

ARTICLES

MULTIPLE PERSONALITY DISORDER AND CRIMINAL RESPONSIBILITY

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MULTIPLE PERSONALITY DISORDER AND CRIMINAL RESPONSIBILITY

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I. INTRODUCTION

What does multiple personality disorder (“MPD”) mean for the law? One of the most wrenching situations in which this question arises concerns criminal law. When a multiple commits a crime, is she responsible for her act? Other vexing questions arise concerning people with MPD—Are they competent to contract? Are they parentally fit? Should we swear in separate alters at trial?—but I focus here on the question of criminal responsibility alone.

In my discussion of criminal responsibility, I will first look at the ways courts have treated MPD. Second, I will briefly consider three different ways of conceptualizing alter personalities. In the third Part, the heart of this Article, I will analyze the criminal responsibility of people with MPD under these three conceptualizations of alters. Fourth, I will suggest that most multiples are nonresponsible under the law, and I will propose a rule for when they should be found responsible and nonresponsible. Finally, I will discuss whether my standard is practicable.

II. THE VIEWS OF THE COURTS

There are at least two problems with the courts’ treatment of MPD and criminal responsibility to date. First, most courts do not specify how the insanity defense applies to people with MPD, and thus abdicate their authority to the experts. Second, the few courts that do articulate a standard get the standard wrong—although at least one court has come close to my vision of the correct view.

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How insanity should be defined is a legal question. Thus, the standard for insanity should be based upon statutes and case law, not upon the decisions of experts. The standard language of the insanity test found in the courts is not adequate when it comes to people with MPD because the insanity defense is not self-interpreting when it comes to this group. On one standard test, defendants must fail to know the nature, quality, or wrongfulness of their acts.¹ But who is “the defendant” here? The alter in control at the time of the act? The host personality? Any personlike alter? Courts must undertake to clarify how the test applies to people with MPD; otherwise, they are vesting experts with an authority that is beyond the scope of their expertise.

Unfortunately, many courts simply allow experts to apply the insanity test as they best see fit. One expert, for instance, testified that:

[T]he conscious personality would have no control over or memory of what happened during a period when he was taken over by the other ‘evil’ personality. The defendant thus . . . could not have distinguished right from wrong during the killing because he was virtually unconscious of what was happening.²

This expert confuses insanity and involuntariness, and does not explain why he concludes that the “defendant” lacked the abilities he specified. One could discern his theory with some effort; but again, an expert should not be responsible for formulating the theory—that is the law’s job.

In another case, an expert concluded the other way³—that although the principal personality “may not have any recollection of the behavior of an alternate, it is somewhat comparable to the behavior of a man who has no recollection of doing something while under the influence of drugs or alcohol but is still held responsible for such behavior.”⁴ The court allowed this expert to make the normative judgment that current unconsciousness is like failure to remember and that the multiple’s condition is, normatively speaking, like voluntary rather than involuntary drunkenness.

Courts should not leave these decisions to the experts. Indeed, many experts simply conclude that multiples could know, or not know, the nature or wrongfulness of their acts—without telling the court the decision rule

¹ See *Daniel M’Naghten’s Case*, 8 Eng. Rep. 718, 722 (H.L. 1843) (establishing that a defense on the ground of insanity requires clear proof that, at the time of the commitment of the act, the party accused was laboring under such defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know that what he was doing was wrong). This is a common standard that has become known as the M’Naghten test. In essence, this test makes the not knowing the nature, quality, or wrongfulness of the act the most important part of the test.

² *State v. Bancroft*, 620 So. 2d 482, 484–85 (La. Ct. App. 1993).

³ *State v. Beverlin*, No. A-92-251, 1993 WL 165349 (Neb. Ct. App. filed May 18, 1993) (not approved for publication), *appeal dismissed* 508 N.W.2d 271 (Neb. 1993).

⁴ *Id.* at *2.

that allows them to draw that conclusion. Courts then simply repeat these conclusions in rote fashion.⁵ Courts must step up to the plate and articulate how the insanity defense applies to people with MPD.

A small number of courts have done just that.⁶ In essence, these courts have taken one of two or three different views (I say “two or three” because one of the views is not clearly held by *any* court). The first view found in the courts is that a multiple is not guilty by reason of insanity (“NGRI”) if the alter that is in control at the time of the act meets the insanity test of the particular jurisdiction.⁷ Thus, experts are directed to look at the mental state of that alter. If the alter, for instance, were psychotic and did not know what she was doing, the multiple would be criminally insane. Or if the alter were a child who did not know what she was doing—which is not always the case since child alters are not actually children—the multiple would also be insane. Otherwise, the multiple would be guilty of the crime.

The second view of courts is that a multiple is insane if *any* alter meets the insanity test. This view is less well grounded in the courts because the decisions that take this position also contain language suggestive of the first position.⁸ For example, in *State v. Rodrigues*, the court reviews the expert’s testimony about each of the three alters’ knowledge at some length.⁹

The third view of the courts is found in a Tenth Circuit case, *United States v. Denny-Shaffer*.¹⁰ This view suggests that a multiple is criminally

⁵ See, e.g., *Tanner v. State*, 265 A.2d 573, 577 (Md. Ct. Spec. App. 1970) (discussing the lower court decision that the defendant was competent to stand trial based solely on the opinion of a psychiatrist); *Lowery v. Abrahamson*, 434 N.W.2d 662 (Wis. Ct. App. 1988) (unpublished limited precedent opinion) (relying on the report of an expert to find that the defendant had the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law at the time of his acts); *R.H.L. v. State*, 464 N.W.2d 848, 849 (Wis. Ct. App. 1990) (agreeing with experts that the defendant suffered from a mental disease); *State v. Jolley*, 508 N.W.2d 770, 771 (Minn. 1993) (citing the testimony of two defense expert witnesses that defendant with MPD knew the nature of his act and that it was wrong).

⁶ See generally ELYN R. SAKS WITH STEPHEN H. BEHNKE, *JEKYLL ON TRIAL: MULTIPLE PERSONALITY DISORDER AND CRIMINAL RESPONSIBILITY* 120–36 (1997) (discussing cases before 1997 that dealt with the criminal responsibility of individuals suffering from MPD).

⁷ See, e.g., *State v. Grimsley*, 444 N.E.2d 1071, 1075–76 (Ohio Ct. App. 1982) (upholding conviction and concluding that there was no evidence that the alter was unconscious, acting involuntarily, or did not know that his acts were wrong); *Kirkland v. State*, 304 S.E.2d 561, 564 (Ga. Ct. App. 1983) (finding criminal liability so long as the personality controlling the defendant’s behavior was conscious and her actions were a result of her own volition). “The law adjudges criminal liability of the person according to the person’s state of mind at the time of the act.” *Id.* at 564; *Commonwealth v. Roman*, 606 N.E.2d 1333, 1336 (Mass. 1993) (citing *Kirkland*, 304 S.E.2d 561).

⁸ See, e.g., *State v. Rodrigues*, 679 P.2d 615, 618 (Haw. 1984) (noting that “one personality often cannot control the actions of another personality,” and “[t]he trend in . . . courts is toward examining the sanity of each personality presented in an individual . . .”). The *Rodrigues* court at one point, however, seems to adopt the view held by the *Grimsley* court.

⁹ 679 P.2d at 619–20.

¹⁰ 2 F.3d 999 (10th Cir. 1993).

insane if the host personality did not plan or participate in the offense.¹¹ In essence, *Denny-Shaffer* takes the position that the “defendant” is the host personality. This view is quite plausible but, as I shall argue, does not go quite far enough.

Courts, then, must articulate how the insanity defense applies to people with MPD. I will argue that they must articulate a standard different from those articulated by the few courts that have considered the issue. Instead, a multiple should be found nonresponsible if any nonfragmentary alter did not know about or acquiesce in the crime.

III. THE PROPOSED STANDARD: A PERSON SUFFERING FROM MPD SHOULD NOT BE HELD RESPONSIBLE FOR A CRIME UNLESS ALL OF HER ALTERS KNEW ABOUT AND ACQUIESCED IN THE CRIME

A. WHY THE STANDARD PROPOSED SHOULD BE ADOPTED

To understand why the standard I propose is appropriate, it is necessary to understand the nature of alter personalities. There are three plausible ways of understanding alter personalities: as persons, as personlike centers of consciousness, and as parts of a divided person.¹² Philosophers tend to take the first two views,¹³ while mental health professionals tend to take the third.¹⁴ It is a mistake to defer to the mental health experts on this question. How to conceptualize alter personalities depends on what is meant by the

¹¹ See *id.* at 1013 (finding the test of insanity to be whether the host personality was aware of and in control of the commission of the offense).

¹² See generally SAKS WITH BEHNKE, *supra* note 6, at 39–66 (discussing the ontological status of alter personalities).

¹³ See, e.g., STEPHEN E. BRAUDE, *FIRST PERSON PLURAL: MULTIPLE PERSONALITY AND THE PHILOSOPHY OF MIND* (1991) (conducting a philosophical discussion of MPD); JENNIFER RADDEN, *DIVIDED MINDS AND SUCCESSIVE SELVES: ETHICAL ISSUES IN DISORDERS OF IDENTITY AND PERSONALITY* 77–89 (1996) (discussing different philosophical approaches to MPD); KATHLEEN V. WILKES, *REAL PEOPLE: PERSONAL IDENTITY WITHOUT THOUGHT EXPERIMENTS* (1988) (examining personal identity from a philosophical rather than a scientific perspective); Susan Leigh Anderson, *Coconsciousness and Numerical Identity of the Person*, 30 *PHIL. STUD.* 1 (1976) (discussing the question of whether there can be one or more persons associated with a body at a single moment in time); Nicholas Humphrey & Daniel C. Dennett, *Speaking for Our Selves: An Assessment of Multiple Personality Disorder*, 9 *RARITAN* 68 (1989) (concluding that a person with MPD has several selves); Peter K. McInerney, *Person-Stages and Unity of Consciousness*, 22 *AM. PHIL. Q.* 197 (1985) (discussing the different factors that compose a unity of consciousness and the possibility that there could be more than one unity of consciousness in a single body); James Moor, *Split Brains and Atomic Persons*, 49 *PHIL. SCI.* 91 (1982) (arguing that split-brain patients should be regarded as one person with one mind that is made up of mental subsystems).

¹⁴ See, e.g., Frank W. Putnam, *Diagnosis and Clinical Phenomenology of Multiple Personality Disorder: A North American Perspective*, 6 *DISSOCIATION* 80, 83 (1993). “Alter personality states [do not] represent separate or complete personalities or people.” *Id.*; Colin A. Ross, *Twelve Cognitive Errors about Multiple Personality Disorder*, 44 *AM. J. PSYCHOTHERAPY* 348 (1990) (arguing that alters are dissociated components of a single personality).

word “person.” It is philosophers and lawyers, not psychiatrists, who are the authorities on this issue, although psychiatrists will naturally provide important empirical data. In my view, how we should conceptualize alters remains an open question.

The first view is that alters are different persons according to the best criteria of personal identity. Philosophers distinguish two theories of personal identity, bodily and psychological. Most people’s intuitions are that their memories, thoughts, and histories—not their bodies—make them who they are. Consider a thought experiment made famous by Bernard Williams that pushes us toward a psychological theory.¹⁵ You and the person next to you will swap minds—her mind will be in your body and your mind will be in her body. Tomorrow, one of the bodies will receive a gift of \$100,000, while the other will be tortured. Which body do you wish to receive which treatment? Most people want the \$100,000 to go to the other body—the one with their mind in it—and want the torture to be done to their old body. Thus, they are implicitly subscribing to a psychological theory.

If we adopt a psychological theory of personal identity, then many alters may be people. On the other hand, the idea that several people could inhabit the same body is perhaps too out-of-accord with common intuitions for the law to embrace. In addition, identifying people with their psychological characteristics may be too administratively inconvenient for the law.

The second view is that alters are different personlike centers of consciousness, or apperceptive centers (as Stephen Braude puts it).¹⁶ Alters each experience their experiences as their own and believe their experiences to be their own—and no one else’s. Moreover, they seem to be people by all criteria of personhood or moral agency except that they lack a body. For instance, they are rational, separately the subject of intentional predicates and viewed as separate objects of moral concern, and they have their own sense of consciousness and self-consciousness.¹⁷

The third view is that alters are nonpersonlike parts of complicated people. This is the view that most mental health professionals hold—although the legal and moral status of alters, again, is not a psychiatric question.¹⁸ Nevertheless, this view also has some plausibility. In essence,

¹⁵ BERNARD WILLIAMS, *PROBLEMS OF THE SELF: PHILOSOPHICAL PAPERS 1956–1972*, 46 (1973).

¹⁶ See generally BRAUDE, *supra* note 13, at 77–87 (discussing multiples as having distinct alters or apperceptive centers).

¹⁷ See WILKES, *supra* note 13, at 23, 130 n.20 (appropriating Dennett’s criteria in her examination of MPD); Daniel Dennett, *Conditions of Personhood*, in *THE IDENTITIES OF PERSONS* 175 (Amelie Oksenberg Rorty ed., 1976) (discussing the criteria of personhood).

¹⁸ A fourth view that alters are simply delusions or figments of the multiple’s imagination is also occasionally argued. While some mental health professionals believe there are fantasy elements

there are reasons to think alters are more partlike than personlike; for instance, they can share thoughts with each other at times, and they can be integrated into one.

Each of these views has some plausibility, and it is premature to claim closure on this question. We need more empirical information and conceptual theorizing about personhood to answer this question. For now, we should consider criminal responsibility on each view.

1. *Criminal Responsibility If Alters Are Persons*

Are multiples nonresponsible if their alter personalities should be construed as different people? Here the answer is clearly yes.¹⁹ True, there is a guilty alter. But what about all the innocent alters? We do not put one person in prison for the crimes of another. Consider, for example, a set of conjoined twins. If one of the twins impulsively picked up a gun and killed someone, we would not put the twins in prison, although we would restrain them in some nonretributive institution if the homicidal twin remained dangerous.

This means, of course, that a guilty person goes free. But our system prefers not to punish guilty people over punishing innocent people. Witness Blackstone's maxim that it is better to let ten guilty people go free than to punish one innocent person.²⁰

There are only two ways around this conclusion. First, one could argue that we should try to punish only the guilty alter. While there are no real theoretical problems with this approach, there are serious practical problems: how do prison guards correctly identify when a guilty alter comes out, and, more important, how do they make that alter stay out to receive the punishment? Thus, this option is impracticable however theoretically sound it may be.

Second, one could argue that we can put the multiple in prison without punishing the innocent alter so long as our punitive intent is directed only toward the guilty alter. But this claim is implausible. First, the innocent alter in prison would seem to be punished, and not simply regulated, under the criteria established by the United States Supreme Court in cases such as *United States v. Salerno*.²¹ Responding *fully* to the claim that the alter is not

involved in some alters, none who support the legitimacy of the diagnosis think that alters are *only* that. For instance, there are amnesia barriers between some alters and personality characteristics that cluster together. To take this position is to make MPD a psychotic disorder and not a dissociative disorder. Finally, even if alters are just delusions, a person with MPD can arguably still satisfy the insanity defense. *See infra* note 28.

¹⁹ See generally SAKS WITH BEHNKE, *supra* note 6, at 68–80 (discussing criminal responsibility of multiples when alter personalities are conceptualized as different people).

²⁰ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 358 (1826).

²¹ 481 U.S. 739 (1987).

being punished would require a complete theory of punishment. Still, when we put someone in prison following a conviction for the length of time that conviction of that crime ordinarily entails, if that person suffers the same detriments as convicted prisoners suffer; if the public perceives punishment; and if that person feels punished then we have punishment, *whatever* our theory of punishment.

Thus, our commitment to not punishing innocent people requires us to find multiples nonresponsible on this theory in order to spare the innocents within them.

2. *Criminal Responsibility If Alters Are Personlike Centers of Consciousness*

Are multiples nonresponsible if alters are personlike parts of people? The answer still seems to be yes when a part commits a crime.²² Personlike entities, because they are capable of guilt and innocence and capable of suffering from punishment just as persons are, should not be punished if innocent any more than innocent people should be.

Indeed, on this theory, the principal reason alters are not people but rather personlike is that they lack a body. But what difference does that make to whether they are guilty or innocent and deserve punishment or not? Presumably, if a disembodied entity ordered someone else to commit a crime, that person would be an accessory-before-the-fact, and punishable. And if that person were innocent—and would suffer from punishment—we would spare punishment. As far as pure guilt or innocence is concerned, what difference does a body make?

The easiest way to see that we should not punish innocent personlike entities is to consider another thought experiment—the story of Pete and Paul. Pete, a wonderful man who is loved by all, is slipped a pill by an evil scientist that changes him into a mean, vicious criminal called Paul. Paul, in a moment of pique, kills someone. An hour later, Pete wakes up in jail charged with murder. Should we punish him?

Most people's intuitions are that we should not, even though the two personalities are not different people—they share a body. The best explanation for this is the idea that we should not punish one personlike entity for the acts of another. Indeed, our usual theories do not work to explain our intuitions. True, Pete was slipped a pill, but what difference does that make? If one were slipped a pill that made one's eyebrows a different color, that would not be a basis for a defense. The pill has to *do* something relevant to criminal responsibility. And of course the pill does

²² See generally SAKS WITH BEHNKE, *supra* note 6, at 80–90 (discussing criminal responsibility of multiples when alter personalities are conceptualized as personlike centers of consciousness).

not make the person hallucinate or anything of the kind. One could also say that the pill gives Pete a kind of illness. But mental illness, by itself, is a basis for exoneration in only one jurisdiction.²³ Perhaps Pete acted under the compulsion of his new character. But if *Paul* had been compelled, this would be an easy case—no one denies that if the alter acting is innocent then the multiple is innocent. Yet most would say Pete is innocent even if *Paul had not been* compelled. The lesson of this case is that we should not punish one personlike entity for the acts of another—*this* explains our intuitions about this case.

3. *Criminal Responsibility If Alters Are Nonpersonlike Parts of a Deeply Divided Person*

If alters are nonpersonlike parts of a deeply divided person, there is still reason for holding that multiples are nonresponsible.²⁴ Consider certain phenomena that the law allows as a basis for exoneration: sleepwalking, acts performed under hypnosis and posthypnotic suggestion, and acts performed in certain epileptic states.²⁵ What do all of these phenomena have in common? One thing is that they are all dissociative phenomena. They all involve “a disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment.”²⁶ But if dissociative phenomena ordinarily lead to exoneration, why not MPD, the paradigm of dissociation?

To determine whether MPD should lead to exoneration, we must consider the reasons dissociative consciousness should lead to nonresponsibility. There are at least three. First, if there is an innocent alter, there is a center of consciousness that did not do wrong and does not deserve to suffer. This is the basis of the first two theories discussed above. Second, in cases of dissociation, significant parts of the self are not brought to bear on the act. Therefore, we do not, and should not, attribute the act to the actors in their capacity as practical reasoners.²⁷ Third, responsibility arguably requires a relatively integrated self. Perhaps an executive is

²³ New Hampshire is the only state that recognizes an act's being a product of mental illness as a basis for exoneration.

²⁴ See generally SAKS WITH BEHNKE, *supra* note 6, at 90–105 (discussing criminal responsibility of multiples when alter personalities are conceptualized as nonpersonlike entities—that is that they are neither persons nor personlike).

²⁵ The theory in this Section may sound in “involuntariness” rather than “insanity.” Still, the question before us is how to understand criminal responsibility as applied to people with MPD. We must address this complicated and difficult issue as a whole and not be bound by particular doctrinal categories. MPD is a phenomenon that cuts across different categories.

²⁶ AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 477 (4th ed. 1994).

²⁷ See generally ROBERT F. SCHOPP, *AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY: A PHILOSOPHICAL INQUIRY*, 190–201 (1991) (discussing criminal liability and practical reasoning).

needed to stand back and decide—evaluate and choose among competing reasons. Otherwise, again, the choice cannot be attributed to the person as a whole.

To underscore the reasonableness of this theory consider another thought experiment. A person is given a pill that walls off all the parts of her personality except her anger. Her kindness, sweetness, thoughtfulness toward others, and uprightness are simply inaccessible to her—behind amnesia barriers that she cannot breach. If the person in this state does an act of harm toward another, do we really want to say the act of harm is her act? Does it really represent her?

Note that the case of parts of the self being behind barriers is different from the case of someone simply being in a strong emotional state—say of rage or greed. Our hypothesis is that the pill erects walls between the person's other parts of her personality and her angry part; she simply cannot access them, just as a person cannot access parts of herself when acting under posthypnotic suggestion. The ordinary rageful or greedy person does not have barriers preventing access to her other parts; she simply neglects them.

One might also say that even in the case of ordinary people only one time-slice of each person—one person-state, so to speak—acts; the other person-states are not represented in the act. On the theory under consideration, do we then have to say that no one is responsible? The answer is no. In the case of ordinary people, different person-states are not too different from each other—they have access to each other, and they think of themselves as one. Each person-state is a decent representative of the whole, unlike the case of the person whose different states think of themselves as different people with different interests (i.e., the case of the multiple). In short, dissociation is different, and people with the extreme dividedness found in most dissociation—such as MPDs—should be found nonresponsible.²⁸

²⁸ Indeed for several reasons, multiples should often be nonresponsible even if alters are conceptualized simply as figments of a person's fantasy rather than one of the three suggested ways. First, other fantasies—such as delusions—often lead to findings of nonresponsibility: a person believing that God is commanding her to act is subject to a fantasy; yet, we hold her nonresponsible even though God was not commanding her, and she was simply imagining such. Second, if a psychotic person delusionally believes someone else is committing a crime when she herself was acting—and that she could do nothing to prevent this other from using her body—we would arguably find her criminally insane: she did not know the nature of her act—that it was her own and so potentially under her control—and therefore she cannot be faulted for doing it as she did not know she was. Finally, as this article discussed, there are reasons for thinking that alters, whatever they are, are more than mere delusions—as every expert on MPD agrees.

4. *The Proposed Rule*

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 acquiesce.²⁹ 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. In other words, I would impose a duty to intervene.

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" and not of the principal offense. In addition, I would not imprison on this basis, just as we do not imprison corporate officers for corporate acts. Liability, then, is mitigated but not erased as it is in the insanity defense.

Cases in which a multiple would be found responsible under this rule are not rare. Consider *State v. Moore*.³⁰ Ms. Moore, in her Billy Joel personality, held hostage and terrorized a group of children and was eventually complicit in the beating death of one. But the Marie Moore personality herself was no stranger to the crime. She would place phone calls to herself pretending it was Billy Joel calling with the children's daily instruction and discipline. And she deflected the police when under suspicion. Since both personalities knew about and acquiesced in the crime, Ms. Moore should not be relieved of responsibility on the basis of MPD. She was evidently a very ill woman who might have some defense, or at least mitigation, for her crime but not on the basis of MPD.

Given my proposal, as a practical matter I recommend that jurisdictions adopt the following language for the insanity defense for people with MPD:

With one exception, people with MPD are NGRI if any of the nonfragmentary alters did not know about or acquiesce in the crime, where acquiescence is defined as being complicit in the crime or failing to intervene to attempt to prevent or terminate the crime when intervention could be done with reasonable effort and without undue danger.

The exception is when the multiples are highly organized and their alter acts within the scope of their authority and with an intent to benefit the

²⁹ See generally SAKS WITH BEHNKE, *supra* note 6, at 106–20 (discussing when multiples should be held responsible for their crimes).

³⁰ 550 A.2d 117 (N.J. 1988).

whole, in which case the multiple's criminality is mitigated to a nonimprisonable offense.

Using a formulation tailored to the case of MPD makes sense, since MPD is a unique disorder. The suggested language is the result of a careful normative analysis of how to assess a multiple's criminal responsibility.³¹

The standard can also be formulated in the language of a jurisdiction's extant insanity defense. Take a jurisdiction with a *M'Naghten*-style insanity defense.³² Here, defendants with MPD are NGRI if any of their nonfragmentary alters either did not know the nature, quality, or wrongfulness of the act as it was occurring, or with reasonable effort and without undue danger, were not able to intervene or attempt to prevent the act of another alter.

Including the language "as it was occurring" will prevent evaluators from saying, as evaluators in these cases sometimes do, that a non-coconscious alter knew, for example, that sexual assault was wrong and therefore is culpable.³³ The question is not whether the defendant knew it was wrong in the abstract, but whether the defendant knew the conduct was wrongful at the time of the act. Of course, if she were unconscious, she did not. Asking this question makes about as much sense as asking the waking-self after the sleepwalking-self committed murder whether she knew murder was wrong.

There may also be a concern with the second part of this test: the multiple is NGRI if the knowing alter could not prevent the act of the acting alter. Is this part, insofar as it seems to refer to control, inconsistent with a *M'Naghten*-type insanity defense?

I think this concern is misplaced. Courts and legislatures that reject a volitional prong of an insanity defense seem to be engaging in the following reasoning: if a person knows her act is wrong, she is to be presumed to be able to control it. The presumption may make some sense in the case of a nonmultiple defendant charged with controlling herself. It does not, however, make sense in the case of a multiple where there is no reasonable theory which presumes that a person who knows someone else (another alter) is acting can control that other person.

To put this less concretely, controlling one's act when one is in control of one's body is different from controlling one's act when one is not. Thus, if a split-off part of the self, as in posthypnotic suggestion or a reflex action, is acting, and the person herself does not have executive control of

³¹ In the same way, the Tenth Circuit in *United States v. Denny-Shaffer*, while sometimes speaking in terms of "appreciation," also said that we should ask simply if the host personality "planned or participated" in the offense. 2 F.3d 999, 1016 (10th Cir. 1993).

³² See *supra* note 1 and accompanying text.

³³ See *State v. Rodrigues*, 679 P.2d 615, 620 (Haw. 1984).

her body, it does not make sense to fault her for the act. If this is so, the suggested language makes eminent sense.

Indeed, this standard is something of a compromise standard. To the extent we accept that alters are persons or personlike, arguably even if one alter knew about the act and could control the acting alter, we should make the multiple nonresponsible, as long as the nonacting alter did not participate, just as we do not impose a duty to intervene to prevent the crimes of one person on another. Imposing a duty to intervene here nevertheless makes sense because sharing a body gives one some culpability if one's body is used to harm another and one could, but did not, attempt to stop it.³⁴

5. *The Advantages of the Proposed Rule over Other Proposals*

The two views that are clearly held by the courts—the “specific alter” and the “host” approaches—are problematic. The first view is problematic because to say that one should look at the sanity of the alter in control at the time of the act seems to be saying that that alter is sufficiently personlike to be punished if guilty. It follows that, if the guilty alter is sufficiently personlike to be punished, then other innocent alters are sufficiently personlike to be spared punishment.³⁵ Even if this charge is wrong, and it is additionally denied that alters are personlike, there is good reason to find multiples nonresponsible on the third theory described above: other parts of the person are not available to be brought to bear on the act. This remains true even if the alter in control at the time of the act does not meet the insanity defense, just as it is true when a person under posthypnotic suggestion knows in her conscious state of mind what she is doing. If this is so, the “specific alter” approach is inadequate.

The second view, the *Denny-Shaffer* “host” view, although an improvement, is also flawed.³⁶ The *Denny-Shaffer* view is an improvement because it recognizes that even if the specific alter acting does not meet the insanity defense, there is another personlike agency in the multiple who is nonculpable and does not deserve to suffer. It is flawed because it does not go far enough. It is usually not only the host who is arguably personlike and should be protected from punishment if innocent but also many of the other alters as well. The view proposed here also makes more sense than the *Denny-Shaffer* host approach because the host concept is somewhat arbitrary: hosts can be difficult to identify, can change over time, and can

³⁴ Finally, if a court in a *M'Naghten*-style jurisdiction rejects this idea, it should simply remove the “control” language from the proposed standard and hold nonresponsible any multiple who had alters lacking knowledge of the act or its wrongfulness.

³⁵ See *supra* note 15 and accompanying text. See generally SAKS WITH BEHNKE, *supra* note 6, at 129–30 (discussing the inconsistencies and deficiencies of the specific alter approach).

³⁶ SAKS WITH BEHNKE, *supra* note 6, at 131–34.

take control a minority of time even though more than any of the other alters.

At least one litigant has suggested a test that if any part of the person's mind knew the act was wrong, the multiple should be guilty.³⁷ This test is problematic for a number of reasons. First, the narrowest view for insanity should require only that a multiple is sane if any alter that *participated* in the crime knew the act was wrongful. Otherwise, we would be forced to punish a multiple all of whose participating alters were psychotic, but who had a split-off part briefly present—for two seconds—during a ten hour crime who knew the act was wrongful. This alter, not being in executive control of the body, could not be faulted for not stopping the act; and the participating alters, by hypothesis, were all psychotic. Is it really fair to blame this multiple? When a participating alter, by contrast, knows the act is wrong, we may fairly blame that alter because having executive control during the crime, the alter could—as much as any other defendant—control the act and therefore can be blamed for not doing so.

Second, in other areas of the law it is not the case that a party's knowledge of the wrongfulness of an act renders the person guilty—namely, in the involuntariness context. A person who acts under posthypnotic suggestion knows perfectly well that the conduct is wrongful, yet we find that person nonresponsible because split-off parts of the person are acting. Once again, she does not have executive control.

Finally, and most importantly, this test suggests that if any alter knows the act is wrongful then the multiple is responsible. Proponents of this test do not justify why we should not rather say that if any alter *does not* know the act is wrongful the multiple is *nonresponsible*. In particular, they do not answer the reasons for proposing the latter as found in *Jekyll on Trial*.³⁸ For example, they do not justify why, even if we accept that alters are nonpersonlike, MPD should not be treated just as many other dissociative phenomena in the law are treated.³⁹

6. *Answers to Criticisms of the Proposed Rule*

Can this proposal be criticized because it is “extreme”? Some court cases and literature have suggested as much.⁴⁰ But, first, to call a view “extreme” is not to make an argument. Second, “extreme” views—in the sense that they result in few or many being affected—may nevertheless be

³⁷ See *State v. Greene*, 960 P.2d 980, 991–93 (Wash. 1999), *aff'd in part and rev'd in part*, 984 P.2d 1024 (1999).

³⁸ SAKS WITH BEHNKE, *supra* note 6, at 67–140.

³⁹ See *supra* Part II.A.3.

⁴⁰ See, e.g., *Greene*, 960 P.2d 980; August Piper, Jr., *Multiple Personality Disorder and Criminal Responsibility: Critique of a Paper by Elyn Saks*, 22 J. PSYCHIATRY & L. 7 (1994).

right; take the view that adult women should be able to vote. Third, and most important, the view against which this criticism has been made has been revised on the basis of greater understanding of criminal defendants with MPD.⁴¹

I do not propose a rule that there be a rebuttable presumption that multiples are nonresponsible. The proposal of a rebuttable presumption was based on the idea that most multiples would meet the insanity test formulated, but experience has proved that idea wrong. The reason it has been proven wrong seems to be that most criminal defendants are male; male multiples tend on average to have a considerably smaller number of alters than do female multiples, and often all the alters do acquiesce or even participate in the crime.⁴²

The literature on MPD and criminal responsibility does contain one critique of my earlier view, which would also apply to the view proposed here, namely, that written by Dr. August Piper.⁴³ Dr. Piper seems mostly concerned with collateral matters involved in this question—can MPD be reliably diagnosed, distinguished from other disorders, and distinguished from malingering?⁴⁴ He does not provide much in the way of an argument that the standard proposed in my earlier work is not well supported by my arguments. The one exception to this is his claim that there is evidence that alters do have control over one another and over when they come out.⁴⁵ But Dr. Piper has only adduced evidence that some alters at some times have this ability; he has not established that they always do or that they do under conditions of significant stress. More important, for Dr. Piper's observation to mean that multiples should be found guilty, it would have to be the case that all of the alters should have this ability. If they do not, then we can say that the alters who could have come out and stopped the crime are culpable, but that the alters who could not are not culpable.⁴⁶

Another criticism of a rule of nonresponsibility for multiples must also be addressed. Some point out that it is in multiples' therapeutic interests to be found responsible because finding them nonresponsible only exacerbates

⁴¹ SAKS WITH BEHNKE, *supra* note 6, at 106–07, 219 n.5.

⁴² See, e.g., Richard J. Loewenstein & Frank W. Putnam, *The Clinical Phenomenology of Males with MPD: A Report of 21 Cases*, 3 DISSOCIATION 135 (1990).

⁴³ See Piper, *supra* note 40, at 7.

⁴⁴ See *infra* Part II.B.

⁴⁵ See Piper, *supra* note 40, at 31–33.

⁴⁶ As an aside, this reasoning shows why a multiple should be nonresponsible even if drug taking lessens the ability of her alters to exert control over the acting alter: one must ask who was taking the drugs. The person taking the drugs is somewhat responsible for her own inability to act to prevent the crime; she *is* culpable. But unless *all* of the other alters were taking the drugs, they were *involuntarily* intoxicated and in no way culpable for their lessened ability to take control.

their condition.⁴⁷ But this is only a good reason for treating multiples as responsible in the therapeutic context—for example, when they misbehave in the hospital. It is not a good reason to find them responsible under criminal law and to punish them criminally. In the same way we do not punish children criminally, although it is perfectly appropriate for parents (and therapists) to treat them as responsible for their acts and punish them. Furthermore, we would not put an innocent person in prison even if a therapist were to say it would be a therapeutic benefit.

The law should not allow therapists to dictate what the standard of responsibility should be on the basis of what is or is not therapeutic for patients. Therapeutic responsibility and criminal responsibility belong to two entirely different domains.⁴⁸

B. THE PRACTICABILITY OF THE PROPOSED STANDARD

There are three potential classes of problems in applying the standard I propose. First, some claim that the diagnostic criteria for MPD are so vague that it is impossible to diagnose reliably someone with MPD.⁴⁹ In particular, they argue, it is impossible to say what a personality is and to distinguish a personality from a personality state or a fragment.⁵⁰ But all line-drawing questions are difficult—and they are pervasive in both psychiatry and the law.

Indeed, the concepts used in the definition of MPD are no more vague than the concepts used in the definitions of other mental illnesses. Take, for example, the concept of a delusion. What is the definition of a delusion as opposed to simply a false belief? Some suggest it is a fixed belief that is nonresponsive to the evidence.⁵¹ Does that mean there are no fleeting delusions? And how fleeting is fleeting enough? Can a belief that could be true, but probably is not, be a delusion? What if it has some basis in the evidence? How much evidence is enough? What about beliefs that are not based on sensory evidence at all—such as a belief in God? What about very unusual religious beliefs? The concept of a delusion, which is firmly rooted

⁴⁷ See, e.g., John O. Beahrs, *Why Dissociative Disordered Patients Are Fundamentally Responsible: A Master Class Commentary*, 42 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 93 (1994) (arguing that exempting patients from responsibility can result in an escalation of distress and behavioral dyscontrol).

⁴⁸ See generally SAKS WITH BEHNKE, *supra* note 6, at 136–40 (discussing the differences between the therapeutic view of criminal responsibility and the legal view of criminal responsibility).

⁴⁹ See, e.g., Piper *supra* note 40, at 11–22 (arguing that the central features of MPD are ill defined, and therefore, it is impossible to differentiate MPD from other psychiatric conditions); SAKS WITH BEHNKE, *supra* note 6, at 21–38 (discussing the skeptics' view of MPD).

⁵⁰ See Piper *supra* note 40, at 11–16.

⁵¹ See JOHN A. TALBOTT, ROBERT E. HALES, & STUART C. YUDOFKY, *TEXTBOOK OF PSYCHIATRY* 190 (1988).

in psychiatric nomenclature, is probably no more clear than the concept of a personality.

In addition, the question of whether MPD can be diagnosed reliably is better answered by studies than by speculation about the vagueness of the diagnostic criteria. Research using the Structured Clinical Interview for DSM-IV Dissociative Disorders (SCID-D) shows that at least this instrument achieves equal ratings on validity and reliability measures as diagnostic instruments for schizophrenia.⁵² No mental illness, other than some organic mental disorders, can be diagnosed as reliably as cancer or bacterial infections. There is no blood test for mental disorders. But on the best measures we have, MPD is as reliably diagnosed as other major mental illnesses.

Second, some suggest that MPD is too easy to mangle for the law to allow an insanity defense based on MPD.⁵³ But there is no evidence whatsoever (as opposed to bald assertions) that MPD is easier to mangle than any other disorder. All mental disorders (with the exception of some organic mental illnesses) can be mangled, and malingering must always be suspected in the forensic context. Psychotic disorders, for instance, can be faked on projective tests, even by subjects uninformed about the diagnosis.⁵⁴ The Minnesota Multiphasic Personality Inventory ("MMPI") does have some fake scales, but interpreting them is most difficult; for instance, high scores can indicate especially severe pathology as much as they can indicate malingering.⁵⁵ Most psychiatrists, in any case, do not use psychological testing alone to rule out malingering but also base their judgment on their clinical intuitions.

It is bare speculation, then, that MPD is easier to mangle than other disorders. Indeed, speculation might point in the exact opposite direction. People faking MPD would need to be able to keep separate in their minds and act out very different characters over an extended time. This is probably very hard to do. In addition, skilled examiners will want extrinsic evidence of MPD predating the crime, if possible; the presence of subtle

⁵² See Marlene Steinberg, *Advances in Diagnosing and Treating Dissociative Disorders: The SCID-D-R*, 64 BULL. MENNINGER CLINIC 146, 148-49 (2000); Marlene Steinberg, Bruce Rounsaville, & Domenic V. Cicchetti, *The Structured Clinical Interview for DSM-III-R Dissociative Disorders: Preliminary Report on a New Diagnostic Instrument*, 147 AM. J. PSYCHIATRY 76, 76 (1990).

⁵³ See, e.g., Piper *supra* note 40, at 19-22 (arguing that the distinction between true and mangled MPD cannot accurately be made); SAKS WITH BEHNKE, *supra* note 6, at 21-38 (discussing the skeptics' view of MPD).

⁵⁴ See, e.g., Samuel Albert, Hayward M. Fox, & Marvin W. Kahn, *Faking Psychosis on the Rorschach: Can Expert Judges Detect Malingering?*, 44 J. PERSONALITY ASSESSMENT 115 (1980). For a review of the article, see Glenn G. Perry & Bill N. Kinder, *The Susceptibility of the Rorschach to Malingering: A Critical Review*, 54 J. PERSONALITY ASSESSMENT 47 (1990).

⁵⁵ See KENNETH S. POPE, JAMES N. BUTCHER, AND JOYCE SEELEN, *THE MMPI, MMPI-2, AND MMPI-A IN COURT: A PRACTICAL GUIDE FOR EXPERT WITNESSES AND ATTORNEYS* 103 (1993).

signs and symptoms that could not be known simply by thinking through what having alter personalities might mean; test results on nonobvious tests that are consistent with MPD;⁵⁶ the absence of other signs of malingering; a consistent presentation over time; and many other indicia of the reality of the disorder.⁵⁷

Third, it might be thought that the proposed standard is impossible to apply, and that to make the diagnosis would take an inordinate amount of time. The idea behind the first point is that it is impossible to determine if non-coconscious alters met the insanity defense. Perhaps the idea is that if the alter was not present, how could one tell if she meet the test? But this is a non sequitur: if the alter was not present, we know she did not know the conduct was wrongful because we know she was not there.

More important, experts who testify that they cannot apply the insanity test to a nonpresent alter sometimes do just that. For instance, Dr. Gagliardi, in *State v. Wheaton*, opined that he could not apply the insanity test to nonpresent alters; but a few sentences earlier the court had quoted him speaking precisely of the other alters' involvement or noninvolvement in the crime.⁵⁸ Similarly, Dr. Olsen in his psychiatric evaluation in *State v. Greene* assessed the other alters' presence and ability to intervene in the crime.⁵⁹ It is not impossible to evaluate nonpresent alters. Notwithstanding what experts sometimes say they can do, that is just what they do.⁶⁰

What about the claim that it would take an inordinate amount of time to apply the proposed test? On its face, the proposed test may look as if it would take more time than the other tests in the cases and the literature, as the evaluator would need to examine each and every alter and not just the host or the alter in control at the time of the act. But this impression is

⁵⁶ An example would be the Rorschach test. See Judith G. Armstrong, & Richard J. Loewenstein, *Characteristics of Patients with Multiple Personality and Dissociative Disorders on Psychological Testing*, 178 J. NERVOUS & MENTAL DISEASE 448, 448-49 (1990).

⁵⁷ The idea that psychiatrists and psychologists cannot detect malingering of MPD is belied by their alleging just that in a number of insanity cases. Southern California's "Hillside Strangler," Kenneth Bianchi was determined to be malingering. See e.g., Diane Kiesel, *Spotting Fake Insanity: Professor Questions the Way Courts Use Psychiatry*, A.B.A. J., Dec. 1984, at 33. Also determined to be malingering were Arizona defendant, James Carlson, see Al Bravo, *Rapist Who Claimed 12 Personalities Says He Lied*, ARIZ. DAILY STAR, Apr. 20, 1994, at 1B, and the defendant in *State v. Greene*, 960 P.2d 980, 991-93 (Wash. 1999), *aff'd in part and rev'd in part*, 984 P.2d 1024 (1999). In addition, I, together with a psychologist and psychiatrist, have deemed a prisoner most likely *not* to have MPD despite a fifteen-year history of carrying the diagnosis.

⁵⁸ 850 P.2d 507, 508 (Wash. 1993).

⁵⁹ 960 P.2d at 985. It is not clear, however, whether Dr. Olsen believes that nonpresent alters are unable to be assessed. See *id.*

⁶⁰ Perhaps the argument is rather that experts cannot reliably assess what alters knew or could control because all they have to go on is the word of the alters. But this argument applies to *all* insanity evaluations which, since they are retrospective, must rely on what people say they knew at some time in the past. In both instances, there are reliable means for the evaluator to decide if what the defendant says is credible.

misleading. First, it is often likely to be the case that the evaluator quickly discovers an alter that did not know about or acquiesce in the crime. Once one such alter is found, it is unnecessary to go further. Second, it may sometimes happen that, on the other tests, all of the alters must be evaluated; without such an evaluation, one may not know who is the host, and one may not know which alter committed and which participated in the crime.

But perhaps all of these tests require too much time for evaluators to apply them reliably and to rule out malingering—to make sure the patient's presentation, over time, is consistent. Yet, this simply seems to be untrue—at least, diagnosis of other disorders is equally difficult or easy. Moreover, sometimes the law has to make decisions without having time to collect the ideal amount of data; consider contested custody cases. We make such decisions as best we can because we have to make them to achieve fairness or some other goal.

IV. CONCLUSION

MPD raises many interesting issues. I have considered one here, a proposed standard for courts to adopt for the criminal responsibility of people with multiple personality disorder. This standard, I think, is justified on normative and legal grounds, practicable, and consistent both with the aims of the criminal justice system to punish only the blameworthy and with the interests of people with multiple personality disorder to obtain needed treatment.

