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Research Question:

“To what extent does the Paradox of Theseus influence the decisions made in a system of justice?”

To what extent does the Paradox of Theseus influence the decisions made in a system of justice?

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ABSTRACT

This essay looks at the Paradox of Theseus and to what extent it may influence the decisions made in a system of justice. The Paradox of Theseus is essentially about personal change and identity, questioning what it is that makes us the same person over time: the cells in our body are constantly replaced, but are the resemblance of cells ample evidence for our identity? The paradox's importance is evident within criminal justice as criminals may be convicted for past crimes, even though they may have changed.

The issue of personal identity and change was developed by discussing what constitutes identity, the parts effectively being material constitution, continuity, persistence and evidence. Illustrative examples included the film director Roman Polanski and war criminal Charles Zentai, and were related to the paradox of Theseus as they both were prosecuted for crimes done many years in the past. Their situations and the personal implications of the paradox of Theseus were explored and the purpose of the paradox was seen in a new light with arguments for and against their prosecution. It becomes evident that their situations are a representation of the current system which does not acknowledge change, as they are both being pursued to be extradited to face their crimes.

It was concluded that the current criminal justice system does not explicitly incorporate the ideas of change from the paradox of Theseus. It was found that in some cases there is a possibility that the paradox of Theseus may provide a better outcome for criminals and courts alike, once decisions are made; such examples include statutes of limitations and parole. Although, determining how the individual has changed is a difficult process, and it seems that future decisions made in the criminal justice system may not acknowledge the paradox of Theseus.

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INTRODUCTION

The paradox of Theseus is essentially a question of how a person's identity changes, or doesn't change, over time. Just as in Theseus' Ship, the physical and biological parts of a person are constantly changing. The cells within our bodies are continually replenished with new ones that serve exactly the same function. So what makes us the same person as the person who existed at an earlier time? The paradox itself is explained and explored in detail in this essay, before the concept of identity is investigated. Identity can be split into areas such as constitution, persistence and evidence. Identity is then developed into personal identity and addresses the issue of what constitutes a person. Concepts such as intellect, continuity and character are used to discuss what makes one person unique from others. Examples are used and seen in light of the paradox of Theseus, including the film director Roman Polanski and Charles Zentai, an alleged Second World War criminal. Areas of the Common Law system are explored and related to the paradox, including legislation, precedents and the judicial process. Then the implications of the philosophical and legal aspects are discussed with reference to the paradox of Theseus.

This essay discusses the fact that a person changes over time and questions how crimes attributed to the earlier person can still be attributed to the later person, asking in the process; **to what extent does the Paradox of Theseus influence the decisions made within a system of justice?**

THE PARADOX OF THESEUS

The Paradox of Theseus is a story recounted by the ancient historian Plutarch of the famous ship of Theseus. The story goes that over the years, Theseus replaced each plank of his ship as it decayed, in order to keep it fit for sea. Eventually, not a single plank of the original ship remained as they were each systematically replaced with a newer plank. The core of the paradox is the question of whether Theseus now possesses the same ship that he had before changing the planks. To extend this paradox, we can consider that the replacing of the planks of Theseus' Ship takes place at sea so that when each plank is systematically replaced with a new one, the old planks are then thrown overboard. While Theseus is at sea throwing away the old planks, another ship, 'Ship X', collects the planks and uses them to replace all of the planks on that ship in exactly the same formation as Theseus' ship. 'Ship X' then later arrives and docks next to Theseus' ship. Which ship can be identified as the ship of Theseus? In the ancient world, the ship became "a standing example among the philosophers, for the logical question as to things that grow; one side holding that the ship remained the same, and the other contending it was not the same" (Clough)

IDENTITY AND CHANGE

Three contenders for the title of 'Theseus' ship' can be identified from the paradox. The first being the original and unchanged collection of planks; the second being the result of the replacement of original's planks with new planks; and the third being the reassembly of original's old planks to form a new ship. These three ships share commonalities, and arguments exist for each claiming that they are the true ship of Theseus. The main focus of these arguments comes down to the constitution of the ships – in particular whether the entirety of the ship is more important than the planks and how their constitutions affect how they are identified.

Material constitution refers to the unique particles of matter that make up, or constitute, an object. If identity was based solely on material constitution, then it is possible that two distinct material objects, such as shoes, could never occupy the same place at the same time, even if they seemed identical. But if material constitution is identity, the same object may not be able to keep its identity after a

change has occurred, such as a new shoe becoming a used shoe. An example of such a change can be seen in Epicharmus' 'Debtor's Paradox' which goes roughly as follows.

A poor but resourceful debtor is approached for payment but responded with a riddle,

'If you add a pebble to a collection of pebbles, you no longer have the same number. If you add a length to a cubit, you no longer have the same measure. In the same way, if you add a bit of matter to a portion of matter you no longer have the same entity. Since man is nothing more than a material object whose matter is constantly changing, we do not survive from one moment to the next.'

(Gallois, 2005)

The debtor concludes that he is not the same person who incurred the debt so he cannot be held responsible for the payment.

Irving Copi once outlined the problem of identity through time by noting that the following two statements are paradoxical, "If an object which changes really changes, then it cannot literally be one and the same object which undergoes the change. But if the changing thing retains its identity, then it cannot really have changed." (Copi, 1954) Therefore how can a definitive distinction be made between change and identity? If the identity of a thing changes then obviously it does 'change', but when there is a physical change how does its identity remain unchanged?

According to Aristotle, there are two types of change, "accidental" and "essential". 'Accidental changes are ones that do not result in a change in an object's identity after the change, such as when a house is painted, or one's hair turns gray. Aristotle thought of these as changes in the accidental properties of a thing. Essential changes are those which don't preserve the identity of the object when it changes, such as when a house burns to the ground and becomes ashes, or when someone dies.' (Gallois)

With reference to Aristotle's 'accidental changes', ones physical growth can be described in this way; the cells in the body 'accidentally' change because they slowly

change as a part of a greater thing. Therefore the 'identity' of the individual has not changed, according to Aristotle. But is this really the case? Accidental changes may cause a person to change their physical appearance, and therefore question their identity. Identity could therefore be substantial evidence to keep a criminal in jail, even if their 'accidental' properties have been changed. In order to address this, the definition of 'identity' and how it changes must be explored.

A distinction must be made between material constitution and identity in order to determine what elements make up identity. It is possible that constitution, unlike identity, is not an equivalence relation. To put this more simply, there are no specific elements of identity that, in union, create identity. In one definition of constitution, we could say that the reassembled ship is never identical with the original ship, but only constituted from exactly the same planks as the original. This means that the identity of the original ship is not passed on with its planks, and therefore there can never be two of Theseus' ships coexisting.

Although, some people argue that constitution *is* identity in itself; that the planks *are* the identity of Theseus' ship. If this were the case, then all other intangible factors would have no effect on the identity of the ship. This view may work for an object such as a ship, but it may not work when analysing the identity of a person.

PERSONAL IDENTITY

Personal identity consists of various subjective elements of an individual including their genetics, personality, intelligence and history. Identity can also include the way people define themselves and the values that structure their life. An individual's identity is therefore a set of properties that classify an individual as a unique person. But there are various questions as to what it is to be a person, and what is necessary for something to count as a person as opposed to a non-person. (Olson) The predominant factors that distinguish a person from anything else include the fact that they are biologically a member of the species *Homo sapiens*, they have the ability to make conscious decisions, they have intelligence, and some would say that they

possess a 'soul' or its equivalent. These attributes, at least, are the difference between a person and a bear, tree or a rock.

A person's identity does not necessarily change every time a physical change occurs; similarly, their personality is a fairly consistent characteristic. It is possible that identity can only exist within a specific time frame, for example a person's identity expiring with their body's cells. The idea that a person's identity can exist from one time to another is referred to as the persistence of their consciousness. So, what does it take for the same person to exist at different times? (Olson) A possible answer to this question relies on the persistence, or continuity, of material constitution over time.

Another possible answer to the question of persistence relies on evidence. For instance, what evidence bears on the question of whether the person who went to the corner store today to buy milk is the same one who went to the corner store to buy bread yesterday? There are different forms of evidence that can be used. One source of evidence is first-person memory: if you remember doing something, it was probably you who did it. Another source of evidence is physical continuity: if the person who did it looks just like you, it is reason to believe it is you. (Olson) Therefore first-person memory may count as evidence alone, or it may only be valid if we check it against the security footage in the corner store.

Though the question of evidence is somewhat similar to the question of persistence, the two are different. What it takes for a person to persist through time is one thing; how we might find out whether they have is another. For example, imagine two people with the same fingerprints; one of them commits a crime and the other is charged with the crime as a result of available physical evidence. Even though this evidence may be conclusive, having the same fingerprints is not what it takes for a past or future person to be the same; it is neither necessary (they could survive without any fingers at all) nor sufficient (someone else could have the same fingerprints as theirs). (Olson) Let's say that material constitution (this includes all our physical features such as fingerprints, facial structure and skin colour) is our only identity. Then due to the fact that the cells, hence our material constitution, in our

body are constantly changed, it may be difficult to determine whether or not a past or future person is the same person as us.

ACKNOWLEDGEMENT OF CHANGE IN A JUSTICE SYSTEM

All countries require some sort of system to maintain justice and to ensure the laws and constitution of that country are upheld. While the two terms 'legal system' and 'system of justice' can be used interchangeably, the term 'system of justice' is more illustrative as it can be used with a wider scope in the context of this essay. The two most widely used justice systems are Common Law and Civil Law. (Farlex, Inc.) Each justice system has its own system of criminal justice. This means that legislation in one area may not be the same as another. The principle of justice is a consequence of our social nature; we all seek what is fair, for the most part. The Common Law system in Australia can be divided into two categories:

1. The criminal law which includes law made by government (legislation) and law made by the courts (precedent); and
2. The judicial process that involves courts and judges.

The subjective elements of an individual, as discussed earlier, include their genetics and character as examples. These elements play a different role depending on which category is focused on. The law (1) is not subjective; it does not consider subjective elements of an individual. If someone commits a robbery (and all the elements of the crime can be proven) then they are guilty of the crime. It does not matter if they committed the crime last week or 10 years ago, it also doesn't matter if they are 20 or 50, black or white. There are some limitations to the application of the law; firstly, it only applies to people over 10 in Australia (if you are younger than this you cannot commit a crime by definition); secondly, if someone is severely mentally disabled or ill (they can also not be guilty of a crime, although they can be involuntarily detained and treated) and; thirdly, a statute of limitations may apply to the specific crime, but this can be waived by the court. So, the law (1) does not consider the paradox of Theseus because it does not recognize personal change and identity. In the case of Roman Polanski, he has performed acts that have broken the law; it doesn't matter when it happened. (Goodfellow)

The second category, the judicial process (2), considers the law (1) but also has the ability to consider additional subjective facts and circumstances of a crime. A court or jury when assessing the law (1) will have to be totally objective (that is, it does not consider any subjective factors such as personal change and identity), but once a person is found to have broken the law (1) then the judicial process will consider the subjective elements. In other words, once a person is found guilty, the court will consider any and all factors it wants. These will include factors such as a personal change, identity, age, history and remorse. The jury is involved in the first stage (i.e. the jury will determine the guilt or innocence of a person) but a judge is responsible for the sentence. The defence lawyer will plead the case for the defendant. They usually tell their personal story (their background, why they committed the crime, how remorseful they are, how they have changed and what they now do with their life). The judge will then consider these factors as well as their obligation to protect the community and their obligation to deter others from committing the crime. The judge will balance all these factors when determining what sentence to impose. (Goodfellow) In terms of the paradox of Theseus, the judicial process (2) does recognise it, but in any case it may not have a great effect on the final sentence made.

ILLUSTRATIVE EXAMPLES

Roman Raymond Polanski is a French-born Polish film director who has won many prestigious film awards. On the 10th of March, 1977, the 43 year old Polanski was arrested and charged with a number of offences against a 13 year old girl which took place in the U.S. Polanski was charged with 'rape by use of drugs, perversion, sodomy, lewd and lascivious act upon a child under fourteen, and furnishing a controlled substance to a minor.' (Allen) After psychiatric testing, Polanski fled to France in February of 1978 before he was formally sentenced. Being a French citizen, he has been protected from extradition, and was a fugitive for many years. All of his charges remained pending until September of 2009 where he was arrested by Swiss police while accepting an award at the Zurich Film Festival. On November 25, 2009, Polanski was put under house arrest.

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Charles Zentai is an 87 year old Hungarian man charged with war crimes that took place during World War II, and who found a new home in Australia. Hungarian authorities wanted the man extradited from Australia to face the allegation of torturing and murdering a Jewish teenager in Budapest in 1944. However some people see the prosecution of an elderly man many years after the alleged crime as 'an improper imposition on the defendant and a waste of community resources' (Boas). In 1988, the commonwealth government amended the 1945 War Crimes Act and prosecuted three Ukrainian immigrants accused of committing war crimes during World War II. All of these prosecutions failed for numerous reasons: evidence was lost, memories faded, witnesses died and offenders became old and frail. In war crimes cases this is especially accentuated by distance and cross-jurisdictional issues. (Boas)

The cases above can easily be related to the paradox of Theseus mainly because they question identity over time. In April 2009, Federal Court judge John Gilmour found that there was no reason why Zentai should not be extradited to face trial. If he is successfully extradited, the case would be historic as no one has ever been extradited from Australia in a war crimes case, although not for want of war criminals or evidence. (Balint) The American Government's incentive to extradite Polanski was that he had not faced justice for his crime. Through the lens of Theseus' paradox, a simple question can be asked: are Polanski and Zentai the same people they were when they committed their respective crimes? Biological testing would conclude that these criminals are exactly the same people, but as we now know, material constitution is not the only factor that creates our identity.

In the case of Theseus' paradox, Polanski's planks have been replaced; the cells that made up his body at the time he committed the crime have changed to form the body he has today. Although there must be good reason for Polanski to be charged 32 years, and Zentai over 50 years, after the occurrence of the crimes. Focussing on the crime, rather than the criminal, we can see some logic behind the belated prosecutions. No matter how much the criminal has changed the crime has still been committed; therefore someone needs to be blamed for the crime, and this would most likely be the person who best matches the evidence provided.

However, there are perspectives that look at cases of extremely belated prosecutions and whether there is any point in proceeding with the matters at all, one reporter saying that ‘there are powerful incentives for simply turning our collective back on this story and letting the old man be. (Balint) This approach would assume that Zentai had changed, most obviously by age but also enough to avoid being prosecuted for his war crimes. Identifying such a change in a person may have a major affect on judicial rulings if it were to be implemented into present day trials.

THE PARADOX WITHIN A JUSTICE SYSTEM

Focussing on Common Law, the implications of Theseus’ ship on the decisions made within the criminal justice system are numerous yet restricted within the confines of the Common Law system. According to law (1), it is possible that we can claim someone to be accountable for a crime they committed many years ago, as in Polanski’s and Zentai’s case, but they have undergone many changes. We can question if an individual is the same person that committed a crime so many years in the past, assuming they did commit it. What is it that makes them the same person, and what is it that doesn’t? When applying the paradox of Theseus to this question, there are a few possible outcomes that can be identified. It may be assumed that Theseus’ ship is still the same ship, and therefore that a person still is the same person who committed a crime in the past. Alternatively, it may be assumed that Theseus’ ship is not the same ship after the change of planks, and therefore that a person is not the same person who committed the crime. But how can these two very different outcomes affect the trial of a criminal in the court of justice?

The elements of identity may be viewed by courts as the only important factor when sentencing, as the possibility of a change in identity does not truly exist in the justice system today. In other words, the criminal standing in front of the court has never, and will never, change. However, if we split the idea of personality and individual character from identity, there are some aspects of the criminal justice system that recognise a person can change their character, if not their identity. This is seen in statutes of limitations, which prevent a person from being prosecuted or sued for an act after a certain amount of time has elapsed. This is predominantly due to judicial

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certainty; a specific time period allows people to know that legal action cannot be taken after a certain time. It is also due to judicial resources as there are limited resources for prosecuting and it is better to apply those resources to recent crimes as opposed to extremely old ones. Major exceptions to statutes of limitations are serious crimes such as murder.

Parole is another example that supports the idea that people can change if not their identity, then at least their character. The notion that people should be released from prison after they have 'done their time' seems to reflect the aspiration that people can change over time. (Crowe)

Statute of limitations, due to the possible degradation of evidence, and parole are areas of the Common Law system that appear to recognise the paradox of Theseus, with some exceptions such as serious crimes against humanity. But would the justice system benefit from taking more notice of this issue? For instance, applying statutes of limitations to crimes as serious as murder, and identifying the criminal's change may have positive and negative implications on their lives. They could, for example, be released from jail never to kill again and lead a positive life in their society. Or they may in fact revert to their old habits and murder again. A possible reason why there is not much notice of the paradox of Theseus is that it is so difficult to identify non-biological change within a human being, let alone a ship that looks exactly the same. Further study into this issue may develop a method to identify change, and allow case by case verdicts with the paradox of Theseus in mind.

CONCLUSION

The Ship of Theseus paradox has presented us with the predominant question of personal identity and change. Using Aristotle's philosophy, the ship undergoes accidental changes; the planks are replaced, but the 'identity' of the ship is not lost. This is similar to humans in that humans undergo physical growth and biological changes but their 'identity' is not lost. Identity relies on many different factors including material constitution, continuity, persistence and evidence. Identity is a combination of the physical and intellectual structure of a person, and the subjective elements that contribute to their personality. One of the purposes of identity is to allow an individual to be identified by their unique characteristics.

Using the examples of Roman Polanski and Charles Zentai, it has been found that the criminal justice system essentially ignores this issue of change in identity. It simply assumes that a criminal defendant is the same person throughout her or his life, despite the philosophical questions that may arise. Therefore, the paradox of Theseus does not greatly influence the decisions made in a system of justice at the present time. In some cases, implementing the idea of the paradox of Theseus into decisions could have a positive effect on the criminal and society. It is however difficult to prove change in a person's identity, and future study and development in this area will allow change to be identified, acknowledged and incorporated into rulings. However, criminal justice serves the purpose of protecting society and ensuring criminals are treated with justice. Since, at this time, there is no accurate way of knowing that a freed criminal won't commit any more crimes, it may be an undesired risk to take. Given this risk, it does not appear that the system will change to accommodate the philosophical question of identity and change.

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