

# MULTIPLE PERSONALITY DISORDER, ACCOUNTABLE AGENCY, AND CRIMINAL ACTS

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## I. INTRODUCTION

Smedley Wormwood is an accountant who is indicted for embezzling funds from the company for which he works. He generally presents an impression of an unobtrusive, conventional, compliant, “vanilla” individual. When his lawyer interviews him about the charges, Smedley seems innocent, frightened, and bewildered. In discussing the details of events around the time of the alleged crime, Smedley becomes somewhat vague and then admits to some lapses in recall. Smedley then startles the lawyer by apparently undergoing a marked change in attitude, tone of voice, and apparent self-identity. The lawyer realizes that she is now discussing the crime with a confident, angry, arrogant client who identifies himself as Slick and announces that he took the money this time, just as he has before. Slick describes prior crimes of various types and laughs about the possibility that “the worm” will be convicted and punished for this episode.

A clinical evaluation results in the diagnosis of dissociative identity disorder (“DID”), more traditionally referred to as multiple personality disorder.<sup>1</sup> Wormwood experiences two states of consciousness. He holds a job as an accountant, rents an apartment, and carries on the mundane affairs of life as Smedley. At certain times, however, he takes on the consciousness of Slick, the psychopathic personality who engages in a variety of types of exploitative and criminal behavior. While Smedley is anxious, compliant, and passive, Slick is confident, arrogant, and aggressive. Smedley has no awareness of Slick or of conduct performed as Slick. Smedley is sometimes embarrassed by lapses in memory and by episodes in which he finds himself in strange places or encounters unfamiliar people who seem to know him. Slick is aware of Smedley and of Smedley’s experience. Slick

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<sup>1</sup> AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 484 (4th ed. 1994) [hereinafter DSM-IV].

perceives Smedley's experience from the perspective of an observer, and he despises "the worm."

Reported cases occasionally address the significance of DID for criminal responsibility.<sup>2</sup> Courts and commentators debate the proper approach to this question without arriving at any consensus. Most often, this dispute addresses the most appropriate manner in which to apply the insanity defense or some alternative criteria of criminal responsibility.<sup>3</sup> Reflecting upon the criminal responsibility of defendants who engage in criminal conduct while manifesting DID provides an opportunity to examine three more general issues. The first involves the exculpatory significance of impaired consciousness as it occurs in DID or in other disorders. Second, this analysis might inform the conception of accountable agency represented by the voluntary act requirement included in the standard legal criteria of criminal responsibility. Third, this analysis demonstrates that in order to understand the exculpatory significance of a particular type of psychopathology, one must integrate description and explanation of the specific pattern of functional impairment with the principles of political morality underlying the applicable criteria of criminal responsibility.

Courts and commentators present several interpretations of the legal significance of DID for criminal responsibility. These interpretations reflect different analyses of the psychological and legal relationships among the individual with DID and the component personalities.<sup>4</sup> I argue here that the most defensible approach addresses the individual with DID, rather than any component personality, as the proper subject of criminal responsibility. This approach most consistently integrates the clinical impairment of consciousness manifested in DID with the current structure of criminal responsibility. This argument defends the following theses. First, to the extent that DID exculpates criminal defendants, it does so for the same reasons that support the exculpatory significance of impaired consciousness more generally. Thus, a satisfactory analysis of DID and criminal responsibility must address DID as a disturbance of consciousness. Second, the exculpatory significance of impaired consciousness ordinarily applies to the criteria of responsibility traditionally represented by the act, or voluntary act, requirement rather than those represented by the insanity defense. Third, this interpretation reflects the concept of accountable

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<sup>2</sup> See, e.g., ELYN R. SAKS WITH STEPHEN H. BEHNKE, *JEKYLL ON TRIAL: MULTIPLE PERSONALITY DISORDER AND CRIMINAL LAW* 120–28 (1997); Sabra M. Owens, *Criminal Responsibility and Multiple Personality Defendants*, 21 *MENTAL & PHYSICAL DISABILITY L. REP.* 133, 134–37 (1997).

<sup>3</sup> See, e.g., SAKS WITH BEHNKE, *supra* note 2, at 2–5; Owens, *supra* note 2, at 134. See generally JENNIFER RADDEN, *DIVIDED MINDS AND SUCCESSIVE SELVES* 125–42 (1996) (discussing multiple personality disorder and culpability in criminal law).

<sup>4</sup> See discussion *infra* Part III.

agency relevant to legal criteria of criminal responsibility in a liberal society.

Part II of this Article provides a brief description of the contemporary understanding of DID. Part III sketches the most common approaches adopted by courts and commentators to the evaluation of the criminal responsibility of defendants manifesting DID, and Part IV raises three important questions regarding these approaches. Part V advances an alternative pattern of analysis intended to address the three questions raised in Part IV. Part VI applies this pattern of analysis in order to explain the significance of DID and of impaired consciousness generally for criminal responsibility and for the underlying conception of accountable agency. Part VII concludes the analysis.

For the sake of consistency, this article adopts the following terminology. "DID" refers to the clinical syndrome as sketched above and commonly described by various clinical nomenclatures and commentators. "Multiple" refers to an individual, such as Wormwood, who manifests fragmentation of consciousness qualifying for the clinical diagnostic category of DID. "Alter" refers to a relatively well-organized and consistent state of consciousness that the multiple experiences as a distinct or independent person, personality, or entity. The "host" is the alter that represents the multiple in the mundane activities of daily life. In many cases, the multiple takes on the host consciousness more often than any other, but mere duration does not define the host. The host represents those portions of the individual's experience and consciousness that do not elicit the problematic or frightening emotional responsiveness around which other alters are organized. A particular alter is "out" or "in control" when that state of consciousness commands the multiple's body. Alters "switch" when one alter replaces another as the alter that currently commands the body.

## II. DISSOCIATIVE IDENTITY DISORDER

The description and incidence of DID remain controversial. Although some have framed this controversy as one about the existence of DID, it might be more fruitfully understood as a dispute about the diagnostic validity and clinical usefulness of the usual formulation of DID. That is, some commentators question whether the current formulation of DID provides an accurate or illuminating description of the pathology manifested by those who receive the diagnosis. Critics raise at least three different questions regarding the current formulation of DID. First, some or all of those diagnosed with DID might malingering the disorder, or certain aspects of it, particularly in circumstances raising questions of criminal

responsibility. Second, the disorder might represent an iatrogenic response to expectations or suggestions from certain clinicians. Third, although some individuals diagnosed with DID might suffer from significant dissociative disorders, the current formulation of DID might not accurately portray the impairment manifested by these individuals.<sup>5</sup> In addition, on the assumption that some individuals suffer from a disorder roughly similar to the current formulation of DID, individuals who receive the diagnosis might vary significantly regarding the precise nature of their impairment, including collateral psychopathology.<sup>6</sup>

This Article does not attempt to resolve these questions. Rather, it proceeds on the premise that the current formulation of the disorder provides at least a roughly accurate and minimally adequate description of a pattern of impairment suffered by some people who engage in criminal conduct. According to the current formulation, DID is a dissociative disorder in which an individual manifests fragmentation of consciousness. Ordinary consciousness involves a relatively consistent and integrated awareness of one's self, one's environment, and the relationship between the two.<sup>7</sup> DID has traditionally been referred to as multiple personality disorder because the individual develops at least two distinct aspects of consciousness identified as personalities or alters. Each of these alters considers himself or herself a distinct person, personality, or entity.<sup>8</sup> Commentators usually designate one of these alters as the host, although the criteria that qualify an alter as the host are not entirely consistent. Frequently, the identified host is the personality that controls the person's body and presents itself to the outside world more often than any other alter and during the periods of relatively mundane daily functioning.<sup>9</sup> The other alters often represent some relatively strong and potentially conflicting emotional state such as anger, aggression, or sexuality. These alters are emotionally organized and driven in that they represent experiences, memories, and behavioral dispositions associated with a particular

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<sup>5</sup> Compare August Piper, Jr., *Multiple Personality Disorder and Criminal Responsibility: Critique of a Paper by Elyn Saks*, 22 J. PSYCHIATRY & L. 7, 11–19 (1994) (arguing that the central features of multiple personality disorder are not well-defined), with SAKS WITH BEHNKE, *supra* note 2, at 21–38 (discussing the arguments and evidence for and against the existence of multiple personality disorder and arguing that the law should recognize multiple personality disorder). See generally Symposium, 27 J. PSYCHIATRY & L. 367–705 (1999) (discussing the interrelationship between factitious behavior, dissociative disorders, and the law).

<sup>6</sup> See CAROL S. NORTH, JO-ELLYN M. RYALL, DANIEL A. RICCI, & RICHARD D. WETZEL, MULTIPLE PERSONALITIES, MULTIPLE DISORDERS: PSYCHIATRIC CLASSIFICATION AND MEDIA INFLUENCE 44–45 (1993).

<sup>7</sup> See LAWRENCE C. KOLB, MODERN CLINICAL PSYCHIATRY 26–28 (9th ed. 1977).

<sup>8</sup> See DSM-IV, *supra* note 1, at 484–85, 487; SAKS WITH BEHNKE, *supra* note 2, at 9.

<sup>9</sup> See FRANK W. PUTNAM, DIAGNOSIS AND TREATMENT OF MULTIPLE PERSONALITY DISORDER 107 (1989); SAKS WITH BEHNKE, *supra* note 2, at 11.

emotional state in relative isolation from the comprehensive set of psychological characteristics that comprise an intact consciousness.<sup>10</sup>

Fragmented consciousness lies at the core of the disorder in that people who suffer from DID experience an array of emotional states, memories, and behavioral dispositions similar to those experienced by people not suffering from DID, but they experience some of these psychological states as encapsulated within relatively distinct compartments of consciousness. Thus, they experience these psychological states and tendencies without the context of a more comprehensive set of psychological characteristics ordinarily provided by integration of awareness.<sup>11</sup> Wormwood, for example, represents a relatively simple division of consciousness in that he performs most of the ordinary tasks of daily life in the state of consciousness identified as Smedley. As Smedley, Wormwood is not aware of intense angry and aggressive emotional states and behavioral tendencies. When these responses become intense, Wormwood experiences an alternative state of consciousness identified as Slick. In this state of consciousness, Wormwood experiences and indulges his anger in relative isolation from the moderating influence of those aspects of his consciousness encapsulated in the identity of Smedley. When Wormwood experiences the host identity of Smedley, he is unaware of the experiences and conduct associated with Slick. When he experiences the alternative identity of Slick, he is aware of the personality traits and behavior of Smedley, but he does not experience these as aspects of himself. Rather, he interprets these as belonging to a different being whom he despises and to whom he refers as “the worm.”

More complex variations of DID can include any number of alters, each of which usually represents some central emotional state and each of which becomes active in circumstances that elicit that type of emotional responsiveness. The alters can vary significantly in the manner and degree to which they are aware of the experience and behavior associated with the other alters and in the degree and manner in which they can influence conduct performed as another alter.<sup>12</sup>

Clinical case descriptions vary markedly regarding a number of important factors. Reports indicate that alters vary widely in the degree to which they are conscious of each other’s experience and that multiples vary in the degree to which they can deliberately manage the process of

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<sup>10</sup> See Piper, *supra* note 5, at 12–13. See also PUTNAM, *supra* note 9, at 103–06 (describing the characteristics of alter personalities); COLIN A. ROSS, M.D., MULTIPLE PERSONALITY DISORDER: DIAGNOSIS, CLINICAL FEATURES, AND TREATMENT 108–25 (1989) (discussing the different types of alter personalities in patients with multiple personality disorder).

<sup>11</sup> See ROSS, *supra* note 10, at 86–90; Nicholas Humphrey & Daniel C. Dennett, *Speaking for Our Selves: An Assessment of Multiple Personality Disorder*, 9 RARITAN 68, 70 (1989).

<sup>12</sup> See PUTNAM, *supra* note 9, at 114–15.

switching states of consciousness in order to address specific situations.<sup>13</sup> Clinical accounts also indicate that some multiples manifest significant collateral psychopathology, including psychotic process, in certain states of consciousness.<sup>14</sup>

Wormwood represents a caricature of DID in the sense that he represents a simple case of the central defining characteristics of the disorder. He experiences only two clearly defined alters, and the Smedley alter is amnesic for the experiences of Slick. Wormwood manifests no serious collateral impairment of psychological capacities in either alter. Thus, Wormwood provides an uncomplicated case of DID that facilitates reflection on the exculpatory significance, if any, of the type of impairment that provides the defining criteria of DID.<sup>15</sup> In contrast, some who suffer from DID might also manifest psychotic process in certain states of consciousness, but the exculpatory significance of their pathology might rest upon that collateral psychotic process, rather than upon the impairment that supports the diagnosis of DID.

### III. DID AND CRIMINAL RESPONSIBILITY

Courts and commentators adopt several approaches to the assessment of the criminal responsibility of defendants who manifest DID. Courts frequently apply the insanity standard to the alter that was in control at the time the offense was committed.<sup>16</sup> Under the most common forms of the insanity defense, courts conclude that defendants are criminally responsible if the perpetrating alters understood what they were doing and that their conduct was wrong in the sense of being illegal or contrary to social standards. Most defendants with DID who commit crimes would be convicted under this approach because DID does not involve any major impairment of reality testing or reasoning.<sup>17</sup> A court that adopted this approach would conclude, for example, that Wormwood was guilty if Slick understood that he was taking money from his employer and that this conduct was illegal or contrary to social standards of acceptable conduct.

Alternately, a court might apply the criteria of insanity to the host.<sup>18</sup> According to some accounts of DID, multiples tend to concentrate angry, aggressive, or antisocial emotions and dispositions in their alters rather than in their hosts, and their hosts are usually unaware of these alters and their

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<sup>13</sup> See *id.* at 117–23.

<sup>14</sup> See NORTH ET AL., *supra* note 6, at 50–52. See also PUTNAM, *supra* note 9, at 57–70 (discussing psychiatric, neurological, and medical symptoms of alters).

<sup>15</sup> DSM-IV, *supra* note 1, at 487.

<sup>16</sup> See SAKS WITH BEHNKE, *supra* note 2, at 124–25; Owens, *supra* note 2, at 134–36.

<sup>17</sup> See Owens, *supra* note 2, at 137.

<sup>18</sup> See SAKS WITH BEHNKE, *supra* note 2, at 126–29; Owens, *supra* note 2, at 137.

conduct.<sup>19</sup> In these circumstances, the application of insanity standards to the host would result in acquittal because the host would have been unaware of the criminal conduct.<sup>20</sup> Wormwood, for example, would engage in illegal conduct as Slick, without any awareness by Smedley. Thus, Smedley would not have known the nature and quality of the conduct.

Some who accept the principle that the state cannot justifiably convict and punish an alter who was unaware of the criminal conduct at the time it was committed would endorse an approach that would exculpate the defendant with DID if any alter was unaware of that conduct. According to this approach, the presence of at least one innocent alter would preclude conviction and punishment because conviction and punishment of the defendant with DID would inflict that conviction and punishment upon an innocent alter. If one accepts this approach, conviction requires serial application of the insanity defense or other criteria of criminal responsibility to all alters. According to this “innocent alter” approach, the state can convict the multiple defendant only if all alters fulfilled criteria of criminal responsibility in some form.<sup>21</sup>

The perpetrating alter, host, and innocent alter approaches can generate markedly different results in any particular case. At a more abstract level, however, they share a common pattern of analysis. All three approaches adopt a “molecular” pattern of analysis in that all three treat Smedley and Slick as distinct foci of legal responsibility. Each of these approaches adopts a molecular pattern of analysis in that they each apply the criteria of responsibility to one or more alters, rather than to the multiple as a complex entity. They diverge in that they select different alters or combinations of alters as the subjects of analysis, and this difference generates different verdicts. The perpetrating alter approach finds that Slick fulfills the requirements of criminal responsibility and thus, that Wormwood is guilty. The host and innocent alter approaches find that Smedley does not fulfill the requirements of criminal responsibility and thus, that Wormwood is not guilty.

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<sup>19</sup> Humphrey & Dennett, *supra* note 11, at 70. *See also* PUTNAM, *supra* note 9, at 104–15 (describing different types of alter personalities and their awareness of each other).

<sup>20</sup> *See, e.g.,* United States v. Denny-Schaffer, 2 F.3d 999, 1013 (10th Cir. 1993) (holding that defendant was not guilty of kidnapping because host personality was not in control at the time of the offense). *See also* SAKS WITH BEHNKE, *supra* note 2, at 131 (discussing the standard set in *Denny-Schaffer*).

<sup>21</sup> *See generally* SAKS WITH BEHNKE, *supra* note 2, at 106–20, 132–34 (discussing the flaws in the *Denny-Schaffer* case and situations when individuals suffering from multiple personality disorder should be held responsible for their crimes).

#### IV. THREE QUESTIONS FOR THE MOLECULAR APPROACH

Consider three questions regarding the molecular pattern of analysis. First, who manifests DID? Slick might fulfill the requirements of antisocial personality disorder in that he has engaged in an extended pattern of conduct that violates the law and the rights of others. Slick might also meet the diagnostic criteria for psychopathy in that he demonstrates an inability to experience empathy, inhibitory emotions, and personal attachments.<sup>22</sup> Slick demonstrates no evidence of fragmented consciousness, however, nor does he experience amnesia. Similarly, Smedley might qualify for some diagnostic categories involving anxiety, but he manifests no evidence of impaired consciousness.<sup>23</sup> Smedley reports some lapses in recall. According to the molecular approach, however, Smedley's failure to recall Slick's experience is not amnesia because amnesia involves loss of memory for one's own experience. Neither Smedley nor Slick demonstrates any loss of memory for his own experience.

It might seem natural to say that Wormwood manifests DID, but to whom does "Wormwood" refer? The molecular approach attributes conduct and mental states relevant to the criminal charge to either Smedley or Slick. Since all waking periods of Wormwood's life occur in the consciousness of Smedley or of Slick, what counts as the psychological characteristics of Wormwood? One might refer to Smedley and Slick collectively as "Wormwood," as one might refer to John and Mary Smith as "the Smiths." It would be very odd, however, to attribute DID or any other form of personal psychopathology to "the Smiths."<sup>24</sup>

Alternately, one might argue that we can and should individuate persons differently for legal and clinical purposes. According to this interpretation, Smedley and Slick are the proper subjects of criminal responsibility, but Wormwood is the proper subject of clinical diagnosis and treatment. This line of argument merely rephrases the question. Under the molecular approach to criminal responsibility, alters are the entities subject to evaluation for criminal responsibility. Why would pathology suffered by any entity other than the subject of criminal responsibility affect the analysis? As usually understood, the insanity defense exculpates certain defendants because those individuals suffer from psychological

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<sup>22</sup> See generally DSM-IV, *supra* note 1, at 645–50 (discussing antisocial personality disorder); ROBERT D. HARE, WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US 33–82 (1993) (discussing the characteristics of the psychopath).

<sup>23</sup> See generally DSM-IV, *supra* note 1, at 393–444 (discussing anxiety disorders).

<sup>24</sup> Clinicians sometimes speak of pathological relationships, and in some cases it might be appropriate to say that the Smiths interact in such a manner as to manifest a pathological relationship. These diagnostic categories attributed to relationships constitute a separate type of relational malfunction, however, precisely because they address pathological patterns of interaction among persons rather than psychopathology of the person.



disorders giving rise to certain excusing conditions. It does not excuse them because some other individuals suffer such impairment.<sup>25</sup> If alters are the subjects of evaluation for criminal responsibility, then either Smedley or Slick must manifest the pathology that gives rise to the claim of exculpation.

Second, if one accepts the molecular approach, why would one think DID raises any problem of criminal responsibility? Slick clearly fulfilled the requirements of criminal responsibility, while Smedley clearly did not because he neither engaged in criminal conduct nor was aware of any criminal conduct. These circumstances raise a dispositional problem because executing Slick's sentence would injure the innocent Smedley, but they do not seem to raise difficult questions of criminal responsibility. Smedley and Slick are not unique in creating such practical problems of disposition. Consider, for example, criminals who provide the sole support for their children, corporate entities, and major shareholders in corporations. In each case, executing the sentence may cause severe injury to innocent children, shareholders, or employees respectively. These circumstances raise perplexing problems for the criminal justice system, but they do not represent difficult determinations of criminal responsibility.

Suppose that Guido, a career criminal, realizes that a trail of evidence will lead to his apprehension. He volunteers to save the life of the holy but very ill Mother Beneficence by allowing the physicians to connect her failing kidney to his own. When a rival gangster visits the hospital room to taunt Guido, Guido draws a gun from under his pillow and kills the rival, to the horror of Mother Beneficence. The police and prosecutor have clear evidence that Guido committed the homicide, but they realize that incarcerating him would require that the state either incarcerate Mother Beneficence along with Guido or disconnect her from him, causing her death.

These circumstances create a perplexing problem of disposition, but the matter of criminal responsibility remains clear. Guido is guilty of the murder of his rival, and Mother Beneficence is not. It seems highly unlikely that anyone will think that the court encounters a difficult question regarding the criminal responsibility of someone named "Guido-Beneficence," rather than a difficult dispositional problem. Under the molecular approach to the criminal responsibility of those who manifest DID, it seems that Smedley and Slick present the same type of case as that

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<sup>25</sup> See generally AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES § 4.01 (Official Draft and Revised Commentaries, 1985) [hereinafter MPC] (discussing standards for when an individual should or should not be held responsible for his conduct when suffering from a mental disease or defect); PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 173(b) (1984) (discussing the element of mental disease or defect in an insanity defense).

presented by Guido and Mother Beneficence. In each case, one party is clearly guilty and the other is clearly innocent. Authorities encounter a dispositional problem because punishing the guilty party will inflict harm on the innocent party. Yet, the two cases seem intuitively to raise different concerns. These cases differ precisely because Guido-Beneficence elicits unambivalent application of the molecular pattern of analysis yet this same approach fails to capture the critical features of Wormwood's case.

Cases involving criminal conduct of defendants suffering from DID initially appear interesting precisely because they raise the perplexing problems of criminal responsibility expected to inform our understanding of the complex issues and principles of criminal responsibility.<sup>26</sup> Rather than addressing these issues in a manner that informs our understanding of the underlying principles and the broader category of cases involving impaired consciousness, the molecular approach apparently dissolves the questions regarding criminal responsibility. The cases seem to raise only practical problems regarding disposition.

Casting these cases as difficult dispositional problems raises once again the first question regarding the identity of the person who suffers from DID. One common answer to this dispositional problem endorses civil commitment to a mental health facility in order to protect the public and to provide treatment for the multiple.<sup>27</sup> Civil commitment, however, ordinarily requires mental illness and dangerousness, and the molecular approach renders it mysterious as to who fulfills these requirements.<sup>28</sup> Some of Slick's conduct may qualify as dangerous, although it is not at all obvious that embezzlement so qualifies. There is no indication that Smedley has engaged in dangerous behavior. Neither Smedley nor Slick manifests any indication of DID. Furthermore, neither suffers from any other major psychological disorder of a type that would ordinarily support civil commitment.<sup>29</sup>

The host and innocent alter applications of the molecular approach avoid the problem of subjecting an innocent alter to unjustified criminal condemnation, but the molecular approach encounters an analogous, and perhaps more severe, problem with commitment. On the host and innocent alter applications of the molecular approach, DID frequently supports an acquittal because criminal conviction would condemn and incarcerate at least one innocent alter for the culpable criminal conduct of another. Civil commitment would confine both alters, although neither would fulfill the

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<sup>26</sup> See SAKS WITH BEHNKE, *supra* note 2, at 2–7. See generally RADDEN, *supra* note 3, at 125–42.

<sup>27</sup> See SAKS WITH BEHNKE, *supra* note 2, at 158–63; Owens, *supra* note 2, at 138.

<sup>28</sup> See generally John Parry, *Involuntary Civil Commitment in the 90s: A Constitutional Perspective*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 320, 322–23 (1994) (discussing the different criteria used for civil commitment throughout the country).

<sup>29</sup> See *id.* at 322–23.

legal requirements that justify such confinement. Slick but not Smedley might fulfill the dangerousness requirement, and neither manifests any major psychological impairment that would fulfill the mental illness criterion.

Third, suppose Smedley committed the crime. Would most people have the same intuitive judgment of responsibility and the same concerns about the justification of executing the sentence that they would experience if Slick had committed the crime? Ordinarily, one would expect that criminal conduct by a person suffering DID would occur when an angry, aggressive alter commands the body. Smedley presents as a compliant individual precisely because Wormwood's antisocial desires have become encapsulated in his consciousness as Slick. It is conceivable, however, that the ordinarily compliant Smedley might decide to embezzle in unusual circumstances. Does the intuitive inclination regarding Wormwood's criminal responsibility remain constant whether Wormwood commits the crime in his consciousness as Slick or as Smedley? On the molecular approach, there seems to be no reason to distinguish these two variations of the story because in either case, one alter would be convicted and punished despite not having participated in the crime.

In short, the molecular approach misconstrues these cases in two important ways. First, it obscures the nature of the clinical impairment that lies at the core of DID. The disorder involves severely fragmented consciousness; addressing each alter as a distinct entity obscures this fragmentation of consciousness. Rather than a form of psychological impairment, DID appears to present a coordination problem among distinct entities. Second, the molecular approach fails to engage the central legal issue involving the significance of distorted consciousness for criminal responsibility. It recasts the legal problem as a dispositional one regarding the manner in which legal institutions should respond when holding one entity criminally responsible will cause hardship to a distinct and innocent entity.

## V. THE ALTERNATIVE MOLAR APPROACH

### A. THE MOLAR APPROACH

The molar approach addresses Wormwood as the subject of criminal responsibility. Wormwood experiences two modes of consciousness in that he experiences and behaves as Smedley and as Slick. These modes are not entirely independent. Although Wormwood might have knowledge and skills in each mode of consciousness that is not available to him in the other, significant learning and knowledge permeates the boundaries among

alters.<sup>30</sup> As-Smedley and as-Slick are aspects of Wormwood, so Wormwood knows everything that falls within the awareness of each aspect, including the nature and quality of the conduct he performs in either mode and that it is illegal or wrongful in the sense relevant to criminal responsibility.

Does it seem to matter intuitively, however, for evaluation of guilt whether Wormwood committed the crime as Smedley or as Slick? Does it seem intuitively more or less justified to convict and punish Wormwood for conduct performed as Smedley or as Slick? According to the original story, Wormwood was puzzled and frightened because he was charged with a crime that he had committed as Slick and regarding which he was unaware as Smedley. Suppose, in contrast, that the investigation demonstrates that Wormwood embezzled in his as-Smedley aspect of consciousness. Wormwood became frustrated and angry because as Smedley he was denied a raise he thought he deserved, so he decided to “give himself a raise.” As Smedley, he embezzled money from his employer, telling himself that he was not really stealing because the employer was taking advantage of his loyalty. Slick merely looked on, commenting that “I guess the worm ain’t as holy as he claims.”<sup>31</sup>

#### B. COMPARE OTHER TYPES OF IMPAIRED CONSCIOUSNESS

As ordinarily understood, DID is a dissociative disorder of consciousness.<sup>32</sup> Unimpaired consciousness involves a relatively comprehensive and well-integrated awareness of oneself, the environment, and one’s relationship to that environment. This relatively consistent and well-integrated awareness of experience in relation to events in the environment provides the individual with a unifying sense of self as an identity that extends over time and circumstances.<sup>33</sup> A variety of disorders involve some disturbance of the ordinary integration of consciousness and memory.<sup>34</sup> Those who manifest DID develop compartmentalization of consciousness such that they experience various events, behavior, and

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<sup>30</sup> See PUTNAM, *supra* note 9, at 114–15; Humphrey & Dennett, *supra* note 11, at 70; Elyn R. Saks, *Does Multiple Personality Disorder Exist? The Beliefs, the Data, and the Law*, 17 INT’L J.L. & PSYCHIATRY 43, 62–63 (1994).

<sup>31</sup> As-Slick is coconscious with as-Smedley, but he is not able to direct or intervene in the conduct Wormwood performs as Smedley. Thus, as-Slick can observe the embezzling, but as-Slick observes that conduct as the behavior of an entity he understands as a distinct actor whom he identifies as Smedley or “the worm.”

<sup>32</sup> See generally DSM-IV, *supra* note 1, at 477, 484–87 (discussing multiple personality disorder); KAPLAN AND SADOCK’S SYNOPSIS OF PSYCHIATRY 638, 644–48 (Harold I. Kaplan & Benjamin J. Sadock eds., 7th ed. 1994) [hereinafter KAPLAN & SADOCK] (discussing dissociative disorders and multiple personality disorder).

<sup>33</sup> See KAPLAN & SADOCK, *supra* note 32, at 638; KOLB, *supra* note 7, at 26–28, 151–52.

<sup>34</sup> See generally DSM-IV, *supra* note 1, at 477–91 (describing the general category of dissociative disorders); KOLB, *supra* note 7, at 151–54 (describing several manifestations of disturbance of consciousness).

psychological responses and processes as occurring within distinct spheres of consciousness referred to as alters or personalities. Rather than an integrated identity that extends across time and experience, they develop separate identities for various spheres of consciousness. This compartmentalization of consciousness includes amnesia within certain spheres of consciousness for at least some experience of the other spheres.<sup>35</sup>

Although this compartmentalization of consciousness and memory into distinct spheres identified as personalities or alters represents the most striking feature of DID, disorders other than DID reveal a similar underlying pathology in that they also involve dissociation of the ordinarily integrated functions of consciousness and memory. Consider, for example, conduct performed in a state of impaired consciousness associated with an epileptic seizure. Some individuals who suffer from epileptic seizures perform simple or complex movements while experiencing clouded consciousness associated with the seizures. These individuals occasionally engage in violent behavior while unaware or only partially aware of their conduct, their circumstances, and themselves. Due to dissociation of ordinarily integrated aspects of consciousness and memory, they may experience intense fear or anger and strike out at a nearby person without conscious awareness of other relevant circumstances or of their own extended set of beliefs, wants, interests, and principles.<sup>36</sup>

Some individuals suffer from a similar state of impaired consciousness associated with hypoglycemia. During these periods of impaired consciousness, they may engage in complex or aggressive behavior.<sup>37</sup> A similar phenomenon is said to occur with somnambulism.<sup>38</sup> In one case, a woman reportedly killed her daughter during a period of somnambulistic distortion of consciousness.<sup>39</sup> The woman is described as engaging in a complex pattern of behavior during which she remained asleep, yet was apparently sufficiently conscious of her immediate environment to leave her bed, walk through the house to a woodheap, retrieve an ax, walk to her daughter's bedroom, and deliver two accurate and deadly strokes.<sup>40</sup>

These disorders of consciousness share a common behavioral pattern insofar as they involve organized, directed, apparently purposeful, and at least partially environmentally responsive conduct. By all appearances, at

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<sup>35</sup> See DSM-IV, *supra* note 1, at 484–87; KAPLAN & SADOCK, *supra* note 32, at 638, 644–48.

<sup>36</sup> See *R. v. Sullivan*, 2 All E.R. 673, 677 (H.L. 1983); G.M. Paul & K.W. Lange, *Epilepsy and Criminal Law*, 32 MED. SCI. & L. 160, 163–64 (1992) (discussing *R v Sullivan*). See also ROBERT F. SCHOPP, *AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY: A PHILOSOPHICAL INQUIRY* 150–51 (1991) (discussing temporal lobe epilepsy).

<sup>37</sup> See, e.g., *R. v. Quick*, 3 All E.R. 347, 350 (C.A. 1973).

<sup>38</sup> See Norval Morris, *Somnambulistic Homicide: Ghosts, Spiders, and North Koreans*, 5 RES JUDICATAE 29, 29–30 (1951).

<sup>39</sup> See *id.*

<sup>40</sup> *Id.* at 30.

least some of those who engage in conduct while suffering these disorders know what they are doing and act purposefully. Those who suffer from these disorders also share a common type of impairment insofar as each acts in a state of impaired consciousness precluding access to the comprehensive set of beliefs, wants, interests, and principles that constitute that person's identity as an accountable agent. Many people might say of these defendants, "they were not themselves when they committed those crimes." In saying that the person was not his or her self, however, observers might *not* mean that the actor did not know what he or she was doing or did not do it purposely but rather that the actor did not know himself or herself. That is, those who engage in conduct while suffering this type of impairment act without access to the comprehensive set of psychological states that constitutes their extended identities.

### C. COMPARE YOURSELF

Think of yourself as an example of an ordinary person in stressful, although not particularly unusual, circumstances. Try to imagine your psychological experience of the situation, the manner in which you would probably behave, and the relationship between these two aspects of your responses. Imagine yourself getting out of bed on Monday morning with pressing responsibilities awaiting when you arrive at work. As you attempt to depart early for work, your kids are screaming and fighting, and you argue with your spouse about which of you is responsible for getting the kids ready for the school bus. When you finally leave the house, the traffic is awful and you fall further behind schedule, arriving late for work. As you arrive, your supervisor berates you for your late arrival on such a busy day. The supervisor continues to criticize you throughout the very unsuccessful day at work, and rush hour traffic renders your return commute more stressful than usual. As you enter the house, you find that your spouse has yet to return, the television is blaring, and the kids are fighting and screaming.

You immediately feel your anger surge, and your first thought is, "I'll pull the plug out of that damn TV, grab both kids by their throats, and strangle them; that'll shut them up." You immediately yank the plug out of the wall, grab the kids by their arms, and propel them into their bedrooms. You grit your teeth and repeat to yourself: "control yourself"; "you're supposed to be the adult"; "you spoiled them"; "you'll feel awful later"; "don't make it worse"; "you'll get arrested." You limit your behavior to propelling the kids into their bedrooms, rather than strangling them, partially by verbally instructing yourself in ways intended to redirect your conduct in a manner that avoids the most objectionable behavior or consequences. Although you audibly mutter these self-instructions only in

extremely stressful circumstances, the more general pattern of modifying your conduct from that which would fulfill an immediate desire to that which is expected to avoid adverse consequences or promote extended interests is quite ordinary. You frequently forgo an opportunity to act upon some immediate desire or impulse in order to pursue some extended goal, interest, or value. Each of the phrases you mutter to yourself represents an appeal to a long-term interest or principle of yours; that is, each reflects your awareness of yourself as a person with an extended identity involving a complex set of experiences, wants, interests, values, and relationships.<sup>41</sup>

Notice that although you restrained your impulse to strangle the kids, you acted on your desire to yank the television plug from the wall. That desire elicited no apparent conflict with competing interests or principles. Your first desire might have been to kick the television off the stand, but that desire would immediately elicit awareness of how expensive it would be to replace the television, leading you to instruct yourself, “don’t—you’ll be sorry.” The desire to kick the television elicits awareness of countervailing interests which you use to resist the desire, but the desire to pull the plug elicits no analogous awareness, so you pull the plug.

Finally, try to imagine what it would be like to experience the same desires to kick the television off the stand and to strangle the kids in isolation from any awareness of your other wants, beliefs, interests, principles, and relationships; that is, without access to your sense of self. Imagine a state in which you are aware only of the anger and the desire to stop the blaring and screaming, dissociated from the other psychological states and processes that constitute your sense of self and through which you usually evaluate and redirect your anticipated conduct.

#### D. COMPARE WORMWOOD, OTHER TYPES OF IMPAIRED CONSCIOUSNESS, AND YOURSELF

You experience the desires to pull the plug and to strangle the kids in the context of your awareness of a complex set of information about your circumstances and yourself. The circumstances include the immediate and long-term situational factors such as ordinary emotional, interpersonal, and institutional responses to your conduct and the likely effects of those responses on your interests. Important information about yourself includes your beliefs, wants, long-term interests, relationships, and principles. You direct your conduct partially by considering its ramifications in light of these considerations. Thus, your integrated consciousness of the complex set of psychological experiences that constitutes your extended identity

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<sup>41</sup> “Wants” suggests a broader sense of inclination than a felt desire, which generally suggests an inclination that is relatively intense or emotionally laden; wants include but are not limited to felt desires.

provides the resources with which you inhibit certain desires, modify your intent, and direct your conduct.

The critical impairment in the dissociative disorders discussed previously involves limitation or distortion of consciousness.<sup>42</sup> Individuals who suffer from these disorders experience a limited and nonrepresentative subset of the ordinary awareness of their environment and of themselves, often in the context of strong emotional responsiveness. These individuals lack awareness of those aspects of their circumstances and of themselves, including their long-term interests, beliefs, relationships, and principles, that ordinarily competent practical reasoners use in order to inhibit and direct their behavior in a manner consistent with their sense of self and with their understanding of the person they want to be or think they should be. Thus, those who suffer from these disorders lack access to the resources that most ordinary people use to inhibit certain strong immediate desires in order to conform their conduct to social or personal norms.

People who suffer from DID resemble those who manifest other forms of impaired consciousness and differ from those who lack clinical impairment insofar as the central impairment of DID involves distortion of consciousness that prevents them from interpreting and acting upon an integrated awareness of themselves and their environment. When Wormwood experiences his as-Smedley aspect of consciousness, he lacks access to the segment of his consciousness compartmentalized as Slick. When he experiences his as-Slick aspect of consciousness, he is aware of the as-Smedley component but not as an aspect of himself. Wormwood-as-Slick experiences Smedley as a separate entity he encounters and abhors.

This analysis is molar, rather than molecular, in that the subject of the analysis is the multiple, rather than each alter. The distinction between the molecular and molar patterns of analysis illuminates the important intuitive differences among Guido-Beneficence, Wormwood, and ordinary people, including you. Guido-Beneficence elicits clear intuitive judgments that Guido is criminally responsible for the criminal conduct and that Mother Beneficence is not criminally responsible for that conduct precisely because each of them is and acts as an independent, intact consciousness that initiates action as an independent accountable agent. These clear intuitive judgments regarding responsibility reflect the unambivalent

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<sup>42</sup> See *supra* notes 4–15 and accompanying text. The DSM-IV categorizes four specific disorders as dissociative disorders and identifies the central feature of these disorders as disruption of the ordinarily integrated functions of consciousness, memory, identity or perception. See DSM-IV, *supra* note 1, at 477–91. A number of disorders that are not listed in this category of the DSM-IV have dissociative properties insofar as they share this central feature. The post-ictal stage of an epileptic seizure, for example, can involve a period of disruption of the ordinary integration of consciousness. Although this post-ictal state is not categorized under the diagnostic category of “dissociative disorder” in DSM-IV, it is a dissociative disorder in this broader descriptive sense.



intuitive inclination to apply the molecular pattern of analysis to Guido and to Mother Beneficence.

Wormwood fails to elicit the same unequivocal intuitive attributions of responsibility because as-Slick and as-Smedley do not represent independent, intact centers of consciousness.<sup>43</sup> Rather, they represent two aspects of Wormwood's consciousness. If one thinks of as-Smedley and as-Slick as two independent, intact centers of consciousness, analogous to Mother Beneficence and Guido, it seems natural to apply the molecular pattern of analysis. The molecular approach fails to provide a satisfactory interpretation, however, because it generates the difficulties raised by the three questions posed in Part IV. The molecular approach renders it mysterious why one would think that the case involves an impairment of consciousness or any problem regarding criminal responsibility.

The molar approach accommodates the intuitive inclination to say that Wormwood suffers from impaired consciousness in the form of DID and presents a difficult case regarding criminal responsibility. When Wormwood embezzles money from his employer in his as-Slick state of consciousness, he differs from Guido and from you when you desire to pull the plug and strangle the kids. Guido and you each act as an independent, intact consciousness. Guido exercises his consciousness in a manner intended to avoid punishment for criminal conduct, and you exercise your consciousness in order to redirect your inclinations within social and personal constraints. Wormwood lacks access to the inhibitory interests and principles that you call upon in order to inhibit your immediate desires and to direct your conduct in conformity with social constraints and your own long-term interests and values. If one applies the molecular analysis to Wormwood, one loses sight of the central impairment of consciousness that differentiates Wormwood from Guido-Beneficence and from you. Thus, the molecular approach to Wormwood obscures the critical issues regarding the type of impairment involved in DID and the significance of this type of impairment for criminal responsibility. The following Section applies the molar pattern of analysis to Wormwood in order to examine the significance of DID for attributions of criminal responsibility.

#### E. WORMWOOD, DID, AND THE MOLAR APPROACH

According to the molar approach, criteria of criminal responsibility apply to Wormwood rather than to Smedley or Slick. This Section contends that the molar analysis and common intuitions converge insofar as each supports exculpation for crimes committed by Wormwood in his as-Slick

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<sup>43</sup> See *supra* notes 10–13 and accompanying text (discussing shared memory and learning among alters as well as the distribution of affective responses among alters).

aspect of consciousness but not for crimes committed by Wormwood in his as-Smedley aspect of consciousness. Consider first the initial variation of Wormwood's story as told in Parts I and II.<sup>44</sup> Wormwood presents as frightened and bewildered. From the molecular perspective, it seems natural to say that Smedley is frightened and that it would be wrong to punish him for Slick's crime. That approach generates the difficulties previously discussed. From the molar perspective, Wormwood is frightened and bewildered because Wormwood-as-Smedley does not recall the crime he committed as Slick. The critical question is not whether society can justly hold Smedley responsible for Slick's crime. Rather, the critical question addresses the exculpatory significance, if any, of Wormwood's fragmented consciousness for conduct he performed in the as-Slick aspect of his consciousness.

When Wormwood acts as Slick, he lacks access to those aspects of *self* (that is, of Wormwood) corresponding to those you use to inhibit your unacceptable inclinations to strangle your kids. You refrain from acting on those inclinations by appealing to the long-term wants, beliefs, interests, and principles that constitute your extended identity. You appeal to your interests when you remind yourself that: "you'll make it worse"; "you'll get arrested." Wormwood-as-Smedley would remind himself: "you'll lose your job"; "you'll get arrested." You appeal to the principles of responsibility you have adopted as important components in your identity, "you're supposed to be the adult." Wormwood-as-Smedley would remind himself of his value for honesty, "you'd be a thief." The point is not, of course, that you are perfectly responsible or that Wormwood-as-Smedley is perfectly honest. Rather, these interests and principles constitute important components of your extended identity, and you ordinarily make use of them in inhibiting unacceptable desires. Similarly, Wormwood-as-Smedley makes use of his inhibitory interests and principles in directing his conduct in conformity with personal and social boundaries.

Like you, Wormwood incorporates such interests and principles into the extended identity that he appeals to in directing his behavior. As Smedley, he has conscious access to them for use in the process of practical reasoning through which he decides to act. When Wormwood is in his as-Slick mode of consciousness, however, he lacks access to these aspects of consciousness *as his*. That is, Wormwood-as-Slick realizes that someone he refers to as "the worm" endorses these interests and principles, but Wormwood-as-Slick lacks consciousness of them as part of his extended identity.<sup>45</sup> Thus, fragmented consciousness prevents Wormwood from

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<sup>44</sup> See *supra* notes 1–2, 11–15 and accompanying text.

<sup>45</sup> The clinical literature discusses alters that are aware of other alters but engage in behavior expected or intended to have results contrary to the other alters' social, legal, or physical interests,

appealing to his own complex set of interests and principles during the process of practical reasoning. Ordinarily, competent adults, in contrast, decide to engage in particular behavior in light of its likely effects on their complex set of relevant interests and values.

Contrast that first variation of the story with the second one in which Wormwood-as-Smedley is frightened because he has been caught embezzling as Smedley due to his resentment at being denied the raise he thought he deserved. Wormwood's as-Slick consciousness took no part in the criminal conduct, merely observing the conduct performed as Smedley.<sup>46</sup> Wormwood-as-Smedley has access to the interests and principles Wormwood ordinarily appeals to for inhibition of desires to act in a manner contrary to law or social standards. The crime reflected Wormwood's decision to act despite these aspects of self. That is, the crime was "out of character" for as-Smedley, but Wormwood performed it with access to the as-Smedley aspects of his character. Wormwood-as-Smedley lacks access to the as-Slick components of his consciousness, but these are not the aspects that Wormwood applies in order to conform to social and legal constraints. Thus, Wormwood-as-Smedley was not deprived of any assets that Wormwood or unimpaired people use to direct their conduct in compliance with the law.

Wormwood might have committed the crime more effectively in the as-Slick aspect of consciousness. However, psychopathology exculpates because it undermines culpability, not because it reduces criminal effectiveness. Psychopathology exculpates those who lack the capacities of criminal responsibility by the systemic criteria of the normative institutions within which their conduct is evaluated. It does not exculpate those who lack criminal talent or skills. Impairment exculpates because it undermines the systemic justification for punishing the defendant, not because it increases his chances of getting caught.

This molar analysis is consistent with the standard account of the development of DID. According to this standard account, alters represent encapsulated segments of consciousness that develop to contain emotional states and emotionally laden behavior that are not acceptable and safe in the developmental circumstances. The host retains consciousness of those aspects of experience that are safe, inhibitory, and compliant in relation to sources of authority, power, or fear.<sup>47</sup> Slick-type alters embody the angry, aggressive, sexual or otherwise unacceptable aspects of experience that are too dangerous to acknowledge in the formative circumstances. Smedley-

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apparently indicating that alters can be aware of the other alters, but perceive them as distinct entities with independent interests. See PUTNAM, *supra* note 9, at 108–09; ROSS, *supra* note 10, at 115.

<sup>46</sup> See *supra* notes 30–31 and accompanying text.

<sup>47</sup> See ROSS, *supra* note 10, at 57–76; Humphrey & Dennett, *supra* note 11, at 70.

type alters embody the relatively safe, compliant, and inhibitory aspects of experience and inclination. Neither alter is “really” Wormwood and neither is a separate agent because each represents certain components of the complete experience and consciousness of Wormwood.

Behavior performed by Wormwood-as-Slick reveals pathology that exculpates, not because Slick suffers from pathology that exculpates, but because Wormwood suffers from impairment in the form of fragmented consciousness that exculpates Wormwood because it distorts his access to the as-Smedley aspect of his consciousness. Thus, Wormwood’s impaired consciousness prevents him from applying the complex set of wants, beliefs, interests, and principles that provide important components of his identity, and that ordinary people apply in directing their conduct in a manner that conforms to legal constraints. Criminal conduct performed by Wormwood-as-Smedley is culpable, not because Smedley is culpable but because Wormwood is culpable for behavior performed with access to the interests and principles that serve the inhibitory functions for Wormwood and for ordinary people. Wormwood-as-Smedley suffers from impaired consciousness, but that impairment does not deprive Wormwood of access to aspects of himself upon which Wormwood or ordinary people would rely in order to conform to the limits imposed by law.

In addition to conforming to the standard account of the etiology of DID, the molar approach comports with a preferred therapeutic goal of integration into a unified consciousness.<sup>48</sup> Successful therapeutic integration would resolve the pathological fragmentation of consciousness and would not raise concerns of illegitimate “homicide” or analogous offenses regarding consenting or nonconsenting alters who fail to survive as distinct centers of consciousness.<sup>49</sup>

In short, the molar analysis provides an account that integrates the clinical understanding of DID with central normative intuitions regarding the culpability of Wormwood, Guido-Beneficence, and ordinary people who experience but resist the desire to engage in prohibited conduct. The molar approach also provides answers to the three puzzling questions posed in Part IV. First, it provides an interpretation according to which Wormwood suffers from DID and constitutes the focus of criminal responsibility as well as the potential subject of civil commitment. Second, it provides an account of Wormwood’s case accurately understood as one

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<sup>48</sup> See generally PUTNAM, *supra* note 9, at 197–217, 301–16 (discussing the different psychotherapeutic techniques used in working with multiple personality disorder patients); Richard P. Kluft, M.D., *Clinical Approaches to the Integration of Personalities*, in CLINICAL PERSPECTIVES ON MULTIPLE PERSONALITY DISORDER 101–33 (Richard P. Kluft & Catherine G. Fine eds., 1993) (discussing integration as a goal for the majority of multiple personality disorder patients).

<sup>49</sup> See SAKS WITH BEHNKE, *supra* note 2, at 63–66 (discussing whether integration is the equivalent of murder).

involving difficult issues of criminal responsibility, rather than merely problematic disposition. Third, it explains the intuitive judgment that Wormwood's criminal responsibility can vary according to whether Wormwood commits the crime as Slick or as Smedley. Readers may differ regarding their intuitive responses to crimes committed as Smedley or as Slick, but at least the molar approach explains why criminal responsibility can vary with the specific type of distorted consciousness represented by different alters.

The analysis remains incomplete, however, because support for the molar approach rests on a coherence argument in that it demonstrates that this approach coheres with the clinical account of DID and with several intuitive judgments about the responsibility of Wormwood, Guido-Beneficence, and ordinary people. A critic might embrace the claim that the molecular approach reframes these cases as instances of problematic disposition rather than as difficult questions of criminal responsibility. This critic might conclude that the initial impression that these cases involve difficult issues of criminal responsibility was simply mistaken. This critic would accept the molecular analysis and conclude that Slick is clearly guilty, that Smedley is clearly innocent, and that these cases do not involve important or perplexing concerns regarding criminal responsibility. Rather, they raise difficult dispositional problems.

A satisfactory response to such a critic would advance a theoretical justification for the molar analysis as a component of a defensible institution of criminal responsibility. This theoretical justification would support the interpretation of DID as raising difficult questions regarding criminal responsibility and the application of the molar analysis to these questions as demonstrated in Part V. This theoretical explanation for the molar approach must provide a conception of accountable agency and an interpretation of a criminal act as an exercise of such agency such that the multiple, rather than an alter, constitutes the accountable agent.<sup>50</sup> Although commentators sometimes refer to metaphysical theories of personal identity, the primary function of this theory of agency is normative.<sup>51</sup> That is, the theory of accountable agency must provide a conception of agency as a component of a more comprehensive normative theory that justifies subjecting accountable agents to criminal conviction and punishment. A

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<sup>50</sup> By a "criminal act," I mean an act that meets the voluntary act requirement of the MPC. In MPC terms, an act is merely bodily movement, and the voluntariness provision requires that this bodily movement stand in the appropriate relationship to the efforts and determination of the actor. Some writers would include this "voluntariness" requirement within the conception of a criminal act. *See* MPC, *supra* note 25, §§ 1.13(2), 2.01. *See generally* SCHOPP, *supra* note 36, at 4–7 (discussing MPC requirement of liability for a voluntary act).

<sup>51</sup> *See generally* SAKS WITH BEHNKE, *supra* note 2, at 41–51 (discussing theories of personal identity).

metaphysical theory of personal identity advances this project only insofar as it informs the normative theory of agency.

## VI. ACCOUNTABLE AGENCY, CRIMINAL RESPONSIBILITY, AND CONSCIOUSNESS

### A. ACCOUNTABLE AGENTS IN THE PUBLIC JURISDICTION OF A LIBERAL SOCIETY

An agent is one who acts, exerts power, or produces an effect.<sup>52</sup> Accountable agents exert power or produce effects in a manner that qualifies as accountable under some normative criteria. Legally accountable agents are accountable according to the criteria specified by some legal institution that embodies underlying principles of political morality that govern that society. Principles of criminal responsibility in the United States and other liberal democracies include criteria that reflect the conception of accountable agency required to justify their holding a defendant answerable to the criminal justice system.<sup>53</sup>

Legal systems in the liberal tradition establish institutions of political justice that provide an institutional structure for social cooperation among individuals who endorse a variety of comprehensive moral doctrines.<sup>54</sup> These individuals might differ regarding important moral issues yet share common principles of political morality that support a mutually acceptable legal system.<sup>55</sup> This legal system establishes and protects public and nonpublic domains of jurisdiction. Individuals participate in the public domain through the democratic political processes in order to establish rules that regulate the public jurisdiction and protect the individual's discretion to pursue a broad range of life plans within the nonpublic domain.<sup>56</sup> All liberal societies maintain a substantial domain of nonpublic life beyond the government jurisdiction. Each competent adult has the

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<sup>52</sup> I THE OXFORD ENGLISH DICTIONARY 248 (2d ed. 1989).

<sup>53</sup> This paper addresses accountable agency in the narrow sense that refers to the properties of agency required to qualify conduct as a voluntary act in the sense that a voluntary act is a necessary but not a sufficient condition for criminal responsibility. See MPC, *supra* note 25, § 2.01. Some theorists might prefer to develop a broader sense of accountable agency that includes all of the requirements of criminal responsibility. If one understands the notion in that manner, this paper discusses only one aspect of accountable agency. I address the narrower conception in order to attempt to understand more clearly the significance of the voluntary act component of the requirements of criminal responsibility in a liberal society.

<sup>54</sup> See ROBERT F. SCHOPP, JUSTIFICATION DEFENSES AND JUST CONVICTIONS §§ 3.3.1–3.3.2, at 65–71 (1998), for a more detailed discussion of this normative framework.

<sup>55</sup> See JOHN RAWLS, POLITICAL LIBERALISM §§ 1–3, at 4–22 (1993) (referring to religious, moral, or philosophical comprehensive doctrines). I refer to all of these as moral doctrines in order to include those systems or aspects of systems that people rely on to address moral questions regarding how we ought to live.

<sup>56</sup> See *id.* § 6, at 35–40.

liberty to direct his or her life in the nonpublic domain through individual decisions and voluntary relationships with others. Thus, each competent adult exercises self-determination in a liberal society by participating as an equal in the political processes of the public domain and by exercising sovereign discretion in the nonpublic domain.<sup>57</sup>

Individuals qualify for equal standing in the public jurisdiction by possessing the psychological capacities that enable them to participate with minimal competence in legal and political institutions and to exercise self-determination in light of their comprehensive doctrines in the nonpublic domain. Individuals qualify as minimally competent for these purposes only if they have the capacities needed to engage in a process of practical reasoning that enables them to function adequately under the law in ordinary circumstances. Minimally competent practical reasoning for this purpose requires the ability to understand the rules, the circumstances, and the actor's preferences and priorities as well as the ability to deliberate on this understanding in order to reason to a plan of action in light of the likely consequences.<sup>58</sup>

The criminal justice system of a liberal society protects equal standing and individual self-determination by proscribing and punishing conduct that violates protected rights and interests. Thus, the criminal law regulates cooperative social interaction in the public jurisdiction, and it articulates the boundaries of the nonpublic domain by proscribing specified types of intrusions as crimes.<sup>59</sup> Criminal justice systems, such as those in the United States and other countries in the liberal tradition, are at least minimally retributive in that they limit criminal conviction and punishment to those who violate a law while meeting systemic standards of criminal responsibility. Criminal responsibility requires, for example, that the defendant fulfills the voluntary act and specified culpability requirements and lacks any impairment that would ground an excuse.<sup>60</sup> Those who violate a law under these minimally retributivist conditions deserve conviction and punishment in that they violate the criminal law while

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<sup>57</sup> See *id.* §§ 5–6, at 29–40.

<sup>58</sup> See generally SCHOPP, *supra* note 36, at 108–28, 188–201, 251–60 (discussing action, psychopathology, free will, and practical reasoning).

<sup>59</sup> Some activities might be criminalized for other reasons. Perjury, for example, is proscribed in order to promote the effectiveness of the legal system, and securities regulations are designed to promote effective functioning of the economy. Crimes such as those against person and property, however, help to define the individual's sphere of autonomy by forbidding others from intruding into those areas.

<sup>60</sup> See generally MPC, *supra* note 25, §§ 2.01, 2.02, 4.01 (discussing voluntary nature of an act, culpability, and mental disease or defect). Minimally retributive theories and institutions are those that require culpability by systemic standards as a necessary condition for the justification of punishment. Some might argue that these systems are, or ought to be, retributive in a stronger sense. I take no position on that issue for the purpose of this paper.

possessing the capacities necessary to participate in the public jurisdiction through a process of competent practical reasoning.<sup>61</sup>

#### B. ACCOUNTABLE AGENCY AND CRIMINAL RESPONSIBILITY

Competent practical reasoners qualify as criminally responsible in the criminal justice process of a liberal society because they possess capacities that enable them to participate in the criminal justice system as an institution of behavior control uniquely appropriate to unimpaired adult human beings. These individuals have the capacities to comprehend the substantive prohibitions of the criminal law and the relevant circumstances. Thus, they can understand that certain conduct violates the prohibitions of the system and anticipate that such conduct will elicit aversive consequences in the form of criminal punishment. They can also make use of this knowledge in the process of practical reasoning through which they direct their behavior. In this manner, competent practical reasoners can pursue their extended interests and values by participating in a rule-based institution of social control through a process of deliberation that enables them to direct their conduct according to anticipated consequences without actually experiencing those consequences.<sup>62</sup>

This process of practical reasoning requires an awareness of self as an identity that extends over time. An individual acts in a manner calculated to attain future rewards or to avoid aversive consequences in the future precisely because that person experiences himself as an extended identity who maintains a relatively stable set of preferences and priorities over time. Thus, Smith acts now in a manner calculated to elicit rewards or avoid aversive consequences at some future time precisely because he identifies the Smith who will experience those future consequences as himself, and he expects himself at that future time to retain certain preferences and priorities that establish these consequences as either positive or aversive.<sup>63</sup> Recall, for example, your response to the desires to kick the television off the stand and to strangle your kids.<sup>64</sup> Your appeals to your own extended interests and principles were effective means for constraining and directing your conduct partially because you understood them as *yours*. You refrained from kicking the television and strangling your kids by calling upon your own future interests in having a television, not having to pay for

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<sup>61</sup> See SCHOPP, *supra* note 36, at 251–260.

<sup>62</sup> See *id.* at 218–61. This interpretation does not require that the individual could have done other than he or she did, and it takes no position regarding causal determinism.

<sup>63</sup> The claim here is not, of course, that Smith could not act in the interest of others or that all acts are necessarily selfish. The point is only that when people act in an ordinary, prudential manner intended to promote their future interests and avoid future difficulties, they do so partially because they have a sense of self as an identity that extends over time and some relatively stable set of preferences and priorities.

<sup>64</sup> See *supra* note 39 and accompanying text.



a new television, and avoiding arrest. That is, you understood yourself as an entity with an identity and interests that extend into the future.

When you first entered the house, you were angry and preoccupied with the frustrations of the day and of the moment. You were not consciously aware of your standing desires to keep your television for the foreseeable future, to avoid paying for a new one, or to avoid arrest. Yet, experiencing the temptation to kick the television and strangle your kids elicited conscious awareness of these standing wants. Ordinary adults with intact consciousness and unimpaired cognitive processes maintain a complex awareness of themselves, their environment, and their relationship to that environment. Their immediate circumstances and purposes direct their attention to a relatively small subset of their beliefs and wants, but they have access to the broader set of beliefs and wants through the associative process.<sup>65</sup> Thus, experiencing the desire to engage in a pattern of conduct, such as kicking the television or strangling your kids, triggers an associative process through which the individual becomes aware of important relevant beliefs, wants, interests, and values. Experiencing the desire to kick the television brings to immediate awareness the desires to continue to have a television and to avoid paying for a new one.

Experiencing the desire to strangle your kids elicits immediate awareness of the desire to avoid arrest, the feeling of ongoing affection for your kids, the commitment to personal responsibility and parenting, and a variety of other interests and principles that you identify as part of your extended sense of yourself. Competent adults manage relatively coherent and adaptive lives partially because the deliberative process of practical reasoning includes an associative process through which the individual becomes aware of her beliefs, wants, interests, and commitments that are most relevant to the circumstances she encounters and the actions she contemplates. Her awareness of these important considerations enables her to select a course of action in light of the circumstances, social and legal constraints, and her own preferences and principles.<sup>66</sup> By providing awareness of one's self, one's environment, and the relationship between the two, intact consciousness constitutes a critical ingredient in the set of psychological capacities that enable unimpaired adults to direct their conduct in light of legal constraints through a process of practical reasoning and thus, to qualify for equal standing in the public jurisdiction and as criminally responsible for criminal conduct.

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<sup>65</sup> See SCHOPP, *supra* note 36, at 136–50.

<sup>66</sup> See *id.*

## C. IMPAIRED CONSCIOUSNESS AND ACCOUNTABLE AGENCY

Disturbance of consciousness undermines this unique status in a manner that differentiates it from either ignorance or thought disorder. Ignorance prevents the individual from bringing the capacities of practical reasoning to bear on the decision to perform the conduct constituting the objective elements of the offense, but it does not constitute any defect in those capacities. Ignorance exculpates insofar as it negates an offense element.<sup>67</sup> Although individuals who act in ignorance that negates an offense element act as competent practical reasoners, they do not perform these offenses as competent practical reasoners. Suppose, for example, that Jones purchases a package of artificial sweetener in which the manufacturer has accidentally placed sugar rather than the artificial substitute indicated by the label. Jones then serves the contents to a diabetic guest, representing it as the artificial sweetener she reasonably believes it to be, and the guest suffers a diabetic coma. Jones fulfills the objective offense elements of assault in that she engaged in conduct that caused bodily injury to her guest, but her ignorance precludes the required culpability element of purpose, knowledge, or recklessness.<sup>68</sup> Jones acted with the capacities of a competent practical reasoner but without awareness of the relevant circumstances and likely effects. Intuitively, many people might say of Jones, “she didn’t realize what she was doing.” Thus, the behavior she deliberately performed did not bear the relation required by the offense definition to the harm she caused.<sup>69</sup>

The insanity defense exculpates agents who engaged in criminal conduct due to certain types of serious psychological impairment. Suppose that Jones knowingly served sugar to her diabetic guest because she experienced psychotic disturbance of thought and perception such that she heard a hallucinatory voice ordering her to do so. She understood this voice as the voice of God telling her that the guest was possessed by Satan and that she could save the guest’s soul from Satan only by serving the guest the sugar that would induce a lethal coma but purify her soul with God’s grace contained in the pure white granules of sugar. In these circumstances, some people might say that Jones did not “really” know what she was doing. Jones knew, however, that she was serving the guest sugar, that the guest was diabetic, and that the sugar would induce a lethal coma. Thus, she knew all she needed to know in order to fulfill the offense elements for murder.<sup>70</sup>

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<sup>67</sup> See MPC, *supra* note 25, § 2.04(1)(a); ROBINSON, *supra* note 25, § 62(d).

<sup>68</sup> MPC, *supra* note 25, § 211.1(1)(a).

<sup>69</sup> See SCHOPP, *supra* note 36, at 94–108.

<sup>70</sup> See generally MPC, *supra* note 25, § 210.2 (setting out the elements of criminal homicide).

This case differs from clear cases of exculpatory ignorance in that Jones acted with the knowledge required by the offense elements, but in deciding to perform the criminal act, she lacked the ability to engage in the process of practical reasoning characteristic of a responsible participant in the public jurisdiction. Intuitively, many people might say of Jones that “she knew what she was doing, but she did it because she was crazy.” Although common standards frame the defense in terms of the ability to know or appreciate the nature, quality, or wrongfulness of the conduct, these standards misclassify some cases and misrepresent the basis for the defense because they conflate the exculpatory significance of ignorance with that of impairment of the capacities of practical reasoning required for criminal responsibility.<sup>71</sup>

Defendants who claim that they did not fulfill the voluntary act requirement advance a fundamentally different exculpatory rationale than those involved in claims of ignorance or insanity.<sup>72</sup> If Jones caused bodily injury to another person when she fell into that person as a result of an unexpected seizure, she would deny culpability by claiming that she had not engaged in a voluntary act.<sup>73</sup> Intuitively, many people might say of Jones that “she couldn’t help it.” Her movement was not an act because the ordinary connection between behavior and the psychological processes of decisionmaking was severed. Although Jones’ body moved, that movement was not produced by her psychological processes of practical reasoning in the manner that these processes ordinarily produce action. Stated intuitively, Jones’ body moved, but Jones did not do anything. Rather, the seizure was an event that happened to her.<sup>74</sup> Thus, the seizure movement does not constitute an act because it was not produced by her psychological processes of practical reasoning and decisionmaking. Because seizure movements do not constitute acts, they provide clear examples of a category of behavior that does not qualify as an exercise of accountable agency.

Compare the relatively clear cases involving seizures with the forms of impaired consciousness discussed in Part V, including post-ictal states, somnambulism, and hypoglycemia. In each case, the defendant behaved in an apparently directed, organized, purposeful, and environmentally responsive manner. Yet, impaired consciousness elicits the intuitive

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<sup>71</sup> See generally SCHOPP, *supra* note 36, at 160–217 (discussing the insanity defense).

<sup>72</sup> The point here is to clarify the exculpatory significance of the types of impairment ordinarily addressed under this requirement and not to argue that the current classification of such claims as a failure of proof defense is most appropriate.

<sup>73</sup> See MPC, *supra* note 25, § 2.01. Some would contend that “voluntary act” is redundant because acts must be voluntary in order to qualify as acts. Here, I use “voluntary acts” in order to make clear that I am referring to acts that fulfill the MPC’s voluntary act requirement and the similar traditional requirement of criminal responsibility.

<sup>74</sup> See generally SCHOPP, *supra* note 36, at 94–108 (discussing involuntary actions and culpability).

judgment that “she wasn’t herself when she did it.” She lacked access to herself in the sense that she was not able to engage in a process of deliberation that included an associative process that would provide her with access to the extended set of beliefs, desires, interests, and principles that constitute her extended identity. Thus, she was unable to engage in the ordinary process of deliberation through which competent adults direct their conduct in light of anticipated external consequences and self-evaluation by appeal to their own principles and values.<sup>75</sup> Due to this failure of the associative process that ordinarily provides access to her extended identity as a participant in the public jurisdiction, she did not act as an accountable agent by the standards of the criminal justice system. When she acted, she knew what she was doing, but *she did not know herself*.

According to this interpretation, the voluntary act requirement articulates the traditional requirement that the behavior for which a person is held criminally responsible must represent an exercise of the capacities of accountable agency that fulfill a necessary condition for participation as an equal in the legal institutions that order the public jurisdiction. Behavior fulfills this requirement when the individual produces the behavior through the exercise of psychological processes that include an associative process that provides access to the individual’s extended identity as a participant in the public jurisdiction of the liberal society.

Movement produced by seizure represents a relatively clear case of behavior that does not fulfill the voluntary act requirement because the movement occurs independently of the decisionmaking process that initiates action as an exercise of accountable agency. Thus, the behavior cannot be attributed to the individual in his status as an accountable participant in the legal institutions that order the public jurisdiction. Some behaviors associated with other forms of impaired consciousness, such as that experienced during a post-ictal or hypoglycemic state, involve a decision to engage in organized, directed, and environmentally responsive conduct. Yet, the decision to engage in that conduct is disassociated from the extended self that qualifies for participation in the public jurisdiction as an accountable agent. The point here is not merely that the act was out of character for the defendant. Rather, the decision to act was made without access to the person’s character. That is, the individual engaged in conduct without access to the extended and integrated consciousness that forms the person’s extended identity and enables him to participate in the public jurisdiction as an accountable agent by the criteria of the criminal law as the primary behavior-directing institution of the public domain in a liberal society.

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<sup>75</sup> See *id.* at 150–58.

DID, like any other serious form of impaired consciousness, should exculpate if, and only if, it precludes attribution of the conduct constituting the offense to the defendant in his capacity as an accountable agent in the public domain. Although an individual engages in purposeful behavior, we cannot impute that conduct to this person as an accountable agent unless the defendant acted with access to the extended consciousness that enables this person to function as a participant in the public jurisdiction of the liberal society.

Wormwood-as-Slick lacks access to the inhibitory aspects of himself because these components of Wormwood are encapsulated in his as-Smedley consciousness. Wormwood-as-Slick resembles an individual in a post-ictal state or similar condition of impaired consciousness in that he acts upon certain emotions, desires, and perceptions without access to the larger set of psychological states that constitute his extended identity and enable him to participate in the public jurisdiction as an accountable agent. The illegal conduct does not represent Wormwood as a participant in the public domain because as Slick, he lacks access to those aspects of himself that enable him to inhibit and direct conduct in the context of the criminal system of behavior control by appeal to the inhibitory prudential and moral interests that are part of Wormwood's extended identity as a citizen of the public jurisdiction and as a subject of the criminal justice system.

Wormwood-as-Smedley has access to these inhibitory components. Like any other accountable agent, he may fail to make use of them in order to conform his conduct to law in a particular situation. If Wormwood commits an offense as Smedley, his impairment of consciousness does not preclude criminal responsibility because lack of access to the as-Slick component of his consciousness does not deprive Wormwood-as-Smedley of access to any components of self that Wormwood would exercise in the process of practical reasoning in order to conform with the limits set by the criminal justice system.

In summary, the molar analysis integrates the clinical account of DID as a disorder of consciousness with the principles of criminal responsibility in a liberal society. Wormwood suffers from impaired consciousness that precludes criminal conviction and punishment for crimes committed as Slick because his impairment prevents him from participating in the public jurisdiction through a process of practical reasoning with access to the inhibitory components of his identity that would enable him to direct his conduct as an accountable agent. The next Section argues that only Wormwood qualifies as an accountable agent in the public jurisdiction; that is, Wormwood's alters do not qualify as independent foci for evaluation of criminal responsibility.

## D. MULTIPLES AS ACCOUNTABLE AGENTS IN THE PUBLIC DOMAIN

Recall the case of Guido-Beneficence.<sup>76</sup> That case unambiguously raises concerns regarding disposition rather than criminal responsibility. Guido is clearly guilty of the crime, while Mother Beneficence is clearly innocent, and it seems impossible to subject Guido to ordinary criminal punishment without injuring Mother Beneficence. At first glance, the critical distinction between this case and that of Wormwood seems to involve consistent conscious control of a body. Guido and Mother Beneficence each maintain constant command of a body, but Wormwood's alters each have only intermittent control of a body. Consider, however, persons with seizure disorders and ordinary healthy people during sleep. These conditions also involve periods of time during which the person lacks conscious control of the body, yet these persons remain accountable agents regarding any conduct performed during the periods of conscious control. If one thinks of Smedley and Slick as analogous to individuals in these conditions, it seems that each alter would be responsible for conduct performed while that alter was in control, and DID would raise only dispositional concerns. Yet, Wormwood seems to differ from Guido-Beneficence partially because DID raises serious questions of criminal responsibility and not merely of disposition.

One might suggest that these conditions differ in the following manner. Regarding seizure disorders or sleep, either the individual has conscious command of the body or no one has such command. In Wormwood's case, in contrast, sometimes as-Smedley has control of the body, and sometimes as-Slick has conscious command of the same body. According to this interpretation, the critical distinction between DID and seizure disorder or sleep lies in the pattern of alternating control of the same body by different centers of consciousness.

Consider, however, an analogous case involving Siamese twins. Assume that the Smith twins (Susan and Sally) have distinct heads and upper bodies that join at the hips into a single lower body. Assume further that psychologically each is a distinct and unimpaired adult. Each has independent conscious command of her own upper body, but they share command of their common lower body. Either can move their common legs, for example, if the other does not resist.<sup>77</sup> Suppose that Susan becomes angry at a third person and kicks that person with no cooperation from Sally and no warning to Sally. Susan has committed an assault by use of a limb that either she or Sally can independently command, but Sally took no

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<sup>76</sup> See *supra* notes 25–26 and accompanying text.

<sup>77</sup> This description is designed for expository purposes. I make no claim that it reflects the conditions experienced by any actual people.

part in the decision to commit the assault and was unaware that Susan planned to do so until the assault occurred.<sup>78</sup> This case resembles Wormwood insofar as each of two distinct centers of consciousness sometimes commands the same body. Yet, it seems clear that this case resembles Guido-Beneficence rather than Wormwood regarding the intuitive judgment of responsibility. That is, Susan is clearly guilty, and Sally is clearly innocent. This case, like that of Guido-Beneficence, raises a difficult problem of disposition rather than a question regarding criminal responsibility.

In summary, Wormwood represents an intuitively difficult case for judgments of criminal responsibility. Guido-Beneficence and the Siamese twins represent difficult dispositional problems, but they do not appear to raise difficult questions regarding criminal responsibility. The comparison to seizure disorders and sleep demonstrates that the difficult questions regarding Wormwood's responsibility do not arise from the mere fact of intermittent consciousness on the part of each alter. The comparison to the Siamese twins demonstrates that the questions regarding Wormwood's responsibility do not arise from the mere fact that different centers of consciousness sometimes command the same bodily movements.

For the purpose of evaluating criminal responsibility, the central distinction between Wormwood and either Guido-Beneficence or the Siamese twins involves the presence of independent and intact centers of consciousness. Guido, Mother Beneficence, Susan, and Sally each represent an intact and independent center of consciousness, but as-Smedley and as-Slick do not. Although some alters demonstrate some memory, knowledge, or skills that other alters lack, a multiple's alters also share substantial memory, knowledge, and skills. Each alter represents a dominant affective state with related desires, memory, and beliefs, but each also manifests a substantial body of neutral background psychology shared by the various alters.<sup>79</sup> Alters tend to take command or recede from consciousness in response to emotionally relevant stimuli. That is, each alter represents a dominant affective state, and each alter either assumes consciousness or recedes from consciousness as psychological or environmental stimuli elicit various affective responses.<sup>80</sup> Thus, the subset of Wormwood's consciousness that commands the body fluctuates and is largely responsive to emotionally laden cues.

Multiples resemble ordinary accountable agents insofar as psychological and situational cues elicit emotional responses. Multiples

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<sup>78</sup> See generally MPC, *supra* note 25, § 211.1(1)(a) (setting out the elements of simple assault charge).

<sup>79</sup> See *supra* notes 10 and 30 and accompanying text.

<sup>80</sup> See *supra* notes 10–13 and accompanying text.

differ from ordinary accountable agents, however, in that these emotional responses alter the available range of consciousness. Emotionally laden cues alter not only the multiple's emotional state but also the range of consciousness to which the multiple has access. The unimpaired individual responds to emotionally laden cues with emotional responses that can alter the content and intensity of that person's wants, but that person retains associational access to a relatively stable set of wants, beliefs, interests, and principles that provide that person's extended sense of self. Although the emotional cues might trigger strong immediate tendencies to engage in certain conduct, the individual retains access to that complex sense of his or her extended identity in the context of legal contingencies as resources for use in directing his or her conduct. Thus, that agent has the opportunity to call upon that extended set of central personal concerns in directing his or her conduct in light of the situational factors, including the legal ramifications of various types of behavior.

Recall, for example, your desire to kick the television and strangle your kids.<sup>81</sup> You directed your conduct away from uninhibited action on the desire and toward a modified plan of action by appeal to a variety of relevant interests and principles. The emotionally laden circumstances elicited an unusually intense emotional response, but that emotional response did not deprive you of associational access to the broader and relatively stable set of wants, beliefs, interests and principles that constitute your extended awareness of yourself. Conscious awareness of this sense of self played a critical role in the process of deliberation through which you inhibited the immediate inclination and redirected your conduct toward a less destructive course of action. You directed your conduct through a process of practical reasoning that called upon accurate reality testing, unimpaired reasoning, and the complex set of interests and principles contained in your extended identity. Had you had access only to a limited state of consciousness that contained your immediate perceptions, emotional state, and behavioral inclinations, but not your inhibitory beliefs, interests, and principles, you could not have redirected your conduct through the same process.

Individuals who possess a relatively stable set of wants, beliefs, interests, and principles can pursue these central concerns within the legal structure, making use of them in order to direct their conduct in light of these concerns and legal contingencies. Those who possess widely fluctuating sets of concerns can direct their conduct in a manner likely to accommodate their changing concerns.

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<sup>81</sup> See *supra* note 40 and accompanying text.



At first glance, the multiple might seem analogous to an unimpaired individual with a widely fluctuating set of interests and principles in that the multiple's central concerns vary across alters. The unimpaired individual with unsettled interests or principles differs from the multiple in two crucial respects. First, in contrast to Wormwood-as-Smedley, the unimpaired individual is aware that her concerns fluctuate. Second, in contrast to Wormwood-as-Slick, she is aware that the full set of central concerns is hers; that is, she understands that she is the person who experiences these fluctuations. Thus, she can direct her behavior in light of this awareness that her central concerns fluctuate, just as people often make decisions in conditions of uncertainty regarding many other circumstances. Wormwood, in contrast, is unaware of his as-Slick aspect during the as-Smedley periods, and during his as-Slick periods he is unaware that the as-Smedley concerns are his. Thus, in each aspect of consciousness, Wormwood lacks the ability to bring the full range of his own central concerns to bear on the process of directing his behavior through the process of practical reasoning in light of the legal contingencies. As Smedley, he lacks access to his own anger and to his aggressive dispositions, but as Slick, he lacks access to his interests and principles that would otherwise serve to facilitate compliance with the law.

Law provides an institutional structure within which competent adults can participate in the public jurisdiction in such a manner as to influence legal limits on their liberty through the political process, avoid unwanted state intrusion, and preserve their discretion in the nonpublic domain.<sup>82</sup> In order to work effectively, this structure requires at least minimal consistency of two types. First, the legal system must provide relatively consistent legal contingencies such that individuals can direct their conduct in the public jurisdiction through practical reasoning in light of at least minimally predictable legal consequences. Second, individuals must have relatively stable abilities to engage in practical reasoning regarding the significance of those relatively consistent legal rules for their central concerns and to direct their conduct through that process of practical reasoning. When these two conditions are obtained, individuals can predict, and to a substantial degree influence, the degree and type of state intrusion into their lives. In this manner, they can function effectively in the public jurisdiction and pursue their individual lives in the public and nonpublic jurisdictions.

Alters cannot participate effectively in this structure because they do not maintain a consistent consciousness or consistent command of the conduct in which their bodies engage when they are not in control. In order to function effectively in the public jurisdiction, individuals must engage in

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<sup>82</sup> See discussion *supra* Part VI.A.

a process of competent practical reasoning in light of the legal contingencies and their own extended identities. Because alters assume or lose consciousness and command of their bodies in response to a variety of conditions that elicit various emotional states and because their bodies can elicit state intrusion by engaging in conduct under the command of different consciousnesses, alters cannot consistently predict and manage the degree and manner of state intrusion to which they are subject.

Consider the manner in which various other actors compare to alters in this regard. Guido-Beneficence provides a clear case in which Guido and Mother Beneficence each function as a consistent consciousness and a competent practical reasoner. Thus, each functions as an accountable agent, although their current circumstances create a dispositional problem. A quadriplegic person has very little command of his body, but he maintains a consistent consciousness that commands any conduct, such as soliciting another to commit a crime, that might elicit state intrusion. One who engages in criminal conduct as a result of psychosis or severe retardation maintains a consistent consciousness and consistent command of any conduct that might elicit state intrusion. Thus, her conduct fulfills the voluntary act requirement because it constitutes an exercise of accountable agency. She fails to qualify as criminally responsible, however, because she does not direct that conduct through competent practical reasoning.

An individual who is subject to grand mal seizures does not act as an accountable agent during the seizures because she has no conscious control of her bodily movement. She would qualify as an accountable agent between seizures, but the seizure movements do not qualify as exercises of accountable agency. An individual who is subject to unpredictable and uncontrollable seizures would be accountable for engaging in conduct, such as driving a car, that created an unreasonable risk when a seizure occurred. She would be accountable for that conduct precisely because the act of driving the car would constitute an exercise of accountable agency.

Although alters are also subject to unpredictable variations in consciousness through switching, they differ in two important ways from the individual who is subject to unpredictable seizures. First, some alters are not aware that they are subject to variations of consciousness. Smedley is unaware that Slick sometimes replaces him as the consciousness in control of the body, and although Slick is aware that Smedley sometimes controls the body, he is not aware that he and Smedley represent different aspects of Wormwood's consciousness. Second, Smedley lacks the ability to refrain from creating risk to others because he lacks the ability to consciously direct the process of switching to the Slick alter. Indeed, if a society were to recognize alters as participants in the public jurisdiction,

switching would not involve merely a variation in consciousness; it would involve the unpredictable substitution of one citizen for another.

One can imagine circumstances in which Wormwood-as-Smedley would assume the standing of accountable agency analogous to that of the person with unpredictable seizures. Suppose that Wormwood-as-Smedley became aware of his as-Slick aspect and developed the ability to direct the switching process. In these circumstances, Wormwood would have the ability to deliberately maintain consciousness and control of his body as Smedley or to allow his as-Slick aspect to take over consciousness and control of his body. Thus, Wormwood-as-Smedley would stand in a position analogous to that of the person subject to unpredictable seizures insofar as each would be aware that engaging in certain conduct would create unjustifiable risk to third parties. In these circumstances, Wormwood-as-Smedley would qualify as an accountable agent because he would have the ability to retain command of his body in a state of consciousness that allows access to his inhibitory assets. Switching consciousness would constitute reckless conduct, because switching would create substantial risk, and it would be an act he performed with access to his inhibitory dispositions in his as-Smedley aspect of consciousness, rather than an event that happened to him. Thus, Wormwood-as-Smedley would qualify as an accountable agent, and should he cede consciousness to his as-Slick aspect and perform criminal conduct in his as-Slick aspect, he could be guilty of recklessly committing that crime.<sup>83</sup> This account addresses Wormwood-as-Smedley as the accountable agent; however, it does not address the alters as accountable agents.

According to the usual account of DID, alters differ from Wormwood-as-Smedley in these hypothetical circumstances precisely because alters are not aware that they have other aspects of consciousness as part of themselves, and they are usually unable to reliably predict or direct their changes of consciousness. According to the usual description of DID and the analysis advanced here, Wormwood-as-Smedley would be an accountable agent for conduct performed in his as-Smedley aspect because he commits the criminal conduct as an exercise of agency with access to Wormwood's inhibitory processes. He is not accountable for ceding consciousness to as-Slick because that change of consciousness is something that happens to Wormwood in response to affectively laden cues rather than an exercise of agency. He is not accountable for criminal conduct performed as Slick because in that aspect of consciousness he lacks access to his inhibitory processes. Thus, the question is always whether Wormwood acts in a state of consciousness in which he qualifies

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<sup>83</sup> See MPC, *supra* note 25, § 2.02(2)(c) (discussing recklessness).

as an accountable agent; it is not whether Smedley and Slick are accountable agents.

Consider once more the Siamese twins: Susan, who committed the assault, and Sally, who did not. Recall the assumptions that Susan and Sally constitute independent consciousnesses and that each independently directs the movement of her upper body but that either can direct the movement of the common lower body. If Susan had simply picked up a knife and stabbed someone with an arm that was solely within her capacity to direct, this case would present comparable circumstances to those presented by Guido-Beneficence in that an accountable agent committed a crime in circumstances that created a dispositional problem because criminal punishment would injure an innocent party. That Susan committed an assault by the use of a leg that either Susan or Sally can direct does not change the conclusion regarding accountable agency. Although either Susan or Sally can direct this limb in some instances, this particular kick was a bodily movement directed by an exercise of Susan's intact consciousness. This kick was an exercise of accountable agency by Susan, and the problem remains a dispositional one.<sup>84</sup>

The cases involving sleep, seizure disorder, and the Siamese twins demonstrate that accountable agency is not simply a matter of having constant and exclusive control of bodily movement. Rather, the central issue involves the relationship between the bodily movement that fulfills the objective elements of an offense and an intact and independent consciousness. Alters fail to qualify as accountable agents because they are not intact and are not independent consciousnesses. Rather, they are subject to unpredictable switching in response to affectively laden circumstances involving environmental cues, the psychological states and processes represented by each alter, and the psychological states and processes shared by the various alters. Alters cannot qualify for equal standing in the public jurisdiction because this vulnerability to switching renders them unable to participate consistently in the public jurisdiction in light of legal contingencies and their own wants, beliefs, interests, and principles. Furthermore, this vulnerability is characteristic of the ordinary state of alters rather than a pathological deviation from their ordinary state. Thus, if

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<sup>84</sup> Professor Saks raises the question regarding the manner in which we would address criminal responsibility and punishment in a world populated entirely by Siamese twins. SAKS WITH BEHNKE, *supra* note 2, at 71. This question invites extended reflection on the proper institutions of social control for such a world, but I suspect that the initial step in that process of reflection is fairly clear. Simply put, we would have different institutions of social control representing different principles of responsibility. Legal institutions representing liberal principles of political morality and corresponding principles of criminal responsibility purport to establish a justifiable political structure for human beings that are roughly similar to those that fall within a broad range of familiar conditions. There is no obvious reason to expect that the same principles or legal institutions would be justified if important properties of individuals or of their circumstances were significantly different.

the liberal state acknowledged alters as equal participants in the public jurisdiction, it would recognize those alters as qualified for a role that their ordinary condition rendered them unable to fulfill.

Those who suffer from seizures or psychotic episodes qualify as participants in the public jurisdiction during their periods of intact functioning. Such individuals differ from alters in that the state can address them as participants in the public jurisdiction during intact periods while recognizing their periods of dysfunction as pathological deviations from intact functioning. Alters, in contrast, are vulnerable to switching with other alters as part of their ordinary condition as alters. If the liberal society recognized alters as participants in the public jurisdiction, then barring severe collateral psychopathology in some alters, the state cannot treat those alters as suffering pathological processes analogous to seizures or psychotic episodes. Doing so would imply the contradictory premises that alters both do and do not possess the capacities required to qualify for equal standing in the public domain. That is, according to the molecular approach, each alter qualifies as an equal participant in the public jurisdiction. Yet, due to their vulnerability to switching, neither has the ability to consistently direct conduct in the public jurisdiction through a process of practical reasoning in light of legal contingencies and his own identity. Thus, alters possess the capacities required to qualify for equal standing in the public domain, and they do not. In contrast, for those who suffer from seizures or episodic psychosis, the seizures or psychotic episodes represent pathological deviations from the intact state that qualifies them as participants in the public jurisdiction. Thus, a liberal society cannot adopt the molecular approach precisely because doing so attributes accountable agency in the public jurisdiction to alters who cannot function in that capacity due to their vulnerability to switching.

The molar approach, in contrast, recognizes Wormwood as the agent. When Wormwood commits a crime as Smedley, he acts as an accountable agent in the public jurisdiction because his impairment of consciousness does not deprive him of access to psychological states or processes that he would use to inhibit his criminal inclination in light of legal contingencies. Wormwood-as-Slick does not qualify as an accountable agent because he lacks access to aspects of his consciousness that Wormwood would exercise in order to comply with the law. Access to those inhibitory aspects of consciousness enables the accountable agent to avoid state intervention by directing his life in compliance with the law through a process of practical reasoning.

## VII. CONCLUSIONS

The clinical core of DID consists of fragmentation of the ordinarily integrated functions of consciousness and memory. Those who commit criminal offenses while suffering DID raise complex questions of criminal responsibility. The molecular pattern of analysis obscures both the clinical features of DID and the questions of criminal responsibility raised by the disorder. The molar pattern of analysis illuminates the significance of DID for criminal responsibility because it promotes interpretation of DID as one form of impaired consciousness. In this manner, the molar approach also clarifies the significance of impaired consciousness for the conception of accountable agency appropriate to the public jurisdiction in a liberal society. Thus, it illustrates the importance of integrating an understanding of the clinical features of a purportedly exculpatory disorder with an understanding of the principles of political morality represented by the legal institutions of criminal responsibility.

Wormwood is criminally responsible for the crimes he commits as Smedley, not because Smedley is responsible, but because Wormwood-as-Smedley suffers no impairment of consciousness that deprives him of access to inhibitory processes ordinarily exercised by Wormwood and by other accountable agents in the public jurisdiction. Wormwood is not criminally responsible for the crimes he commits as Slick, not because Slick is not responsible, but because Wormwood-as-Slick suffers from impairment of consciousness that deprives him of access to Wormwood's inhibitory processes. This interpretation also explains why exculpation of Wormwood for conduct performed as a psychopathic alter does not entail exculpation of a psychopath. Unlike Wormwood-as-Slick, a psychopath suffers no impairment of consciousness.<sup>85</sup>

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<sup>85</sup> See Robert F. Schopp & Andrew J. Slain, *Psychopathy, Criminal Responsibility, and Civil Commitment As a Sexual Predator*, 18 BEHAV. SCI. & L. 247 (2000), for a substantive analysis of the criminal responsibility of psychopaths.