is about homogeneous and simultaneous action (the same action at the same time), 'action together' in an order of association means action to which each member contributes a distinctive part, the sum of which parts make for a greater whole.

One way of thinking about this is in relation to the modern political community, which necessarily presupposes a capacity for action together, sets out an account of what this action looks like, and values the action itself. In fact, we can go further than this and suggest that the order of association – an order based on a practice of cooperation – is exemplified by the modern political community, and, more specifically, by imaginaries of that community. This is not only insofar as the community of citizens (*civitas*) was originally understood as a practice of association;[154] but insofar as the tasks that a political community must perform can be understood through its lens. Damian Chalmers has suggested that these tasks are fourfold. He argues that the concept of political community serves to secure citizen trust in a political system, that it secures sacrifice on the part of citizens in the name of the system, that it generates a type of mutual commitment (expressed in the institution of citizenship), and that it supplies a language of public reason.[155]

The notion of cooperation clearly underlies all four qualities. In relation to trust in the political system, Chalmers argues that political community establishes "terms of recognition", sets out a space for resolving collective disputes, and offers

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[151] R. Sennett, *Together: The Rituals, Pleasures and Politics of Cooperation* (2013 [2012], Penguin Books), px.
[152] *Ibid.*, p6.
[153] *Ibid.*, px.
[154] De Coulanges (1854), above n77, p177.
[155] D. Chalmers, 'Political Community and EU Law' (manuscript on file), p7-10.

an account of the political system that encompasses its subjects.[156] In relation to sacrifice for the political system, costs are distributed within the community in a manner that is "determined by the content and quality of the mutual commitments [that] members owe each other" as well as by the "affective ties" that exist within the system (between members and between subjects and the system).[157] In relation to mutual commitment (which identifies members and their identical entitlements), citizenship works in a way that "citizens are…presumed to have equal access to the public sphere, public health system and public education".[158] And in relation to public reason, political community offers a language of membership which unites its members.[159]

The form of association that is depicted in this way is based on a practice of cooperation, involving the capacity for action together and action together itself. Chalmers argues that the vision of political community that emerges from this involves "the interlocking of two forms of association between strangers" – one which is about "co-existing together (communities of co-presence)" (and in which there is a commitment to living together), and another which is about "doing things of value together (communities of shared activity)" (and in which the community is established on the basis of "participation in a shared activity").[160] He argues that it is the interaction between these two forms of association that marks out a political community as such. But from our perspective here, we can also see in this the distinction between an order of incorporation and an order of association. Whereas in the case of the former, co-presence and action are about *common being* – about doing things in the same way and at the same time – in the case of the latter, co-presence and action are about *being-in-common* – about doing things together. The mode of common being in an order of incorporation is oriented towards the activity in question. The mode of being-in-common in an order of association is, meanwhile, oriented towards being together and relating to one another. It therefore requires bonds to be formed between members of the

[156] *Ibid.*, p7.
[157] *Ibid.*, p8.
[158] *Ibid.*, p9.
[159] *Ibid.*, p9-10.
[160] *Ibid.*, p18.

community; and such bonds will be commonly expressed in the language of solidarity. In an order of incorporation, by contrast, such bonds will be thin, if not absent. Primacy is, instead, attached to the activity of the order. Hence, for example, the emphasis that is placed in the Benedictine Rule on the dignity of the activity and its stipulation that "measures should be taken [in the monastery] to prevent there being an opportunity for one monk to defend another or to try to protect him, even if they are related".[161]

The ethos that functions to support the mode of being-in-common of an order of association is an ethos of sociality, which is about the norms of relating between members. It is about the *manner* of relating to others and of being aware of others that is prescribed as being a part of – and a means to – the practice of cooperation itself. In this sense, 'sociality' here denotes something that is at once thinner and thicker than prevailing conceptualisations in the literature. It is thinner in the sense that it is about 'relating to others' (as compared, for example, with Marilyn Strathern's conception of sociality "as the relational matrix which constitutes the life of persons"[162]) and it is thicker in the sense that it has a normative hue (it is about a prescribed manner of being with others, as opposed, for example, to being about the propensity for being with others as such[163]).

The norms that comprise and are expressed in an ethos of sociality in this sense may develop between members of the community as they go about their pursuit of a project of acting together. They may also be imposed on these members 'in the name of' (which is to say for the sake of some conception of) the community. The critical point is that the project of acting together is deemed to rely for its sustenance on the maintenance of these norms. Contemporary expressions of an ethos of sociality (as a manner of relating to others) in the context of the modern political community include, for example, notions of

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[161] *RSB*, Ch.59.

[162] M. Strathern, Presentation in the 1989 debate of the Group for Debates in Anthropological Theory (on the motion: 'The concept of society is theoretically obsolete'), in T. Ingold (ed.), *Key Debates in Anthropology* (1996, Routledge), 50-55, p53.

[163] On which see N. J. Long and H. L. Moore, 'Introduction: Sociality's New Directions', in N. J. Long and H. L. Moore (eds.), *Sociality: New Directions* (2013, Bergahn Books), 1-24, 9-11.

'civility' (which has its roots in the classical ideal of good citizenship[164]), 'social integration' (which whilst not necessarily appealing directly to the political community is increasingly inseparable in its contemporary European usage from a vision of what it means to be a part of, or at least to relate to, this community[165]), and 'social behaviour' (of the sort that we see being articulated in the context of the regulation of 'anti-social' behaviour, for example[166]). The norms of relating that are articulated in this way – norms that, I am suggesting, set out a manner of cooperating – are intertwined in the practice of cooperation itself; and the effect of this is that the ethos of sociality underpins and conditions the mode of being-in-common that is the mode of being of the order of association.

1.3.3 Order and being

What emerges most notably from this analysis of the orders of incorporation and association is the way in which each form of order presupposes and constructs a mode of being that is supported and structured by the ethos of the order. The mode of being in an order of incorporation is a mode of common being, the ethos of which is an ethos of stability; the mode of being in an order of association is a mode of being-in-common, the ethos of which is an ethos of sociality. The inseparability of being and order that is depicted in each case points towards the way in which each order is lived. This notion, of *lived order*, implies the possibility of the order itself as a mode of being.[167] It points towards the way in which the

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[164] B. Davetian, *Civility: A Cultural History* (2009, University of Toronto Press), p9.

[165] See esp. the following essays in in Azoulai et al. (eds.) (2016), above n1: S. Barbou des Places, 'The Integrated Person in EU Law', 179-202; L. Azoulai, 'The European Individual as Part of Collective Entities (Market, Family, Society)', 203-223, p212-214; S. Coutts, 'Union Citizenship, Social Integration and Crime: Duties Through Crime', 225-240.

[166] E.g., in England and Wales, the Anti-social Behaviour, Crime and Policing Act 2014 (and measures like 'Public Spaces Protection Orders' adopted thereunder, on which see S. Trotter, 'Birds Behaving Badly: The Regulation of Seagulls and the Construction of Public Space' (2019) *Journal of Law and Society* 46(1), 1-28).

[167] This subtly distinguishes the concept of 'lived order' from the 'form of life' concept by way of which the relationship between life and its form has been theorised most fully in the literature. That concept expresses an ontological notion (of the inseparability of life and its form) and a phenomenological notion (that this form is something lived); and it has been deployed, e.g., to depict a pattern of life (e.g., E. Spranger, *Types of Men: The Psychology and Ethics of Personality* (transl. P. J .W. Pigors) (1928 [1921], Max Niemeyer Verlag)), a shared mode of being (e.g., L. Wittgenstein, *Philosophical Investigations* (transl. G. E. M. Anscombe) (2001 [1953], Blackwell Publishing), and an order that contains a life (e.g., G. Agamben, *Homo Sacer: Sovereign Power and*

order itself structures – and accounts for – the life within it. If we go back and think about our two forms of order in this sense, we can see more closely how each one is lived in this way.

In the case of the order of incorporation, the demand exerted by the mode of common being entails an abandonment of individual identity: a process of self-surrender and incorporation under a Rule.[168] This process – of a giving over of identity – is instigated by the conditions that must be observed by an individual seeking admission to the order. In the case of the Benedictine monastery, for example, the aim of the conditions stipulated in this regard is to ensure that the individual demonstrates perseverance and endurance: he "should not be granted easy entry" and must be tested.[169] The process of admission is accordingly a lengthy one. Only if "the newcomer persists in knocking and seems to endure patiently the harsh treatment and the difficulty of entry" should he be granted entry in the first instance, and then only to stay in the guest-house "for a few days".[170] Following this, he initially dwells in "the novices' centre", where he is supervised by a senior and "told about all the difficult and harsh things that he will experience along the road to God"; and if he nevertheless perseveres, then after two months, he is read the Rule.[171] If he can observe it, he returns to live among the novices; if not, he departs at this point. The process is repeated again after six months ("so that he knows what he is letting himself in for") and again, "[i]f he still stands firm", after another four months.[172] After that, he is "received into the community" if "he promises to observe all the rules and to obey all the commands given to him".[173] But that admission occurs "in full awareness of the fact that the law of the rule lays down that from that day on he is not allowed to leave the

Bare Life (transl. D. Heller-Roazen) (1998 [1995], Stanford University Press); G. Agamben, *The Highest Poverty: Monastic Rules and Form-of-Life* (transl. A. Kotsko) (2013, Stanford University Press)).

[168] This has its roots in the etymology of 'abandonment' itself. See 'abandonment' in the Oxford English Dictionary (www.oed.com, last accessed 19 July 2019), and 'abandunement' in the Anglo-Norman Dictionary (www.anglo-norman.net, last accessed 19 July 2019).

[169] *RSB*, Ch.58. Perseverance and endurance remain vital in the monastery itself; see, e.g., *RSB,* Ch.7.

[170] *RSB*, Ch.58.

[171] *Ibid.*

[172] *Ibid.*

[173] *Ibid.*

monastery or to withdraw his neck from the yoke of the rule, which he had been allowed to accept or reject during the extended period of reflection".[174] He proceeds to take the vows of stability, conversion of life, and obedience. From now on, obedience will always denote that early liberty; and the Benedictine scheme is consequently taken to be one of "ordered liberty".[175]

Running alongside this process is a gradual elimination of individual will. This is cast as stemming from the choice to be admitted as a monk,[176] which means that what we have here is an act of will which, at the moment of its expression, entails its renunciation; hereafter, the monk "will not even have jurisdiction over his own body".[177] The monk is to "renounce" his own will,[178] to "hate" his own will,[179] to "give up" his own will,[180] to "guard" himself against his own will and to avoid "loving" his own will…;[181] simply put, "monks should not…count their own bodies and wills as their own".[182] Only in one sense does any form of individual will hold, and this comes to light if, exceptionally, the monk has to be disciplined and order in the monastery has to be restored.[183] The idea of individual will re-emerges here in that while all good is attributed to God and to the common stability of the monastery, any bad or disobedience is attributed to the individual.[184] The underpinning theory seems to be that instances of disobedience reveal that the monk had never renounced his will in the first place. And so the monk is disciplined and punished; and the aim is to bring this renunciation about.

The order of incorporation thus subsumes the individual within the status of subject of its order. It creates a bounded individual, by drawing a literal and metaphorical boundary around individual will and revoking this only in exceptional

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[174] *Ibid.*
[175] C. Cary-Elwes, *Law, Liberty and Love: A Study in Christian Obedience – Foundation of European Civilization* (1950, Hodder & Stoughton), p94-95.
[176] Or, in the case of the admission of young boys, parental choice: *RSB*, Ch.59.
[177] *RSB*, Ch.58.
[178] *RSB*, Prologue.
[179] *RSB*, Ch.4.
[180] *RSB*, Ch.5.
[181] *RSB*, Ch.7.
[182] *RSB*, Ch.33.
[183] *RSB*, Chs.23-30, 44-46.
[184] *RSB*, Ch.4.

conditions. This enables the mode of common being, because in eliminating the notion of the individual, the possibility of deviation is also eliminated.[185] The focus then comes to be on the activity of the order.

The order of association is lived differently. There is no renunciation of individual will comparable to that seen in an order of incorporation. Rather, the individual is cast as committing herself to the practice of cooperation in the community and as bearing a series of rights and duties that are associated with the collective interest. More specifically, she is conceived of as identifying and relating as a member of the community; and the focus of the mode of being-in-common is on the ties that are formed between these members. Critically, from the perspective of each individual member, the status of membership of a given order of association is but one status. An individual may be a member of or identify with other forms of community, status, and organisation. The idea of 'the individual' supplies a coherence and identity across these different statuses, which means that unlike in an order of incorporation, where the status of the individual therein is a total status, the status of membership in an order of association is but one face of the individual. The different faces of the individual furthermore interact.

The practice of cooperation in an order of association accordingly relies largely on the negotiation of difference, because although the status of member itself entails that members are identifiable as sharing some sameness, this identification occurs from the perspective of individual difference. Differences are emphasised as being of equal worth and the politics is one of the recognition of this individual worth.[186] Members are required to recognise each other and their own position in relation to these others and to the collective; and the conception of identity that emerges is one that is about sharing. It involves shared vulnerability, shared difference, and shared community; and this secures the mode of being-in-common that is the mode of the order of association.

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[185] Thus where there is deviation, this is taken to reveal that the individual had not been fully incorporated in the first place.

[186] On which see C. Taylor, 'The Politics of Recognition', in A. Gutman (ed.), *Multiculturalism: Examining the Politics of Recognition* (1992, Princeton University Press), 25-73, p28-44.

This is not to say, however, that the individual is necessarily read on her own terms in an order of association. For although the order of association presupposes a negotiation of difference as occurring within it, it primarily reads the individual in terms of her membership of it. And so whilst the individual is conceived of as being expressed in and as uniting all the multiple statuses that she holds, she is typically only presented and read through the lens of her roles and ties of membership.[187] The focus comes to be on the individual as member, and as part of this, she is oriented towards the form of the ideal member. This means that whilst the community of the order of association appears to preserve the status of the individual as such, it also poses a risk of suppressing her singularity. It emphasises individual participation, but it reads the individual as embedded for this purpose in roles and ties of membership, to which can be attributed an ideal form, and towards which the individual can be oriented and bound.

In both the orders of incorporation and association, then, the fate of the individual[188] is one of a comparable complexity. The mode of common being of the order of incorporation involves a renunciation of the individual will that brings about incorporation in the first place. It creates a bounded individual, by drawing a literal and metaphorical boundary around individual will and revoking this only in exceptional conditions. The mode of being-in-common of the order of association requires the commitment of the individual to its practice of cooperation, but at the same time it primarily presents her in the terms of her roles and memberships. It creates a bonded individual, by binding the individual to her roles and statuses, to which can be attributed an ideal form, and towards which form the individual then comes to be oriented.

The inseparability of being and order that is depicted in this way points to the notion of order as lived. What we have seen with the orders of incorporation

[187] The embedding of the individual in this way is a problem of communitarian philosophies like MacIntyre's in which such primacy is attached to the particular role that is inhabited that "what is good for me has to be good for one who inhabits those roles" (A. MacIntyre, *After Virtue: A Study in Moral Theory* (Second Edition) (1985, Duckworth), p220-21).

[188] By this, I mean the fate of 'the individual' who is presupposed by each order. The order of incorporation presupposes an individual who seeks admission to it; the order of association presupposes an individual capable of continuing commitment to cooperation in this order.

and association is not only that they set out a mode of being but that they do so in a manner that renders this mode of being inseparable from the mode of order. The order thus structures the life within it; and it conceives of an individual that befits it. And what we come to, then, is this: an illustration of what it means for an order to be lived.

1.4 Lived order

When we take the insights gained from this study of order back to our question of European human rights law, we see the beginnings of something very interesting. For if we start to think about the order of individuation that is constituted by the ECHR legal order as a lived order – and as a legal order, it is, by definition, a lived order[189] – we come to a way of analysing it and accounting for it that forefronts the question of the mode of being that underpins a conception of order that has, as its basis, 'the individual'. To prepare us for such a study of European human rights law as a lived order of individuation, this section examines in further detail the concept of lived order itself. It does so by drawing out the main features of a lived order as these were illustrated by our examples of incorporation and association. I suggest that a lived order has three principal features: it is governed by an ethos, which functions to support and structure its mode of being (*1.4.1*); it is internalised by those within it (*1.4.2*); and it structures life by setting out a vision of five spheres: space, time, body, wisdom, and things (*1.4.3*).

1.4.1 The ethos of lived order

A lived order is governed by an ethos, which functions to support and structure the mode of being of the order. We know this from our analysis of the orders of incorporation and association; but what these forms of order also show us is that this ethos must have three dimensions: a local dimension (involving the place of the order); a common dimension (involving the body of the order); and an

[189] This is because a legal order necessarily presupposes and expresses a mode of being – a vision of life – such that the order is lived. A specific expression of this lived quality in the case of a system of human rights law would be the way in which to be at all effective it must be able to relate to the lives and experiences of those within its jurisdiction, so that they can rely on, appeal to, and fundamentally assume the existence of the rights set out.

individual dimension (involving the subject of the order). To think about these dimensions, and to see how they interact, we need to go back to our models of incorporation and association.

The ethos that supports and structures the mode of common being of an order of incorporation is, as was discussed above, an ethos of stability. If we return to our example of Benedictine monasticism in this respect, we can see the way in which three strands of stability – local, common, and individual – feature in the Rule of St. Benedict itself and in subsequent interpretations of it. *Local stability* is the strand of stability that we focused on earlier; and it emphasises permanence of place and connotes the attachment to territory that underlies the Benedictine enclosure more generally. But local stability does not offer a comprehensive account of stability, as is revealed by the reality of monastic history, and, in particular, by instances in which monastic communities have had to move or flee. This notably occurred at the Benedictine monastery at Monte Cassino, when, forty years after the death of St. Benedict, the Lombards destroyed his monastery and the monks who were based there fled to Rome.[190] Evidently, this movement and subsequent reconstitution in Rome could not have been easily harmonised with a reading of stability as local stability; and so a conception of *common stability* emerged, which secures the continuity that local stability cannot guarantee. It does so by grounding stability within the permanence and strength of the monastic community or congregation itself.[191]

Local stability and common stability interact; thus Jean Leclercq argues that common stability has its roots in local stability, such that "[s]tability of place was the expression of, and means towards, permanence in the brotherhood, in that daily cheek-by-jowl contact in which all virtues are simultaneously forged within the soul of the cenobite".[192] Common stability is consequently not merely the

[190] J. McCann, *Saint Benedict* (1937, Sheed and Ward), p225.
[191] Thus Butler, whilst offering a reading of *stabilitas* as *stabilitas loci*, reconciles this vision with "extreme cases" of movement and reconstitution (as per the flight from Monte Cassino) by stating that "in such cases stability would lie in the community holding together and re-establishing their monastery elsewhere" (C. Butler, *Benedictine Monachism: Studies in Benedictine Life and Rule* (1919, Longmans, Green and Co.), p123-124). See further McCann (1937), above n133, p144-145.
[192] J. Leclercq, *Aspects of Monasticism* (transl. M. Dodd) (1978, Cistercian Publications), p177-178.

expression of (and means of) the common mode of being, but also "a means of moving towards perfection" and of bringing closer the relationship between monk, neighbour, and God.[193] It rests upon a model of common life that is characterised by the fact that everything is done in common: the monks are occupied by the same tasks, simultaneously, and common stability reflects and derives from this homogeneity and from the rhythm of the Rule that guides it.

The individual monk is incorporated into this common by the strand of *individual stability*. Columba Cary-Elwes supplies the principal reading of the vow of stability in these terms. He argues that interpretations of *stabilitas* as local stability overemphasise the 'local'; rather, the vow of stability is one of stability of obedience, based upon individual "perseverance in the monastic state".[194] This reading, which centres upon the vow of obedience, derives from the weight that is attached to motive and to 'Godward' will throughout the Rule more generally;[195] what St. Benedict was seeking to do, Cary-Elwes argues, was to ensure that self-will was fully suppressed by *stabilitas*, so that *stabilitas* "blocks up the holes by which the fox, self-will, might escape".[196] And indeed, as we have seen already, within the Rule itself it is made clear that individual will is renounced upon admission to the monastery. Whether this truly represents the influence of Stoicism on monasticism – and the attainment of the Stoic ideal of *apatheia* ("the perfect domination over all inclinations of nature") – as Herbert Workman suggests,[197] is more questionable, since on many occasions in the Rule natural inclinations are suppressed only with external assistance. The bulk of the emphasis on monks not finding things too difficult or distressing is thus oriented towards ensuring that they have no cause to grumble in the first place: a subtle shift, but one which does away with a Stoic presupposition that they would not feel difficulty or distress, and replaces it with an external protection against such feelings.[198] The strand of individual stability is,

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[193] *Ibid.*
[194] Cary-Elwes (1950), above n118, p90.
[195] *Ibid.*, p83.
[196] *Ibid.*, p91.
[197] Workman (1913), above n80, p37.
[198] E.g., to ensure that the weekly kitchen servers can serve their brothers at the meal time "without grumbling or hardship", they are to receive, an hour before the meal, "a drink and some bread" (*RSB*, Ch.35).

in this way, underwritten by a fairly weak vision of human psychology. It is, after all, a "little rule for beginners".[199]

When we turn to consider the order of association, we see that the ethos that structures its mode of being-in-common – the ethos of sociality – is similarly composed. This ethos, as we know, is about the norms of relating between members that are prescribed as being a part of the practice of cooperation itself. Like the ethos of an order of incorporation, the ethos of an order of association has three dimensions: local, common, and individual. These strands operate to secure each other. *Local sociality* is about the strand of sociality that pertains to the site of the order of association. It is about the particularity of the norms of relating – a particularity that renders these norms ones that are bound to a specific order of association. For example, contemporary European expressions of 'social integration' – either as a point of assessment in examining an individual's degree of association (and therefore 'belonging' and connection) in a society, or as an explicit injunction[200] – reflect an ethos of local sociality in this sense. They presuppose and express a vision of what it means to be 'socially integrated' in a certain place – of what it means to relate in a specific context. And so if, for example, "proximity to a society" is what is being assessed when the degree of an individual's 'social integration' is being examined,[201] then a vision of what it means to be proximal to a society is necessarily also being articulated too.

Local sociality is connected to *common sociality* in that while local sociality is about the particularity of the norms of a given order of association,[202] common sociality is about the manner of relating to each other (and therefore living together and acting together) that these norms stipulate and give rise to. Appeals to civility draw this strand of the ethos of sociality out particularly clearly,[203] for the notion

[199] *RSB*, Ch.73.
[200] See, e.g., in the context of EU law Barbou des Places (2016), above n108.
[201] As is apparently increasingly so in EU free movement law: *ibid.*, p185.
[202] It is in this sense that I include EU law's notion of 'social integration' – a notion which points to association in the host society. The fact that this then feeds into a broader conception of the EU legal order (an order of integration) is a separate point.
[203] It also, of course, has a local dimension (on which see L. Cahoone, 'Civic Meetings, Cultural Meanings', L. S. Rouner (ed.), *Civility* (2000, University of Notre Dame Press), 40-64).

of civility denotes a 'civil' manner of behaving, relating, and conversing (and one that derives its normative hue from the articulation of what being 'civil' means).[204] This is what is forefronted in the French legal conception of the "minimum requirements of life in society", for instance – a notion that has also been specified in terms of the "minimum requirement of social interaction that is necessary for civility".[205] It is in these terms, for example, that the prohibition on the covering of the face in public has been primarily justified by the French Government, which conceives of the covering of the face in public as being contrary to the principle of "living together" in society.[206]

The final strand of the ethos of sociality is *individual sociality*. If this appears to be a contradiction in terms, it is simply meant to denote the way in which individual responsibility is conceived of in relation to the ethos of sociality. This is about the way in which the individual is conceived of as having an obligation to contribute to the maintenance of this ethos: an obligation expressed, for example, in the language of duties in relation to social integration,[207] and in terms of notions such as of individual social and/or civic responsibility and 'social behaviour'. Individual sociality locates sociality in the individual's demonstration of an awareness of others and in so doing it further secures the mode of being-in-common that forefronts the bonds between members in an order of association.

The first feature of a lived order is, therefore, that it has an ethos, which functions to support and structure the mode of being of the order. The ethos has three dimensions: local, common, and individual. These interact to secure each other and to govern the order.

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[204] See esp. T. M. Bejan, *Mere Civility: Disagreement and the Limits of Toleration* (2017, Harvard University Press); Sennett (2013), above n94, p116-127; Davetian (2009), above n107; A. Bryson, *From Courtesy to Civility: Changing Codes of Conduct in Early Modern England* (1998, Clarendon Press); P. Smith, T. L. Phillips, and R. D. King, *Incivility: The Rude Stranger in Everyday Life* (2010, Cambridge University Press).

[205] 43835/11, *S.A.S. v France* (2014), paras.82, 25. See further Ch.4, part 4.3.

[206] *Ibid*., para.82. See further Ch.4, part 4.3.

[207] On which see, e.g., Barbou des Places, above n108, p196.

1.4.2 The internalisation of lived order

The second feature of a lived order is that the order is internalised by those within it, by which I mean that it is taken in by its subjects. To return to our example of the order of incorporation, the first sentence of the Prologue to the Rule of St. Benedict is: "[l]isten, my son, to the master's instructions and take them to heart".[208] A few pages later, in the chapter describing the "kind of man the abbot should be", we read that he "should work into the minds of his disciples the Lord's commands and his teaching".[209] This language – of taking the instructions to heart and having these instructions worked into the mind – is the language of internalisation. More specifically, it is the language of instructions to internalise – of instructions to take in the Rule of the order. This culminates in the expression of the demand that the individual renounce his will[210] – a demand which paves the way for a total internalisation of the Rule and therefore an internal alignment of life and the order.

The Rule specifies different ways of attaining this internal alignment: specific rules are to be read aloud regularly, for example,[211] and habits are to be formed out of things that once entailed fear and required effort.[212] But the most profound expression of the instruction of internalisation consists in the notion that there is to be a closing of the gap between instruction and action – a closing which eliminates the possibility of thought itself. This has its origins in the idea of obedience that is articulated here. Obedience is to be "unhesitating", such that "[t]he master's order and the disciple's perfect fulfilment of it occur more or less simultaneously".[213] This requires more than proximate simultaneity between instruction and action, however. Rather, it affects motive too. Thus the order must be "carried out without hesitation, without delay, without apathy, without complaint and without any answering back from the one who is unwilling"; and

[208] *RSB*, Prologue.
[209] *RSB*, Ch.2.
[210] See part 1.3.3 above.
[211] *RSB*, Ch.66.
[212] *RSB*, Ch.7.
[213] *RSB*, Ch.5.

the monk has to obey both in his action and "in his heart".[214] The same instruction is repeated elsewhere in the Rule too; in the 'Regulations regarding the singing of psalms', for example, it is said: "let us stand to sing in such a way that there is no discrepancy between our thoughts and the words we are singing".[215]

Such an instruction to close the gap between actions and instructions and between words and thoughts is a somewhat extreme example of an instruction to internalise an order; and the norms of an order can, of course, be internalised in the absence of an explicit instruction to do so. The normative and normalising conceptions of roles articulated within the context of an order of association may be internalised in this sense by way of a process of 'socialisation', for example. This would suppose that the orientation of the individual towards a particular conception of a given role could, over time, bring about its internalisation, such that the norm would be experienced from within. In Freudian thought, this is the mechanism of the Super-ego – a voice of authority and prohibition[216] – and what it essentially denotes is the idea of the internalisation of a form which then sets to work on the ego of the individual, by "setting up an internal authority to watch over him, like a garrison in a conquered town".[217] This enables the norms of the order to be experienced from within and without.[218]

What the notion of the internalisation of lived order points to is the way in which the order is inhabited and assumed by those within it. This is what Jonathan Lear elsewhere describes in terms of the intelligibility that is bound up in a form of life[219] – the notion of 'intelligibility' here pointing to the way in which we are

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[214] *RSB*, Ch.5.
[215] *RSB*, Ch.19.
[216] S. Freud, *The Ego and the Id* (1949 [1927], The Hogarth Press), Ch.3.
[217] S. Freud, *Civilization and its Discontents* (transl. D. McLintock) (2004 [1930], Penguin), p77.
[218] This example of internalisation is, evidently, of a different degree to that which we saw in the case of the Benedictine instruction to internalise; the existence of the Super-ego as a voice of authority arguably serves only to indicate that there remains a gap between life and the rule in this case. But the example nevertheless points to the way in which the norms of a lived order can be taken in, such that they are experienced from within and without.
[219] Lear's argument is made about 'forms of life' but I think we draw on it in thinking about lived order. On the comparison between the notions of 'lived order' and 'form of life' see above n110. The two notions are structurally similar (both are lived); the difference is in what is being lived (an order/a form).

located within a form of life and our life makes sense in relation to it.[220] The focus of Lear's analysis in this respect is on crises of intelligibility – on what happens when intelligibility breaks down.[221] He suggests that in a "loss of intelligibility…the concepts and categories by which the inhabitants of a form of life have understood themselves…cease to make sense as ways to live".[222] Where there is a breakdown in intelligibility, things no longer make practical sense (things "cease to happen"[223]); moreover, the intelligibility of the self is thrown into question, for "the possibility of constituting oneself as a certain sort of subject suddenly becomes problematic".[224] What such breakdowns in intelligibility in a form of life reveal is the extent to which one has "[inhabited] a way of life" in the first place.[225] They reflect the way in which the form of life has been an assumed part of one's existence to the extent that one's self-understanding arises in it and is shaped by it.

If we draw these notions together – these notions of internal alignment with an order, of socialisation and orientation to norms in an order, and of the intelligibility that is bound up in a form of life (and, by extension, a lived order[226]) – we come to a way of understanding the internalisation of lived order that marks it out as being about the way in which the order itself is assumed and so also is life (and self-understanding) in relation to it. This, in turn, forefronts the structuring function of a lived order – the way in which it structures life within it – and this brings us to the final feature of a lived order: the structure of its vision of life.

1.4.3 The five spheres of lived order

The final insight that can be drawn from the orders of incorporation and association is that a lived order sets out an account of space, time, body, wisdom, and things. A lived order claims to structure these spheres; an account of these

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[220] J. Lear, *Radical Hope: Ethics in the Face of Cultural Devastation* (2006, Harvard University Press); J. Lear, 'What Is a Crisis of Intelligibility?', in *Wisdom Won from Illness: Essays in Philosophy and Psychoanalysis* (2017, Harvard University Press), 50-62.
[221] This is not necessarily consonant with a breakdown in the form of life itself: Lear (2017), *ibid.*, p51.
[222] *Ibid.*, p50-51.
[223] Lear (2006), above n163, p6.
[224] *Ibid.*, p44.
[225] *Ibid.*, p6.
[226] See n162.

spheres – which is at the same time an account of how the subject of the order experiences these – is what structures a lived order's vision of life. The five spheres are necessarily intertwined; but an account of each sphere is also separately set out. We can consider the broad contours of the ways in which these spheres are imagined and accounted for in the orders of incorporation and association as follows.

(i) Space

The order of incorporation conceives of space primarily in terms of the enclosure that lies at its basis. As we saw earlier, it is this enclosure that enables the constitution of the order of incorporation as such; and it makes for a focus on delineating that which falls within and without the order. Once this enclosure is secured, a form of 'transitional space'[227] emerges within it. This space is transitional because it is a space of living that is oriented towards the objective of the order. In the case of the Benedictine monastery, for example, life is conceived of as being lived in the transitional space between the monk and God, with the monastery being "a temporary point for the transition of the individual from earth to heaven".[228] Transitional space is a space (and temporal *stage*) of passage: a space that points to a liminal stage involving the feeling of being "betwixt and between" that is experienced as one passes from one realm to the next.[229]

An order of association relies on a notion of enclosure too, in the sense that this order (like any order) must have boundaries.[230] But space is primarily conceived of in an order of association in terms of spatial bonds (rather than spatial boundaries), for attention is drawn in the first instance to the relations between

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[227] The term comes from Winnicott, who introduced it to denote the space at the border between the infant's body and her external reality and the space of creativity: D. W. Winnicott, 'Transitional Objects and Transitional Phenomena' (1953), in *Playing and Reality* (2005 [1971], Routledge), 1-34.
[228] G. Melville, 'The Innovational Power of Monastic Life in the Middle Ages', in L. Bisgaard, S. Engsbro, K. V. Jensen, and T. Nyberg (eds.), *Monastic Culture: The Long Thirteenth Century – Essays in Honor of Brian Patrick McGuire* (2014, University Press of Southern Denmark), 13-31, p16.
[229] V. Turner, *The Ritual Process: Structure and Anti-Structure* (1969, Aldine de Gruyter), p95 (note also his argument at p107 that this "*passage* quality of the religious life" represents an "institutionalization of liminality"). See also A. Van Gennep, *The Rites of Passage* (transl. M. B. Vizedom and G. L. Caffee) (1960 [1908], The University of Chicago Press).
[230] On which see Lindahl (2013), above n76.

members of the order – to the habits of the community of cooperation and the bonds of custom and culture that characterise it (and then only distinguish it).[231] In an order of association, the practice of cooperation is conceived of as making the place (and so defining the space) of the order.[232]

(ii) Time

An order of incorporation is oriented towards the future and towards that which is to come. The monks under the Rule of St. Benedict are accordingly conceived of as being on a "journey to God".[233] This temporal orientation is underpinned by the mode of common being (of doing things in the same way at the same time) that transcends each monk;[234] and this mode of being hinges on the demand of simultaneity. In the Rule of St. Benedict, a rigid schedule enables this. The order of the hour, of the day, of the night, of the week, of the month, of the season, and of the year is accounted for; in fact, it has been argued that the Benedictine way of 'accounting for' "almost every moment of a monk's life" underpinned the establishment of modern scheduling and daily "temporal regularity" more generally.[235] The overriding sense is that there is a proper time for everything; and anything that falls outside this constitutes, by definition, a point of disturbance and a source of distress.[236] The time of the order is, moreover, to supersede all other categories of time. Thus in the Benedictine monastery, "the brothers should keep

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[231] In the context of the political community in this respect see J. Tussman, *Obligation and the Body Politic* (1960, Oxford University Press), p5 et seq.

[232] See, e.g., De Coulanges (1854), above n77, p177, who draws this point out in relation to the ancient meaning of 'civitas' (community of citizens) as a practice of association (as distinct from the urbs, which was the enclosure within which this practice occurred).

[233] McCann (1937), above n133, p108.

[234] If this appears to carry a paradox, as Riesenberg argues – in that individual perfection demands "corporate acts of prayer and mutual regulation" instead of individual action (P. Riesenberg, *Citizenship in the Western Tradition: Plato to Rousseau* (1992, The University of North Carolina Press), p96) – then that view has to be qualified to take account of the fact that the idea here is that without common being there is no perfection (qua common monk) at all.

[235] E. Zerubavel, 'The Benedictine Ethic and the Modern Spirit of Scheduling: on Schedules and Social Organization', (1980) *Sociological Inquiry* 50(2), 157-169, p158.

[236] See esp. *RSB*, Ch.31, in relation to the carrying out of the duties of the cellarer: "Necessary items should be requested and given at the proper times, so that no one is disturbed or distressed in the house of God."

the rank they were assigned at the time of their entry to the monastic life" and it is this time of entry that matters, not, for example, their age.[237]

In an order of association, time is conceived of more in terms of temporal attachment between members, by which I mean that whereas the mode of common being in an order of incorporation is focused on the activity itself (and simultaneity in relation to it), the mode of being-in-common in an order of association is focused on the fact that the activity is engaged in together (through a practice of cooperation). The sort of notions that we accordingly see being articulated are notions of belonging and solidarity. The focus is on temporal continuity, not least because to set up some sense of community there needs to be a sense of narrative continuity; and the literature points to the importance of forms of ritual and tradition in this regard.[238]

(iii) Body

The order of incorporation produces a vision of a body that has been submitted to its order. In the Rule of St. Benedict, for example, it is said that from the moment of his admission to the monastery the monk "will [have nothing], not even have jurisdiction over his own body".[239] This submitted body becomes a habituated body – a body that takes on certain habits[240] and is bound up in a habitual way of being. In the Benedictine monastery, humility is accordingly to be shown by the body; thus in greeting guests, "the brothers should bow the head or prostrate the whole body".[241] Submission and habituation are conceived of as

[237] *RSB*, Ch.63.
[238] See e.g., Sennett (2013), above n94, p86-95; E. Hobsbawm, 'Introduction: Inventing Traditions' in E. Hobsbawm and T. Ranger (eds.), *The Invention of Tradition* (1983, Cambridge University Press), 1-14. See also B. Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (2006 [1983, Verso).
[239] *RSB*, Ch.58. See also Ch.33: "monks should not even count their own bodies and wills as their own…"; and Ch.7 on rejecting bodily desire
[240] See Agamben (2013), above n110, p13-16.
[241] *RSB*, Ch53. See also Ch.7.

enabling the incorporation of the individual body into the common (monastic) body.[242]

In an order of association, a vision of what Nancy Scheper-Hughes and Margaret Lock describe as "the three bodies" – the individual body ("understood in the phenomenological sense of the lived experience of the body-self"), the social body (which "[refers] to the representational uses of the body as a natural symbol with which to think about nature, society, and culture"), and the body politic (which "[refers] to the regulation, surveillance, and control of bodies") – is similarly produced.[243] An order of association has, unlike an order of incorporation, a conception of difference, and the focus is on the contribution of each individual to the order itself. This makes for an organological account, in which each individual is conceived of as playing his or her part in relation to the whole.[244] Bound up in this will necessarily be an account of what it means to be socialised within the order, however; and a vision of ways of using the body will inevitably be articulated as a part of that.[245]

(iv) Wisdom

In an order of incorporation, wisdom is conceived of as being located in the Rule of the order, such that wisdom on the part of those within the order involves an alignment of their understanding and behaviour with the Rule itself. In the case of the Benedictine order, the abbot is the principal figure of wisdom in this regard. Thus a criterion for his appointment is "the wisdom of his teaching"; and his "wise management" of the monastery is cast as consisting in his observation of "[the] rule in all things".[246] Wisdom features as a criterion in the appointment of other authoritative figures in the monastery too: deans should be selected "for their

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[242] And so in relation to "[t]hose who refuse to amend despite frequent rebuke", the abbot must ultimately "use the knife of amputation" by banishing the monk, "to prevent a single diseased sheep infecting the whole flock" (*RSB*, Ch.28).
[243] N. Scheper-Hughes and M. M. Lock, 'The Mindful Body: A Prolegomenon to Future Work in Medical Anthropology' (1987) *Medical Anthropology Quarterly* 1(1), 6-41, p7.
[244] See R. Sennett, *Flesh and Stone: The Body and the City in Western Civilization* (1994, Faber and Faber), p23-24.
[245] See M. Mauss, 'Techniques of the Body (1935)' (1973) *Economy and Society* 2(1), 70-88.
[246] *RSB*, Ch.64.

virtuous behaviour, their learning and wisdom";[247] the cellarer should be "a man who is wise, mature and sensible";[248] and the porter should be "[a] wise old man".[249] For everyone else, wisdom is something to strive for[250] and to acquire through the development of wise habits.[251]

There are three levels to the notion of wisdom that is articulated in this way: it involves a holistic integration of understanding and behaviour that pushes it beyond 'intelligence', 'expertise', or 'specialisation';[252] it constitutes a guide to the conduct of life; and it is an evaluative concept in the sense that actions and motives are assessed against the normative standard of good judgment that it articulates. In an order of association, wisdom in this sense is located in the practice of cooperation itself – and, more specifically, in the terms of its traditions and norms – and it is conceived of as being oriented towards the wellbeing of the association. In the same way that normative conceptions of particular roles within the order are constructed, wisdom will also be cast as an individual virtue; but critically, its meaning as such will be determined collectively and specifically, in accordance with the values of the association that are represented in the ethos of sociality.[253]

(v) Things

A lived order sets out a vision of how material things are related to within it. In an order of incorporation, things are incorporated into the order, just like the individual is. As we saw earlier, the moment of incorporation involves a renunciation of individual will; and at the same time, there is a renunciation of the notion of possession. Thus in the case of the Benedictine order, there is to be no private ownership, and this is because there is no concept of individual possession;

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[247] *RSB*, Ch.21.
[248] *RSB*, Ch.31.
[249] *RSB*, Ch.97.
[250] *RSB*, Ch.73.
[251] E.g., the monks are to speak few words, as is deemed befitting of the wise: *RSB*, Ch.7.
[252] See e.g., G. Labouvie-Vief, 'Wisdom as integrated thought: historical and developmental perspectives', in R. J. Sternberg (ed.), *Wisdom: Its Nature, Origins, and Development* (1990, Cambridge University Press), 52-83, p77-78.
[253] On the specificity of the substantive content of 'wisdom' in this regard, see J. E. Birren and C. M. Svensson, 'Wisdom in History', in R. J. Sternberg and J. Jordan (eds.), *A Handbook of Wisdom: Psychological Perspectives* (2005, Cambridge University Press), 3-31.

the monks are, rather, dependent on the abbot for everything.[254] The monks are cast as relating to material things by way of their relationship with the abbot, therefore; and need for things as independent of this relationship is conceived of as being eradicated.[255] The governing principle is then that all material things are the property of the monastery; and the Rule specifies rules for care of this property.[256]

In an order of association, there is no comparable renunciation of individual will or individual property. The retention of the individual in this sense means that there is also a retention of a notion of individual need; and the satisfaction of this need may be conceived of as being a part of the function of the order of association (as where the order is conceived of as having a welfare-based function, for example). The focus, in addition, is on the contribution of the member to the practice of cooperation and to the collective goods generated through this practice, which makes for a way of relating to material things from the perspective of the practice of cooperation itself.

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To summarise, a lived order has three principal features:

1. *A lived order is governed by an ethos*. This ethos functions to support and structure the mode of being of the order, and it has three dimensions: a local dimension (involving the place of the order); a common dimension (involving the body of the order); and an individual dimension (involving the subject of the order). These dimensions interact to secure each other and to govern the order.

2. *A lived order is internalised by those within it*. This is to say that the order is taken in by those within it. The effect of this is that the order is assumed by its inhabitants, and so also is life and self-understanding in relation to it.

[254] *RSB*, Chs.33, 54, 55, 58, 59.
[255] *RSB*, Ch.55: to eradicate the "vice of "personal property", the abbot is to "hand out everything that is needed…then no one can pretend that they have need of something…"
[256] *RSB*, Chs. 31, 32, 35, 46, 57.

3. *A lived order structures life within it*. The structure of its vision of life consists in the way in which it delineates and sets out an account of five spheres: space, time, body, wisdom, and things.

A study of European human rights law as a lived order of individuation must account for these three features.

1.5 Conclusion

This chapter has set out a way of thinking about European human rights law as a lived order of individuation: as an order that is constituted upon and structured by a vision of 'the individual' and that presupposes and expresses a mode of being such that the order is itself lived. More specifically, this chapter has shown us three things. It has, firstly, elaborated the idea of the ECHR legal order as an order of individuation; and in so doing, it has shown us why we might do well to think of European human rights law in such terms. It has, secondly, shown us what it means to think about European human rights law as an order of individuation, which is to say that it has shown us – through an analysis of the orders of incorporation and association – that the fundamental question must be of the mode of being that underpins a conception of order that has, as its basis, 'the individual'. It has, thirdly, shown us how we might analyse European human rights law as a lived order of individuation. A lived order, I have argued, has three main features: it is governed by an ethos; it is internalised by those within it; and it structures life within it by setting out a vision of space, time, body, wisdom, and things. The next five chapters take up the challenge of analysing European human rights law in these terms.

– CHAPTER 2 –

Space

2.1 Introduction

With this chapter, we embark on an analysis of the ECHR legal order as a lived order. This is an analysis of the mode of being that underpins a conception of order that has, as its basis, 'the individual', and it takes up the rest of my thesis. In the preceding chapter, in which I elaborated the conceptualisation of the ECHR legal order as a lived order of individuation, we saw how a lived order sets out an account of space, time, body, wisdom, and things. In this chapter, we will examine the conception of space that is set out in European human rights law.

The chapter argues that space is conceived of in European human rights law by reference to two visions: a vision of the sense of place of the individual, which I describe as an idea of individual *presence* (*2.2*), and a vision of the position of the individual – of the representation of the individual through the terms of some role or status – which I describe as an idea of individual *presentation* (*2.3*). The fundamental question is of how these two visions are mediated; and the argument that I make is that although the notion of presentation carries within it the possibility of suppressing presence, the mediation of presence and presentation also carries a more productive potential, as it opens a space for the negotiation of individual identity in European human rights law (*2.4*).

2.2 Presence

In Chapter 1, we saw much about the place that the individual holds in European human rights law. We saw, for example, how the ECHR legal order is structured around 'the individual', and we saw how the delineation of the place that is occupied by the individual in this way has been theorised in terms of justification of state action to the individual. But the place of the individual in European human rights law is portrayed in the case law not only in these terms of a position within

the ECHR legal order, but also in phenomenological terms – in terms of the sense of place of the individual. This is captured by a vision that can best be described as a vision of individual presence and is about the individual's feeling of – and articulation of – being here and at home in the world. It originates in the individual's sense of place, which is itself largely inseparable from the sense of orientation (a sense which is about the individual's ability to orient herself in the world) (*2.2.1*). There are three elements to this notion of presence: self-image (which is about the individual's establishment and communication of an image of herself), self-recognition (which is about her capacity to recognise herself), and attachment (which is about her ability and need to attach and create meaning) (*2.2.2*). These elements inform the category of the self in European human rights law. More specifically, they are cast as enabling the individual's articulation of her self (*2.2.3*).

2.2.1 The origins of presence: the sense of place and the sense of orientation

The vision of presence that, as we will soon come to see, emerges in European human rights law as being about the individual's feeling of – and articulation of – being here and at home in the world, originates in a notion of the individual's sense of place. This has been elaborated most fully in cases concerning the home. The home is cast in European human rights law as being a place that is borne of and ought to denote feelings of security, stability, attachment, and familiarity.[1] It is conceived of as grounding and framing a life, such that what is at issue when the Article 8 right to respect for the home is at issue is not only the home that has been built up but also the "personal security and wellbeing" that is associated with it[2] and the life that has been built up in conjunction with it.[3] The right to respect for the home is not only then about physical shelter but also about the sense of being at home: it "touches upon issues of central importance to the individual's

[1] See, e.g., 1870/05, *Irina Smirnova v Ukraine* (2016), para.93.
[2] 9063/80, *Gillow v UK* (1986), para.55.
[3] See, e.g., 13216/05, *Chiragov and Others v Armenia* (2015), para.206.

physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community".[4]

The need that is conveyed in this way – the need of the individual for a sense of place that is here bound up in the meaning of 'home'[5] – is inextricably bound up in another need too: the individual's need to orient herself in the world. In the literature, the development of a sense of orientation is often conceived of as being contingent on the establishment of a sense of place;[6] but the two senses thereafter work together, for just as it is necessary to have some sense of place in order to be able to orient oneself, so it is also necessary to be able to orient oneself in order to develop a sense of place.[7] This is reflected in the case law concerning the loss or destruction of the home, in which much emphasis is placed on the disorienting effects of losing a form of life,[8] of being uprooted from a form of life,[9] and of having to build another life elsewhere.[10] The challenge in the aftermath of such experiences – as in the aftermath of any disorienting experience[11] – is the challenge of reorientation; and here again the sense of place and the sense of orientation go together, the process of reorientation being not only one of

[4] 46577/15, *Ivanova and Cherkezov v Bulgaria* (2016), para.54.
[5] This does not mean, however, that there is "a right to be provided with a home" under the ECHR (27238/95, *Chapman v UK* (2001), para.99).
[6] See, e.g., Y.-F. Tuan, *Space and Place: The Perspective of Experience* (1977, University of Minnesota Press), Ch.3.
[7] This is captured by the idea that the development of the sense of orientation is dependent on experiences of disorientation and reorientation. See, e.g., B. Jager, 'Theorizing, Journeying, Dwelling', in A. Giorgi, C. T. Fischer, and E. L. Murray (eds.), *Duquesne Studies in Phenomenological Psychology: Volume II* (1975, Duquesne University Press), 235-260; A. Buttimer, 'Home, Reach, and the Sense of Place', in A. Buttimer and D. Seamon (eds.), *The Human Experience of Space and Place* (1980, Croom Helm Ltd.), 166-187, p170-174; Y.-F. Tuan, *Landscapes of Fear* (1980, Basil Blackwell), Ch.15; R. Solnit, *A Field Guide to Getting Lost* (2006, Canongate Books), p14-24.
[8] See, e.g., 23656/94, *Ayder and Others v Turkey* (2004), paras.109-110 (concerning the burning of the applicants' homes and possessions).
[9] See, e.g., 46346/99, *Noack and Others v Germany* (2000, admissibility decision), para.1 (concerning the transfer of the inhabitants of a village to a town twenty kilometres away due to an expansion of lignite-mining operations in the area).
[10] 23656/94, *Ayder and Others v Turkey* (2004), para.109 (see n8 above).
[11] By 'disorienting experience' I mean any experience that involves a feeling of expansion or contraction of one's world (deriving, for example, from illness, pain, grief, loss, intrusion, or displacement).

reorienting oneself in the world but also of rebuilding a sense of place in the world.[12]

The significance that is ascribed to the sense of orientation in European human rights law in this way can be further seen by considering the case of *Slyusarev v Russia (2010)*. This concerned the complaint of Mr Slyusarev about his treatment by the police following his arrest for an assault. In particular, he complained that the police had removed his glasses (which he needed greatly) and had failed to return them to him for five months. He argued that this had debased his dignity and had seriously impaired his eyesight, contrary to the prohibition on torture and inhuman or degrading treatment or punishment set out in Article 3 ECHR.

In assessing the case, the ECtHR considered that had the glasses been returned to Mr Slyusarev quickly, no Article 3 issue would have arisen, because the minimum threshold of severity of ill-treatment required to bring an issue within the scope of Article 3 would not have been met. But here, Mr Slyusarev had been without glasses for several months; and "even if having no glasses had no permanent effect on [his] health, he must have suffered because of it".[13] Although Mr Slyusarev had still been able to "attend to himself, orient himself and move around indoors", "he could not read or write normally, and, besides that, it must have created a lot of distress in his everyday life, and given rise to a feeling of insecurity and helplessness".[14] The Court thus appealed to two kinds of orientation: a notion of topographical orientation (about the capacity of Mr Slyusarev to orient himself in physical space and to navigate his environment) and a more ontological notion of the sense of orientation (about Mr Slyusarev's capacity to situate himself in the world). It was this latter notion that, the Court implied, had been disrupted by the feelings of distress, insecurity, and helplessness that Mr Slyusarev had experienced here. The combination of the harm that he had experienced to his sense of place, coupled with the lack of explanation on the part of the State – as to why Mr Slyusarev's glasses had been taken in the first place, as

[12] The challenges of reorientation in this regard are well-captured by theories of grief, e.g. T. Attig, *How We Grieve: Relearning the World* (Revised Edition) (2011, Oxford University Press), Ch.4.
[13] 60333/00, *Slyusarev v Russia* (2010), para.36.
[14] *Ibid*., para.36.

to why there had been a delay in medically examining him, and as to why there had been a delay in providing him with new glasses – led the Court to conclude that Mr Slyusarev had been subjected to degrading treatment in violation of Article 3.

In thinking about the two kinds of orientation elaborated here, two questions arise. The first is as to the relation between topographical orientation and ontological orientation. Topographical orientation emphasises physicality of being (being in physical space) and ontological orientation emphasises security of being (sense of place), and the question that we are left with is of how these relate to one another. If we look to other case law in this respect, what we see is that where physical space is a concern in European human rights law, this is because (and insofar as) it affects the individual's sense of place. This is well-illustrated by case law concerning physical conditions of detention, wherein the ECtHR's central concern is with the effect of these conditions on the detainee's sense of place. For example, a lack of physical space in a prison cell is conceived of as being a problem of a lack of personal space and a problem of the effect of this on the individual's sense of place.[15]

The second question that *Slyusarev v Russia* provokes is the question of the extent of the sense of orientation – a question of how this sense is delineated. After all, a sense of orientation is evidently something that is necessarily individually constituted. We can think of all sorts of things that may well partly or wholly constitute such a sense: relations with significant others; a state of health and bodily integrity; relations to significant activities, work, and interests; memories and the ability to maintain a continuous self-narrative; and the ability to delineate and preserve a sphere of personal space would perhaps be some examples. But such thinking only serves to reinforce the point about how unique a sense this is – and about how potentially far-reaching it is too; and the challenge for European human rights law lies in specifying its scope. In the following pages, we will see how it does this.

[15] On which see, e.g., 14097/12 et al., *Varga and Others v Hungary* (2015).

2.2.2 Elements of presence

There are three elements to the vision of individual presence articulated in European human rights law: self-image, self-recognition, and attachment. These elements are cast as enabling the sense of place and orientation of the individual, and they also tell us something about the category of the self in European human rights law.

(i) Self-image

The first element of individual presence in European human rights law is that of self-image. This is about the projective and introjective needs of the individual in establishing and communicating an image of herself. Jacques Lacan was among the first to theorise self-image in these terms; and in his account, the first occasion of seeing the self is integral to the process of ego-formation.[16] He argued that this occasion consists in the first time that a child sees her own image in a mirror: a moment of identification, whereupon the child "assumes an image".[17] The identification of the ego with its own image inaugurates the 'mirror-phase' and instigates both an anticipation of future unity of self and body and a process of realisation that one possesses the capacity to project a self-image – the culmination of which marks the end of the 'mirror I' and the birth of the 'social I'.[18]

It is at this point of projection – the moment of the 'social I' – that European human rights law becomes interested. Its paramount concern here is with securing the capacity of the individual to project her own image. This is most evident in instances in which there is an appropriation and a controlling of the projected image of self of a subject. An example is *Erdoğan Yağiz v Turkey (2007)*, which concerned the complaint of Mr Yağiz, a police doctor, that he had been intentionally humiliated and degraded by police officers during his arrest and subsequent detention. He had been arrested and handcuffed in public, taken in handcuffs to his workplace and to his home, and made to sit on a chair in custody

[16] J. Lacan, 'The Mirror-phase as formative of the Function of the I' (1968) *New Left Review* 1(51) (Sept.-Oct.), 71-77.
[17] *Ibid.*, p72.
[18] *Ibid.*, p75.

for three days, blindfolded and handcuffed; and he argued that the humiliation that he had been made to endure in this regard in front of his colleagues, neighbours, family, and members of the public had affected him to such an extent that he had been unable to cope and had lost his job.

In assessing this case, the ECtHR emphasised the way in which Mr Yağiz had been "affected mentally by the treatment to which he was subjected".[19] It considered that being made to wear the the handcuffs in public, at his workplace, and in front of his family had "aroused in him a strong feeling of humiliation and shame, especially in view of his professional duties" and that "[his] mental state suffered irreversible damage as a result of the incident, and he was incapable of coming to terms with his ordeal".[20] The humiliation that Mr Yağiz had experienced in his own eyes had been aggravated by its public nature, and, moreover, the Government had not provided any justification as to why the handcuffs were needed or as to why there was a need for Mr Yağiz to be seen wearing them. The ECtHR concluded that "in the particular context of the case, exposing [Mr Yağiz] to public view wearing handcuffs was intended to arouse in him feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his moral resistance",[21] and that this had constituted degrading treatment in breach of Article 3.

What this case highlights is the way in which self-image, both in terms of the control over it, and in terms of the need to be able to project it, serves a relational and communicative purpose, not least because it operates at the boundary between 'concealment' and 'exposure' – "between what we reveal and what we do not".[22] Self-image serves to signify a social identity; and more than this, it represents a vital "transaction" with the world,[23] involving a setting out of self which is understood to be up for a sort of mutual engagement with the world that is only facilitated once the stage in emotional development has been reached

[19] 27473/02, *Erdoğan Yağiz v Turkey* (2007), para.45.
[20] *Ibid*., para.45.
[21] *Ibid*., para.47.
[22] T. Nagel, 'Concealment and Exposure' (1998) *Philosophy and Public Affairs* 27(1), 3-30, p4.
[23] This term comes from Nussbaum's discussion in M. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (2001, Cambridge University Press), p78.

in which it is realised that the world is not there to respond to one's needs. The fact of this interaction means that self-image involves not only the projective qualities of the ego but also the introjective needs of the ego ideal (the vision of the ideal self) and the Super-ego (conscience).[24] The taking in from the surrounding environment that is involved in this process of introjection could be thought of as involving the basic form of the Lacanian 'social I', but it also goes further than this. This is because its findings take the normative form of the idealised and authoritative self-image and become the point to which the (presently) formed self-image either aspires or from which it feels alienated.

The concern of European human rights law in cases of humiliation is that these channels of projection and introjection are fundamentally abused in such instances. A striking illustration of this is to be found in *Bouyid v Belgium (2015),* in which the Grand Chamber held that there had been a violation of the Article 3 rights of the applicants on account of the fact that they had been slapped on their faces by law-enforcement officers. In its reasoning, the Court elaborated the link between Article 3 and the concept of dignity, describing "a slap inflicted by a law-enforcement officer on an individual who is entirely under his control" as "[constituting] a serious attack on the individual's dignity".[25] The Court emphasised, in particular, the effects of a slap to the face: "A slap has a considerable impact on the person receiving it. A slap to the face affects the part of the person's body which expresses his individuality, manifests his social identity and constitutes the centre of his senses – sight, speech and hearing – which are used for communication with others."[26] What was especially significant in this case, therefore, was that a channel for the expression of self-image, along with individual control of that image, was taken over; one of the key means through which the demand for recognition can be made – by way of communication – was violated. The sense emerging from the case law in this regard is that what is most pernicious about the infliction of humiliation is the way in which it sets in train a

[24] For a restatement of the original distinction between these, see J. Mitchell, *Siblings: Sex and Violence* (2003, Polity Press), p16-17.
[25] 23380/09, *Bouyid v Belgium* (2015), para.103.
[26] *Ibid.*, para.104.

process of reducing the individual. The point has been put most starkly in cases involving violations of Article 3 on account of humiliating strip-searches in detention[27] and the display of defendants in 'courtroom cages';[28] and it is this: there comes a point where the individual is reduced to such an extent that not only does she lack control over her self-image, but her position as a subject with a self-image is thrown into question.[29]

(ii) Self-recognition

To have a self-image presupposes that one can recognise oneself in the first place; and this brings us to the second element of individual presence: self-recognition. This is conceived of as presupposing a certain organisation of the self, involving the recognition of a marginal yet fundamental state which is necessary to the constitution of the psyche but only insofar as it is kept in check. This is the realm of the abject – the realm theorised by Julia Kristeva in terms of that which is expelled from the body and is subsequently experienced as alien. The expulsion is necessary for the constitution of the body of the subject as such; but the abject then remains at the border, as a looming and potentially revolting threat to the subject's identity.[30] It constitutes an abyss: "the locus of the subject's generation and the place of its potential obliteration".[31]

The capacity to recognise one's self as such depends on an organisation of self in which the abject is maintained at the margin. The experience of abjection, by contrast, involves a breakdown in this organisation, and the realisation of the possible "relation to death, to animality, and to materiality".[32] This is experienced

[27] E.g., 52750/99, *Lorsé and others v The Netherlands* (2003); 70204/01, *Frérot v France* (2007).
[28] E.g., 5829/04, *Khodorkovskiy v Russia* (2011); 33376/07, *Piruzyan v Armenia* (2012).
[29] See, e.g., 70204/01, *Frérot v France* (2007), in which Mr Frérot argued that the strip-searches in detention made the prisoners look "like slaves or animals for sale" (para.31), and 5829/04, *Khodorkovskiy v Russia* (2011), in which the ECtHR noted that Mr Khodorkovskiy's display in a metal cage in the courtroom "aroused in him feelings of inferiority", and "such a harsh appearance of judicial proceedings could lead an average observer to believe that an extremely dangerous criminal was on trial" (para.125).
[30] J. Kristeva, *Powers of Horror: An Essay on Abjection* (transl. L. S. Roudiez) (1982 [1980], Columbia University Press).
[31] E. Gross, 'The Body of Signification', in J. Fletcher and A. Benjamin (eds.), *Abjection, Melancholia and Love: The Work of Julia Kristeva* (1990, Routledge), 80-103, p89.
[32] *Ibid.*, p89.

as "if an Other has settled in place and stead of what will be 'me'",[33] and it is recounted in European human rights law in terms of the elimination of the sense of place and sense of orientation of the individual. Such total estrangement is, in its interpretation, the experience of the "deliberate inhuman treatment causing very serious and cruel suffering" that is torture,[34] whereby the mind is driven into submission by the dominance of the experience of the body.[35] The self, in this way, is possessed by pain and terror; the "fragile states" of abjection,[36] and the experience of the body as alien,[37] become fixed.

As Elaine Scarry describes it, the experience of torture involves the obliteration of the realm of experience that the individual had beyond the body; and all that remains is the experiencing and subjected body, in relation to which everything becomes "an agent of pain".[38] In European human rights law, this includes even the passage of time, due not only, and immediately, to the fear and uncertainty induced as to what is coming next, but, in some instances, to the deep and persisting psychological scars impressed on the victim.[39] And reflected also, as an agent of torture in the jurisprudence, has even been life itself. In *Mikheyev v Russia (2006)*, for example, the ill-treatment to which Mr Mikheyev was subjected by police was of such severity that he was driven to attempt suicide: an act to which he was not, the Court said, predisposed, and, in fact, "may require a certain personal resolve".[40]

In these cases, which address instances in which the possibility of the sense of place and sense of orientation has been eliminated, the necessity of self-recognition – and its underpinning self-organisation – is implied. Its breakdown not only reveals the way in which it is necessary to be able to recognise oneself as

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[33] Kristeva (1982), above n30, p10.
[34] 5310/71, *Ireland v UK* (1978), para.167; 25803/94, *Selmouni v France* (1999), para.96.
[35] E.g., 42310/04, *Nechiporuk and Yonkalo v Ukraine* (2011), para.157.
[36] Kristeva (1982), above n30, p12.
[37] See J. Mitchell, 'Trauma, Recognition, and the Place of Language' (1998) *Diacritics* 28(4), 121-133, p125.
[38] E. Scarry, *The Body in Pain: The Making and Unmaking of the World* (1985, Oxford University Press), p40.
[39] 23178/94, *Aydin v Turkey* (1997), para.83.
[40] 77617/01, *Mikheyev v Russia* (2006), para.132.

such in order to be able to create and project a self-image. It also suggests that self-recognition – and the underlying self-organisation – is a prerequisite for the possibility of experiencing familiarity at all.[41]

(iii) Attachment

The element of individual presence that is about attachment is about the ability (and need) of the individual to attach and create meaning. This has been elaborated, for instance, in the course of the development of a series of analytical categories of isolation in detention and solitary confinement cases: 'sensory isolation'; total, relative, and partial 'social isolation'; 'removal from association'; and 'solitary confinement'.[42] The focus of the ECtHR in relation to these categories is on the effect of the conditions that they depict on the individual's sense of place and, in particular, on the way in which these forms of isolation – which may entail such consequences as a cutting of contact with relatives, or restricted access to information – may disable the capacity of the individual to seek and create meaning. The ECtHR considers, in particular, that the combination of total sensory isolation and total social isolation is so potentially destructive of the personality that it is unjustifiable.[43] In relation to the other categories (which may also be found to violate the ECHR), it has developed general principles which are aimed at securing conditions conducive to the fulfilment of the individual's need to attach and create meaning. These principles pertain, for example, to the need for contact with friends and family:[44] a need which is often cast not so much in terms of securing its realisation in practice, but in terms of the existence of its possibility ("the opportunity to write and to receive letters", for example[45]) or,

[41] This implies a connection between breakdowns in self-recognition and experience of the uncanny (theorised by Freud as involving a specific and frightening kind of estrangement from the familiar [S. Freud, *The Uncanny* (transl. D. McLintock) (2003 [1919], Penguin Books), 123-162]). Kristeva distinguishes abjection from the uncanny, arguing that abjection more violently rejects familiarity itself (Kristeva (1982), above n30, p5).
[42] E.g., 52750/99, *Lorsé and others v The Netherlands* (2003); 46221/99, *Öcalan v Turkey* (2005); 24626/09, *X v Turkey* (2012); 24069/03 et al, *Öcalan v Turkey (No. 2)* (2014).
[43] See 50901/99, *Van der Ven v The Netherlands* (2003), para.51.
[44] E.g. 41418/04, *Khoroshenko v Russia* (2015).
[45] See, e.g., 13590/88, *Campbell v UK* (1992), para.45.

more strikingly, in terms of the individual's responsibility to minimise the isolation imposed on her.[46]

The role that is played by attachments within the vision of individual presence comes to the fore more strongly still in the case law pertaining to the anguish of relatives in the face of indifferent and incompetent authorities following the disappearance of family members.[47] While European human rights law loses the full extent of its bite in relation to an individual once that individual has died (the prohibition on ill-treatment is not applicable to corpses, for example[48]), it recognises a relational ambit of the rights in question, and remains concerned with surviving relatives.[49] *Varnava and Others v Turkey (2009)* is an example. The applicants here alleged that there had been multiple violations of the ECHR, on account of the (still-unaccounted for) disappearance of their relatives following their detention by Turkish military forces during the Turkish military operations in Northern Cyprus in July and August 1974. One of their complaints was that Article 3 had been violated on the ground of the anguish and distress that they had suffered as a result of being without news of their relatives for thirty-four years – anguish and distress which had only been exacerbated by news reports that missing persons had been used as guinea pigs in biochemical laboratories in Turkey.

The ECtHR began its assessment of this complaint by recounting the applicable principles, recognising, in particular, that "[t]he phenomenon of disappearances imposes a particular burden on the relatives of missing persons who are kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty".[50] It emphasised that where it had previously found the situation of relatives to constitute inhuman and degrading treatment, this was due to the

[46] E.g., 24027/07 et al., *Babar Ahmad and Others v UK* (2012), para.222.
[47] E.g., 3013/04, *Khadzhialiyev and Others v Russia* (2008).
[48] 56760/00, *Akpinar and Altun v Turkey* (2007), para.82.
[49] E.g., although the exercise of Article 8 ECHR rights "pertains predominantly to relationships between living human beings, it is not excluded that these notions may extend to certain situations after death" (40167/06, *Sargsyan v Azerbaijan* (2015), para.255). A restriction on an individual's Article 10 right to freedom of expression may also be necessitated by "[t]he need to protect the rights to honour of the murdered and the piety rights of their relatives" (40721/08, *Fáber v Hungary* (2012), para.58). See further Ch.4, part 4.4.
[50] 16064/90 et al., *Varnava and Others v Turkey* (2009), para.200.

attitudes and reactions of the authorities when the situation had been brought to their attention. Objective factors relevant in this include: "the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, and the involvement of the family member in the attempts to obtain information about the disappeared person".[51] Here, and applying the findings of the Grand Chamber in *Cyprus v Turkey (2001),*[52] the Court found that Article 3 had been violated, reasoning that "[t]he length of time over which the ordeal of the relatives has been dragged out and the attitude of official indifference in face of their acute anxiety to know the fate of their close family members discloses a situation attaining the requisite level of severity".[53]

Whilst the essence of the violation in the disappearance cases thus lies in the indifferent attitudes of the authorities, the essence of the concern with respect to the surviving relatives lies in the 'anguish of uncertainty' under which they are made to labour. This concern derives from the recognition that their sense of orientation and sense of place may be disrupted by uncertainty and fear as to the fate of their relatives, the security and wellbeing of whom is, in which case, at least partly constitutive of their own capacity to situate themselves in the world. The focus, therefore, is on what the attachments, or the objects of those attachments, mean to the individual before the Court, and the emphasis of European human rights law is on setting in place means to aid the individual in managing the disorientation that she has experienced.[54]

2.2.3 The ethos of articulation

The three elements of European human rights law's vision of individual presence tell us not only how this notion of presence is specified. They also point us towards an outline of the category of the self in European human rights law. More specifically, they point us towards European human rights law's vision of what it means to have a sense of self, the central idea of which seems to be that the three

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[51] *Ibid.*
[52] 25781/94, *Cyprus v Turkey* (2001).
[53] 16064/90 et al., *Varnava and Others v Turkey* (2009), para.202.
[54] See further Ch.4, part 4.4.

elements enable the individual's articulation of her self. This notion of articulation – described here as an 'ethos' to capture the way in which it binds the vision of individual presence set out in European human rights law – is not only about the articulation of one's place in the world but also about the meaning that this holds in relation to close others.

The articulation of one's place in the world is in many ways a claim to recognition – a claim to be seen. It comes to light clearly in the case law concerning the right to vote, which is one of the "subjective rights of participation" enshrined in Article 3 of Protocol 1 to the ECHR.[55] At the core of this right is the opportunity to vote;[56] and the jurisprudence here draws out its meaning. In *Scoppola v Italy (No. 3) (2012),* for example, in which the applicant challenged the fact that he had been disenfranchised following a criminal conviction, the Grand Chamber highlighted the relevance of the fact that, under Italian law, it was possible for a convicted person who had been disenfranchised to recover the right to vote. This meant, it said, that the Italian system was not "excessively rigid".[57] But it also meant that the opportunity to vote remained, albeit that it was latent and needed to be restored to be exercised. This same reasoning underpinned *Shindler v UK (2013).* Mr Shindler was a British national living in Italy. He had retained a right to vote in UK elections for fifteen years following his emigration, but he now fell outside this and complained that he was no longer permitted to vote. The Court, in finding that there had been no violation of the right to vote, focused on the proportionality of the restriction; but it also noted that if Mr Shindler returned to live in the UK, his vote would be restored. It could not be said, therefore, that the restriction impaired the very essence of the right.[58] He retained the opportunity to vote; it was simply latent. A final example is *Sitaropoulos and Giakoumopoulos v Greece (2012).* The applicants here were Greek nationals who were based in Strasbourg. They were unable to vote from France in the Greek parliamentary elections, as the Greek legislature had not arranged for this. They argued that this disproportionately

[55] 9267/81, *Mathieu-Mohin and Clerfayt v Belgium* (1987), para.51.
[56] See 24833/94, *Matthews v UK* (1999), paras.64-65.
[57] 126/05, *Scoppola v Italy (No. 3)* (2012), para.109.
[58] 19840/09, *Shindler v UK* (2013), para.108.

interfered with the exercise of their right to vote, as it meant that they would have to travel to Greece to vote. The Grand Chamber considered, however, that Article 3 of Protocol 1 did not require States to implement measures to allow expatriates to vote from abroad, and, moreover, that the disruption that would have been caused to the applicants' lives by the need to travel to Greece would not have been "disproportionate to the point of impairing the very essence of the voting rights in question".[59] Ultimately, the applicants could have travelled; their opportunity to vote was intact.

The essence of the significance of the opportunity to vote in these cases lies in the notion of having a political presence expressive of one's opinions and beliefs.[60] The opportunity to vote is the opportunity to express oneself in this regard. It involves the articulation of one's place in the world and a corresponding claim to have this recognised. It is an opportunity to affirm one's presence and ability to "orient [oneself] in political matters": something which Mr Kiss, in *Alajos Kiss v Hungary (2010),* argued that he could still very much do, in a context in which he had automatically lost his right to vote upon being placed under partial guardianship.[61] And it is an opportunity, too, to affirm one's place and identity as a participant in the political life of a society: something which Mr Aziz, in *Aziz v Cyprus (2004),* argued that he had lost entirely when his registration on the electoral roll was refused on account of his being a member of the Turkish-Cypriot community.[62]

The articulation of one's place in the world in this way is not entirely separable from the articulation of one's capacity; and the significance of the latter is reflected in cases in which the individual has been rendered powerless and unable to articulate her presence. We have already seen something of this in the cases discussed in relation to self-image, self-recognition, and attachment; but there is an added dimension to it that we have not fully drawn out yet and that pertains to

[59] 42202/07, *Sitaropoulos and Giakoumopoulos v Greece* (2012), para.80.
[60] See 24833/94, *Matthews v UK* (1999), in which "the applicant…was completely denied any opportunity to express her opinion in the choice of the members of the European Parliament" (para.64).
[61] 38832/06, *Alajos Kiss v Hungary* (2010), para.30.
[62] 69949/01, *Aziz v Cyprus* (2004), para.17.

the implications for close others (namely family members) of the articulation of an individual's presence. *Gutsanovi v Bulgaria (2013)* is an example. The case concerned a police operation at the home of the Gustanovi family to arrest Mr Gutsanov and to search the family home in conjunction with a criminal investigation into misappropriation of public funds. The issue before the Court was the conduct of this operation: masked and heavily armed police had burst into the house early one morning, while Mr Gutsanov and his wife and their two young daughters were still asleep. The Court found that the psychological ordeal that this had involved had constituted degrading treatment of Mrs Gutsanova and the two children, who had been left "severely affected by the events".[63] It had constituted degrading treatment of Mr Gutsanov too, and this was bound up in the effect of his treatment on his family: the manner of his arrest "very early in the morning, by several armed and masked officers who forced their way in through the door of the house, and under the frightened gaze of Mr Gutsanov's wife and two young daughters" had aroused in him "strong feelings of fear, anguish and powerlessness…capable of humiliating and debasing him in his own eyes and in the eyes of his close relatives".[64] The essence of the degradation in Mr Gutsanov's case was, therefore, the harm to his sense of self in regards to his sense of his capacity to protect his family. And this same point – about the articulation of presence that is bound up in the meaning of that presence for loved ones – has been set out elsewhere too, such as in terms of the effect on a parent of being powerless to protect her child and in terms of the effect on a child of the consequent "degradation of the parental image".[65] The two effects are cast as going together; and the articulation of presence is, therefore, not only about the articulation of one's place and capacity in the world, but also about the articulation of a presence that in some respects derives its meaning for the individual from the meaning that it carries for others. The vision of presence has a reflexive quality in this sense, because it accommodates, within its conception of one's sense of place, not only the effect

[63] 34529/10, *Gutsanovi v Bulgaria* (2013), para.134.
[64] *Ibid*., para.136.
[65] 39472/07 and 39474/07, *Popov v France* (2012), para.101. See further Ch.5, part 5.2.1.

of this sense of place on close others, but the effect of this effect on the individual herself.

2.3 Presentation

Sitting alongside the vision of individual presence articulated in European human rights law is a vision of individual presentation. This is about the position that is ascribed to the individual in the terms of European human rights law – about the way in which the individual is read through the lens of some social role or status and is accordingly presented in the terms of a persona. Towards the end of the discussion of presence above, we began to see something of European human rights law's account of certain roles and positions in this respect. For example, there was a clear sense in the final cases discussed of the meaning and implications of the 'parental image' for the child (something which, in turn, tells us something about how the meaning of being a parent is constructed in European human rights law). The following section examines in greater detail how European human rights law envisages particular statuses and roles and how it presents the individual in the terms of these. I suggest that the individual is always presented in European human rights law in the terms of a persona (*2.3.1*). The persona has three qualities: it is ascribed a master image; it is read in relation to a notion of collective agency; and it is transient in nature (*2.3.2*). These elements are bound together by an ethos of replaceability (*2.3.3*).

2.3.1 The formation of the persona

The idea of presentation originates in the *persona*, which, in turn, derives from the mask: the face that is presented socially; the roles and statuses that the individual plays.[66] Human rights law selects among representations and ascriptions to interpret and present a picture of the individual in this way. It establishes an account through the lens of some role, categorised life stage, or status ('worker',

[66] See further M. Mauss, 'A Category of the Human Mind: The Notion of Person, the Notion of 'Self'' (1938), in *Sociology and Psychology: Essays* (transl. B. Brewster) (1979 [1950], Routledge & Kegan Paul Ltd.), 57-94, p78-82; V. Turner, 'Acting in Everyday Life and Everyday Life in Acting', in *From Ritual to Theatre: The Human Seriousness of Play* (1982, PAJ Publications), 102-123.

'infant', or 'marriage', for example); and to each of these categories comes to correspond a normative and normalising vision of what it stands to represent and entail. The account always revolves around some central activity or task, be it the pursuit of a principle (such as the best interests of the child), a way of life (such as a religious way of life), or an objective that has been decreed and in relation to which all other matters in the case are construed (such as a commitment to the protection of health). This determines the nature of the roles and statuses in question, and, therefore, the terms of the case itself.

Each form of presentation contains a representation of associational ties: a referential or relational element which points either to the central activity or to some other co-participant in it. A case about a 'parent' is necessarily a case about a 'child', a case about an 'employer' one about an 'employee', and so on. It follows that forms of presentation only make sense in the context of their broader set and the activity in question. The focus is on participation in a shared activity; and a body membership is formed around this. Critically, there is no agreement on how to frame the activity, since it necessarily means something different to each participant; what to one person is a question of the freedom of the press and of the publishers to publish is to another a matter of the freedom of the audience to receive the information. Such framing ultimately becomes an exercise in legal interpretation, and this determines the roles and statuses to be invoked and applied. Only then does attention shift to the matter of admission to the structure of membership thereby established – to whether there is a 'fit' between the persona being invoked and that laid out by the activity itself.

What becomes highly significant, then, is the interpretive choice and manner of framing the case: the choice to interpret someone through the lenses of 'illegal immigrant' and 'criminal' instead of through the lens of their family life which is being interfered with by a deportation order;[67] the choice to interpret sadomasochism as the (public) criminal activity of assault and wounding instead of as the (private) consensual sexual activity that those involved in it experience it

[67] E.g., 23078/93, *Bouchelkia v France* (1997).

to be;[68] the choice to interpret a case presented as pertaining to a hierarchical child-parent relationship in terms of two equally autonomous and legally unrelated adults.[69] The latter case (*Odièvre v France (2003)*) is in fact particularly interesting in this regard, for it illustrates the extent and effect of different framings.

The case was brought by Ms Odièvre, who was born anonymously in France under the domestic law on *accouchement sous X*. This grants women a right to give birth anonymously, and it has existed as a legal possibility in one form or another since 1793. Ms Odièvre complained that her Article 8 ECHR rights had been violated by the fact that her birth had been kept secret with the result that she had been unable to obtain information (other than non-identifying) about her origins. Although she submitted that establishing her "basic identity" was integral to both her private life and her family life,[70] the Court only approached the case in terms of her private life, on the ground that she was seeking information about the circumstances of her birth, and not intending to "call into question her relationship with her adoptive parents".[71] By positing private life and family life as mutually exclusive alternatives in this way, the Court was able to sidestep the possibility that the information could be relevant to Ms Odièvre's relationship with her adoptive parents.[72] Instead, it framed the case as being one of competing private life rights: Ms Odièvre's right to knowledge of origins against her birthmother's interest in anonymity.

More significant, however, in terms of the formation of the persona in law, is that the Court then proceeded to fluctuate between two positions: a framing of the case as concerning two adults and a framing of the case as concerning a biological parent and child. It began its analysis in terms of "the child and the mother", noting, for instance, the indifference that had been displayed by Ms Odièvre's birthmother towards her,[73] but it then moved on to consider that the

[68] E.g., 21627/93 et al., *Laskey and Others v UK* (1997).
[69] E.g., 42326/98, *Odièvre v France* (2003).
[70] *Ibid*., para.25.
[71] *Ibid*., para.28.
[72] On which see J. Carsten, 'Constitutive Knowledge: Tracing Trajectories of Information in New Contexts of Relatedness' (2007) *Anthropological Quarterly* 80(2), 403-426, p416.
[73] 42326/98, *Odièvre v France* (2003), para.44.

private interests at stake did "not concern an adult and a child, but two adults, each concerned with her own free will",[74] before shifting, a few paragraphs later, to address the point that most Contracting States did not have comparable legislation "at least as regards the child's permanent inability to establish parental ties with the natural mother if she continues to keep her identity from the child she has brought into the world".[75] Whilst the child-parent framing enabled the Court to grasp the issue here as being a matter of relational statuses, the two-adult framing did not; moreover, the latter equated two unequal instances of free will, and overlooked that Ms Odièvre's position resulted from the birthmother's actions. Nevertheless, it was the two-adult framing that shaped the remainder of the judgment, which ultimately found that the interference with Ms Odièvre's right was justified in the name of the balance that the French legislation had sought to strike between the competing interests.

As this case demonstrates, the formation of the persona in European human rights law involves a selection among memberships, as determined by the construction of the activity or matter in question. This choice is, at the same time, the legal constitution of the subject in terms of some persona; and it is in this way that the vision of presentation here differs most greatly from other frameworks of social presentation, the most notable of which is that set out by Erving Goffman in *The Presentation of Self in Everyday Life*. While Goffman emphasises the interest of the presenting individual in having control over the impression she gives, and, therefore, in indirectly controlling the conduct of others in their "responsive treatment" of her,[76] there is no such individual control in the case of presentation in European human rights law. The persona is, rather, formed in and by law, and the individual is read in these terms. The choice and formation of this persona, moreover, detracts from the reality of the multiple memberships from which to select. And so although each account may in itself have an aura of cohesion (a definitive activity and a definitive vision of a set of participants), that in turn belies the extent to which the account of the individual in general is fragmented. The

[74] *Ibid.*, para.44.
[75] *Ibid.*, para.47.
[76] E. Goffman, *The Presentation of Self in Everyday Life* (1990 [1959], Penguin Books), p15.

articulation of a role or status only reflects placement in relation to one activity, and consequently, the account of the individual supplied here is only ever partial. It is limited by the form through which it is expressed.

2.3.2 Elements of presentation

The notion of individual presentation in European human rights law is accordingly about the way in which the individual is read and represented in the terms of a persona. It involves the representation of the individual through the lens of some role, categorised life stage, or status, with the choice as to the framing of the case being the most significant of all. The form that the persona then goes on to take has three qualities: it sets out a vision of a master image; it relates this to a form of collective agency; and it is transient in nature.

(i) The master image

The account of the formation of the persona already implies that expectations are attached to the roles and statuses in question; and indeed each form of persona is imbued with an ideal status form: a master image.[77] This means that the individual comes to be oriented, in her capacity qua whichever role or status, towards a normative and normalising conception of this. Reference is accordingly made in the case law to stylised conceptions of categories – to what a 'child' needs,[78] or to the 'appropriate' appearance of a 'teacher',[79] for example – with European human rights law revealing itself here to be labouring under a certain vision of various relationships and their accompanying statuses.

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[77] The term 'master image' here is inspired by Spanish constitutional law, where institutions are conceived of as having their own 'master image' (see, e.g., Judgment 198/2012 of the Spanish Constitutional Court, discussed below). A comparable notion of 'master ideals' is theorised by Philip Selznick, who argues, in 'Sociology and Natural Law' (1961) *Natural Law Forum* 61, 84-108, that "normative systems" (such as friendship and democracy) are systems that are governed by a certain "master ideal", towards the realisation of which the system is oriented. Winfried Brugger draws on Selznick's analysis in 'The Image of the Person in the Human Rights Concept' (1996) *Human Rights Quarterly* 18, 595-611, noting that every culture has its own "'images' of the human person", and that "these images represent 'master ideals' of the culture in question" (p596).

[78] E.g., in visions of a child's 'best interests': 41615/07, *Neulinger and Shuruk v Switzerland* (2010).

[79] E.g., concerning religious dress: 42393/98, *Dahlab v Switzerland* (2001, admissibility decision).

Roles and relationships pertaining to family life are, as ever, a hotspot for this normative orientation; and in the case law of the ECtHR concerning the Article 8 right to respect for family life a clear vision of what 'family life' consists in has been articulated. Meeting the standard of 'family life' is necessary to fall within the protection of this provision. For example, between a genetic father and his child, "mere biological kinship, without any further legal or factual elements indicating the existence of a close personal relationship", will not suffice to evince a relationship of 'family life'.[80] The genetic father has rather to demonstrate his commitment to the child; and the case law fleshes out what this looks like. For example, in *L v The Netherlands (2004),* although the genetic father had never cohabited with his daughter and her mother, it sufficed for 'family life' purposes that he had been present at her birth, and that until his relationship with the mother had ended (sixteen months later), he had visited them "at unspecified regular intervals, that he changed A's nappy a few times and babysat her once or twice, and that on several occasions he had contact with Ms. B about A.'s impaired hearing".[81] In *Schneider v Germany (2011*), meanwhile, the Court did "not exclude" the applicability of the Article 8 'family life' protection to an "intended relationship" between a potential genetic father and child.[82] The child in this case – a boy named F – had been conceived thirteen months into a sixteen-month relationship between Mrs H and Mr Schneider which had occurred while Mrs H's husband was away working in the UK. Mr and Mrs H were now raising F together with their daughter, and they refused to allow Mr Schneider to see F. They acknowledged that Mr Schneider could be F's genetic father, but they claimed that it was also possible that it was Mr H. Mr Schneider meanwhile argued that he and Mrs H had planned F's birth, and that this intended family life should suffice for Article 8 protection. The Court agreed: Mr Schneider and Mrs H had not had a "merely haphazard" relationship, and Mr Schneider had demonstrated "interest in and commitment...to F both before and after his birth",[83] by accompanying Mrs

[80] 45582/99, *L. v the Netherlands* (2004), para.37.
[81] *Ibid.*, para.39.
[82] 17080/07, *Schneider v Germany* (2011), para.90.
[83] *Ibid.*, para.89.

H to two antenatal appointments, acknowledging paternity prior to the birth, asking for some photos of F, and trying to have contact with F.

In these cases, the genetic fathers succeeded in establishing that their situations fell within the ambit of 'family life' because they reached something which resembles what is taken, in European human rights law, to be the ideal form – the master image – of 'normal' family life.[84] The idea of presentation is, in this way, teleological in nature. It involves the construction of norms of behaviour, relationships, and states of being. An account is articulated, for example, of the behaviour that befits particular categories (and against which the conduct of individuals performing these categories is assessed),[85] of what – as we have already seen – 'normal' relationships of various sorts consist in, and of what being dependent means.[86] The norms that are elaborated in this way are, furthermore, institutionalised, in the sense that socio-legal institutions, like marriage, are cast as having their own 'master images' too. This has been developed most fully in Spanish constitutional law, where an 'institutional guarantee' exists to protect "certain constitutionally recognised institutions against any legislative action that intends to remove or denaturalize them", the point being "to ensure that the legislator does not remove or empty the institution of its master image".[87] But the basic idea expressed in the idea of the institutional master image is articulated more widely too; it is only with some conception of what a particular socio-legal institution is – of what its master image consists in – that the ECtHR can, for example, assess what is accommodated by it or whether it has changed over time.[88]

[84] On which see, e.g., 6833/74, *Marckx v Belgium* (1979).
[85] See, e.g., in relation to professional statuses, 33677/10 and 52340/10, *Fürst-Pfeifer v Austria* (2016).
[86] E.g., 25960/13, *I.A.A. and Others v UK* (2016, admissibility decision).
[87] Judgment 198/2012 (Spanish Constitutional Court), para.7 (concerning the master image of the institution of marriage).
[88] See, e.g., 30141/04, *Schalk and Kopf v Austria* (2010), para.58 ("Although…the institution of marriage has undergone major social changes since the adoption of the Convention, the Court notes that there is no European consensus regarding same-sex marriage…").

(ii) Collective agency

The master image that is carried by each persona is related to a vision of collective agency, which is about the way in which the individual, in some capacity or role, is related to the collective and charged with upholding it. This underpins, for example, the conceptualisation of secularism in European human rights law: a conceptualisation that has enabled the possibility of a ruling (in the context of States which have secularism as a constitutional principle) that the religious dress of an individual contravenes this principle.[89] The basis of this is the notion that "[a]n attitude which fails to respect that principle [of secularism] will not necessarily be accepted as being covered by the freedom to manifest one's religion";[90] in other words, it is the assumption that the wearing of religious dress (the case in question concerned a student's wearing of the Islamic headscarf) denotes an attitude and that this attitude is one of a lack of respect for the principle of secularism.[91] In relation to States that accord secularism a constitutional status, the principle of secularism is accordingly conceived of by the ECtHR as a collective principle that demands a particular presentation on the part of the individual and, moreover, a particular way of demonstrating commitment to that principle.

We see a similar phenomenon in relation to Article 4 of the ECHR, into which an idea of collective agency – in terms of social solidarity – has been read. Article 4 sets out the freedoms from slavery and forced labour, and it also delineates (in paragraph (3)) what is not included in this latter category, namely work done in legitimate detention, military service (or its equivalent), 'service exacted in case of an emergency or calamity threatening the life or well-being of the community', or work forming 'part of normal civic obligations' (such as compulsory jury service[92] or fire service[93]). In *Van der Mussele v Belgium (1983)* – a case involving the complaint of a lawyer that the requirement on him to provide

[89] E.g., 44774/98, *Leyla Şahin v Turkey* (2005).
[90] *Ibid*., para.114.
[91] On which see esp. the Dissenting Opinion of Judge Tulkens in *Leyla Şahin v Turkey* (*ibid*.).
[92] E.g., 17209/02, *Zarb Adami v Malta* (2006), para.47.
[93] E.g., 13580/88, *Karlheinz Schmidt v Germany* (1994), para.23.

pro bono legal representation constituted 'forced or compulsory labour' in violation of Article 4 – the ECtHR described the subparagraphs of Article 4(3) as being "grounded on the governing ideas of the general interest, social solidarity and what is in the normal or ordinary course of affairs".[94] What was of relevance in Mr Van der Mussele's case was the 'normal civil obligations' exclusion. The Court emphasised that the obligation on Mr Van der Mussele to perform pro bono work had enabled Mr Ebrima (the man whom he had been required to defend) to have his Article 6(3) ECHR rights[95] secured, to which extent the pro bono duty "was founded on a conception of social solidarity and [could not] be regarded as unreasonable"[96] let alone as forced or compulsory labour. This conception of social solidarity, understood here in terms of Mr Van der Mussele acting to help Mr Ebrima to secure his ECHR rights, has underpinned subsequent cases too. For example, it underpinned the finding in *Graziani-Weiss v Austria (2011)* that a lawyer who had been appointed as a legal guardian for someone who was suffering from mental illness had not been required to perform services which constituted forced or compulsory labour.[97] It has also been cast as underpinning obligations on doctors to contribute to the provision of an emergency service. The issue arose in *Steindel v Germany (2010)*, in which Mr Steindel, a private doctor, complained that the requirement on him to participate in the medical emergency service constituted forced or compulsory labour. The ECtHR, in finding that it did not, followed much of its *Van der Mussele v Belgium* reasoning; and it added that the scheme in question was "devised to unburden all practising physicians from the obligation to be available during night-time and at weekends and to ensure the availability of medical services during these times", to which extent it was "founded on a concept of professional and civil solidarity" and was "aimed at averting emergencies".[98] Participation in and contribution to the emergency service was accordingly a demand and a reflection of professional and civil solidarity.

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[94] 8319/80, *Van der Mussele v Belgium* (1983), para.38.
[95] Article 6 sets out the right to a fair trial, and paragraph 3 sets out the 'minimum rights' that everyone charged with a criminal offence has.
[96] *Ibid.*, para.39.
[97] 31950/06, *Graziani-Weiss v Austria* (2011).
[98] 29878/07, *Steindel v Germany* (2010, admissibility decision).

Collective agency in European human rights law seems to be then about the form of social interaction and contribution that is demanded by each form of role or status. It is here that it is related most closely to the notion of the master image, for if the master image is about the normative and normalising vision attached to each role or status, collective agency is about the form of interaction and contribution that is part of this vision. And so, for example, being a student in a secular institution seemingly entails not wearing religious dress in that institution (in the name of the collective principle of secularism); and being a doctor entails contributing to an emergency service programme (in the name of the collective principles of professional and civil solidarity).

In the sense in which it is concerned with norms which we might loosely call norms of the 'common good' in this way – and in the sense in which it accordingly articulates a vision of acting together and 'living together'[99] – collective agency in European human rights law appears to echo the ethos of sociality discussed in relation to the order of association in Chapter 1.[100] And yet what is challenging about European human rights law's vision here, from the perspective of the idea of 'collective agency' itself, is that the focus is primarily on the appearance of things – on what things look like.[101] This is reflected in the distinction that is drawn between the principles of collective agency and the reasons for action underpinning the articulation of these. This can be better understood by considering the cases above in which work-related obligations of doctors and lawyers – obligations that the individuals in those cases claimed to constitute forced or compulsory labour – are deemed reflective of social, civil, or professional solidarity. The consequence of this reasoning is that the work subsequently performed looks like an expression of solidarity; and moreover, this is what counts, with the reasons that motivate the action (essentially, compulsion)

[99] This latter notion (of 'living together') has acquired a life of its own in the ECHR jurisprudence as a possible justification for limitations on the rights to freedom of religion and to respect for private life, and we will return to it in Ch.4 (part 4.3).
[100] See Ch.1, parts 1.3.2 and 1.4.1.
[101] See e.g., 37452/02, *Stummer v Austria* (2011), concerning the question of the full incorporation of prisoners within national social security systems, which indicates that the principle of social solidarity that underlies Article 4(3) does not run so deeply as to disrupt collective national structures and is rather focused on the maintenance of the appearance of pre-existing structures.

being overshadowed by this. Solidarity is conceived of, therefore, not as requiring a certain motivation on the part of the individual, nor as requiring a collectively-oriented perspective per se. It is not about agency, as such, then; rather, it is about the action itself that is taken as expressing solidarity. The focus is on a representation (such as of solidarity or secularism) that is cast as being a mode of collective agency. It is this representation that the individual is to uphold.

(iii) Transience

Talk of appearances leads us to the final feature of any persona in European human rights law, and this is its transient quality. This is not about the transience of the role per se, for as long as the associated activity continues to exist, the role in question will exist too. Rather, transience here is about the transience of the figure filling the role (from law's perspective) and about the individual experience of transience in relation to these roles. The point about the transience of the figure filling the role supports the way in which European human rights law constructs a normative and normalising master image for each role and constructs concepts of value and collective activity more generally. For example, in relation to the activity of school education, pupils come and go, and so in an instance in which the domestic authorities objected to a teacher wearing an Islamic headscarf while teaching, it was less relevant in the eyes of the Court that there had been no complaints whatsoever from any of the parents or pupils at the time (who were individually transient figures) and more important that the headscarf was deemed to be at odds with the domestic authorities' conception of schooling.[102]

The point about the individual experience of transience in relation to roles is about the way in which the experience of roles is conceived of as being potentially transient and about the way in which a distinction is drawn between not becoming something (which is cast as being a transient experience) and becoming something (which is not). This is well-illustrated by *Evans v UK (2007)*, which concerned the competing interests of Ms Evans and her former partner, J. They had frozen six embryos together, prior to an operation that Ms Evans had to

[102] 42393/98, *Dahlab v Switzerland* (2001, admissibility decision).

have to remove her ovaries. At the time of the treatment, Ms Evans and J. each signed a form which stated that under the Human Fertilisation and Embryology Act, it would be possible for either of them to withdraw their consent to the use of the embryos at any time prior to implantation ('the joint consent rules'). Not long after, they broke up, and J. told the clinic that he wanted the embryos to be destroyed. Ms Evans objected, and ultimately argued before the Grand Chamber of the ECtHR that the domestic provisions enabling J. to withdraw his consent in this way violated her Article 8 ECHR rights. In particular, she complained that the effect of the joint consent rules was that she was denied her only chance of having a genetically-related child. The conflict was therefore between her decision to become a parent, and J.'s decision not to; and both decisions were protected by the Article 8 concept of 'private life', the Court said.[103]

Ultimately, J.'s right to respect for his decision not to become a genetic parent trumped in this case, and no violation of Article 8 was found. Whilst there is a broader question to be asked as to why J.'s right trumped in this way,[104] what is notable for our purposes is the way in which the Court tried to find a way around the fact that, with this decision, Ms Evans would not have the chance to realise herself as a genetic parent: the terms in which she conceptualised motherhood.[105] The Court suggested alternative routes to parenthood; she was thus not prevented "from becoming a mother in a social, legal, or even physical sense"; 'only' genetic parenthood was in issue.[106] In other words, Ms Evans could still realise her potential as a mother, just in different senses.

In trying to veil Ms Evans's loss in this way, the Court conceptualised the loss itself as transient; and this can be seen by considering the different ways in which the positions of Ms Evans and J. were framed. Whereas Ms Evans's position was analysed in terms of 'genetic parenthood' (and in terms of not becoming a genetic mother), J.'s position was mostly analysed in terms of the effect that

[103] 6339/05, *Evans v UK* (2007), para.71.
[104] See also 46470/11, *Parrillo v Italy* (2015), in which Ms Parrillo's deceased partner similarly acquired something of a final say in relation to the fate of their frozen IVF embryos (which Ms Parrillo wanted to donate to scientific research). On this case, see Ch.3, part 3.2.1.
[105] 6339/05, *Evans v UK* (2007, para.90.
[106] *Ibid*, para.72.

becoming a 'father' would have on him. And so, as the Court put it, permitting Ms Evans to use the embryos would mean that "J. [would] be forced to become a *father*", whereas refusing this permission would mean that Ms Evans would be "denied the opportunity of becoming a *genetic parent*".[107] Evidently, and even on the Court's own conceptualisation of parenthood as involving 'social', 'legal', and 'physical', as well as 'genetic' dimensions, J. would not have been forced to become a father in all these senses. What he would have become would have been a genetic father. By the end of the judgment, this was somewhat recognised, insofar as the framing came to be one of Ms Evans as genetic parent versus J. as having "a genetically related child with her".[108] But throughout the reasoning leading up to this, the presentation was of Ms Evans as genetic parent and J. as father. The 'genetic' in Ms Evans's case was cast as having been a mere possibility; furthermore, there were other ways in which she could become a parent, and these forms of parenthood were mutually exchangeable. In J.'s case, by contrast, the genetic was cast in permanent terms; use of the embryos would mean that he would become a (genetic) father.

It was not, therefore, the genetic role itself that was cast in transient terms in this case. Rather, the case implies a distinction between becoming something and not. The experience of not becoming something is conceived of as being transient, whereas the experience of becoming something is conceived of as being more far-reaching in effect. This tells us two things about presentation in European human rights law. First, it confirms that the focus is on the activity to which the role is attached, as opposed to the meaning of the role for the individual performing it (a perspective which would have to accommodate the possibility that becoming something and not becoming something might have comparable effects[109]). Second, it points to the way in which the experience of transience is cast as being inseparable from the experience of the exchangeability of roles. And this brings us to the ethos of replaceability in European human rights law.

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[107] *Ibid.*, para.73 (emphases added).
[108] *Ibid.*, para.90.
[109] On which see S. Scott, 'A Sociology of the Nothing: Understanding the Unmarked' (2018) *Sociology* 52(1), 3-19.

2.3.3 The ethos of replaceability

The ethos of replaceability seals the structure of the vision of presentation.[110] Its logic is simple: presentation hinges on some activity, and the roles and statuses invoked pertain solely to this activity; therefore, the activity could be carried out by whoever qualifies as presenting in the terms of the role or status in the necessary (or better) way. This is particularly familiar in the realm of employment and in areas in which roles are primarily assumed as opposed to being assigned. For example, employees who present in ways that are deemed incompatible with their roles may find themselves being dismissed and replaced[111] or else they may be cast as being 'free to leave' and able to go elsewhere.[112] But elsewhere, the way in which this ethos manifests itself is not always clear at first glance. We see this in the 'replicability' cases, in which the individuals in question are deemed free to leave and able to replicate elsewhere whichever possibility or form of life is said to conflict with the trumping 'general' interest. This approach has been applied in a range of cases, including in instances in which individuals or their family members are refused leave to enter or remain in a country, with consequences for their family life (where it might well be concluded that this in itself is no bar, as there are no strict obstacles to replicating this family life in another country[113]), in cases concerning local schooling provision (where parents might be told that in the absence of some public provision – for example, of teaching through the medium of a particular language – they are 'free' to move their child[114]), and in cases concerning noise pollution (where, in the face of a purportedly greater general economic interest in its source – an airport, for example – families might be told that they are free to move and able to replicate their current lives elsewhere[115]).

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[110] This part draws on my paper on 'The ethos of replaceability in European human rights law' in J. Owen and N. Segal (eds.), *On Replacement: Cultural, Social and Psychological Representations* (2018, Palgrave Macmillan), Ch.13.
[111] E.g., 56030/07, *Fernández Martínez v Spain* (2014).
[112] E.g., 29107/95, *Stedman v UK* (1997, admissibility decision). Cf. the balancing approach preferred in 48420/10 et al., *Eweida and Others v UK* (2013), para.83.
[113] E.g., 9214/80 et al., *Abdulaziz, Cabales and Balkandali v UK* (1985), para.68.
[114] E.g., 1474/62 et al., *Case "Relating to Certain Aspects on the Use of Languages in Education in Belgium" v Belgium* (1968), para.7.
[115] E.g., 36022/97, *Hatton and Others v UK* (2003), para.127 et seq.

The refrain of 'free to leave' in such cases is mostly cast in terms of the capacity of the individuals to replicate the activity in question, and its environment, elsewhere. That, at least, is how it is presented in the case law, notwithstanding the reality that the moves in these cases are not as straightforward as they are made out to be.[116] But this articulation of the possibility of replication, of reproduction, which is cast in terms of the choice of the individuals, also, at the same time, communicates the redundancy of these same individuals. Someone else will fill the place that they are 'free' to relinquish; and only in rare cases of high specificity, where there is a drive towards rebuilding some unit with the same members as before, is this any different. Such cases involve, for example, situations in which the maintenance of a child's ties and contact with her family is at stake; and in such instances, "everything must be done to preserve personal relations and, if and when appropriate, to 'rebuild' the family".[117] But with the exception of such cases, replicability is related to replaceabilty.

The focus of the ethos of replaceability is on the role or status that the individual represents and on the function that is being performed; and the question posed is of whether the (alienable) performances of the individual are living up to the normative vision articulated by European human rights law. This approach, by definition, excludes recognition of the singularity of the individual. It overlooks the need to be recognised (a need identified by the vision of presence); and moreover, it demands a reconceptualisation of relations, and their imbuing with a sense of detachment. Such a reconceptualisation has elsewhere been described by Georg Simmel as being an instance of the money economy: an economy which, he argues, depends on an endless role-playing of individuals that poses a threat to individual being itself. He conceives of this economy as instigating a change in our relations of dependency: a shift from us as having a small number of irreplaceable relations to having a larger number of replaceable relations to whom we are

[116] It is only in exceptional cases of this kind, where, e.g., "radical upheaval" for children would be entailed, that the 'free to leave' narrative is not applied (e.g., 25017/94, *Mehemi v France* (1997), para.36).

[117] 40031/98, *Gnahoré v France* (2000), para.59. The obligation on the State here is one of means, not one of result; see, e.g., 805/09, *Pascal v Romania* (2012), para.69 and the cases cited therein.

indifferent.[118] Thus, Simmel writes, "we are remarkably independent of every *specific* member of this society, because his significance for us has been transferred to the one-sided objectivity of his contribution, which can just as easily be produced by any number of other people with different personalities with whom we are connected only by an interest that can be completely expressed in money terms."[119]

This is precisely the vision of political economy that is reflected in the ethos of replaceability. And European human rights law carries this vision further too, for it culminates in its application to those claiming to be family members. There are therefore examples of cases of paternity challenges in which the ECtHR has focused on securing and preserving the stability of the 'existing' family unit in the face of the 'threat' of disruption posed by the man claiming to be the legal father of the child in question.[120] To reach this conclusion, the ECtHR has to focus on the performance of the role of 'fathering', and since this is being presently performed by the social father, he is experienced by the potential biological father – the man contesting his legal paternity – as having replaced him in this role. It is irrelevant, in this respect, whether the man claiming paternity has ever 'done' any 'fathering' in the first place, which, in any case, is not merely a matter of his display of commitment but also of whether the mother has enabled him to be involved.[121] What is at issue in these cases is, rather, the sense of loss: something that can be experienced even if its object has not been 'held' in the first place. The experience of the ethos of replaceability, and the sense of having been replaced, may be felt where the chance to perform the role or status was not even had – where the opportunity did not even arise, therefore, to be in a position to be properly replaced.

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[118] G. Simmel, *The Philosophy of Money* (ed. D. Frisby; transl. T. Bottomore and D. Frisby) (Second Edition) (1990 [1900], Routledge), p297-298.
[119] *Ibid.*, p298.
[120] E.g., 45071/09, *Ahrens v Germany* (2012); 23338/09, *Kautzor v Germany* (2012). See further Ch.3, part 3.4.3.
[121] In *Ahrens* and *Kautzor, ibid.,* for instance, the ECtHR emphasised what it perceived as being the men's lack of demonstrable commitment towards the children in question. But the men argued that the mothers had obstructed their ability to demonstrate their commitment to the children.

What the ethos of replaceability seems to generate, then, is a sense of insecurity and non-recognition. It generates a sense of insecurity by imbuing every role and status with a fragility and by attributing to every performer of every role and status a capacity to be replaced. It generates a sense of non-recognition through the anonymity of the language of roles and statuses that is used to express it: the addressor and the addressed could just as well be other and someplace else.[122] This is the essence of the distinction between the visions of presence and presentation set out in European human rights law. For whereas presence is about the articulation of the distinctive individual, presentation leans towards her non-recognition.

2.4 The mediation of presence and presentation

We therefore arrive at a position in which we have two very different visions to think about: a phenomenological vision of presence, which is about the sense of place of the individual, and a more functional or instrumental vision of presentation, which is about the representation of the individual through the terms of some role or status. The question that arises is of how these two visions are mediated, for they are clearly at odds with one another. Whereas the notion of presence originates in an account of the sense of place and sense of orientation of the individual, the notion of presentation focuses on the social function that she is performing or the activity that she is engaged in.

In this section, we will consider more closely the tension between presence and presentation and we will see how the two notions are mediated. The way in which the individual is split when cast in terms of presence and presentation – split, that is, between her self and her role (*2.4.1*) – gives rise to a possibility for presentation to submerge presence (*2.4.2*). But the mediation of presence and presentation also carries a productive potential too, for it opens a space for the negotiation of questions of individual identity in European human rights law (*2.4.3*).

[122] On which see esp. J. Butler, 'Response: Performative Reflections on Love and Commitment' (2011) *Women's Studies Quarterly* 39(1/2), 236-239.

2.4.1 The tension between presence and presentation

A tension quite evidently exists between the visions of presence and presentation articulated in European human rights law. We have seen, for example, how the ethos of replaceability that structures the vision of presentation is at odds with the ethos of articulation that structures the vision of presence; and we have seen something too of the alienating effects of being formed and represented through the lens of some role, categorised life stage, or status. What this tension points to is the way in which the individual in European human rights law is split between her sense of place and her position. She is split, that is, between her self and her role – between her constitution and her representation.

The effects of this split have been articulated most starkly in case law concerning questions of the recognition (and lack thereof) of an individual's gender identity. In *Goodwin v UK (2002)*, for example – a case concerning the lack of legal recognition of the applicant's gender following reassignment surgery – the ECtHR acknowledged, for the first time in this context, the "stress and alienation" that a discord between an individual's sense of self and legal status could generate.[123] It noted, in particular, the international trend towards the social and legal recognition of transsexuality, and it described the illogicality of an administrative and legal practice that provided for reassignment surgery but then failed to legally recognise its effects – something especially pertinent given the significance of legal recognition for personal development.[124] Failure to legally recognise the gender of the individuals in question would entail the continuation of a situation in which "post-operative transsexuals live in an intermediate zone as not quite one gender or the other".[125]

The alienating effects of a discord between presence and presentation point towards the way in which a form of presentation can come to have a hold on an individual, and the nature of this hold was exemplified in *Axel Springer AG v Germany (2012)*. The applicant here, Axel Springer AG, was the publisher of *Bild,* a

[123] 28957/95, *Goodwin v UK* (2002), para.77.
[124] *Ibid*., paras.78, 85, 90.
[125] *Ibid*., para.90.

German tabloid newspaper. It had been subjected to an injunction prohibiting it from reporting on the arrest and conviction of a well-known actor ('X') – something which, it argued, breached its Article 10 right to freedom of expression. The question for the ECtHR was of the necessity of the interference with Axel Springer AG's rights in the name of protecting X's reputation. It was a question, therefore, of whether a fair balance had been struck between the freedom of expression and the right to respect for private life; and the relevant criteria in assessing this were: the contribution made by the articles to a debate of general interest; X's notoriety and the nature of the subject of the report; X's prior conduct; the "method of obtaining the information and its veracity"; the "content, form, and consequences of the publication"; and "the nature and severity of the sanctions imposed".[126]

The Court found all the criteria to be satisfied: the articles concerned "public judicial facts that may be considered to present a degree of general interest" (albeit one that would "vary in degree…during the course of the proceedings");[127] X was a well-known figure and was arrested in public; he had in the past "actively sought the limelight, so that, having regard to the degree to which he was known to the public, his 'legitimate expectation' that his private life would be effectively protected was henceforth reduced";[128] Axel Springer AG had not "acted in bad faith when publishing the articles";[129] "[t]he articles did not…reveal details about X's private life, but mainly concerned the circumstances of and events following his arrest";[130] and the sanctions imposed, though "lenient", were still "capable of having a chilling effect on the applicant company".[131] The Court accordingly concluded that the restrictions imposed on Axel Springer AG's right to freedom of expression were disproportionate to the legitimate aim pursued (of protecting the reputation or rights of others).

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[126] 39954/08, *Axel Springer AG v Germany* (2012), paras.89-95.
[127] *Ibid.*, para.96.
[128] *Ibid.*, para.101.
[129] *Ibid.*, para.107.
[130] *Ibid.*, para.108.
[131] *Ibid.*, para.109.

It was in the Court's analysis of these criteria – and specifically in its analysis of the criterion concerning X's notoriety and the subject of the report – that a broader point about the tension between presence and presentation in European human rights law came to the fore. This came about through the significance that was attached to X's acting role. At the material time, X played the main character of a police superintendent in "a very popular detective series".[132] The Court noted in this respect a point that had been made by the domestic Court of Appeal as to the existence of X's fan clubs and the way in which "his admirers could have been encouraged to imitate him by taking drugs, if the offence had not been committed out of public view".[133] It went on to consider that "whilst…the public does generally make a distinction between an actor and the character he or she plays, there may nonetheless be a close link between the popularity of the actor in question and his or her character where, as in the instant case, the actor is mainly known for that particular role".[134] Here, X's role was that of "a police superintendent, whose mission was law enforcement and crime prevention": a fact that "was such as to increase the public's interest in being informed of X's arrest for a criminal offence".[135] In other words, the public interest in being informed about X's arrest was heightened by the fact that at the material time, he was playing the role of a police superintendent in a popular detective series. This led the Court to conclude that "he was sufficiently well known to qualify as a public figure": something that "[reinforced] the public's interest in being informed of X's arrest and of the criminal proceedings against him".[136]

The Court accordingly attached a significance not only to X's role as an actor, but to the character that X played as an actor. The fact that he played the role of a police superintendent and therefore held himself out in this role as law-abiding and law-enforcing somehow made it more interesting for the public that he had been arrested for a criminal offence. There are two troubling things about this. The first is the blurring of the distinction between actor and character – a

[132] *Ibid.*, para.98.
[133] *Ibid.*, para.98.
[134] *Ibid.*, para.99.
[135] *Ibid.*, para.99.
[136] *Ibid.*, para.99.

blurring that took place just as the distinction was purportedly being drawn. X's persona as an actor and the persona that he was acting as an actor (the persona of his persona) were blurred into one. The second point is the blurring of the distinction between X himself and the persona of his persona: the fact that he was playing the role of a police superintendent somehow made it interesting that in real life he did not behave in accordance with that role.

What we have in this case, then, is a clear example of the tension between presence and presentation in the form of the hold that presentation can come to carry. This notion – of the hold of presentation – involves a problematisation of the idea of the 'persona' itself. As we have seen it, the idea of the 'persona' in European human rights law is about appearance; it is about the face that is presented socially – about the roles and statuses that the individual plays. Hannah Arendt, writing about social roles and statuses more generally, argues that the derivation of 'persona' (mask) from the Latin 'per-sonare' (to sound-through) means that although we always appear in terms of our roles, "[i]t is through this role, sounding through it, as it were, that something else manifests itself, something entirely idiosyncratic and undefinable and still unmistakably identifiable, so that we are not confused by a sudden change of roles…".[137] We are still recognisable in spite of and throughout the different roles in which we present, in other words; our masks and roles are "not a permanent fixture annexed to our inner self in the sense in which the voice of conscience…is something the human soul constantly bears within itself".[138] However, if in European human rights law this is already only a theoretical possibility (the focus of presentation is on the role itself, as opposed to on the one beneath the role), then the reasoning in *Axel Springer AG v Germany* regarding the notoriety of X flips this possibility on its head. For what is cast as sounding through in that case is not X himself but the character being performed by X. X came to be read in terms of the persona of his role; he was

[137] H. Arendt, 'Prologue (speech delivered upon receiving Denmark's Sonning Prize in 1975)', in *Responsibility and Judgment* (ed. J. Kohn) (2003, Schocken Books), 3-14, p13.
[138] *Ibid.*, p13.

brought to the terms of his role and assessed in their light. He was read, in other words, as if the expectation was that he would personify his role.

2.4.2 Personification

The problem of personification – a problem of the bearing down of presentation on presence – pushes us beyond the experience of alienation that the discord between presence and presentation gives rise to. There are ways of responding to this discord which mitigate the alienation experienced: for example, the cases on gender identity noted above involve a closing of the gap between presence and presentation. There are also ways of rethinking this discord entirely: for example, Rahel Jaeggi suggests that the experience of alienation in relation to a role is not an experience of alienation by that role but an experience of alienation from the self within it, such that the problem is one of a failure to appropriate the role and to identify with it.[139] The problem of personification – in which the individual is conceived of as personifying the role that she is performing – is quite different, because it both obliterates and simultaneously uses the discord between presence and presentation.

An example of the way in which personification works in this regard is the notion of "the risk personified by unreformed and potentially recidivist prisoners": a phrase that was expressed in a Joint Dissenting Opinion in a case concerning the Article 6 rights of two applicants who had been denied legal representation and legal aid for their disciplinary hearings before a prison governor.[140] In this phrase, the persona in question is that of the prisoner. More specifically, it is that of "unreformed and potentially recidivist prisoners". This persona already sits within a narrative of risk: the language of "unreformed and potentially recidivist prisoners" is, evidently, a language that expresses an assessment of risk. But then the persona itself comes to be cast as being a personification of risk ("the risk personified by unreformed and potentially recidivist prisoners"). The 'sounding

[139] R. Jaeggi, *Alienation* (transl. F. Neuhouser and A. E. Smith; ed. F. Neuhouser) (2014, Columbia University Press), Ch.6.
[140] 39665/98 and 40086/98, *Ezeh and Connors v UK* (2003), Joint Dissenting Opinion of Judges Zupančič and Maruste, para.3.

through' here, to take Arendt's term, is the sounding through of a narrative of risk; and it is this that becomes the focus. The individual underlying the persona, and furthermore underlying the personification of this persona, is objectified and lost in the process.

The possibility of personification that emerges in European human rights law in this way is not only then about the discord between the visions of presentation and presence. It is rather about the possibility that this discord gives rise to: the possibility that presentation might submerge presence. This has long been identified as one of the most troubling qualities (if not *the* most troubling quality) of the concept of human rights itself. It was on this ground, for example, that the late nineteenth-century philosopher Vladimir Solovyov offered a scathing critique of the placement of the principles of 'human' and 'citizen' alongside each other in the French Declaration of the Rights of Man and of the Citizen. He argued that had there been "one determining principle – *human* rights", then "the inviolable rights of everyone" could have been guaranteed; instead, the placement of the 'human' and the 'citizen' alongside each other rendered the former subordinate to the latter.[141] Thus, Solovyov wrote: "As is natural, the lower, being more concrete and graphic, turned out to be the more powerful, and soon pushed itself into the superior position. It then swallowed up the first *without a trace*, for the execution of the citizen of necessity killed the man."[142] The French revolutionary terror consequently found "its principal support" in the French Declaration itself, Solovyov argued;[143] and there was nothing contradictory, therefore, about the "declaration of human rights at the beginning, and then the unheard-of systematic obliteration of all such rights by the revolutionary powers".[144]

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[141] V. Solovyov, 'The Idea of Humanity in Auguste Comte' (1898), in J. D. Kornblatt, *Divine Sophia: The Wisdom Writings of Vladimir Solovyov* (2009, Cornell University Press), 213-229, p216-217. (See for comparable critiques H. Arendt, *The Origins of Totalitarianism* (1976 [1951], Harcourt), p290-302; and G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (transl. D. Heller-Roazen) (1998 [1995], Stanford University Press), p126-135.)
[142] *Ibid.*, p217.
[143] *Ibid.*, p217.
[144] *Ibid.*, p215.

In the context of the ECHR legal order, the possibility that presentation might submerge presence is a product of the way in which the vision of space articulated in European human rights law – a vision comprised of the individual's sense of place, on the one hand, and the individual's position in the terms of an ascribed role or status, on the other – splits the individual between constitution and representation. This creates the possibility of personification, in which the individual is conceived of as personifying the role that she is performing. The existence of the possibility of the submergence of presence by presentation in this way is an expression of the tension between presence and presentation in European human rights law. But it also institutes a potential crisis in European human rights law. For the possibility that presentation might suppress presence is the possibility of the suppression of the recognition of the singular individual by the norms of replaceability and non-recognition, which in other words means the possibility for the individual to be sacrificed within the terms of an order founded upon the idea of 'the individual'. This leaves the order of individuation set out in European human rights law as constituted upon the potential sacrifice of its foundational principle.

2.4.3 Individual identity in European human rights law

Conceived of like this, the tension between presence and presentation gives rise to a fragmented vision of the individual. It splits the individual between constitution and representation – between her sense of place and her ascribed position – and in so doing it opens a number of spaces that are configured around a sense of possible absence. We have seen how, therefore, it opens up the possibility of a feeling of alienation (and therefore of a feeling of absence), the possibility of being submerged by the terms of presentation (and therefore of being rendered absent), and the possibility of a gap between reality and the terms of the role or status through which one is being read (and therefore a space of absence which the role in question requires to be breached). More than that, however, the possibility of the suppression of presence by presentation means that the vision of individual presence articulated in European human rights law is itself configured around this sense of absence. This means that the terms for articulating the individual in

European human rights law are also the source of the loss of the individual – the source of her rendering absent.

At the same time, however, the spaces of absence that emerge in this way carry a more productive force too. For in the tension that arises between presence and presentation a space is also articulated for the negotiation of individual identity. We can see this more clearly if we think back to the way in which the visions of presence and presentation each set out an account of identity. The vision of presence involves a conception of identity as *self-identity*, which is about the way in which the individual conceives of herself and articulates herself. The notions of an individual's sense of place and sense of orientation in the world are inconceivable without her being able to conceive of herself in some way at all; and it is this self-conception that is specified in, and indeed supported and generated by, the three elements of individual presence: self-image, self-recognition, and attachment. We can think of individual presence in European human rights law as therefore being about that which is truly distinctive about the individual. It involves the specification and articulation of 'who I am'.

The vision of individual presentation meanwhile involves a conception of identity as *ascribed identity*, which is about the identity that is ascribed to the individual in the terms of the role or status through which she is presented in European human rights law at any one time. Each role or status involves a normative and normalising vision of what it represents, and the individual is assessed in relation to this, so that there is also a normative assessment bound up in the conception of identity that is set out in these terms. On the one hand, then, individual presentation makes for an account of 'what I am'. On the other hand, this is bound up in an account that originates in a notion of 'what I am said to be'. This sets up a challenge between the individual's own conception of her roles and statuses in the world and the way in which she is conceived of in the terms of the roles and statuses articulated in European human rights law; and it is in this context that an interplay between self-identity and ascribed identity emerges.

This interplay occurs in three ways. There is firstly the possibility of a reconciliation of self-identity and ascribed identity, involving an identification with

the roles ascribed – an appropriation of these roles, in Jaeggi's terms.[145] If we think back to the visions of presence and presentation, we can see how the roles in which we are presented in European human rights law may indeed play a part in our sense of presence. For example, we may fully identify with the vision of parenthood articulated in European human rights law, such that being a parent in the way specified forms a part of our sense of self. Likewise, our capacity to present ourselves in the terms of some role or status envisaged in European human rights law – and our reputation acquired in relation to this role or status – may form a part of our self-identity.

The second way in which an interplay occurs between self-identity and ascribed identity in the context of the question of roles and statuses here is about the way in which self-identity is articulated in the context of (and sometimes directly against the backdrop of) ascribed forms of identity. This is reflected in the case law in which individuals challenge legal conceptions of various roles, statuses, or institutions: challenges which reflect, by definition, a sense that the legal conception in question is at odds with the individual's self-conception (often put in terms of her "social reality"[146]). Sometimes, a challenge is direct, as in *X, Y, and Z v UK (1997)*, in which the applicants complained of the lack of legal recognition of the father-child relationship between X (who had transitioned from female to male) and Z (the child, who had been conceived by donor insemination and carried by Y, X's partner).[147] At other times, there may be more of an interaction between the notions of identity in question, as in *Muñoz Díaz v Spain (2009)*, in which the applicant complained that, following the death of her partner (to whom she had been married under Roma rites and traditions), the authorities had refused her a survivor's pension on the ground that their marriage did not have civil effects in Spanish law, even though those same authorities had treated the couple as a married couple for years.[148] On still other occasions, the interaction between the notions of identity may occur at a more general level, as when we are confronted

[145] Jaeggi (2014), above n139, Ch.6.
[146] On which see Ch.3, part 3.4.3.
[147] 21830/93, *X, Y and Z v UK* (1997).
[148] 49151/07, *Muñoz Díaz v Spain* (2009).

with assumptions and stereotypes about roles or statuses in judgments that in themselves challenge us to think about how we relate to the vision being articulated.[149]

The third way in which an interplay between self-identity and ascribed identity occurs in European human rights law comes to light when we think about how our identities are shaped, in part, by things which we did not become and things we are not.[150] It was this that emerged in the context of the discussion of *Evans v UK* above; and what it suggests is not only that the spaces of possible absence opened up in the tension between presence and presentation are productive spaces but that the notions of presence and presentation must in themselves already be underpinned by a sense of how things could have been different.

What these three levels of interplay between ascribed identity and self-identity point to is the way in which the mediation of presence and presentation produces a space for the negotiation of individual identity in European human rights law. This, in turn, indicates that space is not only conceived of in European human rights law in terms of the place of the individual and the position of the individual, but that the mediation of these two notions generates a third space, which is the space of individual identity.

2.5 Conclusion

This chapter has shown how space is conceptualised in European human rights law by reference to two visions: a phenomenological vision of presence, which is about the sense of place of the individual, and a more functional or instrumental vision of presentation, which is about the position of the individual and her representation through the terms of some role or status. These visions supply the terms through which the individual is articulated and presented in European human rights law, and we will return to them time and again in this thesis. The question that this chapter has focused on, however, is the question of how the

[149] E.g. 60367/08 and 961/11, *Khamtokhu and Aksenchik v Russia* (2017).
[150] See Scott (2018), above n109.

notions of presence and presentation are mediated. The argument that I have made in this respect is that although the splitting of the individual between the terms of presence and presentation carries a possibility that presentation might submerge presence, there is also a more productive quality to the tension between presence and presentation. This consists in the way in which it opens a space for the negotiation of questions of individual identity: questions originating in the interplay that occurs between the form of self-identity articulated by the vision of presence and the form of ascribed identity articulated by the vision of presentation. The effect of this, from the perspective of our consideration of the ECHR legal order as a lived order of individuation, is that the individual is conceived of as not only having a sense of place and a position in this order, but as developing an identity in it too.

– CHAPTER 3 –

Time

3.1 Introduction

In Chapter 2, we saw how the mediation of presence and presentation generates a space for the negotiation of individual identity in European human rights law. In this chapter, I argue that the idea of individual identity that emerges in this way is structured by a notion of individual continuity across time. I locate the origins of this notion in European human rights law's conception of human dignity – a conception which, I argue, is about the protection of potentiality: a latent capacity to become and therefore 'be' within the meaning of European human rights law (*3.2*). Two forms of potentiality are articulated: *vital potentiality*, which marks the beginning of individual being in European human rights law and is about the potential (of an embryo, for example) to develop into a human being, and *ethical potentiality*, which is about the continuous development and realisation of the self. Taken together, vital potentiality and ethical potentiality make for an account in which being is about becoming and the focus is on the future. I argue that the idea of continuity that emerges from this is substantiated by two conditions: habituation (which is about what the individual is habituated to, and is conceived of as stabilising the individual) (*3.3*) and narrativisation (which is about the construction of narrative as a means through which to organise life and to accord it a sense of coherence and continuity) (*3.4*). These conditions contain a way of pinning down the individual within the terms of European human rights law; and this, I argue, is enabled by a vision of the human condition in which we are assumed to have a need to assume our self-continuity across time.

3.2 Potentiality and dignity

The meaning and process of coming into the terms of European human rights law is articulated through a language of "human dignity and human freedom";[1] and in this section I suggest that it is in this notion of dignity that we can locate the origins of time in European human rights law too. I argue that this is because the conception of dignity articulated in European human rights law is about the protection of potentiality: a latent capacity to become and therefore begin to 'be' within the meaning of European human rights law. The principle of dignity protects, in the first place, vital potentiality: the capacity, represented in the embryo, for example, to develop into a human being (*3.2.1*). Individual being, within the meaning of European human rights law, begins in this notion of becoming; vital potentiality in other words secures entrance into the language of dignity and marks the beginning of time in European human rights law. Once this vital potentiality has been realised, a second form of potentiality emerges: *ethical potentiality* (*3.2.2*). This is geared towards the continuous development and realisation of the self. It derives its ethical orientation from the need to continually negotiate the question of living a life that is good for the self; and the attitude of anticipation that is a part of this is also cast as entailing a certain degree of faith, expressed in terms of hope (*3.2.3*). I suggest that taken together, vital potentiality and ethical potentiality make for an account in which being is always about becoming and the objective is one of self-continuity.

3.2.1 Vital potentiality

European human rights law grounds itself in a principle of human dignity: a quality that is unspecified in the case law beyond the twofold stipulation that it is inherent to the individual and to the vision of life that is constructed in European human rights law and that it is to be recognised and respected as such.[2] That the principle of dignity is unspecified is largely because of its fluidity, for what dignity seems to be protecting is a form of potentiality: a latent capacity to become and therefore

[1] As the ECtHR emphasises: "[t]he very essence of the Convention is respect for human dignity and human freedom" (e.g., 2346/02, *Pretty v UK* (2002), para.65).
[2] *Ibid.*

begin to 'be' within the meaning of European human rights law. If this association between potentiality and dignity has a long history in Renaissance humanism and in Catholic social thought,[3] it is carried across into European human rights law in the notion that it is in terms of potentiality that individual being begins in law. In the case of the embryo, for example, the Grand Chamber has stated that "there is no European consensus on the nature and status of the embryo and/or foetus" and that ("at best") "it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person...require protection in the name of human dignity, without making it a 'person' with the 'right to life' for the purposes of Article 2."[4] The issue of when the right to life begins has thereby been enabled to fall within the margin of appreciation of the Contracting States.[5] And so *vital potentiality* – the potential to develop into a human being – seems to pull the embryo into the language of human dignity,[6] but it does not secure legal status as such.

The effects of this casting of vital potentiality as a point of beginning were drawn out in *Parrillo v Italy (2015)*. The applicant in this case, Ms Parrillo, had frozen five embryos during IVF treatment with her partner. He was subsequently killed in Iraq (where he was reporting on the war), and she decided not to proceed with the implantation of the embryos but to donate them to scientific research instead. This, however, was banned under an Italian law that came into force a few months after her partner's death. Before the ECtHR, Ms Parrillo argued that this ban violated her Article 8 right to respect for her private life.

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[3] This is both in terms of potential to become human (here described as vital potentiality), which is a matter of *what I am,* and in terms of potential to become 'me' (here described as ethical potentiality), which is a matter of *who I am.* See esp. on the connection between potentiality and dignity, G. Pico della Mirandola, *Oration on the Dignity of Man* (transl. A. R. Caponigri) (1956 [1486], Henry Regnery Company), p6-8 (also discussed in Ch.1, part 1.2.1(i)). The connection between potentiality and dignity is notably drawn in German constitutional law, where constitutional protection extends to "all developing human life": *'First Abortion Decision'*, 39 BVerfGE 1 (1975, German Constitutional Court), Part C., I., paras.1(b)-2. In this Decision, the German Constitutional Court stated that "[t]he potential capabilities lying in human existence from its inception on are sufficient to justify human dignity" (Part C., I., para.2).

[4] 53924/00*, VO v France* (2004), para.84.

[5] *Ibid.*, para.82.

[6] Cf. C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) *The European Journal of International Law* 19(4), 655-724, p709.

The ECtHR considered that Ms Parrillo's "ability to exercise a conscious and considered choice regarding the fate of her embryos [concerned] an intimate aspect of her personal life and accordingly [related] to her right to self-determination", which meant that Article 8 was applicable here.[7] In framing the case in this way, the Court focused on Ms Parrillo's "freedom of choice"[8] as regards the fate of the embryos; but the connection between Ms Parrillo and the embryos was also relevant: the embryos "[contained her] genetic material…and accordingly [represented] a constituent part of [her] genetic material and biological identity".[9] The ban on donating the embryos to scientific research was accordingly considered to constitute an interference with Ms Parrillo's right to respect for her private life.

The focus of the initial framing of the case was, in this way, on the connection between the embryos and Ms Parrillo and the sense that they were a part of her (they represented a part of her, they contained part of her genetic material, and they were in fact hers). But when it came to the question of the objective of the ban, there was a departure from this vision that was enabled by the fact that the embryos were outside Ms Parrillo's body.[10] The ECtHR accepted that the Italian Government was pursuing the protection of the "embryo's potential for life",[11] on the basis that this "may be linked to the aim of protecting morals and the rights and freedoms of others, in the terms in which this concept is meant by the Government".[12] In the same breath, the Court added that this did not represent an assessment on its part of "whether the word 'others' extends to human embryos".[13] And yet it is hard to get past the sense that the embryos here appeared to be conceptualised as carrying a potentiality independent of Ms Parrillo

[7] 46470/11, *Parrillo v Italy* (2015), para.159.
[8] *Ibid.*, para.159; see also paras.154, 157.
[9] *Ibid.*, para.158.
[10] Cf. the case law where the embryo/foetus is (or was) inside the woman, in which the ECtHR has tended to focus on the tight connection between the life of the embryo/foetus and that of the woman: 53924/00, *VO v France* (2004), paras.86-87; 13423/09, *Mehmet Şentürk and Bekir Şentürk v Turkey* (2013), para.109; 5410/03, *Tysiąc v Poland* (2007), para.106; 25579/05, *A, B and C v Ireland* (2010), paras.213, 237.
[11] 46470/11, *Parrillo v Italy* (2015), para.162.
[12] *Ibid.*, para.167.
[13] *Ibid.*, para.167.

and one to be accorded legal recognition in these terms. They went from being deemed a part of Ms Parrillo (and seen in her image) to having their own potentiality and status as 'others' (and seen in the human image more generally).

The ECtHR proceeded to consider that since the right to donate embryos to scientific research did not pertain to "a particularly important aspect of the applicant's existence and identity" (it was not "one of the core rights" of Article 8, unlike matters concerning "prospective parenthood"),[14] Italy could be afforded a wide margin of appreciation, in an area lacking European consensus. It set out three reasons as to why the Government had not overstepped this margin (and why, therefore, there had been no violation of Article 8). Firstly, the legislature had balanced the interests at stake. Secondly, any inconsistencies as there were in the legislation were not capable of directly affecting Ms Parrillo. Thirdly, there was no evidence that Ms Parrillo's partner, "who had the same interest in the embryos in question as the applicant at the time of fertilisation, would have made the same choice" as she was seeking to make; and there were "no regulations governing this situation at domestic level".[15]

This final reason is incoherent, and it is particularly problematic when considered in the light of *Evans v UK (2007),* discussed in Chapter 2, in which Ms Evans's former partner similarly acquired something of a final say in relation to the fate of their IVF embryos.[16] But looked at in the context of the conceptual transformation that we see in Ms Parrillo's case, it makes sense. The embryos go from being a part of Ms Parrillo – a "constituent part" of her identity – to occupying an intermediate space between being a part of her and being 'others' (not 'mere' possessions'[17]) with their own vital potentiality and divergent interests.

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[14] *Ibid.*, para.174. This hints at the distinction between becoming something and not becoming something, discussed in Ch.2, part 2.3.2(iii).
[15] *Ibid.*, para.196.
[16] See Ch.2, part 2.3.2(iii).
[17] The Court dismissed Ms Parrillo's complaint that there had also been breach of her right to peaceful enjoyment of her possessions under Article 1 of Protocol No.1: "[having] regard to the economic and pecuniary scope of that Article, human embryos cannot be reduced to 'possessions' within the meaning of that provision" (*ibid.*, para.215). See further Ch.6, part 6.4.3.

And so a relationship between potentiality and dignity is established in that vital potentiality – the potential to become human – warrants admission into the realm of European human rights law. Notably, this does not tell us how a conflict between an embryo and a woman is to be resolved; it merely says that a potentiality in the embryo is recognised (as in the granting of a status of 'other' to it). And it does not tell us when life begins in the terms of the ECHR (or, indeed, whether the embryo is granted a right to life); rather, it says that potentiality is recognised within the vision of European human rights law (which is not the same as saying that potentiality is the source of rights). The claim is, therefore, this: that vital potentiality marks the point of beginning in European human rights law – that individual being, within the meaning of European human rights law, begins in this notion of becoming.

3.2.2 Ethical potentiality

If vital potentiality secures entrance into the language of dignity and marks the beginning of time and being in European human rights law, then once this potentiality has been realised, a second form of potentiality emerges: *ethical potentiality*. This is geared towards the continuous development and realisation of the self; and it derives its ethical orientation from the need to continually negotiate, within the context of the processes of self-development and self-realisation, the question of living a life that is good for the self. Self-development is conceived of here as being about the development of the self through time, and self-realisation is about the realisation of one's potential and/or conception of self. The two processes are not entirely separable; and part of the vision of ethical potentiality is about the way in which they are brought together.

The origins of European human rights law's account of self-development lie in Article 8 of the ECHR, which includes, within the ambit of its right to respect for private life, "a right to personal development".[18] This has been variously

[18] This can be traced back to 44599/98, *Bensaid v UK* (2001), para.47. That case does not cite any case law in support of this proposition; the subsequent citation of 16213/90*, Burghartz and Schnyder Burghartz v Switzerland* (1992) and 15225/89, *Friedl v Austria* (1995) is in reference to the other right mentioned ("to establish and develop relationships with other human beings and the outside

conceived of from perspectives of personal identity,[19] personality,[20] and personal autonomy,[21] but the essence of the issue in all three framings lies in the development of the self through time, and, moreover, in the conduct of one's development and life in a manner of one's own choosing.[22] This demands, on the part of the individual, a capacity to see and foresee her self through time and to develop and realise her potential; and it demands, on the part of European human rights law, the provision of guarantees that enable and protect this process. Hence, for example, the emphasis placed by the ECtHR on the importance of safeguarding the "mental stability" of the individual (this being "an indispensable precondition" for the enjoyment of the right to respect for one's private life, and, therefore, for the pursuit of self-development at all),[23] and, separately, the significance attached in the case law to the child's personal development[24] and "ability to reach [his or her] maximum potential".[25] In fact on this latter point, it is

world"). In subsequent cases, *Bensaid v UK* is cited in support of the 'right to personal development' (e.g., 36515/97, *Fretté v France* (2002), para.1 of the Joint Dissenting Opinion).

[19] Details of one's personal identity (such as the details of one's birth parents: 42326/98, *Odièvre v France* (2003), para.29) are, thus, deemed relevant and/or necessary to personal development (e.g., 552/10, *I.B. v Greece* (2013), para.67 and 6339/05, *Evans v UK* (2007), para.71, in which the right to personal development is included as a part of "physical and social identity"), such that an interference with an individual's identity is deemed to constitute an interference with her personal development (e.g., 25680/94, *I v UK* (2002), para.70). In a few other cases, "the right to identity" has been distinguished from "the right to personal development", with the latter being cast as something that can be expressed either in terms of personality or in terms of personal autonomy. This was apparent in 35968/97, *Van Kück v Germany* (2003), para.75, insofar as the consideration was of the relationship between matters of identity and personal development. But it became more apparent in 30562/04 and 30566/04, *S and Marper v UK* (2008), in which the elements of Article 8 pertaining to identity were described and then it was added that "Article 8 protects, in addition, a right to personal development..." (para.66).

[20] This occurs principally where the protection of the individual's own image and her control over this is cast in terms of personal development (e.g., 1234/05, *Reklos and Davourlis v Greece* (2009), para.40). This association of personal development and the right to protect and control one's own image has roots in the Joint Dissenting Opinion of Judges Spielmann and Jebens in 68354/01, *Vereinigung Bildender Künstler v Austria* (2007), para.14. It is now a well-established principle and was subsequently articulated in, e.g., 40660/08 and 60641/08, *Von Hannover v Germany (No. 2)* (2012), para.96.

[21] In the case of adults, the right to personal autonomy means "the right to make choices as to how to lead one's own life, provided that this does not unjustifiably interfere with the rights and freedoms of others" (10161/13, *M. and M. v Croatia* (2015), para.171). Children have a "circumscribed autonomy" (*ibid.*).

[22] E.g., 56030/07, *Fernández Martínez v Spain* (2014), para.126.

[23] E.g., 31827/02, *Laduna v Slovakia* (2011), para.53.

[24] E.g., 33677/10 and 52340/10, *Fürst-Pfeifer v Austria* (2016), para.45. See further parts 3.3.1 and 3.3.2 below.

[25] 23682/13, *Guberina v Croatia* (2016), para.82.

possible to see, through the category of 'the child' alone, a broader vision of individual development being articulated in European human rights law. This is not only in the sense of the extent to which childhood is cast as being a time for "the fundamental programming of personality"[26] but also in the sense that childhood is cast as supplying the framework through which life is subsequently structured and interpreted – an idea that we will return to in due course.[27]

A close connection exists in all this between the processes of self-development (as being about the development of the self through time) and self-realisation (as being about the realisation of one's potential and/or conception of self). The two processes have a reflective and reflexive quality which means that they advance with each other and are a means and an end for each other. For example, the end of self-development may be the attainment of self-realisation ('I have reached my aim…'), but that self-realisation is, in turn, the means towards further self-development ('I have reached my aim; what next?'). Moreover, self-development and self-realisation are also conceptualised as being related to a feeling of fulfilment; and "the right to self-fulfilment" ("whether in the form of personal development…or from the point of view of the right to establish and develop relationships with other human beings and the outside world") has been included within Article 8 in this sense.[28] The ECtHR has specified dimensions of this, which include sexuality (which has "physical and psychological relevance" for self-fulfilment),[29] freedom of expression (which is deemed a condition of individual self-fulfilment),[30] and freedom of thought, conscience, and religion (the rights to which are treated as being important "in guaranteeing the individual's self-fulfilment").[31]

Taken together, these strands of self-development, self-realisation, and self-fulfilment generate a vision in which the focus is on the individual moving forward

[26] 39388/05, *Maumousseau and Washington v France* (2007), Dissenting Opinion of Judge Zupančič, joined by Judge Gyulumyan.
[27] See parts 3.3 and 3.4 below.
[28] 56030/07, *Fernández Martínez v Spain* (2014), para.126.
[29] 17484/15, *Carvalho Pinto de Sousa Morais v Portugal* (2017), para.52.
[30] This goes back to 9815/82, *Lingens v Austria* (1986), para.41.
[31] 29617/07, *Vojnity v Hungary* (2013), para.36.

in her life. This brings it close to the ideal of authenticity – the "project of becoming who you are"[32] – except, as it is expressed in European human rights law, it carries a greater urgency, supplying a direction and a purpose: the right and need to develop one's own potential, and thereby one's own self. The self is rendered a kind of "ethical telos", the orientation towards which is one of "[devotion]…to its continuous realization", to borrow a phrasing from Crispin Sartwell;[33] and this way of conceiving of the self implies a certain capacity to abstract from oneself too. This notion, of a form of abstract self-relation, has been theorised by Barbara Johnson, who offers a reading of the Lacanian mirror stage (which we touched on in Chapter 2[34]) in which she focuses on the effect, in that stage, of the identification "with a form…that interests the subject precisely because it *anticipates* stages of this development where he will be superior to what he is now".[35] The subject, she suggests, "assumes an identity derived from the *discrepancy* between a present and an ideal self – and *that* is what is recognized with such jubiliation. Henceforth the real self for the subject is the one in the mirror: …An idealization. A fiction. An object…".[36] She goes on to argue that the "image of this idealization will haunt the subject his whole life"; for "[n]o matter what he does, he can neither catch up with it nor equal it",[37] such that, ultimately, "the subject comes into being in the gap of inferiority between a flawed viewer and the anticipated wholeness of an armor of fiction", with "the definition of a 'person' [then being]: the repeated experience of *failing to become a thing*".[38]

Johnson's analysis gives us cause to reflect on the form of abstraction that the notion of ethical potentiality articulated in European human rights law entails. For what it brings to the fore is the way in which the construction of – and identification with – an idealised self, such as that which is presupposed by the notions of self-development, self-realisation, and self-fulfilment, entails the

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[32] C. Guignon, *On Being Authentic* (2004, Routledge), p3.
[33] C. Sartwell, *End of Story: Toward and Annihilation of Language and History* (2000, State University of New York Press), p26.
[34] See Ch.2, part 2.2.2(i).
[35] B. Johnson, *Persons and Things* (2008, Harvard University Press), p56.
[36] *Ibid.*, p57.
[37] *Ibid.*, p57.
[38] *Ibid.*, p59.

locating of the individual in a rather ambiguous position. She is positioned as being in transition (as always engaged in the process of striving towards and realising her self) and as bearing the capacity to transcend her (current) self and to take the long view of this. This comes close to a liminal stage: a stage of passage, in which the feeling of being "betwixt and between" is experienced as one passes from one realm to the next.[39] As this is conceptualised in European human rights law, however, liminality is fixed as a more generalised state of readiness and openness to possibility: a state in which the essential pursuit is one of becoming.

3.2.3 Hope

The focus of the vision of ethical potentiality articulated here is on the promise of the future and on the imagination of one's self in that future. The ethical quality of this vision derives in the first instance from the need to continually negotiate the question of living a life that is good for the self; but the attitude of anticipation that is demanded in this is also cast as involving a certain degree of faith, expressed in European human rights law in terms of hope. Significant weight is increasingly placed in the case law on the importance of hope itself; the ECtHR has, in particular, stated that it is not possible, insofar as it is incompatible with human rights law, to either allow someone to labour on under false or misplaced hope[40] or to eliminate entirely the capacity of the human to hope at all. The latter point has been expressed most clearly in the jurisprudence on sentencing. Life sentences, for instance, must be reducible *de jure* and *de facto*; they must carry the prospect of release and the possibility of review of the sentence, "with a view to its commutation, remission, termination or the conditional release of the prisoner".[41]

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[39] V. Turner, *The Ritual Process: Structure and Anti-Structure* (1969, Aldine de Gruyter), p95.
[40] E.g., 26713/05, *Bigaeva v Greece* (2009), in which the Greek authorities had allowed Mrs Bigaeva to carry out her pupillage (to which she had been mistakenly admitted), even though, because of her Russian nationality, there was no way she was going to be able to sit the examinations that she would need to sit in order to be admitted to the Athens Bar. The ECtHR considered that the authorities had left Mrs Bigaeva with a false hope, since there was no chance of her proceeding to the Bar (see para.32 et seq.).
[41] 21906/04, *Kafkaris v Cyprus* (2008), para.78.

The basis of this was elaborated in *Vinter and Others v UK (2013),* which concerned the compatibility of the whole life orders[42] given to the applicants, who were each serving sentences of life imprisonment for murder, with Article 3 of the ECHR. The Grand Chamber set out four reasons as to why there needs to be "both a prospect of release and a possibility of review" for a life sentence to be compatible with Article 3.[43] Firstly, there must always be a legitimate rationale underpinning the detention, and that involves also a review of this justification, and an examination of whether it has changed in any way.[44] Secondly, without any possibility of release or review of the life sentence, "there is a risk that [the prisoner] can never atone for his offence", since "whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable".[45] Thirdly, the ECtHR was influenced by German constitutional law and its recognition that "it would be incompatible with the provision on human dignity in the Basic Law for the State forcefully to deprive a person of his freedom without at least providing him with the chance to someday regain that freedom".[46] This consideration, it stated, was to be also applied in ECHR law. And fourthly, the context of contemporary European penal policy more generally was one of an emphasis on rehabilitation.[47]

For these reasons, the Court said, life sentences must be reducible. They must involve a review which takes into account any changes in the life of the prisoner and the progress of that prisoner towards rehabilitation, and which checks, in the light of this, whether continued detention remains justifiable "on legitimate penological grounds".[48] Moreover, there is to be no uncertainty in the prisoner's mind as to any of this: the prisoner "is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what

[42] A whole life order may be exceptionally imposed instead of a minimum term, with the effect that the offender cannot be released from prison other than by way of the Secretary of State's exceptional exercise of discretion.
[43] 66069/09 et al., *Vinter and Others v UK* (2013), para.110.
[44] *Ibid.*, para.111.
[45] *Ibid.*, para.112.
[46] *Ibid.*, para.113.
[47] *Ibid.*, para.115 et seq.
[48] *Ibid.*, para.119.

conditions, including when a review of his sentence will take place or may be sought."[49]

In the case under consideration, the life sentences could not be regarded as reducible in this sense, and there had, accordingly, been a violation of Article 3. Yet whilst the Court emphasised that this finding did not give the applicants "the prospect of imminent release",[50] what it did do, according to Judge Power-Forde in her Concurring Opinion, was secure the place of the 'the right to hope' in Article 3. The Court had implicitly recognised, she suggested, "that hope is an important and constitutive aspect of the human person".[51] She continued: "[t]hose who commit the most abhorrent and egregious of acts…nevertheless retain their fundamental humanity and carry within themselves the capacity to change…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".[52] These same words were subsequently expressed in the majority's judgment in *Matiošaitis and Others v Lithuania (2017)*, in which it was similarly found that the life sentences that had been served on the applicants were not reducible within the meaning of Article 3.[53]

Hope functions, in this way, as a kernel of faith: as a carrier of a vision of a different future. It is directly linked to an innate potentiality ("the capacity to change", in Judge Power-Forde's words), and, consequently, to something that is already present and needs only to be developed. Indeed, this applies to the object of hope more broadly, since, as Paul Tillich has theorised, "[w]here there is genuine hope, there that for which we hope has already some presence".[54] Hope is a type of power, which can drive its object into realisation.[55] And at the same time as it

[49] *Ibid.*, para.122.
[50] *Ibid.*, para.131.
[51] *Ibid.*, Concurring Opinion of Judge Power-Forde.
[52] *Ibid.*
[53] 22662/13 et al., *Matiošaitis and Others v Lithuania* (2017), para.180.
[54] P. Tillich, 'The Right to Hope' (1965) *Neue Zeitschrift für Systematicsche Theologie Und Religionsphilosophie* 7(3), 371-377, p373.
[55] *Ibid.*, p373.

enables the promise and imagination of the future,[56] hope involves the projection of one's self into that future.[57] It is a source of transformation and motivation.

The loss of hope has, by contrast, been associated in the literature with experiences of helplessness,[58] despair,[59] unquestioning compliance,[60] passive subjection to the uncertainties of fortune and fate, and the end of life itself.[61] We may not be surprised to find any of these featuring, in some form, in the experience of a person sentenced for life with no prospect of release. For such a sentence presents, in effect, what Jonathan Lear elsewhere describes as a breakdown in a way of life, its temporal structure, and its framework of intelligibility.[62] The lack of prospect of release generates a sense of finality; and it imposes a loss of the sense of possibility that things could be otherwise. Crucially, this demands a total resignation, which runs entirely against European human rights law's vision of continuous self-development and self-realisation. For if ethical potentiality supposes a form of temporal continuity in European human rights law – the continuity of the individual, the constitutive principle of its order – the devastation of the future-orientated attitude that it demands, and which is expressed in the principle of hope, brings about non-being. It entails the loss of the framework in which being is and makes sense.[63]

In the terms of European human rights law, this is what a loss of dignity appears to involve: the trampling on possibility, on potentiality – on the capacity to imagine and anticipate at all. Without this, the framework of meaning by which the order of European human rights law is lived and perpetuated is lacking. The principle of dignity, in which this notion of ethical potentiality has its source,

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[56] See on this same point C. Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (2015, Hart Publishing), p163-165.
[57] See, e.g., R. Solnit, *Hope in the Dark: Untold Histories, Wild Possibilities* (2016 [2004], Nation Books).
[58] A. Kellehear, *The Inner Life of the Dying Person* (2014, Columbia University Press), p71.
[59] W. I. Miller, *The Mystery of Courage* (2000, Harvard University Press), p212.
[60] D. W. Winnicott, *The Family and the Individual Development* (2006 [1965], Routledge), p103.
[61] Tillich (1965), above n54, p371.
[62] J. Lear, *Radical Hope: Ethics in the Face of Cultural Devastation* (2006, Harvard University Press), Ch.1. On this, see the discussion in my own Ch.1, part 1.4.2.
[63] See further on this idea: Lear (2006), above n62.

serves, in this way, to preserve and affirm the framework of understanding that it subsequently generates: a framework which hinges on potentiality.

3.3 Habituation

The temporality of European human rights law – the form of time that structures the mode of being of its order[64] – emerges as being one of individual becoming. This is comprised of two steps: vital potentiality (the potential to become human), which pulls an entity within the realm of human dignity, and ethical potentiality, which is about the continuous process of self-development and self-realisation and the accompanying attitude of anticipation. Being, in European human rights law, is accordingly always about becoming; and individual continuity is cast as being promised by the fact of being in a continuous process of development.

The notion of self-continuity that is articulated in this way is, however, quite abstract. How is the individual to know where to go? And what form does this self-continuity take? European human rights law does not leave these questions as open. It substantiates its notion of self-continuity by grounding its vision of self-development and self-realisation in two conditions: habituation (which is about what the individual is habituated to, and is conceived of as stabilising the individual) and narrativisation (which is about the construction of narrative as a means through which to organise life and to accord it a sense of coherence and continuity).

This section considers the condition of habituation. Habituation is cast as stabilising the individual, and the importance that is ascribed to this stabilisation originates in European human rights law's vision of child development, wherein the role of stability in relation to individual development more generally is set out especially clearly (*3.3.1*). The idea is that habituation frees up energy that can be directed towards a longer view of self-development and self-realisation (*3.3.2*). At the same time, the account of what it means to feel habituated is underpinned in the case law by an account of what it means to be habituated – of what it means

[64] This is to take Lear's definition of 'temporality' ("a name for time as it is experienced within a way of life"): *ibid.*, p40.

to be situated. This is articulated by reference to notions such as of the 'roots' of the individual, of the 'degree' of her 'integration', and of her 'original environment'; and habituation thus contains within itself a mode of pinning down the individual (*3.3.3*).

3.3.1 The origins of habituation

The notion of habituation articulated in European human rights law – a notion which is about actions and elements of being that are so habitual that they are an unconscious and an engrained part of one's character – originates in European human rights law's account of child development, and in particular in its emphasis on stability in childhood.[65] This account is largely articulated in the jurisprudence pertaining to family law decisions concerning children. In these cases, the primary, or paramount, consideration is the 'best interests' of the child,[66] of which a "personal development perspective" is taken.[67] In cases involving parent-child relations, the vision of what a child's 'best interests' actually consist in hinges on two things: "that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit" and that "it is in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development".[68] It is in the course of elaborating what these two points mean that the ECtHR has set out a more general and normative account of child development; and it is in this that we can locate the origins of the notion of habituation in European human rights law.

The first element of this account – the point about family ties – is a reflection of the most basic principle of the Article 8 'family life' jurisprudence, which is that "[t]he mutual enjoyment by parent and child of each other's company

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[65] The following pages draw on my paper on 'The Child in European Human Rights Law' (2018) *Modern Law Review* 81(3), 452-479.
[66] See esp. 41615/07, *Neulinger and Shuruk v Switzerland* (2010), paras.134-135. The distinction between a consideration of the child's best interests as 'primary' and as 'paramount' is a significant and much-debated one, but I do not have space to discuss it in this chapter.
[67] *Ibid.*, para.138.
[68] *Ibid.*, para.136. See also 35348/06, *R and H v UK* (2011), para.74; 10383/09, *Mamchur v Ukraine* (2015), para.100.

constitutes a fundamental element of family life".[69] This translates into a series of obligations on the part of domestic authorities in relation to the maintenance of the parent-child relationship. These are both positive obligations (for instance, obligations to enable an established family tie with a child to be developed,[70] to ensure the continuation of family life between parents and children in the event of parental separation,[71] or "to rehabilitate the child and parent, where possible", in public care cases[72]) and negative obligations ("to refrain from measures which cause family ties to rupture"[73]). The sense is that disruption to an established parent-child relationship is to be kept to a minimum,[74] because even a temporary measure can have a long-lasting effect on a child, as it can indeed also on a parent.[75] And so in cases in which a child has been taken into care, for instance, although the domestic authorities are granted a margin of appreciation in assessing the need for a care order in the first place (particularly if it is an emergency order[76]), any further limitations imposed on the parent-child relationship, such as to contact, will be more strictly scrutinised.[77] This is because, particularly in cases involving young children, restrictions beyond the care order "entail the danger that the family relations between the parents and a young child are effectively curtailed"[78] and that the children experience "alienation" from their parents;[79] and authorities, accordingly, have to take steps to ensure that the chances of re-establishing a disrupted relationship are not "definitively compromised".[80] Where children have

[69] E.g., 9749/82, *W. v UK* (1987), para.59.
[70] E.g., 16969/90, *Keegan v Ireland* (1994), para.50.
[71] E.g., 29192/95, *Ciliz v The Netherlands* (2000), para.62.
[72] 28945/95, *T.P. and K.M. v UK* (2001), para.78.
[73] 29192/95, *Ciliz v The Netherlands* (2000), para.62.
[74] The objective of reunion (e.g., in public care cases) does not, however, entitle a parent "to have such measures taken as would harm the child's health and development": 17383/90, *Johansen v Norway* (1996), para.78.
[75] E.g., 56547/00, *P, C, and S v UK* (2002); 11057/02, *Haase v Germany* (2005), paras.101-103; 31127/96, *E.P. v Italy* (1999), para.68. On the effect on the child of separation from biological parents, as compared with the effect of separation from foster parents, see 74969/01, *Görgülü v Germany* (2004), paras.44-46.
[76] 25702/94, *K and T v Finland* (2001), para.165 et seq.
[77] 17383/90, *Johansen v Norway* (1996), para.64.
[78] *Ibid.* Any "total severance of contact" will be justified only in exceptional circumstances: 39221/98 and 41963/98, *Scozzari and Giunta v Italy* (2000), para.170.
[79] 46544/99, *Kutzner v Germany* (2002), para.79.
[80] E.g., 31127/96, *E.P. v Italy* (1999), para.69.

spent time in care, the authorities are obliged to ensure that the children and parents are prepared for their reunion.[81]

The second component of the child's 'best interests' in European human rights law is as to the development of the child in a 'sound environment'. This is not a first-order principle. It does not mean, for example, that the removal of a child from her parents would be justified on the sole ground that there exists, somewhere else, a potentially "more beneficial environment" for her.[82] A 'good enough' environment, to paraphrase Donald Winnicott,[83] is all that matters, although everything hinges, of course, on what 'good enough' means. Rather, what this element of the child's 'best interests' does ultimately establish is that the emotional interest of the child is generally conceived of as being bound in her own stability, not in the emotional wellbeing of her parents. And so if, for example, a child, over time, becomes settled in a 'new' environment, or with 'new' living arrangements, however temporary or contrary to a court order these were intended to be, it may be in her best interests – as distinct from those of her parent(s) – to leave her there and not to enforce any original order to the contrary.[84] Thus in child custody cases, "the passage of time...can, in the end, determine what is in the best interests of the child";[85] and that in itself underpins a host of obligations that domestic authorities have in relation to the enforcement of orders (pertaining to contact or custody with the other parent, or ordering the child to be removed or returned to live with the other parent, for example[86]) and in relation to decision-making processes and the determination of issues before courts.[87]

Through the lens of the 'best interests' principle, the child is, in this way, presented as being an individual actor, with distinctive interests. At the same time,

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[81] E.g., 13441/87, *Olsson v Sweden (No. 2)* (1992), para.90.
[82] 25702/94, *K and T v Finland* (2001), para.173.
[83] D. W. Winnicott, 'Transitional Objects and Transitional Phenomena' (1953), in *Playing and Reality* (2005 [1971], Routledge), 1-34, p13-14.
[84] E.g., 40031/98, *Gnahoré v France* (2000), para.60.
[85] 32842/96, *Nuutinen v Finland* (2000), Dissenting Opinion of Judge Zupančič, joined by Judges Panţîru and Türmen, para.O-I30.
[86] The ECtHR has become increasingly strict about the enforcement of orders and about the use of sanctions to secure such enforcement (e.g., 48206/99, *Maire v Portugal* (2003), para.76).
[87] E.g., 32346/96, *Glaser v UK* (2000), para.66.

however, and underpinning this presentation, a normative account of the nature of the child's interests is constructed – an account in which a "secure and emotionally stable" environment is cast as being a defining interest.[88] This stability is conceived of as deriving either from the parent-child relationship and its maintenance, or from a 'new' relational environment (which might also involve living and establishing a relationship with the 'other' parent). The key point is that it is cast as being a foundation for individual development. Any uncertainty or disruption that is experienced by the child in relation to her family relationships is deemed damaging and destabilising for the child's development.[89] Stability, by contrast, is conceived of as serving as a basis from which to handle the ethical question of self-development: the question of 'who am I to become?'.

3.3.2 The work of habituation

It is in terms of habituation – and, especially, in terms of the importance of the environment to which a child has become habituated – that the child's stability has been most notably specified and valued in European human rights law. An example is *Neulinger and Shuruk v Switzerland (2010)*, which concerned proceedings regarding the order for return of a little boy, Noam, who had been wrongfully removed (within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction) by his mother from Israel to Switzerland. Noam and his mother argued that the order for Noam's return to Israel breached their Article 8 ECHR rights; and the Grand Chamber agreed. In particular, it considered that Noam's best interests would be better served by his staying in Switzerland than by his moving back to Israel, where there would be serious questions as to the capacity of his father to look after him. Noam was by now so well-settled in Switzerland that despite the fact that he was "at an age where he still [had] a certain

[88] 17383/90, *Johansen v Norway* (1996), para.80. See also, e.g., 35991/04, *Kearns v France* (2008), para.80.

[89] E.g., lengthy proceedings, in which a child is left in uncertainty as to where she will end up living, have a notable potential effect on "the child's mental equilibrium": 22430/93, *Bronda v Italy* (2001), para.61. And in 39472/07 and 39474/07, *Popov v France* (2012), the ECtHR considered that the fact that the children were detained, along with their parents, in profoundly unsuitable conditions, effectively destabilised their worldview. The situation "created anxiety, psychological disturbance and degradation of the parental image in the eyes of the children" (para.101). (On this case see further Ch.5, part 5.2.1.)

capacity for adaptation", uprooting him and returning him to Israel would likely carry "serious consequences for him", which would outweigh any potential benefit of his return to Israel.[90] The Court described this in terms of the "habitual environment", from which it would be problematic to uproot Noam.[91]

This notion of the 'habitual environment' of a child has its source in the Hague Convention, which deals with the wrongful retention or removal of children and has, as one of its objectives, 'to establish procedures to ensure their prompt return to the State of their habitual residence...'.[92] In the Hague Convention, however, 'habitual residence' alludes to the State in which the child was living prior to her wrongful removal or retention,[93] whereas in *Neulinger and Shuruk* the Court used 'habitual environment' not in reference to the place that Noam had been ordered to return to (Tel Aviv), but rather in reference to the environment that had since been established with his mother in Switzerland – the environment that had been generated through the act that was 'wrongful' in the sense of the Hague Convention.

In constructing its notion of 'habitual' in this context, the ECtHR sets out an account of what it means to settle. This account hints at an assessment of the degree of social, cultural, and familial ties in question – an assessment which derives from its case law on expulsion measures,[94] and is comparable to the principle of integration most favoured by the Court of Justice of the European Union in this context (a principle which, in turn, derives from its jurisprudence on free movement).[95] Such an analysis, whether it is cast in terms of ties or integration, is looking not just at whether the child has settled, but at how she has settled, and her contribution to this settling; and this is what underpins the subtle distinction between the conceptualisation of habitual environment, which entails this latter

[90] 41615/07, *Neulinger and Shuruk v Switzerland* (2010), para.147.
[91] *Ibid.*, para.147.
[92] Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Preamble para.3.
[93] *Ibid.*, Articles 3 and 4. This is also how 'habitual environment' has mostly been used by the ECtHR (e.g., 39388/05, *Maumousseau and Washington v France* (2007), para.75).
[94] E.g., 41615/07, *Neulinger and Shuruk v Switzerland* (2010), para.146.
[95] Case 497/10 PPU, *Barbara Mercredi v Richard Chaffe* [2010] ECR I-14358, para.56.

fuller assessment of ties or integration, and the second element of the best interests test, as to the development of the child in a 'sound environment'. The sense is that habitual environment is not merely alluding to an environment with which one is familiar. Its articulation in terms of individual stability rather renders it more a matter of individual orientation.[96] The allusion is to an environment that is inhabited – to a habitual way of being. Christopher Gosden has suggested that such habituation – which, on his account, would derive from our socialisation within a material setting – is to be distinguished from the realm of consciousness.[97] Whilst "[l]ife is an intermingling of habitual and conscious elements",[98] it is mostly habitual actions, he suggests – unconscious actions – that link all our actions together and establish a "referential structure...which carries the main burden of our lives, giving them shape and direction".[99] Habitual being is, in this way, deemed to enable continuity, and this is the case whether we are looking at social forms, as Gosden is, or at individual continuity through time.

The idea in European human rights law that disrupting the habitual environment of a child would disturb her development reflects this sense that the habitual aspect of our being is doing a lot of work. The existence of the habitual mode of being anchors the individual and enables energy to be directed elsewhere. In the case of a child, this might immediately be, for example, to school life or peers (as in Noam's case); later on, as parental authority withers, attention might be directed towards the role of the child as a member of society.[100] The crucial idea is that habituation, as a stabilising process that originates in childhood, is a precondition for the child's development; put more generally, the point is that it frees up a space for individual development. It grounds ethical potentiality by

[96] See e.g., 13178/03, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2006), para.51 on the dependency of a five-year-old child on its parents, such that "when separated from its parents and left to its own devices, it will be totally disoriented".
[97] C. Gosden, *Social Being and Time* (1994, Blackwell Publishers), p11.
[98] *Ibid.*, p35.
[99] *Ibid.*, p16.
[100] See the discussion of 29086/12, *Osmanoğlu and Kocabaş v Switzerland* (2017) in part 3.3.3 below.

constructing and expressing a notion of our historical being: of "the past's repetition in the present";[101] of how, psychically, we are "historical persons".[102]

3.3.3 From feeling habituated to being situated

Conceived of in this way, habituation is cast as stabilising the individual and as grounding the processes of self-development and self-realisation that reflect European human rights law's vision of individual continuity. But if we dig a little deeper in the case law, we find that the construction of this habitual, historical self – and the construction of an account of what it means to feel habituated – has also entailed a parallel construction of what it means to be habituated – of what it means to be situated.[103] It is in this context that we find notions of the "roots" of the individual,[104] of the "degree" of her "integration",[105] and of her "original environment"[106] being articulated.

An example of the way in which the ECtHR links habituation to situation in this sense is *Noack and Others v Germany (2000)*. This case concerned the proposed transfer of the 350 inhabitants of the village of Horno – a third of whom were members of the Sorbian minority – to a town twenty kilometres away. The objective of the move was to enable the expansion of local lignite-mining operations. The inhabitants of the village were strongly opposed to this; and before the Court, the fourteen applicants (the majority of whom were members of the Sorbian minority) argued that the decisions of the authorities to pursue lignite mining in the area and the legal provisions enabling this and providing for their transfer breached their right to respect for their private life. In particular, they complained that their rights as members of the Sorbian minority had been infringed, arguing that "the destruction of the village of Horno would deprive

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[101] C. Carlisle, *On Habit* (2014, Routledge), p25.
[102] J. Mitchell, 'The Law of the Mother: Sibling Trauma and the Brotherhood of War' (2013) *Canadian Journal of Psychoanalysis* 21(1), 145-159, p146.
[103] We have already touched on the way in which the ECtHR has drawn out a notion of situated selfhood with respect to the home, which is cast as being a place that grounds and frames a life. See Ch.2, part 2.2.1.
[104] E.g., 52502/07, *Aune v Norway* (2010), para.78.
[105] E.g., 46410/99, *Üner v The Netherlands* (2006), para.56 et seq.
[106] E.g., the notion of the 'original criminal environment' with which an individual in detention is to have limited contact: 25498/94, *Messina v Italy (No. 2)* (2000), para.66.

them of the chance to perpetuate their customs and speak their language" and that "[t]he dissolution of the original community and the obligation to become integrated into a new community would ultimately entail the destruction of Sorbian culture".[107] They also alleged "psychological damage, interference with their right to carry on their occupations and an infringement of their right to respect for their family lives and homes".[108]

The ECtHR framed the case largely in terms of the "private lives and homes of the people concerned".[109] It considered that the essential question was one of balancing "the interests of the community" (by which it seemingly meant the interest in the economic well-being of the country – the legitimate aim pursued by the interference) against "the applicants' right to respect for their private lives and homes, bearing in mind that the vast majority of the applicants are members of the Sorbian community of Horno".[110] In this regard, it noted "the seriousness of the interference": that "[q]uite apart from the fact that it is an upheaval for anyone to be uprooted from the life to which they are accustomed, transferring a village population can have dramatic consequences, especially for the elderly, who find it more difficult to adapt to a new environment" – something that was exacerbated by the fact that "the persons concerned in the present case were members of the Sorbian minority".[111] However, this was treated as being mitigated by two factors: that the decision-making process had been a lengthy and inclusive one and that the site of the proposed transfer was "within the area where the Sorbs originally settled" and had been chosen by the majority of the inhabitants when they were "consulted on their choice of destination".[112] Thus "[e]ven though the transfer means a move and reorganising life in the resettlement area, the inhabitants will continue to live in the same region and the same cultural environment, where the protection of the rights of the Sorbs is guaranteed…, where their language is taught in the schools and used by the administrative

[107] 46346/99, *Noack and Others v Germany* (2000, admissibility decision), para.1.
[108] *Ibid.*, para.1.
[109] *Ibid.*, para.1.
[110] *Ibid.*, para.1.
[111] *Ibid.*, para.1.
[112] *Ibid.*, para.1.

authorities, and where they will be able to carry on their customs and in particular to attend religious services in the Sorbian language".[113] In addition, "the measures regulating the transfer of the inhabitants of Horno are intended to make the transfer as painless as possible for the persons concerned".[114] Given these factors, the interference here, "though indisputably painful for the inhabitants of Horno", was not disproportionate to the aim pursued in the light of the State's margin of appreciation;[115] and the complaint was dismissed.

In acknowledging the effect that being uprooted from the village would have on the inhabitants, the Court recognised that what was at issue was their feeling of habituation – their habitual way of being. At the same time, whereas the applicants were claiming that this way of being was bound up in the place of the village itself, the Court located it in the community constituted by the inhabitants of the village. Their habitual way of being was, accordingly, cast as being situated in the culture, rights, language, and customs of their community; and since this was deemed separable from the village itself, it would consequently move with the community. This focus on what would stay the same for the community enabled the Court to reconcile the uprooting of the community from their village with the way of life from which the inhabitants felt they were being uprooted.

If this case points to a dark site of the notion of habituation in European human rights law – the possibility for the Court to apply its own interpretation of what being habituated means – we see this more starkly still where habituation is grounded in a vision of collective life and articulated by reference to a conception of socialisation. *Osmanoğlu and Kocabaş v Switzerland (2017)* is an example of this. The applicants in this case were practising Muslims, and they argued that the requirement that their daughters take part in mixed swimming lessons at school was contrary to their religious convictions. They complained, in particular, about the authorities' refusal to exempt the girls from the classes, alleging a violation of their right to freedom of religion under Article 9 ECHR.

[113] *Ibid.*, para.1.
[114] *Ibid.*, para.1.
[115] *Ibid.*, para.1.

The Government argued that the interference with the applicants' right to manifest their religion here – the refusal of the authorities to exempt the applicants' daughters from compulsory mixed swimming lessons – pursued the legitimate aims of protecting the rights and freedoms of others and protecting public order; and the ECtHR accepted this. Specifically, the Court considered that the interference pursued the objectives of "the integration of foreign children from different cultures and religions" and of "protecting foreign pupils from social exclusion".[116] It elaborated these notions in its analysis of the necessity of the interference, in which it highlighted the role of the school in the process of 'social integration': a role which took on an even greater significance when it came to "children of foreign origin".[117] Compulsory education, it considered, plays an important role in a child's development; and the children's interest in receiving this full education, thereby enabling their "successful social integration according to local mores and customs", consequently prevailed over "the wish of parents to have their daughters exempted from mixed swimming classes".[118] The domestic authorities had, consequently, not overstepped their margin of appreciation.

The Court's emphasis in this case was on a vision of the development of the child as a 'member' of 'the community' – a 'community' into which she was being 'integrated' and a conception of which was, at the same time, being constructed. And so while physical education, including swimming lessons, was deemed important for a child's health and development, the interest in this education was not limited to the fact of the children learning to swim and to engage in physical exercise. Rather, "it resided especially in the fact of practising this activity in common with all the other pupils, with no exceptions being drawn based on the children's origin or their parents' religious or philosophical convictions".[119] This notion, of value derived from the fact that an activity is engaged in simultaneously (in common), reflects the form of the order of incorporation that we considered in Chapter 1, where an ethos of stability and a common identity is

[116] 29086/12, *Osmanoğlu and Kocabaş v Switzerland* (2017), para.64 (all references to this case are my translations).
[117] *Ibid.*, para.96.
[118] *Ibid.*, para.97.
[119] *Ibid.*, para.98.

generated through such common being.[120] Here, what mattered was that the children were swimming simultaneously. They were "learning together and practising this activity in common";[121] they were sharing time, and engaging, consequently, in what was conceived of as being the construction of a form of collective life. Synchronisation is, after all, "fundamental to any collective order".[122]

Hence also the emphasis placed by the Court on the longer term social lessons that the children would derive from this experience of common being. In addressing the argument made by the applicants as to the option of their daughters having private swimming lessons instead, the Court therefore not only reiterated its statement as to the value of the children swimming in common, but it also considered that granting an exemption from the lessons to children whose parents could pay for private lessons would generate an inequality in relation to children whose parents could not afford lessons. In the same context, the Court recalled that the authorities had already offered to accommodate the applicants, whose daughters could, for example, cover their bodies in the lessons by wearing burkinis. The implicit view was that it was important that children should learn the importance of being 'in common' now, and that they should ingrain this upon their sense of habitual being (a process cast in terms of their 'social integration'), because that would secure the continuity of this way of being in the long run. The children were, in this way, written into a conception of collective life at the same time as this conception was normatively inscribed upon their own mode of habitual being.

As a condition of individual continuity in European human rights law, habituation accordingly emerges as having two functions. On the one hand, it is cast as stabilising the individual and as thereby securing the possibility of the processes of self-development and self-realisation. On the other hand, it entails a normative vision of what it means to be habituated – of what it means to be situated – which renders it a mode of pinning down the individual.

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[120] See Ch.1, esp. parts. 1.3.1 and 1.3.3.
[121] 29086/12, *Osmanoğlu and Kocabaş v Switzerland* (2017), para.100.
[122] B. Adam, *Time and Social Theory* (1990, Polity Press), p108.

3.4 Narrativisation

The notion of habituation that is articulated in European human rights law – a notion that involves a feeling of being habituated and a mode of being situated – in many ways implies the notion of narrativisation, which is the second condition that substantiates European human rights law's vision of individual continuity. The narrative form itself, as a form for understanding, giving meaning to, and constructing an account of our lives,[123] is already implicit in European human rights law's notion of ethical potentiality, on account of the teleological quality of the latter;[124] but it also comes to be explicitly engaged as a means through which to organise life and to generate self-understanding (*3.4.1*). It is cast as working to produce a feeling of continuity and to enable the management of experiences deemed damaging for self-development and self-realisation, such as trauma and anxiety (*3.4.2*). The resulting account, of narrative 'truth', carries only a semblance of certainty; and this reflects the choices that are made in creating a narrative and that therefore underpin and shape the construction of individual continuity (*3.4.3*).

3.4.1 The production of narrative

At the level of our individual lives, we do not usually experience the present as if it is the panning out of some preordained narrative.[125] We will likely try to "stabilize the sense of self" and maintain a sense of continuity by relating past and present experiences,[126] but the act of living itself is not an act of narration. The act of narration, which is an act – an attribution – of meaning,[127] comes only

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[123] On which, see esp. J. Bruner, *Acts of Meaning* (1990, Harvard University Press).

[124] See e.g., C. Taylor, *Human Agency and Language: Philosophical Papers 1* (1985, Cambridge University Press), Ch.2. The connection is drawn out especially in the literature on narrative psychology and humanistic psychology (which is focused on nurturing individual potential). See, e.g., R. Josselson and A. Lieblich, 'Narrative Research and Humanism', in K. J. Schneider, J. F. Pierson, and J. F. T. Bugental (eds.), *The Handbook of Humanistic Psychology: Theory, Research, and Practice* (Second Edition) (2015, Sage Publications), 321-334.

[125] I say 'we do not usually' because there are exceptions to this. One such exception is the case of unconscious fantasies, highlighted by Lear. He points to the example of the judgment that "*life shall be disappointing*", where this serves as an expectation as to how life is and will be: J. Lear, 'Wisdom won from illness: The psychoanalytic grasp of human being' (2014) *The International Journal of Psychoanalysis* 95(4), 677-693, p685.

[126] W. M. Meissner, *Time, Self, and Psychoanalysis* (2007, Jason Aronson), p240.

[127] See, esp. Bruner (1990), above n123; D. E. Polkinghorne, *Narrative Knowing and the Human Sciences* (1988, State University of New York Press); J. Bruner, *Making Stories: Law, Literature, Life*

subsequently, as a means of organising and coming to terms with life and its unpredictability: a form of "self-understanding" generated through "narrative reflection".[128] Hindsight illustrates this well. 'New' or realised information can cast what we had settled as a narrative in an entirely different light, calling for a revised perspective and a new narrative, and perhaps also awakening previously repressed knowledge and unsettling our faith in our capacity to interpret (and therefore narrate) in the first place. According to Mark Freeman, hindsight thus "[performs] a kind of 'rescue' function: by taking up what could not, or would not, be seen in the immediacy of the moment, it can rescue us from the oblivion that so often characterizes the human condition".[129] It enables us to discover and realise things about ourselves; and in so doing, it enables us to form an account of ourselves.

European human rights law embraces the narrative form in this sense. If habituation is conceived of in European human rights law as being fundamental to our sense of stability, the capacity to form an account of ourselves is cast as being fundamental to our self-understanding; and this capacity is, in turn, located in our understanding of our childhood. This connection between an understanding of childhood and self-understanding was first expressed by the ECtHR in *Gaskin v UK (1989)*. Mr Gaskin had spent most of his childhood in care, following the death of his mother when he was a baby. He alleged that he had been ill-treated in care, and upon reaching the age of 18 in 1977, he began trying to obtain access to confidential information about his care, on the basis that he felt that learning about his past would help him to overcome his present difficulties. The authorities refused to grant him access to all his case records, and Mr Gaskin complained that this breached his Article 8 right to respect for his private and family life.

(2002, Harvard University Press). Cf. Nussbaum's critique of accounts linking meaning and narrative (and thereby overlooking "what rich reservoirs of meaning lie in daily conversations, in nonteleological interactions of many types" [p142]): M. C. Nussbaum, 'Living the Past Forward: The Present and Future Value of Backward-Looking Emotions', in M. C. Nussbaum and S. Levmore, *Aging Thoughtfully: Conversations about Retirement, Romance, Wrinkles, and Regret* (2017, Oxford University Press), 125-143.

[128] M. Freeman, *Hindsight: The Promise and Peril of Looking Backward* (2010, Oxford University Press), p4.

[129] *Ibid.*, p20.

The ECtHR considered, firstly, that the case records contained in the file about Mr Gaskin related sufficiently to his private and family life such that the lack of access to the file fell within the ambit of Article 8. It agreed with the then-Commission (which had already considered the case) that the file "no doubt contained information concerning highly personal aspects of the applicant's childhood, development and history and thus could constitute his principal source of information about his past and formative years".[130] The question was whether the UK had breached a positive obligation in its handling of Mr Gaskin's requests for access to his file.

The ECtHR held that it had. On the one hand, there was the "vital interest" of those in Mr Gaskin's position "in receiving the information necessary to know and to understand their childhood and early development".[131] On the other hand, there was the confidentiality of public records, which was important "for receiving objective and reliable information", and for ensuring the protection of third parties.[132] To be compatible with Article 8, the British system, which required the consent of the contributor before granting access to the records supplied by that contributor, needed to secure the protection of the individual's interest in the event that the contributor "either is not available or improperly refuses consent".[133] This was to be enabled by an independent authority which had the final decision on access. The absence of such a procedure here meant that there had been a failure to secure respect for Mr Gaskin's private and family life – a failure to protect his interest in understanding and knowing his childhood.

This need that we are envisaged as having to know about and understand our childhood[134] arises not least because childhood is conceived of in European human rights law as supplying the framework of meaning through which life is subsequently structured. Childhood experiences are cast as serving as a sort of reference point against which later events are interpreted. These experiences are

[130] 10454/83, *Gaskin v UK* (1989), para.36.
[131] *Ibid.*, para.49.
[132] *Ibid.*, para.49.
[133] *Ibid.*, para.49.
[134] See also 39393/98, *M.G. v UK* (2002), paras.28-29; 36983/97, *Haas v The Netherlands* (2004), paras.42-43.

also, of course, interpreted by the ECtHR against the backdrop of its normative account of child development,[135] so that the account that emerges is also one of what development will look like. In cases of childhood trauma, for example, European human rights law constructs an account of the child's experience through the lens of adjustment, with the question being of what a child could, in theory, adjust to.[136] In some cases, the view is that adjustment is not a likely option. In *Z and Others v UK (2001)*, for instance, in which it was found that the local authority had failed to protect the applicant children from severe abuse and neglect at the hands of their parents, the ECtHR considered, in its assessment of damages, that the children would "in all probability, suffer from the effects of their experiences for the rest of their lives", even though "[their] capacity to cope with this past trauma" would vary.[137] Such a mode of analysis, focused on adjustment, entails the construction of a vision of what is likely to be traumatic for a child – a vision of "child-specific reactions to trauma".[138] Whilst this account originates in the more general vision of child development constructed in European human rights law, it also becomes a predictive, normative account of how a life will be subsequently lived. The idea underpinning the Court's point in *Z and Others* was, therefore, that the traumatic experiences of the children would to some degree shape their future lives and experiences. The narration of the experience of the children here thus enabled the construction of a sense of coherence and continuity, not only in the sense that the trauma itself was narrated, but also in the sense that so too were its continuing effects.

3.4.2 The work of narrativisation

Narrativisation emerges in this way as a means through which to organise life and to generate self-understanding. It is cast as producing a feeling of continuity; and as part of this, it is presented as a means for the management of experiences deemed damaging for self-development and self-realisation. We can see this if we consider European human rights law's approach to trauma more closely. Trauma

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[135] See part 3.3.1 above.
[136] E.g., 18527/02, *Tonchev v Bulgaria* (2009), para.39; 40031/98, *Gnahoré v France* (2000), para.60.
[137] 29392/95, *Z and Others v UK* (2001), para.123.
[138] 61495/11, *M.G.C. v Romania* (2016), para.65.

is an interesting case in this context, as it is usually taken to resist meaning and interpretation entirely.[139] This is not least because it is taken to involve a breach in the life of an individual of the sort that defies the usual coping mechanisms[140] and involves a disruption in, or loss of, sense of self.[141] There will only be one who is in any conceivable position to recount the experience, for "trauma is often experienced as specific to oneself; it is something that 'I' and 'I alone' – rather than 'we' – have endured and continued to endure".[142] And yet at the same time as trauma isolates, it erodes and challenges the possibility of recounting the experience at all, by (potentially) affecting and altering or overwhelming the memory that the exercise of that possibility relies on.[143] Thus in *Tyagunova v Russia (2012)*, the ECtHR stated that the authorities face particular difficulties in investigating sex crimes, in part because "[the] impact of such a trauma may affect a victim's ability to coherently or fully recount her experience".[144]

If trauma destabilises an individual's sense of self in this way, and entails, as part of that, a disruption to her sense of continuity, how, then, is an account to be given by this individual, when she is thought to get lost in the process of recounting? In the case of children, we have already seen that European human rights law pulls the experience of trauma into a narrative by reference to its more general account of child development; and it does so in a way that is not entirely separable from its conceptualisation of childhood as structuring subsequent life and experience. In the case of adults, European human rights law takes over certain accounts and recognises these alone as accounts of traumatic experiences. We see this, for example, in cases concerning deportation measures in which it is argued before the ECtHR that the enforcement of an expulsion order would involve psychological trauma in breach of the ECHR (because, for example, the expulsion

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[139] On trauma in this regard, see, e.g., M. S. Roth, *Memory, Trauma, and History: Essays on Living with the Past* (2012, Columbia University Press), p77 et seq.
[140] J. Mitchell, 'Trauma, Recognition, and the Place of Language' (1998) *Diacritics* 28(4), 121-133, p121.
[141] See further R. Mears, *Intimacy and Alienation: Memory, trauma and personal being* (2000, Routledge).
[142] M. Ratcliffe, M. Ruddell, and B. Smith, 'What is a "sense of foreshortened future?" A phenomenological study of trauma, trust, and time' (2004) *Frontiers in Psychology* 5, 1-11, p3.
[143] *Ibid*., p8.
[144] 19433/07, *Tyagunova v Russia* (2012), para.68.

would be to a country where the applicant was previously tortured). The ECtHR often considers in these cases, however, that no substantiated basis for the fear of trauma has been expressed;[145] and/or that there are sufficient conditions, instructions, and assurances surrounding any enforcement of an order to effectively eliminate the question of trauma;[146] and/or that there are possibilities for rehabilitation, treatment, and care in the country to which the applicant is to be returned;[147] and/or that the trauma experienced is attributable to the general state of uncertainty in which the applicants have found themselves, such that it is not really 'trauma' at all.[148]

This latter argument is illuminating in what it reveals about the conception of 'trauma' here. The argument typically runs that the main reason for the "mental problems" experienced is that the individuals in question have, for a substantial period of time (and due to factors for which they are responsible), lived in uncertainty as to whether they will be allowed to remain in a particular country, and have "during this period, in various respects integrated into [that society]" and are now facing removal from it.[149] What is recounted by the applicants as a traumatic experience is recast in law as being a 'consequence' of a general state of uncertainty and something that is not 'really' 'trauma'. This sets in play a tension between the objective time of law and the lived time of the individual, because the former, which has purported to access and recognise the latter, goes back to it and states that its experience was not as recounted.

European human rights law, accordingly, not only articulates objective standards (such as of a substantiated basis for fear of anticipated trauma) but it also imposes upon trauma a narrative form. Moreover, in the cases in which it says that the recounted trauma (which, it adds, is not 'really' 'trauma') is caused by uncertainty, it effectively states that the threatening moment or condition – that

[145] E.g., 15576/89, *Cruz Varas and Others v Sweden* (1991), para.84.
[146] E.g., 45924/99, *Juric v Sweden* (1999).
[147] E.g., 39350/13, *A.S. v Switzerland* (2015).
[148] E.g., 27776/95, *AG and Others v Sweden* (1995, admissibility decision).
[149] E.g., *ibid.*

which was anticipated and feared – has already happened.[150] The scene is reconstructed as reflecting a failure in the process of recounting, and the individual is told that it is not the case that trauma lies ahead; rather, she has unwittingly already passed through what she thought was a traumatic experience – but which, in fact, was a 'state of uncertainty'. The production of narrative becomes, in this way, what Jonathan Lear elsewhere describes as an act of defence, because in covering over breaches in the temporal experience of an individual – in "[covering] over the countless breaks in which life opens up or breaks apart" – the narrative defends the individual against these same disruptions and sustains the notion (even if not the reality) of self-continuity.[151]

We see a similar phenomenon in cases concerning anxiety, which is also cast as being potentially disruptive of self-development and self-realisation and yet is held back from this in the case law by being presented as being containable by narrative. The case law concerning the disappearance of family relatives, discussed in Chapter 2, exemplifies this.[152] These cases, it will be recalled, involve the allegations of relatives that they themselves have been victims of inhuman and degrading treatment on account of the indifference and incompetence displayed by the authorities in the face of the disappearance of their family members. The concern of European human rights law in its response in these instances pertains to the continuing void of anxiety into which the relatives have been plunged as to the fate of their loved ones. Once they are out of this void, however – once the death of their relatives, for example, has been confirmed as a certainty – it is different. This is because the anxiety at the core of these cases is conceived of as being a matter of anxiety about fate: a matter of not knowing something that can be settled by an account of events.[153] Anxiety, on this approach, is presented as being something that can be contained by narrative; moreover, it is cast as needing to be contained by narrative.

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[150] This is, interestingly, in keeping with Winnicott's vision of breakdown: D. W. Winnicott, 'Fear of Breakdown', in G. Kohon (ed.), *The British School of Psychoanalysis: The Independent Tradition* (1986, Free Association Books), 173-182.
[151] J. Lear, *Happiness, Death, and the Remainder of Life* (2000, Harvard University Press), p125.
[152] See Ch.2, part 2.2.2(iii).
[153] See, e.g., 55508/07 and 29520/09, *Janowiec and Others v Russia* (2013).

Narrativisation is thus conceived of as a means for the management of experiences that are deemed damaging to the processes of self-development and self-realisation. These processes are conceived of as depending on a sense of continuity and a self-understanding that is itself based on this continuity; and this sense of continuity can, according to European human rights law, only be generated through the construction of narrative – hence the need to manage experiences that are deemed disruptive to the sense of self-continuity by pulling such experiences within a narrative. Narrativisation is also cast, then, as enabling individuals to come to terms with destabilising experiences. This presupposes a need to come to terms with such experiences at all;[154] and it is on this basis that these experiences are treated as being contained (and thereby organised) within the terms of European human rights law, with the individual then being brought to these terms.

3.4.3 Narrative 'truth'[155]

The use of the narrative form to construct an account of self-continuity across time and to deal with experiences deemed damaging to self-development and self-realisation presupposes that there is some certainty about the narrative that is being offered up. But this brings us to a problem that European human rights law has to address, which is that the narrative form itself is unstable. We know this already from our earlier discussion of hindsight – an experience which shows that an established narrative may be changed in an instant, and that in constructing a new narrative, things that had been latent in the original narrative may come to the fore in different ways. The narrative form is also unstable in a sense highlighted by Martha Nussbaum, who argues that narrativisation destabilises our engagement with the present. This is not only because "the minute one undertakes retrospective narration, one is to that extent no longer living forward", but because the stripping out of all that is "'superfluous', 'repetitious', 'trivial', and so forth" in

[154] See further Ch.5, esp. parts 5.2.3 and 5.3.
[155] The term comes from D. P. Spence, *Narrative Truth and Historical Truth: Meaning and Interpretation in Psychoanalysis* (1982, W. W. Norton & Company), discussed below.

order to create "a clear, and possibly single or at least not too complicated, narrative arc" does not do justice to the "actual messiness" of life.[156]

Implicit in these points of instability and fragility is a further way in which the narrative form is unstable too. This consists in the instability of the assumption that the narrative itself rests on: the assumption of the veracity of the narrative at all. In the early 1980s, this was raised by Donald Spence in his critique of the Freudian narrative tradition in psychoanalysis, whereby, he claimed, psychoanalysts had been led to become "searchers after meaning", looking for "coherence and continuity".[157] He argued that there had been a failure to distinguish 'narrative truth' (with its presentation of a coherent account) and 'historical truth' (what actually happened). By assuming, Spence suggested, that the freely-associating patient had "privileged access to the past", and that the story being heard by the analyst is "the same as the story he is telling", "then it is tempting to conclude that we are a hearing a piece of history, an account of the 'way things were'".[158] Spence argued that this confused narrative and historical truth, and represented a failure to see that "the past is continuously being reconstructed in the analytic process".[159]

If the acts of giving or hearing an account of experience intrinsically involve a working on its form in this way, then not only is there a construction of a narrative – the conferral of coherence and a semblance of continuity on an account – but it is also clear that more than one narrative is possible, and that a choice is always made as to from where to begin the narrative. On occasion, European human rights law has had to specifically address this question of conflicting narratives. An example is to be found in the case law concerning the distinction that haunted the jurisprudence on gender identity up until the start of the present century, which involved a split between individual constitution in law (which adhered to a static biological model) and individual constitution in fact (which did

[156] Nussbaum (2017), above n127, p141-142.
[157] Spence (1982), above n155, p22-23.
[158] *Ibid.*, p27.
[159] *Ibid.*, p93.

not).[160] This was at issue, for example, in *X, Y, and Z v UK (1997),* in which the applicants complained of the lack of legal recognition of the father-child relationship between X (who had transitioned from female to male) and Z (the child, who had been conceived by donor insemination and carried by Y, X's partner). The applicants alleged that this had breached their right to respect for their family life; and they argued, in particular, that it might undermine Z's "sense of security within the family".[161] But in the place of the legal recognition that the applicants sought, the ECtHR proposed a number of ways in which they could circumvent the obstacles and consequences that flowed from the lack of recognition. In respect of the absence of X's name on Z's birth certificate, for example, the Court noted that unless X and Y chose to publicise this, neither Z nor a third party would know that this was because X had been born female. This rendered them similar "to any other family where, for whatever reason, the person who performs the role of the child's "father" is not registered as such".[162] X could still act as Z's social father, therefore, notwithstanding his lack of legal recognition as such.[163]

The overarching concern of the ECtHR in this case was of "maintaining a coherent system of family law", and it was particularly concerned that granting the legal recognition demanded might not necessarily be to the advantage of children in Z's position "in general".[164] In the light of this uncertainty, the Court preferred to protect the stability of its category of 'the child' – a category which, under Article 8, does not oblige States "formally to recognise as the father of a child a person who is not the biological father"[165] – over the interests of Z and her family in having their relationships legally recognised. Its adherence was therefore to (original, historical) representation in law, at the same time as it recognised that this was at odds with the lived experience of the child, and that the latter experience was not legally recognised as such at all.

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[160] On this see Ch.2, part 2.4.1.
[161] 21830/93, *X, Y, and Z v UK* (1997), para.45.
[162] *Ibid.*, para.49.
[163] *Ibid.*, para.50.
[164] *Ibid.*, para.47.
[165] *Ibid.*, para.52.

This case, and the splitting of narratives that it represents, points to the way in which the narrative form is conceived of as enabling a sense of continuity but that the nature of this continuity is specified in a certain way. This is drawn out in further detail in the area of paternity challenges in European human rights law, in which, in a context in which a child has a right to know about her genetic origins, a man who is not registered as the legal father makes a claim to be the genetic father. As we saw in Chapter 2, there are examples in the case law in which the ECtHR has focused on securing the stability of the 'existing' family unit in the face of the 'threat' of disruption posed by the man claiming to be the legal father.[166] I said in that earlier discussion that these examples exemplify the ethos of replaceability that structures the notion of presentation in European human rights law, in that where the ECtHR takes this approach, it emphasises the role of 'fathering', and since this is being presently performed by the social father, he is experienced by the man contesting his legal paternity as having replaced him in this role.

But a further point also emerges in these cases: a problematisation of the idea of 'truth'. Claims brought by men who are seeking to contest or establish legal paternity are cast in terms of 'biological truth',[167] which involves an appeal to genetic fact; and it is in these terms also that the right of the child to knowledge of her origins is also recognised.[168] Whilst a debate as to the claim to 'truth' in this context is certainly to be had (not least because it implicates time, as 'origins', in its claim), the more pressing point for our purposes is that the narrative of biological truth sits alongside another narrative, which presents an account conceived of in terms of the 'social reality' of the child. This latter involves an account of truth as consisting in that which is stable – in that which is habitual – and to which disruption is to be minimised. Where the two narratives are at odds with one another, the ECtHR makes a choice to favour one over the other; and in cases concerning children, the perceived best interests of the child will structure

[166] See Ch.2, part 2.3.3.
[167] E.g., 45071/09, *Ahrens v Germany* (2012), esp. para.71; 23338/09, *Kautzor v Germany* (2012), esp. para.73.
[168] E.g., 53176/99, *Mikulić v Croatia* (2002), esp. paras.55, 64; 42326/98, *Odièvre v France* (2003), esp. paras.28-29; 30955/12, *Mandet v France* (2016).

this decision. But in the fact of the choice itself, the ECtHR specifies a narrative that the individuals in question will have to live with.[169] And so if the condition of habituation is revealed as being a way of situating the individual, the condition of narrativisation is revealed as being a way of shaping the experience of this individual.

3.5 Conclusion

The notion of individual continuity that is specified in European human rights law as structuring its idea of individual identity and constituting its vision of time emerges as being comprised of two parts. On the one hand, it is cast as being about a sense of continuity and as being driven by the continuous processes of self-development and self-realisation that are envisaged in European human rights law. On the other hand, the conditions of habituation and narrativisation that are set out as substantiating the notion of continuity are revealed as being normative notions that problematise the idea that what we are talking about in relation to these is a 'sense of feeling habituated' and a 'sense of continuity' at all. If being in European human rights law is about becoming, then – as the discussion of vital potentiality and ethical potentiality in the first section of this chapter showed that it is – the conditions of habituation and narrativisation that are used to specify what this becoming consists in show that what is in question here is a *particular way* of becoming across time.

The sense underpinning the account set out in this chapter is that the double function that the idea of individual continuity performs in European human rights law is enabled by a vision of the human condition in which we are assumed to have a need to assume our self-continuity across time. This assumption is reflected in the notions of vital potentiality and ethical potentiality (in which we are cast as needing to have a point of beginning and as needing to continually negotiate the questions of self-development and self-realisation), as also in the conditions of habituation and narrativisation that substantiate this notion of individual continuity (and in which we are cast as needing to have a feeling of

[169] A striking example is 16112/15, *Fröhlich v Germany* (2018), discussed in Ch.5, part 5.3.3.

stability and a sense of continuity and self-understanding). Ostensibly, the idea of self-continuity works in this respect as a form of security in the face of the uncertainty that pervades the notions of self-development and self-realisation, insofar as it is conceived of as enabling the individual to see herself in the future. But, as we have seen in this chapter, the step from the construction of a vision of the individual with a need to assume her continuity to the construction of a form of continuity to which the individual is subject is not a wide one in European human rights law. It is a step from conceiving of time as belonging to the individual to conceiving of the individual as belonging to time. And this, of course, is explicable by the constitution of European human rights law as a lived order of individuation: as an order in which the time of the individual is the time of the order – in which the continuity of the individual secures the continuity of the order. Thus if Chapter 2 showed us how the individual develops an identity in this order, this chapter has shown us how this identity is conceived of as having a continuity – a continuity that is constructed on the basis of a vision of the human condition in which we are assumed to have a need to assume our self-continuity across time.

– CHAPTER 4 –

Body

4.1 Introduction

In Chapter 3, I argued that time is conceived of in European human rights law in terms of individual continuity. More specifically, I suggested that an idea of individual continuity structures European human rights law's notion of individual identity and that it reflects a vision of the human condition in which we are assumed to have a need to assume our self-continuity across time. This chapter argues that this assumption is bound up in the way in which European human rights law conceives of us as having a need to be recognised by others – a need which is concretised in European human rights law's vision of the body.

The vision of the body that is articulated in this respect hinges, I suggest, on two ideas: the idea that our fundamental assumptions about the world and about our place in the world are bound up in our sense of our body; and the idea that the right to respect for bodily integrity (which is the fundamental underpinning of relations between living bodies in European human rights law) is about recognition, so that respect for the bodily integrity of another is a matter of recognition of that other (*4.2*). The theory of recognition that emerges from this is a theory of mutual dependence between self and other – a theory in which we are conceived of as being dependent on the other to see and be seen. The need for recognition is cast as exposing us to our vulnerabilities and insecurities, which are managed and confronted with and through the other (*4.3*). But the need for recognition is also conceived of as being essential to the sustenance of the self, such that in the face of the loss of specific others, the focus is on renegotiating that specific form of recognition to reconstitute its effects (*4.4*).

4.2 The need for recognition

In Chapter 3, we saw how an assumption is made in European human rights law about our need to assume our self-continuity; and in this section I argue that this need is conceived of as being bound up in our sense of our body (*4.2.1*) and, in particular, in a need to be recognised by others (*4.2.2*). The notion of recognition that is articulated in this respect entails two demands: a demand that we recognise the abstract position and the role of the other and a demand that we recognise the other as such (*4.2.3*). A vision of our need for the other – and of the mutual dependence between self and other – is accordingly articulated in European human rights law; and the body is revealed to be at the basis of this vision of our relationality and our most fundamental assumptions.

4.2.1 Bodily integrity

We know, from Chapter 3, that an assumption is made in European human rights law that we have a need to assume our self-continuity; but so far, the basis of this assumption (the assumption that we are conceived of as making) is unclear. In the following pages, I will suggest that the body is conceived of as supplying this basis, which is to say that our bodies are envisaged as being the basis from which we make assumptions about the world. This is what the term 'bodily integrity' appears to capture in European human rights law.

The right to 'bodily integrity' (or 'physical integrity') – and, more specifically, respect for this right – is the most fundamental underpinning of relations between living bodies in European human rights law; and it runs throughout a number of ECHR rights. Thus the protection of an individual's physical integrity is "one of the main purposes" of Article 3 (the right to freedom from torture or inhuman or degrading treatment or punishment);[1] it is safeguarded by the rights to liberty and security under Article 5;[2] and physical integrity itself may fall within the realm of the Article 8 right to respect for one's private life[3]

[1] 5856/72, *Tyrer v UK* (1978), para.33.
[2] E.g., 38822/97, *Shishkov v Bulgaria* (2003), para.85.
[3] E.g., 20972/92, *Raninen v Finland* (1997), para.63.

("since a person's body is the most intimate aspect of private life"[4]). In the cases in which it is invoked in these ways, the right to physical integrity is primarily presented as a negative right to freedom from interference; and 'physical integrity' itself appears to denote a form of freedom. In *Tyrer v UK (1978)*, for example, which was one of the earliest cases in which the term was used, and in which the ECtHR found that the judicial corporal punishment of a fifteen-year old by way of birching at a local police station violated his right to freedom from degrading punishment, the Court described the way in which Anthony Tyrer's punishment – which "constituted an assault on...[his] dignity and physical integrity" – consisted in his being "treated as an object in the power of the authorities".[5] In being birched, and in the presence of two other policemen, his father, and a doctor, Anthony Tyrer had been deeply humiliated. He had suffered an interference with his sense of self and with his freedom;[6] he had been objectified, and his body had been used against him by the authorities.

The right to respect for one's physical integrity alludes, in this way, to the notion of the inviolability of the body. This inviolability means, for example, that the protection of an individual's bodily integrity under Article 3 cannot be limited by reason of the requirements of a criminal investigation or in the name of the fight against crime;[7] and at a more general level it means that "any interference with a person's physical integrity must be prescribed by law and requires the consent of that person".[8] The centrality of consent to the idea of bodily integrity also underpins the principle of informed consent in the medical sphere. This is a principle within which the rights to consent and to information are intertwined; and it is conceived of as appealing to notions of freedom and individuality, such that the sense emerges that bodily integrity is not only about the right to control and to use one's body but that the concept of 'integrity' itself is also alluding to something akin to the essence of what it means to be a particular person.[9]

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[4] 45872/06, *Yuriy Volkov v Ukraine* (2013), para.84.
[5] 5856/72, *Tyrer v UK* (1978), para.33.
[6] On which see further Ch.2, part 2.2.2(i).
[7] E.g., 28847/08, *Gladovic v Croatia* (2011), para.47.
[8] 24209/94, *Y.F. v Turkey* (2003), para.43.
[9] See, e.g., 18968/07, *V.C. v Slovakia* (2011), para.112.

'Bodily integrity', as it is conceived of in European human rights law, is about more than the boundaries of the body, then – supposing that it is even possible to delineate these.[10] Jonathan Herring and Jesse Wall, writing on the right to bodily integrity in English law and on the way in which its development there has been influenced by the ECtHR jurisprudence, accordingly propose an understanding of this right as "[giving] a person exclusive use of, and control over, their body on the basis that the body is the site, location, or focal point of their subjectivity".[11] And yet, even then, if this explanation gets us close to a vision of the body as being what grounds our sense of place in the world, the conceptualisation of bodily integrity that is presented in European human rights law appears to carry this vision even further.

The idea that emerges in the ECHR jurisprudence seems to be more that the body is the basis from which we make assumptions about the world; it is cast as being the basis from which our "assumptive worlds" – "the assumptions or beliefs that ground, secure, or orient people, that give a sense of reality, meaning, or purpose to life" – are created.[12] It is this sense that appears to be captured in the term 'bodily integrity'. Breaches of our bodily integrity – by way of degradation and humiliation at the hands of the authorities,[13] for example, or by being denied information necessary to make a free and informed decision about medical intervention[14] – destroy our assumptions about the world and about how we are situated in the world. For, as Drucilla Cornell suggests, we imagine our bodily selves to be in a particular way;[15] and we envisage possibilities that are contingent on these bodies. And so when, for example, the ECtHR says that the sterilisation of a woman without her informed consent is a profound violation of her physical

[10] On which difficulty, see J. Nedelsky, 'Law, Boundaries, and the Bounded Self' (1990) *Representations* 30, 162-189; J. Herring and J. Wall, 'The Nature and Significance of the Right to Bodily Integrity' (2017) *Cambridge Law Journal* 76(3), 566-588, p586-587; J. Herring and P.-L. Chau, 'My Body, Your Body, Our Bodies' (2007) *Medical Law Review* 15(1), 34-61, p45-49.
[11] Herring and Wall (2017), above n10, p580.
[12] J. Kauffman, 'Introduction', in J. Kauffman (ed.), *Loss of the Assumptive World: A Theory of Traumatic Loss* (2002, Routledge, New York), 1-9, p1. The use of the term 'assumptive worlds' in this context originates in C. Murray Parkes, 'Psycho-social transitions: A field for study' (1971) *Social Science and Medicine* 5(2), 101-115. See further the Introduction, n54.
[13] E.g., 54810/00, *Jalloh v Germany* (2006).
[14] E.g., 8759/05, *Csoma v Romania* (2013). See also 81272/12, *Ioniță v Romania* (2017), paras.84-86.
[15] D. Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (1995, Routledge).

integrity, and one which strips her of her "reproductive capability",[16] it is also recognising that the 'assumptive world' of that woman – as to what was possible, and as to what is now possible – has been shattered. Hence also the Court's recognition of the important role played by our physical environments in this regard,[17] and its acknowledgement that risks generated by, for example, uncontrolled packs of stray dogs that are left free to roam the streets,[18] or operations that cause environmental damage and pollution,[19] may be destabilising. The implication that is reflected in such cases is that it is in a sense of bodily integrity that a conception of individual security and stability (and therefore self-continuity) begins. In other words, our assumptions about the world originate in this point.

4.2.2 Recognition

The most fundamental assumption that we make, according to European human rights law, is that we will be recognised by others. This assumption is conceived of as being inseparable from the assumption of self-continuity; and we can see this if we go back and think about the contexts in which 'bodily integrity' is invoked in the case law. It appears primarily in terms of threats to[20] and assaults upon[21] integrity; and the breach is cast as being experienced by the individual in question as being a lack of recognition: an indifference to her situation, and a failure to properly recognise her on these terms. This was what underpinned the complaint of the applicant in *Konovalova v Russia (2014),* for example. In that case, Ms Konovalova complained that she had been made to give birth in front of medical students, in violation of her Article 8 right to respect for her private life. She claimed before the ECtHR that she had only learned of the possible presence of the students when she was nearly unconscious and unable to move hospital, and that she had not given written consent to their actual presence at the birth of her

[16] 18968/07, *V.C. v Slovakia* (2011), para.116. See also 29518/10, *N.B. v Slovakia* (2012).
[17] See, e.g., 22743/07, *Otgon v The Republic of Moldova* (2016), paras.15-17.
[18] E.g., 9718/03, *Georgel and Georgeta Stoicescu v Romania* (2011).
[19] E.g., 46117/99, *Taşkin and Others v Turkey* (2004); 48939/99, *Öneryildiz v Turkey* (2004).
[20] E.g., 57693/10, *Kaluczа v Hungary* (2012), para.59.
[21] E.g., 46423/06, *Beganović v Croatia* (2009), para.67.

child. Her objection was to the unauthorised witnessing of her labour; she felt – as she put it in earlier proceedings – that "the demonstration of her labour, which had been carried out without her consent, had caused her physical and psychological suffering and violated her rights".[22]

The ECtHR considered that there had undoubtedly been an interference with Ms Konovalova's private life right, on account of the fact that the medical students had "witnessed" the delivery and "thus had access to the confidential medical information concerning [her] condition".[23] It focused on the way in which the legal provision which enabled medical students to participate in medical treatments did not contain safeguards capable of protecting the private lives of patients – something which, it said, had only been exacerbated by the approach of the hospital and the domestic courts. The information that had been provided to Ms Konovalova prior to the birth had been vague in its reference to the possibility of the involvement of students; moreover, Ms Konovalova had only learned that students would be present the day before, "between two sessions of drug-induced sleep, when she had already been for some time in a state of extreme stress and fatigue on account of her prolonged contractions".[24] At the time of this notification it was not possible to tell whether Ms Konovalova was given a choice about the participation of students or whether "in the circumstances, she was at all capable of making an intelligible informed decision".[25] The Court concluded that there had been a violation of Ms Konovalova's Article 8 rights, because the presence of the medical students at the birth had not complied with the requirement of lawfulness. The sense conveyed in the reasoning of the Court in reaching this conclusion was that the hospital had failed to properly recognise Ms Konovalova's position (and, in particular, her vulnerability during labour); and this lack of recognition had constituted a form of maltreatment.

Axel Honneth, who has elsewhere similarly noted that the categories that we use to express a sense of "moral maltreatment" are often ones which are

[22] 37873/04, *Konovalova v Russia* (2014), para.24.
[23] *Ibid.*, para.41.
[24] *Ibid.*, para.47.
[25] *Ibid.*, para.47.

"related to forms of disrespect, to the denial of recognition", suggests that this in itself invokes the sense that "we owe our integrity, in a subliminal way, to the receipt of approval or recognition from other persons".[26] The experience of disrespect means that "the person is deprived of that form of recognition that is expressed in unconditional respect for autonomous control over his own body, a form of respect acquired just through experiencing emotional attachment in the socialization process".[27] Mistreatment of another in this way is, accordingly, mistreatment of that other's sense of self.

Within the terms of European human rights law, the denial of recognition need not be deliberate in this regard. In Ms Konovalova's case, for example, the lack of recognition derived primarily from the carelessness and thoughtlessness of the hospital that handled her labour. This point – that there does not need to be any evidence of intention to find a denial of recognition – was illustrated more clearly still in *Price v UK (2001).* Ms Price was four-limb deficient and also suffered from kidney problems. She had been committed to prison for contempt of court, following her refusal to answer questions about her financial situation during civil proceedings. The sentencing judge ordered that she be detained for seven days but took no steps to see whether there were facilities available which could accommodate the level of her disability. Ms Price was subsequently detained in inappropriate conditions, in which she was "dangerously cold, [risked] developing sores because her bed [was] too hard or unreachable, and [was] unable to go to the toilet or keep clean without the greatest of difficulty".[28] The Court concluded that there was no evidence of "any positive intention to humiliate or debase" Ms Price, but considered that the fact of her detention in such conditions, and with such consequences for her, constituted degrading treatment in violation of Article 3.[29]

In a Separate Opinion, Judge Greve developed this reasoning further. She argued that the "compensatory measures" that are secured for a person with

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[26] A. Honneth, 'Integrity and Disrespect: Principles of a Conception of Morality Based on the Theory of Recognition' (1992) *Political Theory* 20(2), 187-201, p188-189.
[27] *Ibid.*, p190.
[28] 33394/96, *Price v UK* (2001), para.30.
[29] *Ibid.*, para.30.

disabilities in a "civilised country" "come to form part of the disabled person's physical integrity".[30] Consequently, any obstacle set up in the path of a person's access to these measures (as, in this case, the impediment to Ms Price taking with her to prison the battery charger required for her wheelchair) constitutes a violation of that person's physical integrity. All that was required in Ms Price's case was, Judge Greve argued, "*a minimum of ordinary human empathy*"[31] – a basic understanding and recognition of Ms Price's position. Instead, there had been a failure to see her situation and to treat her accordingly – a failure, in other words, of recognition.

4.2.3 Seeing the other

Respect for the bodily integrity of another is accordingly cast as being about the recognition of that other. But what, according to European human rights law, do we see when we recognise the other? Judge Greve's suggestion in *Price v UK* was that recognition is about empathy, so that we exercise our imagination to try to envisage and understand the experience of the other. Martha Nussbaum has elsewhere argued that we need a stronger mode of relating to others in these terms too, in the context of her broader analysis of the fears and prejudices that she identifies as structuring many contemporary European and American responses to religion (such as the burqa and niqab bans now common in a number of Council of Europe states[32]). She suggests that whereas fear is a narcissistic emotion, involving the focus of an individual "on her own safety, and (perhaps) that of a small circle of loved ones", in empathy, by contrast, "the mind moves outward, occupying many different positions outside the self".[33] When we use our "participatory imagination" to see the situation of the other, we are transported beyond the limits of our selves and are led to think about the lives of others.[34]

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[30] *Ibid.*, Separate Opinion of Judge Greve.
[31] *Ibid.*
[32] See part 4.3 below.
[33] M. C. Nussbaum, *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age* (2012, The Belknap Press of Harvard University Press), p146.
[34] *Ibid.*, p143-144.

But in European human rights law, the dominant idea of what it means to see the other is narrower and more specified than this. The demand is, firstly, that we see the abstract position and the role of the other – that we see the implications that automatically flow from the position of being a detainee,[35] for example, or of being a patient in hospital.[36] Whereas the empathetic imagination described by Nussbaum demands an imagination of the life of a person that extends beyond the confines of any category, the recognition of position articulated in European human rights law is more limited in quality. We can see this most clearly if we turn to consider cases concerning the family and the protection of the position of children within the family, whereupon we immediately encounter prohibitions that are based largely on the position of these children and are articulated in accordance with a particular conception of the family.[37]

An example is to be found in the case law concerning incest, which is cast as compromising family structure. In *Stübing v Germany (2012)*, for instance, which concerned a consensual sexual relationship between adult biological siblings (who had been brought up separately) and the consequent conviction of Mr Stübing for incest, the focus of the German courts and then the ECtHR was largely on the effect of this relationship on the family structure and on the four children born to the couple. The German Constitutional Court had concluded that criminal liability was justified by a number of objectives, including "the protection of the family, self-determination and public health, set against the background of a common conviction that incest should be subject to criminal liability".[38] In particular, it expressed concerns about the damaging effects that sexual relationships between siblings might pose to family structures (and, consequently, to "society as a whole") and to "sexual self-determination".[39] The ECtHR, in acknowledging these "[not] unreasonable" aims,[40] noted, moreover, the findings of the Leipzig District Court as to the vulnerability of Mr Stübing's sister. She was sixteen when she began the

[35] E.g., 77248/12, *Dimcho Dimov v Bulgaria (No. 2)* (2017), paras.58-62.
[36] E.g., 8759/05, *Csoma v Romania* (2013), para.44.
[37] On which see more generally Ch.2, part 2.3.
[38] 43547/08, *Stübing v Germany* (2012), para.63.
[39] *Ibid.*, para.63.
[40] *Ibid.*, para.65.

sexual relationship with Mr Stübing (who was then aged 23), and the District Court had concluded that she was "only partially liable for her actions", as she "suffered from a serious personality disorder which, together with an unsatisfying family situation and mild learning difficulties, led to her being considerably dependent on the applicant".[41] The ECtHR considered that in the light of these circumstances, Mr Stübing's conviction – which interfered with his sexual life ("he was forbidden to have sexual intercourse with the mother of his four children"[42]) – met a pressing social need, and that the German courts had been within their margin of appreciation in convicting him of incest. There had, therefore, been no violation of Article 8.

Underlying the reasoning of the German courts and the ECtHR in this case was a focus on the protection of family structure and on the undue dependency of Mr Stübing's sister, who was cast as having been "led" to her (over-) dependence on her brother by her circumstances, which included, not least, her "unsatisfying family situation".[43] The siblings had not, the courts considered, been able to form a 'proper' lateral sibling relationship; and implicitly, the sense was that this structural inequality might be handed down to their children now too (as a consequence of their exposure to their parents' relationship), or that it might disrupt family integrity more generally. Similar concerns about family boundaries and about the exposure of children to particular relationships – for example, to a relationship between a father-in-law and his daughter-in-law[44] – have been articulated elsewhere too, with the ECtHR being concerned in such cases to secure recognition of the differentiation of roles within its conception of 'the family'.[45]

The idea that recognition is about seeing the position of the other in this way generates a narrower account, then, than that which is envisaged by Nussbaum's notion of empathy, which demands an imagination that transcends categories. But the account of the position of the other – of the roles by reference

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[41] *Ibid.*, para.64.
[42] *Ibid.*, para.55.
[43] *Ibid.*, para.64.
[44] E.g., 36536/02, *B. and L. v UK* (2005), paras.36-37.
[45] On which see more generally Ch.2, part 2.3.2(i).

to which the individual is presented – is not the only account of recognition that is set out in European human rights law. For if we think back to cases like *Price v UK*, we see that there is also a demand that we see the other as such. This is a thinner demand than that of the feeling of empathy called for by Judge Greve in *Price v UK*. Whereas empathy entails a capacity to imagine the experience of the other (something which requires a capacity to position oneself in the place of the other), the demand to see the other as such is simply one of acknowledging that the other is different and has her own needs. This latter form of recognition carries with it a subtle undertone, too; for if recognition is about seeing the other, then the process of recognition is also a process of individuation.[46] This is because, as Jessica Benjamin puts it, in the moment that we recognise the other, that other recognises us too.[47] This mutuality of recognition means that we are profoundly dependent on each other to see and be seen; and this, according to Benjamin, is what underpins the paradox at the heart of recognition: "the self is trying to establish himself as an absolute, an independent entity, yet he must recognize the other as like himself in order to be recognized by him".[48] We can see, then, that a conception of recognition that is based not only on position but also on being itself necessarily entails a form of self-reflection. The possibility emerges – and as an intrinsic part of European human rights law's vision of our need for the other – that we are seeing something of our own self when we see the other.

4.3 Living with the other

The need for the other that is portrayed in European human rights law and originates in its conception of bodily integrity gives rise to a dependence on the other to see and be seen as a person. In this section, I examine how this dependence deepens into an account in which individual insecurities and vulnerabilities are managed and confronted with and through the body of the other. In particular, I consider the nature of the ethos of 'living together' that is

[46] See further D. Cornell, *At the Heart of Freedom: Feminism, Sex, and Equality* (1998, Princeton University Press), p62-63.
[47] J. Benjamin, *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* (1988, Pantheon Books), esp. Ch.1.
[48] *Ibid.*, p32.

considered to bind the self to the other in the public sphere (*4.3.1*). I suggest that the way in which this ethos has been articulated reveals much about the structure of the relationship between the self and the other and about what it is of ourselves that we see when we see the other (*4.3.2*); and I argue that the idea that emerges from the case law is that we gain exposure to our own vulnerability through the other (*4.3.3*).

4.3.1 Living together

The relation of mutual dependence that obtains between the self and the other in European human rights law culminates in the articulation of an ethos of 'living together', which is about the management of this dependence in the public sphere. This has been constructed in cases involving the outward appearance of the other;[49] and it has been primarily established in cases concerning challenges brought by Muslim women against the French and Belgian prohibitions on covering the face in public – prohibitions which evidently affect the freedom of Muslim women to wear a full-face veil in public.[50] The leading case in this regard is *S.A.S. v France (2014)*, the reasoning of which was subsequently applied in *Belcacemi and Oussar v Belgium (2017)* and *Dakir v Belgium (2017)*.[51] In *S.A.S. v France*, the Grand Chamber accepted the argument of the French Government that the prohibition on covering the face in public pursued, in the name of the protection of the rights and freedoms of others, "respect for the minimum requirements of life in society".[52] It noted that it was aimed at a conception of "living together" in which it was necessary and significant to see the face of the other in social

[49] Cf. the more general point in European human rights law that appearance is a matter of personal identity and is about the expression of personality: 49304/09, *Biržietis v Lithuania* (2016), para.58. Matters are more complex when it comes to religion, however; see, e.g., 44774/98, *Leyla Şahin v Turkey* (2005), para.114-116, on how the secular nature of an institution can purportedly be affected by the religious clothing of an individual (on which see Ch.2, part 2.3.2(ii)).

[50] Such prohibitions have been introduced in several CoE States in recent years (and have been debated in many more States). See further E. Brems (ed.), *The Experiences of Face Veil Wearers in Europe and the Law* (2014, Cambridge University Press).

[51] 37798/13, *Belcacemi and Oussar v Belgium* (2017); 4619/12, *Dakir v Belgium* (2017). For further discussion of these cases see S. Trotter, '"Living Together", "Learning Together", and "Swimming Together": *Osmanoğlu and Kocabaş v Switzerland (2017)* and the Construction of Collective Life' (2018) *Human Rights Law Review* 18(1), 157-169.

[52] 43835/11, *S.A.S. v France* (2014), para.121.

interaction;[53] and it reasoned on the basis of this assumption about the significance of the visibility of the face in socialisation.

This idea, of the special significance of the face, goes back a long way in European thought. The face has been variously theorised as symbolising individuality (symbolising the self, or reflecting the soul, for example[54]) and as being at the basis of ethical relationships of responsibility.[55] Indeed in *Bouyid v Belgium (2015),* the Grand Chamber drew these strands of thought together, noting, in the course of its response to the two applicants (who alleged that they had been slapped on their faces by police officers whilst in a police station), the "considerable impact" of a slap to the face, insofar as such an act "affects the part of the person's body which expresses his individuality, manifests his social identity, and constitutes the centre of his senses...which are used for communication with others".[56] What is significant about these lines of thought in the context of *S.A.S. v France*, however, is that neither supplies an argument for compelling the exposure of the face. Such compulsion would, in fact, be antithetical to the deeper normative orientation of both the argument from individuality and the argument from relationality, which leaves as outstanding the question of the use of this form of compulsion in the name of social interaction.

The sense that there is something more complex at issue in these cases is found in the Court's focus in *S.A.S. v France* (and, subsequently, in *Belcacemi and Oussar v Belgium* and *Dakir v Belgium*) on the way in which the covered face was interpreted by others. The ECtHR considered that it could "understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the

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[53] *Ibid*., paras 81-85.
[54] E.g., G. Simmel, 'The Aesthetic Significance of the Face' (1901) (transl. L. Ferguson), in K. H. Wolff (ed.), *Georg Simmel, 1858-1918, A Collection of Essays, with Translations and a Bibliography* (1959, The Ohio State University Press), 276-281, p277-278; G. Simmel, 'Sociology of the Senses' (1908), in R. E. Park and E. W. Burgess (eds.), *Introduction to the Science of Sociology* (1921, The University of Chicago Press), 356-360, p359-360.
[55] E.g., E. Levinas, *Totality and Infinity: An Essay on Exteriority* (transl. A. Lingis) (1991 [1961], Duquesne University Press), p194-219.
[56] 23380/09, *Bouyid v Belgium* (2015), para.104. See further Ch.2, part 2.2.2(i).

possibility of open interpersonal relationships".[57] It could also "accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier".[58] Both of these statements concerned the interpretation of the veil made by others. It was they who considered that it might call into question the possibility of a particular type of relationship; it was they who interpreted it as a barrier. And if the very fact of these interpretations at all reveals the fragility of a mode of socialisation which, it seemingly transpires, is founded entirely upon this form of appearance, it also brings to light something else. This is that what is in issue here is the projection of meaning onto bodies – in this instance, by individuals onto the covered faces of others. The question is essentially one of the willingness of individuals – who feel destabilised by the appearance, in public space, of a covered face – to conduct interpersonal relationships which do not stem from their own terms of appearance. The construction of the veiled face of another as a 'barrier' reflects an unwillingness – a hostility, an insecurity – which is then projected onto, and subsequently cast as deriving from, that other; and this finds a channel of expression in European human rights law in the ECtHR's acceptance of the experiences of the projecting individual in terms of 'the rights and freedoms of others'. The latter occurs because the projecting individual, in receiving back the meaning that she projected onto these bodies, makes herself a victim whose own rights and freedoms are now at stake. She is, in other words, a victim of her own self. Thus projection is not only cast as being a mode of relating between living bodies, but its alienating effects are also legitimated.

4.3.2 Seeing the self

This same process can be seen in *Gough v UK (2014)*, which also concerned the ethical significance of the exposure of the body. Mr Gough held a belief in "the inoffensiveness of the human body" and "social nudity".[59] He expressed this by being naked in public, and he bore the nickname 'the naked rambler' as a result of

[57] 43835/11, *S.A.S. v France* (2014), para.122.
[58] *Ibid.*, para.122.
[59] 49327/11, *Gough v UK* (2014), para.6.

his decision to walk naked from Land's End in England to John O'Groats in Scotland. He was repeatedly arrested, prosecuted, convicted, and imprisoned for his public nudity, and he complained before the ECtHR that this had violated several of his Convention rights, including his Article 10 right to freedom of expression.

The ECtHR accepted that Mr Gough's public nudity constituted a form of 'expression' within the meaning of Article 10, on the ground that it was a manifestation of his conception of life. It also accepted the argument of the UK Government that the measures taken against Mr Gough – namely his arrest, prosecution, conviction, and imprisonment – were aimed at preventing crime and disorder. The Government had not specified the nature of this potential disorder and crime, and the Court instead elaborated this itself, setting up a framing of the naked body as provocative and threatening that would structure its subsequent reasoning. The measures taken against Mr Gough were, it said, "designed to prevent the applicant's committing breach of the peace through causing offence to and alarming other members of the public by confronting them with his naked state in public"; and the aims pursued were those of "seeking to ensure respect for the law in general" by preventing the potential crime and disorder that could have resulted had Mr Gough been allowed to "continually and persistently flout the law with impunity because of his own personal, albeit sincerely held, opinion on nudity".[60]

The Court's focus was, in this way, on how others would react to Mr Gough's naked body, and on the duty that he was under "to demonstrate tolerance of and sensibility to the views of other members of the public", bearing in mind the "behaviour that they might consider offensive".[61] The framing was one of potential alarm and distress, potential offence, and potential crime and disorder; and it meant that Mr Gough's manifestation of his conception of life and belief in social nudity had to be compliant with this infinite range of uncertainties, insecurities, and anxieties. The way in which he expressed himself was interpreted

[60] *Ibid.*, para.158.
[61] *Ibid.*, para.175.

as constituting a repeated 'imposition' of "antisocial conduct" upon "unwilling" and "unwarned" innocent others;[62] and the basis of the regulation of his naked body was, therefore, the alarm and insecurity of these others. In other words, the issue was with the reaction that his naked body induced in others – with the interpretation that was projected onto his body by these others; with what his naked body became under the gaze of these others.[63] And so just as in the 'living together' cases, the regulation here was based on unease and anxiety.

If we draw these cases on the ethical significance of the exposure of the body together, we could say that they are about symbolic action upon the body. The focus, we could say, is on the appearance of the body, and on a conception of 'public order' that the body is taken to need to signify. This reading would, perhaps, be unsurprising; after all, as Mary Douglas puts it, the physical and social bodies are always in interaction: "[t]he social body constrains the way the physical body is perceived".[64] But there is surely something more at stake here than the regulation of the appearance of this body. The reasoning unravelled in the pages above reveals a deepening of law's vision of the basic dependence of the self on the other; what appears to emerge is the use of the other to preserve fundamental assumptions about the self. This is because in the course of projection, "subject is turned into object and object into subject";[65] problems of the self are perceived as being problems pertaining to the other. The nature of mutual recognition, as we have seen it so far, means that the act of recognising the other involves the presupposition that it is possible for the self to be seen by that other. In the manipulation of the failure to recognise the other into a perception of failure on the part of that other (which is the nature of projection), there is a preservation of the basic assumption that it is possible for the self to be seen at all.

The preservation of this basic assumption in this way is, in fact, a function of defence mechanisms like projection according to George Vaillant, who has

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[62] *Ibid*., para.176.
[63] On this intersubjective, 'gaze'-based quality of nakedness, see R. Barcan, *Nudity: A Cultural Anatomy* (2004, Berg), p23.
[64] M. Douglas, *Natural Symbols: Explorations in Cosmology* (1970, Barrie & Rockliff: The Cresset Press), p65.
[65] G. E. Vaillant, *The Wisdom of the Ego* (1993, Harvard University Press), p46.

elsewhere described how the deployment of such mechanisms reflects the "remarkable capacity" of the ego for "life-preserving distortion".[66] He suggests that they serve an adaptive function, and that in contexts of change and disruption they enable our most basic assumptions (which are otherwise under threat) to be preserved whilst the more gradual process of adapting these assumptions takes place.[67] In the cases considered above, the form that this takes is that of the projection of insecurity onto the other, such that the interpretation that the self makes is of a sense of having been unsettled by the other. This projection serves, in such cases, to preserve two fundamental assumptions: an assumption of the insecurity of the self (now experienced as having its source in the other) and an assumption that the self can be seen at all (just not by this other, who cannot be seen, and therefore cannot see). The act of resisting the other is also, then, an act of expressing a profound need for that other. The dependence between self and other further deepens, therefore.

4.3.3 Vulnerability

In the interpretation that is made of the self as having been unsettled by the other, the body of the other becomes something onto which insecurities are projected. It becomes a reflection of these insecurities. But as Emmanuelle Bribosia and Isabelle Rorive point out, in the context of the face veil bans, there is a question to be asked here about how to reconcile this sort of regulation, based on public insecurity, with the vision of freedom of expression articulated in *Vajnai v Hungary (2008).*[68] There, in the context of its examination of whether Mr Vajnai's conviction for wearing the symbol of the international workers' movement in public had violated his right to freedom of expression, the ECtHR emphasised that although, in the context of Hungary's history, the display of the red star "may create uneasiness among past victims and their relatives", "such sentiments,

[66] *Ibid.*, p9.
[67] On which in European human rights law see further Ch.5.
[68] E. Bribosia and I. Rorive, 'Insider Perspectives and the Human Rights Debate on Face Veil Bans', in E. Brems (ed.), *The Experiences of Face Veil Wearers in Europe and the Law* (2014, Cambridge University Press), 163-183, p174.

however understandable, cannot alone set the limits of freedom of expression".[69] In particular, "[g]iven the well-known assurances which the Republic of Hungary provided legally, morally and materially to the victims of communism, such emotions cannot be regarded as rational fears".[70] And finally: "a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs in a democratic society, since that society must remain reasonable in its judgement".[71]

Although the arguments about public insecurity were not quite as explicit in the face veil ban cases and in the public nudity case as they were in *Vajnai v Hungary,* they still supplied a subtle undertone to the submissions of the Governments and the reasoning of the Court; and the question remains, therefore, of how to reconcile the competing conceptions of freedom of expression that emerge from these cases. The distinguishing feature appears to be the notion of "rational fears": the concerns raised in *Vajnai v Hungary* were explicitly cast by the Court as not being rational.[72] Supposing, then, that there is, at some level, something about the fears and insecurities expressed in the cases concerning the ethical significance of the exposure of the body that is being deemed 'rational', we need to consider what that is. We already know that the capacity of the appearance of another to unsettle us is cast as being grounded in our own capacity to project meaning. In this regard, bodily appearance, as a form of expression, is in many ways more challenging than, for example, speech, because it more clearly leaves as open a range of possible interpretations – a range that is only limited by the imagination of the one interpreting the expression. If, then, we are unsettled by the appearance of a naked body in the street, this may be because that body is reflecting the insecurities that we have projected onto it. In this way, the body of the other can reveal back to us our own insecurities; and, as we have already seen, it is this insecurity that is the part of the self that is seen when we see the other in this way according to European human rights law.

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[69] 33629/06, *Vajnai v Hungary* (2008), para.57.
[70] *Ibid.*, para.57.
[71] *Ibid.*, para.57.
[72] *Ibid.,* para.57.

If this element of the vision of mutual recognition in European human rights law is profoundly self-centric in quality, its nature – of a notion of unsettling – also indicates something more. For inherent within the feeling of being unsettled is also a sense of a loss of control; and here, the unsettled, projecting individual has been made into a victim by herself, and of herself. The sense is that in her quest to retain control (and therefore a sense of continuity), she has realised her essential vulnerability to loss. Here, the vulnerability is to loss of control; but there is also a semblance of a loss of sense of self reflected in the process of the projection of underlying insecurities onto the other. In this way, the suggestion of European human rights law here seems to be that this element of mutual recognition – this element which is about seeing something of our own self – is about seeing our insecurities and our vulnerabilities. Conceived of like this, the underlying idea in the cases considered above comes to be that it is through the other that we see and confront our own vulnerability. This, in turn, implies a fundamental dependence on the other to gain exposure to this vulnerability. The sense implicit in the case law is that there is something rational about a fear of this vulnerability. And yet, at the same time, there is a paradox at play here, which means that this vulnerability is kept at a distance and observed through the other. The paradox is that we need, according to European human rights law, to be able to see our vulnerability – our vulnerability that we fear.

4.4 Loss of the other

The account that emerges is one in which we are cast as being dependent on the other to be recognised at all and to confront and manage our insecurities and vulnerabilities. As part of this, we gain exposure to our vulnerability to loss. The vulnerability that we have discussed thus far is vulnerability to loss pertaining to individual insecurities. But there is also the question of our vulnerability to the loss of the other, which is necessarily a significant part of a vision of mutual recognition which posits the other as being so fundamental to the constitution of the self. In this section, I examine the way in which this vulnerability to loss is envisaged in European human rights law, focusing on the loss of specific others to death. In cases of specific others – objects of attachment – the form of our recognition by

the other is deemed particularly significant to our sense of self. This has its origins in European human rights law's conceptualisation of individual presence, which, as we saw in Chapter 2, is partly about the way in which close others are imagined to figure in our sense of place.[73] Our loss of such an other is, within European human rights law's vision, the ultimate expression of our vulnerability, consisting in a physical loss and in a loss of recognition. I suggest that grief in this context is consequently expressed in two needs: a need for certainty and control over the dead body in question (*4.4.1*) and a need for a representation of the lost object (*4.4.2*). Once these two needs have been met, then, European human rights law suggests, the work of mourning can begin. This consists in the incorporation, by the surviving individual, of the representation of the lost object, such that loss is conceived of as necessitating a renegotiation of the original form of recognition and a reconstitution, therefore, of its effects (*4.4.3*).

4.4.1 Lost objects of attachment

Grief at the loss of a loved one is conceived of in European human rights law as being expressed, in the first place, in terms of a sustained need, on the part of surviving relatives, for the dead body of their lost object of attachment. In particular, this need is for certainty and control over what will happen to the dead body – certainty that the organs of a child will not be removed without parental consent, for instance,[74] or that tissue will not be removed from the body of one's spouse without consent.[75] This latter issue arose in *Elberte v Latvia (2015),* in which Ms Elberte complained that the removal of tissue from her late husband without her consent or knowledge and the fact that he had been buried with his legs bound had violated her Convention rights.

The ECtHR found that not only had there been a violation of Ms Elberte's Article 8 right (since the interference with her right, as the closest relative, "to express consent or refusal in relation to tissue removal" was not in accordance

[73] See Ch.2, part 2.2.
[74] E.g., 4605/05, *Petrova v Latvia* (2014).
[75] E.g., 61243/08, *Elberte v Lativa* (2015).

with the law),[76] but that the level of Ms Elberte's suffering here had amounted to degrading treatment in violation of Article 3. She had only learned about the removal of tissue from her husband two years after his funeral, and she had subsequently endured years of "uncertainty, anguish and distress in not knowing what organs or tissue had been removed...and in what manner and for what purpose this had been done".[77] On top of the uncertainty that she had experienced as to what had happened, she had also then suffered knowing of the "intrusive nature of the acts carried out on her deceased husband's body".[78] A subtle connection was therefore articulated between Ms Elberte's own rights in relation to the fate of the body of her deceased husband and the more general notion of respect for the human body after death.[79]

This connection hinges on the recognition of the dead body as an object of attachment in its own right. This also arose in *Marić v Croatia (2014),* in which the ECtHR found that Mr Marić's right to respect for his private and family life had been violated on account of the fact that the hospital in question had disposed of the remains of his full-term stillborn child as clinical waste, leaving Mr Marić and his wife in great distress and without any knowledge of where their child had been buried.[80] The basis of the violation here was that the interference with Mr Marić's rights had not been in accordance with the law; but in finding that there had been an interference in the first place, the Court also implied that the hospital had handled the case with insufficient sensitivity, especially in the light of the fact that "[i]n an area as personal and delicate as the management of the death of a close relative...a particularly high degree of diligence and prudence must be exercised".[81] Whereas for the couple, the baby had a social identity as their child, this went unrecognised in the hospital's classification of the baby's body as 'waste'. The situation of Mr Marić and his wife had been exacerbated by the fact that they had been left without any knowledge as to where their baby had been buried; and this

[76] *Ibid.*, para.140.
[77] *Ibid.*, para.139.
[78] *Ibid.*, para.142.
[79] *Ibid.*, para.142.
[80] 50132/12, *Marić v Croatia* (2014).
[81] *Ibid.*, para.64.

situation was worsened further still when it came to light that their baby's body had been cremated along with clinical waste. Not only, therefore, had their child's not been recognised as such a body, but they had been left without a material focus for their grief.

That the dead body of a relative – or knowledge of its location and place in the world – can constitute such a material focus further underlies cases concerning participation in funeral arrangements[82] and the return of bodies to families; and in relation to the latter line of case law, the ECtHR has, for example, given short shrift to delay between a post-mortem and the eventual return of a body to the family.[83] In *Girard v France (2011),* the Court stated that the applicants had a right to bury their daughter, which was protected by their Article 8 right to respect for their private and family life;[84] and it considered that the four-month gap between the authorities' decision to return the samples taken from the exhumed body of the applicants' daughter and the actual return of the samples constituted an unjustifiable delay and one which violated the Article 8 rights of the applicants, who were awaiting the samples in order to conduct a final burial ceremony.

The issue in relation to the dead body of a close relative is not only, therefore, that of having some semblance of control over the body, but also of continuing ties to the relative. This was expressed by the ECtHR in *Abdulayeva v Russia (2014)*, in which the applicant complained that the refusal of the authorities to return her son's body to her – on the basis of a legal provision which prevented the authorities from returning the bodies of terrorists who had died "as a result of the interception of a terrorist act"[85] – breached a number of her Convention rights, including her right to respect for her private and family life. The Court emphasised the detrimental effect of the measure on Ms Abdulayeva, who had been "deprived of an opportunity, otherwise guaranteed to the close relatives of any deceased person in Russia, to organise and take part in the burial of the body of her son and

[82] E.g., 55525/00, *Hadri-Vionnet v Switzerland* (2008).
[83] E.g., 37794/97, *Pannullo and Forte v France* (2001), paras.35-40.
[84] 22590/04, *Girard v France* (2011), para.101.
[85] 38552/05, *Abdulayeva v Russia* (2014), para.21.

also to ascertain the location of the gravesite and to visit it subsequently".[86] This was "particularly severe", it considered, since not only did it not "result from her own action, inaction or fault of any kind", but it effectively involved "permanently cutting the links between the applicant and the location of the remains of the deceased".[87] And so although the objectives of public safety, the prevention of disorder, and the protection of the rights and freedoms of others could justify some limitations on Ms Abudlayeva's rights in respect of the funeral arrangements, these objectives were not a "viable justification" for denying her "any participation in the relevant funeral ceremonies or at least some kind of opportunity for paying her last respects to her son".[88] The Court considered that the authorities had failed to consider the possibility of an alternative, and less detrimental approach; rather, the measure here had had "a purely punitive and arbitrary effect on the applicant, by switching the burden of unfavourable consequences in respect of the deceased person's activities from him onto the applicant".[89] There had, consequently, been a violation of Article 8.

Knowledge of the location of a loved one's burial site is, in this way, deemed important for surviving relatives. It operates as an anchor and a point of focus for them, and it thereby comes to represent a form of continuity in the relationship in question. This means that the dead body is not only envisaged as being an object of attachment in itself but as also being a continuing object of attachment. And so in the articulation of the grief that underpins the expression of the significance of the dead body and of continuing ties to this body from the perspective of relatives, there is also the beginnings of a subtler expression – of the continuing social presence of this body – which derives here exclusively from the fact that this body is thought of and related to. The body of the loved one continues to play, in this way, a vital role in the continuing assumptive frameworks of surviving individuals.

[86] *Ibid.*, para.39.
[87] *Ibid.*, para.39.
[88] *Ibid.*, para.44.
[89] *Ibid.*, para.46.

4.4.2 Representation

The need of the bereaved for the form of social presence that we are describing here has elsewhere been cast by Vamik Volkan in terms of a turn towards representation. He suggests that "[t]he physical loss (or even a threat of physical loss) [of a person or thing] turns the adult mourner's attention to the object representation of what was lost".[90] In European human rights law, the notion of the continuing social presence of the dead body of a relative implies this idea of representation, for the body is not only presented as being an object of attachment in itself, but as being a representation of the person who was and the whole "form of life" that went with her being.[91] But European human rights law also goes further than this, in that it implies that there is a need to stabilise an account of the deceased and to represent this by way of a narrative of the life that was lived. This narrative representation of the lost object is conceived of as being in the interests of the surviving relatives, in that it is a representation that they can appeal to.

An example is *Elli Poluhas Dödsbo v Sweden (2006)*, in which Mrs Poluha – whose application to the ECtHR was pursued through her five children following her death in February 2003 – complained that the refusal of the domestic authorities to allow her to transfer the urn containing her husband's ashes from a family grave in Fagersta (where the family had lived) to her family burial plot in Stockholm violated her Article 8 rights. Mrs Poluha herself intended to be buried in the Stockholm plot (and she was in fact subsequently buried there in 2003), and she argued that not only did she no longer have any connection to Fagersta, as she had moved to Västerås to be closer to her children, but that her children had agreed to the transfer and that she was sure that her husband would not have objected to it. The authorities refused the request, however, on the ground of the notion of "a peaceful rest" under the domestic Funeral Act.[92] Before the ECtHR, the Swedish

[90] V. D. Volkan, 'Individuals and societies as "perennial mourners": Their linking objects and public memorials', in B. Willock, L. C. Bohm, R. C. Curtis (eds.), *On Deaths and Endings: Psychoanalysts' reflections on finality, transformations and new beginnings* (2007, Routledge), 42-59, p44.
[91] See J. Lear, 'Waiting for the Barbarians', in *Wisdom Won from Illness: Essays in Philosophy and Psychoanalysis* (2017, Harvard University Press), 80-102, p98.
[92] 61564/00, *Elli Poluhas Dödsbo v Sweden* (2006), para.11.

Government further argued that the interference with Mrs Poluha's Article 8 rights pursued the principle of respect for the deceased (which gave rise to the principle of "the sanctity of graves"), and that it therefore had as its objective the legitimate aims of the prevention of disorder, the protection of morals, and the protection of the rights of others.[93]

The Court framed the case as calling for a balance between "the individual's interest in having a burial transfer" and "society's role in ensuring the sanctity of graves", in the course of which exercise a wide margin of appreciation was to be granted to the State.[94] It considered that whilst, on the one hand, the transfer of the urn would be straightforward and would not entail any public health considerations, there were, on the other hand, "no indications that the applicant's husband was not buried in accordance with his wishes".[95] The Court assumed, rather, that his wishes must have been taken into account when he was first buried – a time when he had no connection to Stockholm. He was buried in Fagersta, "in the town where he had lived for twenty-five years, since his arrival in Sweden, and where he had worked and raised his family".[96] Moreover, Mrs Poluha was not precluded from being buried in the same plot; and the Court noted to this end that she had continued to live there for seventeen years following her husband's death. It concluded that the domestic authorities had struck a careful balance between the interests at stake, and that Mrs Poluha's Article 8 rights had not been violated.

The Court, in this way, accorded significant weight to the presumed placebound ties of Mrs Poluha's deceased husband to Fagersta. It assumed that he would have wanted to stay there, even as his widow moved to a different town; it assumed that since the couple's life together had been in Fagersta, that is where he would have wanted to stay. The Court's reasoning thus presupposed that Mrs Poluha's husband had actually expressed a wish to be buried in Fagersta – when, in fact, the evidence was that he had not expressed any wishes at all as to his burial[97]

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[93] *Ibid.*, para.20.
[94] *Ibid.*, para.25.
[95] *Ibid.*, para.26.
[96] *Ibid.*, para.26.
[97] *Ibid.*, para.13.

– and it also disclosed a lack of attention to the original framing of the case. For although it initially presented the matter in terms of Mrs Poluha's interest in having the urn transferred as against society's interest in protecting the sanctity of graves, its subsequent reasoning departed from this. Rather, Mrs Poluha's desire to transfer the urn was pitted against the presumed desire of her late husband; and the impression conveyed was that she was not acting in accordance with his wishes or interests. The Court, meanwhile, articulated what it took to be the wishes of Mrs Poluha's dead husband.[98]

At the same time, however, we can see in this same reasoning the Court setting out a representation of the couple's life as having taken its complete form in Fagersta. Fagersta, it suggested, was the representation of the common life of the couple; and it was there that the remains of Mrs Poluha's husband were to stay, in that ending. One way of reading this reasoning would be to say that it was oriented towards establishing Fagersta – the place, and the narrative of the couple associated with it – as being a representation, for Mrs Poluha, of her lost object. This reading is consistent with the vision set out in the slightly later case of *Jäggi v Switzerland (2006)*, in which Mr Jäggi, who was sixty-seven years old, complained that the refusal of the domestic courts to allow him to have a DNA test on the remains of A.H., his putative biological father (but who had always denied paternity of Mr Jäggi and had refused to undergo paternity tests), violated his right to respect for his private life. At issue in this case was, therefore, on the one hand Mr Jäggi's right to "establish his paternity" (as an important element of his "right to an identity", and, therefore, of his private life[99]) and, on the other hand, "the right of third parties to the inviolability of the deceased's body, the right to respect for the dead, and the public interest in preserving legal certainty".[100]

The Court considered that A.H.'s family had not presented "any religious or philosophical grounds for opposing the taking of a DNA sample" – a measure

[98] For a similar example of this claimed capacity to speak, see also 46470/11, *Parrillo v Italy* (2015), para.196 (discussed in Ch.3, part 3.2.1).
[99] 58757/00, *Jäggi v Switzerland* (2006), para.37.
[100] *Ibid.*, para.39.

which, it added, was "relatively unintrusive".[101] The only reason that A.H.'s remains had not been moved up until now was that Mr Jäggi had renewed the lease on his tomb up until 2016: "[o]therwise, the peace enjoyed by the deceased and the inviolability of his mortal remains would already have been disturbed at that time", as it would be in 2016.[102] And so, the Court considered, "[t]he right to rest in peace therefore enjoys only temporary protection".[103] By contrast, Mr Jäggi's interest was an "overriding one", and, the Court concluded, his right to respect for his private life had been violated by the Swiss authorities.[104] Implicit in the Court's reasoning here was the sense that the disruption that a DNA test would impose on the deceased would be minimal by comparison with the lifelong disruption that Mr Jäggi had experienced to his personal identity.

Thus whereas in *Elli Poluhas Dödsbo v Sweden*, the Court considered that the account of Mrs Poluha's late husband's life had been settled and that the place of Fagersta, and the narrative of the life of the couple that was associated with it, was itself a representation of the lost object, in *Jäggi v Switzerland*, the account of A.H.'s life had not been settled and continued to affect the "truth" of Mr Jäggi's personal identity.[105] In particular, in the face of his insecurity and lack of knowledge about whether A.H. was his biological father, Mr Jäggi had been incapable of forming a representation of his biological father – for him, the perpetually lost object – or, indeed, a proper representation of A.H., who was now also a lost object.

The importance of settling an account about the deceased in this way – an account which supplies a representation of the lost object for surviving relatives – also emerges in the line of cases concerning the disappearance of family members that we considered in Chapters 2 and 3.[106] These cases typically concern the anguish caused to relatives by uncertainty as to the fate of their loved ones; and the focus of European human rights law here is on the need of the relatives for certainty and for an account which explains what has happened. And so alongside

[101] *Ibid.*, para.41.
[102] *Ibid.*, para.41.
[103] *Ibid.*, para.41.
[104] *Ibid.*, para.44.
[105] *Ibid.*, para.38. On which notion, see further Ch.3, part 3.4.3.
[106] See Ch.2, part 2.2.2(iii) and Ch.3, part 3.4.2.

the procedural obligation under Article 2 to investigate unlawful or suspicious deaths there is, in the case of a disappearance, an obligation to account for this too.[107] This means that "the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for", and this is even if the point is reached where the death of the person in question may be presumed.[108] Thus even in the absence of knowledge as to the location of the dead body, it must be possible, European human rights law says, to account for how the body arrived in that position. An account as to this must be settled so that relatives can come to terms with what has happened. The focus, in other words, is on settling an account about the person and creating a representation of this person by way of a narrative about the life that was lived.

4.4.3 The renegotiation of recognition

The account of loss depicted in European human rights law involves, therefore, the expression of grief in two needs: a need for the material body of the deceased and a need for a representation of the lost object. Only then, law suggests, can the work of mourning begin. Mourning itself is presented as involving a shift in the mode of relating to the representation of the lost object, and one that involves the incorporation of this representation.

This occurs, in the first place, because the nature of a narrative representation (as the representation of a lost object in European human rights law) is one which is presented as enabling a continuation of a narrative about the person after their death. This continuation occurs in the minds of those who seek, for example, to account for the death of a relative, or to understand or discover things about the life of that relative. It is not just the case, therefore, that the body itself continues to exert an influence upon relatives after death – though this influence, as we have seen, is a significant one, as expressed both in the possible desire for control over the dead body of a relative and for certainty and security as to its fate and in the notion that respect for the dead body of a close relative is

[107] E.g., 16064/90 et al., *Varnava and Others v Turkey* (2009), para.145.
[108] *Ibid.*, para.148.

closely bound up in one's own rights. Rather, there is also the continuing social presence of the individual, as this is expressed in the narrative representation of that individual's life. This is a presence which goes beyond the materiality of that individual's body and rather invokes the idea that "the dead – particularly those in living memory – remain in communion with the living".[109] It secures the continuation of the lost object and prevents it from ever being fully "given up",[110] and it has largely as its object the ontological security – the sense of self and stability – of the surviving relative.[111] A narrative about the deceased is accordingly worked into the narratives of the surviving relatives. It is incorporated into their own accounts of their lives.

This form of incorporation is conceived of in European human rights law as serving to overcome the failure in recognition that inevitably occurs when a specific other, as an object of attachment, is dead. For if recognition by a specific other is fundamental to an individual's sense of self, then in the face of that other being dead, there is a need to derive from somewhere – from within, even, European human rights law suggests – the condition that would have been drawn from that other, in order to be able to persist at all. The suggestion seems to be that by incorporating a representation of the lost object, the individual secures this for herself. In the Freudian tradition of psychoanalytical thought,[112] this moment of incorporation would typically be deemed the moment of the potential acceptance of the loss; thus, as Jonathan Lear puts it, Freud's suggestion is that "we come to accept the loss of a person in the external world by re-creating that person imaginatively in our internal world".[113] The account put forward by European human rights law does not go so far as to specify incorporation in terms of acceptance, however. Rather, incorporation is conceived of as securing a form of lost recognition, with the underlying assumption being that the way in which

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[109] 56760/00, *Akpinar and Altun v Turkey* (2007), Partly Dissenting Opinion of Judge Fura-Sandström, para.7, drawing on 30 BVerfGe 173, *Mephisto* (1971, German Constitutional Court).
[110] S. Akhtar, *Matters of Life and Death: Psychoanalytic Reflections* (2011, Karnac Books), p106.
[111] *Ibid*., esp. p155-159.
[112] See S. Freud, 'Mourning and Melancholia' (1917) in *The Standard Edition of the Complete Psychological Works of Sigmund Freud: On the History of Psycho-Analytic Movement, Papers on Metapsychology and Other Works – Vol XIV* (transl. under J. Strachey) (2001, Vintage), 243-258.
[113] Lear (2017), above n91, p98.

the representation of a lost object is related to in death constitutes a continuation of the way in which the object was related to in life. The death of a loved one is accordingly envisaged as entailing a renegotiation of recognition.

This incorporation of a representation of the object enables the possibility of the reorientation of the individual in the face of her loss. The representation is used, in this way; and this is not least because incorporation here involves managing the loss of the object itself (the death of the person) and the threat that this loss poses to the ontological security of the surviving relative.[114] Managing these threats by way of incorporating a narrative representation of the object serves a vital function in European human rights law. It brings surviving relatives to the point and possibility of reorientation.

The account set out in European human rights law here is also, therefore, one in which mourning is conceived of as bringing individuals through to the possibility of reorientation in the face of loss. In this, the account of mourning is also profoundly revealing of the structure of recognition in European human rights law. It reveals the way in which the fragile, yet fundamental, constitution of mutual recognition – which is also a source of the self, in European human rights law – is reconstituted and sustained in the face of loss.

4.5 Conclusion

European human rights law conceives of our fundamental assumptions about the world and about our place in the world as being bound up in our sense of our body – and, in particular, in our sense of bodily integrity; and the right to bodily integrity is conceived of as being about recognition, so that respect for the bodily integrity of another is a matter of recognition of that other. The theory of recognition that emerges on this basis is, as we have seen, a theory of mutual recognition, in which we are conceived of as being dependent on the other to see and be seen. This dependence means two things: that we confront and manage our vulnerabilities

[114] For a parallel account, albeit one of object-usage as opposed to representation-usage, see D. W. Winnicott, 'The Use of an Object and Relating Through Identifications' (1968), in *Playing and Reality* (2005 [1971], Routledge), 115-127.

and insecurities with and through the other; and that recognition by specific others is part of our sense of self, such that in the face of the loss of that recognition, there is a need to reconstitute its effects. Thus the theory of recognition articulated in European human rights law on the basis of its vision of the body emerges as being a theory of the sustenance of the self – a theory in which the need for recognition is conceived of as reflecting and implying a need to sustain continuity and in which our fundamental assumptions to this effect are conceived of as originating in our sense of our bodily self.

– CHAPTER 5 –

Wisdom

5.1 Introduction

In Chapter 4, we saw how European human rights law conceives of our sense of our body as being the basis from which we make fundamental assumptions about the world and about our place in the world, and how a need for recognition is cast as being bound up in these assumptions. This chapter examines how an interaction is envisaged between our fundamental assumptions and our experiences. I argue that a normative account of the management of reality is elaborated in European human rights law, and that this account forefronts a particular manner of integrating experience, understanding, and knowledge that constitutes European human rights law's conception of wisdom.

At the basis of this account of the management of reality is, I suggest, a conception of us as having two needs: a need to preserve our fundamental assumptions, the object of which is the preservation of our sense of identity, and a need to integrate experiences into our frameworks of assumptions, including those experiences that are at odds with our fundamental assumptions (*5.2*). The process of the integration of experience that is articulated on this basis has three stages: a stage of understanding the experience in question; a stage of ascribing meaning to it; and a stage of tolerating it and thereby living with it (*5.3*). The resulting account is one of a normative standard against which our understanding and behaviour is evaluated in European human rights law. But it is also an account that presupposes a vision of what it means to be capable of integrating experience in the first place. More specifically, it presupposes an individual who is capable of accepting responsibility, overcoming emotion, and withstanding influence (*5.4*). I argue that these capacities are conceived of as developing over time into a certain outlook on life towards which the individual is oriented. This supplies a moral orientation to the notion of individual continuity specified in Chapter 3. But it also

implies that this notion of individual continuity has to accommodate a sense of detachment, and this is because the mode of addressing reality that is specified here envisages an individual who is capable of detaching herself from reality.

5.2 The question of reality

We have already seen, and particularly in Chapter 4, that European human rights law envisages us as having a tendency to strive to preserve our fundamental assumptions about the world and about our place in the world. This section examines this tendency and its implications more closely. I suggest that our fundamental assumptions are cast as shaping and underpinning our sense of identity, such that the tendency to strive to preserve our frameworks of assumptions has as its object the preservation of our sense of identity (*5.2.1*). The question that then arises is the question of reality, and, more specifically, of reality that is at odds with our fundamental assumptions (*5.2.2*). I argue that the suggestion made in European human rights law is that to manage reality, we need to integrate experiences into our assumptive frameworks; and this means that we may also need to adapt our assumptions to the reality that we are faced with (*5.2.3*).

5.2.1 Assumptions and identity

Our fundamental assumptions about the world and about our place in the world are conceived of in European human rights law as being bound up in our sense of identity: they are cast as being bound up in the way in which we think of ourselves and articulate ourselves.[1] This is not only in the sense that European human rights law assumes us to make certain assumptions about our self-continuity and our identifiability and recognisability (as discussed in Chapters 3 and 4). It is also in the sense that our fundamental assumptions are themselves presented as securing these same qualities. This is reflected in the idea that we come to learn about ourselves and about what really matters to us as we learn about which of our fundamental assumptions are non-negotiable and which are more malleable and subject to being nuanced over the course of our lives. Our non-negotiable

[1] On this notion of identity see further Ch.2, part 2.4.3.

assumptions are those without which our lives would not make sense to us. They are of the sort that generate, for example, the concern that many people express, according to the ECtHR in its case law on assisted dying, "that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity".[2] Non-negotiable assumptions are fundamental to an individual's sense of ownership of her life. They pertain to her way of conceiving of the meaning of her life.

Our more malleable or developmental assumptions are those assumptions that are deemed essential to our development and to stages of this development, but will, over the course of our lives, be adapted and nuanced. These include the assumptions that children are cast as needing to make about parental authority, such as about the location of their security and safety in a parental figure.[3] This arose in *Popov v France (2012)*, which concerned the administrative detention of a couple and their young children in unsuitable conditions. One of the contributing factors to the ECtHR's finding that there had been a breach of Article 3 of the ECHR in relation to the children was that the situation "created anxiety, psychological disturbance and degradation of the parental image in the eyes of the children".[4] Implicit in the Court's reasoning in this respect was the idea that the children needed to be able to hold on to an image of their parents as protectors. The detention of the family in an insecure and stressful environment, which had been "ill-adapted to the presence of children" and in which the parents were themselves distressed and powerless, was not conducive to this.[5] Rather, it would have harmed the fundamental assumptions that the children made and relied on about the location of their safety and security in their parents: assumptions that were predicated on an internal image of their parents and that were bound up in their own sense of self.

[2] 2346/02, *Pretty v UK* (2002), para.65.
[3] See further Ch.3, part 3.3.
[4] 39472/07 and 39474/07, *Popov v France* (2012), para.101.
[5] *Ibid.*, para.95 et seq.

Ultimately, such developmental assumptions will, by definition, change over time. But they will only do so if they are enabled to be held in the first place; thus, as we saw in Chapter 3, an understanding of one's childhood is cast in the case law as being necessary for self-understanding;[6] and in Chapter 2 we saw how although European human rights law conceives of the senses of place and orientation as working together, the former is somewhat prior to the latter insofar as it is necessary to have some sense of place in order to be able to orient oneself at all.[7] The point about our fundamental assumptions is that our sense of identity is cast as being developed in relation to our developmental assumptions[8] and as being shaped and underpinned by the non-negotiable assumptions that we come to form over time. We know from Chapters 2, 3, and 4 that we are conceived of as having, furthermore, a tendency to strive to preserve our assumptions – assumptions about who we are and who we are taken to be (Chapter 2), about our self-continuity (Chapter 3), and about our capacity to be recognised (Chapter 4). What we see when we consider the way in which our assumptions and our identity are cast as being bound up in each other is that the notion that we have a tendency to strive to preserve our fundamental assumptions is, at the same time, a notion that we have a tendency to strive to preserve our sense of identity.[9]

5.2.2 Assumptions and reality

The question that then arises is the question of reality. This is a question, in particular, of what happens when a tension arises between our assumptions and reality – of what happens when the individual comes up against a reality that is at odds with her fundamental assumptions. As we saw in Chapter 4, George Vaillant has argued that in contexts in which "we cannot bear conflict or when change in our lives happens faster than we can accommodate it",[10] defence mechanisms enable coping and adaptation. They do so, he suggests, by temporarily

[6] Ch.3, part 3.4.1.
[7] Ch.2, part 2.2.1.
[8] This is made especially clear by European human rights law's vision of child development and of the assumptions that children need to make. See further Ch.3, parts 3.3 and 3.4.1.
[9] On which see further Ch.2, part 2.4.3.
[10] G. E. Vaillant, *The Wisdom of the Ego* (1993, Harvard University Press), p108.

"clouding…reality through thoughts, feelings, and behaviours";[11] and the idea is that this then protects the individual and buys her time to adapt to the reality. In European human rights law, the sense is that the act of striving to preserve fundamental assumptions in the face of a contrary reality can be similarly used to defend against reality. This was articulated clearly in *Jehovah's Witnesses of Moscow and Others v Russia (2010)*. The case concerned the dissolution of the religious community of Jehovah's Witnesses of Moscow by the Russian courts – a dissolution which, the ECtHR found, had breached the fundamental rights of the community and its members, including their rights to freedom of religion, association, and expression. The ECtHR ruled that the domestic courts had not adduced "relevant and sufficient" reasons in support of the grounds that they had relied on for dissolving the community (these grounds being that "the applicant community forced families to break up, that it infringed the rights and freedoms of its members or third parties, that it incited its followers to commit suicide or refuse medical care, that it impinged on the rights of non-Witness parents or their children, or that it encouraged members to refuse to fulfil any duties established by law").[12] In particular, when it came to the claims that had been raised by relatives of the members of the community about the effect of the community on their family members, the ECtHR considered that the domestic courts had not sufficiently considered the way in which these claims had been clouded by the feelings and frustrations of the relatives themselves.

As to the charge that the community had forced the break-up of the families of its members, and the blame that families had levelled on the community for deterioration in their relationships with their relatives, therefore, the ECtHR's view was that much of this blame stemmed from "the frustration that non-Witness family members experienced as a consequence of disagreements over the manner in which their Witness relatives decided to organise their lives in accordance with the religious precepts, and their increasing isolation resulting from having been left outside the life of the community to which their Witness relatives adhered".[13]

[11] *Ibid.*, p11.
[12] 302/02, *Jehovah's Witnesses of Moscow and Others v Russia* (2010), para 160.
[13] *Ibid.*, para.111.

Quite often, it stated, the "source of the conflict" and the estrangement that was caused by the unhappiness of family members about the "self-dedication to religious matters" of their relatives had its origins in "the resistance and unwillingness of non-religious family members to accept and to respect their religious relative's freedom to manifest and practise his or her religion that is the source of conflict".[14] Similarly, the claim brought by family members that the community had damaged the health of its members (in that it had led to "sudden and negative changes of personality") "reflected their subjective assessment of the situation, strongly coloured by their frustration and estrangement from relatives".[15]

The ECtHR's view of this case was, therefore, that the complaints that had been raised by relatives of members of the community during the course of the domestic proceedings may have had their roots in an attempt on the part of those relatives to resist the reality of the way in which their family members had chosen to live. Implicit in the Court's reasoning here – and in the language that it used to describe the 'frustration', 'resistance', and 'unwillingness' of the relatives – was the sense that the relatives may have been trying to preserve fundamental assumptions about themselves and their family members. The instruction issued by the ECtHR to the domestic courts in this regard was simply that without close consideration of the reasons that the relatives had for their complaints, the domestic courts risked becoming complicit in the perpetuation of what was essentially a fantasy that the relatives had created.

5.2.3 The need to integrate experience

The question of reality – and of reality that is at odds with our fundamental assumptions – is, in this way, a question of the management of reality. The suggestion made in European human rights law (as was implicit in the ECtHR's reasoning in *Jehovah's Witnesses of Moscow and Others v Russia*, considered above) is that the act of striving to preserve our fundamental assumptions in the face of a contrary reality is not a mode of managing reality as such. Rather, the idea

[14] *Ibid.*, para.111.
[15] *Ibid.*, para.145.

articulated is that in order to manage reality we need to integrate experiences into our assumptive frameworks and thereby into our sense of identity.[16] An example of this comes from case law in which parents are revealed to be holding on to a particular idea of their child in the face of a contrary reality. This was at issue in *Sbârnea v Romania (2011)*, which concerned the complaint of Mr Sbârnea that the authorities had failed to take action to enforce a judgment concerning contact with his daughter, in breach of his Article 8 right to respect for his family life. Mr Sbârnea and M.S. had divorced in 1998, when their child, E., was almost four years old. For a few years, Mr Sbârnea and E. had a "close and affectionate" relationship,[17] but then, during the Christmas holiday of 2002, he told her that he was remarrying and that he and his new wife were expecting a baby. Thereafter, E. refused to meet him on her own. Mr Sbârnea's explanation for this was that M.S. was "trying to punish him by preventing him from having contact with his daughter, after she realised that he was starting a new life and that the separation from her was therefore final".[18] He blamed M.S. for the deterioration in his relationship with E., and he complained that he had been put "in a position" in which he was unable "to exert his parental role" and that his "authority as a father" had not been recognised.[19] He also blamed the public authorities, who, he considered, had failed to convict M.S. for what he alleged was her non-compliance with the judgment defining his contact rights.

In assessing this case, the ECtHR noted that at the time that Mr Sbârnea lodged the criminal complaint against M.S. (in which he alleged that she had not complied with the contact judgment), it did not appear that "his relationship with the child was obstructed to the extent that they had no contact or that the mother [had] prevented him from seeing or contacting the girl".[20] Nevertheless, Mr Sbârnea had still "gained the firm belief that M.S. was discrediting him in front of

[16] See, e.g., 52502/07, *Aune v Norway* (2010), at para.70 on the problems that A (who was in foster care) had been exposed to through his biological parents (e.g., they had been "heavy drug abusers" and "he had been exposed to serious ill-treatment") and how these elements of his background would all have to be "integrated into his identity".
[17] 2040/06, *Sbârnea v Romania* (2011), para.8.
[18] *Ibid.*, para.10.
[19] *Ibid.*, paras.90, 97.
[20] *Ibid.*, para.117.

E. and that this led to the girl's change of attitude";[21] and he had consequently lodged the complaint because "he wanted M.S. sanctioned, considering that this would force her to act in such a way as to change the girl's attitude towards him".[22] The Court concluded, however, that the reason for the lack of contact between Mr Sbârnea and E. was not that E.'s mother had prevented this, nor that there had been a failure on the part of the authorities to encourage contact. Rather, E. had not wanted to have contact with her father – something which had not been helped by Mr Sbârnea's pursuit of the criminal complaint against her mother and the extensive investigations and proceedings that she had been consequently involved in.[23] Whereas Mr Sbârnea had focused his efforts on "obtaining an official acknowledgement of his firm belief that M.S. was exerting a negative influence on the child", the reality was that E. did not want contact and had, furthermore, expressed that "she did not feel that [Mr Sbârnea] attempted to understand her point of view or to respond to the wishes that she had expressed so many times".[24]

Underlying the ECtHR's judgment – and particularly its emphasis on the belief that Mr Sbârnea had formed about M.S.'s purportedly negative influence – was the notion that Mr Sbârnea was striving to retain a particular idea of his child and of his former partner. This is a common feature of the case law in which the ECtHR concludes that the belief of a non-resident parent in the negative influence of the other parent on their child is just that – a belief – and one which can serve to obscure the reality that, for example, their child does not want to have contact with them.[25] At the same time as the ECtHR implies that fixation on such a belief is harmful insofar as it obscures reality, however, it also seems to imply that this kind of belief serves a protective function, in that it enables the individual in question to retain a particular idea of their child and former partner and to thereby preserve particular assumptions that are fundamental to his or her sense of self. The sense is that it might well be easier to adopt the view that the child has been

[21] *Ibid.*, para.118.
[22] *Ibid.*, para.118.
[23] *Ibid.*, paras.122, 137.
[24] *Ibid.*, para.137.
[25] See, e.g., 805/09, *Pascal v Romania* (2012); 13589/07, *Cristescu v Romania* (2012); 22266/04, *Rytchenko v Russia* (2011).

misled by the other parent than to concede that the child is expressly refusing contact, and that it might be easier, too, to conceive of the negative influence in question as having its source in the other parent rather than contemplating that it may lie in oneself. Such thinking enables the preservation of an idea about the child (and particularly about the need of the child for oneself), about one's parental authority (that it is continuing), about the other parent (who emerges as a continuing object for the projections of the self), and about the self (and particularly about the location of blame outside of oneself). What seems to be indicated is that a focus on preserving these ideas – which both support and express fundamental assumptions about the self – can take the place of an accession to a reality that is harder to bear. But critically, this is cast as only serving to signal the existence of the need to face up to reality and to integrate experience itself.

5.3 The integration of experience

On the one hand, therefore, European human rights law envisages us as having a need to preserve our fundamental assumptions, the object of which is the preservation of our sense of identity. On the other hand, we are cast as having a need to integrate experiences into our frameworks of assumptions, and to accordingly face up to reality that is at odds with our assumptions. In the course of the struggle that takes place between these needs, two conclusions are drawn in European human rights law about the nature of the integration of experience. The first is that the act of striving to preserve assumptions that run counter to reality can sometimes be taken to signal a need to adapt to that reality, which is what we saw in the preceding pages. The second is that we are portrayed as taking a while to integrate experiences that require an adaptation in our fundamental assumptions. A vision of what it means to integrate experience (and therefore to adapt our assumptive frameworks) is in this context articulated. This is presented as having three stages: a stage of understanding the experience in question by reference to the reasons for it and its causes (*5.3.1*); a stage of ascribing meaning to the happening (*5.3.2*); and a stage of locating the self in relation to the experience by tolerating the experience and living with it (*5.3.3*).

5.3.1 Understanding experience

The first stage of integrating experience in European human rights law is a stage of understanding the experience in question by reference to the reasons for it and its causes. This is a stage of examining why and how something has happened. Information plays an important role here. In child protection cases, for example, where State authorities have removed children from their homes in response to child abuse allegations, the ECtHR has been clear that "[a] parent may claim an interest in being informed of the nature and extent of the allegations of abuse made by his or her child", and that this is "relevant not only to the parent's ability to put forward those matters militating in favour of his or her capability in providing the child with proper care and protection but also to enable the parent to understand and come to terms with traumatic events affecting the family as a whole".[26] The role of information in these cases is twofold: it enables the parent to deal with the allegations that have been made (and, therefore, to be involved in the decision-making process about the future care of the child) and it is necessary in order for the parent to process ("to understand and come to terms with") what has happened.[27]

The notion of understanding that is articulated in this way is cast as being bound up in the individual's own self-understanding. An example is *Silva and Mondim Correia v Portugal (2017),* in which Mr Silva and Mr Correia alleged that the domestic courts' dismissal of their paternity proceedings (on the ground that their claims were time-barred) breached their Article 8 rights to respect for their private lives. The ECtHR, in assessing this case, emphasised that the time-limit on instituting proceedings to establish judicial recognition of paternity was, under the Portugese Civil Code, ten years from the date of reaching majority, with an additional period of three years being applied following certain circumstances (such as where an individual became aware later on in life of something that would

[26] 28945/95, *T.P. and K.M. v UK* (2001), para.80.

[27] See also, in a different way, the importance ascribed to understanding in the context of the Article 6 right to a fair trial. Article 6 requires that "the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness" (34238/09, *Lhermitte v Belgium* (2016), para.67).

justify bringing proceedings). Mr Silva and Mr Correia had, however, instituted proceedings when they were aged sixty-eight and forty-four years old respectively ("many years after coming of age") and moreover, they had always known the identities of their biological fathers, meaning that they fell outside the supplementary three-year allowance too.[28] The Court considered that the applicants had "shown an unjustifiable lack of diligence in instituting paternity proceedings in that they have waited fifty and twenty-six years, respectively, since reaching the age of majority to seek to have their paternity legally established".[29] The fact that they had a "vital interest in having their biological truth legally established" did not itself "exempt them from complying with the requirements laid down by domestic law";[30] and, the Court concluded, the application of the time-limit in their case did not entail a breach of Article 8.

The ECtHR's implication here was that the passivity and lack of diligence that Mr Silva and Mr Correia had demonstrated with regards to the issue of the legal recognition of their genetic fathers was unreasonable. More than this, the sense was that they had been unreasonable in expecting the issue to be resolved at this stage at all, particularly given that in contexts of paternity proceedings the interests at stake are never only those of the child but also those of the putative father (and indeed also his family) – who has an interest "in being protected from allegations concerning circumstances that date back many years".[31] The Court's ruling required the applicants to see that the outcome (the dismissal, at the domestic level, of the paternity proceedings) had been caused by the fact that they had missed the deadline for instituting proceedings by several decades; and they were also required to see beyond their own interests and to think about the implications that the bringing of these proceedings had carried for the putative fathers. They were, in other words, required to see their own responsibility in relation to what had happened, and to understand the effects of their actions.

[28] 72105/14 and 20415/15, *Silva and Mondim Correia v Portugal* (2017), para.67.
[29] *Ibid.*, para.68.
[30] *Ibid.*, para.68.
[31] *Ibid.*, para.53.

5.3.2 The ascription of meaning to experience

The conceptualisation of understanding as the first stage in the integration of experience raises the question of experiences that resist understanding entirely. These are experiences that Cora Diamond describes as cases of "the difficulty of reality": "experiences in which we take something in reality to be resistant to our thinking it, or possibly to be painful in its inexplicability, difficult in that way, or perhaps awesome and astonishing in its inexplicability".[32] The experience of this difficulty is "the experience of the mind's not being able to encompass something which it encounters".[33] The problem, therefore, is not only one of a reality that is contrary to our fundamental assumptions; it is a problem also, of being unable to even say that it is contrary to these assumptions: a problem of "an experience of inadequacy in human conceptual life itself".[34] Conceptual adequacy is broader in scope than an assumptive framework. An assumptive framework shapes what Cheshire Calhoun describes as an "expectation frame" that is a "stance...toward the facts".[35] She suggests that the frame that we adopt towards a particular state of affairs licences a way of thinking;[36] thus a disposition to contentment is "a disposition to employ expectation frames that enable us to see our imperfect condition as good enough".[37] Such frames of seeing, which pave the way towards a way of thinking, are shaped by our fundamental assumptions, and they inform how we perceive reality. But they do not exhaust the possibility of our perception of reality in the same way that conceptual adequacy does. Experiences that resist understanding in Diamond's sense are not only contrary to our fundamental assumptions (and therefore also to our 'expectation frames') but they are inexplicable in the sense that we lack the concepts to describe them and the capacity to think them.

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[32] C. Diamond, 'The Difficulty of Reality and the Difficulty of Philosophy' (2003) *Partial Answers: Journal of Literature and the History of Ideas* 1(2), 1-26, p2-3.
[33] *Ibid.*, p2.
[34] J. Lear, 'The difficulty of reality and a revolt against mourning' (2018) *European Journal of Philosophy* 26, 1197-1208, p1200.
[35] C. Calhoun, 'On Being Content with Imperfection' (2017) *Ethics* 127, 327-352, p336.
[36] *Ibid.*, p337.
[37] *Ibid.*, p340.

When we turn to consider European human rights law, we find no experiences which resist understanding in this sense, which is to say that we find no experiences which are taken to express "the sense of difficulty that pushes us beyond what we can think".[38] This is a reflection of the extent of the conception of the integration of experience in European human rights law – something that seems to be primarily a consequence of the way in which the narrative form is used here. We saw in Chapter 3 how even in cases of traumatic experiences – which would otherwise be taken to consist in their resistance to meaning and interpretation – the narrative form is used to contain and account for individual experience.[39] More broadly, the sense is that traumatic events can be understood and brought to terms; thus, as the ECtHR put it in *T.P. and K.M. v UK* (2001) (the case concerning child abuse allegations that I quoted from above), information about the nature and extent of such allegations is important not least "to enable the parent to understand and come to terms with traumatic events affecting the family as a whole".[40]

Narrativisation is, by definition, a way of ascribing meaning to an experience or event; and it is this ascription of meaning to a happening that, put more broadly, forms the second stage of the integration of experience in European human rights law. This stage is one of describing what it is that has happened, and of establishing the meaning of this in relation to the individual's fundamental assumptions about her life. An example that draws out what this means in practice is *Kearns v France (2008)*.

Ms Kearns, an Irish national, had travelled to France in February 2002 to make of use of the French system of anonymous birth (a system that enables women to give birth anonymously and not to be recorded on the baby's birth certificate[41]). She gave birth to a baby girl who was placed in the care of the authorities the following day; and in May, the baby was placed with a couple with a view to her full adoption. In July, Ms Kearns sought the return of the baby,

[38] Diamond (2003), above n32, p12.
[39] See Ch.3, part 3.4.
[40] 28945/95, *T.P. and K.M. v UK* (2001), para.80.
[41] On which see further Ch.2, part 2.3.1.

because she had persuaded her husband (who was not the biological father) to legally recognise the baby and, in addition, the baby's biological father had by now learned of the birth. The French authorities refused her request, however, because the two-month time-limit for withdrawing consent to adoption had expired. Ms Kearns challenged this in proceedings that went on for almost two years; but she was unsuccessful, and in June 2004, a full adoption order was made to the couple with whom the baby had originally been placed. Ms Kearns then took her case to the ECtHR, where she argued that there had been a breach of her right to respect for her private and family life. She complained, in particular, that the time-limit for withdrawing consent to adoption was too short and that she had not received sufficient information and linguistic assistance to understand the implications of registering a birth anonymously.

The ECtHR disagreed with Ms Kearns, concluding that the two-month time-limit specified by the domestic legislation had struck a proportionate balance between the interests at stake. It considered that although the time-limit "may seem brief", it appeared "sufficient to allow the biological mother time to reflect and to reconsider her decision to give the child up".[42] The Court went on to note that although it was "mindful of the psychological distress which the applicant must have experienced", it "[observed] that she was 36 years old at the time, was accompanied by her mother and had two lengthy interviews with the social services after giving birth".[43] The sense was that Ms Kearns had received sufficient support at the time that she had made the decision, that she had had enough time to reflect on this decision, and that she now had to accept the decision that she had made. As to the information provided to Ms Kearns – and her argument "that the French authorities had not taken all the necessary steps to ensure that she understood the precise implications of her actions"[44] – the Court emphasised her agency here too. It noted that she had chosen to travel to France to take advantage of the possibility of anonymous birth registration and that she had visited the hospital prior to the birth with her mother and a lawyer. Moreover, following the birth, she had had

[42] 35991/04, *Kearns v France* (2008), para.81.
[43] *Ibid.*, para.81.
[44] *Ibid.*, para.85.

two long interviews with the social services "in the presence of...a nurse and a doctor with knowledge of English, who had been made available by the hospital to act as interpreters";[45] and the form that she had subsequently signed consenting to the adoption clearly stated that there was a two-month time-limit for withdrawing consent, such that "no ambiguity could have persisted in the applicant's mind as to the period within which she could seek the return of her child".[46] The authorities had provided her with "sufficient and detailed information, affording her linguistic assistance not required by law and ensuring that she was informed as thoroughly as possible of the implications of her choice and of the time-limits and procedures for withdrawing consent";[47] and overall, the State had not breached its positive obligations under Article 8.

The ECtHR's reasoning in this case offers a clear account of the first and second stages of European human rights law's vision of the integration of experience, insofar as the Court here set out what understanding and ascribing meaning would entail in the context of the facts of this case. It emphasised that the situation was one that Ms Kearns had brought about herself and that she needed to take responsibility for, from which the implication followed that for her to understand what had happened, she needed to acknowledge and accept this responsibility. The meaning to be ascribed to the experience in this case was to be ascribed in these same terms too: the Court's reasoning required Ms Kearns to relate to her actions by claiming ownership of these, which is to say that it required her to establish the meaning of her actions as being reflective of her agency.

5.3.3 Tolerating experience

The requirements of understanding and ascribing meaning to experience demand a degree of reflection and detachment on the part of the individual. She is required to look beyond herself and to reflect on what has happened. This was emphasised in a point made in a Concurring Opinion in *Odièvre v France (2003)* – a case discussed in Chapter 2 and which, like the case of *Kearns v France* discussed above,

[45] *Ibid.*, para.87.
[46] *Ibid.*, para.89.
[47] *Ibid.*, para.91.

concerned the French system of anonymous birth.[48] Ms Odièvre had been born anonymously under this system, and she complained that the fact that her birth had been kept secret, and that she had consequently been unable to find out about her genetic origins, had breached her Convention rights. The ECtHR disagreed, essentially concluding that the French legislature had balanced the right of individuals to learn about their origins with the (weightier) "general interest" (an interest which was essentially one of "[t]he right to respect for life", which encompassed the concern to protect the health of women during pregnancy and birth, to avoid abortions, and to avoid "children being abandoned other than under the proper procedure"[49]). Critically, in its discussion of the way in which the domestic legislature had balanced the interests here, the ECtHR implied that Ms Odièvre needed to think about what she was asking, in a context in which her birthmother had never expressed any desire to see her – she had, indeed, "greeted their separation with total indifference"[50] – and bearing in mind that disclosure of information could "entail substantial risks, not only for the mother herself, but also for the adoptive family...and her natural father and siblings...".[51] But it was Judges Ress and Kūris who put the point most bluntly in their Concurring Opinion, stating that "[p]ersons who seek disclosure at any price, even against the express will of their natural mother, must ask themselves whether they would have been born had it not been for the right to give birth anonymously".[52] Ms Odièvre, they suggested, needed to reflect on the implications of what she was asking.

This requirement of reflection is articulated more strongly still in relation to the third stage of the integration of experience set out in European human rights law, which is about how the individual locates herself in relation to the experience. This is about more than seeing why and how something has happened and more than ascribing meaning to the experience, though both of these are prerequisites. Rather, it is about tolerating the experience and coming to live with it. *Fröhlich v Germany (2018)* illustrates what this means. The applicant here, Mr Fröhlich,

[48] See Ch.2, part 2.3.1.
[49] 42326/98, *Odièvre v France* (2003), para.45.
[50] *Ibid.*, para.44.
[51] *Ibid.*, para.44.
[52] *Ibid.*, Concurring Opinion of Judge Ress joined by Judge Kūris, para.4.

claimed to be the biological father of a girl named S., who had been born to a married woman named X with whom Mr Fröhlich had had a relationship. This relationship had ended shortly after S. was born, and X and her husband (who was S.'s legal father) were raising S. together, along with their other children. They refused Mr Fröhlich's attempts to have contact with S. and they disputed that he was her biological father. Matters ended up in the domestic courts, where Mr Fröhlich unsuccessfully tried to establish his legal paternity of S., to have biological paternity testing conducted, and to obtain joint custody of S. Before the ECtHR, he complained, in particular, that the decisions of the domestic courts not to allow him to have any information about S. breached his Article 8 rights.

The ECtHR found that there had been no violation of Mr Fröhlich's Article 8 rights here: the domestic courts had been acting in S.'s best interests and had adduced "relevant and sufficient reasons" to justify the decision not to grant Mr Fröhlich information about the child.[53] The domestic Court of Appeal had based its refusal of information rights on its finding that addressing the (preliminary) paternity question would be contrary to S.'s best interests, not least because there was a risk that "if the applicant's biological paternity were established, it could not be ruled out that this might destroy the child's present family as the mother's husband might lose trust in his wife".[54] It was "more likely", according to the domestic court, that Mr Fröhlich was S.'s biological father; X's husband, meanwhile, who had known about the relationship between Mr Fröhlich and X, "may have had doubts about his biological paternity but…he could live with this uncertainty and his attitude had no negative consequences for the child".[55] The sense was that X and her husband preferred not to know S.'s biological paternity; and if Mr Fröhlich's paternity was established "against [their] will, there was a risk that their marriage would break up, thereby endangering the well-being of the child who would lose her family unit and her relationships".[56] As to S. herself, she was

[53] 16112/15, *Fröhlich v Germany* (2018), para.66.
[54] *Ibid.*, para.62.
[55] *Ibid.*, para.63.
[56] *Ibid.*, para.63.

only six years old, and it would not be in her best interests to "[confront her] with the paternity issue".[57]

In the ECtHR's consideration (and acceptance) of the reasoning of the domestic courts as to S.'s best interests here, a significant point emerged about the way in which the management of experience is envisaged in European human rights law. At the heart of this case lay, in a way, the strategy of X and her husband for managing the situation (a strategy of refusing to find out S.'s biological paternity). The ECtHR did not comment on this strategy; the domestic courts had heavily hinted that the likely reality was that Mr Fröhlich was S.'s biological father, and the problem was clearly that the revelation (or confirmation) of this would potentially shatter the relationship between X and her husband and, with this, S.'s family life. But in many ways the strategy of X and her husband did unavoidably shape the case, because it appeared to be primarily on account of this that the ECtHR considered that determining S.'s biological paternity would not be in her best interests. More than this, the sense underlying the ECtHR's judgment (and inseparable from the strategy of X and her husband) was that if X's husband was said to be able to live with the uncertainty that the situation entailed, Mr Fröhlich was required to do so too. This is not in itself surprising or unusual: it is in the nature of the principle of the child's best interests that the wishes or desires of adults may be set aside in its name. What is more notable is the extent of the sense that Mr Fröhlich had to live with what had happened, in a context in which the domestic courts had implied that they considered him to be S.'s biological father. He was required to tolerate the uncertainty and to live with it in the name of a conception of S.'s best interests – a conception of best interests that had been largely shaped by the strategy that S.'s parents had adopted to manage their experience of the situation.

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If we draw these stages of European human rights law's vision of what it means to integrate experience together – these stages of understanding the experience in

[57] *Ibid.*, para.64.

question, of ascribing meaning to it, and of tolerating it and thereby living with it – what emerges is that the account elaborated is not only an account of the way in which European human rights law *conceives* of us as managing reality and as thereby reconciling our (ascribed) needs to preserve our assumptions and to integrate experience. It is also an account of how European human rights law *expects* us to manage reality and, in so doing, to integrate understanding and knowledge. This is reflected in notions such as of a "realistic expectation" and a "realistic hope" that arise in the case law and point towards a conception of what a hope or expectation that is borne of reality (as this is conceived of in European human rights law) would look like.[58]

The account of what it means to integrate experience is also, in this way, an *evaluative* account. It involves the elaboration of a standard against which our understanding and behaviour is assessed and the construction of a normative vision of a manner of integrating understanding and knowledge that, I would suggest, constitutes European human rights law's conception of wisdom. This normative vision is primarily reflected in the way in which the account that we have been discussing presupposes a conception of what it means to be capable of integrating experience in the first place – which, in turn, widens into an account of the development of a particular outlook on life that is valued in European human rights law as constituting a form of moral orientation. It is this normative quality of the vision of the integration of experience that the final section of this chapter addresses.

5.4 The development of a certain outlook on life

The account of the integration of experience that is articulated in European human rights law necessarily presupposes a conception of what it means to be capable of integrating experience in the first place, and it is this conception that I consider in this final section. I argue that European human rights law's vision of the integration of experience presupposes a capacity on the part of the individual to

[58] E.g., 46113/99 et al., *Demopoulos and Others v Turkey* (2010), para.136; 39678/03, *Voronkov v Russia* (2015), paras.38-39.

accept responsibility (*5.4.1*), to overcome emotion (*5.4.2*), and to withstand influence (*5.4.3*). The development of these capacities – and the development, therefore, of the ability to integrate experience in the manner depicted in European human rights law – is, at the same time, I suggest, the development of an outlook on life in which these capacities are forefronted and towards which the individual is oriented. This outlook supplies a moral orientation to the notion of individual continuity specified in Chapter 3. But it also implies that this notion of individual continuity has to accommodate a sense of detachment, and this is because the outlook articulated here involves a degree of detachment from reality itself.

5.4.1 Accepting responsibility

European human rights law's account of the integration of experience presupposes a capacity on the part of the individual to accept responsibility in a particular way, which is to say that a vision of what it means to be responsible is specified in the case law. This involves two demands on the individual: a demand that she behave in a manner that is consistent with any role that she has taken on and a demand that she bear the consequences of her actions.[59]

The first demand, which is about individual behaviour in relation to specific roles, was first discussed in Chapter 2, where I argued that the notion of presentation articulated in European human rights law involves a normative conception of the roles through which the individual is presented.[60] It is this same quality that is at issue here in the demand that the individual behave in a manner that is reflective of her position in the world and her role-related responsibilities and duties. Adults, for example, are conceived of as bearing a specific responsibility to children, which consists in a "moral duty to defend a child's interests".[61] And when it comes to more specific roles, the conception of personal responsibility articulated in European human rights law quite simply requires behaviour that is consistent with the responsibilities and duties carried in relation to these. Thus members of the armed forces are not to use their freedom of expression to

[59] See further Ch.6, part 6.3.1.
[60] See Ch.2, part 2.3.
[61] 18620/03, *Juppala v Finland* (2008), para.43.

"[undermine] military discipline"[62] or to disclose secret military information that would undermine national security;[63] politicians are expected to display "a greater degree of tolerance" of criticism that is made of them than "private" individuals are, having "inevitably and knowingly [laid themselves open] to close scrutiny of...every word and deed";[64] and public figures more generally are to expect that actions that they may well deem private, but that are in fact of public nature and interest (like matters to do with the legality of income), will likely be taken to reveal something about their character and qualities as public figures.[65]

If an individual has taken on a particular role, then, she is expected to become used to the mode of conduct that this role entails, and to foresee what will be expected of her in this light. And so, for example, in assessing whether a 'law' has met the requirement of 'foreseeability',[66] the ECtHR has held that not only may this requirement be satisfied "even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail",[67] but that this need to take legal advice "is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation" and who "on this account [can] be expected to take special care in assessing the risks that such activity entails".[68] Such individuals are, on account of their roles and their consequent habituation to certain ways of conducting themselves, to expect to be held to a different standard than those who are not used to conducting themselves in this way.

The second way in which a conception of personal responsibility is specified is in terms of the demand that individuals understand the reasons for

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[62] 5100/71 et al., *Engel and Others v The Netherlands* (1976), paras.100, 103.
[63] 12945/87, *Hadjianastassiou v Greece* (1992), paras.45-47.
[64] 9815/82, *Lingens v Austria* (1986), para.42.
[65] See, e.g., 34315/96, *Krone Verlag GmbH & Co. KG v Austria* (2002), paras.36-37.
[66] This occurs in the context of analysing whether an interference with a right was 'in accordance with the law' or in the context of specific provisions such as Article 7. The assessment here is essentially of reasonable foreseeability; see, e.g., 1051/06, *Mihai Toma v Romania* (2012), paras.26-31; 32492/96 et al., *Coëme and Others v Belgium* (2000), para.150.
[67] 17862/91, *Cantoni v France* (1996), para.35.
[68] *Ibid.*, para.35.

their actions[69] and that they bear the consequences of these.[70] This has been set out most clearly in cases in which the expectations of individuals are at odds with their situation in law – and which mismatch, European human rights law suggests, they should have been aware of. In *Dalia v France (1998),* for example, the ECtHR paid short shrift to Mrs Dalia's argument that the refusal of the French courts to lift the permanent exclusion order against her breached her private and family life rights, in a context in which the main family tie in question (a child born to her in France) had been formed at a time "when she was in France illegally" and "could not be unaware of the resulting insecurity".[71] In this case, it was Mrs Dalia's conviction for drugs offences that had led to the the permanent exclusion order against her in the first place; and the nature of this conviction weighed heavily in the Court's reasoning, especially given "the devastating effects of drugs on people's lives", with the Court understanding "why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge".[72] The Court concluded that the refusal of the domestic courts to lift the exclusion order was not disproportionate to the legitimate aim of preventing disorder or crime and that there had, therefore, been no violation of Mrs Dalia's Article 8 rights. The more subtle idea underpinning the reasoning here was that individuals who put themselves in insecure and uncertain positions through their own conduct cannot expect these positions to be secured and stabilised, and that they should firstly have foreseen the consequences of their actions and must secondly take responsibility for these.[73]

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[69] See, e.g., 31753/02, *Kaya v Germany* (2007), para.63; 69735/01, *Chair and J.B. v Germany* (2007), paras.63, 67, in which the ECtHR implied that the applicants had not fully "come to terms" with the reasons for the offences that they had committed.

[70] See, e.g., 42857/05, *Van der Heijden v The Netherlands* (2012), concerning the applicant's complaint that she was required to give evidence in criminal proceedings against her long-term unmarried partner (whereas an exemption applied to couples who had formal recognition of their partnership by way of marriage/registered partnership) and in which the Court noted that the applicant had to "accept the legal consequence" that followed from the fact that she had "chosen" not to formally register her relationship, which was that she "[had] maintained herself outside the scope of the 'protected' family relationship to which the 'testimonial privilege' exception attaches…" (para.76).

[71] 26102/95, *Dalia v France* (1998), para.54.

[72] *Ibid*., para.54.

[73] This is a common theme in the case law. See, e.g., 26940/10, *Antwi and Others v Norway* (2012), para.92 (on the formation of links to a country through "unlawful residence"); 5049/12, *Senchishak*

This notion of foresight was further drawn out in *Ruszkowska v Poland (2014)*. This case was brought by Ms Ruszkowska who, until the sudden death of her husband G.K. in December 2004, ran a foster home with him in which they cared for seven foster children and their two biological children. Following her husband's death, Ms Ruszkowska legally dissolved the foster family. But complex proceedings then ensued concerning the survivors' pension to which G.K.'s children (biological and fostered) were entitled in equal shares. Ms Ruszkowska claimed that the only children eligible were G.K.'s biological children, and that since the children who had formerly been in her foster care were now with other families, they should not be entitled to the pension. Before the ECtHR, she further argued that the way in which the pension was apportioned meant that her biological children were being treated less favourably than the foster children, and that this constituted discrimination against her and her biological children. She argued that whereas her biological children "had only one parent to provide for them", the foster children "had new foster parents to provide for them, they could still inherit from their biological parents and, in addition, continue to receive their part of the survivors' pension".[74] Had she not fostered any children at all, "her biological children would have been entitled to half the total amount of the pension each"; but she had, and this had led, she claimed, to her family "bearing an excessive individual burden", including a deterioration in their finances and "life prospects".[75]

The Court assessed Ms Ruszkowska's complaint under Article 14 (the protection from discrimination in the enjoyment of ECHR rights and freedoms) in conjunction with Article 1 of Protocol 1 (the right to peaceful enjoyment of

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v Finland (2014), para.56 (on there being no 'family life' between Mrs Senchishak and her adult daughter, and that this hadn't been established by the fact that the two had lived together for five years at the time of the case since Mrs Senchishak "[had] not been lawfully resident in Finland during this time and she must have been aware of her insecure situation created by the fact that she was not regularised in Finland"); 25358/12, *Paradiso and Campanelli v Italy* (2017) (concerning the termination of a relationship with a child born through an international surrogacy arrangement, and the notion that this was a "consequence of the legal uncertainty that [the applicants] themselves created in respect of the ties in question, by engaging in conduct that was contrary to Italian law and by coming to settle in Italy with the child" [para.156]).

[74] 6717/08, *Ruszkowska v Poland* (2014), para.39.

[75] *Ibid.*, para.40.

possessions). It noted that Ms Ruszkowska and her husband "decided to create a foster home of their own free will", with the aim of "providing care to a number of non-biological children in difficult situations on a par with care provided to their biological children".[76] They were financially supported by the State in this venture. Moreover, Ms Ruszkowska "accepted responsibility for the children's care" – a responsibility which affected the inheritance rights of her biological children.[77] Furthermore, it had not been argued or shown that the total amount of the pension would "have constituted a significant part of the budget of the applicant's family", nor had it been shown that the way in which the pension was divided "was such as to make a significant difference" to the "financial situation or life prospects" of the biological children by comparison with the foster children.[78] The Court concluded that "the difference in treatment complained of had no appreciable impact on the applicant's and her biological children's situation",[79] and that there had been no violation of Article 14 with Article 1 of Protocol 1. It emphasised that Ms Ruszkowska and her husband had chosen to run the foster home, and that at the time they did so, the relevant provisions were in force. Thus Ms Ruszkowska "was not justified in expecting that the pension would be apportioned to the children in the way she suggested".[80] Rather, the Court implied, she should have thought about the implications of her actions at the time she set up the foster home; and it was these actions that she was now required to bear the consequences of.

5.4.2 Overcoming emotion

The second capacity that is presupposed by European human rights law's vision of the integration of experience and that forms part of the outlook on life that it envisages is the capacity to set aside emotion. This is presented as being a matter of mature judgement. In cases concerning parental separation, for instance, and where there are complex problems owing to "unresolved issues between the

[76] *Ibid.*, para.62.
[77] *Ibid.*, para.62.
[78] *Ibid.*, para.63.
[79] *Ibid.*, para.63.
[80] *Ibid.*, para.64.

parents", the ECtHR has been clear that "a certain amount of time has to pass in order for the parents to overcome emotional hurdles and establish a mature relationship focusing on the best interests of the child".[81] Emotions are thereby cast as clouding judgement and as needing to be set aside or overcome. Moreover, the capacity to do this is deemed a sign of maturity – maturity which must be attained by the individuals in question by themselves, for "when two persons have lost affection for each other...it cannot realistically be expected from the State to make one of these persons adopt a positive attitude towards the other".[82] The obligation that a "lack of cooperation between separated parents" places on the State in contexts of, for example, contact disputes, is, then, rather "an obligation to take measures that would reconcile the conflicting interests of the parties, keeping in mind the paramount interests of the child".[83]

The capacity to overcome emotion in this way is essentially conceived of as being about self-control, and this was set out clearly in *Wdowiak v Poland (2017)*. Mr Wdowiak complained that the domestic authorities had failed to effectively secure his rights to contact with his son, J., in breach of his right to respect for his family life. Mr Wdowiak and J.'s mother, M.K., had separated not long after J. was born, in 2002. From 2005, the courts were involved in arranging contact between J. and his father. In January 2007, M.K. took J. to Germany (in breach of the Hague Convention on the Civil Aspects of International Child Abduction), and for a year, Mr Wdowiak had no contact at all with J. Following the return of M.K. and J. to Poland in January 2008, the conflict between M.K. and Mr Wdowiak "grew deeper", and "each applied to the courts to strengthen their own rights to the detriment of the other parent", following which the domestic courts suggested that they go for counselling.[84] Although this suggestion failed, the ECtHR noted that the authorities had nevertheless been able to ensure contact between Mr Wdowiak and J. between 2005 and 2012; thereafter, when further conflict arose, the domestic courts modified the contact arrangements, ordered mediation and family

[81] 28708/06, *Trdan and Ć v Slovenia* (2010), para.96. See also 13589/07, *Cristescu v Romania* (2012), para.69; 805/09, *Pascal v Romania* (2012), para.85.
[82] 60092/12, *Z.J. v Lithuania* (2014), para.105.
[83] E.g., 48542/99, *Zawadka v Poland* (2005), para.67.
[84] 28768/12, *Wdowiak v Poland* (2017), para.68.

counselling, and enabled penalties to be applied to M.K. each time a visit between J. and Mr Wdowiak did not take place. Despite these efforts, however, there was "little impact on the applicant's right to participate effectively in his son's life, visit him regularly or take important decisions about him".[85]

The ECtHR considered that the national authorities had taken all the steps that they could in order to enforce the contact arrangements, and that there had accordingly been no violation of Mr Wdowiak's family life rights. The difficulties in enforcing the contact arrangements were rather "largely due to the mother's reluctance to allow contact but also to the child's open hostility towards his father and his refusal to see him".[86] Matters had been especially exacerbated by M.K.'s "uncooperative attitude" and her inability to overcome "her manifest hostility" towards Mr Wdowiak;[87] and, as the domestic courts had recognised, both parents had adopted an "egoistic attitude...which prevented them from cooperating in the best interests of the child".[88] There was nothing more that the domestic authorities could do; each parent – and M.K. in particular – needed to overcome the hostilities that they felt towards each other.

The ECtHR's interpretation in this case, as in other similar cases in which it finds that the hostility and lack of cooperation between separated parents is "to the children's detriment",[89] was, therefore, that there was an inability on the part of the parents to focus on what mattered: the child. The parents were cast as being unable to overcome their emotions in a way that would have enabled them to make arrangements about their child's future. The sense was not only, therefore, that the management of the situation here required the setting aside of emotion, but there was also a valuing of the capacity to set aside emotion itself, the idea being that clarity as to what matters sometimes requires looking beyond the self.[90]

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[85] *Ibid.*, para.71.
[86] *Ibid.*, para.71.
[87] *Ibid.*, para.71.
[88] *Ibid.*, para.69.
[89] 17254/11, *Krasicki v Poland* (2014), para.95. See also, e.g., 2210/12, *P.F. v Poland* (2014), para.60, and, concerning lack of cooperation with the authorities: 13441/87, *Olsson v Sweden (No 2)* (1992); 26971/07, *V v Slovenia* (2011).
[90] It was this same point that we saw in relation to 16112/15, *Fröhlich v Germany* (2018), discussed in part 5.3.3 above.

5.4.3 Withstanding influence

The idea of the individual that begins to emerge is of an individual who thinks with herself and for herself, and who is capable of withstanding influence and in a way being free of herself. This is reflected in the assumption of the capacity of the individual to overcome her emotions, and in the notion of the possibility that she might reflect on and ascribe meaning to her experiences in a way that enables her to live with these. An assumption is made in this regard about the individual's capacity to withstand influence. In our earlier discussion of *Kearns v France*, we saw, for example, that the ECtHR assumed that Ms Kearns had the capacity to separate the decision that she had made immediately following the birth from the influence of the circumstances that then presented themselves a few months down the line (and in which the baby's biological father had learned about the birth of the baby and her husband had agreed to legally recognise the child). She was required to separate the decision that she had made about the baby at the time of (and prior to) the birth from her reflections on this decision.[91]

There is a normative underpinning to this assumption about the individual's capacity to withstand influence. We can see this more clearly when we consider the way in which the assumption that was made about Ms Kearns' capacity to tolerate her sense of regret here was inseparable from the implication that Ms Kearns ought to have known better. This seemed to be the undertone of the ECtHR's reference to the fact that she was thirty-six years old at the time of the birth;[92] and we saw a similar sort of reference to age being made also in *Odièvre v France*.[93] In that case, the Court took the view that Ms Odièvre and her anonymous biological mother were in an equivalent position, such that the private interests at stake here "[did] not concern an adult and a child, but two adults, each endowed with her own free will".[94] By interpreting this case as involving two women with equal autonomy, the Court was able to sidestep the hierarchical relationship that

[91] See part 5.3.2 above.
[92] 35991/04, *Kearns v France* (2008), para.81.
[93] See part 5.3.3 above.
[94] 42326/98, *Odièvre v France* (2003), para.44.

necessarily obtained between them and that was precisely what was at issue here.[95] It was able to flatten the hierarchical structure and to assume a capacity on Ms Odièvre's part – and to demand of her this capacity – to withstand this structure and to situate herself as equally positioned to her biological mother.

The capacity to withstand influence is conceived of as developing with age, such that it is presented as being an effect of (or achievement of) maturation; thus in *Kearns v France,* it was noted that Ms Kearns was thirty-six years of age, and in *Odièvre v France,* it was emphasised that the case here concerned two adults. This makes for a normative vision of what it means to be mature; but it also paves the way for an account of what it means to be immature (and therefore, in the ECtHR's sense, susceptible to influence). This is articulated particularly in relation to children, who are conceived of as not having fully developed this capacity to withstand influence; and the effect of the subsequent construction of a notion of 'immaturity' (as susceptibility to influence) is a simultaneous construction of what 'influence' consists in.

An example is *Dahlab v Switzerland (2001).* The applicant in this case, Ms Dahlab, was a primary-school teacher, and she complained that a prohibition on her wearing her Islamic headscarf while teaching infringed her right to manifest her religion. The ECtHR deferred to the reasoning of the Federal Court, which had found the measure to be justified on the grounds of the "potential interference" with the religious beliefs of others and the breach of the principle of neutrality in schools.[96] It conceived of the Islamic headscarf as "a powerful external symbol", and noted that it was hard to assess the impact that this might have on the freedom of conscience and religion of Ms Dahlab's pupils, who were aged 4-8 ("an age at which children wonder about many things and are also more easily influenced than older pupils").[97] The Court's assumption here – that there would necessarily be some (negative) impact on the children – was notwithstanding the fact that there was no evidence of any impact whatsoever on

[95] On which see further Ch.2, part 2.3.1.
[96] 42398/98, *Dahlab v Switzerland* (2001, admissibility decision), para.1.
[97] *Ibid.*, para.1.

the children. Thus the Court considered that it could not "[deny] outright that the wearing of a headscarf might have some kind of proselytising effect", and expressed concerns that it was hard to reconcile with the values and principles "that all teachers in a democratic society must convey to their pupils" (such as gender equality, tolerance, respect for others, equality, and non-discrimination).[98]

The effect of the invocation of the age of the children in this case, combined with the claim that they were susceptible to influence and that the Islamic headscarf could have an influence upon them, was thereby bound up in a normative judgement about the signification of the headscarf itself. The same approach has since then been taken in cases involving students choosing to wear the Islamic headscarf, notwithstanding that this involves a collapse in the basis of the argument as it was originally made (which was about teachers being in a unique position to transmit a particular vision to their impressionable pupils).[99] Thus the invocation of a notion of 'immaturity' and of susceptibility to influence has enabled the construction of an account of what constitutes 'influence',[100] which is to say that the articulation of the importance of the development of the capacity to withstand influence has enabled the construction of a normative account of what constitutes 'influence' itself.

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The capacities presupposed by European human rights law's vision of the integration of experience – the capacities of accepting responsibility, of overcoming emotion, and of withstanding influence – form a conception of what it means to be capable of integrating experience in the manner set out in European human rights law. They are also cast as being capacities that develop over time, so that the account of the integration of experience is an account of the acquisition of experience. An association is consequently drawn between being young and

[98] *Ibid.*, para.1.
[99] E.g., 27058/05, *Dogru v France* (2008); 44774/98, *Leyla Şahin v Turkey* (2005).
[100] Elsewhere in the case law, we see this same argument about susceptibility to influence being made where a State has expressed concerns about the access of the 'general public' to something (see, e.g., 10737/84, *Müller and Others v Switzerland* (1988) (concerning paintings); 17419/90, *Wingrove v UK* (1996) (concerning a video); 13470/87, *Otto-Preminger-Institut v Austria* (1994) (concerning a film)).

making errors, with some errors being linked to youth (hence the phrase "acts of juvenile delinquency"[101]) and children and young adults more generally being granted a margin of error in the course of learning social norms and rules *because* they are young and maturing.[102] The sense is that in youth, errors are to be learned from and overcome through the process of maturation – this being a time in which the individual's "personality and attitude" is changing and developing.[103]

The resulting account is not only, therefore, one of the capacities required to integrate experience in the manner set out in European human rights law. As a developmental account (an account in which these capacities are conceived of as developing over time), it is also an account of an outlook on life – an account of a manner of approaching life – towards which the individual is oriented and to which she is to aspire. As such, it supplies a moral orientation to the notion of individual continuity specified in Chapter 3. At the same time, it points to the way in which this notion of individual continuity has to accommodate a certain degree of detachment, because the outlook on life constructed here is, as we have seen, one which demands that the individual is able to detach from reality itself. It envisages an individual who is able to set aside her circumstances, her emotions, her history, and her vulnerability – an individual who exercises agency to stand at a certain distance from life itself.

5.5 Conclusion

The vision of the management of reality that emerges in European human rights law – a vision predicated on a particular way of integrating experience and

[101] 1638/03, *Maslov v Austria* (2008), para.81. See also, e.g., 12313/86, *Moustaquim v Belgium* (1991), para.44.

[102] See, e.g., 5056/10, *Emre v Switzerland (No 2)* (2011), para.74, on how the criminal activities of the applicant were "errors of youth that he seems to have acknowledged". This is part of the more general construction of childhood as an important time for learning social rules (on which see Ch.3, part 3.3.3).

[103] Thus in cases involving the sentencing and treatment of young offenders, the Court has emphasised the need to take account of "developments in the young offender's personality and attitude as he or she grows older" – "the changes that inevitably occur with maturation" (21928/93, *Hussain v UK* (1996), para.53; 23389/94, *Singh v UK* (1996), para.61). See also 60367/08 and 961/11, *Khamtokhu and Aksenchik v Russia* (2017), para.80: "The Court considers that when young offenders are held accountable for their deeds, however serious, this must be done with due regard for their presumed immaturity, both mental and emotional, as well as the greater malleability of their personality and their capacity for rehabilitation and reformation."

approaching life – is one in which the individual is required to detach from reality and to approach it at a distance. The stages of European human rights law's account of the integration of experience (stages of understanding experience, ascribing meaning to it, and tolerating it and thereby living with it) and the capacities that underpin these stages (capacities of accepting responsibility, overcoming emotion, and withstanding influence) are, in this way, all oriented towards this sense of distance.

The resulting account is of a mode of integrating experience, understanding, and knowledge and of coming to approach life and to exercise judgement in a manner that is consistent with the outlook on life that is valued in European human rights law. It is against the backdrop of this normative standard that European human rights law evaluates understanding and behaviour. But more than this, the standard elaborated here is conceived of as being a standard to which the individual is oriented in going about her life: a vision of what the wise management of reality consists in, and one which locates the notion of wisdom in a degree of detachment from reality itself.

– CHAPTER 6 –

Things

6.1 Introduction

In Chapter 5, I argued that European human rights law's account of the integration of experience is oriented towards the development of a certain outlook on life, and that this outlook demands a degree of detachment from reality itself. This chapter examines the vision of the present that is bound up in this – and, more specifically, the way in which the individual is conceived of as relating to this present. I argue that the individual is envisaged as being attached to the present and as extending beyond it, and that this comes to light when we examine how the individual is conceived of as relating to material things in European human rights law.

To begin, I argue that things are conceived of in European human rights law as standing for something in time (such that, for example, the things that go to make up an individual's home are cast as containing the memories of the past, the familiarity of the present, and the hopes of the future) and as revealing something about that which has already happened (for example, a thing that is taken to represent a forthcoming risk already tells us something about the way in which the present is conditioned by that risk) (*6.2*). The duality that emerges between the present and what lies beyond the present in this way makes for a vision in which the individual is conceived of as relating to material things in a way that pushes her beyond the present itself. This is underpinned by an emphasis on foresight (on foreseeing that which is to come), a notion of the everyday (which the condition of the present is appealed to), and a way of abstracting the individual and representing her in the terms of the form of the thing (which is an image of the relationship that links the individual to the thing) (*6.3*). I argue that this makes for a vision in which the individual is conceived of as being attached to the present and as extending beyond the present; and the final part of the chapter assesses the

implications of this for the notion of individual continuity in European human rights law (*6.4*).

6.2 Things in time

Implicit in the chapters of my thesis thus far has been a sense of the way in which European human rights law conceives of the individual as having an attachment to material circumstances and to material things. We have seen this in cases concerning matters ranging from the material conditions of detention to questions of symbols, clothing, works of art, animals, and prostheses. In none of these cases is the 'thing' in question ever 'just' a thing, of course. Rather, what is at issue is what the 'thing' signifies, represents, and communicates – of the way in which the thing is placed. In this section, I argue that things are placed in European human rights law in relation to individual time and that this is how they acquire meaning here[1] (*6.4.1*). The way in which things are cast as standing for something in time is partly a function of the treatment of things as embedded in narratives (for example, the things that go to make up an individual's home are envisaged as containing the memories of the past, the familiarity of the present, and the hopes of the future); but it is also about the way in which things are cast as pointing to some conception of time that lies beyond the thing and that is materialised in it (as when, for example, a thing is taken to represent a forthcoming risk) (*6.4.2*). I argue that in materialising time in this way – in pointing to that which is to come – things also materialise that which has already happened (a present that has come to be in a particular way), such that the account of things in European human rights law is also an account of the condition of the present and of how the individual relates to this present (*6.4.3*).

6.2.1 Time in things

Things come into European human rights law in the language of time, and in particular in the language of expectations about the thing and expectations as these

[1] This notion of the acquisition of meaning should not be taken to imply that things have some prior state to meaning in European human rights law: the placement of things in relation to individual time means that things have meaning in this sense from the outset (they are things because they are in relation to individual time).

are read into and thought of as being represented by the thing. The question is of what the thing stands for in time – of the time that can be seen in the thing. This is most obviously illustrated by things that both stand for and are taken to be a part of some phenomenon. For instance, the material interests that are a dimension of the Article 8 notion of 'family life' (and that pertain, for example, to maintenance obligations and inheritance matters)[2] are taken to stand for this family life (and indeed to affirm the reality of its existence).[3] Another example is that of the home, which is cast as containing and representing a sense of attachment and as also being the target of (and so that which is contained by) that same sense of attachment.[4] Thus whether somewhere constitutes a 'home' within the meaning of the Article 8 right to respect for the home depends on "the existence of sufficient and continuous links with [the] specific place",[5] which means that the home – elsewhere described as that most "central material referent for ordering nature and human behaviour"[6] – is cast in temporal terms, as the representation of one's roots and expectations about the future. Critically, it is not enough that a place is thought of as being one's home; nor is it enough that the place is intended to become one's home. The meaning of the notion of 'home' in the ECHR does not, therefore, "comprise property on which it is planned to build a house for residential purposes", and nor does it "cover an area of a State where one has grown up and where the family has its roots but where one no longer lives".[7] Rather, the notion of the "sufficient and continuing links" that are represented in the 'home' demands that the imagination of the 'home' be grounded in some material reality – that it be grounded in some reality of having *made* the place a home. Markers of having

[2] 6833/74, *Marckx v Belgium* (1979), para.52.
[3] The material interests must seemingly flow from the actual existence of this 'family life' and from an engagement with what 'family life' entails, such that the material interest comes to stand for this family life. Thus whereas it is not possible to derive from Article 8 "a right to be recognised as the heir of a deceased person for inheritance purposes" (36983/97, *Haas v The Netherlands* (2004), para.43) rights pertaining to one's self-understanding, and to one's personal identity – and, therefore, to knowledge and understanding of one's childhood and background, for this purpose – do form part of Article 8 (58757/00, *Jäggi v Switzerland* (2006), para.26).
[4] See, e.g., 15711/13, *Stolyarova v Russia* (2015), para.61.
[5] 58255/00, *Prokopovich v Russia* (2004), para.36.
[6] J. Wilford, 'Out of rubble: natural disaster and the materiality of the house' (2008) *Environment and Planning D: Society and Space* 26, 647-662, p654.
[7] 15318/89, *Loizidou v Turkey* (1996), para.66.

made a place a home (and that are drawn out in case law in which individuals have, for whatever reason, left the place they call home) therefore include those that are bound up in 'things', such as the leaving behind of furniture.[8]

If the cases on the material interests of the family and on the home bring to the fore the question of what the thing represents in time (and of how it can come to be a particular thing because of how it contains and represents some notion of time or inherently temporal sense, such as attachment), the significance of the posing of a prior question – of the meaning of seeing time in the thing at all – is well-illustrated by *Chowdury and Others v Greece (2017)*. In that case, the ECtHR had to determine whether the work of Bangladeshi migrants in appalling conditions on a big strawberry farm in Greece constituted forced or compulsory labour in breach of Article 4 of the ECHR. In the course of its deliberation on this – in which the ECtHR ultimately concluded that the case had indeed "clearly [demonstrated] the existence of human trafficking and forced labour"[9] – the Court relied on a conception of time purportedly rendered visible by the strawberry in order to emphasise that the applicants' situation could not be characterised as one of servitude.[10] It considered that whereas "the fundamental distinguishing feature between servitude and forced or compulsory labour within the meaning of Article 4…lies in the victim's feeling that his or her condition is permanent and that the situation is unlikely to change", here "the applicants could not have had such a feeling since they were all seasonal workers recruited to pick strawberries".[11] Despite the harsh living and working conditions that the workers had to endure, therefore – they worked in the greenhouses for twelve hours a day, "picking strawberries under the supervision of armed guards";[12] they lived in "makeshift

[8] See, e.g., 9063/80, *Gillow v UK* (1986), para.46. See also 72118/01, *Khamidov v Russia* (2007), in which the applicant's intention to return to the estate that he and his family had moved away from for two years was treated as being supported by the fact that he had left the gas and electricity running (para.127).
[9] 21884/15, *Chowdury and Others v Greece* (2017), para.100.
[10] The applicants were not claiming that their situation had constituted servitude. The point is more to consider the way in which the Court distinguished forced or compulsory labour and servitude on the basis of the way of seeing involved in each situation.
[11] *Ibid.*, para.99.
[12] *Ibid.*, para.7.

shacks made of cardboard, nylon and bamboo, without toilets or running water";[13] they had not been paid for months, and were shot at by an armed guard when they went across the fields together to ask the employer for their wages – the Court emphasised that the applicants could see beyond these conditions. This was because their labour (and so their very being on the farm) was tied to the picking of the strawberries in season. The ECtHR's focus in this regard was on the notion of time represented in the ripe (or almost ripe) strawberry – the strawberry 'in season' – and the workers, being seasonal workers, were attached to (and captured in the Court's analysis in relation to) this one period in the life of the strawberry.

We can see the real significance of this framing – this reading of the moment of time rendered visible in the strawberry 'in season' – by considering what this perspective depended on. It depended on the setting aside of the reality of a longer-term perspective – a perspective which would have entailed an account of all the work that had to be done in the run-up to the strawberries being ready for picking and all the work that would need to be done for the following year's crop. By focusing on the strawberry in season, and on the individual workers as seasonal workers in relation to this one moment, there was an obscuring of the more relational reality of the way in which each worker on the farm, however seasonal, was locked into a structure that both conditioned and transcended the moment of the strawberry 'in season' and that was tied to the conditions on the farm. This longer perspective was in fact reflected in the Court's finding that the situation in the strawberry fields had been an ongoing one that the authorities had known about for a long time, and that Greece had consequently failed to fulfil its positive obligations under Article 4 to prevent human trafficking and to protect the applicants. But within this finding, it was the shorter-term perspective – of the time of the individual worker only – that structured the Court's analysis of whether the situation constituted servitude or forced labour; and in its finding that the applicants would not have felt their situation to be permanent and unlikely to change (and that it therefore did not constitute servitude, though it did constitute forced labour), the sense was that they would have retained their capacity to see

[13] *Ibid.*, para.7.

out of the situation. In other words, they would have retained their ability to imagine a future and to thereby project their own individual continuity through the temporary (because seasonal) situation; they would have retained their capacity to hope.[14] The act of seeing, that depended here on a way of thinking about the strawberry in season, was thereby cast as constituting a way of resisting, at the same time as it was reiterated as being at the essence of the distinction between forced or compulsory labour and servitude in European human rights law.[15]

6.2.2 Narratives of things

The notion of the time that can be seen in the thing, and the act of seeing that is bound up in this, points to the way in which things are embedded in narratives in European human rights law. Of course if things are read in terms of individual time – a form of time that, as we have already seen, is about individual continuity through time[16] – then a narrative reading is inevitable. Things – and the material environment of the individual more generally – will always be embedded in a narrative. To take one of the most striking illustrations that we have already touched on, the 'home' in European human rights law is a narrative notion. It is conceived of as being bound up in the construction of a narrative of an individual's life (insofar as it grounds and frames a life[17]) and as signifying a more normative narrative too (insofar as it is conceived of as being a notion that is borne of and ought to denote feelings of security, stability, attachment, and familiarity).[18]

In respect of this way of reading things in narrative terms, the reasoning in *Chowdury and Others v Greece* discussed above points not only to the way in which the strawberry in that case was treated as being embedded in a narrative about the impermanence of the situation of the workers. It also illustrates the way in which a narrative about the future (and in that case, about the possibility of a different future) can be drawn from the thing, such that the thing is conceived of as

[14] On which see further Ch.3, part 3.2.3.
[15] On which see also 67724/09, *C.N. and V. v France* (2012), para.91.
[16] See Ch.3.
[17] See further also Ch.2, part 2.2.1.
[18] See, e.g., 1870/05, *Irina Smirnova v Ukraine* (2016), para.93: "A home is usually the place where an individual is supposed to feel safe...and sheltered from unwanted attention and intrusions...".

containing a form of time and as simultaneously materialising that time. The way in which things can be taken to reveal something about the future emerges more starkly still in cases of things that are taken to stand for the forthcoming. An example is to be found in the readings of things implicated in cases of 'natural' and industrial disasters that are deemed to have been foreseeable to the point that the occurrence of the disaster represents an inevitable materialisation. In such cases, what is at issue in regards 'things' is not as much the way in which disasters disrupt the relationship between humans and things ("[a]s buildings crumble, streets buckle, houses flood, and bridges collapse, it is not just the 'natural' world that opposes humans, but all material things"[19]) but rather the way in which disasters that are deemed to be foreseeable involve, by definition, the framing of things – both material things and the matter involved in the disasters – through the lens of a build-up to an event, such that the thing comes to represent the forthcoming disaster. For example, in the years running up to the methane explosion that was at issue in *Öneryildiz v Turkey (2004)* (an explosion that occurred at a municipal rubbish tip and killed thirty-nine people who lived in slum dwellings below it), the risk was deemed to have been so foreseeable, and so containable, that the waste at the rubbish tip essentially represented the forthcoming disaster, and the homes and belongings of the people who lived below the tip represented susceptibility to disaster.[20]

We can see this further still by considering *Budayeva and Others v Russia (2008)*, which was a case brought in the aftermath of a series of devastating mudslides that hit the town of Tyrnauz in Russia in July 2000, killing many people and destroying many homes. In its reasoning in this case, the ECtHR focused on how the State authorities had failed to maintain the mudslide defence and warning infrastructure, in a context in which they knew of (and had repeatedly been warned about) the likelihood of a mudslide hitting that particular town.[21] The Article 2 part of the case was therefore cast as being one that involved "the foreseeable exposure

[19] Wilford (2008), above n6, p648.
[20] 48939/99, *Öneryildiz v Turkey* (2004).
[21] 15339/02 et al., *Budayeva and Others v Russia* (2008).

of residents...to mortal risk";[22] and the devastation was cast as flowing from the lack of repair to the defence infrastructure, with there being "no justification for the authorities' failure to prepare the defence infrastructure for the forthcoming hazardous season".[23]

There was a shift within this analysis when it came to the applicants' complaint that the same failings of the authorities that had led the ECtHR to find a violation of Article 2 had also led to a violation of their right to protection of their property. The Court therefore considered that in "natural disasters, which are as such beyond human control" the positive obligations on the State "as regards the protection of property from weather hazards do not necessarily extend as far as in the sphere of dangerous activities of a man-made nature";[24] and the devastation, which had hitherto been cast as flowing from the failure to maintain and repair the mud-defence infrastructure,[25] was now cast as flowing from the "weather hazards".[26] The mudslides themselves went from being thought of as an event that had engaged "the State's responsibility for positive preventive action"[27] to something resembling more an "assemblage" of processes, matter, and forces,[28] with the applicants' property being what was in the way of the "weather hazard". On either approach, however, both the property and the mud infrastructure were cast as representing susceptibility to risk. Just as in *Öneryildiz v Turkey*, the risk that was represented in this case in the damaged mud-defence infrastructure, and in the mud itself, also weighed down on and marked the homes and possessions of the residents of Tyrnauz.

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[22] *Ibid.*, para.158.
[23] *Ibid.*, para.151.
[24] *Ibid.*, para.174.
[25] *Ibid.*, para.149.
[26] *Ibid.*, paras.174-175.
[27] *Ibid.*, para.142.
[28] For such "a congregational understanding of agency", see J. Bennett, *Vibrant Matter: A Political Ecology of Things* (2010, Duke University Press), p20, Ch2. Thus when it came to the question of compensation, the Court considered that "the damage in its entirety could not be unequivocally attributed to State negligence, and the alleged negligence was no more than an aggravating factor contributing to the damage caused by natural forces" (15339/02 et al., *Budayeva and Others v Russia* (2008), para.182).

The time that was made visible in and that was read from the things in *Öneryildiz v Turkey* and *Budayeva and Others v Russia* was the time of risk; the focus of the ECtHR was on how the disasters had come to be so forthcoming and on the materialisation of this forthcoming. As part of this, the thinking about each of the things involved in these cases was a thinking about the thing in the future and the future represented by the thing. Such a way of thinking not only draws attention to how things in the case law are implicated in narratives (for example, narratives of belonging, possibility, and inevitability). It also draws attention to how this way of thinking is a thinking about a thing that has brought itself closer and that has consequently also brought a particular notion of the future closer. The question is of what is brought forth in the thing.

6.2.3 Materialisation

The materialisation of that which is to come is also, necessarily, a materialisation and revelation of that which has already happened (a present that has come to be in a particular way). In other words, the representation of the thing in terms of individual time – and largely in terms of the future represented in the thing – is a means through which the thing discloses that which has already happened: the life that has been made conditional on the management of a specific risk, for example. The thing, in this way, not only renders visible that which has already happened; it relays some effect that it is also, in part, a cause of.[29]

This rendering visible of that which has already happened – of how the present has been shaped – is exemplified by the case law concerning polluting matter, and in particular by cases in which a certain concentration of pollutants is described as being "potentially harmful".[30] Notwithstanding this description, the 'potential' per se cannot ever be the issue in these cases, for it is already too late: the term "potentially harmful" collapses past, present, and future insofar as it

[29] This formulation comes from Strathern's analysis of gift exchange. See M. Strathern, *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia* (1988, University of California Press), at p221: "Gift exchange...is...the circulation of objects in relations in order to make relations in which objects can circulate... The gift works as the cause of a relation as well as its effect."

[30] E.g., 55723/00, *Fadeyeva v Russia* (2005), para.87 (and see also 53157/99 et al., *Ledyayeva et al. v Russia* (2006)).

points to the notion of the 'potentially harmed' (either already, or right now, or in the future). It points to the condition of the potential, and this condition is a continuing condition of susceptibility and vulnerability (which in itself may constitute "actual detriment" to an individual's "health and well-being"[31]).

The question in cases concerning 'potential harm' cannot only be one of the potential for something, and of whether the potential itself has been actualised, therefore; it is also a question of what the potential has done to the current condition. In this sense, the term 'potentially harmful' renders visible the condition of the present. An example of this is *Dzemyuk v Ukraine (2014)*, in which Mr Dzemyuk complained that the construction of a cemetery in close proximity to his home had contaminated his water supply and had adversely affected his use of his home as well as his and his family's health, in breach of his right to respect for his home and private life. The first question for the ECtHR, "in the absence of actual damage to the applicant's health" was of "whether the potential risks to the environment caused by the cemetery's location established a close link with the applicant's private life and home sufficient to affect his 'quality of life' and to trigger the application of the requirements of Article 8".[32] The Court found that the Article 8 threshold was indeed met. The cemetery was situated 38 meters from the applicant's home (in breach of the domestic regulations, which stipulated a minimum distance of 300 metres), it was "a continuous source of possible health hazards and the potential damage caused by such [was] not easily reversible or preventable", and it exposed the applicant to the risk of "serious water pollution" (something which the authorities had acknowledged).[33] In these circumstances, the Court considered, there had been an interference with the applicant's right to respect for his home and private life; and "the interference, being potentially harmful, attained a sufficient degree of seriousness to trigger the application of Article 8".[34]

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[31] As in 55723/00, *Fadeyeva v Russia* (2005), para.88 (which involved the "potentially harmful" industrial pollution that came from a steel plant that operated near the applicant's home).
[32] 42488/02, *Dzemyuk v Ukraine* (2014), para.82.
[33] *Ibid.*, para.83.
[34] *Ibid.*, para.84.

The ECtHR ultimately found in this case that there had been a breach of Mr Dzemyuk's Article 8 rights on account of the fact that the actions of the authorities in building and using the cemetery had been in breach of the domestic regulations and had therefore not been lawful within the meaning of Article 8. But what this case also shows, from the perspective of our consideration of materialisation, is the way in which the notion of 'potential harm' reveals the condition of the present. It renders visible how the potential for something has already reshaped the present. And this same rendering visible applies to the notion of containing time in European human rights law more generally too. The language of containing time – of containing risk, for example, as in *Öneryildiz v Turkey* and *Budayeva and Others v Russia* – pulls the future within the present.[35] But in so doing, it also reveals the effect that this has already had on the present. The condition of the present emerges as being one of containing this future,[36] which is to otherwise say that the mode of relating to the present that is envisaged here is a mode of containing the future.

6.3 The condition of the present

The temporal configuration of things depicted in the preceding pages shows how things in European human rights law are taken to enable encounters of particular kinds: encounters with a narrative of the future that a thing is taken to reflect and represent, for example, or encounters with the reality of that which has already happened as it is disclosed by a thing. But more than this, the account of the placement of material things in European human rights law also gives rise to an account of the present: an account of a present which is conceived of as being about containing the future.

This section examines the way in which the individual is located in this vision. The conceptualisation of the present as containing the future makes for an

[35] On which see further Ch.3, part 3.4.2, on the language of containing anxiety.

[36] See also Hu's argument that the language of containing risk, of disaster management and contingency planning, renders it impossible to think about how life could be radically different, because the focus is entirely on containing the future within the present and on maintaining the present as such: C. Hu, '"A jungle that is continually encroaching": The time of disaster management' (2018) *Environment and Planning D: Society and Space* 36(1), 96-113, p102-110.

account in which the individual is located between present and future. On the one hand, she is conceived of as being attached to material things. On the other hand, these material things are taken to reveal that which is to come as well as that which has already happened; and so in being attached to material things, the individual is also pushed beyond them. I suggest that this account is underpinned by a way of seeing that emphasises foresight (*6.3.1*), a way of relating to material things that is based on a notion of the material extent of the individual (of how far she extends in her material environment) (*6.3.2*), and a way of representing the individual in her relations with material things that involves an abstraction from life itself to deal in the language of forms (a form being an image of the relationship that links the individual to the thing) (*6.3.3*).

6.3.1 Foresight

The positioning of the individual between present and future places certain demands on the individual. Foremost among these is a demand of foresight, which, as we saw in Chapter 5, is part of European human rights law's vision of personal responsibility.[37] Foresight is conceived of as being central to European human rights law's vision of seeing material things; and it is primarily articulated in terms of the expectations that apply to the individual in her dealings with things. These expectations will, on occasion, be deemed inherent in the role that an individual has taken up or the position that she holds; and where this is the case, the material thing in question will be treated as pointing to that expectation. For instance, the non-reimbursement of expenses incurred in the course of performing a professional duty may be a part of (and a signification of) that duty (such that the duty cannot in itself constitute an interference with the peaceful enjoyment of possessions stipulated under Article 1 of Protocol No. 1).[38] Restrictions on individual property may, meanwhile, be justified in the name of social justice – something which feeds into the idea, discussed in Chapter 2, of the role of the

[37] See Ch.5, part 5.4.1.

[38] See 8919/80, *Van der Mussele v Belgium* (1983), paras.48-49 (concerning the complaints of Mr Van der Mussele that the pro bono work that he was obliged to do as a lawyer breached his Convention rights). On this case see Ch.2, part 2.3.2(ii).

individual in constructing a conception of the collective.[39] And in cases involving any kind of "commercial venture", the ECtHR has been keen to point out that such ventures, by their nature, involve "an element of risk" that must necessarily inform the conduct of the individuals (and companies) in question.[40] Individuals acting in these roles and engaging in these activities must in other words foresee what might happen and act accordingly.

An example of this latter approach is *Gasus Dosier-und Fördertechnik GmbH v The Netherlands (1995)*. The applicant company here, Gasus, had sold a concrete-mixer to a company called Atlas on the condition that it retained title of the mixer until the full price had been paid. The concrete-mixer was subsequently seized and sold by the tax authorities that were pursuing Atlas; and Gasus complained that this had breached their property rights under Article 1 of Protocol No. 1. In holding that the interference was proportionate, the Court emphasised that Gasus were "sufficiently aware" of the risk involved in this venture "to take steps to limit it" (for example, they had allowed Atlas to pay the purchase price of the mixer in instalments and had reserved their title to the mixer until the full price had been paid).[41] There were other steps that they could have taken too (for example, they could have declined to extend credit to Atlas); and it was also relevant that they had allowed the goods "to serve as "furnishings" of the tax debtor's premises" such that "[t]hey might therefore well be held responsible to some extent for enabling the tax debtor to present a semblance of creditworthiness".[42]

What was essentially at issue in this case was, therefore, the expectations that had been formed about the concrete-mixer; and the mediation of expectations is the essence of the point in the notion of foresight that emerges here. The expectations that have been projected by the individual onto a thing or that have been formed in relation to that thing are mediated by the expectations that derive from the roles that those same individuals are performing or the positions that

[39] See, e.g., 8793/79, *James and Others v UK* (1986); 10522/83, *Mellacher and Others v Austria* (1989). See also 18072/91, *Velosa Barreto v Portugal* (1995) (on the social protection of tenants). See further Ch.2, part 2.3.2(ii).
[40] See, e.g., 12742/87, *Pine Valley Developments Ltd and Others v Ireland* (1991), para.59.
[41] 15375/89, *Gasus Dosier-und Fördertechnik GmbH v The Netherlands* (1995), para.70.
[42] *Ibid*., para.70.

they hold. An example which illustrates more closely how this mediation occurs is *Brosset-Triboulet and Others v France (2010)*. The family of the applicants in this case had, since 1945, occupied a house that stood on maritime public land. Following the enactment of the Coastal Areas Act – the aim of which was to protect the seashore and the environment – the authorities had refused authorisations to occupy such properties. The applicants' occupancy authorisation had consequently not been renewed, and they complained that this (and the order to demolish their house) breached their right to the peaceful enjoyment of their possessions.

The Court structured its reasoning in this case around two narratives. On the one hand, it considered that the applicants were aware of the precarious nature of the basis of their occupancy of the house (the basis of their occupancy being the decisions authorising this); and they were also aware of the obligation on them "in the event of revocation of the decision authorising occupation, to restore the site to its original state if required to do so by the authorities".[43] On the other hand, the authorities had tolerated their occupancy of the house;[44] and "the time that elapsed had the effect of vesting in the applicants a proprietary interest in peaceful enjoyment of the house that was sufficiently established and weighty to amount to a 'possession' within the meaning of...Article 1 of Protocol No. 1".[45] The question was of whether, given the applicants' interest in continuing to occupy the house, "the order to restore the site to its original state" was a means proportionate to the legitimate aim pursued (of "[promoting] unrestricted access to the shore").[46]

The Court held that it was. It emphasised the importance of protecting coastal areas and reiterated that the applicants "had always known that the decisions authorising occupancy were precarious and revocable".[47] But more than this, it treated both the authorities' refusal to renew the authorisation of occupancy and the order to demolish the house as "[corresponding] to a concern to apply the law consistently and more strictly, having regard to the increasing need to protect

[43] 34078/02, *Brosset-Triboulet and Others v France* (2010), para.70.
[44] *Ibid.*, para.89.
[45] *Ibid.*, para.71.
[46] *Ibid.*, para.84.
[47] *Ibid.*, para.89.

coastal areas and their use by the public, but also to ensure compliance with planning regulations".[48] Thus the question became one of the viability of exempting the applicants from the application of this law: something which "would go against the aims of the Coastal Areas Act...and undermine efforts to achieve a better organisation of the relations between private use and public use".[49] The expectations that were held by the individuals in this case (and that were formed in the context of their knowledge about the precarious basis of their occupancy) were therefore to be mediated with the expectations that were made of them in the context of their position as private occupants of public land and as subjects of the law. There was a sense, moreover, that all this was already known – or ought to have been known – in the first place, given the nature of the applicants' position here as private occupants of public land – as occupants with a precarious basis for occupancy and therefore a precarious relationship with the house. The broader point to be drawn from this case is that the placement of things in terms of time entails a certain expectation that the individual, being located between present and future by dint of her relations with material things, will use the knowledge gained from this position to demonstrate a degree of foresight in her engagement with these things.

6.3.2 Material extent

The extent of the foresight that is required in this context is shaped by an account of the material extent of the individual, which is about how far the individual extends in her material environment. Some things, for example, are cast as being things in relation to which the individual has built up her sense of self to the point that she is treated as having a material dimension of her self.[50] We have already seen that the things of the home are especially closely associated with an individual's sense of self;[51] and other examples of close associations between things

[48] *Ibid.*, para.92.
[49] *Ibid.*, para.92.
[50] See further the psychologist William James's notion of the 'material self': W. James, *The Principles of Psychology, Volume I* (1981 [1890], Harvard University Press), p279-324.
[51] This is arguably seen most clearly in cases involving searches of the home, where the interference with the home is often cast as constituting an interference with the sense of self (insofar as it closely touches private life) and as disrupting the sense of familiarity in the home.

and sense of self in the case law include the relevance ascribed to "sentimental attachment" to a thing (including in awards of damages)[52] and the treatment of a bag search as a body search.[53] These things, we might say, are things into which individual "psychic energy" is deemed to have been invested[54] or that have already become "biographical objects".[55] They are things into which the individual has already extended her self.[56]

An assumption is quite clearly made in European human rights law, however, that there is some limit to the way in which the individual articulates herself in this way. The case of *Botta v Italy (1998)* draws out what this means in practice. The applicant, Mr Botta, was physically disabled, and he complained about the lack of facilities (in particular, access ramps and lavatories) to enable people with disabilities to access the beach and the sea at a private seaside resort. He alleged that this was in breach of Italian legislation and that the State had violated his Article 8 rights by failing to take appropriate measures to remedy the situation. In particular, he complained that the lack of access at the seaside resort had left him "unable to enjoy a normal social life which would enable him to participate in the life of the community and to exercise essential rights".[57]

The Court held that the right to respect for private life was not applicable here, because the "direct and immediate link" that there needed to be between the

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Thus the Court has stated that "[t]he exercise of powers to interfere with home and private life must be confined within reasonable bounds to minimise the impact of such measures on the personal sphere of the individual guaranteed under Article 8 which is pertinent to security and well-being..." (28867/03, *Keegan v UK* (2006), para.34).

[52] E.g., 34044/02, *Depalle v France* (2010), para.90 (sentimental attachment to the house); 35014/97, *Hutten-Czapska v Poland* (2006), para.248 (sentimental value of the family house); 34078/02, *Brosset-Triboulet and Others v France* (2010), para.93 (sentimental attachment to the house); 24360/04, *Giuran v Romania* (2011), para.22 (the sentimental value of the items stolen from the applicant's apartment); 55167/11, *Waldemar Nowakowski v Poland* (2012), para.56 (the sentimental value of a collection of old weapons).

[53] As per domestic law: 27153/07, *Cacuci and S.C. Virra & Cont Pad S.RL. v Romania* (2017), para.70.

[54] M. Csikszentmihalyi and E. Rochberg-Halton, *The meaning of things: Domestic symbols and the self* (1981, Cambridge University Press), p8.

[55] See V. Morin, 'L'objet biographique' (1969) *Communications* 13, 131-139; J. Hoskins, *Biographical Objects: How Things Tell the Stories of People's Lives* (1998, Routledge).

[56] On the idea of which see further L. Malafouris, 'Between brains, bodies and things: *tectonoetic* awareness and the extended self', in C. Renfrew, C. Frith, and L. Malafouris (eds.), *The Sapient Mind: Archaeology Meets Neuroscience* (2009, Oxford University Press), 89-104.

[57] 21439/93, *Botta v Italy* (1998), para.27.

measures sought by Mr Botta and his private life in order for there to be positive obligations on the State in this regard was lacking.[58] Mr Botta was considered to have asserted a "right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays": something that concerned "interpersonal relations of such broad and indeterminate scope" that there could be "no conceivable direct link" between the measures that he was urging and his private life.[59]

If the framing of this case stemmed from the framing of the concept of 'private life' in terms of the 'primary' intention of the Article 8 guarantee "to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings",[60] the focus on how far, in terms of relations, the Article 8 guarantee extended derived from the sense that there is a limit to these relations, and also to the extent of the individual in his or her material environment. The reference to the idea that Mr Botta was out of his usual place and out of his usual time (he was "at a place distant from his normal place of residence" and on his holidays[61]) furthermore pulled the case out of the realm of his everyday life and implied that this made a difference to the nature of the 'right' that Mr Botta was asserting and distanced it still further from his private life.

Since *Botta v Italy*, the Court has emphasised that in cases of this kind, "Article 8 cannot be considered applicable each time an individual's everyday life is disrupted, but only in the exceptional cases where the State's failure to adopt measures interferes with that individual's right to personal development and his or her right to establish and maintain relations with other human beings and the outside world...".[62] A particular conception of the 'everyday' is adopted, therefore; and so in *Zehnalová and Zehnal v The Czech Republic (2002)*, for example, in which Mrs Zehnalová and her husband Mr Zehnal complained about the inaccessibility

[58] *Ibid.,* para.34.
[59] *Ibid.,* para.35.
[60] *Ibid.,* para.32.
[61] *Ibid.*, para.35.
[62] 27677/02, *Sentges v The Netherlands* (2003, admissibility decision).

of a number of public buildings in their home town to people with impaired mobility, it was a significant factor for the ECtHR in its ruling as to the inadmissibility of the complaint that it was unclear, given "the large number of buildings complained of" (initially 220 buildings) "as to whether the first applicant needs to use them on a daily basis and whether there is a direct and immediate link between the measures the State is being urged to take and the applicants' private life".[63] The everyday has a formative function in constructing an account of the material dimension of the self in this way.[64] It matters in determining how far the individual extends in her material environment.[65]

6.3.3 The form of things

The ways of seeing and relating that are articulated here, with their constructions of foresight and material extent, set in train a way of abstracting from the individual and the thing, and this is further developed in the convergence of these elements in the idea of the form of the thing. The form of the thing is an image of the relationship that links the individual to the thing, and it enables the thing or the material environment of the individual to be carried through time. The idea of the form itself derives its logic from the notion of potentiality discussed in Chapter 3.[66] Potentiality not only underpins individual continuity in European human rights law but it also involves the ascription of a form which there is then a becoming into. This occurs, in particular, in conjunction with the idea of self-development

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[63] 38621/97, *Zehnalova and Zehnal v The Czech Republic* (2002, admissibility decision), para.2.
[64] This is the term of the psychologist William James. See above n50.
[65] See further, e.g., 46133/99 and 48183/99, *Smirnova v Russia* (2003), which concerned, among other things, the complaint of one of the applicants that her national identity paper (the 'internal passport') – "a document essential for everyday living in the country" (para.89) – had been unjustifiably withheld by the authorities. The Court emphasised the way in which "in their everyday life Russian citizens have to prove their identity unusually often, even when performing such mundane tasks as exchanging currency or buying train tickets. The internal passport is also required for more crucial needs, for example, finding employment or receiving medical care. The deprivation of the passport therefore represented a continuing interference with the applicant's private life" (para.97). See also 27812/95, *Malige v France* (1998), in which it was relevant in classifying the sanction of deducting points from a driving licence in terms of Article 6 that "the right to drive a motor vehicle is very useful in everyday life and for carrying on an occupation" (para.39) – something from which the Court could infer that "although the deduction of points has a preventive character, it also has a punitive and deterrent character and is accordingly similar to a secondary penalty" (para.39).
[66] See Ch.3, part 3.2.

that directs the individual; but its logic also applies much more generally, so that things in European human rights law are ascribed with specific forms. For example, the things that are put in the place that is called the home (such as furniture) both come to carry and are mutually intertwined in the form of the familiarity that is represented in the home;[67] the treatment of a bag search as a body search suggests that the bag comes to acquire the form of the inviolable;[68] the treatment of the crucifix as part of tradition enables it to be carried through by reference to that tradition;[69] and cases concerning the right to peaceful enjoyment of possessions are treated in terms of the form of ownership, the essence of which is the ability to use and alienate the possessions in question.[70]

The idea of the form in these cases tells us something about the continuing representation of the individual in the thing. For example, the form of things owned is ownership, and thinking about oneself as owner involves the continuing representation of "owner-identity" in the thing.[71] But the notion of the form also tells us something about how things are carried through in terms of individual time and about the relation between the individual and the thing that is established in this regard. An example which illustrates this is the way in which questions of peaceful enjoyment and market value are intertwined when it comes to the right to the peaceful enjoyment of possessions. Cases in which the complaint is that

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[67] See part 6.2.1 above.

[68] As per domestic law: 27153/07, *Cacuci and S.C. Virra & Cont Pad S.RL. v Romania* (2017), para.70.

[69] 30814/06, *Lautsi and Others v Italy* (2011), para.68.

[70] Thus even where a right of property has "become precarious" and has "lost some of its substance", it is still possible to say that it has not fully disappeared providing that the individuals can continue to use the possessions (7151/75 and 7152/75, *Sporrong and Lönnroth v Sweden* (1982), para.63). (See also, e.g., 14556/89, *Papamichalopoulos and Others v Greece* (1993), para.45; 27053/95, *Vasilescu v Romania* (1998), para.53.) And even where use is temporarily not possible, the fact of retaining the status of owner is what counts (see e.g., 5493/72, *Handyside v UK* (1976), para.62).

[71] The term comes from J. Lamb, *The Things Things Say* (2011, Princeton University Press), p42. See, e.g., 58254/00, *Frizen v Russia* (2005), which concerned the seizure of Mrs Frizen's car in the course of criminal proceedings against her husband. Mrs Frizen argued that this seizure violated her property rights, as sole legal and registered owner of the car. The Court ultimately held that the interference with Mrs Frizen's property rights had no legal basis; but in considering which of the rules regarding property the case was to be examined under, the Court distinguished this case from those "where the domestic authorities ordered forfeiture of physical things which had been the object of the offence...or by means of which the offence had been committed...even where such things belonged to third parties" (para 29). As Mrs Frizen submitted, "the vehicle in question was only for her personal use and...it was not used to commit any offence" (para 29).

there has been some interference with the peaceful enjoyment of possessions are accordingly tied up with the question of whether there has been some interference with the market value of the possessions (this non-interference with market value being deemed a part of peaceful enjoyment). In *Galev and Others v Bulgaria (2009)*, for example, the applicants, who lived in a four-storey block of flats, complained about their neighbour's reconstruction of her second-floor flat as a dental surgery, alleging, inter alia, that the operation of the surgery had prevented them from peacefully enjoying their possessions and that it had caused the value of their flats to decrease. The Court ruled this complaint to be manifestly ill-founded: as to the first limb, it noted that "Article 1 of Protocol No. 1 does not guarantee the right to enjoy one's possessions in a pleasant environment", and as to the second it noted that "while a severe nuisance may affect the value of real estate and thus amount to a partial expropriation, there is no evidence showing that the construction of the dentist's surgery caused the value of the applicant's flat to drop".[72] The sense was that it would be the language of market value – the language of the abstract representation of the thing – that would enable the thing to be carried through time, not the subjective experience of it.

The effect of the carrying through of the thing or the material environment of the individual in reference to the form that is ascribed to the thing is further illustrated by *Nerva and Others v UK (2002)*. The applicants in this case were waiting staff, and they complained about the decision of the domestic courts to treat the tips that were included by customers in cheque and credit card payments as the property of their employer, the effect of which was that their employer could treat the tips as part of their statutory minimum remuneration. They argued that this breached their right to the peaceful enjoyment of their possessions.

The Court disagreed. It considered that the applicants "[could not] maintain that they had a separatet right to the tips and a separate right to minimum remuneration calculated without reference to those tips" and stated that "[t]he fact that the domestic courts ruled in a dispute between private litigants that the tips at

[72] 18324/04, *Galev and Others v Bulgaria* (2009, admissibility decision), para.2.

issue represented 'remuneration' within the meaning of the applicable legislation cannot of itself be said to engage the liability of the respondent State under Article 1 of Protocol No. 1".[73] The Court emphasised that this was a matter of interpreting and applying domestic legislation; and the domestic courts had held that the title in the tips had passed to the employer who had then paid the tips to the applicants "out of its own funds".[74] Furthermore, the applicants "[could not] claim that they had a legitimate expectation that the tips at issue would not count towards remuneration" as this view "[assumed] that the customer intended that this would not be the case" – something that was "too imprecise a basis on which to found a legitimate expectation which could give rise to 'possessions' within the meaning of Article 1 of Protocol No. 1".[75] The Court concluded that "it was for the applicants to come to a contractual arrangement with their employer as to how the tips at issue were to be dealt with from the point of view of their wage entitlement" and that they could not "rely on Article 1 of Protocol No. 1 to base a claim to a higher level of earnings".[76]

In this case, the disruption of the relationship between the individual waiter and the customer with regards to the tips paid by that customer essentially occurred in the moment that payment was made by cheque or credit card. These modes of payment led to the passing of title to the employer, which in turn meant that the tip acquired a different form. It lost its form as a tip and became part of a wage, and this was because it became part of a different relationship (that between employer and employee).

The form of the thing – as an image of the relationship that links the individual to the thing – constitutes, in this way, a representation of the individual in her relations with material things that involves an abstraction from life itself. It works alongside the way of seeing that emphasises foresight and the way of relating to material things that emphasises the material extent of the individual to make for an account in which the individual is conceived of as being attached to material

[73] 42295/98, *Nerva and Others v UK* (2002), para.43.
[74] *Ibid.*, para.43.
[75] *Ibid.*, para.43.
[76] *Ibid.*, para.43.

things and as also extending beyond them – as being both attached to the present and carried beyond it.

6.4 Beyond the present

The condition of the present emerges as being one in which the focus is on containing the future. This means that the individual, in being attached to the present, is simultaneously conceived of as extending beyond it. She is located between present and future; and as we saw in the preceding section, this is underpinned by a way of seeing that emphasises foresight, a way of relating to material things that is based on a notion of the material extent of the individual, and a way of representing the individual in her relations with material things that involves an abstraction from life itself to deal in the language of forms.

This section examines the implications of this vision. It begins by analysing the logic of the form in more detail. I argue that the form's logic of abstraction has a reflexive quality, such that the possibility arises for the form itself to become a thing, with the relationship between the individual and the thing then being rendered material and pursued for its own sake (*6.4.1*). This entails a shift from the practice of the thing (a practice originally represented in the form, in that the form is an image of the relationship between the individual and the thing) to the practice of the form (a practice of a representation) (*6.4.2*). I argue that the overall effect of this is that stability in European human rights law comes to be located beyond the present, with the individual conceived of in terms of that which is to come (*6.4.3*).

6.4.1 Forms as things

We have already seen how the logic of the form (as an image of the relationship between the individual and the thing) works to represent the relationship between the individual and the thing through time – and how it works, therefore, to represent and locate the individual between the present and the future. But forms can also be treated as things that are pursued as such. This has been partly enabled through the concept of 'possession' that underpins Article 1 of Protocol No. 1 of the Convention – a concept that has "an autonomous meaning which is not limited

to ownership of physical goods"[77] and that has been interpreted to extend into forms that are built up through the individual (such as forms of use and livelihood) and that would otherwise be inseparable from the individual.

An example of the reconstruction of a form as a thing is to be found in *Saghinadze and Others v Georgia (2010)*. The ECtHR in this case had to assess whether a cottage that the applicant had settled in with his family – a cottage that he had been offered by his employer, but to which he had no registered title – constituted a possession within the meaning of Article 1 of Protocol No. 1. In deciding that the applicant had "a right to use the cottage as his accommodation and that this right had a clear pecuniary dimension" such that it could be regarded as a 'possession',[78] the Court emphasised "the authorities' own manifest tolerance of the first applicant's exclusive, uninterrupted and open use of the cottage and the adjacent premises for more than ten years".[79] During that time "the first applicant installed and planted various fixtures, fruit trees and vegetables, and started keeping poultry and small livestock; he was also able to accommodate eight of his displaced relatives, without applying for additional permission from the State; the State never objected to the socio-economic and family environment established by the first applicant".[80] The way in which the applicant had been using the cottage, and the way in which he came to build up a "socio-economic and family environment" thus came to constitute a 'possession' within the meaning of the Convention. The form of use was thereby reconstructed as a thing.

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[77] See, e.g., 33202/96, *Beyeler v Italy* (2000), para.100. For example, the concept of 'possessions' has been interpreted to include other rights and interests that constitute assets and pecuniary assets such as – in certain situations – debts and claims ("even to a particular social benefit...if it is sufficiently established to be enforceable...") (see, e.g., 11931/03, *Teteriny v Russia* (2005), para.47). The notion of 'possession' does have a material edge to it; thus "the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a 'possession'...nor can a conditional claim which lapses as a result of the non-fulfilment of the condition" (see, e.g., 42527/98, *Prince Hans-Adam II of Liechtenstein v Germany* (2001), para.83).

[78] 18768/05, *Saghinadze and Others v Georgia* (2010), para.108.

[79] *Ibid*., para.106.

[80] *Ibid*., para.106. See also 13216/05, *Chiragov and Others v Armenia* (2015), paras.146-147 (the treatment of a 'right of use' of land conferred on an individual as a possession within the meaning of Article 1 of Protocol No. 1).

A similar reconstruction, albeit this time involving the form of livelihood, occurred in *Doğan and Others v Turkey (2004)*, which concerned the forced eviction of the applicants from their village by the security forces and the authorities' refusal to allow them to return to their homes and land. In addressing the alleged breach of Article 1 of Protocol No. 1 here, the Court held that the "overall economic activities" of the applicants could constitute 'possessions' within the meaning of this provision.[81] It emphasised that the applicants had built up their livelihood in the village: "[a]lthough they did not have registered property, they either had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivated the land belonging to the latter"; furthermore, they "had unchallenged rights over the common lands in the village, such as the pasture, grazing and the forest land, and...they earned their living from stockbreeding and tree-felling".[82] The applicants' livelihood was reconstructed in this way as a 'possession' – a thing.

The treatment of a form (such as a way of use or livelihood) as a possession poses a challenge to theories that depict close relationships between self-possession and the possession of objects and between possession and narrative. Such theories depict the owning of something – its treatment as a possession – as being what enables an account of it to be given, with the idea being that ownership enables the incorporation of a thing into a narrative of self-continuity and, simultaneously, a construction of that same narrative self-continuity.[83] The challenge posed by cases in which forms are treated as things is that these cases involve the alienation of that which is already bound up in the individual. The treatment of a form as a thing involves the taking of the image of the relationship between the individual and the thing – the taking of the image of the practice between the individual and the thing, for example (as in the cases of the forms of use and livelihood) – and its rendering material. This points to the reflexive quality of the form (the way in which it indicates back to the material present from which it came and continues to affect it) and to the consequently cyclical quality of its

[81] 8803/02 et al., *Doğan and Others v Turkey* (2004), para.139.
[82] *Ibid*., para.139.
[83] See further Lamb (2011), above n71, p64 et seq.

logic of abstraction (the way in which it involves a cycle of abstracting from the material present and then the rendering material of this abstraction).

6.4.2 The practice of forms

Where a form is rendered a thing in this way, two points of abstraction are involved. There is firstly the original abstraction: an abstraction from the relationship between the individual and the things in question (and therefore from the actual practice of things) to the form itself. This is the nature of the form as an image of the relationship between the individual and the thing; thus in the case of *Doğan and Others v Turkey* that we discussed above, the material activities of the working of the land and the felling of the trees were cast in the first place in the terms of the form of 'livelihood'. The second point of abstraction occurs from the form to the practice of the form itself, which is to say that the focus shifts from the actual practice represented in the form (the felling of trees represented in the form of 'livelihood', for example) to the practice of the representation (the practice of a notion of 'livelihood' in terms of its treatment as a 'possession').

The effects of this second form of abstraction are illustrated in the case law in which the form of reputation is treated as a thing. The possibility for one's reputation (as something made) to be treated as a thing possessed was left open in *Niemietz v Germany (1992)*. The applicant in this case, Mr Niemietz, was a lawyer, and he argued that a search of his office (which the Court found to be in breach of Article 8) had impaired his reputation and had consequently breached Article 1 of Protocol No. 1. The Court dismissed this strand of Mr Niemietz's complaint, considering that it had already treated "the potential effects of the search on the applicant's professional reputation" in terms of Article 8 such that no separate issue arose under Article 1 of Protocol No. 1.[84] It did not say, however, that reputation does not fall within the realm of Article 1 of Protocol No. 1; and so a space was left for the possibility that reputation could be treated as a thing possessed.

[84] 13710/88, *Niemietz v Germany* (1992), para.40.

In the earlier case of *Van Marle and Others v The Netherlands (1986)*, the reputation of the applicants had in fact been indirectly treated as a possession in this sense. The case concerned a refusal by the domestic authorities to register the applicants as certified accountants, and in it the Court treated the clientele that the applicants had built up (through their reputation) as an asset "and, hence, a possession" within the meaning of Article 1 of Protocol No. 1.[85] The Court went on to find that there was an interference with the applicants' right to the peaceful enjoyment of their possessions because "[t]he refusal to register the applicants as certified accountants radically affected the conditions of their professional activities and the scope of those activities was reduced. Their income fell, as did the value of their clientèle and, more generally, their business".[86] And so the reputation of the applicants in this case was treated, albeit indirectly, as a possession; and then in *Niemietz v Germany* the possibility for a more explicit treatment of reputation was left open.

The question of the form of reputation arose once again in *Buzescu v Romania (2005)*, which concerned the annulment of Mr Buzescu's registration with the Constanța Bar. Before the ECtHR, Mr Buzescu complained, inter alia, that the decision interfered with his right to the peaceful enjoyment of his possessions, arguing that "the economic interests associated with his business represented a 'possession' within the meaning of Article 1 of Protocol No. 1".[87] The Court noted that although the part of Mr Buzescu's complaint that concerned "loss of future income" fell outside the scope of Article 1 of Protocol No. 1, "law practices and their goodwill" did constitute 'possessions' within the meaning of that provision.[88] But the difficulty in sustaining this distinction – arguably, the loss of clientele would only ever be relevant in this context because of its leading to a loss of income – was then revealed in the Court's finding that "there was an interference with [Mr Buzescu's] right to the peaceful enjoyment of his possessions" on the basis that "the annulment of [his] registration with the Constanța Bar led to a loss

[85] 8543/79 et al., *Van Marle and Others v The Netherlands* (1986), para.41.
[86] *Ibid.*, para.42.
[87] 61302/00, *Buzescu v Romania* (2005), para.79.
[88] *Ibid.*, para.81.

of that part of his clientele which was interested in his ability to provide the full range of services of a Romanian lawyer, and hence to a loss of income".[89]

In these cases, the pursuit of a form (reputation) leads to its being indirectly treated in terms of a thing. This, in turn, enables some other thing (for example, lost income) to be pulled within the notion of possession, in the name of the further pursuit of the form of the reputation. The focus shifts from the form itself (and from the actual practice represented in the form) to the practice of the form. And once the form has been alienated from the individual in this way, the individual can no longer remain in full possession of it, even though it is the very rendering of the form as a 'possession' within the meaning of the Convention that brings about this result. This is because the relocation of practice at the level of the form entails a shift to the presentation of the individual in the terms of the form – a shift from the realm of experience to the realm of representation.

6.4.3 The location of stability

The notion of the form emerges as having three expressions that are critical to the configuration of things in terms of individual time in European human rights law and that underpin the conceptualisation of the individual as being located between present and future. The *form of the thing* (as an image of the relationship that links the individual to the thing) enables the thing or the material environment of the individual to be carried through time. It presupposes the attachment of the individual to material things and to material circumstances (the image of the relationship is an image of this attachment) but it also conceives of this attachment as extending beyond the present. The *form as a thing* (involving the rendering material of the original image of the relationship that links the individual to the thing) points both to the reflexive quality of the form (the way in which it indicates back to the material present from which it came and continues to affect it) and to its logic of abstraction (the way in which the logic of the form is one of a cycle of abstracting and rendering material). The *practice of the form* (involving a practice of

[89] *Ibid.*, para.88.

the representation that the form constitutes) ties experience itself to the level of the form.

The construction of the form in this way implies that the form is a stabilising force in the location of the individual beyond the present and in the conceptualisation of the condition of the present as a condition of containing the future, because it supplies a frame for the carrying through of the individual beyond her material attachment to the present. This stabilising quality derives from the origins of the form in the notion of potentiality in European human rights law (potentiality being about becoming, and the form being a specific expression of a becoming into). Potentiality is itself conceived of as being stabilising. There are two reasons for this. First, potentiality generates individual continuity through time in European human rights law – something that we saw in detail in Chapter 3 and that is reflected in the way in which material things are conceived of as pointing beyond the present. Second, potentiality itself remains always beyond the present, to the point that it can never itself be rendered a material 'thing'.[90] It is conceived of as bearing a stable focus: a focus on that which is to come. Thus whereas others, and Hannah Arendt in particular, have depicted things themselves as "stabilizing human life",[91] the vision in European human rights law seems to be more that stability is primarily located at the level of the form (and in the final analysis, in potentiality).

The location of stability at the level of the form, and the conceptualisation of this as being both a consequence of and a part of the notion of individual continuity in European human rights law (by virtue of the relationship between the notion of the form and potentiality) is not, however, without implication for the notion of individual continuity itself. In particular, this way of locating stability entails the alienation of the individual, in the sense that an alienating way of relating

[90] Thus in 46470/11, *Parrillo v Italy* (2015), discussed in Ch.3, part 3.2.1, and in a context in which the embryos were being treated in terms of vital potentiality (their potential to become human), the Court stated that "[having] regard to the economic and pecuniary scope of that Article, human embryos cannot be reduced to 'possessions' within the meaning of that provision" (para.215).
[91] H. Arendt, *The Human Condition* (Second Edition) (1998 [1958], The University of Chicago Press), p137.

is set out here[92] – a way of relating that involves a distancing of the individual, the relocation of continuity at the level of her representation, and the emergence of a mode of being that is constituted on the basis of this distance and is located in the form (the representation itself). As we have seen in this chapter, this is what is concretised in the placement of things in terms of individual time: a placement which entails the location of the individual between present and future and therefore her representation in terms of that which is 'to come'. And the effect of this account of the relationship between the individual and material things – an account entailing a conceptualisation of the individual as being attached to the present and as extending beyond it – is that a notion of alienation emerges as being inherent within the vision of individual continuity in European human rights law.

6.5 Conclusion

The argument of this chapter has been that the individual is conceived of in European human rights law as being attached to the present and as extending beyond it. This, I have suggested, is concretised in European human rights law's vision of the relationship between the individual and material things, which emerges as follows. Things are cast in European human rights law as materialising time: as pointing to that which is to come as well as that which has already happened. This gives rise to a conception of the condition of the present as being a condition of containing the future, and this, in turn, makes for an account in which the individual is located between present and future – attached to material things and extending beyond them. This is underpinned by a way of seeing that emphasises foresight, a way of relating to material things that is based on a notion of the material extent of the individual (of how far she extends in her material environment), and a way of representing the individual in her relations with material things that involves an abstraction from life itself to deal in the language of forms (a form being an image of the relationship between the individual and the material thing). The representation of the individual in this way culminates in a

[92] See further Jaeggi's theory of what alienation of this kind (in the sense of a disruption in one's identification with and appropriation of the world) looks like: R. Jaeggi, *Alienation* (transl. F. Neuhouser and A. E. Smith; ed. F. Neuhouser) (2014, Columbia University Press, New York).

shift from the realm of the individual's relations with the thing to the practice of what these relations represent – a shift which, I have argued, means that stability in European human rights law emerges as being located beyond the present and in the terms of potentiality – the terms of that which is to come. The effect of this is that the notion of individual continuity in European human rights law has to accommodate a notion of alienation, because in the moment that stability is located beyond the present, individual continuity is relocated at the level of the representation of the individual, and a mode of being emerges that is located between present and future and in terms of that which is to come.

– CONCLUSION –

This thesis has offered an account of how European human rights law imagines the human condition. It has shown how a series of ordering assumptions about the human condition structure European human rights law; and it has shown, moreover, that these assumptions are a constitutive part of its nature as a lived order. What I want to do in these final pages is to draw the arguments of my thesis together and to consider the overall vision of the lived order of individuation that is articulated in European human rights law. I will begin with a brief summary of the arguments made in the six substantive chapters.

In Chapter 1, I argued that we can think of the ECHR legal order as an *order of individuation* (as an order that is constituted upon and structured by a vision of 'the individual'), and, more specifically, as a *lived order* of individuation (as an order that presupposes and expresses a mode of being such that the order is itself lived). I argued that a lived order has three main features: it is governed by an ethos, which functions to support and structure the mode of being of the order; it is internalised by those within it; and it structures life by setting out a vision of space, time, body, wisdom, and things.

In Chapter 2, I argued that space is conceptualised in European human rights law by reference to two visions: a phenomenological vision of the sense of place of the individual, which I described as an idea of *presence,* and a more functional or instrumental vision of the position of the individual – of the representation of the individual through the terms of some role or status – which I described as an idea of *presentation.* I argued that the two visions are fundamentally at odds with one another, but that their mediation opens up a space for the negotiation of individual identity in European human rights law.

In Chapter 3, I argued that this idea of individual identity is structured by a notion of individual continuity across time: a notion that is borne of European human rights law's conceptualisation of 'being' as being about 'becoming' (potentiality) and that is grounded by reference to two conditions: habituation

(which is about what the individual is habituated to) and narrativisation (which is about the construction of narrative as a means through which to organise life). I argued that whilst these conditions are cast as being about the individual's sense of continuity, they also enable the individual to be pinned down within the terms of European human rights law and the continuity of its order to be secured. I argued that this double function is enabled by a vision of the human condition in which we are assumed to have a need to assume our self-continuity across time.

In Chapter 4, I argued that this assumption about our need to assume our self-continuity is bound up in the way in which European human rights law conceives of us as having a need to be recognised by others – a need which is conceived of as originating in our sense of our body. The chapter developed an account of the theory of recognition elaborated in European human rights law on this basis; and I argued that this is, in essence, a theory of profound mutual dependence between self and other – a theory in which we are cast as depending on the other in order to gain exposure to our vulnerabilities and in which in the face of the loss of a specific other, the focus comes to be on reconstituting the effects of the loss of recognition by that other.

In Chapter 5, I examined the way in which an interaction is envisaged between our fundamental assumptions (as originating in our sense of our bodies) and our experiences in European human rights law. I argued that a normative account of the management of reality is elaborated, and that this account forefronts a particular manner of integrating experience, understanding, and knowledge that constitutes European human rights law's conception of wisdom. In particular, I argued that as part of this the individual is oriented towards an outlook on life that forefronts a series of capacities that essentially require her to detach from reality, so that European human rights law's vision of the wise management of reality is conceived of as involving a detachment from reality itself.

In Chapter 6, I examined the vision of the present that is bound up in this conceptualisation of the management of reality. I argued that the individual is envisaged as being attached to the present and as extending beyond the present, and that this is concretised in European human rights law's vision of the

relationship between the individual and material things. I argued that the representation of the individual in this way – as ultimately located between present and future – means that stability in European human rights law is located beyond the present and in the terms of that which is to come. The effect of this is that the notion of individual continuity in European human rights law has to accommodate a notion of alienation, because in the moment that stability is located beyond the present, individual continuity is relocated at the level of the representation of the individual, and a mode of being emerges that is located between present and future and in terms of that which is to come.

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The account that I have developed through the six chapters of my thesis is an account of five main categories of ordering assumptions that structure European human rights law and are all broadly oriented towards a notion of individual continuity – towards the persistence of 'the individual' through time. These are assumptions about the way in which 'the individual' develops an identity in European human rights law, about her need for a sense of continuity across time, about her need for recognition by others, about her agency in managing reality and her capacity to detach from reality, and about the way in which she is located between present and future by being both attached to material circumstances and able to extend beyond these. My argument has been that these assumptions are a constitutive part of the nature of European human rights law as a lived order. To see what binds these assumptions together, therefore – to see what vision of the human condition underpins and emerges from the notion of individual continuity that these assumptions give rise to – we need to turn our attention back to the question of the lived order constituted by European human rights law. In particular, we need to consider the three features of lived order outlined in Chapter 1: the structure of its vision of life (in terms of its account of space, time, body, wisdom, and things); its internalisation as an order; and the ethos that governs it. Drawing the chapters of this thesis together, we can account for the lived order of individuation set out by European human rights law as follows.

1. *The structure of European human rights law's vision of life (in terms of its account of space, time, body, wisdom, and things)* is as follows. *Space* is conceived of in terms of the sense of place and the position of the individual (the mediation of which generate a space for the negotiation of questions of individual identity). *Time* is conceived of in terms of individual continuity (a notion which has its origins in an idea of potentiality). The vision of the *body* that is set out is a vision of the way in which our bodies ground us (in the sense that our fundamental assumptions about the world and our place in the world are cast as being based on our bodies) and relate us to each other (in the sense that our bodies are cast as being bound up in each other, as reflected in the theory of mutual recognition elaborated in this context). *Wisdom* is conceived of in terms of a mode of managing reality and addressing life that involves the development of an ability to detach from reality itself. The vision of *things* set out is a vision of a way of relating to material things that forefronts their standing in relation to individual time: a vision that involves a conceptualisation of the individual as being attached to material things and as extending beyond them.

2. *The internalisation of the order that is constituted by European human rights law* is envisaged in terms of (and is reflected in) the way in which those within the jurisdiction of ECHR law rely on, appeal to, and fundamentally assume the existence of the rights and freedoms set out in the ECHR. More than that, we have seen in this thesis how European human rights law is conceived of as engaging with the assumptions of those within its jurisdiction, insofar as it makes assumptions about these assumptions (about a need for a sense of continuity and a need to be recognised, for example). The consequence of the way in which European human rights law sets out a vision of the human condition in these terms is that when those within the jurisdiction of ECHR law assume their rights in the terms of the ECHR, they also assume European human rights law's vision of the human condition. This to say that appeals to European

human rights law are also, inevitably and necessarily, appeals to its vison of the human condition. The ECHR legal order is accordingly lived and internalised through the way in which (and to the extent that) those within the jurisdiction of ECHR law rely on and assume their rights and freedoms under the ECHR.

3. *The ethos that governs the lived order of European human rights law* is an ethos of individual continuity, involving an appeal to – and a concern with – the persistence of the individual through time. Thus the space of individual identity that is articulated in European human rights law is structured by a notion of individual continuity, the basis of which is an assumption that the individual needs to assume her self-continuity; European human rights law's account of the fundamental assumptions that the individual makes more generally generates a theory of mutual recognition that leads us towards a vision of how the individual reorients herself (and therefore sustains herself) in the face of loss and disruption; the account of the management of experience that is set out on this basis is conceived of as being directed towards the acquisition of wisdom and as being, therefore, a developmental account; and finally, the individual is conceived of as relating to material things in a manner that depicts things as materially representing individual continuity – a representation that leads to a vision of the individual as located between present and future and in terms of that which is to come.

It may be recalled that I said in Chapter 1 that the ethos of a lived order has three dimensions: a local dimension (involving the place of the order); a common dimension (involving the body of the order); and an individual dimension (involving the subject of the order). The ethos of individual continuity that governs the lived order of European human rights law has three dimensions in this sense. *Local continuity* pertains to the way in which the ethos of individual continuity is envisaged in the context of the jurisdiction of the order of individuation

> set out in European human rights law (it is a vision that is tied to this jurisdiction, since it is tied to European human rights law). *Common continuity* pertains to the way in which the vision of individual continuity is also a vision of the continuity of the mode of being articulated through European human rights law – and, indeed, a vision of the continuity of the order of European human rights law itself – since 'the individual' is the basis of this order entirely (and so in securing the continuity of this individual, the continuity of the order is secured). *Individual continuity* pertains, finally, to the conceptualisation of the subject of the order of individuation – 'the individual' – in terms of her individual continuity and as located between present and future and oriented towards her continuity.

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And so we come, finally, to the question of the mode of being that is presupposed and expressed by European human rights law's mode of order; and what we have seen in this thesis is that the ethos of individual continuity that is set out in European human rights law functions to support and secure a mode of being that is about becoming. The individual is conceived of as being in a continuous state of becoming, and this is not only in the sense of the notion of ethical potentiality discussed in Chapter 3 (a notion which, as we saw in that chapter, involves a vision of the continuous development and realisation of the self) but in the sense that the notion of individual continuity that drives European human rights law involves a conceptualisation of a continuous process of *coming into the terms* of European human rights law and of *coming to terms with* all that which must be brought to terms according to European human rights law.

Chapters 2 and 3 were, accordingly, about coming into the terms of European human rights law, in that they set out an account of what it means to come into the language of presence and presentation that underpins European human rights law's idea of 'the individual' and into the language of dignity that underpins European human rights law entirely. Chapters 4 and 5 were about coming to terms with all that which must be brought to terms according to

European human rights law, in that they grappled with European human rights law's vision of the challenge of putting something into terms and living with it when the possibility of the former somehow presupposes the latter and the latter simultaneously the former. The chapters showed how, in this context, European human rights law envisages the management of specific experiences (like loss) and sets out a broader account of what it means in European human rights law to integrate experiences (including those that are at odds with our fundamental assumptions) into our assumptive frameworks and to accordingly acquire experience. Chapter 6, finally, was about the effect of this vision of coming to terms, in that it set out an account of the logic of this vision – a logic which ultimately involves the locating of the individual between present and future, and the conceptualisation of the present as being about containing the future – and considered the implications of a focus on the 'coming' of the coming to terms (a focus which eventually means that individual continuity is relocated at the level of representation and the individual is conceived of in terms of that which is 'to come').

The vision of the human condition that emerges in European human rights law is, in this way, a vision in which the fundamental question to be negotiated is a question of coming to terms – a question of *coming into the terms* of European human rights law and of *coming to terms with* all that which must be brought to terms according to European human rights law. This mode of becoming – of coming to terms – is what binds the ordering assumptions of EHRL together and underpins the notion of individual continuity that these assumptions give rise to. It also, therefore, underpins the six qualities that European human rights law relies on for its significance and that were introduced in the Introduction to this thesis. It underpins the *interpretive vision* of European human rights law, in that, as we have seen, an account of what it means to come to terms underlies the interpretation of cases before the ECtHR. It structures the *modes of reasoning* of European human rights law, by way of which conflicting interests are brought into terms with each other. It underpins the *integration of values* that we see in European human rights law, in that the provisions of the ECHR are integrated in the interpretation of the

ECtHR by reference to a vision of what it means to come to terms. It structures European human rights law's *expression of a vision of emancipation*, insofar as emancipation is cast as involving being brought into the terms of European human rights law (in the way set out in Chapters 2 and 3) and claiming through the language of these terms. It structures the expression of the *therapeutic potential* of European human rights law, insofar as European human rights law is conceived of as supplying a language and a means for coming to terms with experiences that may well otherwise resist the very possibility of a (potentially beneficial) expression. And it structures the expression of the *form of accountability* that is pursued through European human rights law, insofar as the constraint that European human rights law places on State power – and its delineation, more specifically, of the use of that power – is bound up in an account of how the individual comes to terms.

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That, then, is my thesis: that European human rights law imagines the human condition as a condition of coming to terms. And what we have seen in this thesis is what this vision entails, which is to say that we have seen an account of how life is lived when this vision is lived. To conclude, I want to reflect on two implications of this drawing of an order of individuation around a mode of being of becoming – a mode of coming to terms.

The first implication is that the possibility of 'arriving' (of being as anything other than becoming) is precluded by the very nature of the structure of the order that is constituted by European human rights law. This is an order that, as I have argued, presupposes and expresses a mode of being of becoming – a mode of coming to terms – and is sustained by an ethos of individual continuity that both functions to support and structure this mode of being and simultaneously sustains the continuity of the order of individuation itself. The effect of this vision – a vision of continuity based on a mode of being as becoming – is that there is never any need to account for what it looks like to 'come' to terms. This is not only an effect at the level of the individual, who is always conceived of as becoming. It is also, and inevitably (given the nature of European human rights law as an order

that is constituted upon and structured by this individual), an effect at the level of the order, in the sense that there is never any need to give an account that points to anything beyond European human rights law's order of individuation. This is because, in expressing and presupposing a mode of being that is about becoming, European human rights law's order of individuation is conceived of as exhausting the possibility of a 'beyond' that is not accommodated by it. Thus it is not only that there is no need to give an account of what it looks like to 'come' to terms, or to go 'beyond' the order; it is that these possibilities are precluded entirely.

The second implication of the mode of being of becoming articulated here is related to the first; and it is that the possibility of writing a full account of 'the individual' in European human rights law is precluded by the nature of the form of order that 'the individual' is an organising principle of. For in European human rights law's order of individuation – an order which has, as its mode of being, a mode of becoming – 'the individual' is always, necessarily, an individual who is 'coming to terms': an individual who is always 'to come'. We can draw out the assumptions that are made in European human rights law about 'the individual', therefore; but we can never fully account for 'the individual' who is always 'to come'.

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This thesis has offered an account of the vision of the human condition that underpins the interpretation of the ECHR by the ECtHR. It has shown how a series of assumptions about the human condition are made in European human rights law; and it has shown how these assumptions structure European human rights law and are a constitutive part of its nature as a lived order. More specifically, my thesis has offered an account of the vision of the human condition that underpins and emerges from these assumptions. This vision is one of the human condition as a condition in which the fundamental question to be negotiated is a question of coming to terms – a question of coming into the terms of European human rights law and of coming to terms with all that which must be brought to terms according to European human rights law. It is this vision that European human rights law relies on for its significance, in the sense that it underpins its

interpretive vision, its modes of reasoning, its integration of values, its expression of a vision of emancipation, its therapeutic potential, and its form of accountability. It is this vision that underpins European human rights law's nature as a lived order of individuation. And it is this vision, finally, that is brought to bear every time an appeal to an ECHR right is made.

– BIBLIOGRAPHY –

Case law

European Court of Human Rights

1474/62 et al., *Case "Relating to Certain Aspects on the Use of Languages in Education in Belgium" v Belgium* (1968)

5100/71 et al., *Engel and Others v The Netherlands* (1976)

5493/72, *Handyside v UK* (1976)

5310/71, *Ireland v UK* (1978)

5856/72, *Tyrer v UK* (1978)

6833/74, *Marckx v Belgium* (1979)

7151/75 and 7152/75, *Sporrong and Lönnroth v Sweden* (1982)

8919/80, *Van der Mussele v Belgium* (1983)

9214/80 et al., *Abdulaziz, Cabales and Balkandali v UK* (1985)

9063/80, *Gillow v UK* (1986)

8793/79, *James and Others v UK* (1986)

9815/82, *Lingens v Austria* (1986)

8543/79 et al., *Van Marle and Others v The Netherlands* (1986)

9267/81, *Mathieu-Mohin and Clerfayt v Belgium* (1987)

9749/82, *W. v UK* (1987)

10737/84, *Müller and Others v Switzerland* (1988)

10454/83, *Gaskin v UK* (1989)

10522/83, *Mellacher and Others v Austria* (1989)

14038/88, *Soering v UK* (1989)

15576/89, *Cruz Varas and Others v Sweden* (1991)

12313/86, *Moustaquim v Belgium* (1991)

12742/87, *Pine Valley Developments Ltd and Others v Ireland* (1991)

16213/90*, Burghartz and Schnyder Burghartz v Switzerland* (1992)

13590/88, *Campbell v UK* (1992)

12945/87, *Hadjianastassiou v Greece* (1992)

13710/88, *Niemietz v Germany* (1992)

13441/87, *Olsson v Sweden (No 2)* (1992)

14556/89, *Papamichalopoulos and Others v Greece* (1993)

13580/88, *Karlheinz Schmidt v Germany* (1994)

16969/90, *Keegan v Ireland* (1994)

13470/87, *Otto-Preminger-Institut v Austria* (1994)

27776/95, *AG and Others v Sweden* (1995, admissibility decision)

15225/89, *Friedl v Austria* (1995)

15375/89, *Gasus Dosier-und Fördertechnik GmbH v The Netherlands* (1995)

18072/91, *Velosa Barreto v Portugal* (1995)

17862/91, *Cantoni v France* (1996)

21928/93, *Hussain v UK* (1996)

17383/90, *Johansen v Norway* (1996)

15318/89, *Loizidou v Turkey* (1996)

23389/94, *Singh v UK* (1996)

17419/90, *Wingrove v UK* (1996)

23178/94, *Aydin v Turkey* (1997)

23078/93, *Bouchelkia v France* (1997)

21627/93 et al., *Laskey and Others v UK* (1997)

25017/94, *Mehemi v France* (1997)

20972/92, *Raninen v Finland* (1997)

29107/95, *Stedman v UK* (1997, admissibility decision)

21830/93, *X, Y and Z v UK* (1997)

21439/93, *Botta v Italy* (1998)

26102/95, *Dalia v France* (1998)

27812/95, *Malige v France* (1998)

27053/95, *Vasilescu v Romania* (1998)

31127/96, *E.P. v Italy* (1999)

45924/99, *Juric v Sweden* (1999)

24833/94, *Matthews v UK* (1999)

25803/94, *Selmouni v France* (1999)

33202/96, *Beyeler v Italy* (2000)

29192/95, *Ciliz v The Netherlands* (2000)

32492/96 et al., *Coëme and Others v Belgium* (2000)

32346/96, *Glaser v UK* (2000)

40031/98, *Gnahoré v France* (2000)

25498/94, *Messina v Italy (No. 2)* (2000)

46346/99, *Noack and Others v Germany* (2000, admissibility decision)

32842/96, *Nuutinen v Finland* (2000)

39221/98 and 41963/98, *Scozzari and Giunta v Italy* (2000)

44599/98, *Bensaid v UK* (2001)

22430/93, *Bronda v Italy* (2001)

27238/95, *Chapman v UK* (2001)

25781/94, *Cyprus v Turkey* (2001)

42393/98, *Dahlab v Switzerland* (2001, admissibility decision)

25702/94, *K and T v Finland* (2001)

37794/97, *Pannullo and Forte v France* (2001)

33394/96, *Price v UK* (2001)

42527/98, *Prince Hans-Adam II of Liechtenstein v Germany* (2001)

28945/95, *T.P. and K.M. v UK* (2001)

29392/95, *Z and Others v UK* (2001)

36515/97, *Fretté v France* (2002)

28957/95, *Goodwin v UK* (2002)

25680/94, *I v UK* (2002)

34315/96, *Krone Verlag GmbH & Co. KG v Austria* (2002)

46544/99, *Kutzner v Germany* (2002)

39393/98, *M.G. v UK* (2002)

53176/99, *Mikulić v Croatia* (2002)

42295/98, *Nerva and Others v UK* (2002)

56547/00, *P, C, and S v UK* (2002)

2346/02, *Pretty v UK* (2002)

38621/97, *Zehnalova and Zehnal v The Czech Republic* (2002, admissibility decision)

39665/98 and 40086/98, *Ezeh and Connors v UK* (2003)

36022/97, *Hatton and Others v UK* (2003)

41666/98, *Kyrtatos v Greece* (2003)

52750/99, *Lorsé and others v The Netherlands* (2003)

48206/99, *Maire v Portugal* (2003)

42326/98, *Odièvre v France* (2003)

27677/02, *Sentges v The Netherlands* (2003, admissibility decision)

38822/97, *Shishkov v Bulgaria* (2003)

46133/99 and 48183/99, *Smirnova v Russia* (2003)

50901/99, *Van der Ven v The Netherlands* (2003)

35968/97, *Van Kück v Germany* (2003)

24209/94, *Y.F. v Turkey* (2003)

23656/94, *Ayder and Others v Turkey* (2004)

69949/01, *Aziz v Cyprus* (2004)

8803/02 et al., *Doğan and Others v Turkey* (2004)

74969/01, *Görgülü v Germany* (2004)

36983/97, *Haas v The Netherlands* (2004)

45582/99, *L. v the Netherlands* (2004)

48939/99, *Öneryildiz v Turkey* (2004)

58255/00, *Prokopovich v Russia* (2004)

46117/99, *Taşkin and Others v Turkey* (2004)

53924/00, *VO v France* (2004)

36536/02, *B. and L. v UK* (2005)

61302/00, *Buzescu v Romania* (2005)

55723/00, *Fadeyeva v Russia* (2005)

58254/00, *Frizen v Russia* (2005)

11057/02, *Haase v Germany* (2005)

44774/98, *Leyla Şahin v Turkey* (2005)

46221/99, *Öcalan v Turkey* (2005)

73316/01, *Siliadin v France* (2005)

11931/03, *Teteriny v Russia* (2005)

48542/99, *Zawadka v Poland* (2005)

61564/00, *Elli Poluhas Dödsbo v Sweden* (2006)

35014/97, *Hutten-Czapska v Poland* (2006)

58757/00, *Jäggi v Switzerland* (2006)

54810/00, *Jalloh v Germany* (2006)

28867/03, *Keegan v UK* (2006)

53157/99 et al., *Ledyayeva et al. v Russia* (2006)

77617/01, *Mikheyev v Russia* (2006)

13178/03, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2006)

46410/99, *Üner v The Netherlands* (2006)

17209/02, *Zarb Adami v Malta* (2006)

56760/00, *Akpinar and Altun v Turkey* (2007)

69735/01, *Chair and J.B. v Germany* (2007)

27473/02, *Erdoğan Yağiz v Turkey* (2007)

6339/05, *Evans v UK* (2007)

70204/01, *Frérot v France* (2007)

31753/02, *Kaya v Germany* (2007)

72118/01, *Khamidov v Russia* (2007)

39388/05, *Maumousseau and Washington v France* (2007)

5410/03, *Tyisąc v Poland* (2007)

68354/01, *Vereinigung Bildender Künstler v Austria* (2007)

15339/02 et al., *Budayeva and Others v Russia* (2008)

27058/05, *Dogru v France* (2008)

55525/00, *Hadri-Vionnet v Switzerland* (2008)

18620/03, *Juppala v Finland* (2008)

21906/04, *Kafkaris v Cyprus* (2008)

35991/04, *Kearns v France* (2008)

3013/04, *Khadzhialiyev and Others v Russia* (2008)

1638/03, *Maslov v Austria* (2008)

30562/04 and 30566/04, *S and Marper v UK* (2008)

33629/06, *Vajnai v Hungary* (2008)

46423/06, *Beganović v Croatia* (2009)

26713/05, *Bigaeva v Greece* (2009)

18324/04, *Galev and Others v Bulgaria* (2009, admissibility decision)

49151/07, *Muñoz Díaz v Spain* (2009)

1234/05, *Rekłos and Davourlis v Greece* (2009)

18527/02, *Tonchev v Bulgaria* (2009)

16064/90 et al., *Varnava and Others v Turkey* (2009)

25579/05, *A, B and C v Ireland* (2010)

38832/06, *Alajos Kiss v Hungary* (2010)

52502/07, *Aune v Norway* (2010)

34078/02, *Brosset-Triboulet and Others v France* (2010)

46113/99 et al., *Demopoulos and Others v Turkey* (2010)

34044/02, *Depalle v France* (2010)

302/02, *Jehovah's Witnesses of Moscow and Others v Russia* (2010)

41615/07, *Neulinger and Shuruk v Switzerland* (2010)

18768/05, *Saghinadze and Others v Georgia* (2010)

30141/04, *Schalk and Kopf v Austria* (2010)

60333/00, *Slyusarev v Russia* (2010)

29878/07, *Steindel v Germany* (2010, admissibility decision)

28708/06, *Trdan and Ć v Slovenia* (2010)

23459/03, *Bayatyan v Armenia* (2011)

5056/10, *Emre v Switzerland (No 2)* (2011)

9718/03, *Georgel and Georgeta Stoicescu v Romania* (2011)

22590/04, *Girard v France* (2011)

24360/04, *Giuran v Romania* (2011)

28847/08, *Gladovic v Croatia* (2011)

31950/06, *Graziani-Weiss v Austria* (2011)

5829/04, *Khodorkovskiy v Russia* (2011)

31827/02, *Laduna v Slovakia* (2011)

30814/06, *Lautsi and Others v Italy* (2011)

42310/04, *Nechiporuk and Yonkalo v Ukraine* (2011)

35348/06, *R and H v UK* (2011)

22266/04, *Rytchenko v Russia* (2011)

2040/06, *Sbârnea v Romania* (2011)

17080/07, *Schneider v Germany* (2011)

37452/02, *Stummer v Austria* (2011)

26971/07, *V v Slovenia* (2011)

18968/07, *V.C. v Slovakia* (2011)

45071/09, *Ahrens v Germany* (2012)

26940/10, *Antwi and Others v Norway* (2012)

39954/08, *Axel Springer AG v Germany* (2012)

24027/07 et al., *Babar Ahmad and Others v UK* (2012)

67724/09, *C.N. and V. v France* (2012)

13589/07, *Cristescu v Romania* (2012)

40721/08, *Fáber v Hungary* (2012)

57693/10, *Kaluczа v Hungary* (2012)

23338/09, *Kautzor v Germany* (2012)

1051/06, *Mihai Toma v Romania* (2012)

29518/10, *N.B. v Slovakia* (2012)

805/09, *Pascal v Romania* (2012)

39472/07 and 39474/07, *Popov v France* (2012)

33376/07, *Piruzyan v Armenia* (2012)

126/05, *Scoppola v Italy (No. 3)* (2012)

42202/07, *Sitaropoulos and Giakoumopoulos v Greece* (2012)

43547/08, *Stübing v Germany* (2012)

19433/07, *Tyagunova v Russia* (2012)

42857/05, *Van der Heijden v The Netherlands* (2012)

40660/08 and 60641/08, *Von Hannover v Germany (No. 2)* (2012)

55167/11, *Waldemar Nowakowski v Poland* (2012)

24626/09, *X v Turkey* (2012)

8759/05, *Csoma v Romania* (2013)

48420/10 et al., *Eweida and Others v UK* (2013)

34529/10, *Gutsanovi v Bulgaria* (2013)

552/10, *I.B. v Greece* (2013)

55508/07 and 29520/09, *Janowiec and Others v Russia* (2013)

13423/09, *Mehmet Şentürk and Bekir Şentürk v Turkey* (2013)

19840/09, *Shindler v UK* (2013)

66069/09 et al., *Vinter and Others v UK* (2013)

29617/07, *Vojnity v Hungary* (2013)

45872/06, *Yuriy Volkov v Ukraine* (2013)

38552/05, *Abdulayeva v Russia* (2014)

42488/02, *Dzemyuk v Ukraine* (2014)

56030/07, *Fernández Martínez v Spain* (2014)

49327/11, *Gough v UK* (2014)

37873/04, *Konovalova v Russia* (2014)

17254/11, *Krasicki v Poland* (2014)

50132/12, *Marić v Croatia* (2014)

24069/03 et al, *Öcalan v Turkey (No. 2)* (2014)

2210/12, *P.F. v Poland* (2014)

4605/05, *Petrova v Latvia* (2014)

6717/08, *Ruszkowska v Poland* (2014)

43835/11, *S.A.S. v France* (2014)

5049/12, *Senchishak v Finland* (2014)

32541/08 and 43441/08, *Svinarenko and Slyadnev v Russia* (2014)

60092/12, *Z.J. v Lithuania* (2014)

39350/13, *A.S. v Switzerland* (2015)

23380/09, *Bouyid v Belgium* (2015)

13216/05, *Chiragov and Others v Armenia* (2015)

61243/08, *Elberte v Lativa* (2015)

41418/04, *Khoroshenko v Russia* (2015)

10161/13, *M. and M. v Croatia* (2015)

10383/09, *Mamchur v Ukraine* (2015)

46470/11, *Parrillo v Italy* (2015)

40167/06, *Sargsyan v Azerbaijan* (2015)

15711/13, *Stolyarova v Russia* (2015)

14097/12 et al., *Varga and Others v Hungary* (2015)

39678/03, *Voronkov v Russia* (2015)

49304/09, *Biržietis v Lithuania* (2016)

33677/10 and 52340/10, *Fürst-Pfeifer v Austria* (2016)

23682/13, *Guberina v Croatia* (2016)

25960/13, *I.A.A. and Others v UK* (2016, admissibility decision)

1870/05, *Irina Smirnova v Ukraine* (2016)

46577/15, *Ivanova and Cherkezov v Bulgaria* (2016)

34238/09, *Lhermitte v Belgium* (2016)

61495/11, *M.G.C. v Romania* (2016)

30955/12, *Mandet v France* (2016)

7334/13, *Muršić v Croatia* (2016)

22743/07, *Otgon v The Republic of Moldova* (2016)

37798/13, *Belcacemi and Oussar v Belgium* (2017)

27153/07, *Cacuci and S.C. Virra & Cont Pad S.RL. v Romania* (2017)

17484/15, *Carvalho Pinto de Sousa Morais v Portugal* (2017)

21884/15, *Chowdury and Others v Greece* (2017)

4619/12, *Dakir v Belgium* (2017)

77248/12, *Dimcho Dimov v Bulgaria (No. 2)* (2017)

81272/12, *Ioniță v Romania* (2017)

60367/08 and 961/11, *Khamtokhu and Aksenchik v Russia* (2017)

56080/13, *Lopes de Sousa Fernandes v Portugal* (2017)

22662/13 et al., *Matiošaitis and Others v Lithuania* (2017)

29086/12, *Osmanoğlu and Kocabaş v Switzerland* (2017)

25358/12, *Paradiso and Campanelli v Italy* (2017)

72105/14 and 20415/15, *Silva and Mondim Correia v Portugal* (2017)

28768/12, *Wdowiak v Poland* (2017)

16112/15, *Fröhlich v Germany* (2018)

Court of Justice of the European Union

C-26/62, *Van Gend en Loos v Administratie der Belastingen* (1963) ECLI:EU:C:1963:1

C-497/10 PPU, *Barbara Mercredi v Richard Chaffe* (2010) ECLI:EU:C:2010:829

National courts

30 BVerfGe 173 (1971) (*Mephisto*) (German Constitutional Court)

39 BVerfGE 1 (1975) (*First Abortion Decision*) (German Constitutional Court)

Judgment 118/1996 (Italian Constitutional Court)

Judgment 198/2012 (Spanish Constitutional Court)

Legislation

Anti-social Behaviour, Crime and Policing Act 2014 (England and Wales)

Article 66 of the French Constitution

Charter of Fundamental Rights of the EU

Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Books, articles, and chapters

Abelard, P. *Peter Abelard's Ethics* (ed. D. E. Luscombe) (1971 [c.late.1130s], Oxford University Press)

Adam, B. *Time and Social Theory* (1990, Polity Press)

Agamben, G. *Homo Sacer: Sovereign Power and Bare Life* (transl. D. Heller-Roazen) (1998 [1995], Stanford University Press)

Agamben, G. *The Highest Poverty: Monastic Rules and Form-of-Life* (transl. A. Kotsko) (2013, Stanford University Press)

Akhtar, S. *Matters of Life and Death: Psychoanalytic Reflections* (2011, Karnac Books)

Anderson, B. *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (2006 [1983], Verso)

Anderson, E. N. 'German Romanticism as an Ideology of Cultural Crisis' (1941) *Journal of the History of Ideas* 2(3), 301-317

Arendt, H. 'Prologue (speech delivered upon receiving Denmark's Sonning Prize in 1975)', in *Responsibility and Judgment* (ed. J. Kohn) (2003, Schocken Books), 3-14

Arendt, H. *The Human Condition* (Second Edition) (1998 [1958], University of Chicago Press)

Arendt, H. *The Origins of Totalitarianism* (1976 [1951], Harcourt)

Attig, T. *How We Grieve: Relearning the World* (Revised Edition) (2011, Oxford University Press)

Azoulai, L., Barbou des Places, S., and Pataut, E. (eds.), *Constructing the Person in EU Law: Rights, Roles, Identities* (2016, Hart Publishing)

Azoulai, L. 'The European Individual as Part of Collective Entities (Market, Family, Society)', in L. Azoulai, S. Barbou des Places, and E. Pataut (eds.), *Constructing the Person in EU Law: Rights, Roles, Identities* (2016, Hart Publishing), 203-223

Azoulai, L., Barbou des Places, S., and Pataut, E. 'Being a Person in the European Union', in L. Azoulai, S. Barbou des Places, and E. Pataut (eds.), *Constructing the Person in EU Law: Rights, Roles, Identities* (2016, Hart Publishing), 3-11

Baer, S. 'Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism' (2009) *University of Toronto Law Journal* 59(4), 417-468

Barbou des Places, S. 'The Integrated Person in EU Law', in L. Azoulai, S. Barbou des Places, and E. Pataut (eds.), *Constructing the Person in EU Law: Rights, Roles, Identities* (2016, Hart Publishing), 179-202

Barcan, R. *Nudity: A Cultural Anatomy* (2004, Berg)

Bejan, T. M. *Mere Civility: Disagreement and the Limits of Toleration* (2017, Harvard University Press)

Benedict, St. *The Rule of St Benedict* (transl. C. White) (2008 [c.540], Penguin Books)

Benjamin, J. *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* (1988, Pantheon Books)

Bennett, J. *Vibrant Matter: A Political Ecology of Things* (2010, Duke University Press)

Birren J. E. and Svensson C. M. 'Wisdom in History', in R. J. Sternberg and J. Jordan (eds.), *A Handbook of Wisdom: Psychological Perspectives* (2005, Cambridge University Press, Cambridge), 3-31

Braunels, W. *Monasteries of Western Europe: The Architecture of the Orders* (transl. A. Lang) (1972, Thames and Hudson Ltd.)

Brems, E. (ed.), *The Experiences of Face Veil Wearers in Europe and the Law* (2014, Cambridge University Press)

Bribosia, E. and Rorive, I. 'Insider Perspectives and the Human Rights Debate on Face Veil Bans', in E. Brems (ed.), *The Experiences of Face Veil Wearers in Europe and the Law* (2014, Cambridge University Press), 163-183

Brugger, W. 'The Image of the Person in the Human Rights Concept' (1996) *Human Rights Quarterly* 18, 595-611

Bruner, J. *Acts of Meaning* (1990, Harvard University Press)

Bruner, J. *Making Stories: Law, Literature, Life* (2002, Harvard University Press)

Bryson, A. *From Courtesy to Civility: Changing Codes of Conduct in Early Modern England* (1998, Clarendon Press)

Burckhardt, J. *The Civilization of the Renaissance in Italy: An Essay* (2010 [1860], Dover Publications)

Butler, C. *Benedictine Monachism: Studies in Benedictine Life and Rule* (1919, Longmans, Green and Co.)

Butler, J. *Giving an Account of Oneself* (2005, Fordham University Press)

Butler, J. 'Response: Performative Reflections on Love and Commitment' (2011) *Women's Studies Quarterly* 39(1/2), 236-239

Buttimer, A. 'Home, Reach, and the Sense of Place', in A. Buttimer and D. Seamon (eds.), *The Human Experience of Space and Place* (1980, Croom Helm Ltd.), 166-187

Cahoone, L. 'Civic Meetings, Cultural Meanings', L. S. Rouner (ed.), *Civility* (2000, University of Notre Dame Press), 40-64

Calhoun, C. 'On Being Content with Imperfection' (2017) *Ethics* 127, 327-352

Carlisle, C. *On Habit* (2014, Routledge)

Carsten, J. 'Constitutive Knowledge: Tracing Trajectories of Information in New Contexts of Relatedness' (2007) *Anthropological Quarterly* 80(2), 403-426

Cary-Elwes, C. *Law, Liberty and Love: A Study in Christian Obedience – Foundation of European Civilization* (1950, Hodder & Stoughton)

Cavarero, A. *Relating Narratives: Storytelling and Selfhood* (transl. P. A. Kottman) (2000, Routledge)

Cavarero, A. *Horrorism: Naming Contemporary Violence* (transl. W. McCuaig) (2009 [2007], Columbia University Press)

Chalmers, D. 'The Persona of EU Law', in L. Azoulai, S. Barbou des Places, and E. Pataut (eds.), *Constructing the Person in EU Law: Rights, Roles, Identities* (2016, Hart Publishing), 89-108

Chalmers, D. 'Political Community and EU Law' (manuscript on file)

Chalmers, D. and Trotter, S. 'Fundamental Rights and Legal Wrongs: The Two Sides of the Same EU Coin' (2016) *European Law Journal* 22(1), 9-39

Cohen-Eliya, M. and Porat, I. *Proportionality and Constitutional Culture* (2013, Cambridge University Press)

Cornell, D. *At the Heart of Freedom: Feminism, Sex, and Equality* (1998, Princeton University Press)

Cornell, D. *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (1995, Routledge)

Costa, J.-P. 'Human Dignity in the Jurisprudence of the European Court of Human Rights', in C. McCrudden (eds.), *Understanding Human Dignity* (2013, Oxford University Press), 393-402

Coutts, S. 'Union Citizenship, Social Integration and Crime: Duties Through Crime', in L. Azoulai, S. Barbou des Places, and E. Pataut (eds.), *Constructing the Person in EU Law: Rights, Roles, Identities* (2016, Hart Publishing), 225-240

Csikszentmihalyi, M. and Rochberg-Halton, E. *The meaning of things: Domestic symbols and the self* (1981, Cambridge University Press)

Davetian, B. *Civility: A Cultural History* (2009, University of Toronto Press)

De Coulanges, F. *The Ancient City: A Study on the Religion, Laws, and Institutions of Greece and Rome* (1916 [1864], Simkin)

De Witte, F. 'Emancipation Through Law?', in L. Azoulai, S. Barbou des Places, and E. Pataut (eds.), *Constructing the Person in EU Law: Rights, Roles, Identities* (2016, Hart Publishing), 15-33

De Witte, F. 'Integrating the Subject: Narratives of Emancipation in Regionalism' (2019) *The European Journal of International Law* 30(1), 257-278

Desouza, N. 'Philosophy as Philosophical Anthropology: An Interview with Charles Taylor', in A. Waldow and N. DeSouza (eds.), *Herder: Philosophy and Anthropology* (2017, Oxford University Press), 13-29

Diamond, C. 'The Difficulty of Reality and the Difficulty of Philosophy' (2003) *Partial Answers: Journal of Literature and the History of Ideas* 1(2), 1-26

Douglas, M. *Natural Symbols: Explorations in Cosmology* (1970, Barrie & Rockliff: The Cresset Press)

Douglas, M. *Purity and Danger: An analysis of concepts of pollution and taboo* (1966, Routledge & Kegan Paul Ltd.)

Douzinas, C. 'Human Rights, Humanism, and Desire' (2001) *Angelaki: Journal of the Theoretical Humanities* 6(3), 183-206

Dupré, C. *The Age of Dignity: Human Rights and Constitutionalism in Europe* (2015, Hart Publishing)

Dworkin, R. *Law's Empire* (1998, Hart Publishing)

Editorial Comments, 'EU law as a way of life' (2017) *Common Market Law Review* 54(2), 357-367

Eliade, M. *The Sacred and the Profane: The Nature of Religion* (transl. W.R. Trask) (1950, Harcourt, Brace & World Inc.)

European Court of Human Rights, *Overview: 1959-2018, ECHR* (2019, European Court of Human Rights) (available at: https://echr.coe.int/Documents/Overview_19592018_ENG.pdf)

Fabbrini, F., and Larik, J. 'The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights' (2016) *Yearbook of European Law* 35(1), 145-179

Freeman, M. *Hindsight: The Promise and Peril of Looking Backward* (2010, Oxford University Press)

Freud, S. *Civilization and its Discontents* (transl. D. McLintock) (2004 [1930], Penguin)

Freud, S. 'Mourning and Melancholia' (1917) in *The Standard Edition of the Complete Psychological Works of Sigmund Freud: On the History of Psycho-Analytic Movement, Papers on Metapsychology and Other Works – Vol XIV* (transl. under J. Strachey) (2001, Vintage), 243-258

Freud, S. *The Ego and the Id* (1949 [1927], The Hogarth Press)

Freud, S. *The Uncanny* (transl. D. McLintock) (2003 [1919], Penguin Books)

Garin, E. *Italian Humanism: Philosophy and Civic Life in the Renaissance* (transl. P. Munz) (1975 [1947], Greenwood Press)

Goffman, E. *The Presentation of Self in Everyday Life* (1990 [1959], Penguin Books)

Gonzalez-Salzberg, D. A. *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (2019, Hart Publishing)

Gosden, C. *Social Being and Time* (1994, Blackwell Publishers)

Green, V. H. H. *Luther and the Reformation* (1964, B. T. Batsford)

Gross, E. 'The Body of Signification', in J. Fletcher and A. Benjamin (eds.), *Abjection, Melancholia and Love: The Work of Julia Kristeva* (1990, Routledge), 80-103

Guignon, C. *On Being Authentic* (2004, Routledge)

Hay, D. *The Italian Renaissance in its Historical Background* (Second Edition) (1977, Cambridge University Press)

Hegel, G. W. F. *Elements of the Philosophy of Right* (ed. A. W. Wood; transl. H. B. Nisbet) (1991 [1820], Cambridge University Press)

Herring, J. and Chau, P.-L. 'My Body, Your Body, Our Bodies' (2007) *Medical Law Review* 15(1), 34-61

Herring, J. and Wall, J. 'The Nature and Significance of the Right to Bodily Integrity' (2017) *Cambridge Law Journal* 76(3), 566-588

Hobsbawm, E. 'Introduction: Inventing Traditions' in E. Hobsbawm and T. Ranger (eds.), *The Invention of Tradition* (1983, Cambridge University Press)

Honneth, A. 'Integrity and Disrespect: Principles of a Conception of Morality Based on the Theory of Recognition' (1992) *Political Theory* 20(2), 187-201

Hoskins, J. *Biographical Objects: How Things Tell the Stories of People's Lives* (1998, Routledge)

Hu, C. '"A jungle that is continually encroaching": The time of disaster management' (2018) *Environment and Planning D: Society and Space* 36(1), 96-113

Jaeggi, R. *Alienation* (transl. F. Neuhouser and A. E. Smith; ed. F. Neuhouser) (2014, Columbia University Press)

Jager, B. 'Theorizing, Journeying, Dwelling', in A. Giorgi, C. T. Fischer, and E. L. Murray (eds.), *Duquesne Studies in Phenomenological Psychology: Volume II* (1975, Duquesne University Press), 235-60

James, W. *The Principles of Psychology, Volume I* (1981 [1890], Harvard University Press)

Janoff-Bulman, R. *Shattered Assumptions: Towards a New Psychology of Trauma* (1992, The Free Press)

Johnson, B. *Persons and Things* (2008, Harvard University Press)

Johnson, P. *Homosexuality and the European Court of Human Rights* (2013, Routledge)

Johnson, P. *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights* (2016, Oxford University Press)

Josselson, R. and Lieblich, A. 'Narrative Research and Humanism', in K. J. Schneider, J. F. Pierson, and J. F. T. Bugental (eds.), *The Handbook of Humanistic Psychology: Theory, Research, and Practice* (Second Edition) (2015, Sage Publications), 321-334

Kant, I. 'What is Enlightenment?', (1784) in I. Kant, *On History* (ed. and transl. L. W. Beck) (1963, Macmillan), 3-10

Kauffman, J. (ed.) *Loss of the Assumptive World: A Theory of Traumatic Loss* (2002, Routledge)

Kauffman, J. 'Introduction', in J. Kauffman (ed.), *Loss of the Assumptive World: A Theory of Traumatic Loss* (2002, Routledge), 1-9

Kellehear, A. *The Inner Life of the Dying Person* (2014, Columbia University Press)

Keller, H. and Stone Sweet, A. *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008, Oxford University Press)

Kharkhordin, O. *The Collective and the Individual in Russia: A Study of Practices* (1999, University of California Press)

Knowles, D. *From Pachomius to Ignatius: A Study in the Constitutional History of the Religious Orders* (1966, Clarendon Press)

Kristeva, J. *Powers of Horror: An Essay on Abjection* (transl. L. S. Roudiez) (1982 [1980], Columbia University Press)

Labouvie-Vief, G. 'Wisdom as integrated thought: historical and developmental perspectives', in R. J. Sternberg (ed.), *Wisdom: Its Nature, Origins, and Development* (1990, Cambridge University Press), 52-83

Lacan, J. 'The Mirror-phase as formative of the Function of the I' (1968) *New Left Review* 1(51) (Sept.-Oct.), 71-77

Lamb, J. *The Things Things Say* (2011, Princeton University Press)

Lear, J. *Happiness, Death, and the Remainder of Life* (2000, Harvard University Press)

Lear, J. *Radical Hope: Ethics in the Face of Cultural Devastation* (2006, Harvard University Press)

Lear, J. 'The difficulty of reality and a revolt against mourning' (2018) *European Journal of Philosophy* 26, 1197-1208

Lear, J. *The Idea of a Philosophical Anthropology (Spinoza Lectures)* (2017, Koninklijke Van Gorcum)

Lear, J. 'Waiting for the Barbarians', in *Wisdom Won from Illness: Essays in Philosophy and Psychoanalysis* (2017, Harvard University Press)

Lear, J. 'What Is a Crisis of Intelligibility?', in *Wisdom Won from Illness: Essays in Philosophy and Psychoanalysis* (2017, Harvard University Press), 50-62

Lear, J. *Wisdom Won from Illness: Essays in Philosophy and Psychoanalysis* (2017, Harvard University Press)

Lear, J. 'Wisdom won from illness: The psychoanalytic grasp of human being' (2014) *The International Journal of Psychoanalysis* 95(4), 677-693

Leclercq, J. *Aspects of Monasticism* (transl. M. Dodd) (1978, Cistercian Publications)

Levinas, E. *Totality and Infinity: An Essay on Exteriority* (transl. A. Lingis) (1991 [1961], Duquesne University Press)

Lindahl, H. *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013, Oxford University Press)

Long, N. J. and Moore, H. L. 'Introduction: Sociality's New Directions', in N. J. Long and H. L. Moore (eds.), *Sociality: New Directions* (2013, Bergahn Books), 1-24

Luther, M. 'To the Christian Nobility of the German Nation Concerning the Reform of the Christian Estate' (1520) (transl. C. M. Jacobs), in M. Luther, *Luther: Selected Political Writings* (ed. J. M. Porter) (1974, Fortress Press), 37-49

MacIntyre, A. *After Virtue: A Study in Moral Theory* (Second Edition) (1985, Duckworth)

Malafouris, L. 'Between brains, bodies and things: *tectonoetic* awareness and the extended self', in C. Renfrew, C. Frith, and L. Malafouris (eds.), *The Sapient Mind: Archaeology Meets Neuroscience* (2009, Oxford University Press), 89-104

Marshall, J. *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (2009, Martinus Nijhoff Publishers)

Marshall, J. *Human Rights Law and Personal Identity* (2014, Routledge)

Mauss, M. 'A Category of the Human Mind: The Notion of Person, the Notion of 'Self'" (1938), in *Sociology and Psychology: Essays* (transl. B. Brewster) (1979 [1950], Routledge & Kegan Paul Ltd.), 57-94

Mauss, M. 'Techniques of the Body (1935)' (1973) *Economy and Society* 2(1), 70-88

McCann, J. *Saint Benedict* (1937, Sheed and Ward)

McCrudden, C. 'Human Dignity and Judicial Interpretation of Human Rights' (2008) *The European Journal of International Law* 19(4), 655-724

Mears, R. *Intimacy and Alienation: Memory, trauma and personal being* (2000, Routledge)

Meissner, W. M. *Time, Self, and Psychoanalysis* (2007, Jason Aronson)

Melville, G. 'The Innovational Power of Monastic Life in the Middle Ages', in L. Bisgaard, S. Engsbro, K. V. Jensen, and T. Nyberg (eds.), *Monastic Culture: The Long Thirteenth Century – Essays in Honor of Brian Patrick McGuire* (2014, University Press of Southern Denmark), 13-31

Miller, W. I. *The Mystery of Courage* (2000, Harvard University Press)

Mitchell, J. *Siblings: Sex and Violence* (2003, Polity Press)

Mitchell, J. 'The Law of the Mother: Sibling Trauma and the Brotherhood of War' (2013) *Canadian Journal of Psychoanalysis* 21(1), 145-159

Mitchell, J. 'Trauma, Recognition, and the Place of Language' (1998) *Diacritics* 28(4), 121-133

Möller, K. *The Global Model of Constitutional Rights* (2012, Oxford University Press)

Möller, K. 'Justifying the culture of justification' (forthcoming, 2019) *International Journal of Constitutional Law*

Moorhouse, G. *Against All Reason* (1969, The Trinity Press)

Morin, V. 'L'objet biographique' (1969) *Communications* 13, 131-139

Morris, C. *The Discovery of the Individual 1050-1200* (1972, SPCK)

Mureinik, E. 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal of Human Rights*, 31-48

Murray Parkes, C. 'Psycho-social transitions: A field for study' (1971) *Social Science and Medicine* 5(2), 101-115

Nagel, T. 'Concealment and Exposure' (1998) *Philosophy and Public Affairs* 27(1), 3-30

Nedelsky, J. 'Law, Boundaries, and the Bounded Self' (1990) *Representations* 30, 162-189

Neuvonen, P. *Equal Citizenship and its Limits in EU Law: We the Burden?* (2016, Hart Publishing)

Nussbaum, M. C. 'Living the Past Forward: The Present and Future Value of Backward-Looking Emotions', in M. C. Nussbaum and S. Levmore, *Aging Thoughtfully: Conversations about Retirement, Romance, Wrinkles, and Regret* (2017, Oxford University Press), 125-143

Nussbaum, M. C. *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age* (2012, The Belknap Press of Harvard University Press)

Nussbaum, M. *Upheavals of Thought: The Intelligence of Emotions* (2001, Cambridge University Press)

Palmer, R. R. 'Man and Citizen: Applications of Individualism in the French Revolution', in M. R. Konvitz and A. E. Murphy (eds.), *Essays in Political Theory presented to George H. Sabine* (1972 [1948], Kennikat Press), 130-152

Pico della Mirandola, G. *Oration on the Dignity of Man* (transl. A. R. Caponigri) (1956 [1486], Henry Regnery Company)

Polkinghorne, D. E. *Narrative Knowing and the Human Sciences* (1988, State University of New York Press)

Popelier, C., Van De Heyning, C., and Van Nuffel, P. (eds.), *Human rights protection in the European legal order: the interaction between the European and the national courts* (2011, Intersentia)

Porter, J. M. 'Introduction: The Political Thought of Martin Luther', in M. Luther, *Luther: Selected Political Writings* (ed. J. M. Porter) (1974, Fortress Press), 1-21

Rabb, T. K. 'Religion and the Rise of Modern Science' (1965) *Past & Present* 31, 111-126

Raimondi, G. *Opening speech at the solemn hearing for the opening of the judicial year of the European Court of Human Rights* (25 January 2019, Strasbourg) (available at: https://www.echr.coe.int/Documents/Speech_20190125_Raimondi_JY_ENG.pdf)

Ratcliffe, M., Ruddell, M. and Smith, B. 'What is a "sense of foreshortened future?" A phenomenological study of trauma, trust, and time' (2004) *Frontiers in Psychology* 5, 1-11

Rice, E. F. *The Renaissance Idea of Wisdom* (1958, Harvard University Press)

Riesenberg, P. *Citizenship in the Western Tradition: Plato to Rousseau* (1992, The University of North Carolina Press)

Roth, M. S. *Memory, Trauma, and History: Essays on Living with the Past* (2012, Columbia University Press)

Sartwell, C. *End of Story: Toward and Annihilation of Language and History* (2000, State University of New York Press)

Scarry, E. *The Body in Pain: The Making and Unmaking of the World* (1985, Oxford University Press)

Scheper-Hughes, N. and Lock, M. M. 'The Mindful Body: A Prolegomenon to Future Work in Medical Anthropology' (1987) *Medical Anthropology Quarterly* 1(1), 6-41

Schmitt, C. *Political Theology: Four Chapters on the Concept of Sovereignty* (transl. G. Schwab) (1985 [1922, 1934], MIT Press)

Scribner, R. W. *The German Reformation* (1986, MacMillan Publishers)

Scott, S. 'A Sociology of the Nothing: Understanding the Unmarked' (2018) *Sociology* 52(1), 3-19

Selznick, P. 'Sociology and Natural Law' (1961) *Natural Law Forum* 61, 84-108

Sennett, R. *Flesh and Stone: The Body and the City in Western Civilization* (1994, Faber and Faber)

Sennett, R. *Together: The Rituals, Pleasures and Politics of Cooperation* (2013 [2012], Penguin Books)

Sennis, A. 'Narrating Places: Memory and Space in Medieval Monasteries', in W. Davies, G. Halsall, and A. Reynolds (eds.), *People and Space in the Middle Ages, 300-1300* (2006, Brepols Publishers), 275-294

Siedentop, L. *Inventing the Individual: The Origins of Western Liberalism* (2015, Penguin)

Simmel, G. 'Individual and Society in Eighteenth- and Nineteenth-Century Views of Life', in G. Simmel, *The Sociology of Georg Simmel* (transl. and ed. K. H. Wolff) (1950, The Free Press), 58-84

Simmel, G. 'Sociology of the Senses' (1908), in R. E. Park and E. W. Burgess (eds.), *Introduction to the Science of Sociology* (1921, The University of Chicago Press), 356-360

Simmel, G. 'The Aesthetic Significance of the Face' (1901) (transl. L. Ferguson), in K. H. Wolff (ed.), *Georg Simmel, 1858-1918, A Collection of Essays, with Translations and a Bibliography* (1959, The Ohio State University Press), 276-281

Simmel, G. *The Philosophy of Money* (ed. D. Frisby; transl. T. Bottomore and D. Frisby) (Second Edition) (1990 [1900], Routledge)

Simpson, A. W. B. *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001, Oxford University Press)

Slaughter, J. R. *Human Rights, Inc.: The World Novel, Narrative Form, and International Law* (2007, Fordham University Press)

Smith, P., Phillips, T. L. and King, R. D. *Incivility: The Rude Stranger in Everyday Life* (2010, Cambridge University Press)

Solnit, R. *Hope in the Dark: Untold Histories, Wild Possibilities* (2016 [2004], Nation Books)

Solnit, R. *A Field Guide to Getting Lost* (2006, Canongate Books)

Solovyov, V. 'The Idea of Humanity in Auguste Comte' (1898), in J. D. Kornblatt, *Divine Sophia: The Wisdom Writings of Vladimir Solovyov* (2009, Cornell University Press), 213-229

Somek, A. *Individualism: An essay on the authority of the European Union* (2008, Oxford University Press)

Spence, D. P. *Narrative Truth and Historical Truth: Meaning and Interpretation in Psychoanalysis* (1982, W. W. Norton & Company)

Spitz, L. W. *The Religious Renaissance of the German Humanists* (1963, Harvard University Press)

Spranger, E. *Types of Men: The Psychology and Ethics of Personality* (transl. P. J .W. Pigors) (1928 [1921], Max Niemeyer Verlag)

Stalford, H. *Children and the European Union: Rights, Welfare and Accountability* (2012, Hart Publishing)

Stone Sweet, A., and Ryan, C. *A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the European Convention on Human Rights* (2018, Oxford University Press)

Strathern, M. Presentation in the 1989 debate of the Group for Debates in Anthropological Theory (on the motion: 'The concept of society is theoretically obsolete'), in T. Ingold (ed.), *Key Debates in Anthropology* (1996, Routledge), 50-55

Strathern, M. *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia* (1988, University of California Press)

Swart, K. W. '"Individualism" in the Mid-Nineteenth Century (1826-1860)' (1962) *Journal of the History of Ideas* 23(1), 77-90

Taylor, C. *Human Agency and Language: Philosophical Papers 1* (1985, Cambridge University Press)

Taylor, C. 'Philosophy as Philosophical Anthropology: An Interview with Charles Taylor', in A. Waldow and N. DeSouza (eds.), *Herder: Philosophy and Anthropology* (2017, Oxford University Press), 13-29

Taylor, C. 'The Politics of Recognition', in A. Gutman (ed.), *Multiculturalism: Examining the Politics of Recognition* (1992, Princeton University Press), 25-73

Tillich, P. 'The Right to Hope' (1965) *Neue Zeitschrift für Systematicsche Theologie Und Religionsphilosophie* 7(3), 371-377

Thompson, W. D. J. C. *The Political Thought of Martin Luther* (ed. P. Broadhead) (1984, The Harvester Press)

Troeltsch, E. 'The Ideas of Natural Law and Humanity in World Politics' (1922), in O. Gierke, *Natural Law and the Theory of Society 1500 to 1800 – Volume I* (transl. E. Barker) (1934, Cambridge University Press), 201-222

Trotter, S. 'Birds Behaving Badly: The Regulation of Seagulls and the Construction of Public Space' (2019) *Journal of Law and Society* 46(1), 1-28

Trotter, S. '"Living Together", "Learning Together", and "Swimming Together": *Osmanoğlu and Kocabaş v Switzerland (2017)* and the Construction of Collective Life' (2018) *Human Rights Law Review* 18(1), 157-169

Trotter, S. 'The Child in European Human Rights Law' (2018) *Modern Law Review* 81(3), 452-479

Trotter, S. 'The ethos of replaceability in European human rights law' in J. Owen and N. Segal (eds.), *On Replacement: Cultural, Social and Psychological Representations* (2018, Palgrave Macmillan), 137-146

Tuan, Y.-F. *Space and Place: The Perspective of Experience* (1977, University of Minnesota Press)

Tuan, Y.-F. *Landscapes of Fear* (1980, Basil Blackwell)

Turner, V. 'Acting in Everyday Life and Everyday Life in Acting', in *From Ritual to Theatre: The Human Seriousness of Play* (1982, PAJ Publications), 102-123

Turner, V. *The Ritual Process: Structure and Anti-Structure* (1969, Aldine de Gruyter)

Tussman, J. *Obligation and the Body Politic* (1960, Oxford University Press)

Ullmann, W. *The Individual and Society in the Middle Ages* (1967 [1966], Methuen & Co Ltd.)

Ullmann, W. *Medieval Foundations of Renaissance Humanism* (1977, Elek Books)

Vaillant, G. E. *The Wisdom of the Ego* (1993, Harvard University Press)

Van Gennep, A. *The Rites of Passage* (transl. M. B. Vizedom and G. L. Caffee) (1960 [1908], The University of Chicago Press)

Volkan, V. D. 'Individuals and societies as "perennial mourners": Their linking objects and public memorials', in B. Willock, L. C. Bohm, R. C. Curtis (eds.), *On Deaths and Endings: Psychoanalysts' reflections on finality, transformations and new beginnings* (2007, Routledge), 42-59

Wilford, J. 'Out of rubble: natural disaster and the materiality of the house' (2008) *Environment and Planning D: Society and Space* 26, 647-662

Winnicott, D. W. 'Fear of Breakdown', in G. Kohon (ed.), *The British School of Psychoanalysis: The Independent Tradition* (1986, Free Association Books), 173-182

Winnicott, D. W. *The Family and the Individual Development* (2006 [1965], Routledge)

Winnicott, D. W. 'The Use of an Object and Relating Through Identifications' (1968), in *Playing and Reality* (2005 [1971], Routledge), 115-127

Winnicott, D. W. 'Transitional Objects and Transitional Phenomena' (1953), in *Playing and Reality* (2005 [1971], Routledge), 1-34

Wittgenstein, L. *Philosophical Investigations* (transl. G. E. M. Anscombe) (2001 [1953], Blackwell Publishing)

Workman, H. B. *The Evolution of the Monastic Ideal: From the Earliest Times down to the Coming of the Friars – A Second Chapter in the History of Christian Renunciation* (1913, Charles H. Kelly)

Zerubavel, E. 'The Benedictine Ethic and the Modern Spirit of Scheduling: on Schedules and Social Organization', (1980) *Sociological Inquiry* 50(2), 157-169