

University of Pennsylvania Carey Law School

Penn Carey Law: Legal Scholarship Repository

All Faculty Scholarship

Faculty Works

2018

Patty Hearst Reconsidered: Personal Identity in the Criminal Law


Kimberly Kessler Ferzan

University of Pennsylvania Carey Law School

Author ORCID Identifier:

 Kimberly Ferzan 0000-0002-9976-5913

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship

 Part of the [Criminal Law Commons](#), [Ethics and Political Philosophy Commons](#), [Law and Philosophy Commons](#), [Law Enforcement and Corrections Commons](#), [Philosophy of Mind Commons](#), and the [Public Law and Legal Theory Commons](#)

Repository Citation

Ferzan, Kimberly Kessler, "Patty Hearst Reconsidered: Personal Identity in the Criminal Law" (2018). *All Faculty Scholarship*. 2326.

https://scholarship.law.upenn.edu/faculty_scholarship/2326

This Article is brought to you for free and open access by the Faculty Works at Penn Carey Law: Legal Scholarship Repository. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Penn Carey Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

Patty Hearst Reconsidered: Personal Identity in the Criminal Law

Kimberly Kessler Ferzan*

I cannot imagine that there is single criminal law professor or student who does not know Joshua Dressler's name. Between his casebook,¹ his treatise,² and his voluminous publications,³ Dressler's reach has encompassed the entirety of criminal law (and this is ignoring his similar mastery of criminal procedure).⁴ Despite the breadth of his reach, Dressler has also always made time to mentor. Somehow he finds the time to read drafts and engage with arguments from the countless scholars across the country who ask it of him. And his advice is both kind and critical. He can see the weakness of a work, but always through a lens of seeing it in its best light.

There is much to admire in the systematizing reach of his work, and there is much to praise about the person who Joshua Dressler is. But my goal today is to engage with his scholarship. His work displays the mastery of a trapeze artist. He is able to take on the twists and turns of theory, but he always lands solidly on doctrinal ground. Dressler is willing to take on the difficult question of the day, from battered women to gay panic,⁵ to devote them to exacting scrutiny, and to

* Harrison Robertson Professor of Law, University of Virginia Law School. I am honored to have the opportunity to honor Joshua, who has been a friend, mentor, and inspiration to me throughout my career. Thanks to Steve Garvey for inviting me to contribute, and to Larry Alexander, Mitch Berman, Steve Garvey, Doug Husak, Stephen Morse, John Oberdiek, and Ken Simons for helpful feedback on this manuscript. Michael Corcoran and Chinny Sharma provided excellent research assistance, and thanks to the excellent questions raised by the Virginia law students who attended my work-in-progress session. A much earlier version of this paper was presented at the Boundaries of Rights and Responsibilities in Morality and Law held by the Rutgers Institute for Law and Philosophy in 2006, and I am grateful to the participants there, even if they convinced me to do more thinking and put that early version in a drawer. Given that I wrote a seminar paper on personal identity in 1993, a draft manuscript in 2006, and have now returned to the topic in 2017, I suppose I am quite R-related to my prior self, as I have loved this puzzle for almost twenty-five years.

¹ JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* (1994) (2d ed. 1999) (3d ed. 2003) (4th ed. 2007) (5th ed. 2009) (6th ed. 2012) (7th ed. 2015) (co-author, beginning with 6th ed., Stephen P. Garvey).

² JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* (Matthew Bender 1987) (Matthew Bender / Irwin 2d ed. 1995) (Lexis 3d ed. 2001) (LexisNexis / Matthew Bender 4th ed. 2006) (Lexis Nexis / Matthew Bender 5th ed. 2009) (LexisNexis 6th ed. 2012) (LexisNexis 7th ed. 2015).

³ See Joshua Dressler, Curriculum Vitae, http://moritzlaw.osu.edu/faculty-old/cv/dressler_joshua.pdf [<https://perma.cc/H5MQ-5XP6>].

⁴ *Id.*

⁵ E.g., Joshua Dressler, *Gay Teachers: A Disesteemed Minority in an Overly Esteemed Profession*, 9 RUTGERS-CAMDEN L.J. 399 (1978); Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man"*

chart careful doctrinal paths forward. Sometimes those paths are popular, and sometimes not. But he takes the arguments where they lead him.

Nowhere is this mastery of playfulness and practicality more on display than in his response to Richard Delgado's claim that there ought to be a "transferred mens rea" defense for those who are coercively indoctrinated.⁶ And, keyed to the events of the day, a central figure in the Delgado-Dressler debate was the heiress Patricia Hearst. In arguing that defendants should be exculpated for mental states that were not "their own," Delgado claimed that victims of coercive indoctrination, like Hearst, cannot fairly be blamed for their actions.⁷

In response, Dressler argued that Delgado's theory was woefully over and under-inclusive. If someone is "indoctrinated" into becoming pro-environment, this indoctrinated belief, Dressler argued, should not relieve him of responsibility for killing polluters.⁸ Conversely, asked Dressler, why should we excuse only those who are coercively indoctrinated? After all, poverty, abuse as a child, and all sorts of internal and external events may lead someone to have a belief or a desire, but causation does not itself excuse.⁹

As Delgado framed the problem, and then as Dressler fairly responded, the issue was the general question of whether we must be responsible for our beliefs and desires to be responsible for the acts they cause.¹⁰ This determinism question is, of course, a perennial and important question, but it is not the only question.

Instead, the question I want to ask is one of personal identity. Is there a point in time at which one person is not sufficiently the same person so that she may not be fairly held accountable for her prior actions? If the indoctrinated Hearst became "Tania," but then, as we are told, converted back to Hearst, is it correct to say that *Hearst* committed the crimes at all?

I fear that my inquiry will spend more time in the theoretical air than on solid doctrinal ground, but I hope, in the spirit of Dressler's meticulous doctrinal probing, to spend time with a bit of both in this article. Part I briefly sketches the Hearst facts so as to frame the personal identity debate. Part II sets forth the philosophical question of personal identity, wherein I ultimately concur with those philosophers who argue that we may need different conceptions of personal identity for different purposes. Part III analyzes the ways that personal identity

Standard, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995); Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457 (2006).

⁶ Joshua Dressler, *Professor Delgado's "Brainwashing" Defense: Courting a Determinist Legal System*, 63 MINN. L. REV. 335, 358 (1979).

⁷ Richard Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, 63 MINN. L. REV. 1, 1-3 (1978).

⁸ Dressler, *supra* note 6, at 353-54.

⁹ *Id.* at 358; see also Michael S. Moore, *Causation and the Excuses*, 73 CALIF. L. REV. 1091, 1112 (1985) (noting causation is not itself an excuse).

¹⁰ See also Thomas D. Nolan III, Note, *The Indoctrination Defense: From the Korean War to Lee Boyd Malvo*, 11 VA. J. SOC. POL'Y & L. 435, 457 (2004) (accepting Delgado's argument "would be a substantial step towards courting a determinist legal system").

might intersect with doctrine. Part IV then returns to how we might think about the Hearst case through the lens of an “identity defense.”

I. THE PATTY HEARST CASE

A. *Hearst: From Victim to Revolutionary and Back Again*

On February 4, 1974, nineteen-year-old Patricia Hearst was forcibly kidnapped from her apartment.¹¹ At that time, the Hearst name stood for “[f]ame, wealth, and power on a grand scale.”¹² Armed with weapons, members of the Symbionese Liberation Army (“SLA”) blindfolded Hearst, tied her up, threw her in a trunk, and eventually locked her in a bedroom closet wherein she remained blindfolded.¹³

Hearst’s kidnappers lacked a cohesive vision of why they had kidnapped her.¹⁴ At one point, it appeared they wished to arrange for the release of two of their members who were being held pretrial for murder.¹⁵ Eventually, the group required Hearst’s parents to arrange for a significant and substantial food giveaway.¹⁶ Ultimately, however, Hearst was never exchanged for a ransom.¹⁷

Instead, months later, Hearst morphed into Tania, a revolutionary.¹⁸ As Tania, Hearst assisted in the robbery of a bank.¹⁹ Later, while the group was on the lam, Tania and Emily and Bill Harris, two of her “comrades” (as they called each other), went to purchase living supplies.²⁰ Bill made the mistake of shoplifting, and while being wrestled to the ground by a sporting goods employee with police officer ambitions, Tania took a gun and began firing at the scene, thereby freeing the couple.²¹ This showdown resulted in Tania and the Harrises fleeing town and dumping the car they had been using; that car had a parking ticket in it that they had intended to pay, and the fateful result was that the police finally had a lead as to where the SLA was located.²² When other members of the SLA were ultimately

¹¹ JEFFREY TOOBIN, *AMERICAN HEIRESS: THE WILD SAGA OF THE KIDNAPPING, CRIMES AND TRIAL OF PATTY HEARST* 1–9 (First Anchor Books ed., 2017).

¹² *Id.* at 4.

¹³ *Id.* at 2, 4, 9, 67.

¹⁴ Their first ransom note had no ransom demand. *Id.* at 73.

¹⁵ *Id.* at 60. And if that failed, they wanted safe passage to Cuba. *Id.*

¹⁶ *Id.* at 83–84, 104–07.

¹⁷ *Id.* at 73.

¹⁸ *Id.* at 134 (noting that Patricia evolved “from empathy to sympathy to comradeship”).

¹⁹ *Id.* at 151–53.

²⁰ *Id.* at 175–76.

²¹ *Id.* at 177–79.

²² *Id.* at 183. Tania’s crew had been carjacking people and identifying themselves as the SLA; hence, the authorities knew the SLA had traveled from San Francisco to Los Angeles. *Id.*

burned to death in a bloody showdown with the Los Angeles Police Department,²³ Tania remained underground, eventually grouping with other revolutionaries.²⁴ Able to leave, she did not.²⁵ Ultimately, this group also became violent, bombing police cars and police buildings.²⁶ They also decided to rob another bank.²⁷ During this bank robbery, one participant's gun accidentally discharged, killing a bank customer.²⁸

When she was later caught in September 1975,²⁹ more than thirty months after her initial kidnapping, Tania continued to engage in revolutionary talk.³⁰ However, after meeting with her attorney, F. Lee Bailey, Tania transformed.³¹ She again was Hearst.³² At trial, Hearst painted a picture of cruel captivity and fear, claiming that she was sexually assaulted by two men in the SLA.³³ Prosecutors used Hearst's words in tapes and letters against her, including her actions when she and the Harrises kidnapped a teenager briefly so as to steal his car after the sporting goods incident.³⁴ Prosecutors countered the claim of rape with evidence that Hearst not only called her purported rapist, "the gentlest, most beautiful man [she had] ever known"³⁵ but she also kept a keepsake he had given her.³⁶ This was

²³ *Id.* at 187–98, 203–11.

²⁴ *Id.* at 220–67.

²⁵ At one point, one of the revolutionaries enlisted his parents' assistance, and the parents suggested that they should take Hearst home. She declined. *Id.* at 238. The parents were sympathetic because the mother's father was a founder of the IRA, and accordingly, the mother had childhood memories of her mother lying to the police to shield the IRA. *Id.* at 235–38.

²⁶ *Id.* at 283–86.

²⁷ *Id.* at 273.

²⁸ *Id.* at 273–78. Hearst's eventual cooperation with the government on this case saved her from potential felony murder charges, for which she could have received the death penalty. *Id.* at 323, 351–52.

²⁹ *Id.* at 305–06.

³⁰ *Id.* at 309–10 (raising a clenched fist and stating her occupation was "[u]rban guerrilla"); *id.* at 315 (writing in prison that "there will be a revolution in Amerikkka, and we'll be helping to make it").

³¹ *Id.* at 323–35.

³² "[Hearst] responded rationally to her surroundings in Daly City, and she did the same in San Mateo." *Id.* at 328. "In the closet, she became a revolutionary; in the jail cell, she became a Hearst." *Id.* at 329.

³³ *Id.* at 336, 344–45.

³⁴ *Id.* at 182–86, 333–41. Tania bragged about how easily she could handle her gun and how the SLA put the cyanide in the bullets. *Id.* at 185. Even after his death in Los Angeles, Patricia called the man who purportedly sexually assaulted her "the gentlest, most beautiful man I've ever known." *Id.* at 226. She further claimed that she was "ripped off by the pigs when they murdered" him. *Id.* And she bemoaned that the police probably had his Monkey necklace (for which she had the match). *Id.* at 227–28. Later, while on the lam, she described her transformation as one of "political development," and called the idea that she had been brainwashed "bullshit." *Id.* at 253–54.

³⁵ *Id.* at 226.

³⁶ *Id.* at 139.

a crucial find by a paralegal at the U.S. Attorney's Office, who explained to the Assistant United States Attorney prosecuting the case that, "No woman would carry around a memento from a man who raped her . . . for over a year!"³⁷ With the only potential legal argument being duress, Hearst was ultimately convicted and sentenced to seven years.³⁸ However, after serving a year in pretrial custody, being out on bail pending appeal, and then returning to prison after her appeal for just nine months, her sentence was commuted by President Jimmy Carter.³⁹ And, years later, still fighting that she was a convict at all, Hearst and her family employed further political pressure for a presidential pardon.⁴⁰ Despite vociferous objections by then-U.S. Attorney, Robert Mueller, President Bill Clinton pardoned Hearst on January 20, 2001, his last day in office.⁴¹

In analyzing Hearst's plight, there are clearly disputed facts. Jeffrey Toobin's historical account does seem to give credence to nonconsensual sex between Hearst and one of the SLA members, but Toobin ultimately seems sympathetic to the view that Hearst cared about him and that Hearst was never brainwashed.⁴² Rather, Hearst was reasoned with. As Toobin recounts: "This was no indoctrination, formal or otherwise; the SLA wasn't organized enough for such an undertaking, and there was no apparent point anyway. . . . [T]hey didn't expect to keep her around for very long. It's just that the SLA were *talkers*, and Patricia was, very literally, a captive audience."⁴³

Moreover, Toobin's account deems Hearst's frequent transformations as a matter of rational self-interest—and she successfully morphed from heiress to revolutionary to victim and back to a member of high society.⁴⁴

³⁷ *Id.* at 363.

³⁸ *Id.* at 370–71, 376.

³⁹ *Id.* at 390.

⁴⁰ *Id.* at 402–03.

⁴¹ *Id.* at 403–04.

⁴² *Id.* at 131 (noting the "irreconcilable conflict" between the versions on the question of sexual assault); *Id.* at 133 (finding "Patricia's description" to be "more persuasive than that of the SLA").

⁴³ *Id.* at 112; *see also*:

In all, during the long hours in the house in Daly City, the SLA started saying things that made sense to Patricia. The real danger came from the FBI. [The two SLA members being held for murder] were being framed. The SLA . . . was fighting for a better world. Patricia listened, and she talked, too. She was not what the SLA expected. She was curious and feisty. She laughed in the right places In short order, [three SLA members] told their comrades, *You're not going to believe this, but we like her.*

Id. at 119–20.

⁴⁴ *See, e.g., id.* at 404–5.

The shoot-out [in Los Angeles] cemented Patricia's transformation into a committed revolutionary. She was kidnapped on February 4. On March 31, she convinced the comrades of her worthiness to join the SLA; on April 3, she sent the communiqué in which she vowed to "stay and fight" under her new name of Tania; on April 15, she participated in the robbery of Hibernia Bank; on April 24, she sent the

B. Coercive Indoctrination and Personal Identity

Obviously one can question whether Hearst was ever brainwashed, or whether she committed her crimes because of duress.⁴⁵ But for purposes of explication, let us assume that Hearst was in fact brainwashed and then became Tania, the fully committed revolutionary.

If this were true, the facts diverge along two paths, each of which creates its own theoretical questions. If we are to suppose that Hearst had simply changed into Tania and remained Tania throughout her trial and the remainder of her life, then to ask whether “Hearst” should be punished is to ask the wrong question. After the brainwashing, on any psychological view of personal identity, Patty Hearst simply ceased to exist. The question in such a scenario is whether Tania, not Hearst, should be punished. This is a determinism question, as it is a question of whether we can be responsible when we do not choose who we are.⁴⁶ Delgado’s

communiqué that mocked the idea that she had been brainwashed; on May 16, she fired her machine gun (and another gun) at Mel’s to free Bill Harris from the clutches of his pursuers; on May 17, she watched her comrades, including Willy Wolfe, die excruciating deaths.

Id. at 215.

“One could say that the lawyers reverse-brainwashed her, but the truth may be simpler. Patricia was always a rational actor—with the SLA and now with her lawyers. Even in chaotic surroundings, she knew where her best interests lay.” *Id.* at 351. Toobin concludes his book by noting, “The story of Patricia Hearst, as extraordinary as it once was, had a familiar, even predictable ending. She did not turn into a revolutionary. She turned into her mother.” *Id.* at 405.

⁴⁵ The duress defense (and implicitly the brainwashing defense) were rejected by the jury. *United States v. Hearst*, 563 F.2d 1331, 1338 (9th Cir. 1977).

⁴⁶ For further exploration, with a sympathetic view of a possible defense, see Paul H. Robinson, *Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and “Rotten Social Background,”* 2 ALA. C.R. & C.L. L. REV. 53, 69 (2011). Dressler, himself, was sympathetic to some partial mitigation, just not a full excuse. Joshua Dressler, *Commentary: Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse*, 75 J. CRIM. L. & CRIMINOLOGY 953, 957 n.36 (1984).

There are other theoretical thickets here as well. First, did the people who brainwashed Hearst *kill* her? In each case, there would still be a living human being, so the death of a *human being* would not have occurred. But to those associated with the victim before the radical change, it would seem as if the person they knew had died. *See, e.g.,* TOOBIN, *supra* note 11, at 149 (quoting Hearst’s mother as saying after Hearst became Tania, “I think they killed Patty. I know she’s dead already.”). Still, it would be odd to think of self-improvement or New Year’s resolutions as attempts at suicide.

Second, even if criminal law typically adopts a compatibilist approach (*see generally* Stephen J. Morse, *Criminal Responsibility and the Disappearing Person*, 28 CARDOZO L. REV. 2545 (2007)), does Tania get an initial break? Unlike those of us who had our entire childhoods to form our characters, Tania came into existence quickly. She did not have the time to develop reflectively her beliefs, desires, and values. Childhood is not unconnected to our current identities; it is the birthplace of our current identities. *Cf.* JOHN MARTIN FISCHER & MARK RAVIZZA, *RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY* 208–10 (1998) (childhood is part of becoming a moral agent). Thus, one view is that until Tania has the time to develop her values in the way most of us have—in a temporal period much longer than Tania’s—she has not attained responsible status. *Cf. id.* at 233 (for an agent to be responsible for an act issuing from a “mechanism,” the individual must have taken responsibility for that mechanism) and *id.* at 235 n.30 (“We are inclined to say that, if the

claim that Hearst's desires were not her own because they were caused by an external source does indeed raise the challenge of determinism, as Dressler clearly addressed it. With this approach, the fact that Patty Hearst once inhabited Tania's body is immaterial.

Although this is not a paper about coercive indoctrination, it is clear that Delgado had a tough row to hoe to make such a case. What separated Hearst from SLA member Angela DeAngelis, one of the bank robbers who burned to death in Los Angeles? Angela grew up in the New Jersey suburbs, cared for her sisters after the death of her mother, and was a good student and head cheerleader.⁴⁷ Upon arrival in Indiana for college, she discovered through a *Life* magazine article that her father's friends were members of the Mafia.⁴⁸ She then joined a sorority and got involved in theater; as the theater performances were on street corners and prisons, she increasingly became political, culminating in a move to San Francisco where she met Kathy Soliah, one of the revolutionaries Hearst ultimately teamed up with after Los Angeles.⁴⁹ Why were her beliefs more hers than Hearst's were Hearst's? Although there clearly can be instances of *duress*,⁵⁰ how could the law possibly cabin a claim that we can only be responsible for what we do if we are also responsible for who we are?⁵¹

But, what if, as we are to believe happened according to some commentators,⁵² Hearst returned to "being herself" or became an older and wiser, but non-Tania, Hearst? May we then punish Hearst for Tania's actions? Perhaps

manipulation is sufficiently global, a "new person"—at least for the sake of moral responsibility ascriptions—has been created. This "new person" can be responsible for his behavior, once he has taken responsibility for the kinds of mechanisms that issue in it."); MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR THE CRIMINAL LAW* 260 (1993) (suggesting that Patty Hearst should be afforded an affirmative defense because she lacked a "fair chance" "to integrate the newly implanted beliefs into her character, or to reject them in light of her other beliefs.").

⁴⁷ TOOBIN, *supra* note 11, at 76.

⁴⁸ *Id.*

⁴⁹ *Id.* at 77.

⁵⁰ For further exploration of duress, see Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331 (1989).

⁵¹ Beth Hillman examines the possibility of brainwashing for POWs during the Korean War. Elizabeth Lutes Hillman, *Disloyalty Among "Men in Arms": Korean War POWs at Court-Martial*, 82 N.C. L. REV. 1629 (2004). She documents the "extreme deprivation" they suffered, noting "[s]ummary executions and extreme brutality in Korean War POW camps exacerbated the lack of adequate food, housing, sanitary facilities, and medical care. Under such conditions, separating acts of disloyalty from behavior essential to survival was all but impossible." *Id.* at 1639. Still, even in Hillman's analysis, she fails to distinguish adequately between what is arguably a case of duress, and the question of brainwashing compared to any other way we do not get to choose who we are. She notes, "At its core, the 'brainwashing' explanation for collaborating POWs is convincing. Most soldiers who became dedicated Communists in the camps were fighting to survive or hoping to improve their living conditions, not making principled decisions or objective choices among political systems." *Id.* at 1641.

⁵² Delgado, *supra* note 7, at 9 & n.38.

not. Here, the person whom we would criminally punish no longer endorses those projects, values, or ends that led to the commission of the crime. In important respects, Hearst is not Tania.

Hence, to motivate the personal identity question, we need not stretch as far. Hearst, as Tania, was committed to causes with which she later failed to identify. And though her case seems all the more compelling because of the force with which it began, the same threads run through other SLA members' stories. Kathy Soliah, one of the bombers and members of the group that robbed the bank and killed a bystander, went underground for two decades and led a law abiding life in Minnesota before *America's Most Wanted* did her in.⁵³ Bill and Emily Harris ultimately pled guilty to kidnapping Hearst and served six years each.⁵⁴ After divorcing Bill, Emily went on to become a successful computer consultant.⁵⁵ Bill became a private eye, married a defense attorney, had two boys, and coached peewee soccer.⁵⁶ But post-9/11, renewed interest in the felony murder and an attempted police car bombing led to both HARRISES being charged and serving five additional years.⁵⁷ As a result of the crimes they committed a quarter of a century earlier, both struggled to rebuild their lives after the release from prison.⁵⁸

If we have any shred of hesitation in punishing these actors for crimes they committed decades earlier, what grounds it? Clearly, some concerns may be consequentialist—what good comes from tearing down the lives they had managed to build? But we should also ask whether there is some question that the people who were later punished were not sufficiently psychologically connected to their earlier selves. We need to ask the personal identity question.

Notice, then, the distinction between these two types of claims. In the first case, the person who committed the crime is the same person who is to be punished. In the second case, the person who committed the crime is not the person whom we want to punish. The first case raises a responsibility question. The second case raises an identity question. If Patty Hearst became Tania and then went back to being Patty Hearst again, we can ask an altogether different question from the determinism question: we can ask whether Hearst committed the crime at all.

Granted, our criminal law presupposes that we are one person over time. But philosophers from Plato to Aquinas to Locke have offered accounts of personal identity.⁵⁹ What would it mean for the criminal law to take the challenge of

⁵³ TOOBIN, *supra* note 11, at 395.

⁵⁴ *Id.* at 396.

⁵⁵ *Id.* at 397.

⁵⁶ *Id.* at 397–98.

⁵⁷ *Id.* at 398.

⁵⁸ *Id.* at 398–99.

⁵⁹ For an historical overview, see Raymond Martin & John Barresi, *Introduction: Personal Identity and What Matters in Survival: An Historical Overview*, in PERSONAL IDENTITY 1, 1–74 (Raymond Martin & John Barresi, eds., 2003).

personal identity seriously? In the next section, we will explore the theoretical puzzle created.

II. THE PUZZLE OF PERSONAL IDENTITY

Although we generally assume that the person who committed the crime is the person whom we are punishing when both have the same body, there are some cases that call such an assumption into question. To begin with, science fiction examples often challenge our notions of identity. When, in *Star Trek* episodes, Scotty beams up Captain Kirk, does one Kirk die and a new Kirk begin? And, what if the transporter manufactures a second Captain Kirk at the same moment it beams up the original? Are they both Captain Kirk? If prior to being beamed up, Kirk had committed a crime, should both of these Kirks be punished?⁶⁰

Of course, there are far more mundane ways in which this question can arise. Time can pass. Character can change. People can forget. And, for the Hearst case, we shall assume that people can be forced to adopt beliefs and desires that they later come to disavow.

Because we believe that people do persist from one moment to the next and do not change identities with the addition of just one new belief or the loss of one bit of fingernail, the challenge is to present an account of “personal identity”—what it is that makes us the same person. Personal identity even by its metaphysical lights is not a requirement that one be *identical*. So what is it? There is a rich and detailed philosophical literature. In modern times, the leading philosophical account of personal identity is that of Derek Parfit.⁶¹ Parfit claims that a person’s existence is reducible to his brain, body, and “the occurrence of a series of interrelated physical and mental events.”⁶² His reductionist account rejects tying personal identity to some further fact, such as a Cartesian Ego or a soul.⁶³

For Parfit, questions of identity are not the right questions to be asking. He claims that “*identity*” does not capture “*what matters*.”⁶⁴ In support, he presents *My Division*:

My body is fatally injured, as are the brains of my two [identical triplet] brothers. My brain is divided, and each half is successfully transplanted

⁶⁰ In “The Enemy Within,” the transporter malfunctions and divides Kirk’s personality in half. *Star Trek: The Enemy Within* (NBC television broadcast Oct. 6, 1966), IMDB, <http://www.imdb.com/title/tt0708463/> [<https://perma.cc/4JPA-KE52>] (last visited, Apr. 15, 2018). I am imagining two exact duplicates. For these sorts of cases, see DEREK PARFIT, REASONS AND PERSONS 199–201 (1984).

⁶¹ PARFIT, *supra* note 60.

⁶² *Id.* at 211.

⁶³ *Id.* at 210.

⁶⁴ *Id.* at 215.

into the body of one of my brothers. Each of the resulting people believes he is me, seems to remember living my life, has my character, and is in every other way psychologically continuous with me. And he has a body that is very like mine.⁶⁵

Parfit argues that we should not ask whether “he” still exists.⁶⁶ Any approach seems odd: Did he die? Did he go on to live in both of his brothers? But one entity cannot be identical with two other identities! Just one? Which, then? Lefty or Righty? This line of analysis is fruitless, says Parfit. We already have all the information we need to have.⁶⁷

Parfit argues that we should care, not about identity per se, but about what he calls “Relation R.”⁶⁸ People form identities over time because of psychological continuity and psychological connectedness. “*Psychological connectedness* is the holding of particular direct psychological connections.”⁶⁹ “*Psychological continuity* is the holding of overlapping chains of *strong* connectedness.”⁷⁰ Both relations matter, seemingly equally.⁷¹ According to Parfit,

For X and Y to be the same person, there must be over every day *enough* direct psychological connections. . . . [W]e can claim that there is enough connectedness if the number of direct connections, over any day, is *at least half* the number that hold, over every day, in the lives of nearly every actual person.⁷²

Relation R is “psychological connectedness and/or continuity, with the right kind of cause.”⁷³ In application, the two surviving brothers in *My Division* stand in this Relation R, and thus, “[k]nowing this, we know everything.”⁷⁴

⁶⁵ *Id.* at 254–55.

⁶⁶ *Id.* at 255–56.

⁶⁷ Parfit also claims that identity is sometimes indeterminate. He imagines a club that holds regular meetings, and then the meetings stop. Later, some club members form a club with the same name and rules. Parfit believes the claim, “This is the same club,” is neither true nor false. We could go either way, and thus, asking whether it is the same club is to ask an empty question because we already know everything we need to know without answering that question. *Id.* at 213–14.

⁶⁸ *Id.* at 215.

⁶⁹ *Id.* at 206.

⁷⁰ *Id.*

⁷¹ *Id.* at 301 (“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.”).

⁷² *Id.* at 206. One objection here is that Parfit’s view, like Locke’s, is inherently circular. That is, psychological states may not be able to be understood outside of the agents that hold such states. Then, psychological states like memory and desire may presuppose identity and therefore can’t constitute it. See Marya Schechtman, *Personhood and Personal Identity*, 87 J. PHIL. 71 (1990).

⁷³ PARFIT, *supra* note 60, at 215.

⁷⁴ *Id.* at 260.

Because psychological connectedness is a matter of degree, that means a person can be more or less connected to who he was years ago and who he will be in the years to come. This revelation seemingly presents a challenge for ethics. Why should someone care about what happens to her in twenty years? Why stop smoking? Why save money? Although some do not care about future consequences, we associate that attitude with the shortsightedness of youth, not with a claim that the youth will not be the later adult. However, if the youth and the adult will not be the same person (or sufficiently R-related), then legislation that appears to be paternalistic—protecting the youth against his own imprudence—actually protects other people. Parfit's view, as he himself recognizes, turns youthful imprudence into morally wrongful action.⁷⁵

Parfit's claim also has legal implications.⁷⁶ Are contracts over extended periods enforceable?⁷⁷ Should a doctor honor an advance directive?

Parfit's view also presents a significant challenge for the criminal law. If Parfit tells us that there is no strict identity, what are we to make of our practice of holding people responsible for *their* prior actions? For his part, Parfit answers, "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."⁷⁸

In a 1990 article, Rebecca Dresser confronted Parfit's challenge to criminal responsibility and claimed that responsibility was still possible so long as the defendant was appropriately R-related to who he was when he committed the crime.⁷⁹ The connection of R-relatedness is scalar, and thus all that is required is that "the person subject to punishment has enough in common with the offender to be held responsible for the offender's acts."⁸⁰

Relevant considerations would include the presence of memories of the crime, its surrounding events, and one's role in planning and executing it. Other features of interest would be the psychological characteristics that led the offender to engage in criminal conduct, such as a desire for illegitimate personal gain, disrespect for the interests of others, lack of

⁷⁵ *Id.* at 317–30.

⁷⁶ Indeed, even those who know nothing of Parfit's account must work with a conception of identity to understand questions such as whether current citizens of the United States should make reparations to the descendants of slaves and whether a corporation that acquires another corporation that was guilty of wrongful conduct should also be liable for its misdeeds.

⁷⁷ *Id.* at 326–29.

⁷⁸ *Id.* at 326.

⁷⁹ Rebecca Dresser, *Personal Identity and Punishment*, 70 B.U. L. REV. 395, 423 (1990).

⁸⁰ *Id.*

impulse control, and rejection of the numerous other values and concerns protected by the criminal law.⁸¹

I believe Dresser is on the right track. The question is, however, whether Dresser can reach this conclusion from Parfit's reductionism. Relation R is quantitative. People are more or less the same person. But Dresser's normative approach cannot be directly derived from Parfit's reductionist Relation R.

Specifically, if at t_1 , Carl has a number of beliefs, desires, and intentions, then at t_2 , Carl will stand in some sort of relation to Carl at t_1 , depending on extent of the psychological connectedness and continuity. The more attenuated the connections, the less Carl at t_2 will identify with Carl at t_1 . But if Carl at t_2 is too remotely connected with Carl at t_1 , then it seems that the criminal law should be wary of punishing Carl at t_2 , separate and apart from which particular connections persist and which do not. Bottom line: Fewer connections, less identity. Recall that Parfit maintains that for:

X and Y to be the same person, there must be over every day *enough* direct psychological connections. . . . [W]e can claim that there is enough connectedness if the number of direct connections, over any day, is *at least half* the number that hold, over every day, in the lives of nearly every actual person.⁸²

This account is entirely quantitative. This is not a normative question about which connections persist and which do not.

What Dresser wants to do is to engage in a normative inquiry. She focuses on the particular connections that this agent has to the agent who committed the crime. For example, what if the Carl who committed the crime is extremely connected to the Carl at trial *except* that this Carl has completely rejected the values that led to his committing the crime? In contrast, what of the David who committed the crime who is extremely disconnected to the David at trial, except that the later David continues to reaffirm the values and the decisions that led to his commission of the crime? If identity is scalar, then Carl is more the same Carl than David is the same David. Dresser's argument thus stands in stark contrast to what Parfit says, namely, that when the offender is less connected to himself at the time of his crime, he deserves less punishment.⁸³ Metaphysical facts give us no reason to privilege which aspects of identity are normatively important.

⁸¹ *Id.* at 429. Dresser is aware that this question is difficult: "But how many of the relevant features must persist? Much exploration of the nature of the relevant connections, and how they might be ranked as providing more or less support for desert-based punishment, is needed." *Id.* at 429–30. Dresser believes that such an inquiry does not unduly burden the criminal justice system because in most cases there will be significant psychological connectedness. *Id.* at 431.

⁸² PARFIT, *supra* note 60, at 206.

⁸³ *Id.* at 326.

However, at another point, Parfit leaves open whether one must adopt the “Extreme Claim” that desert is incompatible with reductionism, or whether “psychological continuity carries with it desert for past crimes.”⁸⁴ He mentions both memory and character as potentially important.⁸⁵ Which aspects of Relation R matter for desert also seem to matter for other questions Parfit addresses. When he considers fusion—combining with another person—he asks how the person going through fusion will view things. “I should avoid fusion if it would predictably involve subtracting features I value, and adding features that I find repugnant.”⁸⁶ That is, from the first-person perspective, what matters to whether “I survive” is not merely that half of me survives. Rather, what will matter is whether the half of me *that I value* survives. Hence, Dresser does seem to be following Parfit’s lead in singling out particular aspects of psychological continuity.

Of course, looking at desert cannot be a matter of looking from the person forward. Both Dresser and Parfit are focused on the current defendant’s view of the past crime. Can he see this as something that *he did* in a way that makes it fair to punish him?

It seems now that we have two different potential accounts—an account that focuses on the quantitative aspects of Relation R and an account that views desert as, in some sense, supervening on particular aspects of one’s psychology. Let’s say that we agree with Dresser that these are the connections that are important. What does that tell us? Perhaps the answer is that personal identity is not the only thing that matters for criminal law purposes. Our intuitions might be tying “personal identity” to the aspect of the defendant’s character that gave rise to his demonstrating insufficient concern for others or to those aspects of the defendant that remember having committed the offense. That is, in some ways, it seems these arguments are that desert attaches to particular aspects of one’s psychology.

The resolution comes from realizing that we don’t need one answer to all personal identity questions. Consider Ed and Fred who both wish to visit their mother, Greta, who is in the end stages of Alzheimer’s. Ed might say, “I am visiting my mom,” while Fred says, “It is so sad because when I talk to her, my mother is no longer there.” Not only does it seem as though neither is making a category mistake but also both will find the other’s assertion fully comprehensible.⁸⁷ Indeed, if Greta told her husband, Harry, “Kill me if it ever gets bad,” Greta understands herself as consenting to something happening *to her*.⁸⁸

⁸⁴ *Id.* at 325.

⁸⁵ *Id.* at 325–26.

⁸⁶ *Id.* at 299.

⁸⁷ *Cf.* Eric T. Olson, *An Argument for Animalism*, in *PERSONAL IDENTITY*, *supra* note 59, at 318.

⁸⁸ I realize this is a bit of a quick assertion given the voluminous literature on personal identity and end of life decisions. Still, it seems to me that at t_1 , we hold the belief that at t_2 , we will be making decisions for ourselves (or our bodies) even if “we” will not survive in an important sense.

Of course, the pull of the Parfitian view is that Greta won't consider late-stage-Alzheimer's Greta to be as good as survival. But it does not seem that psychological continuity is as good as survival either. As Marya Schechtman points out, if a madman were to smother you with a pillow in your sleep but brainwash your neighbor into believing she was you, you would hardly feel as though you had survived even if the neighbor is R-related to you.⁸⁹

Ultimately, my goal is not to resolve how many conceptions have normative relevance and how they ought to be understood. Rather, I would like to proceed by suggesting that there may be two distinct roles for identity with respect to the criminal law. Other theorists working in personal identity have been tempted to disambiguate identity questions which might yield different answers to distinct normative questions.⁹⁰ I intend to do the same.

Let's consider two different defendants who are caught twenty years after their crimes. Alex has changed considerably, but he still retains memories of his crime and the character that gave rise to it. However, in all other respects he is psychologically discontinuous with his earlier self. Betty is very much the "same person," except that she has taken her desires for control and power and shifted them in a positive direction. So, according to reductionism, Alex is less the same person as he was than Betty is the same person as she was. In contrast, if we think that a particular aspect or aspects of one's psychology are the desert "carriers" (like a particular gene carries a disease or syndrome) then significant differences in the scalar relation R are not what matter. Rather, what matters is only whether particular psychological aspects remain.

Consider whether we should then say that both Alex and Betty are deserving of punishment. When we look at Alex, we may conclude that although he is not particularly R-related to the Alex who committed the crime, that does not matter so long as the aspects of Alex that gave rise to his committing the crime are still intact. This would mean that desert is not a linear function of reductionism, but rather requires looking specifically at what aspects of psychological continuity remain.

⁸⁹ MARYA SCHECHTMAN, *THE CONSTITUTION OF SELVES* 23 (1996). Walter Sinnott-Armstrong and Stephen Behnke also make the point that psychological theories presuppose personal identity. If someone can be hypnotized to believe he has the same memories as someone else, that can't make the second person the first. Walter Sinnott-Armstrong & Stephen Behnke, *Criminal Law and Multiple Personality Disorder: The Vexing Problems of Personhood and Responsibility*, 10 S. CAL. INTERDISCP. L.J. 277, 285–86 (2001).

⁹⁰ Marya Schechtman distinguishes the reidentification question from the characterization question. See generally SCHECHTMAN, *supra* note 89. See also David W. Shoemaker, *Personal Identity and Practical Concerns*, 116 MIND 317, 337 (2007) ("We are moved to explore the metaphysics of personal identity for sometimes very different reasons, and our mistake was in thinking that, because our questions all pointed us in the direction of personal identity, they had to be united in calling for the same *type* of criterion of personal identity."). For a similar distinction, see Patrick Tomlin, *Choices Chance and Change: Luck Egalitarianism Over Time*, 16 ETHIC THEORY MORAL PRAC. 393, 402 (2013) (distinguishing personal identity and personhood).

In contrast, when we look at Betty, we simply have no reason to even ask whether she is the same person. She is significantly R-related to the person who committed the crime. But does it seem that she ought to be punished because she is mostly the same person?

I submit that the best approach to personal identity is to sever the metaphysical question from the normative one. (Notably, both of these questions could turn on the kind of psychological continuity that Parfit discusses.) There could be both a quantitative inquiry, where enough connections count so that the defendant on trial and the one who committed the crime are the same person, and a qualitative aspect, wherein what matters normatively for desert is not *how much* connectedness survives but *which* psychological characteristics in particular survive. The first inquiry is whether *A* is sufficiently connected to *B*. If *A* is not sufficiently connected with *B* (so as to loosely constitute the “same person”), then the grounds for holding *A* responsible for what *B* did would have to be grounds according to which we would hold one person responsible for what *another* person did.

Even assuming, however, that there is a sufficient relationship such that *A* is *B*, we have an altogether different question as to whether the desert-bearing characteristics of *B* continue to exist in *A*. This would then make a “personal identity” defense a unique kind of defense. Moreover, there is no reason to think that just because Relation-R is scalar that desert diminishes over time. It might be that the defendant satisfies the first criterion, though she is less connected to her former self, but her the desert-bearing characteristics are still fully in existence.

The question then is how to assimilate the identity defense within the rest of criminal law, as well as how to distinguish it from claims criminal law does and should flatly reject (such as that the claim that an act is “out of character” is itself an excuse). In the next section, I suggest that identity plays a role in status responsibility, in the act requirement, and in a very unique form of excuse.

III. HOW COULD THE CRIMINAL LAW CONCEPTUALIZE AN “IDENTITY DEFENSE”?

What would it mean for the criminal law to take seriously the possibility that we may not be the same person over time? There are clearly non-retributive reasons to worry. Dangerousness might not track identity, and more importantly, as a matter of general deterrence (and societal ease generally), the idea that criminals can go on the run and thereby escape punishment completely by changing their identities appears to be a recipe for disaster. Nevertheless, if *A* is not the same person as *B*, then generally, you cannot punish *A* for what *B* did. The criminal law also does not punish *A* if she was sleepwalking, or acting under duress, or insane, and so forth. These positions may not be ideal from a purely consequentialist point of view, but if criminal law seeks to punish the deserving, and punish them proportionally, then it must take the identity defense seriously as a challenge to retributive blameworthiness.

A. Moral Agency/Status Responsibility

One way that personal identity over time bears on responsibility is in our presuppositions about moral agents. Rationality is the cornerstone of responsible agency. If an agent cannot comprehend or respond to norms,⁹¹ then it cannot be said that laws or morality are properly addressed to the agent.⁹² Young children and the very insane lack the capacity to fully reason through their actions and are thus exempt from criminal liability.⁹³

If individuals lack a settled identity over time, then they are also not rational. Consider Loren Lomasky's definition of the "Indiscriminate Evaluator," as "the person whose motivational thrusts are so sudden and transient that they elude all our attempts to understand them as emanating from a common core. . . . [Their lives] represent[] deviation from the standard of a life that is rendered thoroughly coherent through the persistence of projects."⁹⁴

The indiscriminate evaluator has no projects. No goal of his extends from one time period to another. Thus, he will not recognize the value to him of any desire because every desire is fleeting, and he will find it difficult to comprehend the long-range goals of others because he does not experience the same drives. This is not to say that individuals who favor short-term goals over long-term ones are irrational, nor are those who flitter about in their lives. But if an individual truly wakes up with a clean slate each day and cannot project himself from one day to the next, then he is irrational.

One example in popular culture comes from the movie, *Memento*, where the protagonist suffers from anterograde amnesia.⁹⁵ Because the protagonist is unable to create new memories, he lacks the ability to create projects that extend into the future. (The movie presents a rather compellingly dangerous person who seeks revenge and cannot remember that he has already achieved it.) He is not a moral agent.

If individuals who lack a settled identity are not rational, they are therefore not moral agents to whom the law applies. Although the criminal law currently fails to acknowledge this as an exemption from its demands (like infancy), conceptually, the lack of a settled identity undermines moral agency writ large.

This exemption is narrow. First, in presupposing a settled identity, we need not assume that one's character must be fully fixed. After all, we may hold children morally responsible for some wrongful acts, even if they lack a settled character. But a child who is in the process of developing her identity is far more

⁹¹ On rationality, see generally MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP (1984); Stephen J. Morse, *Rationality and Responsibility*, 74 S. CAL. L. REV. 251 (2000).

⁹² MOORE, *supra* note 91, at 62.

⁹³ *Id.* at 64–65.

⁹⁴ LOREN E. LOMASKY, PERSONS, RIGHTS, AND THE MORAL COMMUNITY 45 (1987).

⁹⁵ MEMENTO (Summit Entertainment et al., 2001).

rational than an individual who lacks the ability to form new memories and starts each day without sufficient recollection of the day before. A twelve-year-old who is punished for lying is sufficiently a moral agent to understand what he has done and why he is being punished. Thus, it might be said that if the ability to form projects and goals that extend over time is required for moral agency, even most children have this capacity.

Second, just because an individual can or does experience a change in identity does not mean that she lacks rationality. Consider two contrast cases from Lomasky: “radical conversion” (a “conversionary experience [that] conceivably could bifurcate a life”) and “total cleavage” (an abrupt and complete metamorphosis).⁹⁶ Someone who undergoes a radical conversion chooses, in some way, to reject prior plans in favor of new ones. The radical converter is rational both before and after the identity change. She can reason and plan. Likewise, the person who suffers total cleavage, through amnesia and the like, does not have any uniting projects that continue throughout his entire life, but rather, uniting projects for one period followed by uniting projects for another. (This person may not be a moral agent for a short time period while his new identity is forming.)⁹⁷ Both actors are rational agents whose personality changes are either chosen or externally caused, but who do not lack a capacity to project themselves into the future.⁹⁸

Finally, one might wonder whether even the person with anterograde amnesia can be held responsible for some actions.⁹⁹ Assume, as in the movie *Memento*, that prior to the incident that causes anterograde amnesia, the actor does have a previously formed character and thus a set of stable long-term memories that inform who he is. Assume that he gets into a bar fight and punches someone, and that his victim decides to punch him back or demands \$50 in compensation on the spot. The actor in this scenario does seem qualitatively different from someone who is so irrational that it would not make sense to demand compensation from him or that he suffer punishment. However, this window of cognition is too short to be of much use to the actual criminal law. Still, this discussion does reveal why theorists debate whether the defense of lacking the status of a responsible agent should be conceptually severed from excuse defenses.¹⁰⁰ Any crack in the window of irrationality, and some claim of responsibility can crawl through, even if it is only an immediate demand for fifty bucks.¹⁰¹

⁹⁶ LOMASKY, *supra* note 94, at 45–46.

⁹⁷ See discussion *supra* note 46.

⁹⁸ LOMASKY, *supra* note 94, at 45.

⁹⁹ I thank Toby Heytens for raising this point.

¹⁰⁰ See, e.g., Stephen J. Morse, *Moore on the Mind*, in LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL S. MOORE 233, 239–43 (Kimberly Kessler Ferzan & Stephen J. Morse eds., 2016).

¹⁰¹ Stephen Morse argues, for example:

[People with severe mental disorders] may be competent or morally responsible for some conduct. Involuntary civil commitment, for example, no longer has the consequence of declaring the person committed civilly incompetent for all purposes, such

In summary, part of being a rational agent is being able to comprehend how one's actions will extend into the future. If agents lack this capacity, they are not moral agents. Thus, individuals who lack any settled identity over time may be exempt from the criminal law.

B. *The Act Requirement*

Another point at which the criminal law presupposes settled identity is in its voluntary act requirement. That requirement is that the defendant's will as well as his body must be involved in the commission of a crime.¹⁰²

It is at this point that we see at least a very thin metaphysical account of personal identity that is presupposed by the criminal law. The defendant's body must be the same body as that of the person who committed the offense. We look to fingerprints and DNA to see if this is so. If the defendant's body is not the body of the person who committed the offense, then the defendant did not commit the offense.

Of course, the fact that one's body "commit[ted]" the crime is insufficient to satisfy the act requirement because the act must also be voluntary.¹⁰³ Among the instances that the Model Penal Code lists as involuntary are bodily movements caused by reflex, sleepwalking, or hypnosis, as well as those bodily movements that are "not a product of the effort or determination of the actor."¹⁰⁴ To illustrate, in the case of *People v. Newton*, after being shot in the stomach by one police officer, Huey Newton shot another officer and then walked to the hospital.¹⁰⁵ The defendant claimed that he could not remember his behavior.¹⁰⁶ The defendant's medical expert testified that Newton's testimony was consistent with a gunshot injury: this sort of injury can produce a "profound reflex shock reaction."¹⁰⁷ Based on this medical evidence, Newton was entitled to an instruction that he did not commit a voluntary act because of his unconsciousness because he was not *conscious of acting*.¹⁰⁸

Identity changes present even stronger denials of the actus reus than do claims of involuntariness. An involuntariness claim entails that there is a defendant who is being charged for a movement of his body over which he lacked adequate

as making contracts or voting. Moreover, those people who are omni-disabled are usually too disorganized to engage in criminal conduct other than simple assaultive or disorderly conduct, for which no sensible defendant raises an insanity defense.

Id. at 241.

¹⁰² JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.02[C][2] (7th ed. 2015).

¹⁰³ *Id.*

¹⁰⁴ MODEL PENAL CODE § 2.01 (AM. LAW INST. 1981).

¹⁰⁵ *People v. Newton*, 87 Cal. Rptr. 394, 400–02 (Cal. Ct. App. 1970).

¹⁰⁶ *Id.* at 402.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 400–06.

control. The defendant himself exists both before and after this involuntary action—and no other actor voluntarily committed the crime. His claim is not one of nonidentity. Rather, his claim is that he is not to blame for this bodily movement because it is not an exercise of his will.¹⁰⁹

In contrast, we could imagine a defendant claiming such a profound break in identity that the crime his body committed was committed by his body's former occupant, not by him. Again, although such cases are more fanciful than realistic, we can imagine a person who suffers amnesia, undergoes a significant character change, and has significant time pass since "her" commission of the offense as someone lacking the minimal R-relation necessary to say that she is still the same person as the one who committed the offense.

To be clear, here, to constitute a denial of the actus reus, the defendant must make the quantitative metaphysical claim—that is, that she is not the same person who committed the offense. Whatever we take to be our best metaphysical theory of personal identity would have to be met. In this article, I have discussed Relation R. And with respect to Relation R, this question is entirely quantitative: Do enough connections hold? But even if one adopts a different account of personal identity, the criminal law question would be the same. *A* must either be *B* or stand in a responsibility-grounding relationship to *B* in order to be responsible. A denial of the former is a denial of actus reus. However, the fact that enough connections hold for *A* to be the same person as *B* does not mean that we have every connection we want for purposes of criminal responsibility.

C. *At the Excuse/No Act Border: Blips, Brews,¹¹⁰ and Brainwashing*

A personal identity claim is that the person has become a new person, and the prior person has ceased to exist. This claim is to be distinguished from a "blip" claim, in which the same person exists before and after the crime but claims a lack of control over or attachment to the events that occurred during the crime. For instance, Huey Newton was Huey Newton before and after the offense. The claim that he was unconscious is not a claim that someone else committed the offense; rather, it is a claim that he lacked sufficient control over the act to be blamed for it. It isn't something that *someone else did*, though he disputes that *he did it* in a morally meaningful way.

But "blip" cases don't always look like this. Sometimes it appears that someone else inhabited the defendant's body during the blip. One example is Jekyll and Hyde. Another is Patty Hearst.

Above I suggested that the criminal law might best employ two theories of personal identity and not one. At the thinnest level, we could have a metaphysical

¹⁰⁹ This is another border (here between no act and excuse), the boundary of which has been debated by Moore and Morse. See Morse, *supra* note 100, at 237–39.

¹¹⁰ "Potion" or "serum" is less misleading, as I am looking at Jekyll and Hyde cases (not ones of intoxication); but I couldn't resist the alliteration.

account of personal identity. But the criminal law might still care about a thicker account for assessing responsibility. That is, one could adopt a thin account of the identification question (is *A*, *B*?) but a thicker account of the characterization question for purposes of an excuse (*A* is not sufficiently related to *B* to be responsible).

With these potential divisions of labor in mind, let's look at Jekyll and Hyde. Are we to think that there are two people that have inhabited the body at different times? Notice that a thin biological account of personal identity would push any claim by Jekyll that he should not be deemed culpable for what Hyde did into being an excuse. There was just one person (Jekyll) who committed the crime, but that person may be entitled to an excuse because he was not sufficiently psychologically related to the person who committed the offense. (The actual Jekyll does not, of course, escape culpability because he knowingly risked causing the psychological discontinuity.) By contrast, any account that requires any sort of psychological connection for the metaphysics itself would deny that the person who committed the offense is the same person as the one who is being punished. On the latter account, Jekyll and Hyde would not be *the same person*, but Jekyll would be responsible for Hyde's behavior insofar as he risked causing it, just as he can be responsible for what another person does.

To summarize, then, with "blip" cases such as Hearst or Jekyll, the criminal law will go one of two ways depending on what it takes to be the barest prerequisite for "being the same person." If we are dealing with two distinct people, then the act requirement fails. If it is one person, there may still be room for an excuse, a possibility I consider in the next section.

Determining how this would have worked for Hearst requires us to dive into a pool of disputed facts. Unlike Jekyll who lacks any memory of what Hyde does (though he is responsible for taking the potion), Hearst did remember her Tania days. She just did not fully identify with them. Similarly, many of us do not fully identify with our teenage selves. Under a Parfitian theory, there may be sufficient connections to say that there is the kind of R-relation to think that we are our teenage selves, and Hearst was Tania—at least insofar as the act requirement is concerned.¹¹¹

¹¹¹ Before moving on, it is worth noting one interesting wrinkle in blip cases. It seems intuitive that if Hearst was brainwashed and became Tania as a result of coercive indoctrination, then we should want to "deprogram" her. (For an interesting exploration of the constitutional limits of such actions, see generally Robert N. Shapiro, *Of Robots, Persons, and the Protection of Religious Beliefs*, 56 S. CAL. L. REV. 1277 (1983)). But this reflects a choice between punishing Tania and resurrecting Hearst, and thus, choosing between retribution and rehabilitation. (The same would be true if we could either punish Hyde or give him a serum to reestablish Jekyll). *But see* Jim Staihar, *A New Systematic Explanation of the Types and Mitigating Effects of Exculpatory Defenses*, 12 NEW CRIM. L. REV. 205, 281 (2009) (arguing that criminals incur obligations of restoration and these obligations are more easily met if they undergo deprogramming). But then, why should we change Tania back to Hearst but not change an ordinary criminal to a different, better state? If Ted commits crimes because of poverty and abuse, and he will become a better and different person if rehabilitated, a retributivist is committed to punishing Ted so long as Ted meets the requirements of

D. Identity, Character, and Excuse

Let us now turn to a pure theory of excuse. Here, the idea is that, though there is a sufficient metaphysical connection to say that *A* is *B*, *A* is no longer sufficiently psychologically connected to *B* so that it seems fair to punish *A* for what she did.

Reconsider the way that people change over time. We do *identify* with our prior selves. We look at our parent's picture albums and think, "Why did *I* wear my hair like that in high school?"¹¹² Our parents love the *same person* who was born, and we, for each child we have, love *just one child*. We might say, "You were such a delightful baby." Both a biological account and an R-relation account could make sense of this because the person referred to has had the same body, and because psychological continuity and connections hold, tying the person then to the person now.

Still, even if there are sufficient connections for declaring that this is one person, we might still think that Dresser is onto something when she worries about blameworthiness. That is, desert doesn't supervene on your toes or fingers or on your memories of your first fishing trip. Desert seems tied to character. Hence, significant and substantial characterological changes of the sort raised by Dresser do seem to constitute a denial of desert-relevant responsibility.

This claim, however, appears far more like a denial of the actus reus than a traditional excuse. And it does reveal why the border between the two is perplexing. In some ways, it is a claim that the part of the defendant who committed the offense no longer exists, but it is not a denial that the defendant committed the offense. It isn't even a denial that the defendant did not will the commission of the offense. It is instead a claim that there is such a substantial

moral personhood. But Tania also meets those requirements. Is the difference between Ted and Tania simply that we can already identify who Tania will be (was?), whereas we have not seen the alternative life that might have been available to Ted had his life been different from what it was?

If we are truly to deny the excusing potential of brainwashing, we are committed to punishing Tania and mourning the death of Hearst. There is no reason why we should think that this defendant deserves less punishment than that of any other criminal defendant who might have been a different person and done different things had their beliefs and desires been different.

This leads to further questions I cannot answer here, such as whether a state has a right to prevent such deprogramming in order to convict the guilty pre-deprogrammed person. Compare the related question of whether it is permissible to forcibly medicate a defendant so that he is competent to stand trial. See *Sell v. United States*, 539 U.S. 166, 179 (2003) (holding it is permissible "involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important government trial-related interests.").

¹¹² Cf. Shoemaker, *supra* note 90.

psychological discontinuity between the defendant now and who she was when she committed the offense that it no longer seems fair to punish her for it.

I don't aspire to add to Dresser's account here. The questions of character, memory, and psychological traits do all seem to have bearing on the idea of whether one is the same person one was before in such a way that one ought to be held responsible. Moreover, I doubt that most personal identity excuse claims can be met. After all, most of us identify with the person we were before, and indeed, may feel guilt over acts committed decades ago. Hence, I expect that even were the law to recognize the excuse, it would be quite rare. The sort of change necessary would require a rather strong combination of character, time, and memory. That is, one must imagine a person who commits an offense, gets in an accident, suffers amnesia, totally changes from a bad to a good person, and does not get caught for decades. Still, if this *could* happen, ought there to be an excuse here? I think the answer is yes.

Even if this seems to be a plausible theory of excuse, there is a worry here. The concern is whether the personal identity excuse requires the criminal law to adopt a more capacious view of character-based excuses. After all, this kind of defendant does not have the usual rationality or volitional impairments that are thought to ground excuse. Let me explain why allowing for a personal identity excuse is *not* the thin edge of a character excuse wedge.

There are two (seemingly) competing views of criminal excuse. Character theorists argue that "[t]he distinguishing feature of excusing conditions is that they preclude an inference from the act to the actor's character."¹¹³ In other words, people should not be punished for those actions that are "out of character." On the other hand, choice and capacity theorists argue that it does not matter what an individual's character is;¹¹⁴ the grounds for excusing an actor are that the actor lacked the rationality to appreciate the criminality (or immorality) of her conduct or the volitional ability to conform her conduct to the requirements of law.¹¹⁵

There are significant problems with character theories. First, it seems that even if an action is "out of character," that should not be sufficient to exculpate the defendant.¹¹⁶ Second, character theorists make the commission of a criminal act merely evidentiary, as opposed to providing the primary basis for responsibility.¹¹⁷

¹¹³ GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 10.3.1 (1978).

¹¹⁴ I am grouping choice and capacity here. I take it the primary disagreement between these two theories is whether to punish negligence. Because both theories reject "character" approaches, I need not distinguish them for my purposes.

¹¹⁵ H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 152 (1968).

¹¹⁶ JEREMY HORDER, *EXCUSING CRIME* 118 (2004); Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 378 (2004).

¹¹⁷ R.A. DUFF, *CRIMINAL ATTEMPTS* 191 (1996).

Finally, character theorists seem to get the relationship between character and action exactly backwards: Action is prior to, and constitutive of, character.¹¹⁸

Still, there seems to be some grain of truth in character theories. An actor is not simply a choosing machine. Rather, choice theorists must presuppose some sort of agent identity over time that is beyond mere possession of rationality. As Antony Duff observes, “A ‘character’ conception expresses a significant truth about *who* can be held criminally liable: that only moral agents, whose actions exhibit the structures of thought, attitude, and motivation that constitute ‘character,’ should be held liable.”¹¹⁹

Hence, when we focus on whether to excuse an actor for her conduct, choice theorists are correct in their view that to be excused, the agent’s choice to engage in the criminal act must be the result of either a substantial volitional or rational impairment. However, all excuses, and all criminal liability, operate on the assumption that there is a settled character of an actor who is making those choices.

Character theorists might claim that my position on personal identity is quite at home with their version of excusing, and indeed, that my entire argument is a character theory of excuse. The character theorist’s argument goes as follows: When an individual develops a new character that is different from her character when she committed the crime, she is “not herself” and does not deserve blame.

As a choice theorist who rejects the character theory, the puzzle, then, is whether I can avoid this slippery slope. What I think these examples reveal is that there is a scalarity to identity claims, and that a truly substantial change in Relation R is necessary for responsibility-relevant identity changing. This does mean, however, that choice theorists do presuppose a stability of character, and that when it is lacking in a significant way, responsibility is undermined.

Consider the facts of an actual case. Barry Kingston knew that his former employers, the Formans, had engaged in illegal business and tax dealings.¹²⁰ The Formans hired Kevin Penn to blackmail Kingston.¹²¹ Although Kingston had never been charged with anything improper, Penn learned that Kingston was attracted to young men and teens.¹²² Penn lured Kingston to his flat, laced Kingston’s coffee with sedatives, and then invited him to a bedroom where a drugged fifteen-year-old boy lay unconscious on the bed.¹²³ Penn suggested that Kingston have sex with the boy, and Kingston did so.¹²⁴ The Formans ultimately

¹¹⁸ *Id.* at 188; John Gardner, *The Gist of Excuses*, 1 *BUFF. CRIM. L. REV.* 575, 577 (1998); Morse, *supra* note 116, at 377–78.

¹¹⁹ DUFF, *supra* note 117, at 191.

¹²⁰ PAUL H. ROBINSON, *CRIMINAL LAW CASE STUDIES* 199 (5th ed. 2015).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 200.

¹²⁴ *Id.*

informed the police, and Kingston was convicted of indecent sexual assault.¹²⁵ Experts concluded that (1) Kingston knew what he was doing, (2) that Kingston would not have committed the crime had he been sober, (3) that Kingston's volitional capacities were impaired, and (4) that Kingston had not completely lost his capacity for self-control.¹²⁶ Thus, because Kingston's involuntary intoxication neither negated his *mens rea* nor negated his capacity for self-control, Kingston was denied an excuse defense.¹²⁷

G.R. Sullivan and Victor Tadros have both separately suggested that Kingston was entitled to an excuse because his "unity of self" was "destabilized."¹²⁸ I reject this view of personal identity and excuse.

First, we should reject this claim as an empirical matter. In terms of the actor's identification with the situation, she will perceive herself as the person experiencing it. A person who acts at the point of the gun experiences the situation as something happening to *her*. Even when we say, "I am not myself when I drink," this is metaphorical. We clearly still recognize our spouses and our homes. We may realign our priorities and feel the pull of some otherwise suppressed desires, but we do not suffer a destabilization of our *selves* in any deep sense.

Still, having adopted a characterological theory of an identity excuse, this may be an insufficient response. Even if one recognizes a threat as something happening to one, one may look back on the action taken in response as not reflecting who one is. Instead, one might argue that the acts were attributable to outside, alien forces.

This leads to a second objection to the Sullivan/Tadros position. Stressful situations rarely change an individual's beliefs or desires but instead reveal pre-existing features of the defendant's character. To illustrate, consider Albert, who walks in on his wife committing adultery. Now, if Albert gets angry and kills his wife, are we likely to believe that he *changed* his identity? Rather, it would seem that Albert reacted out of pre-existing feelings that he had for his wife and pre-existing tendencies to react in a violent way. As Jeremy Horder claims,

D's reaction is likely to stem from the influence of a perfectly ordinary and reasonable, more or less 'settled', aspect of D's character, namely his or her tendency to feel wounded and indignant at what was perceived to be a serious attack on his or her self-image and self-esteem, a feeling that then generated what is in such instances an all-too-common desire, the desire to 'get even' by some means or another.¹²⁹

¹²⁵ *Id.* at 201; R v. Kingston [1994] 2 AC 355 (HL).

¹²⁶ ROBINSON, *supra* note 120, at 201.

¹²⁷ R v. Kingston [1994] 2 AC 355 (HL).

¹²⁸ G. R. Sullivan, *Making Excuses*, in HARM AND CULPABILITY 131, 137–41 (A. P. Simester & A. T. H. Smith, eds., 1996); VICTOR TADROS, CRIMINAL RESPONSIBILITY 297 (2005).

¹²⁹ HORDER, *supra* note 116, at 123.

A third reason to reject the Sullivan/Tadros view is that it makes personal identity too fragile. Even if involuntary intoxication creates a reordering of one's desires, or gives rise to some new beliefs or desires, our daily encounters create the same pressures. Are we all "destabilized" by every odd encounter? Indeed, if we are destabilized by an intoxicant, then seemingly we can then be destabilized by viewing beautiful ruby earrings; but the fact that the latter creates an intense desire would not undermine one's responsibility for theft.¹³⁰ It cannot be that every pressure on our character challenges who we are. Indeed, I suspect that once the character theorist begins to try to articulate which factors count, he will ultimately adopt the very view endorsed by choice and capacity theorists.¹³¹

Finally, it seems that the Sullivan/Tadros view of persons is largely unnecessary in order to account for our intuitions about excuse and mitigation in instances in which our rationality or volitional abilities are extremely impaired. Moreover, as I argued in my co-authored book with Larry Alexander, *Crime and Culpability*, even when a full excuse is not appropriate, mitigation might still be warranted.¹³²

In summary, our theory of excuses does not presuppose fragile and ever-changing identities but relatively stable ones over time. This is as it should be.

The challenge then is to articulate a test that can provide a principled distinction between the sorts of substantial changes in identity that do warrant an excuse and illegitimate "out of character" claims. What we are looking for is a sense of identity, one that can justify a person's reflecting on an earlier act and saying, "That was not I who did that." This will be different from a claim that one was drugged or had a gun to her head. Rather, it is the claim that as one reflects on an earlier act, the goals, projects, beliefs, and desires that motivated that act are no longer ones with which the defendant identifies. A defendant who acted at gunpoint recognizes that she was the one who acted and why she did so. But Patty Hearst may find the Tania who committed those offenses to be utterly alien to who she is now, even if she recognizes that in some thin sense, *she* committed them.

Ultimately, the question is not just whether the defendant is sufficiently R-related (or biologically related, etc.) to be the same person as the one who committed the crime; there is a further question as to whether the character traits upon which desert supervenes still exist. If there are insufficient desert-relevant connections, the defendant does not warrant punishment.

In closing, let me consider one objection to this view of excuse. Walter Sinnott-Armstrong and Stephen Behnke are hostile to psychological continuity theories for law:

¹³⁰ *Id.* at 120.

¹³¹ *See also id.* at 124–25.

¹³² LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 162–68 (2009).

Suppose Joe is a heroine [sic] addict who undergoes a religious conversion to fundamentalism, changing his character or personality changes [sic] almost completely. We would and should allow him to inherit what his grandfather left to him in a valid will. We would and should find him guilty for crimes that he committed before his conversion, even if we reduced or commuted his sentence. The same applies to people with manic depression or bipolar disorder, who change dramatically, unprompted by external factors. If a continuous personality were required for personal identity, and if personal identity were required for punishment, then one could escape punishment by changing one's personality after committing the crime. Criminals who plan such an escape should not be excused.¹³³

There are a number of confusions in this paragraph. We might think that desert attaches to certain aspects of character, whereas inheritance does not. Moreover, the grandfather, who leaves the will in place after the religious conversion, effectively decides to leave his belongings to fundamentalist Joe.¹³⁴

More importantly, the Sinnott-Armstrong/Behnke analysis seems to beg the personal identity question. Say that Alex commits a crime and then "wants to change his personality." Well, he would have to do a bit more than attend a self-help class or two. So say that he purposefully bludgeons his brain so as to forget everything that happened for the last ten years. The Parfitian view would be that Alex does not survive. It is very hard to plan *your* escape (from responsibility) and simultaneously cease to be you! Ultimately, though, a consequentialist concern that some people could escape punishment is just unresponsive to the retributive concern that the defendant who exists now does not deserve punishment for what "she" did in the past.

IV. CONCLUSION: HEARST RECONSIDERED

Let us now return to Patricia Hearst and consider whether she lacked status responsibility, whether she could claim that "she" did not act, and whether she is potentially entitled to an "identity excuse." Again, at some level, these are factual disputes. But I can at least gesture toward how the arguments would run.

Hearst was clearly status responsible. She was a rational actor when she was Patricia and when she was Tania. Moreover, the argument some theorists are tempted to make—that for a brief time Tania lacked status responsibility¹³⁵—is not

¹³³ Sinnott-Armstrong & Behnke, *supra* note 89, at 291.

¹³⁴ This does raise interesting philosophy of language issues. Does the grandfather intend to leave to any Joe occupying that body, or would significant changes mean that the term in the will fails to refer? Fortunately for law, even if people are more or less the same person as they were when the testator selected them, the testator also knows that people change over time. And, if the testator no longer likes the person who later emerges, that is what disinheritance is for.

¹³⁵ See discussion *supra* note 46.

pertinent here. We aren't asking whether Tania is to blame for what Tania did. We are asking whether Hearst is.

But is Hearst Tania? Let us assume that Parfit has the best account of personal identity. Hearst and Tania were quite R-related. Hearst's memory was intact.¹³⁶ Little time passed. It seems hard to believe that on a purely quantitative account, that Hearst can claim that *she* did not commit the offense.

Now consider the identity excuse. Here the evidence is mixed. For instance, after the first audiotape was released wherein Patricia announced her new allegiance to the SLA, her mother stated, "I think they killed Patty. I know she's dead already."¹³⁷ In contrast, when Hearst's father questioned two of Tania's fellow revolutionaries (the husband whose grandfather founded the IRA and his wife), they said she was fully committed to the SLA. In response, he said "It doesn't surprise me. . . . She's always been a rebel."¹³⁸ He worried that he could not let her go to trial because "[s]he is going to call the judge a fucking pig and then she'll be in jail for the rest of her life."¹³⁹ After her arrest, Toobin reports that Hearst's parents had "to recognize that their daughter was, at least for the moment, a very different young woman from the one they thought they knew."¹⁴⁰ But then, one government psychiatrist testified at her trial:

The girl was a rebel. She had gotten into a state where she was ripe for the plucking. . . . She was a rebel in search of a cause. . . . [I] think this was all *in* her. In a sense, she was a member of the SLA in spirit, without knowing it, for a long, long time.¹⁴¹

Under Dresser's qualitative test, there may be arguments on both sides. Recall:

Relevant considerations would include the presence of memories of the crime, its surrounding events, and one's role in planning and executing it. Other features of interest would be the psychological characteristics that led the offender to engage in criminal conduct, such as a desire for illegitimate personal gain, disrespect for the interest of others, lack of

¹³⁶ Strikingly, if memory is a necessary condition of personal identity (as John Locke thought), many killers would be fully exculpated. Of those convicted of homicide, 25–45% claim amnesia for the killing. Michael D. Kopelman, *The Assessment of Psychogenic Amnesia*, in *HANDBOOK OF MEMORY DISORDERS* 428–29 (Alan D. Baddeley et al. eds., 1995).

¹³⁷ TOOBIN, *supra* note 11, at 149.

¹³⁸ *Id.* at 297.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 320.

¹⁴¹ *Id.* at 359.

impulse control, and rejection of the numerous other values and concerns protected by the criminal law.¹⁴²

Ultimately, Hearst's defense should not rise or fall simply on the duress question. Nor should it be a matter of whether she was "brainwashed." Rather, the question was whether the person who sat in the courtroom could not even identify with the person who committed the offense. Or whether, on the other hand, Tania was in her all along.

¹⁴² Dresser, *supra* note 79, at 429. Tomlin gestures in a similar direction: "[T]his kind of theory of responsibility would suggest that when an agent has changed to the extent that she is less prepared or able ('taking ownership' need not be a binary concept) to recognise the intellectual process that produced the action as her own, she is less responsible." Tomlin, *supra* note 90, at 404.