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SOCIAL DEPRIVATION AND CRIMINAL JUSTICE

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This chapter concerns the use of social deprivation as a mode of lawful punishment. In this context, ‘social deprivation’ refers not to poverty and its associated social ills, but to a persisting inadequacy of access to minimally supportive social contact including interpersonal interaction, associative inclusion and interdependent care. In what follows, I elaborate a view that I articulate elsewhere—that there is a human right against social deprivation—and I argue here that modes of lawful punishment that involve social deprivation constitute human rights violations.² To the extent that interpersonal social needs have been considered in debates about either socio-economic human rights or lawful punishment, they have been largely subsumed under economic-welfare rights, in the first case, and under rights against torture in the second, which paints an incomplete and skewed picture both of the importance of the human need for social inclusion

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² K Brownlee, ‘Social Deprivation and Human Rights’ (in progress).

irrespective of economic needs and physical needs, and of the reasons not to employ socially privative punishment.³

Briefly, the position I defend is as follows. Human beings have a right to those conditions that are necessary for the realisation of a minimally decent human life. Having minimally adequate access to supportive social inclusion is a necessary condition for a minimally decent human life (and indeed for a less than minimally decent human life) because, among other things, social deprivation threatens or undermines both the development and the maintenance of the cognitive, physical, emotional, linguistic and social abilities that both partly constitute a minimally decent human life and make other rights and domains of value meaningfully available.⁴ I argue elsewhere that the human right against social deprivation is a secure right in the sense that it does not depend on either good community standing or good behaviour.⁵ In what follows, I elaborate this view and consider its implications for the use of social deprivation in criminal justice.

³ For defences of socio-economic rights as human rights, see H Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* 2nd edn (Princeton, Princeton University Press, 1996); J Nickel, 'Poverty and Human Rights' (2005) 55 *Philosophical Quarterly* 385, 391; J Nickel, *Making Sense of Human Rights* (Oxford: Blackwell, 2007) ch 9; TW Pogge, *World Poverty and Human Rights* (Cambridge, Polity Press, 2007). All of these philosophers give little attention to social needs independent of economic needs.

⁴ I do not mean to imply that persons who are unable to develop some of these abilities or who lose some of these abilities necessarily lead lives that are not minimally decent. Rather, I mean that a minimally decent life is one in which persons have the opportunities to develop and maintain these abilities according to their own capacity.

⁵ I have borrowed the language of 'secure rights' and 'secure claims' from James Nickel, who uses it to articulate four areas in which, in his view, persons have secure, but abstract moral claims upon others: (a) secure claim to have a life; (b) a secure claim to lead one's life; (c) a secure claim against severely cruel or degrading treatment; and (d) a secure claim against severely unfair treatment. Nickel argues that these four abstract rights are 'secure' in the sense that they do not have to be earned through membership or good behaviour and their availability does not depend on that person's ability to generate utility or other good consequences. However, Nickel does qualify his view on their 'security'; he says that, although these claims do not depend on good behaviour 'claims to liberty can be justifiably suspended upon conviction of a crime'. See J Nickel, 'Poverty' (n 2); J Nickel, *Human Rights* (n 2) ch 9. This language is more attractive than that of 'inalienable rights' because, unlike the former, the latter implies that a person not only could not lose rights through poor conduct, but also could not voluntarily forfeit rights. Since the voluntary relinquishment of a right is a distinct issue from that of forfeiture through poor conduct, it is useful to have

I Social Deprivation and Punishment

To set the scene, let us begin in ancient Athens where the Assembly adopted an unusual formal practice to ease tensions among political rivals. The practice was that of voting annually on whether to banish one citizen from the city. If in a given year the majority of Assembly members held that it was necessary to banish a citizen, then a second vote would be taken and each Assembly member would write the name of the citizen he most wished to see banished on a broken piece of pottery called an ‘ostrakon’ (which is the etymological root of the word ‘ostracism’). The citizen with the most votes would then be banished from Athens for an extended period of up to 10 years.⁶

Although banishment from Athens would undeniably have been a burdensome experience, it differs significantly from contemporary practices of forced social exclusion, isolation and deprivation. In Athens, the practice of democratic banishment was not a formal part of the criminal justice system; there was no declaration of fault, no trial and no offering of a defence. And, when the period of banishment ended, the

a distinct description that allows that rights can be immune to the latter, while remaining agnostic about the former.

⁶ J Ober, ‘How to Aggregate Knowledge in an Epistemic Democracy’ (APSA paper 2008), online: convention2.allacademic.com/one/apsa/apsa08. Ober states that, typically, the majority response when asked if an ostracism was necessary in a given year was ‘no’. Only about 15 ostracisms are known to have occurred during the 180 years of the Athenian democracy. During the period of his exile, an expelled citizen’s property was not confiscated; his family could remain in Athens; and ostensibly he suffered no real loss of status.

banished member could return to the city without stigma.⁷ The procedure was essentially a pre-emptive measure designed to neutralize political conflicts that might pose risks to the community.⁸ By contrast, in contemporary societies including Canada, much harsher ways of forcibly socially marginalizing or socially depriving persons are practised, and they do form formal parts of the criminal justice system. In contemporary Western societies, banishment is in fact a comparatively modest (and fairly rare) form of socially privative punishment. One example of its use is the 2010 case of Regina resident Gerald Klein, who was banished from his home city for one year for harassing a woman through three decades. In imposing this unusual peace bond, Dennis Fenwick J stated that ‘The world’s a large place. There’s lots of places for Mr Klein to go’.⁹ Such a view rests on the assumption that another community will be willing to accept, house and employ (or otherwise provide for) Mr Klein. That assumption may be reasonable in this case, but it nevertheless disregards the significance of this man’s social ties, relationships and interdependences. Commenting on the judgment, Klein’s lawyer Brian Pfefferle observed that:

There’s something about your home that can’t be replaced ... your friends, your family, the support network. And those are things that Mr Klein clearly does have in Regina that he does not have to the same extent in Saskatoon or any other city ... Essentially being thrown out of Regina is akin to being sent to jail because you’re removed from the people

⁷ Plutarch *Liues* 135, ‘This manner of banishment for a time, called Ostracismon, was no punishment for any fault committed, but a ... taking away of the enuie of the people’ (T North tr, 1579) in *The Oxford English Dictionary*, online: oed.com/viewdictionaryentry/Entry/133172.

⁸ Ober, ‘Epistemic Democracy’ (n 5).

⁹ JG Pruden, ‘Man banished from Regina after woman stalked for 35 years’ *Regina Leader-Post* (9 August 2010).

that you have contact with, removed from the people that you love, the freedoms that you enjoyed are taken away from you.¹⁰

The punishment imposed on Klein may have risked social deprivation, but it is far less severe than other kinds of socially privative punishments that are practised in Western democracies including Canada, and most particularly practised in the United States as in the examples outlined below.

The first is long-term solitary confinement, which, as the empirical evidence indicates, tends to cause persons to suffer acute psychological and physical deterioration.¹¹ Prisoners of war and long-term incarcerated offenders often report on their release that they initially experience solitary confinement with despondency and depression, but over time begin to feel themselves disintegrating. They sleep over 12 hours a day, forget facts and memories and lack the energy to read, eat or move. Some begin to hallucinate, have panic attacks and mutilate themselves.¹² Some go into a semi-catatonic state and become unable to respond to basic instructions. These individual accounts are corroborated by scientific studies which indicate that acute loneliness, understood as perceived social isolation, generates the same threat response as pain, thirst, hunger or fear; it sets off a chain of anxiety-inducing physiological reactions known as the 'fight or flight' response. Chronic loneliness is associated with obesity, the

¹⁰ B Pacholik, 'No Christmas homecoming for banished stalker: Sask. judge reserves decision' *Montreal Gazette* (9 December 2010).

¹¹ For a general critique of the use of 'special, maximum-security' prisons in the United States, see R Lippke, 'Against Supermax' (2004) 21 *The Journal of Applied Philosophy* 109–24. See also, R Lippke, *Rethinking Imprisonment* (Oxford, Oxford University Press, 2007).

¹² In his memoir, journalist Terry Anderson reports on his solitary confinement in prison: 'The mind is a blank. Jesus, I always thought I was smart. Where are all the things I learned, the books I read, the poems I memorized? There's nothing there, just a formless, gray-black misery. My mind's gone dead. God, help me'. Cited from A Gawande, 'Hellhole: The United States holds tens of thousands of inmates in long-term solitary confinement. Is this torture?' *The New Yorker* (30 March 2009).

progression of Alzheimer's disease, increased vascular resistance, elevated blood pressure,¹³ diminished immunity, a reduction in independent living, alcoholism, depression, suicidal ideation and behaviour, and mortality in older adults.¹⁴ No doubt factors other than the solitude could account for some of a person's deterioration in solitary confinement, but there is a commonality among persons' recollections of long-term solitary confinement, namely, that they report it to be as agonising as torture.¹⁵ And, for many, their psychological and emotional deterioration continues to affect them long after their release. One recent case of solitary confinement in Canada is that of James Bacon who was held in near total isolation for several months at the Surrey BC, pre-trial detention centre. In this case, the isolation was not imposed as a punishment since it preceded Bacon's trial for gun offences. In June 2010, Bacon successfully argued that his pre-trial detention in solitary confinement breached his rights under the Canadian Charter of Rights and Freedoms.¹⁶

¹³ Socio-neurological studies, such as those conducted by John Cacioppo, indicate that the blood pressure of lonely people can be as much as 30 points higher than that of people with healthy social connections. See, J Cacioppo, 'Research Summary' (Faculty of Psychology, University of Chicago) online: psychology.uchicago.edu/people/faculty/cacioppo/index.shtml.

¹⁴ Cacioppo states that human beings, whose abject dependency at birth is the longest of any species and who are dependent throughout life on conspecifics for survival and prosperity do not fare well when they either are living solitary lives or perceive themselves to be living in isolation. 'The average person spends about 80% of waking hours in the company of others, and the time with others is preferred to the time spent alone ... Social isolation, in contrast, is associated not only with lower subjective well-being ... but with broad based-morbidity and mortality'. Loneliness, Cacioppo notes, has also been associated with gene expression including the under-expression of genes that bear anti-inflammatory glucocorticoid response elements and the over-expression of genes bearing pro-inflammatory response elements. He concludes that social environment (and persons' perception of their social environment) is fundamentally involved in the sculpting, activation and inhibition of basic structures and processes in the human brain and body For extensive references, see Cacioppo, 'Research Summary', *ibid*.

¹⁵ According to Gawande, 'Hellhole' (n 11), a US military study of 140 naval aviators imprisoned in Vietnam reported that 'they found social isolation to be as torturous and agonizing as any physical abuse they suffered'.

¹⁶ K Bolan, 'Judge rules Jamie Bacon's rights violated by treatment in jail' Vancouver Sun (10 June 2010). Mark McEwan J of the BC Supreme Court stated that BC Corrections had breached James Bacon's Charter rights on several fronts 'by creating circumstances and maintaining the petitioner in circumstances that

A second, severe mode of socially privative punishment commonly practised in prisons—though not formally sanctioned within Western democratic criminal justice systems—does not take the form of isolation, but rather that of brutality and degradation. Prison conditions that are marked by extreme brutality, hostility, degradation and cruelty are socially privative because the persons who endure them are deprived of minimally adequate access to the ordinary kinds of supportive social interaction that make for a minimally decent human life free from extreme degradation and cruelty. Data on the US and other Western countries indicate that tens of thousands of offenders are held in restrictive social conditions marked by brutality and hostility.¹⁷ Recognizing that certain socially ‘inclusive’ conditions are nonetheless socially privative, enables us to assess the legitimacy of a person’s accepting or even welcoming such conditions. Just as voluntary acceptance of social isolation should be looked at with some scepticism,¹⁸ so too should acceptance of an extremely brutal or hostile social environment. It must be considered in relation to the range and value of the person’s available options and her ability to assess those options. For instance, putting an offender in a prison cell with a deranged inmate can be likened—forgive the analogy—to giving a starving person contaminated water to

manifestly threaten the security of his person (which includes both a physical and a psychological dimension) by the unlawful deprivation of his rights for an unlawful purpose’. For an examination of the use of segregation and isolation in Canadian federal penitentiaries, see M Jackson, *Justice Behind the Walls* (Vancouver, Douglas & McIntyre, 2002). For a comment on the ongoing use of solitary confinement in US prisons, see J Casella and J Ridgeway, ‘No Evidence of National Reduction in Solitary Confinement’ (15 June 2010) Solitary Watch, online: solitarywatch.com/2010/06/15/no-evidence-of-national-reduction-in-solitary-confinement/. Statistics on the number of convicted offenders held in long-term solitary confinement in the United States range from 20,000 to 120,000.

¹⁷ For an examination of abuse in US prisons, see ‘The Report of the Commission on Safety and Abuse in America’s Prisons’ (2006), online: prisoncommission.org/. See also Jackson, *Walls*, *ibid*.

¹⁸ Brian Barry observes that voluntary self-exclusion is to be looked at with some scepticism. If the prevailing social context is one of discrimination and hostility, then a withdrawal from that environment may be voluntary, but the context makes it little different from non-voluntary exclusion. See B Barry, ‘Social Exclusion, Social Isolation, and the Distribution of Income’ in P Agulnik and J Hills (eds), *Understanding Social Exclusion* (Oxford, Oxford University Press, 2002).

drink. In neither case does the provision meet the relevant need. And yet, many persons who endure solitary confinement in prison report that, for them, any companion, no matter how horrific, is better than no companion.¹⁹

This last observation highlights a distinctive feature of the logic of the harm of forced social deprivation, namely, that the risk and reality of harm for any one person suffering this treatment is less when others are similarly treated. To make this point vivid, consider the proverbial desert island on which a bunch of shipwrecked hopefuls form a community. At some point, the community decides to punish one person, Robinson, for some offence, by socially isolating him. They do this either by banishing him to a neighbouring uninhabited island or by confining him alone within a large enclosure. In doing so, they force him to struggle for survival without the companionship, pooling of epistemic and physical resources and noble sense of purpose that come with interdependent social life. But, if they ostracize Crusoe along with Robinson, then Robinson and Crusoe each have the prospect of being companion and helpmate to the other. And, if they ostracize Friday along with them too, then prospects improve even more for each of them and for the trio as a whole. Indeed, assuming that there is no scarcity of resources and no homicidal behaviour among those ostracized, their prospects for survival and good life become greater the more people thus ostracized by the original group (up to the point where no new additions to the rejected group will improve on their individual and collective conditions). It is because social interaction, inclusion and interdependency are so central to human life that a person's condition radically changes

¹⁹ Gawande, 'Hellhole' (n 11).

when she has the prospect of at least one companion.²⁰ The fact that *ceteris paribus* social isolation of two persons together risks or causes less harm overall and less harm for each than does the isolation of one alone shows how this kind of harming contrasts with many typical kinds of harming such as causing direct injury or death since doing the latter to more than one person does not lessen the harm done to any one person thus harmed.²¹

These observations about harm do not settle a consequentialist debate about the normativity of social deprivation as a mode of lawful punishment, since such a debate must attend to consequences other than those affecting the socially deprived person. The issue for consequentialists in the context of criminal justice is whether social deprivation can be expected to serve such aims as promoting general wellbeing, stability and general deterrence from wrongdoing no less well than otherwise. If the real or expected consequences of solitarily confining an offender were no less good than those expected from any alternative measure, then solitary confinement would be acceptable, and indeed obligatory, within simple consequentialist frameworks. The difficulty in affirming the antecedent of this conditional is that it is vulnerable to counter-evidence of the correlative variety, such as the fact that penal systems that impose very harsh punishments such as solitary confinement typically have higher recidivism rates and higher violent crime rates than do systems that eschew solitary confinement and, in general, impose milder

²⁰ Of course, at T2, Crusoe and Friday may decide not to engage with Robinson, in which case he faces the same level of risk as when he excluded alone at T1.

²¹ That said, in non-lethal cases, there may be both the derivative comfort for each victim of knowing she was not alone and the social benefits of having her experience be unexceptional. The point here is simply that social deprivation risks and causes less harm when there are other people willing to engage with you; these may be other ostracized people, or other people previously ostracized, or other people who simply are not part of the group that has isolated you.

punishments.²² And, the data about solitary confinement in particular suggest that it not only does not deter offending, but creates new risks of greater and more deranged wrongdoing since it often leaves persons unable to lead socially integrated lives.²³

Of course, irrespective of the empirical data, such crude consequentialist calculations are inadequate in being insensitive to salient normative factors such as intentions, the moral quality of acts in themselves, personal commitments, role-related duties, and rights. Taking a Kantian line, for example, we may argue that there is a categorical prohibition against modes of lawful punishment that either threaten or undermine persons' abilities to lead autonomous lives. Since, in general, long-term socially privative punishment of the two forms described above can render a person unable to respond to instructions let alone appreciate the moral quality of her acts, such punishment fails to treat her as a reasoning agent; it fails to engage with her in a way that allows her to reflect on the reasons not to act as she did. Taking a different, non-consequentialist line that focuses not on our duties to persons as ends in themselves, but on persons' rights as persons, we may argue that there are human rights against modes of treatment that deny a person minimally adequate access to supportive social interaction and inclusion because such access is necessary for a minimally decent human life. It is to this position that I now turn.

II A Human Right against Social Deprivation

²² Gawande, 'Hellhole' (n 11).

²³ *ibid.*

As just noted, my case for the existence of a human right against social deprivation centres around the claim that human beings have a right to those conditions that are necessary for the realisation of a minimally decent human life, and that, irrespective of whatever else comprises a minimally decent human life, having minimally adequate access to supportive social inclusion is a necessary condition for such a life. More specifically, the right against social deprivation is not simply a negative right to be left free to endeavour to establish minimally adequate interpersonal ties; it is also a positive right to be provided, according to one's needs, with minimally adequate interpersonal contact and inclusion when one cannot secure it for oneself. For persons who have adequate means of securing their basic needs for social contact, little intervention by states or other parties is necessary or desirable. But for persons who lack the means to secure their basic needs or whose social ties have been forcibly severed, there is a duty to ensure the satisfaction of the basic minimum need for meaningful access to social contact. Consequently, in the context of criminal justice, the state's human rights obligations come into play unequivocally because offenders are under direct state control; the state is engaged in the practice of lawful punishment which, if not regulated appropriately, can result in the social deprivation of offenders.²⁴

Even though the empirical and normative case for the human right against social deprivation is strong I believe, nevertheless this right is not a commonly recognized one. It is neither highlighted in contemporary theoretical debates about socio-economic human rights, nor identified as a distinctive right in most international treaties. No mention is

²⁴ I thank Virginia Mantouvalou for clarifying this point.

made of interpersonal social rights in either the Universal Declaration of Human Rights or the International Covenant on Economic, Social, and Cultural Rights, which may be a reflection more of the historical context in which these documents were written than of any general scepticism about interpersonal social needs as grounds for human rights.

Only a few international documents refer to these social needs. For instance, Article 30 of the European Social Charter states that ‘everyone has the right to protection against poverty and social exclusion’. However, the conjunction of ‘poverty’ and ‘social exclusion’ in this Article indicates that the Article may be taken to refer principally to the kinds of social marginalization that tends to accompany economic deprivation and not to persons’ needs for interpersonal social inclusion irrespective of their economic situation. Social deprivation is neither unique to nor universal among the economically deprived.

Although the right against social deprivation cannot be subsumed under economic rights, it might be subsumable under, or derivative of, other presently recognized human rights (whose philosophical respectability I shall not question here). Could the right against social deprivation be subsumed under a right to basic education, or a right to basic health, or a right to physical security? Could it be subsumed under a right against torture, cruel and inhuman treatment, or some combination thereof? Constrained by space, I shall consider these various options only briefly. Human needs for interpersonal contact and care cannot be subsumed under a right to basic education for two reasons. First, this would require a highly non-standard notion of ‘basic education’ since our social developmental needs as children and young adults are akin to our subsistence needs. Just as adequate food is needed for us to grow taller and healthier, so too adequate social contact and care are needed for us to acquire language as well as the physical, social,

emotional and cognitive abilities necessary for a minimally decent human life (which makes punishment through social deprivation particularly abhorrent when it is imposed on a young person). It is no more appropriate to say that socializing us during critical stages of development is part of 'basic education' than it is to say that feeding us is part of 'basic education'. Secondly, subsuming social needs under education needs or even, more broadly, under developmental needs would imply that, once we have developed into functioning adults, we no longer have social needs or, rather, we no longer have social needs that ground human rights. But, our social needs are not exclusively developmental. As the above empirical data indicate, the need of all persons for social contact and inclusion exists independently of any developmental or educative purpose it may serve, that is, the need for protection against social deprivation holds even for adequately developed and educated adults. The social nature of human life is not a contingent reality, but a necessary part of minimally decent human existence.

At first glance, it is more plausible to suppose that the right against social deprivation may derive from, or be subsumed under, the right to basic health since it seems that, in general, basic physical and mental health cannot be either achieved or fully maintained without minimally adequate access to social contact and inclusion. However, subsuming social needs under health needs could distract us from the distinctive interdependent nature and value of social interaction. Or, more optimistically, it could enable us better to recognize the distinctive interpersonal dimensions of our health needs. Thus, for example, if we appreciate the impact that our social needs tend to have on our health, then we take a different view of the use of quarantine. Even though holding contagious patients in some form of quarantine may be necessary to contain the spread of

a disease, we may be less likely to dismiss as a regrettable externality the likely negative impact on the persons who are thus isolated. That said, there is a more general concern about subsuming social needs under health needs, which is that social needs are not purely health related. Acknowledging the significance of persons' interpersonal social needs is part of respecting persons as persons, whose identities and autonomous choices draw much of their content, meaning and significance from meaningful opportunities for social inclusion.

Let me turn briefly to rights against torture and cruel, inhuman, or degrading treatment. In the context of criminal justice, the right against social deprivation does seem to be derivative of these rights taken together as a set. Subsuming the right against social deprivation under the right against torture alone would invite an overly narrow interpretation of the content of such rights as well as of the criminal justice contexts in which they are at issue and the kinds of suffering that social deprivation engenders. (As an aside, there is but weak international recognition of the inhumanity of solitary confinement as a mode of punishment. Principle Seven of the UN Basic Principles for the Treatment of Prisoners states insipidly that 'efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged'.) As noted above, social deprivation in prisons occurs not only through long-term solitary confinement—which may well be regarded as torturous—but through ongoing exposure to brutal and degrading social conditions that are not isolating, and which presumably are not torturous as such in most cases. To recognize that the latter conditions constitute rights violations, we must give sufficient attention to the content of the rights against cruel, inhuman and degrading treatment. Forced social deprivation of

both the solitary and non-solitary variety is cruel, inhuman and degrading in itself and renders a person vulnerable to other forms of cruel, degrading and brutal treatment; protection from social deprivation is necessary to reduce persons' exposure to, and vulnerability to, treatment that persons credibly have a secure claim not to suffer.²⁵ That forced social deprivation is cruel, inhuman and degrading shows that, in the eyes of human rights law, the right against (forced) social deprivation would not be principally a social and economic (second generation) human right, since those rights are typically understood to centre around material conditions and economic resources. Rather, in the eyes of human rights law, the right against social deprivation would be a civil and political (first generation) human right and hence would receive more expansive and privileged protection under human rights law than do socio-economic rights.²⁶

Although each of the human rights just discussed—basic education, health, torture, cruel and inhuman treatment—touches on an important dimension of persons' interpersonal social needs, none of them seems to capture fully the core content and distinctive value of the right against social deprivation. Thus, assuming that we have considered the most viable candidate 'cover-rights', there is reason to conclude, at a minimum, that the right against social deprivation is a distinct human right that protects persons' fundamental interests in having minimally adequate access to supportive

²⁵ Nickel, 'Poverty' (n 2); Nickel, Human Rights (n 2).

²⁶ I thank Virginia Mantouvalou for drawing my attention to this point. In her response to my paper at the Royal Holloway 'Margins of Citizenship' conference, she observed that the European Court of Human Rights has considered one dimension of social deprivation in prison, namely, whether lengthy solitary confinement in prison violates Art 3 of the European Charter on Human Rights (ECHR), which prohibits inhuman and degrading treatment. She observed that, whereas the ECHR does not protect second-generation socio-economic human rights, it does protect first-generation human rights and thus the Court could afford legal protection to applicants through a civil and political rights procedure.

interpersonal social interaction and inclusion. With this explication of the right against social deprivation in hand, let us turn to the issue of its security. In the next section, I elaborate my view that the right against social deprivation is secure in the sense that it does not depend on either good community standing or good behaviour.

III A Secure Right against Social Deprivation

Secure rights are distinct from social and political privileges which flow from good standing and good behaviour, and which can be retracted or withheld when a person damages her standing in the community. Unlike political privileges, secure rights are not so vulnerable. They persist even when a person acts wrongly or lacks good standing; in other words, a person cannot forfeit these rights through poor conduct or loss of community standing. Several arguments can be marshalled in support of the view that the right against social deprivation is a secure right.

First, one argument for the security of this right is that it is a human right and that all human rights are secure in virtue of their special moral status. Human rights are claims that protect human beings' most fundamental needs and interests. Part of their purpose, as Peter Jones puts it, is to provide guaranteed safeguards for persons, particularly against the abuse of political power.²⁷ For such guarantees to provide the security they promise, it would seem that they must be secure and immune to changes in persons' conduct, community standing, or the declared needs of the community. Although attractive, this argument may claim too much for human rights, and may have some *prima facie*

²⁷ P Jones, *Rights* (London, Palgrave, 1994). Jones does raise doubts about the security of all human rights.

counterintuitive, though possibly legitimate, implications. For instance, if the right to life were secure, then a person would not forfeit that right were he to attempt to kill another person, which would mean that the victim who successfully defends herself and kills this attacker breaches the attacker's right not to be killed. For another instance, in the context of criminal justice, if all human rights including property rights and movement rights were secure, then any imposition of hard treatment as a form of punishment, be it a fine or (in serious cases) temporary incarceration, would be unjustified on the grounds that it is a human rights violation.

Despite these implications, we should not dismiss this argument too quickly. If indeed rights arise from those interests that are sufficiently strong to ground duties in others, and if, as I have argued, a person's interests in having minimally adequate access to supportive social contact are sufficiently strong to give rise to a basic right against social deprivation, then a person's right against social deprivation remains as long as she has sufficiently strong interest in social contact. It is only when she ceases to have the interests that give rise to such a right that she may be said not to have such a right. Her right may well be overridden by more pressing considerations, which may include, but are not limited to, others' rights. But that is a separate matter from whether her right still exists. The existence of her right depends on the presence of the relevant interests. And, there is reason to doubt that a person's interests in social interaction and inclusion lessen or disappear once she acts wrongly. Indeed, it is more plausible that a person's interests in social interaction and inclusion become stronger once she acts wrongly since such inclusion may serve to restore her sense of self-respect, may aid her to understand the wrongness of her act, may help her to overcome any proclivity for such behaviour, and

may give her responsibilities and a sense of empowerment that reduce the likelihood of such behaviour.

Second, although it may be difficult to argue that all human rights are secure, it is plausible to hold that at least some human rights are secure. Indeed, the notion of a secure human right that cannot be forfeited through poor conduct is not controversial. Two uncontroversial and related examples of secure rights are the right to equal recognition before the law and the right to a fair trial. A third example that should be uncontroversial, despite recent debates, is the right against torture. These rights are not forfeited when a person acts wrongly. Indeed, the second of these rights—the right to a fair trial—only comes into play once a person is accused of acting wrongly. Thus, it is reasonable to think that other human rights, and certainly fundamentally important rights such as the right against social deprivation, may also not be conditional on good behaviour.

Third, the right against social deprivation is an important one on which the meaningful exercise of other human rights, such as personal security, subsistence, movement, employment, education, political participation and family life, depends. In consequence, interference with this right not only undermines it, but undermines the rights that are conditional on it, having a more expansive, damaging and morally problematic impact on the person than may be initially supposed. In brief, a society cannot deny a person adequate access to minimally supportive social contact and inclusion without threatening or undermining many, if not all, of her rights, most, if not all, of which society would have no intention or wish to impinge upon, and no grounds for impinging upon, by denying her adequate access to social contact.

Recognizing the security of the right against social deprivation has significant implications for criminal justice. Let me explore the implications by addressing some possible objections to the claims outlined above. These objections are the ‘Problem of the Purposes of Punishment’ and the ‘Problem of the Intolerable Person’.

IV Objections

The Problem of the Purposes of Punishment begins with the observation that a central insight of retributivism is said to be that the legitimate response to culpable wrongdoing is to suspend normal relations with an offending person until that person assumes the restorative responsibilities that flow from the wrongdoing.²⁸ On a typical interpretation, suspension of normal relations means withdrawing the respect and recognition that are otherwise appropriate to relations with that person. This is what it is to blame someone, and to be blameworthy is to lose the claim not to be subject to such a withdrawal of respect and recognition.²⁹ In serious cases, it is held to be acceptable, if not obligatory, retributively to ostracize, isolate or exile persons who engage in culpable wrongdoing so as to respond proportionally and to convey the appropriate degree of censure for the offence. If the use of social deprivation in punishment is, by nature, unjustifiable on the grounds that it constitutes a human rights violation, then it seems that we unduly restrict the community’s capacity to respond proportionally to offending.

²⁸ See, eg, C Bennett, *The Apology Ritual* (Cambridge, Cambridge University Press, 2008).

²⁹ See, eg, T Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge MA, Harvard University Press, 2008).

In reply, such retributive insights can be reconciled with a rejection of social deprivation as a justifiable mode of punishment when those retributive insights are given a sufficiently narrow interpretation, according to which the suspension of normal relations need not, and indeed should not, entail the suspension of minimally adequate access to supportive social relations with the culpable wrongdoer, which it does when it takes the form of long-term solitary confinement or extremely brutal and degrading incarceration. Rather, the suspension of normal relations entails that relations become focused, as much as possible, on the responsibilities that flow from the wrongdoing. Specifically, the relations should become oriented towards providing forums and opportunities for the wrongdoer meaningfully to make good on the restorative responsibilities that are hers in light of her past conduct without denying her minimally adequate access to supportive modes of social interaction and inclusion. This kind of approach to retribution also honours a person's right to be engaged with non-coercively as a reasoning agent who is responsive to moral reasons.³⁰ And, it retains a direct link between the wrong done and the kind of punishment imposed in response, thereby giving the correct meaning to the communication of blame. This approach to punishment does not challenge the use of all socially limited forms of punishment; rather it focuses on the *minimum* level of adequate access to social inclusion, a level which falls far below what is typical or 'normal'. Thus, this approach rules out the use of socially limited

³⁰ A practical model for this interpretation of the retributive insight can be found in some European penal systems which eschew the harsher methods of Anglo-American systems in favour of practices that respect offenders' sense of honour and dignity, give those in prison a voice about their conditions, assign to them transparently meaningful responsibilities related to reparation and enable them to retain many of their familial responsibilities (in some jurisdictions, families can live with prisoners). See, eg, JQ Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (New York, Oxford University Press, 2005).

punishments which undermine the base threshold for minimally adequate access to supportive social contact.³¹

The second problem is the Problem of the Intolerable Person, which is fairly self-explanatory. In brief, in prison settings and in communities in general, the question at issue is: How can either the state or its delegates honour the right against social deprivation in cases where an offender is a truly abominable human being whose presence in any social setting threatens or violates the human rights of others not to be socially deprived through extremely brutal, hostile, cruel or degrading treatment? There are at least four possible responses to the Problem of the Intolerable Person. First, there may be various ways to satisfy a minimum standard of adequacy in a person's access to supportive social interaction that do not risk others' human rights or general interests; possibilities include mediated or virtual interaction, regulated group interaction and other forms of non-standard social inclusion. Secondly, although it might be true of some 'intolerable' people that they could not but be as they are, this may not be true of all such persons. There is considerable evidence, some of which I note above, that the ways in which a person is treated in childhood and early adulthood have a significant impact on his or her ability to lead a socially integrated life. In consequence, focusing on prevention may be as important a solution to this kind of problem as looking to ways to manage persons who are presently socially intolerable. Thirdly, a somewhat unattractive, but nonetheless plausible response is that, in extreme cases, there may be persons for whom the human right against social deprivation cannot be fully satisfied in view of the

³¹ I thank Leslie Green for helping to clarify this point.

distinctive interpersonal nature of the social opportunities that satisfaction of this right requires. The possibility that not all persons' rights against social deprivation can be fully honoured does not mean that persons have no such right. Fourthly, moreover, in the context of criminal justice, the matter at issue is the duties that the state itself has not to subject persons to those kinds of treatment and conditions that fall below a credible threshold for minimally adequate access to supportive social inclusion.

Despite the practical issues that attend this approach to lawful punishment, responsibility-focused retributive responses that eschew socially privative punishment are not only more in line with, and more directly communicative of, appropriate blame and censure than socially privative measures, but are more respectful of the wrongdoer as a person responsive to reasons. Resort to social deprivation in lawful punishment is not only coercive, intolerant, unimaginative and radical, but conveys the inaccurate message that the basic rights of socialization are privileges to be earned rather than secure claims that are essential for a minimally decent human life.