

Punishment and Precious Emotions: A Hope Standard for Punishment

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Abstract—Each year, hundreds of people in high-income countries take their own lives while they are in prison. Thousands engage in self-harm and thousands abuse other prisoners. Such behaviours often correlate with mental health problems, but they are also often pleas for help and for hope. Some courts have invoked the ideas of *hope* and the *right to hope* in the context of life imprisonment, but they have neither subjected the concept of *hope* to sustained analysis nor specified the role that hope should play in our practices of lawful punishment overall. This article offers a preliminary investigation of the role for hope in lawful punishment. It argues that one standard that both individual modes of punishment and overall systems of punishment must meet to be morally justifiable is that they be compatible with a reasonable person retaining hope both in the present and for his future after punishment. Such a hope standard narrows the scope of legitimate modes of punishment.

Keywords: emotions, hope, life imprisonment, prison, punishment, self-harm, suicide.

‘Hope’ is the thing with feathers -
That perches in the soul -
And sings the tune without the words -
And never stops—at all -
And sweetest—in the Gale—is heard -
And sore must be the storm -
That could abash the little Bird
That kept so many warm -
I’ve heard it in the chilliest land -
And on the strangest Sea -

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Yet—never—in Extremity,
It asked a crumb—of me.¹

1. Introduction

One storm that can abash the little bird of Hope is lawful punishment, and particularly imprisonment. Here are some statistics that make this vivid. Many European countries have average prison suicide rates of more than 10 per 10,000 prisoners.² France has one of the highest suicide rates in prison in Europe presently, with 12.6 suicides per 10,000 inmates in 2017, followed by Austria at 12.3 and then Germany with 11.8.³ In the UK, each year, about 100 people, including dozens of young people, take their own life while they are in prison. In 2016, there were 119 suicides in prison in the UK, the highest number since records began in 1978. The UK Ministry of Justice also reported record numbers of self-harm and assault incidents in 2016, with 37,784 self-harm incidents and 25,049 assault incidents.⁴ In Australia, in 2016–17, there were 91 deaths in custody. Of those, 19 were self-inflicted.⁵ That number includes both intentional and unintentional self-harm and accidental hangings.

Self-harm, harming other people and suicide in prison often correlate with mental health problems, but they are also often pleas for help and for hope. This article considers the role that *hope* should play in our practices of lawful punishment. Specifically, the article defends a *hope standard for punishment*: one standard that both a particular mode of punishment and an overall system of punishment must meet to be legitimate and morally justifiable is that they be compatible with a reasonable person retaining hope both in the present and for his future after punishment.⁶ This formulation of the hope standard relies on the notion of a *reasonable person* in order to bracket various considerations, such as the fact that individuals' moment-to-moment levels of hope might not be fully under their control, that some individuals might lack the capacity to feel hope at all and that some might be unable to judge whether their circumstances warrant their having hope about the present or the future.

¹ “‘Hope’ is the Thing with Feathers’ by Emily Dickinson, in *The Poems of Emily Dickinson*, edited by Thomas H. Johnson, Cambridge, Mass.: The Belknap Press of Harvard University Press, Copyright © 1951, 1955, 1979, 1983 by the President and Fellows of Harvard College.

² Between 2011 and 2014, close to 4000 people died by suicide in prison in 24 high-income countries in Europe, Australasia and North America. Seena Fazel, Taanvi Ramesh and Keith Hawton, ‘Suicide in Prisons: An International Study of Prevalence and Contributory Factors’ (2017) 4 *Lancet Psychiatry* 946.

³ Council of Europe statistics cited by Nikolaj Nielsen, ‘Prison Suicide Rates in France Highest in Europe’ *EU Observer* (2 April 2019) <<https://euobserver.com/justice/144563>>.

⁴ ‘Prison Suicides Rise to Record Level in England and Wales’ (*BBC News*, 26 January 2017) <www.bbc.co.uk/news/uk-38756409>.

⁵ Alexandra Gannoni and Samantha Bricknell, *National Deaths in Custody Program: Deaths in Custody in Australia 2016–17* (Australian Institute of Criminology 2019).

⁶ The pronoun ‘he’ is used throughout this article because the overwhelming majority of people who receive criminal convictions and are sentenced to prison are male.

The *reasonable person* invoked here is a situated reasonable person who must make choices and respond to his punishment against the backdrop of a particular life story and set of experiences.⁷ The hope standard insists that hope is relevant not only in the context of life imprisonment without parole, which both legal scholars and some courts, including the European Court of Human Rights, have discussed in terms of denying someone a *right to hope*, but also in relation to all other modes of punishment. The standard shows that a range of punishments that are regularly used—either formally or informally—in high-income systems are illegitimate and indefensible.

Philosophers of punishment have written at length about whether punishment is justified in principle, asking a well-known trinity of questions: Whom to punish?, Why punish?, and How much to punish? But they have shown far less interest in the justifiability of particular modes of punishment or, indeed, in the justifiability of overall systems of punishment, beyond assessing their severity as a matter of cardinal or ordinal proportionality. Philosophers have dripped little ink about the fact that many common modes of lawful punishment assault precious, sustaining emotions like hope. This article begins with an analysis of the concept of *hope* (section 2) and a reflection on the nature of its value (section 3). Next, it shows how limited our punishment practices would become if we take hope seriously (section 4).⁸ Then it offers four arguments to support those limits as part of a *hope standard for punishment* (section 5); and finally, it answers some objections pertaining to redeemability and proportionality (section 6).

2. *What Is Hope?*

According to the *Oxford English Dictionary* (OED), *hope* is the expectation of something desired; or rather, *hope* is a desire combined with an expectation that the desire will be satisfied. Philosophers describe this as a compound attitude, that is, an attitude that contains both the desire for a certain outcome and the belief (be it well-founded or not) that that desired outcome is likely to occur.

The OED cites John Locke's *Essay Concerning Human Understanding*, in which he uses the term 'hope' in this sense: 'Hope is that pleasure in the Mind, which every one finds in himself, upon the thought of a probable future enjoyment of a thing which is apt to delight him.'⁹ Locke packs several elements into this pithy statement: (i) hope is future-oriented; (ii) hope is broadly realistic because the desired future event is probable; (iii) hope is universally available to human beings, that is, a pleasure of the mind which every person

⁷ Borrowing lightly from Canadian case law, the test is whether a similarly situated reasonable person would proceed differently, or respond to his punishment differently, if he were properly informed.

⁸ For a discussion of how legal institutions, other than criminal justice, can contribute significantly to people's cultivation of hope when they find themselves in positions of hopelessness, see Kathryn Abrams and Hila Keren, 'Law in the Cultivation of Hope' (2007) 95 CLR 319.

⁹ John Locke, *Essay Concerning Humane Understanding* [1690] Book ii, ch xx.

can find in herself; (iv) hope has a specific emotional tone of pleasure and delight; and, by not delimiting it, he implies that (v) hope can arise in many contexts, good and bad. Some of Locke's elements are indeed defining features of *hope*, but others are not. Here are five observations about the nature of hope.

1. *Hope is more than a preference*: Locke is correct to say that hope is more than a mere preference for some outcome combined with a belief that it is likely to occur. Hope is marked by eagerness, investment and vulnerability.

2. *Hope can arise in many settings*: Hope can arise within good conditions even if Emily Dickinson is right that hope is sweetest when it is heard in a gale. This view differs from that of social psychologist Barbara Fredrickson, who states that:

Although most positivity [joy, love, amusement] arises when you feel safe and satiated, hope is an exception. If everything were already going your way, there would be little that you'd need to hope for. Hope comes into play when your circumstances are dire—things are not going well for you, or there's considerable uncertainty about how things will turn out. Hope arises precisely within those moments when hopelessness or despair seem just as likely. Perhaps you've just failed an important test, lost your job, found a lump in your breast, or scooped up your child after a bloody bike accident. Hope, in desperate situations like these, is 'fearing the worst but yearning for better'.¹⁰

If Fredrickson were right that hope need only arise or, indeed, *can* only arise when circumstances are dire, then hope would not present much of a quality-control standard for lawful punishment practices. Rough prison conditions would be ideal Petri dishes in which to cultivate hope if hope only arises in dire circumstances.

However, Fredrickson overstates the point when she says that hope only makes sense in dire conditions. People can intelligibly hope for things against a backdrop of good fortune—they can hope that their talented team will win the game, or that their baby will be a girl. They can equally hope that their happiness will last even when they have no strong reason to doubt it. Consider, for instance, Barack Obama's use of *hope* as a key concept in his campaign for the US presidency. Both the Chicago company that designed Obama's campaign logo—the sun rising over hills inside a perfectly circular O—and Shepard Fairey, the artist who designed the famous red, beige and blue portrait of Obama, referred to *hope* as an orienting concept in their work.¹¹ Presumably, Obama did not intend for Americans to fear the worst or

¹⁰ Barbara Fredrickson, *Positivity* (Crown 2009) ch 3.

¹¹ Lorene Yue and Brandon Glenn, 'Chicago Designers Create Obama's Logo', *Chicago Business* (22 February 2007) <www.chicagobusiness.com/article/20070222/NEWS/200023974/chicago-designers-create-obama-s-logo>. 'A team of Chicago graphic designers has given Barack Obama's campaign its signature look. Sol Sender of Sender LLC and five others in his firm created the logo the Illinois senator is using for his 2008 presidential bid. The icon, a gradated blue "o" featuring three red stripes, is prominently displayed on Mr. Obama's campaign Web site pages and featured on t-shirts, buttons and bumper stickers. Sender LLC is a Chicago brand consultancy and design studio whose clients include *Crain's*. "We were looking at the 'o' of his

think that his candidacy was against all odds. His slogan of ‘Yes we can!’ aimed to show people that the prospects for change were very good.¹²

Equally, when a person’s conditions are truly dire, such that he is struggling and failing to hang on to his mind, he cannot hope for things at all. Emily Dickinson is mistaken to suggest that the little bird of Hope *never stops at all* and so is Alexander Pope in saying that ‘Hope springs eternal in the human breast’. If a person becomes chronically malnourished and is unable to function competently, or if he breaks down mentally and physically in solitary confinement or becomes paralysed by fear during a prison riot, then—in those moments at least—he loses the cognitive and emotional capacities for hope.¹³

In short, outside of extreme, hope-erasing contexts, it is appropriate to take a broad view of the contexts in which persons can feel hope, the kinds of things they can hope for and the probability of occurrence that such hoped-for things must have.

3. *Hope can be present-oriented and past-oriented*: Contrary to Locke, hope need not be future-oriented. It can, in fact, be present-oriented: Sam hopes her partner is as happy in their relationship as she is. In addition, it can be past-oriented: Ali hopes that her friend did not suffer greatly when he passed away last month. She cannot *pin* her hopes on his having died peacefully, but she could *cling* to the hope that he died peacefully, and Sam *can* pin her hopes on her partner being happy, as an ongoing hope that is both present- and future-oriented.¹⁴

4. *The object of hope can be improbable*: Also contrary to Locke, the things persons can intelligibly hope for need not be probable. Although persons cannot intelligibly hope for deeply impossible things, such as to travel back in time, they can intelligibly hope for things that are highly unlikely, such as the eradication of global poverty or redemption if they are sitting on death row.

Stanley Tookie Williams is one person who hoped for—who could only hope for—something highly improbable. Williams was for many years a gang leader in Los Angeles. In 1979, he was convicted for four murders that took place during two robberies, and was given a capital sentence. For several years on death row, Williams continued to lead a gangster life, assaulting guards and fellow inmates and attempting escapes, resulting in six and half years in solitary confinement. In the mid-1990s, however, Williams began to renounce

name and had the idea of a rising sun and a new day,” Mr. Sender said. “The sun rising over the horizon evoked a new sense of hope.”

¹² I thank Patrick Emerton for suggesting to me that Barack Obama used the language of *hope* as a language of redemptive possibility, and did so for a specific purpose, namely, to tap into the idea that it is a sin to give up hope, that we should never treat dire conditions as hopeless because to do so would be to turn our back on redemption and God.

¹³ Kimberley Brownlee, ‘The Competent Judge Problem’ (2016) 29 Ratio 312.

¹⁴ Philip Pettit notes that ‘pinning my hopes’ on some prospect ‘certainly presupposes having an open mind on whether it will occur and having a desire for its occurrence. But, more crucially, it means investing the prospect with a characteristic, galvanizing, and orientating role: it involves setting aside doubts about the possible nonoccurrence of the prospect and acting accordingly’: Philip Pettit, ‘Hope and Its Place in Mind’ (2004) 592 *Annals of the American Academy of Political and Social Science* 152.

his former life. He became an anti-gang activist, wrote several children's books against gang life with Barbara Cottman Becne, received a President's Call to Service Award from George W Bush and reportedly was nominated five times for the Nobel Peace Prize. In a *Guardian* interview in November 2004, Williams was asked what kept him going, and he replied softly: "*Dum spiro, spero*," pausing for a moment before translating the Latin: "While I breathe, I hope."¹⁵

Williams's reply is similar to a line uttered by Claudio, a young man of Vienna, in Act III of Shakespeare's *Measure for Measure*. Claudio has been sentenced to death. The Duke of Vienna, disguised as a friar, asks Claudio if he hopes to be pardoned by Lord Angelo. Claudio replies that, 'The miserable have no other medicine / But only hope: / I've hope to live, and am prepared to die'.¹⁶ Such declarations indicate that even in the still-life world of death row, one can hope for redemption and forgiveness. In Tookie Williams's case, however, his hope was in vain. His final appeal for clemency to the then Governor of California, Arnold Schwarzenegger, was unsuccessful and he was executed in California on 13 December 2005.

As Williams's case suggests, hope can often make most sense when the prospects for success are low (which is a different thing from conditions being dire, though in Williams's case they were both). Indeed, hope might be a sibling of faith—the state of believing in something when common sense tells us not to¹⁷—especially in the chilliest wind or on the strangest sea. Indeed, hope may be a form of rational irrationality.¹⁸ If the outcome that a person desires is highly likely or even certain to occur, does it make sense for him to *hope* for it?¹⁹ If he were to hope for rather than actively prepare for a certain result, he may well seem neurotic, superstitious or disingenuous.

5. *One can hope for things that are not worth hoping for*: A person can hope that some horrible event will befall his enemy or that some horrible event will befall himself, especially if that event is the lesser of two evils in his eyes. For instance, if he feels that the punishment he is enduring is horrific, he might hope for death to end his suffering.

Now, this hope to end one's suffering in death or Tookie's hope to continue to live, while perfectly describable as hopes, are not the kinds of hope that

¹⁵ Tony Thompson, 'Stanley "Tookie" Williams: One of the Last Men to be Executed in California' *The Guardian* (London, 27 November 2004) <www.theguardian.com/books/2004/nov/28/biography.tonythompson>.

¹⁶ I thank Simon Gansinger for highlighting this quotation.

¹⁷ This idea of *faith* is drawn from the 1947 film *Miracle on 34th Street*.

¹⁸ As a form of rational irrationality, hope seems akin to pragmatic encroachment or epistemic bribes, where it can be 'reasonable' or appropriate for us to have beliefs that do not track the facts when doing so will maximise the chance that we will have more true beliefs overall. That said, in the case of hope, the rational irrationality of hoping for a 'one in a million' chance is not that you misjudge the probability—you know it is one in a million—but that you are voluntarily making yourself vulnerable—becoming invested. Being open to the risk of the fall is the only way to get the buoyancy of hope.

¹⁹ Locke describes this as joy, rather than hope. '7. Joy is a delight of the mind, from the consideration of the present or assured approaching possession of a good: and we are then possessed of any good when we have it so in our power, that we can use it when we please. Thus a man almost starved has joy at the arrival of relief, even before he has the pleasure of using it': Locke (n 9) Book ii, ch xx.

animate the *hope standard for punishment*. Tookie's hope is a hope to have a future *at all*, let alone a future after punishment. And a hope for death is a hope *not* to have a future.

The kinds of hope for the present and hope for the future after punishment that drive this discussion are reasonable hopes for good outcomes for oneself and one's affiliates. A hope is reasonable—rather than a rational irrationality—if, first, there is a sufficiently high prospect but not a certainty that the hoped-for outcome will occur (it is a matter for debate how high the prospect must be) and, secondly, the hoped-for outcome is at least minimally decent and comparatively good. In the case of a future after punishment, it would be a future that is minimally worth hoping for whatever a person's position is and comparatively good when considered in relation to that person's particular past and position. It would not be simply a vicarious hope that loved ones not suffer; it would be centrally a hope that, when his punishment ends, the person will have a future worth hoping for. Such a future could be a comparatively better situation than his past was, it could be a better future than his past would suggest he could have or it could be an absolutely good future that any reasonable person might hope for regardless of their circumstances. When it comes to present-oriented hopes during punishment, what matters is that the situated reasonable person be able to retain reasonable ongoing hopes about his punishment throughout his punishment (eg he can reasonably hope that the family connections he has now will persist and survive his punishment) as well as momentary hopes or micro-hopes about his day-to-day treatment (eg he can reasonably hope that he will be allowed to attend the church service this evening as agreed; that he will be allowed to attend his grandfather's funeral even though it will require an overnight escort; that inmates in his wing will not be put in lockdown unexpectedly today; that he will not have his routine access to his family denied this week; or that he will not be assaulted tonight). Such provisions require funding and decent, safe, well-managed conditions so that the staff on the ground can provide these forms of support and need not use prisoners' access to their families or meaningful activities as a carrot-and-stick.²⁰

To some extent, a prison's or a system's commitment to a hope standard can be measured by its recidivism rates and its statistics on assault, self-harm and suicide in prison. That said, although the hope standard is not person-specific (ie it does not focus on whether a *particular* person is quick to put low probabilities on likely events, has unreasonable degrees of belief in the

²⁰ One issue I wish to bracket is whether the hope standard could be weaker in the case of a situated reasonable person who is religious or spiritual and believes in an afterlife. The thought would be that such a person need not have a sufficiently high prospect of leading a minimally decent and comparatively good life after prison. All that matters is that his day-to-day conditions and his future are such that he can retain his hope for a good afterlife. In the account I am developing, such a hope is beside the point in the same way that a hope for others' well-being or a hope like Tookie's to be allowed to live is 'beside the point'. The kind of future-oriented hope that satisfies the hope standard is a reasonable hope for a good enough life *after* punishment. I thank Rowan Cruft for highlighting this issue.

likelihood of bad outcomes or is quick to lose hope), it nevertheless demands more than a detached generic assessment of statistics and punishment practices. It requires a situated approach that focuses on how a 'reasonable person' would react to a given mode of punishment if he had had past experiences and conditioning akin to those of the person receiving that punishment. How much fortitude would a reasonable person have to show, given a particular past and profile, to endure that mode of punishment with equanimity? If the level of fortitude that a reasonable person would have to show in those circumstances is remarkable, then that punishment is at odds with the hope standard.

To sum up what has been established so far, people can hope for many things, in many contexts, for many reasons, which have different prospects for success. People can even hope, in dire conditions, to lose their capacity to hope; and they can lean on their capacity to hope against hope—as a form of rational irrationality—when the thing they hope for, good or bad, is highly improbable. However, the *hope standard for punishment* requires more than merely keeping alive the bare possibility for hope as such. It is not enough that a punishment ensure that a reasonable person could retain his cognitive and emotional capacities to tilt at windmills or be optimistic despite the odds. To satisfy the hope standard, a punishment or system of punishment must ensure that a situated reasonable person can sustain hope about his punishment whilst enduring that punishment and feel hopeful that he will enjoy a minimally decent future—a future worth hoping for—after his punishment ends.

Before exploring in detail the impact that the hope standard would have on punishment practices, it is necessary to comment on the value of hope and why there are reasons to ensure that a person convicted for a serious offence be able to live in conditions compatible with retaining hope.

3. *Is Hope Valuable?*

The title of this article declares that hope is a precious emotion. But what are the reasons to think that hope is valuable at all, let alone precious? And, if it is valuable, what exactly is its value? Is it instrumentally valuable? Is it inherently valuable? Is it a virtue? Is it all three?

Perhaps hope is a vice or an excuse for laziness and passivity. Consider Mr Wilkins Micawber, the character in Charles Dickens's *David Copperfield*, who is poor and spends time in debtors' prison, and whose relentless optimism is captured in his famous phrase: 'Something will turn up.' Perhaps such hope is not so much optimism as gullibility in a tailcoat, and the perpetually hopeful person is simply clueless. As suggested above, in certain circumstances, hope seems to be a rational irrationality, but, in the wrong circumstances, a relentlessly hopeful disposition might be a character flaw, certainly if it manifests itself in passivity and irresponsibility.

Alternatively, perhaps hope is neither a vice nor inherently disvaluable, but instead valuable only in particular contexts, and prison is not one of them. Perhaps people are better off if they lack hope in prison; this does not mean feeling *hopeless* in the sense of despairing, but rather being without hope in the simpler sense of being resigned and without any wish to alter what comes their way. Here are two reasons this might be true. First, hope might exacerbate an imprisoned person's vulnerability. If someone were hopeful, or overly hopeful, then he would risk a farther, harder, more disillusioning fall when his hopes are dashed. Secondly, living without hope might be a mark of an imprisoned person's courage. Aristotle claims that the brave man is fearless when he is at sea or has a disease, but not in the same way that seamen are fearless. Seamen are hopeful because of their experience at sea, but the brave man gives up hope of safety while disliking the thought of death in this shape.²¹ In other words, the person who has the virtue of courage in rough waters and strange seas is the one who can live composedly without the hope of safety.²²

One might acknowledge these possibilities, but maintain that hope has a core of deep, non-instrumental value at least when oriented towards good things, for reasons that Emily Dickinson captures in her poem. The basic capacity for optimism is a precious reservoir. It keeps a person warm and, in doing so, helps him to keep the people who depend upon him warm. Hope is the garden in which a person's resilience, sense of agency and self-worth grow. It animates his moral ambitions to do better and be better; it orients and shapes his autonomy. Fredrickson states that:

Deep within the core of hope is the belief that things can change. No matter how awful or uncertain they are now, things can turn out better. Possibilities exist. Hope sustains you. It keeps you from collapsing into despair. It motivates you to tap into your own capabilities and inventiveness to turn things around. It inspires you to plan for a better future. The anthropologist Lionel Tiger casts hope as the evolved antidote to our big human forebrains. Unlike any other earthly creature, we humans can envision our own futures and, in so doing, all possible calamities. Without hope, our uniquely human ability to forecast our inevitable death and demise would leave us in motionless despair. With hope, we become energized to do as much as we can to make a good life for ourselves and for others.²³

In a similar vein, Philip Pettit observes that hope ensures that a person does not lose heart and cease to exercise his agency effectively.²⁴ Hope is, he says, a cognitive counterpart of planning.

²¹ Aristotle, *Nicomachean Ethics*, Book III, 6 (WD Ross tr).

²² Rowan Cruft has observed in personal correspondence that, by giving up *hope* for his safety, the 'brave' man seems not to value properly the prospect of getting out of the water. A person who hopes to get back on dry land alive is more honest with himself about his situation.

²³ Fredrickson (2009) ch 3.

²⁴ Pettit (n 14) 158 states that in addition to other things: 'Hope will consist in acting as if desired prospect is going to obtain or has a good chance of obtaining, just as precaution consists in acting as if this were the case with some feared prospect. It will guard against the danger of loss of heart where precaution guards against exposure to a catastrophe.'

It frees you from the bleakest of beliefs that would reduce you to numbed inaction and from the burden of beliefs that wax and wane unpredictably in levels of confidence. It gives you firm and friendly coordinates in an uncertain and uncompanionable world. To have hope is to have something we might call cognitive resolve.²⁵

Also, hope is a sibling of many other attitudes and emotions that are intuitively valuable, such as joy, love and happiness. Hope is a necessary feature of a meaningful human life.

Although hope has great inherent value—at least when oriented towards good things—persons have no *right* to feel hopeful or to have a hopeful disposition any more than persons have a right to be healthy. There is no human right to guaranteed *success* in such domains. But persons do have a human right to have the conditions of their lives be conducive to their cultivating or retaining both hope and other positive attitudes according to their abilities, in the same way that they have a human right to have adequate healthcare as well as the basic underlying material, social and political conditions necessary for health.

At this point, a sceptic might flag that rights—including some human rights—are forfeitable. Although certain rights such as the human right against torture are absolute, other rights, including, perhaps, rights related to hope or rights to have the conditions conducive to hope, are contingent on good standing and good behaviour, so the challenge goes. This challenge will be answered after an examination in the next section of the impact that a hope standard would have on punishment practices. The article offers four arguments for the hope standard—one of which is the inherent value of hope just highlighted—which together answer this challenge by showing that respecting and protecting someone's interests in hope are conditions for recognising that person as a human being, and we have a strong duty to view all human beings as capable of redemption.

4. *What Impact Would the Hope Standard Have on Punishment Practices?*

Let us review what the hope standard requires: to be legitimate and morally justified, a punishment or system of punishment must be compatible with a situated reasonable person retaining hope during his punishment about his punishment and hope for his future after punishment. What limits would such a hope standard place on the modes of punishment that a state may permissibly use? What follows are seven comparatively modest limits, offered with the acknowledgement that the hope standard could potentially commit states to much more than the minimum outlined here.

²⁵ *ibid* 159.

(1) Any kind of future after punishment would include being alive after punishment. So, the hope standard immediately excludes capital punishment. Moreover, any punishment that is compatible with a person retaining hope about his present situation would not force him to wait and wonder indefinitely if, and when, he will die at the pleasure of the state. So, the hope standard excludes capital punishment on present-oriented-hope grounds as well as on future-oriented-hope grounds.

(2) For a person to have a reasonable prospect of having any kind of a future after punishment, he must not face too high a risk of losing his life during his punishment. Moreover, for a person to retain hope about his present situation, he must not face too high a risk that he will be assaulted on a given day or become depressed to the point of self-harming. Hence, the hope standard excludes extremely dangerous punitive conditions—settings rife with gang violence or abuse by staff—which make it insufficiently likely that a person can retain hope either about his present situation or about surviving his punishment to have a future afterward.

In addition, importantly, the hope standard excludes modes of punishment that create too high a risk of self-inflicted death. One thing to note is that some of the people most at risk of suicide in prison may not be the people who are given the longest and harshest punishments. One 2017 study of 24 countries indicated that female prisoners are nine times more likely to die from suicide compared with the general population (a much higher difference than that between male prisoners and the general population), and female prisoners are typically not the prisoners who receive the harshest sentences.²⁶

Consider the story of 21-year-old Katie Allan, a student at the University of Glasgow in Scotland, who received a 16-month jail sentence in March 2018 for injuring a teenager while driving drunk. She took her own life in Polmont Prison in June 2018. Her parents, Linda and Stuart Allan, state that she was bullied by other inmates and was repeatedly strip-searched by staff, who failed to acknowledge that she was vulnerable and failed to respond to her self-harm wounds. The Allans conducted research into the occurrence of suicide in Scottish prisons. According to the BBC, the Allans' research showed that 'in the last 10 years 40% of prisoner deaths were suicides, and 32 of the 82 people who took their own life in that period were under the age of 30'.²⁷ Mrs Allan stated that:

Our campaign attempts to present to government ministers, academics and society the stark reality of what is going on in the halls of our prisons—no gloss over, no excuses, no spin, no soundbites. It is young people who are dying, it is not people on

²⁶ In the UK, female prisoners are 20 times more likely than the general population to end their lives through suicide, as opposed to male prisoners, who are 5–6 times more likely. Fazel, Ramesh and Hawton (n 2).

²⁷ "Stark Reality" of Prison Suicide Ignored Claim Parents' (*BBC News*, 2 April 2019) <www.bbc.co.uk/news/uk-scotland-glasgow-west-47786379>.

the life sentences, it is people who have been days or weeks in custody. People break the law, people get punished and if that includes a custodial sentence then so be it. But we don't have the death penalty in Scotland and people should not pay for their crimes with their lives.²⁸

As noted at the outset, the suicide rates in many European countries exceed 10 per 10,000 prisoners. At the lowest end of the spectrum, with zero suicides for 2017, are Cyprus, Croatia, Greece, Luxembourg and the non-EU states Iceland and Montenegro.²⁹ Even though these countries have smaller populations than their comparators both outside and inside prison, it might nonetheless seem surprising that such states could have zero suicides in prison in a given year. If it is surprising, this reveals how aware we are of, and how dulled we are to, the realities of living in prisons like ours.³⁰

(3) For a person to have a reasonable prospect of having any kind of a future after punishment, he could not be given a life sentence without parole. Such a sentence removes the possibility of a life *after punishment*. It is in relation to this kind of punishment that legal scholars and courts have reflected on hope.³¹ Article 1(1) of the Basic Law of the Federal Republic of Germany states that 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.' Dignity is thus understood as an absolute constraint. One determination that has been made in German case law on the meaning of this constraint is that a literal life sentence without parole is prohibited because it would leave a person without hope and that would be a violation of dignity.

The 1977 Judgment of the German Federal Constitutional Court determines, on the basis of Articles 1 and 20(3) of the Basic Law, that

it is evident that life imprisonment can only be enforced in accordance with human dignity if the convicted person has the concrete and in fact realizable expectation [*konkrete und grundsätzlich auch realisierbare Chance*] of regaining his freedom at a later

²⁸ The BBC states that the Scottish prison service disputed some of the Allans' figures, stating that their own records show there were 89 suspected or confirmed suicides between 2008 and 2018. *ibid*.

²⁹ Nielsen (n 3).

³⁰ Some research conflicts with Mrs Allan's observation that it is people who have been given days or weeks in custody who are dying. A 2017 international comparative study of suicide rates in 24 countries showed that rates of prison suicide vary considerably—with 23 suicides per 100,000 prisoners in the United States compared with 180 per 100,000 prisoners in Norway. The study found that there was an association between rates of incarceration and rates of prisoner suicide: rates of prisoner suicide were higher in countries where fewer individuals were imprisoned per 100,000 members of the general population and vice versa. The United States has an incarceration rate more than eight times higher than the majority of other countries. The researchers' proposed explanation is that, in countries with low incarceration rates, the prisoner population will include a large proportion of people who have committed more serious or violent offences and, most likely, a large proportion of people suffering from mental illness. Fazel, Ramesh and Hawton (n 2).

³¹ See William W Berry, III, 'Life-with-Hope Sentencing' (2015) 76 Ohio St LJ 1051; Elaine Crawley and Richard Sparks, 'Is There Life after Imprisonment? How Elderly Men Talk about Imprisonment and Release' (2006) 6 Criminology & Criminal Justice 63; Jonathan Bild, 'The Whole-Life Sentence in England and Wales' (2015) 74 CLJ 1; Dirk van Zyl Smit and Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis* (Harvard UP 2019); Netanel Dagan and Julian V Roberts, 'Retributivism, Penal Censure, and Life Imprisonment without Parole' (2019) 38 Criminal Justice Ethics 1; Catherine A Appleton, *Life after Life Imprisonment* (OUP 2010).

point in time. This is so because it targets the core of human dignity when, regardless of his personal development, the convicted person is forced to give up all hope of regaining his freedom.

At the same time, the Court is of the opinion that ‘If the legislature deems life imprisonment a necessary and adequate sanction for the most serious cases of homicide, then this is not in violation of the constitutional imperative of reasonable and proportionate punishment’.³²

In subsequent judgments, while remaining committed to the boundaries that Article 1 of the Basic Law sets around the Penal Code, the Constitutional Court has repeatedly affirmed the lawfulness of life imprisonment even in cases where it was highly unlikely that the convicted person would ever be released from prison.³³ The European Court of Human Rights has also grappled with the idea of hope—and specifically a right to hope—in some recent cases involving the UK, maintaining that a whole-life order without the prospect of parole violates Article 3 of the European Convention on Human Rights as a form of degrading and inhuman treatment. There must be a mechanism for review and a genuine prospect for release.³⁴ In her concurring judgment in *Vinter*, Judge Power-Forde characterises ‘the right to hope’ as deriving from the principle of human dignity of all individuals, no matter how grave their wrongs:

hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change . . . To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.³⁵

In practice, however, release from a whole-life sentence in the UK is based solely on ‘compassionate grounds’, which the European Court of Human Rights has (mistakenly) accepted as sufficient.³⁶

In Australia, as of June 2018, close to 1000 people have received indeterminate prison sentences of various descriptions, including ‘Indeterminate life’, ‘Life with a minimum’, ‘Indeterminate—Her Majesty’s pleasure’ and ‘Indeterminate—administrative’.³⁷ Of those people, 45% can expect to serve a

³² Judgment of 21 June 1977, 45 BVerfGE 187 [245] and [253] Federal Constitutional Court (translation by Simon Gansinger).

³³ I thank Simon Gansinger for his research on this point.

³⁴ See *Vinter v UK* App nos 66069/09, 130/10 and 3896/10 (Grand Chamber, 2013) [69].

³⁵ *ibid.* Cited from Andrew Ashworth and Lucia Zedner, ‘Some Dilemmas of Indeterminate Sentences: Risk and Uncertainty, Dignity and Hope’ in Jan W de Keijser, Julian V Roberts and Jesper Ryberg (eds), *Predictive Sentencing: Normative and Empirical Perspectives* (Hart Publishing 2019) 127–48.

³⁶ *Hutchinson v UK* (2015) ECHR 239. For discussion, see Ashworth and Zedner (n 35).

³⁷ Australian Bureau of Statistics, ‘4517.0—Prisoners in Australia’ (2018) Data Cubes and Explanatory Notes <www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02018?OpenDocument> and <www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4517.0Explanatory%20Notes12018?OpenDocument>.

whole-life sentence.³⁸ Australia is one of the few liberal democracies that sentence juveniles to life imprisonment without parole. Only in the Australian Capital Territory is life imprisonment of children explicitly forbidden.³⁹ By way of comparison, as of 2016, 14 US states prohibit life-without-parole (LWOP) sentences of children.⁴⁰ Despite these facts and the growing debate in Europe, ‘life imprisonment has been the subject of very little political scrutiny or legal scholarship in Australia [with the exception of the work of John Anderson]’.⁴¹

(4) To have punishment conditions that are compatible with both present-oriented hope and a future after punishment worth hoping for (ie a future that is minimally decent and comparatively good), a person’s punishment cannot be criminogenic. In particular, his conditions in prison cannot force him to embrace the identity of being a ‘criminal’ rather than the identity of someone who made a mistake. According to research cited in the UK Ministry of Justice Report *Transforming Rehabilitation* (2014), a person is more likely to desist from crime if he does not identify with being an ‘offender’ or ‘criminal’: ‘People with criminal records who do not define themselves purely as “offenders” but see themselves as basically good people who made a mistake may find it easier to desist.’⁴² Since others’ views of a person greatly shape how he views himself, he can only persistently view himself as basically a good person when his conditions allow him to believe that others see him as a good person too.

³⁸ The majority of both groups (people being sentenced to and people actually serving life) have been convicted of murder, which is punishable with life imprisonment in all Australian jurisdictions. Recently, other offences (eg serious child sex offences in Queensland) also attract a life sentence.

³⁹ See Wendy O’Brian and Kate Fitz-Gibbon, ‘Cemented in Their Cells’: A Human Rights Analysis of Blessington, Elliott and the Life Imprisonment of Children in New South Wales’ (2016) 22 AJHR 111, 114. O’Brian and Fitz-Gibbon’s article argues that ‘successive legislative changes in various Australian jurisdictions have resulted in a framework for sentencing decisions that is considerably out of step with international legal standards for criminal justice. These increasingly punitive legislative changes exacerbate Australia’s already declining record of cooperation with UN processes, and reveal Australia’s reluctance to respect the legitimacy and authority of international law. Against this troubling context, the views of the Human Rights Committee serve as a much-needed reminder about the importance of a principled approach to child sentencing that forecloses neither the goal of rehabilitation nor the prospect of release and reintegration’ (111).

⁴⁰ In several recent cases, the US Supreme Court has ruled against the imposition of life-without-parole sentences on juveniles. As Ashworth and Zedner (n 35) summarise, in *Graham v Florida* 130 S Ct 2011 (2010), the USSC held that a life-without-parole sentence constitutes a ‘cruel and unusual’ punishment that is contrary to the US Constitution, if imposed on a juvenile (under 18) for a non-homicide offence. Justice Kennedy wrote: ‘Life in prison without the possibility of parole gives no chance for fulfilment outside prison walls, no chance for reconciliation with society, no hope.’ In *Miller v Alabama* 132 S Ct 2455 (2012), the Court held that LWOP violated the ‘cruel and unusual’ clause if it was mandatory for a juvenile. ‘Whatever the offence of conviction,’ Ashworth and Zedner say, ‘it was essential to allow room for a court sentencing a juvenile to take account of mitigating circumstances.’ In *Montgomery v Louisiana* 136 S Ct 718 (2016), ‘it was held that the two previous decisions apply retrospectively to young people already sentenced’.

⁴¹ Kate Fitz-Gibbon, ‘Life without Parole in Australia: Current Practices, Juvenile and Retrospective Sentencing’ in Dirk van Zyl Smit and Catherine Appleton (eds), *Life Imprisonment and Human Rights* (Hart Publishing 2016) 76.

⁴² UK Ministry of Justice, *Transforming Rehabilitation: A Summary of Evidence on Reducing Reoffending* (2014) <www.gov.uk/government/publications/transforming-rehabilitation-a-summary-of-evidence-on-reducing-reoffending>.

Additionally, his conditions must not make his primary social group a crime-related group. Having access to other outside groups is key to preserving an identity as a member of the community, which allows a person to have hope about his present situation and hope for a non-criminal future. Moreover, his conditions must not be crime-ridden. (This claim—that crime-ridden and criminogenic prison conditions fall below a hope standard—is premised on the potentially disputable assumption that life in such conditions is not minimally decent.)

(5) To satisfy a hope standard, prison conditions must be rehabilitative, improving and educative, to make it probable that a person can sustain hope about those conditions and can lead a good life after punishment. Additionally, a person's experiences upon release must give him good enough support that he can re-establish himself in society. In the UK, over one-third of people are homeless on their first night out of prison; some people are not given a map showing them where they are when they leave prison; and most people are given £45 to survive on for three weeks until their welfare benefits kick in.⁴³

The right to have conditions conducive to hope arises not only in relation to whole-life orders and indeterminate sentences, but also in relation to long sentences produced by adding up the sentences for separate offences. The totality principle holds that courts should avoid simply adding up the sentences for all the crimes that a person committed and instead take an overall view (ie less than the arithmetical total). This is because an extremely long sentence may be crushing and, as the New South Wales Court of Criminal Appeal puts it, such a sentence may

induce a feeling of hopelessness and destroy any expectation of a useful life after release. This effect both increases the severity of the sentence to be served and also destroys such prospects as there may be of rehabilitation and reform. Of course, in many cases of multiple offending, the [person] may not be entitled to the element of mercy entailed in adopting such a constraint.⁴⁴

One could certainly quibble with the claim that a person might not be 'entitled' to mercy, but that is a debate for another day.

One objection against rehabilitative theories of punishment is that they tend to license indefinite detention.⁴⁵ If a person is not showing that he is being rehabilitated, the theory would seem to permit society to prolong his detention

⁴³ In the UK, in 2012, two in five prisoners (37%) stated that they would need help to find a place to live after they were released. Of those, 84% reported needing a lot of help. See Kim Williams, Jennifer Poyser and Kathryn Hopkins, *Accommodation, Homelessness and Reoffending of Prisoners: Results from the Surveying Prisoner Crime Reduction (SPCR) Survey* (Ministry of Justice 2012) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/278806/homelessness-reoffending-prisoners.pdf>.

⁴⁴ This quotation is drawn from the New South Wales Court of Criminal Appeal in *R v MAK, R v MSK* [2006] NSWCCA 381 [15]–[18] (and referring to *R v Rossi* (1988) 142 LSJS 451) about the importance of avoiding a crushing sentence.

⁴⁵ For discussion, see Ashworth and Zedner (n 35).

to achieve that desired result. This clashes not only with norms of proportionality, generality and predictability, but also with the hope standard. The hope standard would put a check on indefinite detention because the hope standard requires that a person be able to hope for a future *after punishment*. This check on indefinite detention is justified both irrespective of redemption and as a necessary component of redemption. If a person can have no confidence about when, or whether, he will be released, then he cannot orient his attention around hope for such a future.⁴⁶ This refinement of rehabilitation theory is one of the distinctive contributions that the hope standard makes, and it is a contribution that cannot be reduced to a simple argument about respect based on desert. Below, this article highlights another distinctive contribution of the hope standard, which is that it identifies a limit on credible versions of deterrence theory.

(6) Having a future after punishment worth hoping for includes being able to *lead* a life after punishment. Leading a life requires cognitive competence, which rules out punishments such as torture—including solitary confinement—that compromise or threaten to compromise cognitive capacity. Torture and solitary confinement are also ruled out by the demands of present-oriented hopes: a person cannot reasonably sustain hope about his day-to-day prison conditions if he faces a genuine prospect of corporal punishment or social deprivation.

Leading a life after punishment also includes being able to hold some legitimate position within society, including employment appropriate to one's skills or at least the option to compete on equal terms with others for such positions. To have such options, a person's sentence and criminal record cannot remain a noose around his neck for the rest of his life. This means abandoning the idea that some people must carry records that they can never 'spend'. Hope can be abashed by the various (sometimes extensive) collateral sanctions that result from conviction or that may be added at sentencing.⁴⁷ If someone poses a serious threat to others and is unable to reform his conduct, he may require a civil commitment to incapacitate him, but that would not be imposed as a punishment.

More richly, a person having a future after punishment worth hoping for might mean his having a meaningful option to return to the positions he held before his offence, in the same way that a person might return to his position at work after parental leave. Arguably, it might seem indefensible to retain such a person's former position for him, but it is unclear why that would be so. Saying that such support would be indefensible would suggest that such a

⁴⁶ In 2014, New South Wales improved their quality assurance procedures for coding prisoners with life sentences. As a result, a higher proportion of prisoners are being coded correctly to Life with a minimum sentence, rather than to Life with an indeterminate term': Australian Bureau of Statistics (n 37) para 94.

⁴⁷ For a discussion of the collateral legal consequences of criminal convictions (losing one's job, house, right to vote, etc), see Zachary Hoskins, *Beyond Punishment?* (OUP 2019).

person could never call the score settled, that he could never pay his debt, that he could never really be a ‘returning citizen’.

(7) Finally, having hope for the future extends to having hope for one’s dependents and particularly one’s children, that they will not be irreparably harmed—or have their own futures truncated—during or after one’s punishment.

As noted above, this is by no means an exhaustive list. Nonetheless, it shows that a hope standard is rich and demanding even when the reference point used is a *minimally* decent and comparatively good present and future.

5. *Four Arguments for a Hope Standard*

The first argument for adopting the hope standard is anticipated in section 3 above: hope, like autonomy, is inherently valuable and necessary for a meaningful human life. In the same way that society should attend to a person’s physical needs when he is in custody, so too society should attend to his mental and emotional needs, and that includes recognising the importance of maintaining conditions that are conducive to hope.

The fact that the inherent value of hope lies in helping a person to orient his autonomy, pursue a meaningful life and cultivate an impulse to be better shows that the hope standard is not relentlessly self-interested. Often, the person in prison who clings to his hopes about himself and his future deeply wishes to contribute to his family and society again; he craves to redeem himself, to be forgiven and to be useful once more. These ideas are considered further below.

The second argument concerns the appropriate way to view people. This argument appeals to the idea that a person is never beyond the pale, but must always be viewed as having the potential for redemption.⁴⁸ Avishai Margalit observes credibly that:

Even if there are noticeable differences among people in their ability to change, they are deserving of respect for the very possibility of changing. Even the worst criminals are worthy of basic human respect because of the possibility that they may radically reevaluate their past lives and, if they are given the opportunity, may live the rest of their lives in a worthy manner . . . Even though it is likely that she will continue living this way, this likelihood should not be turned into a presumption, because in principle an evildoer has the capacity to change and repent. This capacity implies that she deserves basic respect as a human being who should not be ‘given up on’, precisely because there is a chance, no matter how small, that she will repent.⁴⁹

⁴⁸ The following paragraph is drawn from Kimberley Brownlee, ‘Don’t Call People “Rapists”: On the Social Contribution Injustice of Punishment’ (2016) 69 CLP 327.

⁴⁹ Avishai Margalit, *The Decent Society* (Harvard UP 1998) 70–5. Cited in John Tasioulas, ‘Punishment and Repentance’ (2006) 81 *Philosophy* 279, 295; Kimberley Brownlee, *Conscience and Conviction* (OUP 2012) 36. I avoid the language of ‘worst criminals’ that Margalit uses, but otherwise endorse this statement.

In a similar vein, Andrew Ashworth and Lucia Zedner state, in the context of their discussion of the right to hope, that ‘A commitment to hope requires that [a person’s] capacity for moral choice [be] acknowledged and that sentences imposed even on those deemed dangerous have, built within them, the means to enable, assess and act on signs of change’.⁵⁰ Moreover, to honour such a commitment to hope in practice, Ashworth and Zedner continue, risk-management and rehabilitative programmes in prison must be available, accessible and adequate, otherwise the result will be to deny people hope.

The third argument concerns the implications of viewing all people as redeemable. David Miller maintains that human rights are dependent upon reciprocity: possessing human rights is conditional upon a willingness to respect the rights of other people. If this is correct, then it is necessary to ensure that punitive conditions allow persons to retain the cognitive and physical capacities necessary for them to redeem themselves and to re-establish reciprocal relations with others. The retention of such capacities could place stringent constraints on modes of punishment.

The fourth argument is more strategic. In all probability, it is in society’s interests to adopt a hope standard. According to research cited in the UK Ministry of Justice report *Transforming Rehabilitation* (2014), numerous factors linked to desistance turn on having non-criminal social bonds as well as optimism about one’s future.⁵¹ One such factor is having something to give to others: ‘[People who have offended] who find ways to contribute to society, their community or their families appear to be more successful at giving up crime. If these achievements are formally recognised, the effect may be even stronger.’ If correct, this point about recognition is particularly noteworthy. It signals that, when society fails to acknowledge that people who have spent time in prison can be and are things other than their offences, society can make it harder for them to desist. A second set of factors associated with desistance are family and intimate relationships:

There is evidence that forming strong and supportive intimate bonds with others appears to help desistance from crime, although more contemporary research is needed on this subject. Such relationships can reduce the amount of time spent in groups of same-age, same-sex friends (a known risk factor for young male offending). Strong partnerships and relationships with his or her children also provide an individual with something to lose if there is a return to prison. Living with non-offending parents can have the same sort of effect on ex-offenders who have returned to the family home. Finally, family and intimate attachments may give offenders a sense of purpose, meaning and direction. Individuals who devote themselves to raising their children or caring for elderly parents may find that crime and imprisonment are incompatible with such roles.

⁵⁰ Ashworth and Zedner (n 35) 138.

⁵¹ This material, drawn from the UK Ministry of Justice Report (n 42), is also quoted in Brownlee, ‘Don’t Call People “Rapists”’ (n 48) 327–52.

A third set of factors focuses specifically on hope and motivation:

Research suggests that individuals who desist from crime are usually very motivated and confident that they can change their lives: offenders who clearly say they want to stop offending are the most likely to desist. The impact of these motivational factors has even been found in long-term studies up to ten years after release from prison.

A fourth factor is having a place within a non-criminal social group: ‘Those who feel connected to others in a (non-criminal) community are more likely to stay away from crime. Social networks that help desistance include extended family, mutual aid groups, clubs and cultural or religious groups.’

A fifth factor is being believed in:

Research with desisters has identified that having someone believe in them is important and that desistance can be supported by interactions with others who communicate a belief that they can and will change, that they are good people, and that they have something to offer society or other people.⁵²

These factors reinforce the thought that retaining hope is key to desistance and, hence, society has self-interested reasons to ensure that people can retain hope both during their punishment and in their future after punishment.

These observations about the factors that tend to lead people to desist invite a reconceptualisation of the commitments of deterrence theory. One complaint against deterrence theory is that it licenses, in principle, cruel and disproportionately harsh punishments if such punishments are necessary to deter people from reoffending. Although deterrence theory cannot entirely escape this ‘in principle’ charge, it can nevertheless take seriously these psychological points about desistance and assert confidently that the theory is constrained by such empirical evidence and, hence, would *in practice* only recommend modest punishments that are in keeping with people developing an inclination to desist.

In the implications for deterrence theory and for rehabilitative theory—if not for other theories—lies some of the distinctive value and normative significance of an appeal to a hope standard. Briefly, that value and significance lie in the check that hope places on these dominant theories of punishment, and in the prod it gives us to focus on equity rather than a broader, abstract notion of equality. Although adopting the hope standard is plausibly a necessary condition for respect for human dignity properly understood, it cannot be reduced to an abstract appeal to respect or dignity for several reasons. First, respect is not what gives hope its muscle to rein in deterrence theory and rehabilitative theory: what gives hope its muscle here are facts about human psychology. Secondly, although respect figures in the four arguments for the hope standard, nevertheless, as an abstract concept, *respect* can lead to

⁵² I shall bracket the problem of determining whether the supporter is sincere in their belief in the person who has offended. I thank Tom Parr for highlighting this problem.

competing practical recommendations, such as a commitment to generic equality as opposed to equity, or a commitment to honour a person's so-called right to be punished rather than not. The hope standard offers a distinctive vision of what it means to respect people, a vision premised on recognising all persons as redeemable.

6. Objections

A. Redemption

Some philosophers—including John Locke—take the view that a person could act so egregiously that he loses his status as a rights-bearing human being. In his discussion of whether human rights are conditional, David Miller quotes Locke's observation that:

For having quitted Reason, which God hath given to be the Rule betwixt Man and Man, and the common bond whereby humane kind is united into one fellowship and societie; and having renounced the way of peace, which that teaches, and made use of the Force of War to compass his unjust ends upon an other, where he has no right, and so revolting from his own kind to that of Beasts by making Force which is theirs, to be his rule of right, he renders himself liable to be destroyed by the injur'd person and the rest of mankind, that will joyn with him in the execution of Justice, as any other wild beast, or noxious brute with whom Mankind can have neither Society nor Security.⁵³

Miller observes that this idea that 'all other Rights [of an aggressor] cease' is not Locke's considered view because, elsewhere, Locke distinguishes carefully between the rights that an aggressor loses and those he retains: when an 'armed robber' threatens me on the highway, I am entitled to kill him (in self-defence), but not to steal his possessions and let him go.⁵⁴ The point, though, is that, in Locke's view, the person who behaves egregiously is not redeemable, but instead is beyond the pale—a beast.

Moreover, the objection might continue that, even if someone were redeemable—or even if everyone is morally obligated to assume that he is redeemable (as argued above)—what he has done is so egregious that his redeemability and interest in hope are irrelevant: it simply does not make sense to share the Earth with him.⁵⁵ Hannah Arendt writes along these lines in her epilogue to *Eichmann in Jerusalem*:

And just as you [Eichmann] supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations—as though you and your superiors had any right to determine who should and who should not inhabit the world—we find that no one, that is, no member of the human

⁵³ John Locke, *Two Treatises of Government* (P Laslett ed, CUP 1988) 383. Cited from David Miller, 'Are Human Rights Conditional?' (Kobe Lecture, Doshisha University, 9 July 2011).

⁵⁴ Miller (n 53), citing Locke, *Two Treatises of Government* (n 53) 390.

⁵⁵ I thank Simon Gansinger for highlighting this idea.

race, can be expected to want to share the earth with you. This is the reason, and the only reason, you must hang.⁵⁶

The Australian jurist Julius Stone, whose works include *The Eichmann Trial and the Rule of Law*,⁵⁷ discussed Eichmann's fate in subtler terms with his son Jonathan Stone soon after Eichmann's execution. According to Jonathan Stone:

The execution had followed swiftly on the verdict; then it was done and over. The trial had gone on for a long time; Maybe that led observers to expect a less-swift execution of the death sentence. But it was done and over and, as you know, the Israelis have not passed a death sentence through a judicial process since. I was troubled; I just don't like the idea of taking someone to a place of execution and killing them; and have long been against capital punishment. I would be more likely than others to 'throw away the key', but not [execution]. I must have said something to [my father] that reflected my disquiet. He and I did not need to discuss the enormity of the crime. He read my mind and said 'I suppose it would simply be impossible for the Israeli authorities to keep him alive'. And then, though I don't recall him saying it, we would have had an assassination of some sort, by stealth or riot.⁵⁸

In other words, given the context, it seemed there was no viable political outcome other than execution, but both Julius Stone and his son regretted it. Cases like Eichmann's are so extreme, so loaded and so debate-silencing that, perhaps, there is no option but to treat them as exceptions in an otherwise general account of a hope standard.

That said, it is worth noting that, even in some extreme cases, people can access responses other than vengeance. In some cases, survivors and family members of victims can and do respond with remarkable grace and forgiveness. One survivor of the shootings in Christchurch, New Zealand, in March 2019, Farid Ahmed, said of the gunman who killed his wife, Hosne, that he forgives him and will pray for him. Hosne was shot as she ran from the women's area of the Al Noor mosque to the men's area to save Farid, who used a wheelchair. Similarly, after Dylan Roof killed nine people in a shooting in June 2015 at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina, a remarkable trial followed. At the trial, family member after family member of the victims stood up in court and declared, brokenheartedly, 'I forgive you', expressing grief, compassion and a wish for mercy for the man who had destroyed their lives.⁵⁹

⁵⁶ Hannah Arendt, *Eichmann in Jerusalem* (Viking Press 1963).

⁵⁷ Julius Stone, 'The Eichmann Trial and the Rule of Law' (Annual meeting of the International Commission of Jurists (Australian Section), 10 July 1961). Republished in Julius Stone, *Of Law and Nations: Between Power Politics and Human Hopes* (WS Hein 1974).

⁵⁸ Personal correspondence (2019).

⁵⁹ Inae Oh, 'Families of Charleston Shooting Victims: "We Forgive You"' (*Mother Jones*, 19 June 2015) <www.motherjones.com/mojournal/2015/06/families-charleston-shooting-victims-we-forgive-you>.

B. Proportionality

Recall Mrs Allan's claim that the people taking their own lives in prison are not the people who have been given life sentences, but instead they are young people, people who have been days, weeks or months, not years, in custody. Is there some way to make sense of the idea that weeks-long or months-long punishments might be sometimes harsher than life sentences?⁶⁰

To answer this question, it is necessary to look more closely at who is being punished and in what ways. The idea that there is no greater inequality than to treat differently placed people equally overstates the point, but turns in the right direction. Young people are more vulnerable and more likely to be buffeted—to have their little bird of Hope abashed in the harsh conditions of prison—than older and more experienced people are. Equity must be a key principle in criminal justice.

More controversially, one might observe that the life stories of people who tend to be given these types of sentences explains how they react in prison. The person who is more likely to engage in behaviours that yield a life sentence is more likely to have led a tougher life than someone who is more likely to engage in behaviours that yield a short sentence. For the person who has led the tougher life, prison might not be such a shock, might indeed be a reprieve from some of the chaos of his life outside, might be a regular meal and bed for the night. The person who does things that yield a short sentence may well have been much better off beforehand and, hence (perhaps paradoxically), may be less resilient.

Of course, it would be reasonable to highlight that the privileged person already had so many advantages, why should he be treated more mildly in prison because his 'coddling' outside made him more of a teacup? But it is hard to argue with suicide, and with who is losing hope. Moreover, advocating that punishment systems treat people more gently—abandon prison wherever possible—can be a recommendation that is made across the board and not simply for people who are more likely to lose hope quickly in prison.

7. Conclusion

This article has shown that societies and punishment systems should take hope seriously as a necessary and precious human emotion, and that taking it seriously has significant implications for punishment practices. These implications go far beyond life imprisonment without parole, which has occupied the

⁶⁰ Adam Kolber argues that two people who commit the same crime and get the same prison sentence for it receive identical punishments in name only because people vary significantly in how they experience punishment: some people are considerably more sensitive than others. Kolber does not argue that more sensitive people should receive more modest sentences than less sensitive people, but that we should acknowledge that, when they are given equal prison terms, more sensitive people are actually punished more harshly than less sensitive people are because of how they experience punishment. Adam J Kolber, 'The Subjective Experience of Punishment' (2009) 109 Colum L Rev 182.

attention of scholars who have considered hope in relation to punishment. The hope standard for punishment radically narrows the range of punitive methods a society could aim to justify and it details specific constraints on how a society may implement the methods that it can permissibly use. In implementing such constraints, punishment practices would better honour and preserve that little thing with feathers that perches in the soul and sings the tune without the words.