

A THEORY OF COMMAND AND CONTROL: A REPLY TO ELYN SAKS

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Professor Saks has performed an invaluable service by legitimizing the consideration of Multiple Personality Disorder (“MPD,” also known as “Dissociative Identity Disorder” or “DID”) in the legal world. Her outstanding book, *Jekyll on Trial: Multiple Personality Disorder and Criminal Law* (with Stephen H. Behnke), also makes cogent and convincing arguments defending the concept of MPD against many of its foes.¹ It is therefore a sobering thought to reply to her paper disagreeing with many of her points. However, over the years I have seen an evolution of both her views and mine, and regard this reply as a contribution to further evolution.

I. ON WHOSE AUTHORITY?

Professor Saks repeatedly tells us that neither the definition of insanity nor that of personality or personhood should be decided by experts. The former, she argues, should be based upon statutes and case law. With respect to the latter Saks states, “How to conceptualize alter personalities depends on what is meant by the word ‘person.’ It is philosophers and lawyers, not psychiatrists, who are the authorities on this issue, although psychiatrists will naturally provide important empirical data.”² Insofar as the term, “insanity” is a word of art with a specific meaning under the law, it is of course proper for legislators and courts to define it. Philosophers, lawyers, and psychiatrists are equally entitled to address the concepts of person, as are theologians, biologists, and nonlawyer legislators. However, psychiatrists are the most likely to gather relevant empirical data about alter personalities. If philosophers or lawyers adopt a concept of the alter that is

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¹ See generally ELYN R. SAKS WITH STEPHEN H. BEHNKE, JEKYLL ON TRIAL: MULTIPLE PERSONALITY DISORDER AND CRIMINAL RESPONSIBILITY (1997).

² Elyn R. Saks, *Multiple Personality Disorder and Criminal Responsibility*, 10 S. CAL. INTERDISC. L.J. 185, 190 (2001).

incompatible with that of psychiatry, the concept is likely not to be very robust, and may be profoundly misleading.

II. MIND AND BODY

For example, Saks states that philosophers distinguish between two kinds of theory of personal identity, bodily and psychological. Yet both developmental psychology and neuropsychiatry hold that it is impossible to separate personal identity from either the physical body or the psychological.³ Freud believed that the ego was, first of all, a bodily ego.⁴ Developmentalists from Spitz to Stern see the growth of the psychological out of the bodily.⁵ Neuroscientists tell us that the psychological mind itself is not merely a person's memories, thoughts, and histories, but their brain chemicals as well.⁶ Saks herself seems to see this when she says, "The idea that several people could inhabit the same body is perhaps too out-of-accord with common intuitions for the law to embrace."⁷ Even the example of the Siamese twins is instructive. Here there are clearly two brains, two personalities, two centers of intention, with less than two separate bodies. The twins would not go to prison, but because they share some body parts that cannot be separated, the healthy twin would be remanded to some nonretributive institution if the homicidal twin remained dangerous. Aside from the question of whether the innocent twin would consider this so-called nonretributive institution (presumably a high security unit in a psychiatric hospital) punitive, this example shows how hard it is to separate mind and body.

Let me turn to the example of Pete and Paul. Pete is slipped a pill that affects his mind by changing his neurochemistry in some profound way. Paul is the mean, vicious criminal Pete has been turned into. Paul murders someone and is caught, but the pill wears off just as Paul is jailed. Should Pete be punished? Saks says no. But does it make a difference if Pete himself took the pill, rather than having been slipped the pill by an evil scientist? Perhaps if Pete took the pill, not knowing what its effects would be, and if Pete disappeared completely while being replaced by Paul, he should not be punished. But if Pete knew he was taking an evil pill, and Paul committed a murder, would Pete be guilty of murder, or merely be an accessory? Or consider this variation: Pete has an unusual neurochemical

³ THE IDENTITIES OF PERSONS 1 (Amelie O. Rorty ed., 1976).

⁴ SIGMUND FREUD, THE EGO AND THE ID 26 (1989).

⁵ See, e.g., DANIEL STERN, THE INTERPERSONAL WORLD OF THE INFANT 73 (1985); RENE SPITZ, THE FIRST YEAR OF LIFE 73, 103 (1965).

⁶ RHAWN JOSEPH, NEUROPSYCHIATRY, NEUROPSYCHOLOGY, AND CLINICAL NEUROSCIENCE: EMOTION, EVOLUTION, COGNITION, LANGUAGE, MEMORY, BRAIN DAMAGE, AND ABNORMAL BEHAVIOR 441, 564 (1996); JAAK PANKSEPP, AFFECTIVE NEUROSCIENCE, THE FOUNDATIONS OF HUMAN AND ANIMAL EMOTIONS 309 (1998).

⁷ Saks, *supra* note 2, at 190.

abnormality. On his 40th birthday, his brain chemistry changes, he turns into Paul for a single day, and then turns back into Pete. What is his responsibility? What if his brain chemistry changes once a month? What if his brain chemistry changes at unpredictable intervals? The latter two examples begin to resemble a defense based on hormonal changes in the first instance and bipolar disorder in the second. The only significant difference is that in Saks' example, Pete is not present when Paul is. It is the presumption that there is an impenetrable barrier between them that is critical. But if the Pete who is euthymic is unable to stop the Pete who is manic or the Pete who is depressed; or if the euthymic Pete is not accessible when in a "manic Pete" state, is there really a functional difference? What if Pete were bipolar, and habitually referred to himself, when manic, by the nickname, "Paul?" Why wouldn't bipolar disorder create involuntariness similar to MPD?

III. DISSOCIATION AND RESPONSIBILITY

In her next section, Saks considers criminal responsibility if alters are nonpersonlike parts of a deeply divided person. She is correct to assert that this is the view that most clinicians hold. She asserts, "[I]f dissociative phenomena ordinarily lead to exoneration, why not MPD, the paradigm of dissociation?"⁸ For this assertion to hold, Saks must demonstrate that MPD is like sleepwalking, hypnosis, posthypnotic phenomena, and certain epileptic states. The most common dissociative state, depersonalization, does not ordinarily lead to exoneration.

She gives three reasons why dissociative consciousness should lead to nonresponsibility. First, an innocent alter should not be punished. Second, significant parts of the self are not brought to bear on the act, thus rendering the actor fully present as a practical reasoner. "Third, responsibility arguably requires a relatively integrated self."⁹ The weakness in this view is betrayed by the argument given in its behalf. Saks asks us to imagine another pill that erects impenetrable amnestic barriers between a person's anger and all of the internal forces that are capable of restraining that anger. She states that this is different from the case of someone simply in a strong emotional state. Here she comes closest to my own view, based heavily on clinical experience. The factor that determines nonresponsibility is the degree of the amnestic barriers and the extent of separation among the alters. But how different are ordinary people with different person-states from people with MPD?

⁸ *Id.* at 193.

⁹ *Id.* at 194.

How many times does ordinary language acknowledge that people are both continuous and discontinuous? Has anyone said, "I'm sorry about what I said or did; I wasn't myself yesterday"? If you weren't yourself, who were you? Or what about the phrase, "I guess I just lost it when I broke the vase"? What did the person lose? If it was the capacity to restrain the bad act, if only for a second, then isn't there a person-state that passes Saks' test for nonresponsibility? Saks does indeed address this problem in the section *Proposed Rule*:¹⁰

While multiples are often nonresponsible, in whatever way we construe their alter personalities, there are nevertheless two occasions when multiples should be found responsible. First, they should be responsible when *all* of their alters know about and acquiesce in a crime, unless only a trivial number of very fragmentary alters do not I would find acquiescence if there is any act of complicity, or where the alter knows about the crime and can prevent it without undue danger or effort, but does not attempt to do so. . . . Second, when multiples are so organized that it is just to hold them on a theory of corporate criminal liability, I would do so, provided that the alters act within the scope of their authority and with an intent to benefit the whole. In this case, a multiple's liability should be mitigated because some of the alters will only be guilty of 'negligent delegation' not of the principal offense.¹¹

This last point tells us that if Pete took the mind-changing pill to allow Paul to murder Pat, because Pete thought that Pat might harm him in some way, then Paul might be guilty of murder; but Pete would only be guilty of a lesser offense, and liability would be mitigated but not erased. In such a case, Pete might escape prison, because "we do not imprison corporate officers for corporate acts."¹²

IV. SOME CLINICAL PERSPECTIVES

My clinical experience is that very few people with MPD have impenetrable amnestic barriers. There is some significant degree of coconsciousness in most people with MPD. For example, it is nearly always the case that a rescuing alter intervenes to prevent death in a suicide attempt. Many MPD patients who are parents are able to intercede to prevent an angry alter from harming their children (unfortunately, there are some who are not). As to the corporate criminal liability comparison, it is almost always the case that each alter believes that they are acting for the benefit of the whole, as each in good faith understands it. The person created alters, in the first place, for the benefit of the whole system.

¹⁰ *Id.* at 195.

¹¹ *Id.*

¹² *Id.*

Generally, all alters act principally in the sphere of their expertise and authority.

Saks does recognize that “[c]ases in which a multiple would be found responsible under this rule are not rare.”¹³ I contend that in the clinical world this variation is more common than the impenetrable walls. In recognition of this, Saks does not propose a rule of rebuttable presumption of nonresponsibility for people with MPD.

V. INNOCENT ALTERS AND DIMINISHED CAPACITY

Next, I want to turn to the question of innocent alters. The examples of the Siamese twins and of Pete and Paul are compelling. To the extent that a person with MPD resembled those two cases, it would also be inappropriate to imprison the innocent alters to punish the guilty ones. I believe that, in clinical situations, MPD patients do not often resemble those cases. But there are theoretical problems in addition to the practical clinical ones. Saks says that if there is collusion or acquiescence by all the alters, the person with MPD would be found responsible. She then says that there can be a “trivial number of very fragmentary alters” who do not acquiesce and the person would still be responsible.¹⁴ What is the difference between a fragmentary alter and an alter? Is it time in control? If so, what do we do with patients who report thousands of alters? Clearly, none of them can be in control for very much time. Does it rest on the complexity of the alter structure? The more an alter possesses sufficient complexity, the more likely that there will be coconsciousness and the capacity to intercede in the acts of other alters.

If the avoidance of punishing innocent alters is of prime importance in Saks’ proposal, what do we do with the person with MPD who creates new alters after the crime has been committed? Suppose, for example, that a murderer has three personalities, Joe, Jim, and John. Joe planned a robbery; Jim emerged when confronted by the shopkeeper, and committed a murder, all of which was cheered on by John. All three know what happened and cooperate in attempting to evade capture. The police take a few weeks to apprehend the perpetrator, and by the time they catch him, Jay has been created. At first, Jay knows nothing of the crime. During the eighteen months it takes to come to trial, Jay overhears conversations with the police, with the lawyers, and with the examining psychiatrists, and thus learns about the murder. Jay is mortified that Joe, Jim, and John committed such an act. Jay is even more innocent, if that is possible, than an alter cowering in the background at the time of the murder, for he was nowhere

¹³ *Id.*

¹⁴ *Id.*

near the crime scene in either space or time. Do we let Joe/Jim/John free so that we don't thereby punish innocent Jay? If so, how do we prevent this mechanism from being used by people to avoid consequences?

How would Saks' theory handle this variation? A crime is committed by four alters in collusion, three others know about it but feel unable to stop it, and two more do not know about it. While awaiting trial the person has the opportunity to be treated by an expert in dissociation. Excellent therapy brings about complete integration. There is no longer a separate innocent alter. Is this individual responsible or not? If Saks' application of the Blackstone maxim of letting the guilty go free in order not to punish the innocent is a primary consideration, then the person with MPD who manufactures an innocent alter after the crime should not be punished, whereas the one whose formerly noncomplicit alters have been integrated with the guilty ones and therefore no longer exist as separate innocents, should be punished.

Here Saks and I differ significantly. She sees the nonpersonlike parts of a divided person as still possessing sufficient personlike qualities that they are separate: one part can be innocent while another part is guilty. I see alters as mental constructs which are integral parts of a single person. Frank Putnam affirms this when he states, "Alter personalities are not separate people . . . They are best conceptualized as examples of a fundamental and discrete unit of consciousness, the behavioral state."¹⁵ He then compares the presence of alters to the behavioral and affective shifts that occur in bipolar illness.¹⁶ Richard Gottleib makes a similar argument.¹⁷

The critical point for me is not the existence of alters, which I view as states within a single person, but the capacity of the alters to influence behavior across mental states. "Command and control" of actions is the central element in my assessment. Thus I would find Joe/Jim/John/Jay responsible and guilty, because at the time of the crime the key parts of the system cooperated in the murder; that Jay, who was created later, is "innocent" would not be persuasive. On the other hand, in my second example, the person might be able to be held nonresponsible even though, by the time of the trial, there were no longer any innocent alters. More important for me would be the question of the relative knowledge and strength within the system at the time the crime was committed.

¹⁵ Frank Putnam, *Discussion: Are Alter Personalities Fragments or Figments?* 12 PSYCHOANALYTIC INQUIRY 95–111 (1992).

¹⁶ *Id.*

¹⁷ Richard M. Gottleib, *Does the Mind Fall Apart in Multiple Personality Disorder? Some Proposals Based on a Psychoanalytic Case*, 45 J. AM. PSYCHOANALYTIC ASS'N 907–32 (1997).

VI. RESPONSIBILITY

On the issue of the therapeutic versus the criminal law context, I agree with Saks that the standard of legal responsibility should not be based solely on what is therapeutic for patients. On the other hand, the clinical presumption of responsibility is based on the understanding that MPD is a complex system designed to protect and promote the interests of the whole person. Alters come into being to be responsible for emotions, memories, and actions for the purpose of problem solving and survival. Alter systems are designed to be cooperative for the good of the whole. Where they go wrong is that they do not adapt quickly enough to improved conditions of adulthood. But alter systems are not static either. Problems of amnestic barriers and coconsciousness are more quantitative than qualitative. The presence of amnesia and the conceptualization of an alter as separate from other alters tell only part of the story. The system as a whole is a complex structure with an underlying unity. For this reason I am in more accord with a theory of mitigation rather than a theory of nonresponsibility.

VII. SOME ADDITIONAL STANDARDS

Here I would like to interject some thoughts about the criteria that I would find useful in determining that an individual with MPD is not criminally responsible. First, there must be some corroborating evidence that the MPD existed prior to the time the crime was committed, preferably dating back to childhood. Second, there has to be a sufficient amount of time to observe the individual to note the consistency of alter states. Third, the alter or alters who committed the acts in question must be able to describe what they did. Fourth, the "command and control" of the entire system must be assessed. To qualify for nonresponsibility, the individual must have significant dissociative barriers that prevent key alters from interceding to prevent the acts, or that prevented them from knowing that the acts were taking place. Witness alters who knew about, but could not stop, the acts in question must be evaluated to see if their inability was genuine or a form of passive acquiescence. I would require evidence that the alters had been unable to influence each other in the past. A pattern of alter coconsciousness and ability to influence each other in the past would lead me to assume that alters could have interceded to stop a crime, but chose not to. Fifth, in this evaluation, I would regard most minor alters and most clone alters as equivalent to Professor Saks' fragmentary alter concept. My working assumption would be that coconsciousness and ability to influence generally exists, and I would need to see that it did not exist in the particular individual being evaluated. Sixth, whether the diagnosis of MPD would be a factor in nonresponsibility or in mitigation of

sentencing would depend on the quality and quantity of the ability or lack thereof to know about and to influence the actions in question. Intermediate degrees of dissociative barriers might qualify for mitigation even if they did not reach the threshold for nonresponsibility.

Conceptually, I come closest to agreeing with Professor Saks' third formulation of the nonpersonlike parts of a deeply divided person. Responsibility, mitigation, or nonresponsibility then rests on the quality and quantity of the dissociation and its impact on communication and control internally. It is not that the alters have a separate and semiautonomous existence. It is that the person, as a whole, did not have all the ingredients with which to understand and restrain the criminal act in question.

I agree with the modification regarding "corporate responsibility," except that Saks has not convinced me not to imprison in such cases. After all, the individual might be analogized to a corporation, but in the end they are a single person, albeit deeply divided.

VIII. OTHER CONCERNS

Finally, I would like to raise some other general concerns. If persons with MPD are considered to be separate people, as in the first conceptualization, or separate personlike entities, as in the second, what are the consequences for the rest of the law? I realize that Professor Saks was focusing only on criminal responsibility. If we accept any theory that is not based on the ultimate unity of the person, we may be inviting a host of problems greater than the ones Saks is trying to solve in her paper. To the extent that any part of the law regards alters as separate and personlike, that will affect the person's status in other areas. For example, if an individual can be held nonresponsible for a criminal act, can they be held nonresponsible for a noncriminal act? If only one alter gets married and the other alters did not consent because they were unable to intervene, does that invalidate the marriage? Is it possible for a majority of alters (as measured either by degree of control or by numbers) to invalidate a contract? What about a minority of alters? Even the third conceptualization of a deeply divided person with nonperson-like alters who are separate enough to be considered individually opens the door to those problems. While recognizing that these papers focus on criminal responsibility, I do not believe that any of the "alters are personlike" approaches should be adopted before considering wider implications across the law. The conceptual path we travel to get to the question of criminal responsibility in MPD is critical. That is one reason that I prefer a concept of a single person whose multiplicity may cause a diminished capacity due to the inaccessibility of crucial internal knowledge and control. The alternative

seems to be an undue reification of alter states not consistent with the clinical data.

