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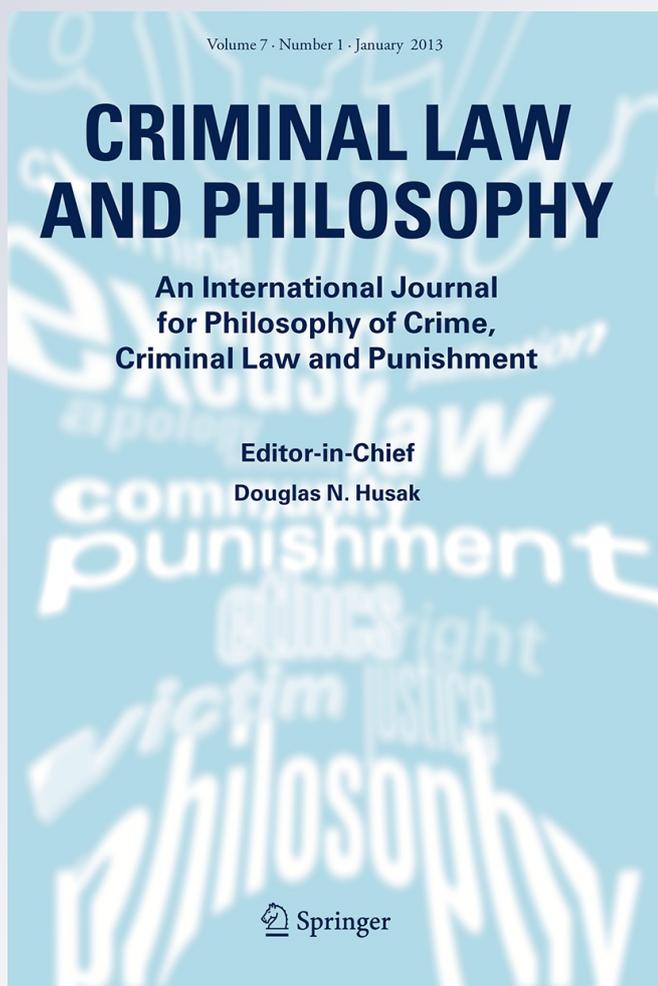
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Should the Late Stage Demented be Punished for Past Crimes?

Annette Dufner

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Abstract The paper investigates whether it is plausible to hold the late stage demented criminally responsible for past actions. The concern is based on the fact that policy makers in the United States and in Britain are starting to wonder what to do with prison inmates in the later stages of dementia who do not remember their crimes anymore. The problem has to be expected to become more urgent as the population ages and the number of dementia patients increases. This paper argues that the late-stage demented should not be punished for past crimes. Applicable theories of punishment, especially theories with an appropriate expressivist, or communicative element, fail to justify the imprisonment of the late-stage demented. Further imprisonment would require a capacity for comprehension on the part of the punished, and, under certain narrowly specified conditions, even a capacity to be at least in principle capable of recalling the crime again.

Keywords Dementia · Punishment · Criminal responsibility · Personal identity

Introduction

A few years ago, the state of New York opened its first prison unit for older inmates with dementia. They had caused problems in their home facilities with behavior that was sometimes interpreted as intentionally aggressive by their unaware guards. The authorities also pointed out that “some of them don’t even remember their crimes anymore” (Hill 2007).¹ Demented criminals who do not even remember their crimes? In prison? One may wonder whether a prison—however well equipped for the purpose—is the right kind of place for such people.

¹ Quoted in an article written for *Associated Press*, which then appeared in countless large newspapers and other media across the United States.

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In this paper I will argue that a prison is *not* the right place for people with late-stage dementia. There seems to be something the matter with imprisoning human beings who lack most of their memories, who lack a sense of anticipation regarding the future, who are mostly bed-bound and without recollection of how to use their bodies, and who are therefore isolated in space and time. More specifically, I will argue that applicable theories of punishment, especially theories with an appropriate expressivist, or communicative element, fail to justify the imprisonment of the late-stage demented, because this would require a capacity for comprehension on the part of the punished, and, under certain narrowly specified conditions, even a capacity to be at least in principle capable of recalling the crime.

Only some criminals with dementia are convicted prison inmates. They acquired dementia while serving their sentences, and we may now wonder whether they should stay where they are. Others—currently free dementia patients—might 1 day turn out to be that long searched-for serial rapist. In this case, some authority—possibly a court—will *then*, after the subject has been diagnosed with dementia, have to determine what should happen. Both cases require a decision on whether the demented can be held responsible and punished for past crimes. We do not usually think that a serious criminal responsibility can be absolved if the person responsible for the crime never serves a sentence or receives a pardon. But in a time of higher life expectancies, we should get used to the idea that sickness, particularly cases of severe dementia, can constitute a further basis for absolution.

Researchers found that approximately 20 % of people over the age of 65 develop dementia (Alzheimer's Association 2012). The most central symptom of the various forms of dementia is memory loss, accompanied by the further loss of cognitive abilities. According to a summary by the Alzheimer's Association, patients “become increasingly dependent on help with their daily activities such as bathing, getting dressed, using the bathroom, and eating, until, in the final stages, they lose their ability to communicate, fail to recognize loved ones, become bed-bound and reliant on continuous care” (Alzheimer's Association 2011). This paper will not address the question of determining a specific moment in the course of their illness when dementia patients' loss of cognitive abilities represents a pressing problem for their continued incarceration. In order to side-step the problem presented by the gradual development of the condition, the paper will often refer to patients with significant and undeniable symptoms as being in the late stages of dementia.

One can give at least two initial reasons why the late-stage demented should generally not be punished for their crimes. First, one can insist that they no longer possess the relevant mental characteristics that are necessary for punishment or ascription of criminal responsibility. The lack of such characteristics is generally the reason why the severely mentally disabled are provided with a legal guardian, preventing them from entering legal contracts on their own. Similarly, a certain degree of mental competency might be necessary in order to be fit for a punishment (Fazel et al. 2002). Second, one can insist that the late-stage demented do not stand in the right kind of psychological relationship with the crime. It might be the case that in order to be fully responsible for a crime, one must at least in principle be capable of remembering that crime.

I will take it as uncontroversial that the late-stage demented do not possess the kinds of mental characteristics that would be necessary in order to hold them fully responsible for the commitment of a crime. Surely, a criminal prosecution against a person who committed an offense in the late stages of dementia would not lead to a conviction, on the ground that the perpetrator was not competent. But in the cases at hand, the person was competent back

then, at the time of the crime, while at the current time he or she is not competent anymore, and arguably does not remember the crime.

In legal contexts a competency requirement is familiar, while a recollection requirement is not. Competency usually plays a role when determining whether the person was fully accountable at the time of the crime. Competency also usually plays a role when determining whether someone is fit for a trial and, later, fit for punishment. In the United States, *Ford v. Wainwright* (1986) represents a turning point for the question of whether prisoners who were competent at the time of their crimes and during trial, but develop a mental disorder after their trials, are fit for the death penalty.² The Court ruled “that such an execution has questionable retributive value, presents no example to others, and thus has no deterrence value, and simply offends humanity” (477 U.S. 399, 400). The British Mental Health Act more generally permits the transfer of prisoners to hospitals in cases of mental health issues. Similar provisions are included in the German and French penal systems, and in many other countries. Attempts to justify these provisions usually point at the importance of comprehension of the punishment on part of the punished. In the *Ford* case, Justice Lewis Powell pointed out in a concurring opinion that “the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it” (477 U.S. 422). The British Mental Health Act extends this rationale to ordinary prison sentences and lends support to a more general argument according to which “punishment aims, and must aim, if it is to be properly justified, to *address* the offender as a rational and responsible agent: if she cannot understand what is being done to her, or why it is being done, or how it is related as a punishment to her past offence, her punishment becomes a travesty” (Duff 1986, 27).

One of the issues discussed in this paper is whether a competency requirement is necessary for the continued, justified punishment of demented prisoners. The recollection requirement seems more unusual. Nonetheless, the paper will also address the possibility of a recollection requirement for clinical cases of dementia. The position that a recollection capacity has to be present for legitimate punishment can generate various problems. One of these problems is the problem of deceivers: for example, most criminals deny that they remember having committed the crime in question. Of course, this is a pragmatic concern, and it applies likewise to competency and claims of insanity—cases that the criminal justice system has been able to accommodate, despite the problem of deceivers. Maybe severe cases of incompetence or insanity manifest themselves more overtly in peoples’ behavior than severe memory loss. But the reason could also be more substantial; loss of competency might imply that the criminal cannot justifiably be seen as fit for punishment, while loss of recollections might not establish this.

If the worry turns out to be mostly pragmatic, however, it would not seem to be as pressing in the case of the late-stage demented. Whether someone is in the late stages of dementia can usually be determined quite accurately. Moreover, it is a condition that is present for years or even decades before the final stages are reached. All one needs for the purpose of the present argument is the position that people who display memory loss *for involuntary, non-instrumentalized and clinically verifiable reasons* should not be held accountable for their crimes anymore. In order to adopt such a policy, one would not need to also introduce a general recollection requirement for all normal cases. In the following I will only be concerned with such requirements for clinical cases that satisfy the aforementioned restrictions.

² For the additional problems that *curable* mental disorders can raise in this context, see Latzer (2003).

It might also be worth recalling that the idea of a recollection requirement is not new. One Early Modern thinker, John Locke, notoriously believed that responsibility depends on having the capacity to *remember* the event in question. Although the question of what to do with demented criminals cannot be fully addressed by appealing to traditional philosophical accounts, it is interesting to consider what he wrote:

For whatsoever any substance has thought or done, which I cannot recollect, and by my consciousness make my own thought and action, it will no more belong to me, whether a part of me thought or did it, than if it had been thought or done by any other immaterial being anywhere existing.
(Locke 1975, 49).

The qualification “having the capacity” is important here. When healthy people are sleeping or are thinking of something else, they are not actively remembering the past, but the past is nonetheless in principle available to them. The late-stage demented no longer possess the capacity to remember most of their past, even in principle. Thomas Reid later objected to Locke. He was worried that taking something as unreliable as recollective capacities to be important would imply that “a man may be, and at the same time not be, the person that did a particular action” (Reid 1975, 114). While this would indeed be a worrisome general conclusion to draw, it could nonetheless be a helpful analysis of the special case of demented prisoners. Consequently, I will treat an appropriately specified and context-sensitive recollection requirement, just like the competency requirement, as a plausible candidate for determining whether the demented should be subjected to punishments.

The Debate About Advance Directives for the Demented

Before launching into the discussion, I should briefly point out why one of the most well-known philosophical discussions regarding the demented will not be helpful in settling the punishment question. This discussion concerns the advance directives of the demented regarding medical treatments. This issue is especially important if somebody has issued an advance directive not to have her life prolonged in the case of dementia. Later, in a demented state, not remembering the directive, she can seem perfectly content and happy, despite a comparatively impoverished mental life, so that one may wonder whether it is really appropriate to follow the directive. In other words, earlier decisions and actions of the individual seem to be at odds with how we would normally want to treat someone in a sick and mentally disturbed condition.

However, the debate surrounding advance directives features a number of aspects that make it questionable whether the respective positions can simply be adopted for issues having to do with punishment and responsibility. The problem of advance directives turns largely on the moral status of timed preferences and the authoritative force of fairly explicit decisions (Buchanan and Brock 1990). Punishment is supposed to have nothing to do with the *preferences* of the punished and few criminals explicitly *choose* or *authorize* their own, later punishment. A punishment is usually explicitly unwanted. Similar concerns apply for other concepts that have played a role in arguments about advance directives. For example, Dworkin believes that the advance directives of the demented represent their *critical life interests*, while their later, merely *experiential interests* are of a lower status (1993). It would overstretch the notion of critical life interests to insist that criminals have such an interest in their own punishment. Of course it is even less plausible to believe that

criminals in the late stages of dementia have a basic experiential interest in their own punishment.³ But the lack of an interest does not seem to settle the question of whether they *should* be punished. The general problem here is that neither preferences and explicit decisions, nor interests are the right place to look in the context of resolving the punishment question.

Dementia and Justifications of Punishment

The straightforward way of tackling the issue consists in looking at the various possible justifications for punishment in legal theory. Some of these justifications of punishment contain no relevant psychological reference to the punished. Such accounts do not necessarily depend on whether or not the individuals in question can recall the crime or possesses any degree of mental competency. Their punishment could then remain justified despite their loss of cognitive abilities. So far, though, it is not at all clear whether proper justifications of punishment can accommodate the view that a recollection-less and comprehension-less individual can be subject to a justified punishment.

I will now look at some of the most common justifications of punishment, starting with the idea that dangerous criminals should be incapacitated. When presented with the position that the late-stage demented should not live in prisons anymore, some people are immediately worried about the potential danger these people could present if they are not 'locked away.' They have committed serious crimes in the past, and now they might be even more unpredictable. In a sense, and contrary to most normal people, they seem to 'have it in them' to commit the worst.

There are at least two responses one can give to this concern. First, when looking at the capacities of the demented, it quickly becomes clear that they can no longer be said to literally *act* with any intention at all. Committing a crime seems to require being able to remember one's intention for more than a couple of moments. These people, though, do not remember why they made a few steps toward the door by the time they arrive there. Moreover, in the very final stages of the disease, the patients tend to forget how to use their bodies. A person who cannot move in a purposeful way will hardly be able to commit a crime anymore.

There remains the problem that they might nonetheless become aggressive. In contrast to other dementia patients, they might still be the *kind of individual* who is capable of committing a terrible assault or the like, even if that assault was aimless. In general, character traits of this kind do not just disappear when memories and other mental capacities fade (Brink 1997). An individual's character might remain static despite the loss of memories and other mental capacities. However, there is a strong response to this worry. The medical observation seems to be that the character of many dementia patients tends to change. This does not seem surprising, given the strange mental state they are in. Calm people can turn into aggressive dementia patients and vice versa. When memories fade, so apparently do the behavioral patterns of the past. This means we cannot assume that the "bad" character of a criminal remains static when he or she develops dementia. Quite the contrary, changed social behavior seems to be a part of the condition (World Health Organization 2004). If potential aggressiveness is a reason to incapacitate the demented,

³ Rebecca Dresser argues that the "present best interest principle" should guide doctors faced with advance directives prohibiting life-prolonging treatments (1986). Applied to the punishment problem, this would raise the question of whether punishment lies in the present best interest of the demented.

then this has to apply to all potentially aggressive dementia patients, not just to the ones who have committed crimes in the past.

Moreover, the suggestion that what justifies punishment is a 'bad' character is often tied to the hope that punishment will trigger an improvement of that character. This is unlikely to happen in the case of dementia patients. They cannot influence their own characters anymore and they suffer from a continuously worsening mental condition. Given the mental and physical properties of the late-stage demented, neither an incapacitation justification nor the hope for an individual deterrent effect or for moral improvement appear to be particularly convincing reasons for keeping them in prison.

Furthermore, even character-based accounts that are not tied to the hope for improvement will be faced with the problem that the late stage demented can no longer be seen as persons whose characters are voluntary and of their own making, just as they can no longer be seen as persons who can bring about autonomous and purposeful actions. Punishing them for their current accidental characters—products of the disease rather than choice—seems rather implausible. This leaves only the possibility of arguing that late-stage demented criminals should be punished on the ground that they had bad characters in the past (The addition “in the past” is important here, for, as we have seen, change of character is a symptom of the disease, making it impossible to infer a bad present character from the bad character in the past). Basing the further punishment of the demented on this fact about their past represents an entirely past-directed justification characteristic of some retributive justifications that I will discuss in a moment.

What about the idea of the general deterrent effect of keeping demented criminals imprisoned?⁴ This might be a more interesting route to take, even though it has often been argued that general deterrence does not work quite as well as one would hope.⁵ It is also often pointed out that basing a justification of punishment on deterrence alone can lead to the implausible consequence that we ought to punish the undeserving, so that the view has to be supplemented by further constraints. But let's assume that these difficulties can be overcome. Would keeping the late-stage demented in prison have a plausible chance of producing such a deterrent effect in the general public? I believe it is possible to argue that it would not. In the late stages of dementia, it is surely not possible anymore to understand that one is in a prison rather than in a caretaking facility. If the late-stage demented do not notice or understand this difference, why should the threat of remaining incarcerated even in late-stage dementia matter to one's previous deliberations?

There are some aspects of the situation that would still matter. For example, it is probably significantly more difficult to receive visitors in a prison than in a caretaking facility. Visits from old friends or relatives might have a comforting effect on the demented, even when they do not recognize these people anymore. In fact, it might be even more comforting for the demented to live with their relatives at home, where they might still recognize their surroundings—at least in cases in which those surroundings had not changed much since they were young. On the one hand, this sounds plausible. On the other hand, most people who are not in prison cannot count either on private caretaking arrangements or on visits by family and friends when they are old. Many of the elderly are

⁴ Even though I will not address this here, I take it that a plausible form of general deterrence theory has to contain a restriction according to which only the guilty may be punished (Hart 1986).

⁵ For example the Panel on Research on Deterrent and Incapacitative Effects by the US National Academy of Sciences thinks that there is more evidence to the effect that there are general deterrent effects of punishment than to the contrary, but at the same time “cannot yet assert that the evidence warrants an affirmative conclusion regarding deterrence” (Blumstein et al. 1986, 7). Similar points have also been established in a more recent meta study (Dölling et al. 2009).

lonely. Moreover, visits and familiar settings are comforting at all points in life, and they are certainly most comforting at those times when one can still appreciate them the most. If a potential criminal is not deterred on the basis of losing the comforting features of life during a time of high payoffs, why should there be a deterrent effect on the basis of losing them during a time of lower payoffs? The idea of a general deterrent effect as the basis for keeping the demented in prison appears to be significantly more speculative than the idea of a general deterrent effect on the non-demented—and even the latter effect is empirically and philosophically controversial.

Let me turn now to the idea of a retributivist justification of punishment. According to a retributivist justification, a criminal simply *deserves* his or her punishment. Retributivism might be a particularly promising candidate for an argument in favor of keeping the demented in prison. The reason is that the idea of desert as such might not necessarily require a persisting subjective element on behalf of the deserving. It is rather hard to establish this conclusively, though. Arguably, desert can decline along with an individual's diachronic psychological conditions. Desert might not in fact be an all-or-nothing relation. Instead, it might depend on the strength and degree of someone's psychological unity across time. Declining cross-temporal psychological relations, such as progressive memory loss, can be seen as resulting in a declining degree of desert for punishment. This was the upshot of Derek Parfit's proposal in *Reasons and Persons* (Parfit 1984). His proposal has remained controversial. The concern has always been that it could lead to mind-numbingly implausible excuses: "I don't remember robbing the bank last week, so I don't deserve the punishment..." The severe and irrevocable psychological decline and process of dying in those who suffer from dementia is a more plausible case, though. If desert declines along with their psychological capacities, then the retributive basis for punishing them declines as well. It would then turn out to be unjust to punish the late-stage demented.

There is also a further problem: a general aspect of most *definitions* of punishment, *especially* a retributivist definition, consists in the claim that a punishment should be unpleasant for the punished. Under the assumption that someone in the late stages of dementia can no longer differentiate between a prison setting and a caretaking facility, the idea that remaining in prison is more unpleasant than the alternative seems to lose its force. One may object that it is not true of *all* prisoners that remaining in prison is more unpleasant than any alternative. Some prefer to be in prison rather than having to face a potentially harsh and daunting life outside. A plausible definition of a modern legal punishment can only hold that the punishment should *generally* be considered unpleasant. There can always be exceptions, such as old Joe who is sick of his life out on the streets. Maybe the demented are also such an exception. It is not clear, though, whether a clearly specifiable and recognizable group like the demented should count as a plausible exception to the rule that punishments generally ought to be unpleasant. One reason to accept old Joe as an exception is surely that it is hard to verify whether a prisoner claiming to feel like old Joe is speaking the truth, or merely wants to be let back out on the street. As emphasized before, doctors are usually able to determine quite accurately whether someone is in the final stages of dementia. It is surely a lot harder to determine whether old Joe and his friends are lying than to determine whether someone is truly in the final stages of dementia rather than having been faking the condition for years.

Another possibility here would be to insist that the late-stage demented, while not aware of their prison setting anymore, will nonetheless feel worse in prison than they would were they to live at home with their relatives, or in another setting that was familiar to them in the past. However, the problem with this seems to be the following. If a demented person in a familiar setting feels better than in an unfamiliar setting, such as a prison, then the

same would have to apply to ordinary people in ordinary care taking facilities. Arguably, an ordinary demented person in an ordinary care taking facility feels worse than she would in a more familiar setting. Is being in a care taking facility a punishment even for ordinary people? In order to prevent a deflation of our concept of punishment, we would have to insist that a demented patient who committed a crime in the past should feel *worse* than an ordinary dementia patient. How could we make the prison stay of a patient in the late stages of dementia feel worse than the stay of an ordinary patient with the same condition in an ordinary care taking facility? The only solutions here that come to mind might well be forbidden by human rights considerations.

Of course we could also see the lack of awareness on the part of demented prisoners as an advantage. In fact, it could render a strong justification for their treatment superfluous. The very need for a proper justification of punishment is tied to the fact that it usually constitutes hard treatment. Since the continued incarceration of the unaware is arguably not unpleasant for them, we might not stand in need of a justification for it. But this position seems to overlook the fact that punishment has a function as a symbol of condemnation that does not just go away along with the unpleasantness of the treatment. It is not just the unpleasantness of the treatment that is in need of justification; the reasons for imposing a symbol of condemnation should also be justified.

The previous considerations about hard treatment have turned on the assumption that it matters how the punished feel about their punishment. This is not a necessary feature of a retributive account of punishment. Some retributive accounts have an entirely different upshot according to which a punishment must be intentionally imposed for the right reason, to correct a wrong that the punished have committed. Under the further assumption that the psychological capacities of the punished do not matter to the degree to which they are deserving of their punishment, this could constitute a reason for punishing them irrespective of their current mental capacities, as long as the punishment aims at restoring the right or counter-balancing the wrong that has been done. However, the exact meaning of metaphors such as 'restoring' or 'counter-balancing' is notoriously hard to grasp. I take it that some commentators will certainly take it to be a matter of brute fact that punishing the late-stage demented in a particular way amounts to restoring the right or counter-balancing the wrong. If one were to try to defend such a position further, though, one would have to give some explicit meaning to these metaphors and argue that leaving the late-stage demented in prison implements what is meant.

This brings me to expressivist and communicative justifications of punishment, as they have been defended, for example, by Feinberg (1970) and Duff (2001). According to expressivism, punishment is a reprobative symbol whereby a society is seen to condemn certain kinds of behavior. On the basis of an expressivist account, one could argue that leaving the late-stage demented in prison is a reprobative symbol that condemns the kind of crime they have committed in the past, and further, that imprisonment signals this condemnation in the right kind of way.

My main concern with an expressivist justification is the following: if we accept the idea that punishing the demented still sends the appropriate message of condemning the crime, and does so in the right kind of way, then why do we not continue to punish the corpse of the prisoner as well? Doing so might send the appropriate message as well. The idea seems outlandish at first, but it is actually not. We could punish a dead body by dismembering it, or, more moderately, by burying it in a special prison graveyard, denying it a place among our 'righteous' ancestors. Moreover, if punishing the dead sends the right message, despite the fact that they perceive nothing, then punishing humans in a persistent vegetative coma would have to send the right message as well. It might be too costly to

equip an ordinary prison hospital with the necessary life-sustaining technology for the irrevocably comatose, but this might not change the fact that choosing to do so might send the right signal.

A communicative account, such as Duff's, can avoid this problem. If a punishment is not only to be seen as a form of expression directed at the criminal, but as an act of communication to which we hope the punished will react in some way, then directing legal punishments at the comatose or the dead will be pointless. Instead, the mental capacities of the addressee will enter the picture as a relevant precondition of justified punishment.

Proponents of both expressivist and communicative accounts can argue that a society should not just send appropriate signals of condemnation, but also signals of humanitarian values and compassion. Ignoring these values is exactly what we accuse criminals of doing. For an expressivist account this could be a way of preventing the addressee from falling out of the picture entirely. Diseases and dying are conditions that affect every human being. Respect and compassion for the humanity in everyone might demand exceptions from the rule of legal punishment when people are affected by these conditions. Not doing so might indicate that we are ignoring the very same values that we accuse the perpetrator of having ignored. The human rights declaration has long put restrictions on what we may do to prisoners in order to express our condemnation of their acts. Maybe punishing the demented, the comatose, and the dead lies beyond an appropriate threshold as well.

Appropriate Thresholds for Punishing Dementia Patients

If there is a threshold here, we have to ask where exactly it lies. Not everyone is going to be convinced by the idea of respect and compassion for aging and dying child molesters, rapists, and serial murderers. The reason for this seems to be specifically the fact, again, that we accuse these individuals in turn of feeling no compassion for their victims. Such crimes often produce very severe emotional reactions in people that might or might not be triggered by the basest of human motives, such as rage and thirst for revenge (Nietzsche 1967).

In any case, we have various possible cutoff points for continued punishment in an 'ordinary' process of dying, for example: the loss of competency as it is usually required in order for someone to count as a fully autonomous agent before the law, the loss of recollection of the crime, the loss of comprehension of the information that (and maybe why) a punishment is being issued, the loss of various bodily functions, the irreversible loss of consciousness or brain death, organic death, the decay of the dead body. I am inclined to think that a cutoff point that still requires some subjective capacities on behalf of the punished is most plausible.⁶ Even the vengeful, who would generally give the most extensive support to punishments, will be likely to agree that a punishment is 'better' if the prisoner still has a capacity to experience it. They might also be willing to agree that punishing the irrevocably unconscious will turn out to be rather 'unsatisfying' after a while. But which subjective capacities for experiencing such treatment should we still require?

⁶ I am not going to discuss conditions other than dementia at the end of life. For example, some systems provide room for the idea that an incapacitating and fatal heart disease with a near certain life expectancy of only one more week should also result in a prison release. These further considerations are beyond the scope of this paper.

As plausible candidates, I will consider (a) a very strong requirement of mental competency sufficient for being considered a full agent before the law; (b) a very weak requirement of basic consciousness; (c) a comprehension requirement, sufficient for understanding that (and maybe what) one is being punished for; and (d) a recollection requirement, in the sense of having, in principle, the capacity to recall the time of the crime.

I am inclined to argue that a competency requirement would be too strong. Full competency can already be lost in the early or mid stages of the disease, at a time when patients are still able to comprehend their punishment and remember their crimes. As Agnieszka Jaworska argues, in the earlier and mid stages of the disease, patients still possess the capacity to *value* (1999). Given these assumptions, they should also still possess the capacity to *appreciate* the fact that they are being punished for a particular crime they committed. This can even be the case at a time when their mental condition is such that they would be able to escape a conviction, were they to commit a further criminal offense.

The idea of a basic consciousness requirement lies at the other end of the spectrum. Even the demented in the terminal stages of the disease still possess this capacity in at least the sense of perceiving their surroundings. Jeff McMahan aptly described patients in this condition as “isolated subjects” (McMahan 2002, 65). They possess the capacity for consciousness at all points in time, but they cannot hold on to any diachronic recollections or intentions for long stretches of time. They possess a center of consciousness, but have lost the comprehension of their diachronic existence and place in time. They are isolated in time.⁷

Obviously, a merely conscious being cannot be seen as a rational recipient of an expression of condemnation. If an expression implies that one wants to be understood, then aiming it at a merely conscious person with no capacity for comprehension is futile. Of course one could at this point consider the possibility that the central recipient of the expression is not actually the punished criminal, but society at large. But this is an argument in which the criminal falls out of the picture. If the recipient of the value expression is society at large, we may, again, wonder why we stop short of expressing our condemnation by punishing the dead bodies of criminals. Obviously, stopping short of this implies that we either hope that the criminal will experience hard treatment (which human rights considerations prevent in the case of the merely conscious), or that the criminal will understand our expression of condemnation. Whether there will be such comprehension might well be irrelevant here. What is important, though, is that *the criminal* should in principle be able to comprehend what is being expressed.

This leaves the more controversial recollection requirement up for debate. I suspect that in most actual cases, these two requirements will practically amount to the same thing. However, the ways in which people lose their mental capacities at the end of life are manifold, and the two capacities do not always disappear at the same time. Dementia patients tend to forget the more recent past while still being able to recall the more distant past. This makes it possible in principle for a person to still recall the rule that it is objectionable to hurt another person, a rule that was learned fairly early in life, while at the same time having forgotten the criminal assault committed later in life.

⁷ His position about advance directives is similar to Dworkin's. He agrees that advance directives should be binding on the grounds that the interests of the autonomous adult who consented to the directives are normatively superior to the interests of the demented. He does not address the relative importance of continuity and connectedness in this context though.

A related case in which these two requirements come apart is the case of an otherwise healthy person who does not recall having committed the crime due to amnesia, but is presented with compelling and comprehensible evidence that it must have been him who committed the crime. To make things easier, let us suppose the amnesia in the example occurred involuntarily, there was no intention to instrumentalize its occurrence, and its cause is provable (conditions that are usually fulfilled in cases of dementia). Do we find it plausible to punish such people or to hold them criminally responsible?

I believe it can be argued that the idea is unsatisfying. Without recollections, someone can only regret that the crime occurred, just as every other person could regret that the crime occurred. A genuine subjective appreciation of the fact that it was *oneself* who committed the crime would not be possible.⁸ Anyone claiming that justification of punishment requires the criminal to identify with, or at least relate in some special intimate way, with the crime cannot be entirely happy about a pure comprehension requirement in the absence of introspective recollective access. As specified before, though, this consideration should only apply in cases of involuntary and clinically provable amnesia in a very restricted range of cases (such as late-stage dementia).

In order to figure out the plausibility of such an appropriately restricted and context-sensitive recollection requirement, it is worthwhile to consider the debate about the relative importance of psychological continuity and direct psychological connections (such as memory connections) once more. Arguably, those criminals who develop dementia undergo continuous psychological development from the time the crime was committed until the later stages of their dementia are manifested,⁹ even though there are no longer any direct memory connections back to the crime. An early commentator on this kind of case was Thomas Reid. He introduced the well-known example of an old general who still remembers what he did as a soldier, but not what he did as a boy. As a soldier, however, he had remembered what he did as a boy. Even though Reid was not entirely explicit about this himself, he purposefully left room for an argument about responsibility here: one may argue that there is a continuous psychological chain of mental connections, and that the general should be held responsible for what he did as a boy on the basis of this continuity—despite having later lost his immediate recollective access to that time.

Derek Parfit also makes some remarks about the relative practical importance of continuity and connectedness, but unfortunately he is rather ambiguous about the issue. He makes the following conflicting statements about the matter:

Psychological connectedness is the holding of particular direct psychological connections.

Psychological continuity is the holding of overlapping chains of strong connectedness.

Of these two general relations, connectedness is more important in both theory and practice.

(Parfit 1984, 206.)

⁸ To ensure the possibility of such a subjective appreciation of one's self-involvement these recollections should of course also be caused in the right kind of way. They should not be a result of hypnosis or some other external induction.

⁹ McMahan argues explicitly in favor of this position (2002, 59–66). Parfit's definition of continuity as an overlapping chain of "strong connectedness", which in turn applies if there are at least half as many connections from day to day as in ordinary people, leaves some wiggle room here. Arguably, the demented can lose their psychological capacities more rapidly than required by this definition, so that they would not display continuity anymore (Parfit 1984, 206).

If connectedness matters more, as the quote suggests, and does so not only for theoretical purposes, but also for the practical purpose under discussion, then the demented who have lost their mental connection to the crime might well fail to represent adequate targets for criminal responsibility ascriptions and deserved punishment.

However, approximately a hundred pages later, Parfit writes:

I believe that both relations matter. Others may believe that one matters more than the other. But I know of no argument for such a belief. I shall assume that neither relation matters more than the other. (This is not the assumption that their importance is exactly equal. Such a question could not have an exact answer.)

(Parfit 1984, 301.)

If both relations matter, and if it can be argued that continuity is still present in the demented, then their further punishment would make sense. This ambiguity has often been overlooked, even though Parfit's *Reasons and Persons* was published in the eighties. We may wonder what is meant by the remark that connectedness is more important in 'practice' in the first quotation. Presumably he means it will be important in terms of what matters from a subjective point of view about one's mental survival. If this is what he means, though, the passage seems to contradict the later one that suggests that continuity and connectedness matter more or less equally. This means Parfit is ambiguous about the relative importance of continuity and connectedness in terms of what matters subjectively in a person's psychological survival.

However, it is possible to overcome Parfit's unhelpful ambiguity. In the passage in which he claims that connectedness is more important, he also insists that only continuity can be a criterion of personal identity, since only continuity is transitive. Numerical identity is by definition a transitive notion. If A is identical to B, and B is identical to C, then A also needs to be identical to C. Connectedness relations cannot guarantee such transitivity. If A is connected to B and B is connected to C, it does *not* follow that A is connected to C. In order to get a transitive identity criterion we therefore have to adopt the notion of continuity. This leaves room for the hypothesis that continuity might be important to generate a transitive criterion of numerical identity (which may or may not be preserved in case of the demented), while connectedness is what *matters* to people about their mental survival. Given the fact that Parfit's central thesis in *Reasons and Persons* consists in the claim that numerical identity does not matter for practical purposes anyway, this gives support to the idea that it is really psychological connectedness, rather than continuity, that matters to him for such purposes.

This is also the view he seems to settle on in his brief remarks about desert and punishment, when he writes,

(...) I shall make one general claim. When some convict is now less closely connected to himself at the time of his crime he deserves less punishment. If the connections are very weak, he may deserve none. (Parfit 1984, 326.)

As mentioned before, pragmatic considerations—in particular the problem of deceivers—should prevent us from turning this position into a general policy and Parfit's position about responsibility and desert has often been stigmatized as having bizarre implications. Within the restricted scope of most cases of late-stage dementia, the position has no such pragmatic disadvantages though, and we should insist that in the irrevocable absence of all recollective connections to the crime due to dementia, a prisoner does not deserve a further punishment at all.

There is also another reason to believe that connectedness should matter more than continuity for practical purposes. This reason is best illustrated by use of an example. Imagine we are trying to determine the extent to which the punishment of two different dementia patients in the earlier stages of the disease is justified. The first patient has clear recollections of having plotted and committed the crime, but there is a brief time period in between the crime and the present for which the patient is already drawing a complete blank. The second patient also remembers the crime, and there is no period of amnesia in between the crime and the present time. The first case differs from the second in an important respect. In the first case, there is a direct *connection* to the crime, but no *continuity* between the present and the time of the crime. Continuity is a transitive notion. If there is a period in someone's past that the patient does not even in principle have the capacity to remember anymore, then there is no transitive chain, and therefore no continuity anymore.¹⁰

The absence of continuity in the first case seems to generate no relevant normative pull on us. It does not seem to matter to us whether there is a period of amnesia between the crime and the present. It seems much more plausible to say that a punishment is equally justified in both cases. This example therefore seems to speak in favor of the view that psychological continuity, which may be preserved in case of the demented, is not the decisive relation here.

One need not be a Parfitian about the normative force of personal identity considerations in order to follow this conclusion. Further reasons speak in favor of it. As argued above, a justification of punishment with at least a partial expressivist element—and more so a justification with a communicative element—should treat the criminal as a recipient of the expressive function of punishment. Arguably, this does not just speak in favor of a comprehension requirement on behalf of the criminal. Without recollections, a prisoner might well understand that he or she is being accused of a crime and that all available evidence speaks in favor of this verdict, but only recollections would offer the more intimate information about what really happened, what the real intentions were back then, and what went on inside one's head when committing the action. Apart from preventing a full appreciation of the details of the condemned action, which runs counter to conveying the full meaning of the expressed condemnation, there is always a small chance that important evidence that should lead to the a change of verdict will never be available, thereby increasing the chance of legal mistakes.

These considerations apply even more in the case of punishment justifications with a communicative element. If the criminal is seen as a participant in a communication process, not merely as an addressee of a value expression, then we have to hope for a reaction of some kind. An attempt to view the punished as a potential respondent to the punishment—for example by expecting him to be a source of an *explanation*—is futile in the case of the late-stage demented. This plays a role even if the victims, or society at large, are not actually interested in hearing an explanation. When suffering from a lack of recollection, criminals cannot even fully *explain* the events to themselves. Their full comprehension of the condemned action would *depend on* recollections.

To summarize, without a recollective capacity, a prisoner can only regret the fact that a crime *occurred*, but not the fact that it was *him or her* who committed the act.¹¹ This is not sufficient for a modern justification of punishment. Under the conditions that (1) physicians

¹⁰ David Shoemaker presents a competing analysis of amnesia cases (Shoemaker 2012).

¹¹ Note that this formulation requires—contra Parfit—that personal identity does matter in some cases. A less controversial, but also rhetorically less powerful way of putting things would be to insist on a special intimate psychological connection or relationship between the dementia patient and the crime.

can accurately determine whether or not a demented prisoner has a recollective capacity, that (2) the memory loss occurred involuntarily, and that (3) the memory loss was not counted on in order to instrumentalize it to escape responsibility, we should implement a recollection requirement for further punishment of prisoners in the late stages of dementia.

A final clarifying remark might be in order. The proposal at hand is of course not to turn demented prisoners out on to the streets and to leave them to their own devices. They should receive adequate care by educated professionals and family members who are accustomed to handling the typical problems such patients present. If such care is not available for them outside of a specialized prison facility, they are probably better off in prison for now. But I believe this does not change the fact that they should not be in prison. Relatives should not have to name a prison when asked for their address. These patients should be in caretaking facilities. And these caretaking facilities should not be prisons.

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