MULTIPLE PERSONALITY DISORDER AND CRIMINAL RESPONSIBILITY: A REPLY

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The opportunity provided by this symposium volume to think in a sustained way about the issue of Multiple Personality Disorder ("MPD") and criminal responsibility has been very helpful to me as I refine my own thinking on this issue. The contributions in this volume are of very high quality indeed. Given the brief space allotted for my comments, I would like to focus on the issue of criminal responsibility, and the questions of personhood critical to it. As a result, many interesting and provocative points made by the contributing scholars must unfortunately go without remark.

Let me turn directly to the contributions. I discuss the two primarily clinical contributions first, namely, Dr. Armstrong's and then Dr. Steinberg's articles. I would like to briefly comment on what a wonderful case Professor Armstrong has presented. Her notion of the three levels of thinking about MPD is fascinating and enormously helpful. Her clinical description of the case is powerful and compelling, largely because of the mixed nature of Mr. Wood's pathology, which she develops beautifully. How should we conceptualize pathology, including both dissociative and psychotic features, and psychotic features which may not generalize in a simple way across personalities? The case is also interesting because we can bracket the psychotic features and ask about each individual alter's participation and acquiescence in the crime. Professor Armstrong has given us a thoughtful and skilled example of doing just that. In addition, she is sensitive to the limits of professional expertise, and she carefully teases out the role requirements of different actors in forensic MPD cases.

Drs. Steinberg, Hall, Lareau, and Cicchetti make an important contribution to the forensic assessment of individuals with MPD. They describe the SCID-D-R, the "gold standard" for the diagnosis of the dissociative disorders, discuss its reliability and discriminant validity, and review studies that demonstrate the SCID-D-R's ability to distinguish genuine MPD patients from simulators. In one study, evaluators relying on

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the SCID-D-R identified 100% of the MPD patients as MPD and 0% of the feigning patients as MPD.

They also provide very thoughtful guidelines for using the SCID-D-R in forensic evaluations and they put forth precise criteria that support the accuracy of diagnostic tests for dissociative disorders. They summarize by providing an extremely useful figure that gives an algorithm for the forensic assessment of MPD and they conclude by applying their theory to an MPD plaintiff. Their application demonstrates how to rule out malingering.

Their discussion will be very useful for mental health professionals who perform forensic evaluations on people claiming to have MPD. It will also be useful for lawyers, who will gain a sense of what a competent evaluation looks like. Finally, having the ability to identify malingerers accurately, as the study reviewed has shown and as the guidelines are meant to provide, should go some way toward appeasing those who think the disorder is easily malingered. The fear that an MPD insanity defense will allow many designing people to escape the punishment they rightly deserve may simply be contrary to fact. Thus, I take their discussion to support the practicability of my recommendation for an MPD insanity defense.

Professor Glenn Saxe does an important service in developing Frank Putnam's discrete behavioral state model of dissociation. According to this model, individuals with MPD suffer discrete behavioral states caused by trauma in childhood. The resulting picture is a failure to integrate autobiographical memory or a sense-of-self between these states.

I find this model of the development of MPD interesting and persuasive, but I do not think it answers the normative, theoretical questions surrounding personhood and responsibility. Professor Saxe states that "[a]ccording to a Discrete Behavioral States model, an alter personality is clearly not a person."[1] But knowing the etiology of different self-states is not sufficient to determine whether the resulting states are persons or personlike states. It may be, for example, that having its own memories and sense of self converts the split-off part—the alter—into a personlike state.

Imagine a thought experiment in which enough stress led to a person's brain and body splitting into two, with each part having its own memories and sense-of-self. Would the resulting entities not be persons by virtue of their etiology? Or imagine a different etiology: unity of the body was a developmental achievement, and persons who did not reach this state split into two. These thought experiments are of course fanciful, but they underscore the point that telling a developmental story about MPD doesn't answer the question of how we should conceptualize personhood.

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[1] Glenn Saxe, *Dissociation and Criminal Responsibility: A Developmental Perspective*, 10 S. CAL. INTERDISC. L.J. 243, 248 (2001).

Professor Saxe also makes the point that alters appear to be separate people by Dennett's criteria "because they are part of a person, not because they are a separate person—much as anyone would fulfill this criterion if it were applied during a specific emotional state."[2] It appears to me that there is an important difference between Sarah in her angry state of mind and in her peaceable state of mind, and an angry and a peaceable alter. Sarah in her angry state of mind and Sarah in her peaceable state of mind do not *separately* meet Dennett's criteria. Sarah is rational, a language user, has her own sense of self and so forth. Sarah-as-angry and Sarah-as-peaceable do not have their own separate senses of self. In addition, we do not think of Sarah-as-angry and Sarah-as-peaceable as separate moral objects and agents. By contrast, the angry and peaceable alters do separately meet Dennett's criteria and therefore have more claim to being different persons, or at least personlike entities.

Professor Saxe also addresses the question of responsibility in some detail. He suggests that we do not need a special rule of criminal responsibility for MPDs. Instead, we should just ask whether the person appreciated the wrongfulness of the act and could control it. But what does that mean in the case of someone with MPD? Of whom should we ask the test questions? Professor Saxe might say that we should just look at what was going through the person's mind at the time of the act, but the question arises yet again: which person? Suppose part of a person knows he or she is wrongfully murdering and part does not. Does "this" person know?

Perhaps Professor Saxe would urge us to look at the mental state of the alter in control at the time of the crime: if that part knows, the multiple is responsible. But we should be clear that a decision-rule is being proposed here which has built-in assumptions and biases. The point is that it is *not* good enough to declare simply that we should apply the traditional rule of criminal responsibility. I have argued why this rule is not the best rule: either, alters are personlike and it is not fair to punish them when innocent, or, they are partlike but the whole is insufficiently integrated for the multiple to perform a responsible act. While Professor Saxe is most drawn to the last theory, which he thinks is most consistent with his etiological hypothesis about alter states, he does not conclude that multiples should be nonresponsible. To support his nonconclusion, he points to the phenomenology of, say, rageful states in all manner of diagnoses. Such intense states lead to great difficulty in accessing and integrating all parts of the self for the purpose of decisionmaking.

I would say two things in response. First, it may be that we should have some mitigation of responsibility in sufficiently intense states of rage.

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[2] *Id.*

Second, MPD seems significantly different from these kinds of states in the very ways that Professor Saxe points out—MPD is marked by a failure to integrate autobiographical memory and the lack in a stable sense of self. The differences between rageful states and rageful alters may be relevant to criminal responsibility because in the latter case there are dissociative barriers. I would refer Professor Saxe to Professor Schopp's lucid description of how multiples' responsibility is compromised on my third theory of alters, a theory which Professor Saxe appears to embrace.

Professor Jennifer Radden writes an extremely interesting and thoughtful response to my position and to Professor Armstrong's case. Professor Radden argues that multiples should be criminally responsible.[3]

In doing so she makes three arguments regarding my opposite position. She argues that I am wrong in arguing 1) that imprisonment punishes innocent alters and is therefore impermissible, 2) that insanity defense fails to account adequately for the phenomenology of MPD, and 3) that innocent alters do not have sufficient control to act as their brothers' keepers. I respond to each of these claims.

Professor Radden argues, first, that imprisoning innocent alters may not be to punish them. She believes that because punitive *intent* is not directed toward the innocent alters, as such intent is not directed toward children who suffer from their parents' imprisonment, innocent alters (and the children) are not being punished. She acknowledges that this position depends on a deontologic view that is not without controversy. In making her argument, Professor Radden points to a weakness in my position: that there is a distinction between being punished and being burdened by punishment, and the innocent alters are punished while the child is only burdened by punishment. She notes that I adduce two factors to distinguish these cases: that stigma attaches to the whole in the case of MPD but not the child, and that the MPD feels punished in a way that a child does not. She rightly says that these are empirical claims that require study. She also gives reasons for doubting the latter: children may actually suffer much more from their parents' punishment than innocent alters from being in prison.

Professor Radden has identified a point in my position that requires further work. I agree that the differences between the innocent alter and the child require empirical study. I continue to think—speculate—that children, even very young children, will not feel criminally punished by their parents' incarceration, although they will certainly suffer and they may feel punished. The point is that they will not feel punished as criminals. In

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[3] *See* JENNIFER RADDEN, DIVIDED MINDS AND SUCCESSIVE SELVES: ETHICAL ISSUES IN DISORDERS OF IDENTITY AND PERSONALITY (1996) (developing her position in detail).

addition, the stigma point is an important difference between these cases, although the claim again is partly empirical: infants in prison with their mothers and innocent conjoined twins (if we should wrongly imprison them) would be recognized by the public as being innocent and not being criminally punished. Innocent alters, since they share a body with other alters and are not so easily distinguishable, will probably have the taint of guilt and punishment attach.

I respond to Professor Radden by acknowledging that answering the question about whether innocent alters are being punished depends on a full and complete theory of punishment, which I do not undertake to provide.[4] This theory seems even more important to me than the empirical research that is also needed. Perhaps one day I will undertake to think about this issue more clearly and I certainly invite others to engage in this task. Professor Radden's observations will remain important in thinking about this issue.

Second, Professor Radden argues that I may be wrong to think that the insanity defense as currently formulated does not have the case of MPD in mind, insofar as the disorder is fairly new and has only recently come before the courts. She says that I account for the increase in diagnosis of the disorder by supposing a "stable diagnostic practice/variable epidemiology,"[5] while she thinks it more likely that the facts are accounted for by "stable epidemiology/variable diagnostic practice."[6] To put the matter another way, I suppose MPD is fairly new and that its newness accounts for there not being a particularly good fit between MPD and the current insanity defense. Professor Radden, on the other hand, thinking it likely that MPD has always been around, concludes that the focus on cognitive and volitional impairments for nonresponsibility, which we find as far back as Aristotle, arose because these—and not dividedness—are important for nonresponsibility.

I would make a number of points in response. First, I do not think I need to suppose that the epidemiology of MPD has increased in the face of stable diagnostic practice. Indeed, I think it quite likely that diagnostic practices have been refined and we therefore see a greater incidence of the diagnosis of MPD. It is enough for me to suggest that MPD was not recognized as a disease until recently. If this is so, it is clear why the insanity defense has not taken account of dividedness in its formulation: the

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[4] I do say a few things about this issue in my book, but do not purport to offer a full account. *See* ELYN R. SAKS WITH STEPHEN H. BEHNKE, JEKYLL ON TRIAL: MULTIPLE PERSONALITY DISORDER AND CRIMINAL LAW 73–77 (1997).

[5] Jennifer Radden, *Am I My Alter's Keeper?: Multiple Personality Disorder and Responsibility*, 10 S. CAL. INTERDISC. L.J. 253, 263 (2001).

[6] *Id.*

insanity defense has a disease requirement. Cases involving MPD were simply not brought before the courts.[7]

Second, it would be interesting to see how scholars in periods when MPD was not seen as a disease, but rather, say, demonic possession, thought of the responsibility of these people. The insanity defense, of course, is a relatively new invention. Were people who appeared "possessed" commonly blamed and punished, informally, for their acts while under possession? I question Professor Radden's assumption that when MPD-like phenomena were taken into account they were not thought to vitiate responsibility.

Third, while I do not think it especially helpful to get entangled in doctrinal categories, it may be that MPD-like phenomena are accounted for in our jurisprudence under the "involuntariness" doctrine. I point out that dissociative phenomena often lead to acquittal. Perhaps this doctrinal framework is where severe dissociative phenomena—to the extent such phenomena have been recognized—have implicitly been placed.

Fourth, suppose that my position about why current versions of the insanity defense do not accommodate MPD is incorrect. Suppose that people were aware of the disorder, and simply rejected it as a basis for nonresponsibility. It is, of course, possible that people were wrong in this conclusion. I give reasons for thinking MPD should often lead to a finding of nonresponsibility. If my reasons are persuasive, it may not matter that our current jurisprudence does not fully accommodate MPD. It should.

Fifth, I am somewhat surprised by Professor Radden's position that the absence of MPD-accounting language in the insanity defense may be because we should not find MPD phenomenology to be responsibility impairing. I find this surprising because Professor Radden herself believes that, apart from the criminal justice system, we should find individuals with MPD nonresponsible. Her position is that, for everyday purposes, we should excuse innocent alters—only, we should not do so in the criminal arena. Professor Radden's reasons for this position do concern the blameworthiness of innocent alters.

This seems odd to me. My own view is that criminal responsibility should be a higher standard than responsibility in the everyday world, because criminal punishment is so onerous and involves action by the state. Thus we punish children for their wrongdoing in order to train them; we

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[7] This does not explain why Aristotle did not have a dividedness account of nonresponsibility, but perhaps the disorder, though present in his time, did not come to his attention. MPD has been said to be a disorder of "secretiveness." In addition, there are other dissociative conditions that are clearly a basis for nonresponsibility—such as sleepwalking and posthypnotic suggestion—which Aristotle is not typically mentioned as including. We may thus be wrong to think Aristotle meant to be exhaustive in his account.

wouldn't dream of punishing them criminally. In a way, we are saying that children are responsible for their actions for purposes of everyday life but not for purposes of the criminal law. If individuals are nonresponsible according to everyday ways of thinking, how could they possibly be responsible for purposes of the criminal law? Professor Radden supposes the insanity defense does accommodate MPD because we feel that these people are indeed responsible. How is it, then, that for purposes of everyday life, Professor Radden believes they are not?

Professor Radden's third argument is that we need more study of how much control alters have over their brethrens' behavior. She points out that, with all the publicity around MPD, people should have an obligation to seek help if they notice symptoms of MPD. Alters also may have more power over switching than we now realize. Thus, if an alter can switch and thereby prevent a crime, it should have a duty to do so.

In response to these points, I can say only that I am largely in agreement. I suggest that individuals with MPD may at times have an obligation to seek help, or to take other steps to avert danger, if they know danger is present.[8] I am not sure that I would impose an obligation to seek help solely on the basis that individuals are aware of their symptoms of MPD; but I would where there exists reason to believe an alter might be dangerous. For example, where an individual has seen the havoc done or is aware of an intention to do harm, there may well be an obligation to seek help, on pain of being deemed to have "acquiesced" in the crime.

Similarly, I certainly think that alters who can take control over the person and, during a crime, do not take control should be deemed to have acquiesced. I'm not sure why Professor Radden thinks I say otherwise. I explicitly impose a duty to intervene on alters who can reasonably and safely prevent a crime and do not. In this way, I treat them less as full persons than if they had different bodies, in which case there is no duty to intervene. But this seems justified to me for a variety of reasons.[9] Switching would seem the easiest way to avert a crime and so alters who can switch have a duty to do so.

There is one caveat. To say that individuals with MPD have the power to switch, and hence a duty to do so, may be to lodge the power in the wrong place. Individual alters have the power to take over. In a given multiple during a given crime, some alters may have the ability to take over, while others do not. In this case, we should deem those alters with the power acquiescent, and those alters without the power nonacquiescent. Thus, while there may be a power of switching, the individual should

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[8] SAKS WITH BEHNKE, *supra* note 4, at 112.
[9] *Id.* at 108–13.

nevertheless be found nonresponsible because nonacquiescent alters are present.

Professor Stephen Marmer has written an extremely thoughtful and interesting critique of my position. Professor Marmer and I are very close on when it is appropriate to deem someone with MPD nonresponsible. We differ somewhat on how to conceptualize why. His arguments against my position can be divided into those directed at my personhood or personlikehood arguments, and those directed at my nonperson-like parts arguments.

In response to my claim that alters are persons, or personlike, Professor Marmer argues that psychiatrists have as much authority as philosophers and lawyers when it comes to addressing the ontological status of alters. On this I agree, but I part company when he suggests that psychiatrists may have more to say here because they have authority on the empirical facts. Thus, Professor Marmer objects to thought experiments that isolate psychological and bodily factors, because the best evidence in neuropsychiatry and developmental psychology establishes that the two cannot be separated.[10] I note that philosophers, too, have held this position—recall Kathleen Wilkes' book *Real People: Personal Identity Without Thought Experiments*[11]—but the weight of the authority is that thought experiments are most instructive. Thought experiments are of course counterfactual. But so long as we can imagine, say, two minds swapping bodies—and we can imagine this—then thinking about the case helps us see what is most important in real life.

Professor Marmer's second objection to the personhood view is deeply challenging. According to the personhood argument, it is wrong to punish innocent people. Yet how can we justify punishing an individual with MPD, all of whose alters were complicit in the crime, when that individual creates another alter after the fact? Conversely, why shouldn't we punish the multiple who integrates before trial, even if there were firm barriers preventing innocent alters from intervening? After all, in this case no innocent alter will be punished. Both of these problems pose substantial challenges to my position.

I think the second problem can be answered more readily than the first. There are grounds for saying that the integrated person is a different person from the alter who committed the crime, and therefore we would be

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[10] At points in this argument Professor Marmer makes the claim that one cannot separate personal identity from both bodily and psychological factors, but at other points he makes the claim in the text. The arguments for the former essentially make Professor Marmer a bodily theorist of personal identity, because those theorists, of course, want some psychological continuity too. For example, a dead body continuing in existence would not be enough for personal identity.

[11] KATHLEEN V. WILKES, REAL PEOPLE: PERSONAL IDENTITY WITHOUT THOUGHT EXPERIMENTS (1988).

punishing an innocent person if we punished the integrated person. Punishment, in the scenario Professor Marmer raises, would be inappropriate.

To begin a response to Professor Marmer's first challenge, I believe that we should not punish the new system with an innocent alter but should restrain the whole in a hospital. I have argued that multiples are civilly committable in these circumstances. But they are no longer civilly committable if they are no longer mentally ill and that could well be the case following integration. In that case—and herein lies the heart of the challenge—we could not hold them any longer in the hospital.[12] Nor could we hold them in prison—after integration, there is a different person who, because an innocent part is included, can be said to be innocent.[13]

One response is to say that responsibility turns on the personality configuration at the time of the crime, and we do not take account of subsequent events. Imagine a woman who commits a crime with a guilty mind at time T_1 and then undergoes an extraordinary transformation at T_2 that wholly rids her of her bad parts. Perhaps we could even say she is a different person. While we might claim she no longer deserves blame and no longer needs specific deterrence, we still might believe punishment is appropriate because blame and punishment are based on her state at the time of the act. Thus, we punish when alters acquiesced at the time of the crime, because there was no innocent agent. And we do not punish the multiple who has integrated—in order to spare an innocent person suffering punishment—when, at the time of the act, there were innocent alters within. Blame and punishment are retrospective. What happens after the fact is irrelevant.

This argument, while plausible, is not entirely convincing. We do not blame and punish the person with MPD who, at the time of the act, had innocent alters within precisely because we do not want to punish innocent alters. And punishing individuals with MPD whose innocent alters come later does just that. One may counter that the reason we do not punish innocent people is they are not blameworthy and the transformed person above is likewise not worthy of blame. The point is that we don't punish when someone was not blameworthy at the time of the crime. What happens afterward we ignore. The same is true with the multiple—what is relevant is the mental configuration at the time of the crime regardless of whether innocent alters appeared later.

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[12]Although obviously one would hold them quite some time to make sure the integration is stable—which it is often not.

[13]Responses that say the new person is *mostly* guilty because there is only one new innocent alter can be met by hypotheticals where many innocent alters are created.

One problem with this argument is that, if we take seriously the idea that alters are people, perhaps we shouldn't punish the individual who develops innocent alters/people after the crime. Imagine a person who can "grow" a conjoined twin after committing murder. Should we really punish this set of persons, or should we confine them in a nonretributive institution? Although guilty then, an innocent person will be suffering punishment now. But suppose integration takes place. Would we then say the resultant person had to be released, because the kind of condition that warrants civil confinement no longer exists? And that, because this person is a different person from the guilty one, and an innocent person at that, the individual could not be punished? Or would we rather take the opposite track and claim that because the innocent twin no longer exists the individual should now be criminally punished?

In my view an intermediate position is the most appropriate. I would argue for continued confinement in nonretributive institution because there is reason to fear that the resultant person is dangerous. We allow confinement, even though the person is not mentally ill and subject to civil commitment. We could continue to allow confinement, once the person has integrated, on the same basis that we allowed it in the first place: the person committed a crime and is dangerous.

This response also points to what we would do, on this view, in the case of the multiple who was guilty at the time of the offense and then "grew" an innocent alter. We would confine the multiple in a hospital until integration and after that confine the resultant person in a nonretributive institution in order to protect ourselves. We do so because the person committed a crime and continues to be dangerous. This involves somewhat of a departure from our current practice, but hard cases call for innovative solutions.

In short, there are two possible responses to Professor Marmer's provocative challenge. One response is to base the type of confinement on the individual's psychological makeup at the time of the act. A second response is to avoid criminal confinement if new alters (twins) appear on the scene, yet permit nonretributive confinement based on danger and a past crime. Both responses have merit and I will need to ponder the issue further. I would like to point out, however, that on my third view of alter personalities—that they are nonperson-like parts of one deeply divided person—the problem Professor Marmer poses disappears. This aspect of my argument for nonresponsibility does not rely on the wrongfulness of punishing innocent alters.

In Professor Marmer's third argument against the personhood of alters, he suggests that such a conceptualization may have bad consequences for the rest of the law. He mentions that we might not be able to hold

individuals with MPD responsible for noncriminal acts, we might have to invalidate marriages when all the alters did not consent, and we might face difficult issues in deciding whether contracts are valid. While Professor Marmer raises an important issue, I am not sure the problem cannot be overcome. Deciding these competency issues may call for a different analysis because the contexts are different. Legal approaches to problems almost always turn on a purpose-analysis and the purposes of the law differ across these different contexts.

Consider that while mental illness sometimes allows a defense to a crime, it never does so in the case of the tort of negligence. Negligence law and criminal law have different purposes, so we have different rules of responsibility. In the same way, we might say alters are persons for purposes of the criminal law, but not for purposes of tort law. We would certainly say only one paycheck per multiple, perhaps on the basis that all the alters do the work of only one person.

As for competency to contract, write a will, or get married, we would need to do a careful analysis of each. We might decide to allow consent of one competent alter in most cases (while we require it of all in the case of the criminal law) because the alternative is to appoint a guardian—adding another competent alter to the mix. Or we might decide that while an additional person can negotiate among all the alters, an alter in the system might not care about the other alters, so we should appoint a guardian. This is a complicated issue that I must leave for another time. My principal point here is that taking a particular view in the criminal law does not dictate that we take the same view in the civil law. The legal system is full of different rules for different contexts. It is a context-driven system.

In turning to the personlike view, Professor Marmer has serious problems with the case of Pete and Paul. He says that it may matter if Pete purposely brings on Paul. I completely agree with Professor Marmer's point, inasmuch as Pete would then be complicit in the crime. (Professor Marmer seems troubled by the idea that Pete would be only an accessory and not the murderer himself, but accessories-before-the-fact are considered as guilty, and punished as much, as the person who pulls the trigger.) Professor Marmer also wonders whether we would feel differently if the transformation of Pete into Paul were the result of his brain biochemistry, and not a pill. What if his brain biochemistry changed just once? Every month? At unpredictable intervals? Professor Marmer notes that this case then seems similar to hormonal changes or bipolar disorder.

In my view it would not matter whether the change were a result of the person's brain biochemistry rather than a pill so I disagree with the idea that this theory would apply to hormonal disorders or bipolar disorder. In the latter cases, the person in the different state-changes does not have

different senses of self. And a different sense of self may make a difference to the personhood analysis. Moreover, the other states are inaccessible during the time of the crime, which may make a difference to the nonperson-like parts analysis. Indeed, Professor Marmer will later suggest that when the dissociative barriers are fairly impermeable in the case of MPD an insanity defense may be appropriate. It is highly doubtful to me that the same kind of argument would fly in the case of hormonal or bipolar disorder—or that Professor Marmer would make it in such cases—although there may be other reasons to call people with these disorders nonresponsible.

Similar to my third view of alter personalities, Professor Marmer suggests that ordinary people in a strong emotional state may not be very different from an MPD. To illustrate, he points out that ordinary language includes such locutions as "I was not myself when I did that." Yet Professor Marmer embraces the view of alters as nonperson-like parts and he himself thinks that when barriers are fairly impenetrable, multiples (but not people in strong emotional states) should be nonresponsible.

Indeed, I want to conclude this discussion of Professor Marmer's critique by noting that his discussion of when he would find an MPD nonresponsible is extremely close to my position. I would agree with virtually all of his six points of what to look for when assessing criminal responsibility. In particular, I would want to know whether there were "significant dissociative barriers that prevent key alters[14] from interceding to prevent the acts, or that prevented them from even knowing that the acts were taking place."[15] Professor Marmer is exactly right to emphasize this point. I also agree that "[w]itness alters who knew about, but could not stop, the acts in question must be evaluated to see if their ability was genuine or a form of passive acquiescence."[16]

There are some small differences between Professor Marmer's view and my own. I might be more ready to expect significant dissociative barriers than Professor Marmer—our default expectations would be different—but that is not so important because we would both be open to what we found upon examination. In addition, Professor Marmer might be more likely than I to find mitigation rather than complete nonresponsibility. He speaks of the "quality and quantity of the ability or lack thereof to know

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[14]Professor Marmer argues that my concept of "fragmentary" alters would be hard to apply, but then makes use of a very similar concept himself. Stephen Marmer, *A Theory of Command and Control: Reply to Elyn Saks*, 10 S. CAL. INTERDISC. L.J. 267, 273 (2001). See, in addition to this expression, his notion of "minor alters" and "clone alters." *Id.* Professor Marmer himself acknowledges this, yet it weakens his critique of my notion.

[15] *Id.*

[16] *Id.*

about and to influence the actions in question."[17] If Professor Marmer means that a person with some capacity to influence should arguably receive mitigation rather than exculpation, I certainly agree. I would disagree, however, if he means to say that the presence of some alters who can influence provides a basis for mitigation rather than exculpation.[18] In my view, if there are any nonfragmentary alters with complete incapacity, we should find the multiple nonresponsible.

In short, Professor Marmer and I are in close agreement on how to assess multiples for criminal responsibility. It is therefore interesting that he finds my analysis leading to this position so flawed, and I would be interested to see how he would justify his recommended procedure. I invite Professor Marmer in future works to provide the theoretical justification for his position.

Professors Walter Sinnott-Armstrong and Stephen Behnke provide an extremely interesting and compelling treatment of the question of how we should conceptualize alter personalities. They challenge my suggestion that alter personalities may be persons and therefore challenge my account of criminal responsibility. Their treatment is just the kind of sustained analysis of the personhood question, drawing on the skills of a professional philosopher and a psychologist/lawyer, that is needed in this debate. I make my own arguments in response to them with trepidation as I am not a philosopher and, in fact, take only a tentative position on how we should conceptualize alters in anticipation of future philosophical work.

My response to Saxe addresses Sinnott-Armstrong and Behnke's first argument—about how we should understand Dennett's criteria. They then enter an extended discussion of personal identity, the subtle details of which I cannot examine. The upshot is that there are good reasons to think that brain identity is sufficient for personal identity; that convergent memories are sufficient for personal identity; or in any case that the combination of the two is sufficient (provided no one else has exactly similar phenomenological memories); and that other candidates for necessary conditions of personal identity—e.g., similarities in personality—are not plausible. If this is so, alter personalities are not different people. They share a brain and (generally) many different convergent memories.

My response is to raise questions about the supposed joint sufficiency proposed. It seems clear that convergent memories alone are not sufficient, as Sinnott-Armstrong and Behnke briefly concede. Imagine a person who

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[17] *Id.* at 274.

[18] Thus, Professor Marmer notes that alters can and do intercede to prevent harm—e.g., to respond to a suicide attempt or to prevent harm to their children by another alter. But this of course shows only that some can intercede, not that all can. The question is what we should do when some cannot.

has a memory of eating breakfast at T_1. At T_2 the person splits into two people with exactly similar brains at that time and they go on to live rich and full—and different—lives. They both still have the memory of eating breakfast at T_1—suppose for some reason it was a vivid memory—so they have a so-called "convergent memory." But now at T_n, with different brains, different experiences, and different memories, do we really want to say they are the same person?

If we add brain identity to the mix, are then convergent memories together with this brain identity sufficient for personal identity? For someone like Locke, who believed that mind is a separate substance independent of the brain, brain identity would not be the point. Yet we in the 21st century mostly subscribe to mind/brain identity theories. Does that mean that brain identity is what counts?

I am not so sure. Imagine that the brain is a substance that is affected by certain experiences and works via certain operations. Then imagine that we could reproduce the exact effects of the experiences of one person's brain on another's and could exactly reproduce the substrate for the same operations. To make this simple, imagine the brain is like paper with a lithograph on it. Then imagine two lithographs, L_1 and L_2. We then "lift" the engravings on the papers that have L_1 and L_2 on it, and put the L_1 engraving on the L_2 piece of paper, and vice versa. I think most people would say that the L_1 piece of paper is now the L_2 lithograph and vice versa.

In this way, the brains of two people—the Cobbler and the Prince—remain the same brains (stay in their respective bodies), just as the pieces of paper above remain the same, but the "lithographs" constituting the operations and experiences of the two brains are switched. People speak in this connection of "brain traces." Of course I am not saying that this is how brains actually work—via "traces"—just that this operation is understandable and would mean that brain identity is not sufficient for personal identity and that we could imagine the Cobbler and Prince "switching minds" in ways consistent with more subtle versions of mind-brain identity theories.

If this makes sense, Sinnott-Armstrong and Behnke's account is not correct: brain identity and convergent memories are not jointly sufficient for personal identity. Rather, something like "brain-trace" identity and convergent memories would be. On this account, alter personalities could indeed be different persons. They may share the same brain but we could imagine a new "lithograph" energizing the brain when each new alter took control in turn. (Alternatively, if one shares Locke's view of the mind, each alter could have a different mind.)

These are just some provisional thoughts, and again I leave it to professional philosophers to debate the status of alter personalities. Where I do feel more confident myself is on the question of criminal responsibility. Here I think that Sinnott-Armstrong and Behnke move far too fast. They say that if alters are not persons we must view them as mental states and then the question is whether the individual met the relevant standard at the time of the crime. They go on to say that if the personhood question is foreclosed, then the question is not how divided the person was, but whether, at the time of the crime, the person knew, appreciated, or could control his act.

The problem is that if alters are not persons, they may still be personlike. Even if they are not personlike, it may be the multiples' dividedness that is precisely the question. Consider the first, that alters are personlike. Even if Sinnott-Armstrong and Behnke are correct that brain identity and convergent memories are sufficient for personal identity, what about the thought experiment of Pete and Paul? Pete is transformed by a pill into Paul (who, we may suppose, shares a convergent memory with Pete). Pete and Paul are not different persons, because they share a brain and convergent memories. Yet do we really want to hold Pete responsible for the murder Paul committed? Armstrong-Sinnott and Behnke need to deal with this case in order to support their conclusion that we should take a *Grimsley*-type approach to criminal responsibility.

In the same way, even if alters are just parts of a complicated person, a profound dividedness may preclude criminal responsibility, just as we find in cases of sleepwalking and posthypnotic suggestions. Robert Schopp does a beautiful job developing this theory here. Before saying that the question is whether the alter, at the time of the crime, knew, appreciated, or could control his act, Sinnott-Armstrong and Behnke must respond to the account that says that lack of integration—profound dividedness—can also vitiate responsibility. All of that said, Sinnott-Armstrong and Behnke give a thoughtful and subtle account of the personal identity question, and I do hope their account inspires other philosophers and psychologists to ponder this issue as it applies to alter personalities.

Professor Robert Schopp writes a far-ranging account of MPD as a form of impaired consciousness. In essence, he adopts my third position, which he calls the "Molar Approach," and does a beautiful job explaining why multiples on that approach should often not be responsible for their crimes. It is not surprising that my third approach and Professor Schopp's should coincide, inasmuch as I drew upon Professor Schopp's earlier discussion of impaired consciousness (not as applied to MPD) when I formulated my third approach. Nevertheless, the painstaking way in which Professor Schopp develops why a multiple on this theory should not be

responsible is extremely helpful. Professor Schopp also clarifies "the significance of impaired consciousness for the conception of accountable agency appropriate to the public jurisdiction in a liberal society."[19]

Naturally I can find little fault with Professor Schopp's articulation and development of my third theory. Instead, I wish to examine his critique of what he calls the "Molecular Approach" (alters are people or personlike) and to raise questions about certain assumptions he makes in describing the Molar Approach. Professor Schopp levels three arguments against the Molecular Approach. First, if alters are people, then who has the MPD? The individual alters clearly do not. And the whole ("Wormwood," in Professor Schopp's example) is really just an amalgam of the two alters, Smedley and Slick. Even if Wormwood has the MPD, why would his pathology excuse the alter, Slick, of his crime?

I do not find this argument compelling. If alters are people, they clearly suffer from some pathology, even if we choose not to call that pathology MPD. Let us say that each suffers from "Shared Body Disorder." Being subject to shifts in one's center of control (as Professor Schopp will later concede), as well as periods of amnesia—in essence, sharing a body with other agents—is certainly enough to constitute a mental illness. Alternatively, one might see little harm in saying the person has multiple personality disorder. "Having multiple personality disorder" could then mean "being a person who shares a body with other persons" or "having a body in which other personalities reside"—and each alter is or has that. If this manner of speaking is troubling, and we prefer more precision, we may, again, simply refer to the "Shared Body Disorder" which each alter has. In short, Professor Schopp's first argument is not persuasive. It trades on a terminological point—the imprecision or oddity of saying alters have multiple personality disorder. That we may be speaking sloppily when we speak of "multiple personality disorder" does not constitute a strong argument about the status of alter personalities.

Professor Schopp's second argument against the Molecular Approach is that it may not raise any true problem of criminal responsibility. Once the Molecular Approach is adopted, Professor Schopp argues, only uninteresting dispositional problems remain—what do we do if one person is innocent, the other person is guilty, and we cannot punish the latter without punishing the former? One may respond that, while it might have been nice to have light shed on responsibility by thinking about MPD, the facts may be that the disorder raises only a dispositional question—albeit a fascinating question, in my view. Professor Schopp acknowledges this

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[19] Robert Schopp, *Multiple Personality Disorder, Accountable Agency, and Criminal Acts*, 10 S. CAL. INTERDISC. L.J. 297, 334 (2001).

argument, claiming that an adequate response would be to advance "a theoretical justification for the molar analysis as a component of a defensible institution of criminal responsibility."[20] But this response suffers from the very same flaw as the original argument. It is nice if the Molar Approach helps us better to understand one facet of criminal responsibility. But that doesn't make it true. It may be that the facts—clinical and theoretical—are such that we should construe alters as persons or personlike and not as nonperson-like parts.

Professor Schopp also notes that casting the responsibility question as primarily a dispositional matter also poses a serious dilemma in the civil commitment context. If we cannot punish the innocent alter, how can we civilly commit the alter who is neither mentally ill nor dangerous? It seems to me a case can be made that each alter is mentally ill and dangerous—if only by virtue of sharing a body with another alter who is dangerous, so that the base rate of harm goes up around the non-dangerous alter as well.[21] Even if this is not so, the purposes of civil commitment—and the differences from criminal punishment—are such that we can justify confining the innocent alter in a hospital.

Professor Schopp's third argument against the Molecular Approach is that our intuition is accommodated if Wormwood is guilty if he committed embezzlement as Smedley, the nice one, while Wormwood is nonresponsible if he committed the crime as Slick, the bad one. The reason for this intuition is that as-Slick does not have access to the good, restraining influences of the whole and so cannot be faulted for failing to restrain himself. The "impaired consciousness" rationale accounts for this intuition, while the "different person" approach does not. On the latter approach we would find the individual nonresponsible if either alter was noncomplicit.

I have a number of responses to this argument. Most important, my intuitions do not coincide with Professor Schopp's here. I would hold Wormwood not guilty on each scenario. On this view, the Molar Approach is not in the least supported by this example. In addition, and quite apart from whether the Molar Approach is supported, I wish to contest the differential treatment of as-Smedley and as-Slick. In essence, my "third view" would find both nonresponsible. One problem is that Schopp's "impaired consciousness" reasoning is somewhat confusing. Doesn't Wormwood-as-Smedley have impaired consciousness too, in not having access to the values, interests, etc., of as-Slick? Is the excuse not having access to important parts of oneself or not having access to the good parts

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[20] *Id.* at 317.

[21] SAKS WITH BEHNKE, *supra* note 4, at 158–63.

of oneself? What if one does not have good parts; should that be an excuse too?

Further, it seems to me that it should be the lack of access to important parts of oneself, and not just to the good parts, that constitutes the excuse. Consider, for example, that Wormwood-as-Smedley doesn't have access to the as-Slick parts of himself that may also serve as restraints on his behavior. They may be restraints for the wrong reasons—as-Slick realizes the risk of getting caught is too high—but we don't punish ordinary people who restrain themselves for the wrong reasons. Professor Schopp's view that as-Smedley is a responsible agent, whereas as-Slick is not, seems odd, insofar as clinically the "good alter" is usually disabled whereas the "bad alter" generally has more capacity. Often the good alter is quite an anemic character, without knowledge of or access to the other parts, whereas the bad alter tends at least to be aware of other parts. So Professor Schopp may have things exactly backwards.

Finally, the example Professor Schopp relies on is, as he realizes, highly stylized. It will rarely, if at all, be found in the real world. Most individuals with MPD have many alters, and the alters are not simple caricatures of good and evil. Accordingly, Professor Schopp's example risks obscuring what we should do in the case of real multiples.

Thus, I do not find Professor Schopp's three arguments against the Molecular Approach convincing. In addition, his intuitions about how we should lodge responsibility when different aspects of the person act strike me as wrong. I want to stress that I am not convinced the Molecular approach is correct—just that Professor Schopp has not convincingly established it is not. To me, the question of how we should conceptualize alter personalities is open and needs much more research.

One final comment about Professor Schopp's approach. Is it really our intuition that as-Slick is not responsible because of his impaired consciousness? I think we should ask ourselves whether we would punish as-Slick, if we could do so without punishing the others. My intuitions say yes. That is, as-Slick should be found guilty. If we could punish as-Slick, we would—but we cannot, at least not without punishing innocent alters as well.

I hope the articles in this volume are helpful to people who work in the legal system with those who struggle with MPD. I also hope these articles inspire both debate and research, and thus, serve as a beginning, rather than an end, to serious thinking about the enormously challenging and provocative relationship of MPD and criminal responsibility.