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# Memory and Punishment

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CHRISTOPHER BIRCH

## I Introduction

Lawyers and legal philosophers have both recognized that our prevailing concepts of criminal responsibility and punishment depend upon a particular notion of personal identity, namely our possession of conscious minds to which are ascribed the qualities of unity, continuity through time, and the clear separation of each person from all others and the rest of the world. With the rebirth of interest in the philosophy of mind in the last twenty years, the nature of personal identity has again become philosophically important. The issue has gained philosophical notoriety with the publication in 1984 of Derek Parfit's *Reasons and Persons*.<sup>1</sup> Parfit's book contains a long and detailed argument that seeks to refute the common view of personal identity, namely, that an individual's identity is a special further fact additional to the sequence of that person's mental states. Although not the first, Parfit's work is one of the most sustained efforts to advocate a reductive theory of mind.

Much of our moral practice, and most laws in most major legal systems, treat the individual as the fundamental unit of moral or legal responsibility. Indeed, moral or legal practice that appeals to notions of collective guilt or the punishment of communities is generally to be criticized. Further, individual responsibility is not usually thought to fade or shift with the passage of time. If, however, there are credible arguments for a reductive account of personal identity, then some of the central presumptions of individual responsibility that underpin our moral practice and the criminal law begin to unravel. This paper investigates some of the problems that this recent work creates for criminal law, particularly those concerned with an agent's continuing responsibility through time for criminal acts and specifically, with the role of memory in our assignment of such responsibility.

A central argument of this paper is that, at the instant a person commits an immoral or criminal act, neither moral nor criminal responsibility should be assumed for all time. Liability to punishment depends upon the responsibility of the individual for that punishment continuing to be generated afresh throughout the period from commission of the offense to the completion of any sentence. The problem of explaining how moral or criminal responsibility continues through time has been a central focus of the debate regarding the nature of personal identity.

Many of those who advocate a reductive theory of mind accept that, with the diminishing psychological connectedness of an offender's later selves from his earlier selves, moral responsibility may diminish. Thus many reductionists consider it true that someone does not deserve to be punished as severely for a crime he committed a long time ago as he does for a recently committed crime. For most mental reductionists, it is the overall qualitative change in a person's character, personality, and memories, that diminishes the extent of the person's responsibility for past acts. Non-reductionists would usually accept that acute mental illness seriously diminishes or terminates liability for punishment. Other than the absence of acute mental illness neither reductionists or non-reductionists have argued that any specific mental state is an essential condition for an offender continuing to be liable to punishment other than an offender's knowing why he is being punished.

Contrary to the position adopted by most mental reductionists, I will argue that memories of doing a wrongful act, and of one's self and one's life at the time of doing of the act, are pre-conditions for being held responsible for that wrong, and hence liable for punishment. I argue that loss of memory of these matters relieves a person of moral responsibility for an act, even if he continues to share strong connections with the prior self who committed the wrong. Thus, an offender whose character, personality, and moral beliefs have remained substantially un-

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changed, and who still has substantial memories of most parts of his prior life, ought not to be liable for punishment if he has suffered a loss of memory with respect to the period of his life during which he committed a particular offense.

Many non-reductionists have argued that moral responsibility attaches to an individual at the time of the wrong and does not diminish over time. Exceptions are made only when the individual suffers some form of mental catastrophe that undermines his capacity to have moral responsibility attributed to him. The non-reductionist view does not countenance the possibility that a person may cease to have responsibility for a past wrong simply because an intervening mental accident impaired his memory of his life at the time of the wrong but left his other mental faculties intact. I also criticize this non-

reductionist view of the irrelevance of memory to liability for punishment.

I argue that the function of memory in rendering an individual responsible for his earlier actions cuts across the distinctions that have been made by reductionists and non-reductionists alike. A careful investigation of our moral intuitions in regard to certain examples of memory loss will show that we consider the memory of our past life to be a condition of continuing responsibility for our past actions. I argue that these intuitions are rationally supportable. I further argue that if a retributivist justification of punishment is to remain coherent, this understanding of the role of memory in continuing responsibility for punishment needs to be reflected in sentencing practice.

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## II The Notion of Personal Identity

Most people experience themselves as possessing a deep unity of consciousness. It is deep in the sense that we find it difficult to envisage ourselves in any other way. At the simplest level, we experience our unity of consciousness when the thoughts and beliefs of which we are aware belong to or form part of the one subject, the first person "me" or "I." I recognize that the visual and tactile sensations I am currently having are both being had by me. Likewise, I recognize that the thoughts I am having about the article that I am now writing, my desire for another cup of coffee, and my intentions about what I shall do when I stop writing, are all, in some sense, "my" thoughts. The usual transparency of our minds, in which the thinking subject, the "I" or "me," seems to have access to the whole content of our mind, reinforces this sense of unity. Of course, this description of the experience leaves unexplained precisely what is the "I" to which I am ascribing all these thoughts.

Not only do I experience myself as possessing a unity of consciousness in the sense just described, but I also have memories of past thoughts and perceptions. I recognize these memories as memories of my past thoughts and perceptions. I recognize them as mine, in the sense of being thoughts or perceptions once had by the subject, "I" or "me," which is now recollecting them. In this fashion I experience myself as having a continuity through time. I may have a thought now about what I shall do next weekend, but I may also recollect that an hour ago I had a thought about what I may do next weekend. I can thus point to a chain of mental experiences which I identify as my own and that extend back into the past.

These experiences of the unity of consciousness and of continuity through time, which we commonly recognize as the ground for being a person, lead most lay people and many philosophers to conclude that people are more than merely a sequence of mental states. This something more is what we usually think we are referring to when we refer to a person. We regard the mental states as properties of the person, or something that the person has. That the subject, the "I" or "me," is something over and above my sequence of mental states is the nonreductive view of personal identity. The central problem for this view is to provide an adequate account of the exact nature of this subject.

The reductive theory of mind is the view that people do not exist as distinct parts of the universe, separate from the patterns of human mental experience which they name. It claims that the existence of a person is merely a conventional way of identifying these patterns of human mental experience. These patterns may of course have particular causal connections, and certain bundles of human experience may have connections with particular bodies.

Parfit argues that the notion of a person does not describe or refer to some further fact about the universe in addition to the patterns of mental experience and the knowledge we already possess about their connections.<sup>2</sup> Among others, he seeks to undermine the view that the concept of a person refers to something other than these patterns. To do so, Parfit appeals to actual psychological experiments as well as to thought experiments and argumentation.

Among the more famous psychological experiments are the so-called split brain cases. These have involved attempts to treat people with severe epilepsy by severing the connection between the left and right upper hemispheres of their brains. Such operations have produced relief for the sufferers from their epilepsy. But psychological tests performed on these patients after the operation have suggested that it also had the unintended consequence of creating two separate spheres of consciousness, in effect two minds within the one brain.<sup>3</sup> The separate hemispheres of the brain control separate halves of the visual field. When one of these patients was given a visual clue in one half of the visual field and asked to write a description of what she had seen, she was unable to do so to the extent that the task involved the use of the other hemisphere of the brain.

If one accepts (which not all commentators do) that split brain experiments reveal a division of consciousness, then the question may be posed, "What happened to the personal identity of the patient that existed prior to the operation?" Those who believe that a person is something other than a conventional description of a stream of thought which usually ends only in death, may struggle to identify in the patients with the divided brain the person who existed prior to the operation. For reduction-

ists such as Parfit, the term "person" is merely a convenient label for describing a particular bundle of mental experiences, and to ask the question whether the person has continued to exist is no more useful or meaningful than to ask what happened to Czechoslovakia after it divided into the Czech and Slovak Republics.<sup>4</sup>

These experiments clearly raise a question about the principles by which we attribute moral responsibility, particularly in relation to the notion of moral desert.<sup>5</sup> Ignoring for the moment the claim of some reductionists that nobody can deserve punishment, and assuming that where persons in the conventional sense are identifiable, then moral responsibility will follow, we might treat the divided self examples as instances in which responsibility terminates—as occurs in death or with the onset of serious mental disease. Indeed, the law usually treats multiple personality disorders as excuses, by subsuming them under the rubric of mental illness. However, this way of dealing with the issue raises its own problems. One, alluded to by Wiggins, concerns whether or not someone could seek to evade responsibility or punishment by contriving her own fission.<sup>6</sup> But in addition to such problems with personal identity viewed at a specific moment, further difficulties are raised by the identity of persons over a passage of time.

### III Personal Identity Through Time and Moral and Criminal Responsibility

Strong reductionists such as Parfit argue that because personhood is not some further and additional fact over and above the continuity of mental experience, it follows that the notion of a person continuing through time is merely a conventional means of referring to this psychological continuity.

Clearly, memory is critical to generating the experience of our personal identity through time. The point was made by John Locke in his *Essay Concerning Human Understanding*:

For as far as any intelligent being can repeat the idea of any past action with the same consciousness it had of it at first, and with the same consciousness it has of any present action; so far it is the same personal self.<sup>7</sup>

Bishop Butler was one of the first to argue that if one treated Locke's argument as a means of defining personal identity then it suffered from circularity.<sup>8</sup> If one defines personal identity as the ability to recollect or remember one's prior mental experience, one is already presupposing the notion of personal identity. Distinguishing my recollection of an experience such as hearing on the radio

that President Kennedy has been assassinated, from my recollection of being told by someone that it had just been announced that President Kennedy has been assassinated, appears—Butler would have argued—to have already presupposed the notion of personal identity.

The contemporary philosophical debate has taken up and transmuted Locke's argument into a psychological continuity criterion for personal identity. For psychological continuity theorists the relevant features of a person that must be continued are more than just memory experiences, although they may be among the more weighty. Robert Nozick writes:

The closest continuer view holds that Y at T2 is the same person as X at T1 only if, first, Y's properties at T2 stem from, grow out of, are causally dependent on X's properties at T1 and, second, there is no other Z at T2 that stands in a closer (or as close) relationship to X at T1 than Y at T2 does.<sup>9</sup>

Nozick's view, like Parfit's, is also reductive. The definition of personal identity is in effect constitutive and carries with it an intrinsic degree of arbitrariness about what psychological continuers are to be treated as constituting

the same person. Thus, one can imagine a case of personal fission in which a brain is divided and each half is transplanted into a new body. Each of the two individuals thereby created possesses memories and thoughts continuous with the person who existed prior to the fission, each will be a psychological continuer, but neither will be a closer continuer than the other to the pre-fission person. On Nozick's view, the person did not survive the fission. On the other hand, if one of the brain hemispheres had been destroyed rather than transplanted, the person created with the other hemisphere would be the closest continuer of the original person and therefore, on Nozick's theory, would enjoy identity with the original person.

The reductive theory of personal identity challenges the conventional notion of desert. If our concept of a person is a construction by which we bundle and label certain human experiences, but does not describe any additional or deep fact beyond those experiences, then we appear to lose any good reason for suggesting why this bundle of experiences here and now deserves to suffer punishment for something done by another bundle of experiences at a previous time.

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In *Reasons and Persons*, Parfit did not entirely abandon the concept of desert. He suggested that a consequence of his reductive view was that as change occurs in the nature of the bundle of experiences identified at any time as a particular person, this change leads to an attenuation of moral desert. I have such strong similarity today with the bundle of experiences that constituted myself yesterday that a strong relationship of desert exists between my two selves over that period. In twenty years time such significant change will have taken place in the nature of the experiences that constitute the bundle identified as me that I will have only an attenuated moral responsibility for things done twenty years ago by my earlier self.<sup>10</sup>

Some commentators have argued that Parfit's reductionist theory of personal identity leads to anomalous or unwarranted conclusions about what punishment a person might deserve. Thus Lloyd Fields has argued that it is a consequence of Parfit's position that an innocent per-

son may, in certain instances, deserve some degree of punishment, and a murderer may deserve no more punishment than someone who renders a person unconscious for a temporary period.<sup>11</sup> It has also been argued that Parfit's reductionism undermines the basis for seeking to compensate people for harms done to them at an earlier time.<sup>12</sup> Parfit appears to have met some of these criticisms by taking a less ambivalent approach to whether we deserve punishment, arguing in his responses to a forum published in *Ethics* that any concept of desert which depends upon individuals as its bearers or agents must be abandoned if one adopts the reductionist view.<sup>13</sup> Parfit's response might allow for a modified or reworked concept of desert that is consistent with the reductionist view, but such a concept is not further elucidated. What Parfit does suggest is that principles of distributive justice may still apply although the aim is now "for a fair distribution between the different parts of all our lives."<sup>14</sup>

The greatest challenge to Parfit's moral metaphysics comes from those Kantians who argue persuasively that any coherent account of moral agency assumes that the temporal continuity of a person must have ascribed to it a unity beyond that conceded by Parfitian reductionism. For Christine Korsgaard, this unity of agency may nevertheless be compatible with Parfit's insight, that is, that the existence of persons need not point to some further deep fact beyond consciousness and its unity.<sup>15</sup>

We might tentatively conclude that there are serious obstacles to espousing a strong reductionist view about personal identity, akin to that of Parfit's, while also seeking to deploy the concept of desert. However, a coherent account of our moral practice may also require some modification of the strong reductionist approach. The aim of this paper is not to seek a direct resolution of this issue, but rather to take one of our strongest intuitions about punishment, namely that people should deserve any punishment inflicted upon them, and to examine whether this in turn involves a commitment to the position that, as a condition of their deserving punishment, agents must have particular mental states. The conclusion reached may look a little like the reductionist position, namely, that a change of mental state might attenuate liability for punishment, but the argument for this position is not a lack of identity between the later self and the earlier self, but that memory of one's earlier life is essential to being morally deserving of punishment.

Some, although only a few, of our intuitions about punishment and moral responsibility may reflect the reductionist concept of a desert/time equation. It does seem desirable that punishment should follow the crime

as swiftly as is compatible with due process. In some jurisdictions, and for some crimes, there are statutes of limitation preventing prosecution after a substantial period. Usually the period is longer for the more serious offenses. In New South Wales (Australia), there is a six-month limitation period on the prosecution of certain summary offenses but no limitation period on the prosecution of serious felonies.<sup>16</sup> Other Australian states have similar provisions. Some European countries have statutes of limitation even upon the prosecution of serious felonies. The law in Australia may merely reflect the principle that difficulty in prosecution and possible prejudice to the defense increase with the passage of time and that a blanket rule should be applied to prevent prosecution of minor offenses after a reasonable period, whereas more serious offenses should be dealt with on a case-by-case basis. The application of statutes of limitation to even the most serious offenses in European jurisdictions appears more reflective of the principle that responsibility may become attenuated over time.

Some people are troubled by prosecution for crimes that were committed in the distant past. They consider it wrong to prosecute Nazis, now all elderly people in their 70s or 80s, for crimes they committed more than fifty years ago while in their youth. The reductive theory suggests that it is right to see their moral responsibility as having been substantially attenuated over such a long period of time.<sup>17</sup>

Parfit's reductionist views certainly imply that the person that I am today is different from the person I was in the past. The concept of personhood merely indicates that class of selves in which the later selves are psychological continuers of the earlier selves. It is, however, to the whole bundle of psychological characteristics of such a set that Parfit directs attention. Those changes that he sees as diminishing moral responsibility are generally not changes in memory but in other psychological characteristics. Indeed, memory is probably one of the closest connectors of the past with the present. The aging Nazi may still possess vivid memories of the events that led to him being

charged. Certainly, many victims of the Holocaust fifty years later possess vivid memories of what was done to them. Parfit draws attention to the changes in our character and personality that occur with age, the evolution of our moral and social sensibilities, all those things which often cause a reformed criminal to assert that he is a new person. For Parfit this assertion is not merely rhetorical. Presumably, the changes that could lessen or alter a person's desert of punishment are not dictated solely by the passage of time but are also governed by the nature and extent of the changes that make the current self different from the prior self. A radical memory loss may be sufficient to produce a large degree of discontinuity.

This reductionist approach, which considers only the overall degree of qualitative change, overlooks the fact that while certain mental states make strong connections with the past, others simultaneously evidence disconnections with the past. Reductionists have not usually delved into the varieties of mental experience or sought to argue that certain types of psychological continuity are more critical than others to the preservation of moral responsibility.

Despite those few aspects of our moral or legal practice that may reflect a subliminal attention to the reductionist theory of the person, our normal moral and legal practice is dominated by a non-reductive concept of the self. For this model, the challenge is not to explain why later selves deserve punishment for the conduct of their prior actions but, rather, why one's responsibility for past wrongs should ever be attenuated by the passage of time or change of psychological characteristics. That I have a failing memory, have converted to Christianity, and that I now regret the life I once led might entitle me to some reduction in punishment but not to exculpation or a dramatic reduction in sentence for a serious offense. For those so-called positive retributivists, in the Kantian tradition, the punishment must be proportionate to the extent of wrongdoing in the commission of the offense. Most proponents of the principle of proportionality give little or no weight to mental changes that follow the offense.<sup>18</sup>

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#### IV Punishment and the Offender's Mental State

It is a central doctrine of criminal law that, for most offenses, an essential element is that the offender had, at the time of the offense, *mens rea*, or criminal intent. The offender must, in some relevant fashion, have intended to commit the act which attracts criminal responsibility. Intentionality, however, is only one of the criminal law's

psychological presumptions. Michael Moore suggests that it is also underpinned by a notion of a responsible person that presupposes the idea of a unified consciousness at the point of action and over time. Multiple personalities, separated left-brain/right-brain perceptual experiences, and fugue states<sup>19</sup> deprive a person of mental attributes

requisite for criminal responsibility. Moore further suggests that for a person to be criminally responsible he could not suffer either a division of memory allegedly experienced by multiple personalized persons or a shattered memory of the kind produced by constantly renewed amnesia. Moore argues that these are not mere excuses that undermine intentionality, akin to the defense of intoxication or diminished responsibility, but that they undermine the fundamental personhood of individuals and thus any attribution of criminal responsibility to them.<sup>20</sup>

Rather than looking at the mental condition of the offender at the time of the alleged offense, let us progress forward in time. If by the time an offender is apprehended and brought to trial, she has lost the mental capacity to understand the trial process, she may be found unfit to stand trial.<sup>21</sup> Of course, this may not necessarily result in her immediate release. If she otherwise suffers from a severe mental illness, she may end up being detained under mental health legislation. However, detention under mental health legislation is not intended in any sense as punishment for past wrongs, but is justified on the grounds of protecting the offender from herself and protecting the community from the offender in circumstances in which the offender may cause harm.

Fitness to stand trial is about the offender's understanding of the trial process. It does not automatically follow that an offender is unfit to stand trial if she cannot remember the events that are said to constitute the offense. The offender who has no recollection of the events in her life at the time of the alleged offense must stand trial if she is otherwise capable of understanding the trial process and of appreciating the evidence led against her by the prosecution. Fitness to stand trial is principally

concerned with the cognitive abilities of the offender at the time of the trial.<sup>22</sup>

Continue still further forward in time to the period of punishment. Australian criminal law has no established rules or principles that would entitle an offender to exoneration after conviction because of some loss of mental capacity that occurred at a later date in her life.<sup>23</sup> (I suspect that the same is also true of the United States and Great Britain.) In cases in which an offender is eligible for release at the discretion of parole authorities, her mental state is relevant to determining whether to grant parole. Mental states customarily looked for in parole applications are those of remorse or contrition in addition to reformed attitudes to social obligations. If, as a result of memory loss, an offender could no longer recall the commission of her offense, this would undermine her ability to experience remorse or contrition. However, it would be appropriate, in determining eligibility for parole, to be more sympathetic to an offender whose lack of remorse was the effect of memory loss than it would be to an offender whose lack of remorse reflected an intractable adherence to illegality and evil.

The central concern of this paper is not with the mental condition of an offender at the time of the offense's commission, but with the effect of memory loss on an offender's criminal responsibility (or, more particularly, liability to punishment) after the commission of the offense. I argue that if an offender is to deserve punishment, we need to attend not only to her mental condition at the time of the commission of an offense, but also to her continuing mental state. The radical memory loss cases discussed below suggest a change of mental state that may render an offender no longer deserving of punishment.

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## V The Neuropsychology of Memory

Later in this article a number of thought experiments are considered as part of an effort to probe our moral intuitions about the role of memory in the attribution of responsibility for past wrongs. One possible objection to drawing any conclusions from these thought experiments may be that they are psychologically impossible. Therefore, it is worth considering briefly the science of neuropsychology, and some case studies, which show that the type of memory loss postulated can and does occur.

Although much concerning the operation of human memory is still unknown, the following distinctions made

by psychologists appear to be well established. First, an important distinction is made between short-term and long-term memory. Short-term memory is involved in cases in which one obtains and recalls information over a brief period, up to a few minutes. A common example is remembering a telephone number that has just been dictated and which one then seeks to dial. Psychological experimentation has revealed that within short-term memory different memory systems appear to operate for retaining verbal and visual information, and there are possible sub-systems within these components.

Long-term memory is concerned with the retention and recall of information for periods from several minutes to those extending over a person's lifetime. Long-term memory is used not only to remember information such as the names of one's friends or colleagues or where one parked one's car in the morning, but also to remember the meaning of words, and skills.

Within long-term memory there are separate faculties for declarative and procedural memory. Declarative memory is concerned with remembering specific events, facts, or similar information. Procedural memory is concerned with information that we cannot reflect or reason about discursively, such as a skill.

Declarative memory is divided between semantic and episodic memory. Semantic memory concerns facts, concepts, and meanings whereas episodic or autobiographical memory concerns events that have been personally experienced.<sup>24</sup> That these distinctions reflect discrete memory abilities supported by different systems within the brain has been established by numerous case studies in which brain damage resulted in the impairment of some of a patient's memory abilities but not others.

As used clinically by psychologists, the term "amnesia" usually refers to a specific form of memory loss, sometimes arising from viral infections of the brain, strokes, head injury, or Korsakov's Alcoholic Syndrome, in which a patient is left with a functioning short-term memory, semantic IQ, intact procedural memory and other cognitive abilities, but with dense permanent anterior-grade amnesia (in which the patient is impaired in acquiring new knowledge) and some degree of retrograde amnesia (in which the patient has some impairment of the ability to recall events which occurred prior to the onset of the amnesia).

Clearly, if a patient has suffered some form of brain injury which effectively destroyed all memory capacity,

so dramatic would be the impairment of the individual's mental abilities that he would not be fit to stand trial. Should such complete memory loss occur after conviction, few would doubt that continuing to punish her would not be justified. Severe damage to short-term and procedural memory would render the offender incapable of performing the most simple daily tasks, and the offender would in any event almost certainly need to be dealt with under appropriate mental health laws. What case studies also show, however, is that brain injury may bring about severe retrograde amnesia while leaving the procedural memory intact. Thus, a patient may lose all or substantially all of his knowledge of events over a significant portion of his past life but not necessarily lose his basic living skills or the ability to speak and to understand his language. Although his amenity of life may be severely impaired, he may nevertheless be able to lead a relatively normal existence so far as day-to-day functions are concerned.

McCarthy and Hodges report on a person who suffered brain injury as a result of a stroke leaving him with a relatively normal IQ, short-term memory, and little impairment of language or visio-spatial function, but extensive autobiographical memory loss. Thus, although the cerebral accident occurred in 1989, the patient appeared to have no memory of events that had occurred since his departure from the navy in 1946.<sup>25</sup>

The findings of neuropsychology show that one may have memory loss without necessarily suffering other major mental disabilities. It is not only a philosopher's thought experiment, but a physical possibility, that an offender could suffer a memory loss that deprived him of knowledge of his life at the time of commission of an offense, but which preserved other character and personality traits, as well as other memories that maintained strong connections with his prior life.

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## V Memory and Punishment: Some Hypotheticals

There is little doubt that mental reductionists view memory as a prime connector of ourselves with our past. However, memory is significant, not only because it connects our present with our past, but also because of the strong intuition we have that our ability to remember our self and our life at the time we did wrong is a condition of our continuing to deserve punishment. I will argue that this intuition can be rationally supported. To do so I will reject the notion that moral responsibility is a once-and-for-all status acquired at the time of a wrong's commission.<sup>26</sup>

The following hypotheticals are intended to elicit intuitive responses that memory is important to our continuing to deserve punishment.

### *Case 1*

A is arrested and charged with defrauding V of her life savings. There is cogent evidence from V and a paper trail linking the lost monies with A, sufficient for any jury to conclude that A is guilty of the alleged crime.

A says that she has no recollection of committing the



offense. She had engaged in so many financial dealings in the preceding year with various people, some fraudulent and some not, that she has no independent recollection of the particular dealing with *V*. Although *A* lacks any recollection of the facts constituting the case, few would consider that there is any moral difficulty in punishing her for this offense.

*Case 2*

*A* is charged with committing a serious crime of violence. At the time the event occurred he had a seriously impaired declarative memory as a result of brain damage, and thus a day or two after the event he had no recollection of what had occurred. Indeed, he has few memories of anything that has occurred since the accident which caused his brain damage. Nevertheless, he still has long-term memories and a sense of personal continuity. He has a sense of right and wrong, and when he committed the assault he possessed the requisite mental ability to be legally responsible for his conduct at that time.

If our intuitions suggest that *A* should still be punished for the offense, this is nevertheless a harder case. He will have no recollection of the event. He can have no personal or inner knowledge of the truth of the allegations against him and can only believe in his guilt if he is persuaded of the prosecution case.

*Case 3*

*A* commits an offense at a time at which she has all her mental capacities. Later, however, she suffers a catastrophic cerebral accident in which she loses virtually the whole of her accumulated declarative memories though her procedural memories of learned motor skills and language skills are retained.<sup>27</sup> *A* has suffered a major fracture in her own perception of her personal identity.

Punishing this individual is much harder. Assuming that she is sentenced to imprisonment for ten years, each day sitting in her cell she can have no more knowledge or recollection of either the event for which she is being punished or the person who committed the crime than she is able to glean by reading transcripts of the proceedings or newspaper reports. The person who committed the offense for which she is being punished is in a sense a different person. It would be as if she was being punished for a crime committed by another.

*Case 4*

Persuaded by examples like Case 3 above that continuing to punish someone after he has suffered a radical memory loss is unfair, the law has now been modified so that in cases in which one has suffered such total memory loss as to have no recollection of one's entire life, including the events constitutive of the crime, the person is entitled to be released.

A political terrorist plans to kill the prime minister. He will almost certainly be caught and most probably imprisoned for the rest of his life. He wishes to avoid that. He has contemplated turning it into a suicide mission but cannot bring himself to commit suicide. He discovers that a drug exists that will eliminate his entire declarative memory of his previous life, leaving only his memory of learned skills and language. He assassinates the prime minister and then takes the drug. The "person" who now has no knowledge or recollection of the events leading up to his taking of the drug then seeks to be relieved from punishment. He has no knowledge of politics, no recollection of being a terrorist, no recollection of planning or killing the prime minister. Should he be punished?<sup>28</sup>

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## VI Why Memory Matters When Punishing an Offender

Clearly, anyone who considers that punishment is to be justified only by deterrence considerations will give little weight to whether an offender can recall what she did after the event. The deterrent efficacy of punishment is best sustained by punishing everyone who commits an offense, including those who cannot later recollect it, especially as it is unlikely that people will know at the time they commit an offense whether or not they will later remember the event. A deterrence theory of punishment would definitely advocate punishing the individual in Case 4. The problem of memory loss is really one for those who found punishment on retributive grounds. Here I do

not seek to resolve the controversy between deterrence and retributivism as justifications of punishment; my concern is rather to investigate what follows from reliance upon retributivism.

It may also be objected that the acceptance of memory loss as a defense to criminal responsibility would be unworkable because of the difficulty involved in distinguishing genuine memory loss from false claims of memory loss. I will argue below that the difficulty is to some degree ameliorated because, to be excused, one must not only have lost the memory of an incident or an event, but also of a sufficient portion of one's life such that one

cannot now remember any of the circumstances surrounding the offense, including how one came to have the opportunity of committing it, and of one's character and beliefs over that period. Such complete holes in one's memory will not arise from forgetting, but only from damage to one's faculty of memory. It is plainly more difficult to fabricate consistently a claim to have forgotten an entire portion of one's life than merely to have forgotten a particular event. As well, there may be physical symptoms that corroborate the assertion of such memory loss (evidence of brain damage). In any case, neurology and neuropsychology may one day reveal a reliable and objective test for verifying claims of memory loss.

For the reductionist about personal identity, it is not surprising that some or most of us may intuit that the person in Case 3 did not deserve continued punishment following the radical loss of memory, or at least that her deservingness of punishment had been affected by the loss of memory. Such a dramatic memory loss would clearly represent a major disconnection between an offender's later and earlier selves.

We could propose a further hypothetical (Case 5) that would challenge the reductionist. Case 5 would be similar to Case 3 in involving an offender who had all her mental faculties at the time of commission of a wrong but afterwards suffered a radical memory loss. But now assume that the radical memory loss covered only the events of a five-year period that included the time at which she committed the offense. Assuming that the offender was an adult of middle age, she would still have memories of her childhood, adolescence, and most of her adult years, and moreover, her character and personality traits would have remained substantially unchanged. The reductionist might still argue that this memory loss represented such a dramatic disconnection of the present from the past selves that the offender's responsibility was far more drastically diminished than would normally occur with the passage of time. But the response would also be a rather ad hoc accommodation of our intuition about the

importance of memory, given all the other strong connecting factors. In any event, one could postulate shorter and shorter periods of memory loss, in each case making it harder for the reductionist to sustain his intuition.

The hypothetical Case 5, in which an offender has limited memory loss and otherwise is strongly connected with her past selves, including the self responsible for committing the wrong, suggests that any intuition we have about the importance of memory to continuing responsibility cannot be explained purely in terms of the reductionist claim that responsibility diminishes with the level of qualitative difference between present and former selves. Even had my memory loss been limited to a period of six months, during which I committed some wrong, it is troubling that I might afterwards sit in prison for having done something of which I had no internal knowledge, and about which I knew only from reading accounts of what happened, thus gaining my knowledge in the same fashion as those innocent of the offense.

It ought not to be thought that our intuitive reluctance to accept responsibility for what we cannot remember is merely the product of doubts about our factual guilt. That we committed the offense may be indubitable. Assume that our wrongful act was videotaped. Even so, if punished, we would suffer a sense of its undeservedness. Someone who doubts this might consider the opposite possibility—doing some act deserving of great praise or public recognition. We would not gain the same satisfaction from public recognition were we to have lost all memory of our conduct and thoughts at the time.

Even if it can be shown beyond doubt that we performed some physical conduct now censured or praised, only our memory can provide us with access to the reasons and chain of mental events that led us to doing it. This problem would not be solved had we left behind a detailed contemporary statement of our reasons. Even though I may have written a book describing my thoughts, I can now have no way of knowing whether the reasons I put in the book were genuine or self-serving.

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## VII Memory Loss and Retributivism

Some modern advocates of retributivism believe that punishment requires the restoration of an equilibrium that has been disturbed by the offender's act.<sup>29</sup> By repudiating an obligation of obedience, accepted and undertaken by law-abiding members of the society, the offender has enjoyed a freedom or liberty that others have forgone. Cor-

rective justice demands that the equilibrium be restored by punishing the offender.

Theories of punishment based upon an idea of corrective justice provide an explanation of the principle of proportionality, namely, that punishment should fit the crime. Provided one includes as elements of the crime all

those aspects of the offender's mental state at the time of the offense that contributed to its commission, then the severity of the crime will increase in proportion to the harm intentionally caused by the offender.

From the viewpoint of corrective justice, proportionality is a necessary feature of just punishment. Discounting the punishment because of the offender's cooperation with law enforcement agencies, the likelihood of the offender's reformation or rehabilitation of the offender, displays of contrition, or other so-called mitigating factors would be a departure from just punishment.

Sophisticated retributivists may acknowledge that the amount of punishment to be inflicted on an offender should take additional factors into account. Sadurski, for example, echoes Berlin's dictum that liberty is not justice or equality by arguing that showing mercy is not just: determining the appropriate punishment will involve a plurality of values of which retributive justice is but one.<sup>30</sup>

In most theories of punishment, however, proportionality usually has an indexical priority. Although many accept that offenders may be punished less than they deserve for reasons of mercy, rehabilitation, or the like, few support punishing offenders more than they deserve.<sup>31</sup> Further, many of the other values that retributivists may acknowledge are seen only as factors that justify a discounting of the deserved punishment. In other words, people should receive the punishment they deserve unless there are good grounds for modifying it.

Discounting punishment is frequently believed to involve a sacrifice of justice and to be something that should be kept within limits. Recent controversies over discounts for informers are evidence of this concern.

Retributive theories that view punishment as the expression of society's disapprobation of certain conduct usually have difficulty in accommodating the concept of proportionality. Even they, however, attempt to provide a place for proportionality rather than abandon it.

All retributive theories of punishment take the view that an offender must be morally deserving of punishment. The offender deserves to be punished because the offense was intentionally committed. Even if a sophisticated retributivist acknowledges a plurality of values involved in punishment and accepts that an offender ought to receive less punishment than she deserves, the operation of such further values will usually be limited to avoid grave violation of the principle of proportionality.

From a retributive perspective, the wholly reformed offender may be a tragic figure. Fitting the punishment to the crime requires that even the reformed character and personality be punished. It would be almost easier if

reform did not take place, for one can more readily have no sympathy for the suffering of the unreformed and uncontrite offender.<sup>32</sup>

For the retributivist and mental non-reductionist, changes of character or personality do not alter an individual's identity and consequently do not affect the individual's responsibility for past wrongs. For a retributivist and non-reductionist, memory loss may never be sufficient to terminate an offender's responsibility for past wrongs, and partial memory loss of the kind described in Case 5 would be unlikely to be thought sufficient to terminate responsibility.

Non-reductionists might concede that a particular person's continued existence may be cut short by mental catastrophe of the kind described in Case 3. In allowing this, one of course sides with Locke and accepts that memory is, if not the sole ground, then at least a *sine qua non* for the existence of personal continuity. Casti suggests that total erasure of memory is equivalent to physical death.<sup>33</sup>

When memory loss has not been so drastic as to render the offender legally insane, the sophisticated retributivist may still acknowledge that any form of mental impairment, including memory loss, even if not sufficient to disrupt personal identity, may be a mitigating factor.<sup>34</sup> However, such acknowledgement, as discussed above, is usually seen as a recognition that offenders need not always be punished to the fullest extent that they deserve. Thus, in *R v. Richards*, Justice Mullighan acknowledged that a case could arise in which an accused person had suffered memory loss, albeit through no fault of her own, and in which, therefore, a stay of proceedings could be justified on grounds of fairness.<sup>35</sup>

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*From the viewpoint of corrective justice,  
proportionality is a necessary feature  
of just punishment.*

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However, the proper role of memory in determining liability to punishment lies in its centrality to desert. Where a person has suffered substantial memory loss of the kind contemplated in Case 5, this will not only provide a reason for mitigating punishment but will undermine the offender's desert.

Locke recognized the importance of memory to a person's liability for punishment. Consistent with his

argument that personal identity is founded upon memory, Locke considered that if a person irretrievably lost the memory of parts of her life, she was not responsible for any acts committed during the portion of her life she was unable to remember. Breaks in memory constituted breaks in personal identity. It was a different person who acted during the period that could not be remembered.<sup>36</sup>

Parfit directly poses the question whether we deserve to be punished for crimes we committed in a past we have forgotten, but leaves the issue unresolved, commenting only that loss of memory seems insufficient.<sup>37</sup>

It does appear insufficient to escape liability that a person has merely forgotten the facts of the offense. Few

would have difficulty in punishing the fraudster in Case 1. The difference between Case 1 and cases of radical memory loss is that radical memory loss deprives the individual of the recollection of her character, personality, and life that led to the offense. What we value about a contrite individual is not merely her regret at having committed the offense but her regret about the type of person she was and the life she led prior to committing the offense. Radical memory loss deprives individuals of the internal mental knowledge of those aspects of their past that form the background and prelude to their criminal acts.

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### VIII Memory Is Essential for Liability to Be Punished

The intuition that we ought not to be held liable for wrongs we have committed where we have suffered a radical loss of memory about ourselves at the time the wrong was committed cuts across both reductionist and nonreductionist accounts of responsibility. For the mental reductionist, qualitative changes to a person over time bring about greater and greater degrees of disconnection. It is these qualitative differences between present and past selves that affect a person's desert for past conduct (at least for reductionists who have not abandoned the notion of desert entirely).

By virtue of my character, personality, knowledge, dispositions, and memories of my life generally, I could have maintained a high level of qualitative connection with my earlier self at the time I committed an offense. Yet, if

our intuitions are to be trusted, I ought not to deserve punishment for wrongs committed during the period of my life that I cannot now remember.

For the nonreductionist, our intuitions about memory will appear anomalous. Although extreme memory damage might result in such mental impairment that an offender could be excused from further liability on grounds akin to those of mental illness, limited memory loss of the kind described in Case 5 does not fit into any conventionally accepted excuse.

In the remaining sections, I advance two arguments to justify the intuition that memory is necessary to continuing liability for punishment. If these arguments are accepted, we need to modify our understanding of how someone continues to deserve to be punished for a past wrong.

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### IX Memory and Contrition

Some retributivists believe that a reason for punishing offenders is to induce them to repent or be contrite.<sup>38</sup> For some, the mental discomfort that comes from acknowledging the wrongness of one's conduct may itself be a form of suffering which constitutes part of the punishment. Such accounts have sometimes been dubbed teleological retributivism.

If we believe that inducing contrition or repentance in the mind of the wrongdoer is a central purpose of punishment, it might explain some of our intuitions about punishment. But it also generates paradoxes. Why punish someone who appears unlikely to experience repentance or contrition? Must there be some reasonable probability

that repentance or contrition will be experienced to justify the punishment and, if so, at what level of probability? Once someone has experienced genuine repentance and contrition, should we punish her less or cease punishment altogether?<sup>39</sup>

The difficulty with teleological retributivism leads Nozick to suggest that the primary purpose of retributive punishment is better seen as connecting the offender with correct values. Punishment connects the offender with correct values whether or not she acknowledges the wrongness of her conduct. However, Nozick's idea of connecting someone with correct values appears to differ only marginally from intuitive retributivism's appeal to

the fundamental assumption that wrongful conduct deserves punishment. He does, however, recognize the possibility that both non-teleological and teleological justifications may be required and that to effect the connection of the offender with correct values the punisher must herself possess the appropriate intentions. This, Nozick suggests, requires a teleological retributivist intention or hope.<sup>40</sup> It is possible to build on Nozick's argument that there must be a teleological retributivist hope. Or, to put it differently, as a condition of her being liable to punishment there must be a possibility that she can experience contrition or repentance, whatever the probability of it being realized.

Is memory of one's wrongful conduct and of one's life at the time of that conduct a precondition to experiencing genuine contrition or repentance? In its most complete sense, repentance involves a remaking of one's moral sensibility and should involve an alteration of one's attitudes and responses in the light of knowledge of what one has done. Usually we expect this to be effected in regard to one's internal knowledge of the acts of wrongdoing, but genuine contrition also appears to involve a conscious remaking of one's self. Even if one does not go the whole way with Parfitian reductionism, the notion of changing one's self appears to be the best explanation of what contrition is about. Can I be contrite about a matter of which I have no recollection?

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*The necessity of knowing why one is being punished should be viewed as an element of one's continuing to deserve punishment.*

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Contrition requires that a person perform a mental operation upon the moral attitudes and beliefs held at the time of the offense and that led to its commission. These attitudes and beliefs now exist only in the offender's memory and the process of contrition involves her recollecting them and, to use a computing metaphor, reprogramming herself by replacing what she recollects of the deficient mental attitudes and beliefs surrounding her conduct at the time of the offense with correct moral beliefs and attitudes. A person who is unable to recollect the moral attitudes and beliefs she held at the time of the offense and the decisional process by which she came to commit it, and to modify her mind in the fashion just

described, is not capable of contrition or repentance. She can condemn her past conduct or regret that it occurred. In doing that, however, she will be doing no more than anybody can or should do with regard to a wrongful act.

Why should the ability of an offender to experience contrition or repentance matter? Leaving aside the difficulties involved in suggesting that repentance or contrition is the purpose of punishment, could it be a condition of deserving punishment that an offender be capable of contrition?

In the first instance, a person comes to deserve punishment by virtue of committing an offense. This usually requires that she had a particular mental attitude, a *mens rea* or criminal intent. It is important to retributivists that the offender formed an intention to do harm before causing it. But continuing to deserve punishment for the offense clearly depends on continuing mental attitudes of the offender to her punishment. The offender must know why she is being punished. Indeed this is almost essential to the restriction of her liberty or the imposition of her suffering if it is to be characterized as punishment.<sup>41</sup> Although one might consider it more fitting for an accident or harm to befall a bad person rather than a good person, we would not suggest that such accidents be arranged for those who deserve to be punished even were we otherwise confident of the offender's guilt. If someone is punished, the offender has a right to know why she is being punished. If, through mental illness, someone has lost the capacity of knowing or understanding why she is being punished, it is wrong to continue punishing her.

The necessity of knowing why one is being punished should be viewed as an element of one's continuing to deserve punishment. The necessity for knowledge at the punishment stage is related to the necessity for knowledge at the time of the commission of the offense.

It should be clear from the foregoing that after the commission of an offense an offender must continue to have certain mental attitudes or beliefs if he is to continue to deserve punishment. The reason, in part, is that punishment is something we impose on intelligent, conscious, and sentient human beings. We naturally expect them to respond to punishment—initially by suffering, but also, we hope, by contrition or repentance. They may even have a duty to strive for repentance. The ability to respond correctly to punishment parallels the possession of those mental faculties that permit conduct to be characterized as criminal in the first instance.

The foregoing helps us to understand why the ability to experience contrition is important even if it is not attained in a substantial number of cases. Many people engage in

wrongful conduct without adopting a critically reflective attitude to their behavior and consciously choosing evil, yet we do not abandon our belief in the importance of freedom and choice in the moral evaluation of their conduct. The fact that many prisoners, perhaps the majority, never repent, should not gainsay the importance of their being capable of repenting. Only if they can repent do they deserve punishment.

Retributivist theories that fail to recognize the necessity for moral responsibility to be continually renewed through the presence of appropriate mental states in the wrongdoer provide a defective account of why people deserve

punishment. If, on inspecting one's intuitions, one discovers that it is troubling to punish someone who has suffered a memory loss of the kind described, it may be because the ability to experience genuine repentance or contrition—whether or not it is likely to be experienced—is a precondition of being held responsible. Contrition is not something that one can experience merely by regretting or condemning something about which one has been told by others. Without internal knowledge of one's past wrongs and how one came to commit them, a person cannot be truly sorry even though she may be able to express regret.

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### X Internal Knowledge and Moral and Criminal Responsibility

It has been argued so far that the memories of having committed an offense and of one's life at the time of its commission are preconditions of the ability to experience contrition or repentance and that the ability to repent is a prerequisite for deserved punishment. But it might still be asked whether, if this position is rejected, memory could have a further and more direct relationship to deserving punishment. Is it a precondition of being held morally culpable for my past acts that I continue to remember those acts and my life at the time of their commission? Does continuing moral culpability for past acts require internal mental knowledge of what was done and what the offender was like at the time, or could someone be held morally culpable for acts, even after having suffered substantial declarative memory loss, provided he could be shown to have committed the acts in question?<sup>42</sup>

Quite apart from the ability to experience repentance,

internal knowledge of past wrongs is one of the critical matters that distinguishes the wrongdoer or perpetrator from every other person. The perpetrator who has suffered memory loss and is unable to recall how he came to decide to commit those wrongs can now experience those wrongs only in the same fashion as the innocent.

If one tries to envisage oneself spending years in prison for having committed some crime that one is now unable to recall and where one has no internal knowledge or memory of one's motivations, reasons, character or life at the time, it is difficult to believe that one could acknowledge the punishment as deserved. One would experience that punishment as an accident of fate, akin to being run over by a motor car, rather than as justly deserved for what one recalls having intended at some time in the past. At this point, however, there may be no further general principle that can be appealed to.

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### XI Conclusion

Radical memory loss cases may not account for a very large number of total offenders, but reflection upon the relationship of memory to deserved punishment helps to illuminate why we consider that offenders deserve to be punished. Although this paper has proceeded on the assumption that some retributivist theory appropriately justifies punishment and has avoided the controversy about whether retributivism should be embraced in the first instance, close attention to the nature of the mental

states required for desert shows that any good retributivist theory must find a place for the role of memory and the notions of repentance or contrition.

These reflections also highlight the importance of understanding that the offender's deserving punishment is not something determined once and for all immediately after the commission of a crime, but it is something that must be sustained until the punishment has been completed.

## NOTES

- 1 D. PARFIT, *REASONS AND PERSONS* (1984). For other recent work on personal identity, see also J. DANCY; *READING PARFIT*, 1997; B. WILLIAMS, *PROBLEMS OF THE SELF* (1973); S. SHOEMAKER; *SELF KNOWLEDGE AND SELF IDENTITY* (1963); J. GLOVER, *THE PHILOSOPHY AND PSYCHOLOGY OF PERSONAL IDENTITY* (1988), and the collections edited by A. RORTY, *THE IDENTITIES OF PERSONS* (1989); and H. NOONAN, *IDENTITY* (1993).
- 2 D. PARFIT, *supra* note 1, at 202ff.
- 3 See D. PARFIT, *supra* note 1, at 245, M. MOORE, *LAW AND PSYCHIATRY*, 1984, 399, Thomas Nagel; *Brain Bisection and the Unity of Consciousness* 22 *SYNTHESE*, 396 (1971).
- 4 See D. PARFIT, *supra* note 1, at 259.
- 5 D. PARFIT, *supra* note 1, at 323ff, V. HASKAR, *INDIVISIBLE SELVES AND MORAL PRACTICE* 200ff. (1991).
- 6 See Wiggins, *Locke, Butler, and The Stream of Consciousness in IDENTITIES OF PERSONS* 46 (ed. A. Rorty, 1969).
- 7 J. LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 342 (ed. P. Nidditch, 1975).
- 8 J. BUTLER, *THE ANALOGY OF RELIGION* Appendix (1736).
- 9 R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 36 (1981).
- 10 D. Parfit, *supra* note 1, at 323ff.; V. HASKAR, *supra* note 5, at 198.
- 11 Fields, *Parfit on Personal Identity and Desert* 37 *PHIL. Q.* 432 (1987). Vinit Haskar has argued that it would be more consistent with Parfit's reductionism to abandon the concept of desert, see Haskar, *supra* note 5, at 200ff.
- 12 See Schultz, *Persons, Selves and Utilitarianism* in 96 *ETHICS* 832 (1986), and Jeske, *Persons, Compensation And Utilitarianism* in 102 *PHIL. REV.* 541 (1993).
- 13 Parfit, *Comments on Contributors*, 96 *ETHICS* 839 (1986).
- 14 *Id.* at 872.
- 15 See Korsgaard, *Personal Identity and the Unity Of Agency: A Kantian Response to Parfit* 18 *PHIL. & PUB. AFFAIRS* 101 at 117 (1989).
- 16 The High Court of Australia in its decision in *Jago v District Court (NSW)* (1989) 168 CLR 23 rejected the principle that an accused has a right to a speedy trial independently of any affect delay may have upon the procedural fairness of the trial. The decision reflects perhaps the common laws' general reluctance to countenance a diminution of moral responsibility with time.
- 17 Following the publication of the Mitrokhin archive in 1999, an 87-year-old great grandmother was exposed as having passed information about Britain's atomic bomb technology to the Soviet Union before 1945. Despite the fact that her conduct presumably constituted an offense of the most serious kind, and which at the time carried the death penalty, and that the woman openly admitted her guilt on television, and that she was unrepentant and defended her action, it was all the more remarkable that calls for her prosecution were muted and the Director of Public Prosecutions ultimately took no action. Although the end of the Cold War may have altered the perspective of many on the seriousness of the offense it still seems more reasonable to consider that for many the passage of over 50 years was the chief reason the disclosure was met with relative indifference. See *Sydney Morning Herald*, Sept. 13, 1999.
- 18 See Tonry, *Proportionality, Parsimony and Interchangeability of Punishment* in *READER ON PUNISHMENT*, 140ff (ed. A. Duff & D. Garland, 1994).
- 19 During a fugue state or disassociative fugue a person will undertake sudden unexpected travel away from his home or customary place of daily activities and be unable to recall some or all of his past. This may be accompanied by confusion about personal identity and even the assumption of a new identity. The condition may last from hours to weeks. Once the individual returns to his pre-fugue state he may have no memory for events that occurred during the fugue. See *AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS*, 493 (4th ed. 19XX).
- 20 See M. MOORE, *PLACING BLAME* 616 (1997).
- 21 For the law in Australia, see the decision of the High Court of Australia in *Kesavarajah v The Queen* (1994) 181 CLR 230 at 245.
- 22 Under English and Australian law loss of memory will not render a defendant immune from being tried where he is otherwise mentally normal at the time of the proceedings and capable of instructing his lawyers. See *R v Podola* [1960] 1 QB 325; His Majesty's Advocate v *Brown* [1907] (FC) 67; *R v. Richards* (1994) 77A CrimR 1.
- 23 In New South Wales, the Mental Health Act 1990, §100 provides that mentally ill prisoners shall be removed to mental hospitals where their sentences continue to run, with time in the hospital to count as part of the sentence.
- 24 This summary is taken from R. CAMPBELL & M. CONWAY, *BROKEN MEMORIES: CASE STUDIES IN MEMORY IMPAIRMENT* xix (1995). See generally, on the neuropsychology of memory, L. S. CERMAK, *HUMAN MEMORY AND AMNESIA* (1982); L.R. SQUIRE & N. BUTTERS, *NEUROPSYCHOLOGY OF MEMORY* (1984). D. BROWN & A. SCHEFLIN, *MEMORY TRAUMA TREATMENT AND THE LAW* (1998).
- 25 McCarthy & Hodges, *Trapped In Time, Profound Autobiographical Memory Loss Following A Thalamic Stroke* in R. CAMPBELL & M. CONWAY, *supra* note 24, at 31.
- 26 Walter Glannon argues that only a low threshold of psychological connectedness is necessary to deserve punishment and lack of memory does not impair moral responsibility. This largely follows from his view that incurring responsibility is a once and for all event. See his *Moral Responsibility And Personal Identity*, 35 *AM. PHIL. Q.* 231 (1998).
- 27 See the case discussed in S. ROSE, *THE MAKING OF MEMORY* 126ff. (1992).
- 28 Although the hypothetical may sound far fetched in *R v. Richards* (1994) 77A CrimR 1, the accused was charged with unlawful sexual assault. Depressed by the allegations, he attempted suicide by hanging prior to the trial, and as a result of anoxia suffered brain damage, which caused a complete loss of memory concerning the period when the offenses were alleged to have occurred. The accused unsuccessfully sought to have the trial permanently stayed on the ground that his memory loss rendered him unfit to stand trial.
- 29 See Morris, *Persons and Punishment* in *XX MONIST* 475 (19XX);

and also J. FINNIS J, NATURAL LAW AND NATURAL RIGHTS 263 (1980); N. WALKER, WHY PUNISH? 74 (1991); W. SADURSKI, GIVING DESERT ITS DUE: SOCIAL JUSTICE AND LEGAL THEORY 225 (1985).

30 Sadurski, *supra* note 29, 240.

31 H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1968).

32 R NOZICK, *supra* note 9, at 372.

33 See J. CASTI, THE CAMBRIDGE QUINTET 145 (1998).

34 Glannon, *supra* note 26, at 231-32.

35 (1994) 77 ACrimR 1, at 9

36 J. LOCKE, *supra* note 7, at 336

37 D PARFIT, *supra* note 1, at 325. Parfit also refers to Peter Geach's rejection of Locke's view as morally repugnant, see P. GEACH, GOD AND THE SOUL 4 (1969).

38 Ellis, *Recent Work on Punishment* 45 (179) PHIL. Q. 225 (19XX).

See also, Feinberg, *The Expressive Function of Punishment* in DOING AND DESERVING 95-118 (1970).

39 See the discussion in R. NOZICK, *supra* note 9, at 370ff.

40 *Id.* at 378.

41 *Id.* at 369.

42 A related problem arises in regard to whether one ought to be compensated for having suffered pain one can no longer remember. In *Del Ponte v Del Ponte* (1987) 11 N.S.W. LR 498, the New South Wales Court of Appeal considered the argument that an adult ought not to be compensated for pain and suffering that had been experienced by the plaintiff when a very young child and of which the plaintiff now had no memory. The Court concluded that a plaintiff's memory of pain experienced as an adult would also be diminished and no one can relive pain precisely by reviving the memory of it. The plaintiff was awarded damages for the pain she could no longer remember. A more systematic resolution of this issue may depend on determining whether compensation is principally related to the harm suffered at the time, or to the condition of the plaintiff at the time he or she is compensated.