

Multiple Personality Disorder and Criminal Responsibility

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INTRODUCTION

Imagine a man, Multiple, who has two personalities, John and Joe. John is a clerk in a bank. He is efficient and hard-working. He has a long-standing relationship with a coworker, with whom he has lunch daily and often spends weekends. He is also well-loved by his friends and coworkers for his kindness and thoughtfulness. Joe, in contrast, is arrogant and aggressive, works as a night watchman only intermittently, and is not well-liked by anyone. He does have a girlfriend—though he can be quite abusive to her. He spends some evenings and weekends with her, but on many others he is out gambling or committing crimes instead.

Joe is aware of John, and very scornful of him. John is not in the least aware of Joe, although he knows that he "loses time."

One day Joe is confronted by someone to whom he owes a gambling debt. This person insults him roundly. Indeed, Joe has never felt so insulted or humiliated before, and, consistent with his personality, he attacks and kills the person. The police have little difficulty solving the crime, as Joe has not covered his tracks well, and they quickly bring Joe into custody. The only problem is that Joe has left the scene psychologically, and it is John who wakes up in jail.

John is completely mystified about why he is in jail, and vehemently denies that he has committed murder, although the evidence is overwhelming that "he" did. Hypnotism elicits the alter personality, and Joe proudly confesses to the crime. Can John now argue that he is not guilty because it was not he who committed the crime, but rather Joe? Do other arguments for his non-responsibility exist, so that we should, finally, exonerate Multiple?¹

This article argues that Multiple should not be found responsible for the murder. Nonresponsibility defenses function to excuse those who are not blameworthy, and my primary concern in this article will be to establish that sufferers from multiple personality disorder (MPD),² or "multiples," are not blameworthy. It may be that other functions of the criminal law militate in favor of punishing them: we may need protection from them, we may need to send a message to others—and to multiples themselves.³

¹ My primary concern in this Article is "*Multiple's*" innocence: it is Multiple, the man, whom we will throw in jail if no grounds for exoneration exist. I will sometimes, however, refer to *John's* innocence. The relation between John's innocence and Multiple's is complex, and varies depending on which interpretation of "John," "Joe," and "Multiple" is at work. The only point worth making now is that my *language* in sometimes referring to John's innocence takes the form it does solely because that is the most natural way to make the argument (John says "*I didn't do it*"). I will always argue at some point for the conclusion that we cannot then incarcerate Multiple.

² See *infra* part I (discussing multiple personality disorder).

³ See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 149-53, 160-65 (5th ed. 1989) (discussing deterrence and incapacitation theories advanced to justify punishment). On the other hand, an instrumentalist might well conclude that the best disposition of criminal multiples is to send them to a mental hospital where they can be successfully treated and restored to the community. See generally ROBERT S. SUMMERS,

But it is a premise of this article that, whatever we design criminal sanctions to do, we can impose them only on those who deserve blame.⁴ And because multiples are not blameworthy, we must not punish them, even if doing so will serve other purposes.

Of course, if multiples are nonresponsible and dangerous, they can arguably be civilly committed in mental institutions. And the difference between incarceration in a mental institution and a prison might seem rather fine, even though the former is a *non-retributive* institution. In fact, however, the difference for a *multiple* between imprisonment and treatment in a mental hospital is vast: imprisonment for murder may be lifelong, while institutionalization will last only as long as necessary to cure the multiple's mental illness—and evidence suggests that treatment for MPD generally takes but a few years.⁵ If this article's conclusions are accepted, the practical consequences for multiples are great.

The standards courts propose for judging multiples' responsibility vary. Some courts seem receptive to claims like John's that *he* did not do the act—Joe did.⁶ Other courts seem to inquire into the sanity of each individual alter⁷ when a multiple commits a crime.⁸ Finally,⁹ some courts hold that a multiple is insane only if

INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982) (discussing means and goals of law as social instrument).

⁴ See KADISH & SCHULHOFER, *supra* note 3, at 217-18 (discussing *mens rea* as it relates to blameworthiness). Thus the article subscribes to what has been called a mixed theory of criminal punishment. See generally H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* (1968).

⁵ See THE AMERICAN PSYCHIATRIC PRESS TEXTBOOK OF PSYCHIATRY 578 (John A. Talbott et al. eds., 1988) [hereafter TEXTBOOK OF PSYCHIATRY].

⁶ See, e.g., *Parker v. State*, 597 S.W.2d 586, 587 (Ark. 1980) (accepting MPD defense if proven but holding that substantial evidence supported trial court's finding that defendant was legally sane at time of crime); *People v. Wade*, 750 P.2d 794, 802-03 (Cal.) (apparently accepting MPD defense though not an issue on appeal and calling defense "somewhat unclear"), *cert. denied*, 488 U.S. 900 (1988); *State v. Shickles*, 760 P.2d 291 (Utah 1988) (not objecting to use of MPD defense although not an issue on appeal).

⁷ In this article I use the term "alter" to refer to the multiple's different "aspects" or "personalities." See *infra* notes 25-45, 79 and accompanying text (discussing multiples' personalities).

⁸ See, e.g., *United States v. Hopkins*, 169 F. Supp. 187, 191 (D. Md. 1958); *State v. Rodrigues*, 679 P.2d 615, 618 (Haw.) (but at points in decision seems to adopt third type of theory), *cert. denied*, 469 U.S. 1078 (1984); *State v. Darnall*, 614 P.2d 120, 123 (Or. Ct. App. 1980). For a case that also seems to hold this view, though less clearly, see *State v. Jones*, 743 P.2d 276, 277-78 (Wash. Ct. App. 1987), *aff'd*, 759 P.2d 1183 (Wash. 1988).

the alter that committed the crime was insane.¹⁰ This is a narrow and mistaken view; the first two theories the courts entertain are far more plausible. Indeed, a simple finding that a defendant suffers from MPD should ordinarily mean that she is not responsible.¹¹

⁹ Other theories that parties propose of when and why multiples might be held nonresponsible are far less clear. *See, e.g.*, *People v. Wade*, 750 P.2d 794, 802-03 (Cal.) (calling MPD defense "unclear"), *cert. denied*, 488 U.S. 900 (1988); *State v. Moore*, 550 A.2d 117 (N.J. 1988); *People v. Baldi*, 362 N.Y.S.2d 927, 936-39 (Sup. Ct. 1974), *rev'd on other grounds*, 429 N.Y.S.2d 677 (App. Div. 1980), *rev'd*, 429 N.E.2d 400 (N.Y. 1981), *disapproved in Strickland v. Washington*, 466 U.S. 688 (1984).

¹⁰ *See, e.g.*, *Kirkland v. State*, 304 S.E.2d 561, 564 (Ga. Ct. App. 1983); *State v. Rodrigues*, 679 P.2d 615, 618 (Haw.) (at points seems to adopt theory of second type), *cert. denied*, 469 U.S. 1078 (1984); *State v. Freeman*, 404 N.W.2d 188, 191 (Iowa Ct. App. 1987); *State v. Grimsley*, 444 N.E.2d 1071, 1075-76 (Ohio Ct. App. 1982) (but court seems to treat insanity and unconsciousness differently, the insanity formulation being an example of the second type of theory); *State v. Darnall*, 614 P.2d 120, 123 (Or. Ct. App. 1980) (court does not state test as whether alter committing crime is insane, but that is the theory of the case).

¹¹ It is useful to look at the data on multiples' exculpation and inculpation under current standards. Some multiples win their insanity claims outright. *See, e.g.*, DANIEL KEYES, *THE MINDS OF BILLY MILLIGAN* at xi (1981) (account of life of "first person in U.S. history to be found not guilty of major crimes, by reason of insanity, because he possessed multiple personalities"); *Prosecutor's Mind a Troubled World*, UPI, Mar. 11, 1989, *available in* LEXIS, Nexis Library, UPI File (case of Judy Russell); *Regional News*, UPI, May 14, 1983, *available in* LEXIS, Nexis Library, UPI File (case of Sheryl Fleming); *Robbery Suspect Blames Unconscious Personality*, UPI, Oct. 7, 1988, *available in* LEXIS, Nexis Library, UPI File (case of Juanita Maxwell). For a case in which the trial court found a multiple innocent as a matter of law, but the appellate court held his guilt was a jury question, see *State v. Rodrigues*, 679 P.2d 615, 617 (Haw.), *cert. denied*, 469 U.S. 1078 (1984). Of course, in most appellate criminal cases the defendant has lost below, and, since the standard for affirming a jury finding is relatively low, evidence for that finding is usually held sufficient. *See, e.g.*, *United States v. Hopkins*, 169 F. Supp. 187, 196 (D. Md. 1958); *Parker v. State*, 597 S.W.2d 586, 589 (Ark. 1980); *State v. Summers*, 614 P.2d 925, 927 (Haw. 1980); *State v. Freeman*, 404 N.W.2d 188, 190 (Iowa Ct. App. 1987); *People v. Baldi*, 362 N.Y.S.2d 927 (Sup. Ct. 1974), *rev'd on other grounds*, 429 N.Y.S.2d 677 (App. Div. 1980), *rev'd*, 429 N.E. 2d 400 (N.Y. 1981), *disapproved in Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Darnall*, 614 P.2d 120, 123-24 (Or. Ct. App. 1980); *State v. Alley*, 776 S.W.2d 506, 519 (Tenn. 1989), *cert. denied*, 110 U.S. 758 (1990). For a case in which the court affirmed a "Guilty But Mentally Ill" (GBMI) finding, see *Kirkland v. State*, 304 S.E.2d 561, 565 (Ga. Ct. App. 1983). For cases in which a multiple was found guilty below, and another issue was raised on appeal, see, e.g., *United States v. Davis*, 835

My analysis considers multiples' responsibility¹² under various

F.2d 274 (11th Cir.) (defendant argued district court improperly allowed opinion testimony), *cert. denied*, 487 U.S. 1219 (1988); *United States ex rel. Heirens v. Pate*, 405 F.2d 449 (7th Cir. 1968) (defendant pleaded guilty at arraignment, but argued on appeal that court should have convened a sanity jury sua sponte), *cert. denied*, 396 U.S. 853 (1969); *People v. Wade*, 750 P.2d 794 (Cal.) (defendant raised evidentiary and ineffective assistance of counsel issues), *cert. denied*, 488 U.S. 900 (1988); *State v. Armentor*, 470 So. 2d 401 (La. Ct. App. 1985) (defendant appealed trial court's denial of motion for continuance and motion for new trial); *State v. Jones*, 743 P.2d 276 (Wash. Ct. App. 1987) (defendant raised Fifth Amendment and speedy trial issues), *aff'd*, 759 P.2d 1183 (Wash. 1988).

For some MPD cases that raise competency or quasi-competency issues, and therefore are of some interest to us, see, e.g., *De Kaplany v. Enomoto*, 540 F.2d 975 (9th Cir. 1976) (competency to stand trial and enter plea), *cert. denied*, 396 U.S. 853 (1977); *United States ex rel. Heirens v. Pate*, 405 F.2d 449 (7th Cir. 1968) (competency to enter guilty plea), *cert. denied*, 396 U.S. 853 (1969); *Johnson v. Johnson*, 701 F. Supp. 1363 (N.D. Ill. 1988) (competency of defendant who suffered memory loss due to earlier sexual abuse); *Commonwealth v. McDonald*, 487 N.E.2d 224 (Mass. App. Ct. 1986) (competency of defendant to stand trial when defendant argued that hypnosis caused amnesia); *State v. Badger*, 551 A.2d 207 (N.J. Super. Ct. Law Div. 1988) (competency to stand trial); *People v. Baldi*, 362 N.Y.S.2d 927 (Sup. Ct. 1974) (admissibility of statements by defendant while hypnotized), *rev'd on other grounds*, 429 N.Y.S.2d 677 (App. Div. 1980), *rev'd*, 429 N.E.2d 400 (N.Y. 1981), *disapproved in* *Strickland v. Washington*, 466 U.S. 668 (1984); *Birkner v. State*, 771 P.2d 1053 (Utah 1989) (competency of victim to testify based on sexual abuse suffered by victim). The disorder is not a stranger to the courts in other contexts as well. See, e.g., *Hall v. Freese*, 735 F.2d 956 (5th Cir. 1984) (MPD as item of damage in negligence action); *Sample v. Schweiker*, 694 F.2d 639 (9th Cir. 1982) (mental disorder as basis of claim for disability benefits); *Kort v. Carlson*, 723 P.2d 143 (Colo. 1986) (appeal from trial court's order requiring state hospital to pay for private therapist to treat defendant suffering from MPD); *Davis v. Oilfield Scrap & Equip., Inc.*, 503 So. 2d 674 (La. Ct. App. 1986) (plaintiff claiming defendant's tortious act worsened pre-existing MPD).

¹² For other treatments of the responsibility of multiples and others in dissociative states, see, e.g., Norman J. Finkel & Steven R. Sabat, *Split-Brain Madness: An Insanity Defense Waiting to Happen*, 8 L. & HUM. BEHAV. 225 (1984); Edmund G. Howe, *Psychiatric Evaluation of Offenders Who Commit Crimes While Experiencing Dissociative States*, 8 L. & HUM. BEHAV. 253 (1984); Irwin N. Pett, *Crime and Multiple Personality Disorder: A Case History and Discussion*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 203 (1991); David B. Savitz, *The Legal Defense of Persons with the Diagnosis of Multiple Personality Disorder*, 3 DISSOCIATION 195 (1990); John G. Watkins, *Ego States and the Problem of Responsibility: A Psychological Analysis of the Patty Hearst Case*, 4 J. PSYCHIATRY & L. 471 (1976); John G. Watkins, *Ego States and the Problem of Responsibility II: The Case of Patricia W.*, 6 J. PSYCHIATRY & L. 519 (1978).

theories of the nature of their alters—that they are different persons,¹³ different personalities,¹⁴ or just parts of one complex personality.¹⁵ I conclude that multiples are nonresponsible under all of these theories. This article's value, then, lies not only in its practical recommendation that multiples should be exonerated, but also in its effort to disentangle the various threads that underlie our blaming practices, such as the concepts of personhood and character. While these concepts normally converge, in the multiple's case they pull apart and force us to ask some hard questions.

Thus, although the number of multiples who commit crimes is small, thinking about the nature of multiplicity makes us rethink, reexplore, and reinterpret some of our basic concepts.¹⁶ Indeed, considering whether multiples should be found nonresponsible raises some important questions about the nature of responsibility in general—and about what we are doing in the criminal law. For example, what are our criteria of personal identity for purposes of the criminal law? Should an act have to reflect badly on one's character to be criminal, and, if so, how do we individuate characters? And what shall we say about the many people who act in uncharacteristic personality states without being multiple—should they be nonresponsible too? To answer these questions will require a careful thinking-through of some of the theoretical underpinnings of the criminal law.

I. MULTIPLE PERSONALITY DISORDER: THE PSYCHIATRIC LITERATURE

The most interesting question about multiple personality disorder, perhaps, is whether it exists. Certainly the diagnosis has a checkered history.¹⁷ It first appeared in the psychiatric literature

¹³ See *infra* part II.

¹⁴ See *infra* part III.

¹⁵ See *infra* part IV.

¹⁶ Michael Shapiro's notion of the fragmentation of our conceptual schemes seems especially apposite here, where the fragmentation in concepts occurs because of a literal fragmentation of the person. See Michael H. Shapiro, *Fragmenting and Reassembling the World: Of Flying Squirrels, Augmented Persons, and Other Monsters*, 51 OHIO ST. L.J. 331 (1990).

¹⁷ For some historical articles, see, e.g., HENRI F. ELLENBERGER, *THE DISCOVERY OF THE UNCONSCIOUS* (1970); Eric T. Carlson, *The History of Multiple Personality in the United States: I. The Beginnings*, 138 AM. J. PSYCHIATRY 666 (1981); Eric T. Carlson, *The History of Multiple Personality in the United States: Mary Reynolds and her Subsequent Reputation*, 58 BULL. HIST. MED. 72 (1984); Catherine G. Fine, *The Work of Antoine Despine: The First Scientific*

in the late eighteenth and early nineteenth centuries,¹⁸ although commentators have suggested that earlier cases escaped notice as medical illness because doctors mistook them for possession states.¹⁹ Well-known late nineteenth- and early twentieth-century psychiatrists and psychologists described multiple personality cases,²⁰ but the disorder virtually disappeared from the literature until about 1970.²¹ Since then, a small number of commentators have described and discussed a large number of cases.²² Indeed, the number of purported cases, and the amount

Report on the Diagnosis and Treatment of a Child with Multiple Personality Disorder, 31 AM. J. CLINICAL HYPNOSIS 33 (1988); Jean M. Goodwin, *Mary Reynolds: A Post-Traumatic Reinterpretation of a Classic Case of Multiple Personality Disorder*, 9 HILLSIDE J. CLINICAL PSYCHIATRY 89 (1987); Saul Rosenzweig, *The Identity and Idiodynamics of the Multiple Personality "Sally Beauchamp": A Confirmatory Supplement*, 43 AM. PSYCHOLOGIST 45 (1988).

¹⁸ See ELLENBERGER, *supra* note 17, at 126-31 (providing historical summary of development of MPD as recognized disorder).

¹⁹ See, e.g., Frank W. Putnam, *Traces of Eve's Faces*, PSYCHOL. TODAY, Oct. 1982, at 88. For articles on MPD and possession states, see, e.g., Ralph B. Allison, *The Possession Syndrome on Trial*, 6 AM. J. FORENSIC PSYCHIATRY 46 (1985); Stephen E. Braude, *Mediumship and Multiple Personality*, 55 J. SOC'Y PSYCHICAL RES. 177 (1988); Michael G. Kenny, *Multiple Personality and Spirit Possession*, 44 PSYCHIATRY 337 (1981); Stanley Krippner, *Cross-Cultural Approaches to Multiple Personality Disorder: Practices in Brazilian Spiritism*, 14 HUMANISTIC PSYCHOLOGIST 176 (1986); R. Douglas Smith, *Hypnosis, Multiple Personality, and Magic: A Case Study*, 17 VOICES 20 (1981); Nicholas P. Spanos & Jack Gottlieb, *Demonic Possession, Mesmerism, and Hysteria: A Social Psychological Perspective on Their Historical Interrelations*, 88 J. ABNORMAL PSYCHOL. 527 (1979); Vijoy K. Varma et al., *Multiple Personality in India: Comparison with Hysterical Possession State*, 35 AM. J. PSYCHOTHERAPY 113 (1981).

²⁰ See, e.g., 1 WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* (authorized ed. 1950); MORTON PRINCE, *THE DISSOCIATION OF A PERSONALITY* (2d ed. 1905).

²¹ One commentator argues that the diagnosis of MPD declined with the introduction of the term "schizophrenia" in the early twentieth century. Milton Rosenbaum, *The Role of the Term Schizophrenia in the Decline of Diagnoses of Multiple Personality*, 37 ARCHIVES GEN. PSYCHIATRY 1383, 1385 (1980). Until more refined diagnosis of MPD became possible, multiples often were diagnosed as schizophrenics. *Id.*

²² See, e.g., Philip M. Coons, *Multiple Personality: Diagnostic Considerations*, 41 J. CLINICAL PSYCHIATRY 330 (1980) [hereafter Coons, *Diagnostic Considerations*]; Philip M. Coons, *Treatment Progress in 20 Patients with Multiple Personality Disorder*, 174 J. NERVOUS & MENTAL DISEASE 715 (1986) [hereafter Coons, *Treatment Progress*]; Richard P. Kluft, *An Update on Multiple Personality Disorder*, 38 HOSP. & COMMUNITY PSYCHIATRY 363 (1987) [hereafter Kluft, *Update*]; Frank W. Putnam, *Multiple Personality Disorder*, MED. ASPECTS HUM.

of literature on the cases, has exploded in the past two decades.²³

SEXUALITY, June 1985, at 59; David Spiegel & Alvin Rosenfeld, *Spontaneous Hypnotic Age Regression: Case Report*, 45 J. CLINICAL PSYCHIATRY 522 (1984); Cornelia B. Wilbur, *Multiple Personality and Child Abuse*, PSYCHIATRIC CLINICS N. AM., Mar. 1984, at 3.

Skeptics about MPD's existence have noted this and suggested that these commentators are excessively fascinated with and over-diagnose the disorder. The commentators' reply is convincing: most of the cases they discuss come diagnosed by a large number of other clinicians. See, e.g., Richard P. Kluft, *The Prevalence of Multiple Personality Disorder*, 143 AM. J. PSYCHIATRY 802, 802 (1986) [hereafter Kluft, *Prevalence of MPD*] (letter to editor).

²³ For some general articles on MPD, see, e.g., CHARLES D. FOX, PSYCHOPATHOLOGY OF HYSTERIA 312-53 (1913) (discussing MPD and amnesia); John O. Beahrs, *Co-consciousness: A Common Denominator in Hypnosis, Multiple Personality, and Normalcy*, 26 AM. J. CLINICAL HYPNOSIS 100 (1983); Elizabeth S. Bowman et al., *Religious Psychodynamics in Multiple Personalities: Suggestions for Treatment*, 41 AM. J. PSYCHOTHERAPY 542 (1987); Philip M. Coons & Victor Milstein, *Psychosexual Disturbances in Multiple Personality: Characteristics, Etiology, and Treatment*, 47 J. CLINICAL PSYCHIATRY 106 (1986); Richard P. Kluft, *High-Functioning Multiple Personality Patients: Three Cases*, 174 J. NERVOUS & MENTAL DISEASE 722 (1986); Richard P. Kluft, *Making the Diagnosis of Multiple Personality Disorder*, in DIAGNOSTICS AND PSYCHOPATHOLOGY 207 (Frederic Flach ed., 1987); Richard P. Kluft, *The Parental Fitness of Mothers with Multiple Personality Disorder: A Preliminary Study*, 11 CHILD ABUSE & NEGLECT 273 (1987); Richard P. Kluft et al., *DSM-III-R Revisions in the Dissociative Disorders: An Exploration of their Derivation and Rationale*, 1 DISSOCIATION 39 (1988); Richard P. Kluft et al., *Multiple Personality, Intrafamilial Abuse, and Family Psychiatry*, 5 INT'L J. FAM. PSYCHIATRY 283 (1984); Reese Price, *Dissociative Disorders of the Self: A Continuum Extending into Multiple Personality*, 24 PSYCHOTHERAPY 387 (1987); Putnam, *supra* note 22; Roy D. Salley, *Subpersonalities with Dreaming Functions in a Patient with Multiple Personalities*, 176 J. NERVOUS & MENTAL DISEASE 112 (1988); Vicki Saltman & Robert S. Solomon, *Incest and Multiple Personality*, 50 PSYCHOL. REP. 1127 (1982); Donald W. Schafer, *Recognizing Multiple Personality Patients*, 40 AM. J. PSYCHOTHERAPY 500 (1986); Spiegel & Rosenfeld, *supra* note 22.

For some reports on series of cases and reviews, see, e.g., Myron Boor, *The Multiple Personality Epidemic: Additional Cases and Inferences Regarding Diagnosis, Etiology, Dynamics, and Treatment*, 170 J. NERVOUS & MENTAL DISEASE 302 (1982); Philip M. Coons et al., *Multiple Personality Disorder: A Clinical Investigation of 50 Cases*, 176 J. NERVOUS & MENTAL DISEASE 519 (1988); David Lester, *Multiple Personality: A Review*, 14 PSYCHOL. 54 (1977); Frank W. Putnam et al., *The Clinical Phenomenology of Multiple Personality Disorder: Review of 100 Recent Cases*, 47 J. CLINICAL PSYCHIATRY 285 (1986) [hereafter Putnam et al., *100 Recent Cases*].

On differential diagnosis, see, e.g., Coons, *Diagnostic Considerations*, *supra* note 22; Philip M. Coons, *Schneiderian First Rank Symptoms in Schizophrenia and Multiple Personality Disorder*, 77 ACTA PSYCHIATRICA 235 (1988) (letter to editor); Jean Franklin, *The Diagnosis of Multiple Personality Disorder Based on*

Although the skeptics remain unconvinced,²⁴ the American Psychiatric Association has acknowledged MPD's existence, classifying it as a dissociative disorder.²⁵ The Association provides a two-pronged diagnostic criterion. First, "two or more distinct personalities or personality states (each with its own relatively enduring patterns of perceiving, relating to, and thinking about the environment and self)" must exist "within the person."²⁶ Second, "[a]t least two of these personalities or personality states [must] recurrently take full control of the person's behavior."²⁷ Some commentators require, in addition, that at least one personality have amnesia for the others' existence.²⁸

Although the Association accepts MPD, commentators dispute its proper conceptualization. Richard Kluft believes that no common psychodynamics underlie MPD,²⁹ but other psychoanalysts disagree, and provide their own interpretations of these psychodynamics.³⁰ Whether MPD is basically a pre-Oedipal disorder³¹

Subtle Dissociative Signs, 178 J. NERVOUS & MENTAL DISEASE 4 (1990); Milton V. Kline, *Multiple Personality: Facts and Artifacts in Relation to Hypnotherapy*, 32 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 198 (1984); Richard P. Kluft, *First-Rank Symptoms as a Diagnostic Clue to Multiple Personality Disorder*, 144 AM. J. PSYCHIATRY 293 (1987); Robert S. Solomon & Vicki Solomon, *Differential Diagnosis of the Multiple Personality*, 51 PSYCHOL. REP. 1187 (1982). On a promising new instrument designed to diagnose MPD, see Marlene Steinberg et al., *The Structured Clinical Interview for DSM-III-R Dissociative Disorders: Preliminary Report on a New Diagnostic Instrument*, 147 AM. J. PSYCHIATRY 76 (1990).

²⁴ See *infra* notes 54-61 and accompanying text.

²⁵ See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 269-73 (3d ed. rev. 1987) [hereafter DSM-III-R] (classifying MPD as dissociative disorder). A dissociative disorder is a "disturbance or alteration in the normally integrative functions of identity, memory, or consciousness." TEXTBOOK OF PSYCHIATRY, *supra* note 5, at 220.

²⁶ DSM-III-R, *supra* note 25, at 272.

²⁷ *Id.*

²⁸ Coons, *Diagnostic Considerations*, *supra* note 22, at 330. Indeed, the proposed criteria for MPD in DSM-IV require some amnesia for the diagnosis. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS at K:2 (Proposed 4th ed. 1991) (on file with the U.C. Davis Law Review).

²⁹ See Kluft, *Update*, *supra* note 22, at 366. "Psychodynamics" is "[t]he science of mental forces in action. Essentially, psychodynamics are a formulation or description of how the mind develops, and of how the hypothesized energies of the mind are distributed in the course of its various adaptational maneuvers." ROBERT J. CAMPBELL, PSYCHIATRIC DICTIONARY 580 (6th ed. 1989).

³⁰ See, e.g., GILBERT J. ROSE, TRAUMA AND MASTERY IN LIFE AND ART 64-

or a hysterical, Oedipal disorder,³² is also disputed. Finally, other

104 (1987); Richard Lasky, *The Psychoanalytic Treatment of a Case of Multiple Personality*, 65 PSYCHOANALYTIC REV. 355 (1978); Stephen S. Marmer, *Psychoanalysis of Multiple Personality*, 61 INT'L J. PSYCHO-ANALYSIS 439 (1980); Robert N. Mollinger, *Self Defense: Multiple Personality and the Fear of Murder*, 1 CURRENT ISSUES PSYCHOANALYTIC PRAC. 35 (1984); Hannah Ries, *Analysis of a Patient with a "Split Personality"*, 39 INT'L J. PSYCHOANALYSIS 397 (1958); John V.K. Scialli, *Multiple Identity Processes and the Development of the Observing Ego*, 10 J. AM. ACAD. PSYCHOANALYSIS 387 (1982).

³¹ A "pre-Oedipal" disorder relates to

the stages of infantile development antedating the Oedipal complex (psychoanalysis). The pre-Oedipal phase . . . is for both sexes that earliest period of attachment to the first love object, the mother, before the advent of the father as a rival. It is the period during which an exclusive relation exists between mother and child.

CAMPBELL, *supra* note 29, at 556. Pre-Oedipal disorders involve conflicts that occur earlier than those involved in other disorders and are usually more psychologically disruptive than later-occurring disorders. See David G. Benner & Brenda Joscelyne, *Multiple Personality as a Borderline Disorder*, 172 J. NERVOUS & MENTAL DISEASE 98, 99 (1984). For authorities who subscribe to the view that MPD is a pre-Oedipal disorder, see, e.g., Owen D. Buck, *Multiple Personality as a Borderline State*, 171 J. NERVOUS & MENTAL DISEASE 62 (1983); William F. Clary et al., *Multiple Personality and Borderline Personality Disorder*, 7 PSYCHIATRIC CLINICS N. AM. 89 (1984); Polly Crisp, *Object Relations and Multiple Personality*, 70 PSYCHOANALYTIC REV. 221 (1983); James S. Grotstein, *A Proposed Revision of the Psychoanalytic Concept of Primitive Mental States* (pt. 2), 20 CONTEMP. PSYCHOANALYSIS 266 (1984); Doris Gruenewald, *Multiple Personality and Splitting Phenomena: A Reconceptualization*, 164 J. NERVOUS & MENTAL DISEASE 385 (1977); Doris Gruenewald, *On the Nature of Multiple Personality: Comparisons with Hypnosis*, 32 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 170 (1984) [hereafter Gruenewald, *Hypnosis*]; Richard P. Horevitz & Bennett G. Braun, *Are Multiple Personalities Borderline?*, 7 PSYCHIATRIC CLINICS N. AM. 69 (1984).

³² An Oedipal disorder is the "[a]ttachment of the child to the parent of the opposite sex, accompanied by envious and aggressive feelings toward the parent of the same sex." TEXTBOOK OF PSYCHIATRY, *supra* note 5, at 1259. A "hysterical disorder" involves symptoms that occur "when there is difficulty at the level of the *oedipal conflict*. Here the wish for the incestuous love object represents the chief danger. The major defenses used are *repression* and *regression*." A GLOSSARY OF PSYCHOANALYTIC TERMS AND CONCEPTS 49 (Burness E. Moore et al. eds., 1968). For authorities who seem to subscribe to the view that MPD is a hysterical disorder, see, e.g., JOSEF BREUER & SIGMUND FREUD, STUDIES ON HYSTERIA 21-47 (James Strachey & Alex Strachey trans. & eds., 2d ed. 1956) (describing Anna O., who exhibited multiple personalities); PRINCE, *supra* note 20, at 22; see also Sophie L. Lovinger, *Multiple Personality: A Theoretical View*, 20 PSYCHOTHERAPY: THEORY RES. & PRAC. 425, 425 (1983) (listing authorities

disorders often complicate MPD's presentation, raising the question of the disorders' relationship.³³ Whether these other disorders simply coexist with, are associated features of, or constitute the basic pathology underlying MPD remains the subject of considerable controversy.

How does MPD arise? Case histories suggest that abuse or neglect in early childhood is etiologically significant; ninety-seven percent of patients in two large samples had suffered such childhood trauma.³⁴ Indeed, some commentators conceptualize MPD

who seem to describe MPD as hysterical, neurotic structure with exotic and florid manifestation). The American Psychiatric Association seems to subscribe to this view as well, although later versions of the Diagnostic and Statistical Manual do not use the hysteria concept. See DSM-III-R, *supra* note 25, at 269; Benner & Joscelyne, *supra* note 31, at 99 (noting that DSM's editors changed MPD's classification from "hysterical" disorder in DSM-II to "dissociative" disorder in DSM-III). Thus, whether MPD is an Oedipal or pre-Oedipal disorder depends on whether unconscious conflicts from the Oedipal or pre-Oedipal period are primary.

³³ See, e.g., William Coryell, *Multiple Personality and Primary Affective Disorder*, 171 J. NERVOUS & MENTAL DISEASE 388 (1983); Thomas A. Fahy et al., *Multiple Personality: A Symptom of Psychiatric Disorder*, 154 BRIT. J. PSYCHIATRY 99 (1989); A. Missagh Ghadirian et al., *Multiple Personality in a Case of Functional Psychosis*, 26 COMPREHENSIVE PSYCHIATRY 22 (1985); James M. Marcum et al., *Chance Discovery of Multiple Personality Disorder in a Depressed Patient by Amobarbital Interview*, 174 J. NERVOUS & MENTAL DISEASE 489 (1986); Colin A. Ross & Geri Anderson, *Phenomenological Overlap of Multiple Personality Disorder and Obsessive-Compulsive Disorder*, 176 J. NERVOUS & MENTAL DISEASE 295 (1988); Colin A. Ross et al., *Somatic Symptoms in Multiple Personality Disorder*, 30 PSYCHOSOMATICS 154 (1989); Laura Schenck & David Bear, *Multiple Personality and Related Dissociative Phenomena in Patients with Temporal Lobe Epilepsy*, 138 AM. J. PSYCHIATRY 1311 (1981); Joseph S. Silverman, *Multiple Personality as Sequel to Hyperventilation Syndrome*, 122 AM. J. PSYCHIATRY 217 (1966); Walter C. Young, *Emergence of a Multiple Personality in a Posttraumatic Stress Disorder of Adulthood*, 29 AM. J. CLINICAL HYPNOSIS 249 (1987).

³⁴ See Kluft, *Update*, *supra* note 22, at 366 (citing Putnam et al., *100 Recent Cases*, *supra* note 23, at 289-90). Some commentators speculate that the history of early abuse explains why the disorder is apparently far commoner in women than in men: young girls suffer abuse more often than young boys. Kluft, *Update*, *supra* note 22, at 364. Alternatively, commentators suggest that many male multiples are underdiagnosed in the prison population. See, e.g., Richard P. Kluft, *Dissociative Disorders*, in TEXTBOOK OF PSYCHIATRY, *supra* note 5, at 557, 571 [hereafter Kluft, *Dissociative Disorders*]. While most reported multiples are women, Coons, *Diagnostic Considerations*, *supra* note 22, at 331, male multiples are more likely to commit crimes. Cf. Eugene L. Bliss, *A Symptom Profile of Patients with Multiple Personalities, Including MMPI Results*, 172 J. NERVOUS & MENTAL DISEASE 197, 198 (1984).

as one form of post-traumatic stress disorder³⁵ that arises in children who have a predisposition to dissociate.³⁶ Consider Richard Kluft's well-known "four factor" theory:

[M]ultiple personality disorder occurs when a child with the capacity to dissociate (factor 1) is exposed to overwhelming stimuli (factor 2) that cannot be managed with less drastic defenses. Hence the capacity to dissociate is enlisted in the service of defense. Dissociated contents become linked with one of many possible substrates and shaping influences for personality organization (factor 3). If there are inadequate stimulus barriers and restorative experiences, or an excess of double binding messages that inhibits the child's capacity to process his experiences (factor 4), multiple personality disorder can result.³⁷

Thus the basic idea is that, in the face of overwhelming trauma, the patient creates a new personality to handle the trauma; "she herself" does not experience it.³⁸ Often the patient will have several different personalities that reflect alternative ways of coping with a difficult issue or problem. For example, a patient may have one personality that responds to aggression with masochistic submission and another that responds with anger and counteraggres-

³⁵ See Kluft, *Update*, *supra* note 22, at 364. Post-traumatic stress disorders develop "following a psychologically distressing event that is outside the range of usual human experience. . . . The characteristic symptoms involve re-experiencing the traumatic event, avoidance of stimuli associated with the event or numbing of general responsiveness, and increased arousal." DSM-III-R, *supra* note 25, at 247.

³⁶ See Kluft, *Update*, *supra* note 22, at 366-67.

³⁷ *Id.* at 366. Other commentators propose different theories. See, e.g., Joseph C. Andorfer, *Multiple Personality in the Human Information Processor*, 41 J. CLINICAL PSYCHOLOGY 309 (1985); Eugene L. Bliss, *Multiple Personalities: A Report of 14 Cases with Implications for Schizophrenia and Hysteria*, 37 ARCHS. GEN. PSYCHIATRY 1388 (1980); Eugene L. Bliss, *Multiple Personalities, Related Disorders and Hypnosis*, 26 AM. J. CLINICAL HYPNOSIS 114 (1983); Bennett G. Braun, *The Role of the Family in the Development of MPD*, 5 INT'L J. FAM. PSYCHIATRY 303 (1984); Mark H. Congdon et al., *A Case of Multiple Personality Illustrating the Transition from Role-Playing*, 132 J. NERVOUS & MENTAL DISEASE 497 (1961); Gruenewald, *Hypnosis*, *supra* note 31; Pieter M. Kroonenberg, *Three-Mode Principal Components Analysis of Semantic Differential Data: The Case of a Triple Personality*, 9 APPLIED PSYCHOLOGICAL MEASUREMENT 83 (1985); Reese Price, *Of Multiple Personalities and Dissociated Selves: The Fragmentation of the Child*, 18 TRANSACTIONAL ANALYSIS J. 231 (1988); Colin A. Ross & Pam Gahan, *Cognitive Analysis of Multiple Personality Disorder*, 42 AM. J. PSYCHOTHERAPY 229 (1988); Edwin E. Wagner, *A Theoretical Explanation of the Dissociative Reaction and a Confirmatory Case Presentation*, 42 J. PERSONALITY ASSESSMENT 312 (1978).

³⁸ See Wilbur, *supra* note 22, at 4-5.

sion.³⁹ Other common personalities are child personalities, protectors, inner persecutors, and personalities that express strong affects and forbidden impulses.⁴⁰

This is not to suggest that the personalities of multiples are caricatures, or one-dimensional creatures. Most multiples have fairly well-rounded personalities that can be very different indeed.⁴¹ For example, Morton Prince's famous patient, Ms. Beauchamp, had one personality who was subdued, withdrawn, and depressed, and another personality who was carefree and mischievous⁴² (recall Eve White and Eve Black of the famous "Three Faces of Eve"⁴³). Billy Milligan had a violent personality who spoke Serbo-Croat, a teenaged personality who was an escape artist, and a helper personality who spoke with an English accent.⁴⁴ Personalities of these patients are often different-handed, wear glasses with different prescriptions, respond differently to medication, score differently on psychological tests, and even respond differ-

³⁹ See DSM-III-R, *supra* note 25, at 270.

⁴⁰ See, e.g., Kluft, *Dissociative Disorders*, *supra* note 34, at 557, 572.

⁴¹ DSM-III-R, *supra* note 25, at 269-70. MPD is in fact on a continuum: some patients have very full, well-rounded personalities, while others simply have different personality states (in which the patterns of perceiving, relating to, and thinking about the environment and one's self are not exhibited in as wide a range of important social and personal contexts). *Id.* Other commentators talk of personality "fragments," which are rather one-dimensional creatures (the "angry personality"). See, e.g., Price, *supra* note 37, at 231, 235. Still, in order to qualify as a multiple, and not simply as someone with an atypical dissociative disorder, the personalities must be "sufficiently distinct to meet the full criteria for MPD." DSM-III-R, *supra* note 25, at 277. Indeed, at least one commentator has suggested that "unless the disturbances meet the general definition of personality used in DSM-III or DSM-III-R, it does not make sense to refer to them as multiple personalities." ANDREW E. SKODOL, PROBLEMS IN DIFFERENTIAL DIAGNOSIS: FROM DSM-III TO DSM-III-R IN CLINICAL PRACTICE 475 (1989).

That MPD is on a continuum means that there may not be one correct way of conceptualizing multiples' alters—as different people, different personalities, or parts of one complex personality—for all multiples. Some multiples may have alters that are distinct personalities, for example, while others may have alters that are parts of one complex personality. Thus it is something of a simplification to proceed as if there is one right answer for all multiples.

⁴² See PRINCE, *supra* note 20, at 21-22.

⁴³ See CORBETT M. THIGPEN & HERVEY M. CLECKLEY, THE THREE FACES OF EVE 21-22 (1957). For accounts of the Eve case by the patient herself, see, e.g., CHRIS C. SIZEMORE, A MIND OF MY OWN (1989); CHRIS C. SIZEMORE & ELEN S. PITILLO, I'M EVE (1977).

⁴⁴ See KEYES, *supra* note 11, at xv-xviii.

ently on physiological measures like the Galvanic Skin Response and EEGs.⁴⁵

Despite these vastly different personalities, many multiples present themselves for treatment unaware that they have MPD. In their presenting personality,⁴⁶ they are simply unaware of the other alters. They know that they "lose time." They are accused early on of acts they deny having done. They "wake up" in the

⁴⁵ DSM-III-R, *supra* note 25, at 270. Anecdotal evidence abounds that personalities of these patients are different-handed, respond differently to different medications, and are otherwise very different from each other. See, e.g., Bennett G. Braun, *Psychophysiological Phenomena in Multiple Personality and Hypnosis*, 26 AM. J. CLINICAL HYPNOSIS 124 (1983); William S. Condon et al., *Three Faces of Eve Revisited: A Study of Transient Microstrabismus*, 74 J. ABNORMAL PSYCHOL. 618 (1969); Russell C. Packard & Frank Brown, *Multiple Headaches in a Case of Multiple Personality Disorder*, 26 HEADACHE 99 (1986).

That the personalities often score differently on psychological, memory, and physiological tests is the subject of an ample testing literature. See, e.g., Allen O. Battle, *Rorschach Evaluations of Two Personalities in a Patient*, 30 PROJECTIVE PSYCHOL. 11 (June 1985); James A. Cocores et al., *Multiple Personality, Seizure Disorder, and the Electroencephalogram*, 172 J. NERVOUS & MENTAL DISEASE 436 (1984); Angelo Danesino et al., *Jo-Jo, Josephine, and Joanne: A Study of Multiple Personality By Means of the Rorschach Test*, 43 J. PERSONALITY ASSESSMENT 300 (1979); Margaret Dick-Barnes et al., *Behavioral Measures of Multiple Personality: The Case of Margaret*, 18 J. BEHAV. THERAPY & EXPERIMENTAL PSYCHIATRY 229 (1987); Robert Lovitt & Gary Lefkof, *Understanding Multiple Personality with the Comprehensive Rorschach System*, 49 J. PERSONALITY ASSESSMENT 289 (1985); Richard J. Lowenstein et al., *Experiential Sampling in the Study of Multiple Personality Disorder*, 144 AM. J. PSYCHIATRY 19 (1987); Arnold M. Ludwig et al., *The Objective Study of a Multiple Personality: Or, Are Four Heads Better Than One?*, 26 ARCHIVES GEN. PSYCHIATRY 298 (1972); Mary Jo Nissen et al., *Memory and Awareness in a Patient with Multiple Personality Disorder*, 8 BRAIN & COGNITION 117 (1988); Putnam, *supra* note 19; Edward K. Silberman et al., *Dissociative States in Multiple Personality Disorder: A Quantitative Study*, 15 PSYCHIATRY RES. 253 (1985).

Others do psychological testing to attempt to determine a typical profile of a multiple on the MMPI or Rorschach test. See, e.g., Bliss, *supra* note 34; Philip M. Coons & Arthur L. Sterne, *Initial and Follow-Up Psychological Testing on a Group of Patients with Multiple Personality Disorder*, 58 PSYCHOL. REP. 43 (1986); Robert Solomon, *Use of the MMPI With Multiple Personality Patients*, 53 PSYCHOLOGICAL REP. 1004 (1983); Edwin E. Wagner, *Diagnosing Multiple Personalities with the Rorschach: A Confirmation*, 47 J. PERSONALITY ASSESSMENT 142 (1983).

⁴⁶ The "presenting personality" is defined as "[w]hichever personality 'presents' itself for treatment." Cornelia B. Wilbur & Richard P. Kluft, *Multiple Personality Disorder*, in 3 AMERICAN PSYCHIATRIC ASS'N, TASK FORCE REPORT ON TREATMENTS OF PSYCHIATRIC DISORDERS 2216 (1989).

middle of conversations talking to people whom they do not know. The world is a confusing, mysterious place for them, but they do not think to conclude that they have different personalities. They do not know what to think. Indeed, even their doctors often miss the diagnosis: it takes on average 6.8 years for multiples to be properly diagnosed.⁴⁷

Once diagnosed, MPD sufferers appear to have a good prognosis if treated, generally by intensive psychotherapy over a number of years.⁴⁸ Hypnotism is often used as an adjunct.⁴⁹ The thera-

⁴⁷ See Putnam et al., *100 Recent Cases*, *supra* note 23, at 287.

⁴⁸ The following description of the therapy of multiples relies heavily on Bennett G. Braun, *Hypnosis for Multiple Personalities*, in *CLINICAL HYPNOSIS IN MEDICINE* 209 (Harold J. Wain ed., 1980); Wilbur & Kluft, *supra* note 46, at 2197.

On the treatment of MPD, see, e.g., JOHN O. BEAHR, *UNITY AND MULTIPLICITY* (1982); Margaret K. Bowers et al., *Therapy of Multiple Personality*, 19 *INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS* 57 (1971); Philip M. Coons, *Child Abuse and Multiple Personality Disorder: Review of the Literature and Suggestions for Treatment*, 10 *CHILD ABUSE & NEGLECT* 455 (1986); Alfred Herzog, *On Multiple Personality: Comments on Diagnosis, Etiology, and Treatment*, 32 *INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS* 210 (1984); Richard P. Kluft, *On Treating the Older Patient with Multiple Personality Disorder: "Race Against Time" or "Make Haste Slowly?"*, 30 *AM. J. CLINICAL HYPNOSIS* 257 (1988); Colin A. Ross & Pam Gahan, *Techniques in the Treatment of Multiple Personality Disorder*, 42 *AM. J. PSYCHOTHERAPY* 40 (1988).

While intensive psychotherapy is the treatment of choice for MPD, other recommendations for therapy also exist. See, e.g., Edward W. Beal, *Use of the Extended Family in the Treatment of Multiple Personality*, 135 *AM. J. PSYCHIATRY* 539 (1978); Glenn R. Caddy, *Cognitive Behavior Therapy in the Treatment of Multiple Personality*, 9 *BEHAVIOR MODIFICATION* 267 (1985); Philip M. Coons & Karen Bradley, *Group Psychotherapy with Multiple Personality Patients*, 173 *J. NERVOUS & MENTAL DISEASE* 515 (1985); Joyce E. Davidson et al., *Complexities in the Hospital Treatment of a Patient with Multiple Personality Disorder*, 51 *BULL. MENNINGER* 561 (1987); James Levenson & Sandra L. Berry, *Family Intervention in a Case of Multiple Personality*, 9 *J. MARITAL & FAM. THERAPY* 73 (1983); Linda A. Mason, *The Emergence of Two Multiple Personalities in a Group: A Description and Assessment*, 12 *J. SPECIALISTS GROUP WORK* 58 (1987); J. Price & N.C. Hess, *Behavior Therapy as Precipitant and Treatment in the Case of Dual Personality*, 13 *AUSTRALIAN & N.Z. J. PSYCHIATRY* 63 (1979); Colin A. Ross, *Inpatient Treatment of Multiple Personality Disorder*, 32 *CANADIAN J. PSYCHIATRY* 779 (1987); Vance L. Shepperson, *Treatment of Multiple Personality: Integrative Aspects*, 4 *J. PSYCHOL. & CHRISTIANITY* 65 (1985); Sarah T. Skinner, *Multiple Personality Disorder: Occupation Therapy Intervention in Acute Care Psychiatry*, 7 *OCCUPATIONAL THERAPY MENTAL HEALTH* 93 (1987).

⁴⁹ See, e.g., William N. Confer, *Hypnotic Treatment of Multiple Personality: A Case Study*, 21 *PSYCHOTHERAPY* 408 (1984); Richard Horevitz, *Hypnosis for Multiple Personality Disorder: A Framework for Beginning*, 26 *AM. J. CLINICAL*

pist and patient come to know each of the personalities, and sometimes the patient enters a stage of easy access to each.⁵⁰ The patient struggles with the personalities' original reasons for being, as well as with their problems. Intense abreactions occur as the patient confronts early traumatizing experiences. Eventually, separate personalities are no longer necessary, and unification becomes possible: the different personalities are integrated into one, often aided by a hypnotic ceremony using images of merger.⁵¹ Therapy then continues to teach the patient to respond with nondissociative defenses in times of trouble, and to stabilize the integration.⁵² Longterm follow-up shows fairly good success. Patients who are treated in a way that minimizes or ignores their multiplicity, however, remain multiple on follow-up.⁵³

HYPNOSIS 138 (1983); Richard P. Kluft, *Autohypnotic Resolution of an Incipient Relapse in an Integrated Multiple Personality Disorder Patient: A Clinical Note*, 31 AM. J. CLINICAL HYPNOSIS 91 (1988); Richard P. Kluft, *Hypnotherapeutic Crisis Intervention in Multiple Personality*, 26 AM. J. CLINICAL HYPNOSIS 73 (1983); Richard P. Kluft, *Hypnotherapy of Childhood Multiple Personality Disorder*, 27 AM. J. CLINICAL HYPNOSIS 201 (1985); Richard P. Kluft, *Using Hypnotic Inquiry Protocols to Monitor Treatment Progress and Stability in Multiple Personality Disorder*, 28 AM. J. CLINICAL HYPNOSIS (1985); cf. Richard C.W. Hall et al., *Amobarbital Treatment of Multiple Personality*, 166 J. NERVOUS & MENTAL DISEASE 666 (1978) (discussing treatment by amobarbital interview); Onno van der Hart, *Metaphoric and Symbolic Imagery in the Hypnotic Treatment of an Urge to Wander: A Case Report*, 13 AUSTRALIAN J. CLINICAL & EXPERIMENTAL HYPNOSIS 83 (1985) (discussing treatment of psychogenic fugue).

⁵⁰ Thus multiples in the process of being treated are less likely to be able to prevent the prosecutor from rebutting the presumption of their nonresponsibility. See *infra* text accompanying notes 162-64 (discussing multiples whose condition vitiates their nonresponsibility).

⁵¹ Wilbur & Kluft, *supra* note 46, at 2207-08 ("Images of streams joining a river, of snow on many mountains melting and flowing into the same lake, on whose surface the mountains are reflected, mirror-like, or of glowing lights coming together have been described." (citation omitted)).

⁵² On post-unification treatment, see generally Richard P. Kluft, *The Postunification Treatment of Multiple Personality Disorder: First Findings*, 42 AM. J. PSYCHOTHERAPY 212 (1988).

⁵³ Older theorists recommended non-reinforcement or "debunking" treatments of MPD, in the hopes that alters would disappear if benignly neglected. The results were not impressive: "[o]f 12 patients whose MPD was addressed by reinforcement/debunking treatments or no treatment, all had MPD on reassessment three to 10 years thereafter." Wilbur & Kluft, *supra* note 46, at 2198, 2216 (citation omitted). By contrast, a study of 52 patients who had been reassessed a minimum of 27 months after apparent fusion found that "49 (94 percent) had not relapsed into behavioral MPD

Despite the many MPD cases and the fairly wide agreement about MPD's phenomenology, etiology, and treatment, some within the medical profession remain intensely skeptical, at least with respect to most reported cases.⁵⁴ These psychiatrists believe that MPD is in most instances either consciously simulated by those who have some ulterior motive—like evading criminal responsibility—or unconsciously adopted by those who wish to seem interesting to or to please their therapists.⁵⁵ The disorder is at best an iatrogenic artifact.⁵⁶ That there are so few reports of the disorder, and that so many skilled diagnosticians fail to diagnose it, gives skeptics further ammunition to challenge its very

and that 41 (78.8 percent) showed neither residual nor recurrent dissociative phenomena.” *Id.* at 2216 (citation omitted); see also Coons, *Treatment Progress*, *supra* note 22, at 715.

⁵⁴ See, e.g., Seymour Tozman & Roman Pabis, *MPD: Further Skepticism (Without Hostility . . . We Think)*, 177 J. NERVOUS & MENTAL DISEASE 708 (1989) (letter to editor). The authors stated:

We regard MPD as a dissociative phenomenon of exceedingly rare occurrence if it occurs at all. Unsurprisingly, it seems related to hypnotizability. The accentuation and “epidemic” of this rare, iatrogenic disorder does no justice to scientific psychiatry, generating media and literature distortions and misinformation. It distressingly often provides untenable and flamboyant legal defense maneuvers for serial killers and others of ill repute. Psychiatry should not reinforce the mystical and bizarre.

Id. at 703 (citation omitted); see also Paul F. Dell, *Professional Skepticism about Multiple Personality*, 176 J. NERVOUS & MENTAL DISEASE 528 (1988) (78% of practitioners who treat MPD patients had encountered intense skepticism from fellow professionals; half reported deliberate interference with the clinical care of patients and repeated acts of harassment against the patient or therapist). Responses to Dell include Eugene L. Bliss, *Commentary: Professional Skepticism About Multiple Personality*, 176 J. NERVOUS & MENTAL DISEASE 533 (1988); Paul F. Dell, *Not Reasonable Skepticism, But Extreme Skepticism: A Reply from Paul F. Dell*, 176 J. NERVOUS & MENTAL DISEASE 537 (1988); Ernest R. Hilgard, *Commentary: Professional Skepticism about Multiple Personality*, 176 J. NERVOUS & MENTAL DISEASE 532 (1988); David Spiegel, *The Treatment Accorded Those Who Treat Patients with Multiple Personality Disorder*, 176 J. NERVOUS & MENTAL DISEASE 535 (1988).

⁵⁵ See, e.g., Abd El Aziz A. Salama, *Multiple Personality: A Case Study*, 25 CANADIAN J. PSYCHIATRY 569 (1980); Spiegel, *supra* note 54; Corbett H. Thigpen & Hervey M. Cleckley, *On the Incidence of Multiple Personality Disorder: A Brief Communication*, 32 INT’L J. CLINICAL & EXPERIMENTAL HYPNOSIS 63 (1984).

⁵⁶ See Tozman & Pabis, *supra* note 54, at 709 (calling MPD a “rare, iatrogenic disorder”).

existence.⁵⁷

More troubling still is that "personalities" can apparently be created under hypnosis,⁵⁸ although some commentators deny that such personalities resemble the alters of multiples.⁵⁹ Even the physiological evidence is equivocal. While multiples' different personalities score differently on physiological measures like the EEG, one study has shown that normal subjects simulating multiple personalities score even more differently on those same measures.⁶⁰ Other studies offer data showing that sensitive tests based on the EEG do discriminate between multiples and simulating normals.⁶¹

The most impressive evidence that supports the believers is the fact that many patients improve, or are even cured, when treated

⁵⁷ See, e.g., Thigpen & Cleckley, *supra* note 55; Paul Chodoff, *More on Multiple Personality Disorder*, 144 AM. J. PSYCHIATRY 123 (1987) (letter to editor); Tozman & Pabis, *supra* note 54. The Chodoff letter is but one in a series of letters on the incidence of MPD, including Eugene L. Bliss, *Dr. Bliss Replies*, 142 AM. J. PSYCHIATRY 1527 (1985); Oliver French, *More on Multiple Personality Disorder*, 144 AM. J. PSYCHIATRY 123 (1987); Richard P. Kluft, *Dr. Kluft Replies*, 144 AM. J. PSYCHIATRY 124 (1987) [hereafter Kluft, *Dr. Kluft Replies*]; Kluft, *Prevalence of MPD*, *supra* note 22, at 802; Pamela S. Ludolph, *How Prevalent is Multiple Personality?*, 142 AM. J. PSYCHIATRY 1526 (1985).

⁵⁸ Consider, for instance, that the personalities of Morton Prince's famous patient, Ms. Beauchamp, first appeared under hypnosis. See PRINCE, *supra* note 20, at 25-26; see also Reima Kampman, *Hypnotically Induced Multiple Personality: An Experimental Study*, 24 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 215, 220 (1976) (32 of 78 highly hypnotizable students able to produce alter when instructed to "go back to an age preceding your birth, you are somebody else, somewhere else"); Harry C. Leavitt, *A Case Of Hypnotically Produced Secondary and Tertiary Personalities*, 34 PSYCHOANALYTIC REV. 274, 275 (1947) (hypnosis induced a second personality in 20-year old soldier who was being treated for hysterical hemiplegia); cf. Nicholas P. Spanos et al., *Multiple Personality: A Social Psychological Perspective*, 94 J. ABNORMAL PSYCHOL. 362 (1985) (while under going hypnotic interview similar to that given to Bianchi, the "Hillside Strangler," 81% of experimental subjects feigned existence of alter personality).

⁵⁹ Thus, commentators suggest, while symptoms like use of a different name and amnesia can be created under hypnosis, full-blown MPD cannot. See, e.g., Bennett G. Braun, *Hypnosis Creates Multiple Personality: Myth or Reality?*, 32 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 191 (1984); Kluft, *Prevalence of MPD*, *supra* note 22, at 803.

⁶⁰ See Philip M. Coons et al., *EEG Studies of Two Multiple Personalities and a Control*, 39 ARCHIVES GEN. PSYCHIATRY 823, 824 (1982); see also Cocores et al., *supra* note 45, at 438 (no EEG alterations in different dissociated states).

⁶¹ See, e.g., Putnam, *supra* note 19, at 88.

as multiples.⁶² their personalities are integrated into one, and they cease to show evidence of the disorder.⁶³ These are the same patients who, initially diagnosed as schizophrenics or manic-depressives, failed to respond to conventional treatment that is often very successful in treating schizophrenia and manic-depression.⁶⁴ The widespread agreement among researchers on symptoms and causes of the disorder also bespeaks MPD's authenticity,⁶⁵ as does the fact that most of these patients suffered abuse as children:⁶⁶ it is far likelier that a history of abuse would lead to a genuine disorder later in life than to a feigning of disorder.

Final resolution of the controversy between skeptics and believers will require much further study. Yet because the American Psychiatric Association recognizes the disorder in its official diagnostic lexicon, and because even most skeptics believe the disorder does exist (but is simply rarer than its proponents suggest),

⁶² It could be argued that anyone skilled enough to present falsely as a multiple is skilled enough to recognize that simulated therapeutic efficacy will help her case—and will achieve the effect of attention from a gratified therapist. Yet many treatments have been tried on multiples and failed—for example, treatment for schizophrenia. This makes little sense, for would not an unusual, MPD-like form of schizophrenia garner these patients as much attention as MPD, and would not the treatment's efficacy garner them as much gratified attention? Indeed, it is not plausible to suppose that a large series of multiples should have independently “decided” that intensive psychotherapy of a particular form should be efficacious, and that new multiples should know of this form of treatment's efficacy, when it does not simply follow from the disorder's phenomenology. Finally, is it even plausible to suppose that multiples would malingering success so as to make their case stronger, when malingering collective *failure* of therapeutic efficacy would enable them to receive indefinite attention from their therapists—the very attention that is supposed to drive these patients to malingering in the first place?

⁶³ See *supra* text accompanying notes 48-53 (discussing prognosis of MPD after diagnosis and treatment).

⁶⁴ The failure of treatments for other disorders on MPD patients also suggests that MPD is not merely a form of one of these other disorders; it is its own category of disorder.

⁶⁵ Even very subtle symptoms that one could not arrive at merely by imagining the implications of multiplicity appear from study to study.

⁶⁶ The report of early abuse in MPD cases is widespread. See Coons & Milstein, *supra* note 23, at 106. In one study, researchers obtained independent corroboration of abuse in 85% of the multiples they studied. *Id.* at 107.

the criminal law must decide how to treat multiples. It is to that question that I now turn.

II. IF MULTIPLES CONSIST OF GROUPS OF PEOPLE, ARE THEY RESPONSIBLE FOR THEIR CRIMES?

A. *Criteria of Personal Identity*

One way to analyze the problem of Multiple's responsibility is to ask if his different alters, Joe and John, are different people. If they are, then it would seem that we cannot hold John liable for what Joe has done. Criteria of personal identity are important in the multiple's case because they tell us whether the different alters—Joe and John—are different people. In this section I argue that the best criteria for personal identity are *psychological*, and that according to those criteria Joe and John are indeed different people.

In general, criteria for personal identity are designed to tell us when a person at time t_2 is the same person as a person at time t_1 .⁶⁷ Is the Julia you meet today the same person as the Julia you knew ten years ago? (Is John, who is in jail today, the same person as Joe, who committed the crime a few days ago?) What would make the two the same? That the brain of Julia now is spatio-temporally continuous with the brain of Julia ten years ago? That Julia now remembers many if not most of the experiences of the Julia then, and has largely the same psychological traits? Both answers have been given, and form the theories I shall call respectively the "Bodily Criterion of Personal Identity" and the "Psychological Criterion of Personal Identity."⁶⁸

⁶⁷ Thus, theories of personal identity tell us whether a person in the past and a person now are the same person at different times or rather two different people. See John Perry, *The Problem of Personal Identity*, in PERSONAL IDENTITY 3, 10-11 (John Perry ed., 1975). Theories of personhood, by contrast, tell us what characteristics entities must possess to achieve the moral status of personhood—and thus be entitled to special deference and respect. See Joel Feinberg, *Abortion*, in MATTERS OF LIFE AND DEATH 183, 185-86 (Tom Regan ed., 1980). For a discussion of whether alters, even if not different people by the best criteria of personal identity, nevertheless meet the criteria for personhood—or at least meet them sufficiently for us to hold that they *are* entitled to the deference and respect owing to persons, see *infra* part IIIA4.

⁶⁸ The controversy between defenders of a Bodily and a Psychological Criterion of Personal Identity has a long history. See, e.g., THE IDENTITIES OF PERSONS I (Amelie O. Rorty ed., 1976). For some recent collections of articles on personal identity, see PERSONAL IDENTITY, *supra* note 67; THE

The Bodily Criterion of Personal Identity posits that personal identity consists in the continued existence of enough of one's brain to be the brain of a living person. The brain's continued existence is not *sufficient* for personal identity, because the brain can continue to exist without a person existing at all, for example, if one is brain-dead. But it is *necessary*. In our workaday world we apply the Bodily Criterion of Personal Identity unthinkingly: if this person's body (and so brain) is spatio-temporally continuous with the body (and so brain) of the person I knew ten years ago, they are the same person.

The Psychological Criterion of Personal Identity focuses instead on the person's psychological characteristics. Formerly framed solely in terms of memory, the criterion today encompasses other kinds of psychological continuity and connectedness.⁶⁹ One is the same person not only if one remembers much of one's past, but also if (say) one's earlier beliefs and intentions persist—for example, one still believes one's mother is named Barbara, and one carries out today the intention to be more charitable than one formed last week. This kind of psychological continuity and connectedness is, intuitively, extremely important to our sense of ourselves. But since bodily continuity supports psychological continuity in the real world, common sense need not distinguish, much less decide, between the Psychological Criterion and the Bodily Criterion of Personal Identity.

1. Intuitions About Personal Identity: The Puzzle Cases

Thought experiments that require us to separate bodily continuity from psychological continuity can help us to decide between the Psychological and Bodily Criteria of Personal Identity. These thought experiments—or “puzzle cases”—attempt to make criteria of personal identity turn on our intuitions about where, given various manipulations of our brain and psychological states, *we nevertheless are*.⁷⁰ Take Locke's famous puzzle case,

IDENTITIES OF PERSONS, *supra*. The most provocative recent treatment of personal identity is Derek Parfit's substantial work. See DEREK PARFIT, *REASONS AND PERSONS* (1984). For a discussion of the effect of Parfit's theory on criminal law conceptions, see Rebecca Dresser, *Personal Identity and Punishment*, 70 B.U. L. REV. 395, 398-401 (1990).

⁶⁹ See PARFIT, *supra* note 68, at 205-06.

⁷⁰ See Perry, *supra* note 67, at 5-6. This procedure is not entirely satisfactory, in that examples can be given in which criteria for counting persons do not align with intuitions about where we are. Suppose we think

that of the Cobbler and the Prince.⁷¹ One evening a mad scientist removes all the brain traces from the brains of the Cobbler and the Prince, and implants the traces of each in the brain of the other. The traces carry along with them all memories, beliefs, personality traits, intentions, and dispositions.⁷² The question is whether we should now identify the Prince with the Prince-bodied person or the Cobbler-bodied person, and the Cobbler with the Cobbler-bodied person or the Prince-bodied person. Locke thought it obvious that the Prince and Cobbler would go, as it were, with their psychological characteristics—that what we had here was a case of the Prince and the Cobbler swapping bodies.

Bernard Williams reinforced this conclusion by posing the following puzzle case:⁷³ one person's (*A*'s) brain traces are implanted in another person's (*B*'s) brain, and vice versa. The next day, one of the bodies will be tortured, and one will receive \$100,000: which body does *A* wish to receive which treatment? Williams suggests that the most natural interpretation is that *A* and *B* have switched bodies, and that *A* will naturally wish for the *A*-bodied person to be tortured, and the *B*-bodied person to receive the cash.

So far our intuitions seem to be that personal identity is a matter of *psychological* connectedness and continuity. Williams confounds these intuitions, however, by telling a second story: one is

that it is psychological characteristics that matter; now imagine that one's brain traces are imaged and transplanted into two separate brains. One cannot be identical with both of these new people (or they would be identical with each other); we must count at least two people here, so that our intuitions about where we are do not settle the personal identity question. Commentators have therefore added certain requirements (such as no duplication) for personal identity. *See id.* at 4-6, 29-30. For our purposes, however, we can ignore such philosophical refinements (which may in any case be required under either the Bodily or the Psychological Theory): using our intuitions about where we are goes a long way toward helping settle questions about the nature of personal identity.

⁷¹ I elaborate a little on Locke's example in the text. *See* JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, bk. II, ch. XXVII, § 15 (photo. reprint 1970).

⁷² Thus, the Prince's and Cobbler's brains remain in their bodies, but their brain *traces* are swapped. Instead of "brain traces," one might speak of the electric organization of the brain. The example is made more persuasive by relying on a particular, widely-held view of the relationship of mind and brain; but it does not presuppose the Psychological Criterion of Personal Identity.

⁷³ *See* BERNARD WILLIAMS, PROBLEMS OF THE SELF 46 (1973).

told that one will be tortured tomorrow, but that before that happens one will lose all one's memories, intentions, dispositions, and ambitions—all of one's psychological traits—and those of another will be implanted in one's brain. Williams suggests that it would still be completely natural to be terrified by the prospect of the torture, even though all one's psychological traits will be disrupted. And this suggests that our intuitions can accommodate the idea of a person's remaining herself despite the absence of any psychological connectedness or continuity at all. That is, our intuitions can accommodate the *Bodily Criterion* of Personal Identity: "if some person's brain continues to exist, and to support consciousness, this person will continue to exist, however great the breaks are in the psychological continuity of this person's mental life."⁷⁴

One might object that the story begs the question by telling me that it is *I* who will be tortured tomorrow—by assuming that I will continue to exist despite the disruption of my psychological connectedness. Yet the objection is not convincing because I can *conceive* that it is I who will exist despite the disruption. Of course the story does not tell us to *prefer* the Bodily Criterion over the Psychological Criterion, only that the former can seem compelling under some versions of the facts: I can also be told that I will be tortured tomorrow after all the matter in my brain has been replaced by that of another, though I retain my psychological characteristics, and I can equally fear the torture on this set of suppositions. Indeed, *all* of these stories can be told in such a way that they seem to favor one Criterion over the other: we can say, for example, not that the Prince and the Cobbler swap bodies, but that they swap personalities.

Our intuitions, then, are not firm, and respond to slight nuances in the way the puzzle cases are put. I suggest nevertheless that there are good reasons for preferring the Psychological Criterion of Personal Identity.⁷⁵ First, many do not even follow

⁷⁴ PARFIT, *supra* note 68, at 229.

⁷⁵ One might argue, for example, that it is the *Psychological Criterion* that permits us to fear the torture: that, because one retains one's faculty for sensing pain, and so remains the same locus of pain, one *oneself* continues to exist, despite the disruption of other psychological characteristics. The notion of psychological change, after all, is fuzzy, and is in any case only a matter of degree. But even if the Psychological Criterion were met if the only psychological continuity were in the faculty for sensing pain, this response to the torture story simply denies Williams's premise: that *all*

Williams to his second story's conclusion; they retain, that is, their conviction in the truth of the Psychological Criterion despite the prospect of torture, and do not fear that *they* will suffer pain. The torture story may still cause such a person fear, but the fear is of the loss of her psychological characteristics. It would be as if she were told that she would be killed tomorrow, and her body then tortured: she would feel terrible, but the fate of her body would be the least of her concerns. Alternatively, she may feel empathy for the torture victim without thinking it is she, especially because, given the loss of her psychological characteristics, she may be more closely related to the person inhabiting her body than to anyone else.

Indeed, the central difference between Williams's two stories is that in the first story *A*'s psychological characteristics reappear in *B*, and in the second they do not. Thus, perhaps even one who follows Williams's second story to its conclusion does so only because her body, with the new psychological characteristics, is the only candidate for being *she*. Better to identify the body as she, and fear the torture, than simply to cease altogether to exist.

It is clear, then, that our response to Williams's torture stories contains both rational and irrational elements,⁷⁶ which we must sort through to arrive at our best judgment about the case. Indeed, the most important consideration is perhaps that our *considered* intuitions favor the Psychological Criterion. Even those who follow Williams's story to its conclusion choose the Psychological criterion when their hand is forced—when they must clarify their intuitions. If one person must suffer, and one be rewarded, they choose to reward the person with their psychological characteristics—not their body; and they choose to torture the body that no longer contains anything of their mind and heart. Thus many philosophers have endorsed the Psychological

psychological characteristics have been disrupted, including one's faculty to sense pain. Because one could still fear the torture, one's intuitions are consistent with a Bodily Criterion of Personal Identity.

⁷⁶ A colleague of mine described intense fear of an operation he was to undergo while under anaesthesia, not because of the risks, or the postoperative pain, but because his flesh was to be cut. Even though he knew rationally that he would not feel any pain, he continued to feel fear. This suggests that the prospect of physical injury raises irrational fears of pain despite our better judgment, and that we should not rely on intuitions that seem to "underlie" such fears—for example, that one will feel pain while unconscious.

Criterion of Personal Identity,⁷⁷ and Derek Parfit himself goes so far as to claim that it is psychological continuity and connectedness, and not identity at all, that *matters*.⁷⁸ These considerations, then, suggest that we favor the Psychological Criterion of Personal Identity.

2. Applying the Criteria to Multiples

How does a multiple fare under the different Criteria for Personal Identity? Clearly, under the Bodily Criterion, she is one person—who acts now in one personality, now in another—for all the personalities use the same brain.

The answer under the Psychological Criterion also seems clear. The American Psychiatric Association defines a personality as “a relatively enduring pattern of perceiving, relating to, and thinking about the environment and one’s self that is exhibited in a wide range of important social and personal contexts.”⁷⁹ A classic multiple’s alters thus *seem* like different people: they have not only different memories and beliefs, but also different tastes and preferences, jobs and hobbies, friends and acquaintances. A multiple with five distinct, well-rounded personalities is more like five people lined up in a row, each with a personality in all respects like one of the five personalities existing in the multiple, than like one person with all her different, even contradictory personality aspects. By the Psychological Criterion of Personal Identity, Multiple would seem to consist of different *people*.

One possible response to this argument is to observe that multiples’ memories may be asymmetrical—some alters may share at least some memory with different alters; yet ordinary people cannot remember other people’s experiences. I suggest, however, that an alter remembers the experiences of another alter as the experiences of another person: she will have access to the experiences in the way I would have access to the experiences of another who reported aloud everything going on in her mind. This would not identify me with her, and so the alters should not be identified with each other.⁸⁰

⁷⁷ The most famous traditional psychological theorist is Locke. See LOCKE, *supra* note 71. More sophisticated modern theorists include PARFIT, *supra* note 68; PETER UNGER, *IDENTITY, CONSCIOUSNESS, AND VALUE* (1990); David S. Oderberg, *Johnston on Human Beings*, 86 J. PHIL. 137 (1989).

⁷⁸ PARFIT, *supra* note 68, at 229.

⁷⁹ DSM-III-R, *supra* note 25, at 269.

⁸⁰ Still, the alter is *not* reporting everything aloud, so the other alter’s

Indeed, most philosophers who have addressed the issue have concluded that multiples consist of different people.⁸¹ For example, according to James Moor, two spheres of consciousness are “intentionally autonomous” if and only if each has its own sophisticated cognitive and social abilities that generate a stable and rich system of beliefs, preferences, and desires that is largely incompatible with the system of beliefs, preferences, and desires of the other sphere of consciousness.⁸² Two intentionally autonomous spheres of consciousness are, for Moor, two selves. Moor’s criterion seems simply to spell out the Psychological Criterion of Personal Identity. Under Moor’s theory, multiples clearly consist of more than one person or self. If this is so, John and Joe are different people, and John is not responsible for what Joe has done.

experience is unlike the ordinary experiences of separate people. When an ordinary person remembers an experience, either she has something like telepathy and is remembering another’s experience—or she is really remembering her *own* experience. Because alters share one brain, we may be willing to accept that one alter can have these unique experiences of another alter’s thoughts, and of remembering its experiences, while we might reject the idea of telepathy between two separate people. The point to keep in mind is that persons with MPD are a weird category of persons that stretches our very idea of personal identity.

Somewhat the same thing can be said about the fact that therapy of multiples integrates the different personalities into one: while we can imagine a mad scientist mixing together the brain traces of the five people standing in a row and creating a hybrid person, we cannot conceive of her integrating their personalities simply by *talking* to them. But multiples, if groups of people, are groups of people who share a common brain, and so may be unifiable in a way that ordinary people are not. The idea of integrating persons by talk does not fit neatly into our concept of personhood, but this may just be to say that the phenomenon of MPD is weird, and may cause us to revise our conceptual scheme.

⁸¹ See, e.g., Susan L. Anderson, *Coconsciousness and Numerical Identity of the Person*, 30 PHIL. STUD. 1, 2-5 (1976) (multiples fail test that one person should not be able to perform contradictory actions simultaneously because person’s consciousness is unified); Peter K. McNerney, *Person-Stages and Unity of Consciousness*, 22 AM. PHIL. Q. 197, 204-05 (1985) (multiples fail to evaluate their characteristics in terms of their suitability to one person in light of exclusive want to be one person). But see Brian Smart, *Persons and Selves*, 26 PHIL. STUD. 331, 334-36 (1974) (multiples are one person; their alters’ names are phase-sortals to pick out the person with a personality).

⁸² See James Moor, *Split Brains and Atomic Persons*, 49 PHIL. SCI. 91, 100 (1982).

*B. The Criteria of Personal Identity for Purposes of
Responsibility Assessments*

The preceding section addressed multiples' responsibility by asking whether multiples consist of distinct persons; and, critically, the section addressed this intermediary metaphysical question in a vacuum. While there may be a correct answer to the question "what is a person," many believe that the question is incomplete. For many the true question is: "What is a person for purposes of (for example) the criminal law?" In other words, why, for purposes of criminal responsibility, should we conceive of persons as constituted by their memories and other psychological characteristics, and not by their bodies?⁸³

The immediate response is that we *care*, for criminality, about persons as psychological beings, and not as bodies. Persons as psychological beings entertain criminal purposes and intend criminal acts, choose to respond or not to the threat of sanctions,

⁸³ The proposed functional approach to personal identity provides one answer to an argument that the law should not adopt the Psychological Criterion for multiples because of all the embarrassing consequences it would cause. For example, people married to multiples would be polygamists, we would have to give multiples numerous unemployment checks, doctors integrating multiples would be guilty of murder, and so on. The functional approach allows us to employ different concepts of personhood for different contexts; and so multiples for purposes of polygamy law, for example, could be argued to be one person.

There are other possible responses as well. For example, we could adopt the same Criterion of Personal Identity for all purposes, but hold that sometimes it is permissible to (say) be married to more than one person or give one unemployment check to several persons (if, for example, they did the job of one person). In the same way, we may at times want to take seriously the different person status of the alters: perhaps identified multiples should be barred from marrying until cured. In short, each area of inquiry raises a distinct normative issue that the law must address on its own terms; and the law is ingenious enough to formulate doctrine accordingly.

For the argument that integrating multiples is a form of homicide if alters are different people, and therefore they must not be different people, see Kathleen V. Wilkes, *Multiple Personality and Personal Identity*, 32 BRIT. J. PHIL. SCI. 331, 344-45 (1981). For a response, see Elyn R. Saks, *On the Argument That Integration of Multiple Personalities is Not Homicide, So Multiples' Alters Must Not Be Persons* 8-13 (1991) (unpublished manuscript, on file with the *U.C. Davis Law Review*) (arguing that integration may be *justified* homicide, and that the question of whether it is justified arises whether or not alters are different people or just different personalities).

and are dangerous. We do not much care whether Frank is in this body or that;⁸⁴ we do care if he is explosive, and so a threat to our welfare.

Do the puzzle cases bear out the intuition that it is as psychological beings that we care about persons for purposes of criminality? If the Prince and the Cobbler changed bodies, and the Cobbler had previously murdered someone, would we want to punish the Prince-bodied person or the Cobbler-bodied person?⁸⁵

I suggest that the public might at first raise an outcry if the body they identified as their Prince were to be hanged. But this must be because we normally identify people with their bodies—the Bodily Criterion of Personal Identity is a good proxy for psychological continuity and connectedness—so that the public, at first, would believe that the wrong person was being hanged. But suppose the public were exposed to the Cobbler-bodied person for some time, saw him thinking and acting just like their beloved Prince, and heard him recount experiences that only the Prince could have had. Suppose the public were also exposed to the Prince-bodied person, and saw a coarse, vicious man with no regard for human life. After a certain amount of exposure, I suggest the public would come to identify the Prince-bodied person with the Cobbler, and would want to see him, if anyone, hanged for the murder.

Now this thought experiment does more than show, again, that our intuitions favor a Psychological Criterion of Personal Identity. It also shows that our intuitions favor *blaming* the psychological being—the being with the thoughts, intentions, and malice of the murderer. Common sense clings to the idea that the body is the best marker of these—but only until shown otherwise. When exposure to the Prince-bodied person proves that it is *he* who has the objectionable thoughts, intentions, and malice, we want to punish *him*.

It seems plausible, then, to say that blame attaches to persons conceived of as psychological beings. Do the particular psychological manifestations of continuity and connectedness central to

⁸⁴ Except, of course, that we want to capture the *right* body—the body that houses the right dangerous *person*.

⁸⁵ Locke thought that the Prince-bodied person would be the Cobbler, and accountable only for the Cobbler's actions. See LOCKE, *supra* note 71, at bk. II, ch. XXVII, § 15.

personhood play an important role in our judgments about blame? In discussing psychological personhood I have focused on continuity of memory, as well as of other psychological characteristics: beliefs, intentions, traits of personality. But why are these particular characteristics central to criminality?

The mental state animating the criminal act is of course critical—we care about the actor's intentions and general state of mind. But as we shall see later, character, and not just the momentary mental state animating an act, plays an important role in criminality.⁸⁶ Memory is critical to character—memory shapes both the actor's self-concept and her nature: what we are is in part what we remember. Personality characteristics, of course, more directly determine what we are. In our direct moral intuitions, both memory and personality play a central role: we are not truly angry at a person who is utterly discontinuous psychologically from the one who harmed us, for example, one who has lost her memory and undergone radical personality change. Thus, the psychological continuities that go to personal identity, because they determine what we are and how we shall act, underlie our judgments about blame.

Indeed, making the Prince and Cobbler puzzle case more closely resemble Multiple's case bolsters the conclusion that untutored moral intuition favors exonerating the entity-as-psychological-being who has not himself committed the crime. Suppose the identical facts of the Prince and Cobbler puzzle case, except that the outside manipulator does not make them change bodies, but makes them alternate, as psychological beings, in the same body. I suggest that we would still identify each person with his psychological attributes. And if we do not blame the Prince-as-psychological-being for the Cobbler's crime when the Prince-as-psychological-being is in the Cobbler-body, why should we blame him for the Cobbler's crime when he simply alternates with the Cobbler in his own body—and was not "there" when the Cobbler committed the crime?

Does our intuition change critically when unconscious psychological mechanisms in the Prince-body itself, instead of an outsider, bring about the alteration? So long as the alteration is not voluntary and intentional, its source should be irrelevant: if an outside manipulator can program the Prince-brain to manifest now the Prince-psychological characteristics, now the Cobbler-

⁸⁶ See *infra* part IIIA.

psychological characteristics, why cannot the Prince-brain program itself, innocently, to do the same? The programs are identical—and their genesis is equally faultless. In the same way, if acute mania vitiates responsibility, does it matter whether the mania springs from a pill slipped in one's drink or from a diseased brain? To say that it does not matter is to say that unschooled moral intuition would still treat the Prince-as-psychological-being as the Prince, even if the alteration had an internal source—and would therefore still want to blame the Cobbler-as-psychological-being for the crime, and to spare the Prince.

In the context of criminal responsibility, then, as well as on a more abstract level, the Psychological Criterion of Personal Identity is preferable to the Bodily Criterion. Our basic notions about blame reinforce the view that we must not punish John for what Joe has done.

*C. The Impermissibility of Imprisoning Multiples
If They Are Groups of People*

If we must refrain from punishing John for Joe's act, it seems clear that we must also refrain from punishing Joe. In particular, if we execute Joe we also execute John; and if we imprison Joe we also imprison John. It would be impossible to release Multiple every time John appeared—Joe could take over as soon as Multiple left the prison gates. Of course, prison is not our only form of punishment, and prison (still more, execution) creates the most serious problem of all our punishments, namely, that to punish a guilty alter, we must punish the innocent alter. But this problem is serious precisely because prison is the punishment of choice for dangerous criminals. And other forms of punishment would produce problems of the same kind. Thus even if we still whipped convicts, we could not guarantee that Joe would stay around when we approached with the whip.⁸⁷

⁸⁷ One possibility, however, that would not burden the innocent alter, would be to deprive the offending alter of an activity or resource that appeals to that alter alone for so long as the multiple is in a hospital being treated, and is therefore subject to control. For instance, if Billy Milligan's painter personality committed a crime, we would deprive that personality of the opportunity to paint while in the hospital.

Perhaps, however, burdening the innocent alter would be acceptable. Imposing a fine, for example, would cause *all* the personalities to suffer from losing the money. But does not the husband suffer in the same way when the wife is fined out of their joint account? One difference is that while we

Nor can a group liability theory justify punishing Multiple: John is innocent of all wrongdoing.⁸⁸ The best analogy to putting Multiple in jail would be imprisoning siamese twins⁸⁹ for a mur-

can easily direct our anger at the punished wife alone, we may find it difficult to distinguish among a punished multiple's alters, and stigma may attach to the whole. Thus, even punishments such as fines burden John more than other innocent relatives.

Another interesting possibility is to convict the guilty alter and impose a criminal record on that alter alone. The alter would stand convicted of a crime, and suffer the stigma of a criminal conviction, even if we impose no further punishment. This proposal has some appeal, but suffers the same serious drawback noted with fines: people aware of the conviction may not be able to separate the guilty from the innocent alters, and they would come to blame, resent, and scorn the multiple as a whole.

⁸⁸ Criminal law occasionally imposes liability on one person for what another has done. For example, under corporate criminal liability, punishment is imposed on the corporation as a whole for what one individual member has done. For the standard of corporate criminal liability, see *State v. Municipal Auto Sales*, 222 So. 2d 278, 279 (Fla. 1969) (listing cases). Similarly, conspiracy doctrine imposes a species of group liability. See, e.g., *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 922-25 (1959). The same is true of complicity. See, e.g., Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 97-98 (1985). Current concepts of group liability all require some fault on the part of the non-offending group members. Older concepts of group liability, however, were even more robust. For example, the Old Testament is filled with accounts of individuals suffering punishment for the wrongdoing of others. See, e.g., *Genesis* 3:12-19; *Exodus* 12:12-13; *Judges* 9:56. Robust notions of collective liability in Europe persisted into the nineteenth century. See 2 EVOLUTION OF LAW, PRIMITIVE AND ANCIENT LEGAL INSTITUTIONS 144 (Albert Kocourek & John H. Wigmore eds., 1915). And non-Western cultures provided an even more conducive environment for collective responsibility. Thus Chinese law historically imposed sanctions on families for individual wrongs, though it varied the severity of sanctions depending on the relationship (the spouse would likely suffer greater punishment than a first cousin would). HYUNG I. KIM, *FUNDAMENTAL LEGAL CONCEPTS OF CHINA AND THE WEST: A COMPARATIVE STUDY* 137-38 (1981). Current notions of collective responsibility would not apply to multiples, as the innocent alters are *completely* innocent of wrongdoing—many do not even know that they are multiple. And past notions of collective responsibility should not be revived. I leave fuller discussion of these issues to another time.

⁸⁹ While joined at a certain part of the body (usually the chest), and often sharing an organ, siamese twins are "clearly distinct individuals." See J. DAVID SMITH, *PSYCHOLOGICAL PROFILES OF CONJOINED TWINS: HEREDITY, ENVIRONMENT, AND IDENTITY* 104-07 (1988). Ample evidence from case studies indicates that such twins are usually different in their personalities, abilities, and interests. *Id.* at xx. Such evidence includes differences in

der one of them impulsively committed.⁹⁰ We might have non-retributive reasons for wishing to incarcerate the twins: the murderer might be extremely dangerous. But to justify actually *imprisoning* them, rather than confining them, say, in an institution that is non-retributive, we should have to think that *not* punishing someone who deserves punishment is as bad as, or worse than, punishing someone who does not deserve punishment. Although some thorough-going retributivists might think this, society as a whole rejects their position—witness the maxim that “it is better to let ten guilty people go free than to punish one innocent person.”⁹¹

Our principles, then, commit us to refrain from punishing innocent people.⁹² It may now be argued, however, that John is not

intelligence and performances on scholastic tests, emotional makeup, desires (e.g., alcohol consumption), and results of the Minnesota Multiphasic Personality Inventory. *Id.* at 104-07.

⁹⁰ What would we do if all the world were siamese twins? It seems we would either have to radically revise our criminal law, or radically revise our belief system. This is an interesting and difficult question, but fortunately one we do not have to answer: there are very few siamese twins in the world. The same of course is true of multiples: that the disorder is a form of pathology, and not the norm, makes a difference.

⁹¹ 4 WILLIAM BLACKSTONE, COMMENTARIES *364.

⁹² Could we solve the problem that the innocent John would suffer punishment when Joe is imprisoned by integrating Multiple first, and *then* putting him in prison? This suggestion raises interesting questions similar to those raised by restoring capital defendants to competency so they can be executed. And we might well deny that it makes sense to make a multiple *well* (and therefore *good*), and *then* to punish her. But even if this argument is rejected, *would* integrating Multiple and then imprisoning him be permissible? One could argue that the new person would still be *Joe* because he would have all of Joe's memories, and some of his psychological characteristics, so we would be punishing the right person. But is this right? The new person would *also* have all of *John's* memories, and some of *his* psychological characteristics—and to that extent, we would *not* be punishing the right person. Indeed, because of the *mixture* of memories and psychological characteristics, I suggest that Joe would not survive the integration: what we would have here would be as much a different person from Joe (and John) as John and Joe are different from each other. Thus the culpable person would no longer exist, and the new person that existed would not be culpable.

To test this intuition, imagine an operation that combined all of your psychological characteristics and memories with those of another. If that other person had previously committed a murder, do you think it would be just to put you and the other person, combined into this new person, in jail? I suggest that most would answer this question “no.”

being *punished* when we put Multiple in jail. The Supreme Court itself has held that to incarcerate a person, even in a prison, is not necessarily to punish the person.⁹³ And here, after all, the state's punitive intent is directed at Joe, not John. John is simply being *burdened*, so that we might punish Joe—and, indeed, we can make prison, for *John*, as pleasant as possible. Burdening others so that we might punish someone else is common. For example, to imprison their parents, we subject small children to the serious deprivations of the foster care system. However regrettable this is, it is permissible—and so is putting John in jail.

To answer this objection satisfactorily would require a full-blown theory of punishment, which is beyond the scope of this article.⁹⁴ Yet I suggest that absence of punitive intent is not sufficient to convert what appears to be punishment into non-punishment—even the Supreme Court concedes as much.⁹⁵ In general, if a person is imprisoned following conviction of a crime for the length of time deemed appropriate for that crime; if she suffers the same detriments that imprisoned convicts suffer; if she feels punished; and perhaps most importantly, if society sees her as being punished, then a strong case has been made that the person is being punished.

Society's *perception* that the person is being punished is perhaps the most important consideration. Consider that even if a convicted person slept through her entire imprisonment as a result of some disease, society would still see punishment. And if the person were innocent, we would not countenance imprisoning her even though we knew she would sleep for the length of her term. By contrast, even those who believe that fetuses are persons have no problems with imprisoning pregnant women, because no one perceives that the fetus is being punished.

John's imprisonment is probably not permissible even under the Supreme Court's jurisprudence. To be constitutionally permissible regulation (as opposed to punishment), confinement must have a rational reason, and not be excessive in relation to

⁹³ See *United States v. Salerno*, 481 U.S. 739, 746-47 (1987); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

⁹⁴ For an attempt to develop a theory of punishment, see Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335 (1990).

⁹⁵ See *Salerno*, 481 U.S. at 746-47 (describing circumstances under which detention can constitute punishment in the absence of legislative intent to punish).

that reason.⁹⁶ There are two possible reasons for confining John: to permit us to punish Joe; or to protect us from Multiple. I think the first is not rational: our interest in punishing guilty people (as opposed to incapacitating them) is not so strong that it justifies so severely burdening others. The second justification is flawed, because the sentence reflects concerns other than protection from danger, such as giving the convict his just deserts; thus, the length of confinement may be excessive in relation to the purpose invoked.⁹⁷

Even if imprisoning the innocent twin, or John, is not punishment, such imprisonment is arguably too injurious to be countenanced. Again, we do put children in foster care so that we can imprison their parents, and this is perhaps the worst collateral harm we allow to occur to non-criminals as a result of others' punishment. But even here, I suggest that society does not think that the *harm* the children suffer, however lamentable, is as serious as the harm an innocent person would suffer by being imprisoned. If it did, it would imprison children along with their parents, sparing them the disruption of important relationships.⁹⁸ Some injuries are simply too severe to inflict on innocent people. We would surely draw the line at requiring an innocent person to lose her life so that someone else might be punished.⁹⁹ Similarly, asking an innocent person to spend the rest of her life in prison, even if she is not being punished, so that we may punish someone else is too severe an injury to be countenanced.

If all of this is right, we cannot punish Multiple, because putting

⁹⁶ *Id.*

⁹⁷ Even if the Supreme Court rejected these arguments, that would show only that John's incarceration would be constitutional. But I have argued primarily, not that his incarceration is unconstitutional, but that it is wrong.

⁹⁸ But note that one Mexican prison reportedly imprisons entire families. *All Things Considered* (National Public Radio, Feb. 9, 1991). And some American prisons have nurseries for young infants (for example, Riker's Island)—although it is clear that infants are not aware of the punitive nature of the institution they are in.

⁹⁹ Imagine a pill that tolled the innocent alter's existence while the guilty one served her sentence in jail. Unlike actually requiring her to be imprisoned, which I have argued is punishment, this would not be punishment: the innocent alter is not suffering the penalty associated with the crime, is not perceived to be being punished, and so forth. Still, losing a large chunk of one's life, even if not a punishment, is a penalty that is too severe to impose solely so that we might punish someone else who deserves punishment.

Multiple in jail is impermissibly to punish, or at least to burden, John. If Multiples consist of groups of people, they cannot be imprisoned for the crimes of one of their alters.

III. IF MULTIPLES CONSIST OF ONE PERSON WITH MANY PERSONALITIES, ARE THEY RESPONSIBLE FOR THEIR CRIMES?

A. *The Role of Character*

If multiples consist of several different people, one of the people, say John, would not be guilty for what another, say Joe, has done; and thus we cannot imprison Multiple, for that would punish *John*. However, even if we do not adopt the Psychological Criterion of Personal Identity for purposes of criminal responsibility, but rather the Bodily Criterion—either on administrative convenience grounds, or because it is the most plausible Criterion—multiples may still be nonresponsible.¹⁰⁰ In this section, I argue that the person acting as John should not be guilty for what the same person acting as Joe did. If one accepts a character-based theory of responsibility, John is innocent, and it is sometimes impermissible to punish innocent parts or aspects of a single person. Under this view, deciding whether these separate “aspects” of a multiple constitute full-fledged persons is unnecessary, as long as the aspects reflect distinct *characters*.

To avoid cumbersome constructions, I shall ask about the responsibility of Multiple’s different *alters*: is the one alter, John, responsible for what the other alter, Joe, has done? This language is not meant to suggest that the alters are different *persons*; I assume in this section, rather, that they are one person. Alters are rather *parts* or *aspects* of persons—but parts, as we shall see, of a very special sort.

1. The Character-Based Theory of Responsibility

It is not this article’s business to defend the character-based theory of responsibility; other commentators have done so elsewhere in more detail.¹⁰¹ Rather, I shall say a little about the the-

¹⁰⁰ For purposes of the remainder of this article, we could either adopt the Bodily Criterion, or adopt the Psychological Criterion and hold that multiples do not meet it.

¹⁰¹ See, e.g., RICHARD B. BRANDT, *ETHICAL THEORY* 465-74 (1959); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 799-802 (1978); ROBERT

ory here to acquaint the reader with it and underscore its plausibility. Our real business will be applying the theory to the multiple's case.

The character-based theory of responsibility excuses the actor if, under the circumstances, we cannot draw any unfavorable inferences about the actor's character from the act.¹⁰² To consider the character-based theory it is useful to introduce an analogy. Suppose Pete is a generally nice guy—never does anything to hurt another, is a conscientious worker, and is well-liked by all. To make the case more interesting, suppose further that Pete's background is such that, without the very hard work he put in, he would have likely turned into a criminal, disliked and feared by all who knew him. He overcame great odds to become such a decent fellow.

One day an evil scientist slips a drug into Pete's diet cola, and Pete is transformed into someone mean and vicious for several hours—call this character Paul. Paul is crossed by someone and, consistent with his character, kills this person. An hour later the drug wears off and Pete returns, only to find himself in a jail cell charged with murder. Is Pete guilty, even if we assume that Paul is not literally a different person from Pete, but merely Pete acting out a new—and vicious—character?

In this analogy we are not tempted to want to punish Pete in order to protect ourselves; the drug has worn off, and there is no danger that the Paul-character will recur. Thus we have a pure culture for our inquiry into blame, and we are unlikely to confuse incapacitative with retributive concerns. Similarly, Pete is clearly not to blame for the Paul-character's existence, so we are not tempted to exonerate him for the act yet blame him for producing

NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363-99 (1981); Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, 1 L. & PHIL. 5 (1982); Richard B. Brandt, *Blameworthiness and Obligation*, in *ESSAYS IN MORAL PHILOSOPHY* 1 (A.I. Melden ed., 1958); Richard B. Brandt, *The Utilitarian Theory of Excuse*, 78 PHIL. REV. 337 (1969); Richard B. Brandt, *Traits of Character: A Conceptual Analysis*, 7 AM. PHIL. Q. 23 (1970); George Vuoso, Note, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661 (1987). For a different kind of character theory, see Peter Arenella, *Character, Choice, and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 7 SOC. PHIL. & POL'Y 29 (1990).

¹⁰² BRANDT, *supra* note 101, at 471; see also Vuoso, *supra* note 101, at 1682-83 (posing example of actor whose brain tumor produces irresistible urges to commit violence, and whom the character-based theory of responsibility would thus excuse).

the character that acted. Finally, we have no inclination to suppose that Paul is a literally different person from Pete: we are not tempted to call such a short-lived aberration a *person*—we simply have Pete transformed for a time by a vicious character.

Is Pete responsible for the act he did while in the Paul-character? A non-character-based theory of responsibility will say that he is, for merely changing Pete's character did not deprive him of the capacity and a fair opportunity not to commit the crime. Inadvertently ingesting a drug does not automatically give one a defense: imagine a drug that merely changed one's eyebrow color. And while some drugs, like LSD, alter one's mind in an obviously responsibility-impairing way—for example, making one hallucinate—a drug that changes one's character from, say, placid to aggressive does not obviously do so. The non-character-based theory in fact argues that, although the Paul-character's natural reaction is to murder people who cross him, Pete is expected to rise above the Paul-character's limitations and do right. So long as one's character does not *compel* one to do the act,¹⁰³ one can choose to obey reason and repudiate one's character-based desires. Pete as Paul should have risen above his character, however flawed; reason should have been his master.

Our initial inclination to say that Pete is guilty may be succeeded by an even stronger, character-based inclination to say that he is not. This is not, by hypothesis, because Pete and Paul are different people, and Pete did not do the act. It is rather because Pete's act while in the Paul-character does not reflect badly on his, Pete's, character. Pete's character has been rendered inert by the drug and replaced by the Paul-character. If his own character *had* been active at the time of the crime, he would once again have resisted his natural inclination to do bad and overcome the temptations put in his way by his background. But Paul has no desire to overcome these temptations; he is inclined to act on whatever impulse is asserting itself at any given moment, without pause or reflection. And so Pete, while in the Paul-character, is inclined to do the same. But is it fair to blame Pete for acting consistently with the Paul-character, when this is exactly

¹⁰³ Suppose then that the Paul-character did not *compel* Pete to act. Does it matter that Pete faced a much *harder* choice to not do wrong because he was acting while in the Paul-character? It would seem not. For if the choice were hard enough to excuse Pete, it should also be hard enough to excuse Paul—and, by hypothesis, it is not. That the choice is simply *harder* for Pete is not to the point.

what he would *not* have done had he been himself—what his own character would have guarded against?

The character-based theory of responsibility grounds our intuition that blaming Pete would not be fair and supports our sympathetic response to Pete's claim that "it was not *I* who acted." What he means is not that a separate person did it, but that it was not in his nature to do such things—the act did not truly reflect his character. And this is enough, under the character-based theory, to absolve him of responsibility.

Our intuitive response to the Pete/Paul example supports a character-based theory of responsibility. But does and should the criminal law require, for an actor to be responsible, that her act reflect badly on her character? Commentators have argued that a number of excuses excuse precisely because, in the circumstances, the act does not reflect badly on the actor's character.¹⁰⁴

Consider provocation.¹⁰⁵ Here, the actor faces a situation that overwhelms her normal character's ability to assert itself; the situation induces her to feel strong emotion that overpowers her normal controls and causes her to do wrong. But the wrong-doing, because so powerfully motivated, does not reflect badly on her character; most people facing a similar situation would act in a similar fashion. The other defenses follow the same logic.¹⁰⁶

One may, however, object to this characterization of the criminal law. The reason the provocation excuse exists, for example, is not that, under the circumstances, the bad act does not reflect on one's *character*. Instead, it is that, because of the circumstances, one's mental state is not in fact all that bad: feeling outraged when attacked, for example, is completely understandable. The criminal law, in other words, is not concerned with character, but with acts and their mental states. The law does not tell the crimi-

¹⁰⁴ See BRANDT, *supra* note 101, at 471; Vuoso, *supra* note 101, at 1682-83.

¹⁰⁵ Provocation, of course, does not completely excuse crime, but simply reduces its grade. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 653 (2d ed. 1986). But the *reason* it does so is character-based. See Vuoso, *supra* note 101, at 1682.

¹⁰⁶ Vuoso, *supra* note 101, at 1682. The classic Anglo-American excuse defenses are mistake, accident, provocation, duress, and insanity. HART, *supra* note 4, at 31. Each excuse defense is based on a perceived lack of moral culpability. Vuoso, *supra* note 101, at 1682; see also Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1095-99 (1985) (providing detailed survey and explanation of excuse defenses though article analyzes defenses in terms of non-character theory).

nal "you are a bad person," but "you have done a bad act, with a guilty state of mind."

This non-character view is shortsighted, however. It is true that the criminal law is not concerned with character in the sense that it punishes for bad character alone; that would severely assault our dignity and privacy for no clear reason, because we cannot predict when bad character will actually—if ever—produce harm. But this does not prevent the criminal law from punishing for bad acts *together with* bad character.

It is also true that a criminal who has a *bad* character may nevertheless defend on the ground that a particular act does not reflect badly on her character. For the defense is not "I have a good character," but rather "my act does not *show* I have a bad character." And this is the case when one is met with a provocation too strong for even the best characters to resist.

Further, to be guilty of a crime, one's character need not be shown to be bad through and through. All guilt for a crime shows is that one's character was bad enough to accommodate this bad act with this guilty state of mind—not that one is a complete scoundrel, or that one will always act in that way under similar circumstances.

These observations, however, do not answer our critic, who will ask why it is not enough, for guilt, to say one did an act with a bad state of mind. The problem is that it is a myth to say that we can look just at the act and the mental state. The mental state, say outrage, is the same whether or not the act resulted from provocative circumstances or other inducements. So we cannot look *just* at the mental state. But what does looking at the provocative circumstances tell us? Does it not tell us that, *given* the provocative circumstances, *having* such a mental state is not that bad? And is *this* not because even people of ordinary firmness of character have such mental states in such circumstances? The blameworthiness of the mental state, in other words, turns on what the mental state *says* about one's character.

The clearest case for excusing someone on a character basis is that of the brainwashed person. There most plainly of all a person would seem to be not guilty because her act does not reflect badly on *her* character, but rather on a character she was brainwashed to assume. While the defense has been raised, it generally fails—although in contexts other than responsibility for

criminal acts, brainwashing often does vitiate responsibility.¹⁰⁷ Moreover, in principle the defense is available.¹⁰⁸ Its availability attests to the importance of the requirement that one's act reflect badly on one's character. In that context, if it is not one's *own* character that the act reflects—if one would not *oneself* do the act—one has an excuse.

Of course, if a brainwashed person was complicit in her brainwashing—asked for it, consented to it—she would lose her defense. If blame attaches to character,¹⁰⁹ as it does under this

¹⁰⁷ A brainwashing defense failed, although not as a matter of law, in the most famous brainwashing case. See *United States v. Hearst*, 563 F.2d 1331, 1335 (9th Cir. 1977) (jury verdict for conviction for bank robbery dismissed implied brainwashing defense), *cert. denied*, 435 U.S. 1000 (1978). For unsuccessful attempts to raise a traditional insanity defense based on brainwashing, see, e.g., *United States v. Fleming*, 19 C.M.R. 438, 448-49 (1954), *aff'd*, 7 C.M.A. 543, 23 C.M.R. 7 (1957); *United States v. Batchelor*, 19 C.M.R. 452, 489-93 (1954), *aff'd*, 7 C.M.A. 354, 22 C.M.R. 144 (1956). In other arenas a brainwashing defense is often successful. Thus, for example, courts have recognized that in the context of confessions, coercion may include "the brainwashing that comes from repeated suggestion and prolonged interrogation." *People v. Andersen*, 161 Cal. Rptr. 707, 713 (Cal. Ct. App. 1980); see also *People v. Hogan*, 647 P.2d 93, 108 (Cal. 1982) (stating that "psychological coercion . . . raises a strong doubt as to whether appellant's statements were truly volitional"); *People v. Adams*, 192 Cal. Rptr. 290, 303 (Cal. Ct. App. 1983) (holding that "involuntary" admissions resulting from "coercive influences" not admissible in criminal case (quoting *Davis v. North Carolina*, 384 U.S. 737, 752 (1965))). In the civil arena, at least one cult case acknowledges that brainwashing may vitiate informed consent. See *Peterson v. Sorlien*, 299 N.W.2d 123, 128 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981). Finally, government prosecutors have attempted to utilize brainwashing principles in *prosecuting* criminal defendants, and one court has held that a defendant may be guilty of holding in involuntary servitude absent coercion by physical force. See *United States v. Mussry*, 726 F.2d 1448, 1453 (9th Cir.), *cert. denied sub nom. Singman v. United States*, 469 U.S. 855 (1984), *disapproved in United States v. Kozminski*, 487 U.S. 931 (1988) (holding that involuntary servitude requires proof of use or threatened use of physical or legal coercion).

¹⁰⁸ No court has held that brainwashing is not a defense as a matter of law. By contrast, some courts have excluded expert testimony on brainwashing on the basis that the concept of brainwashing is not "generally accepted." See, e.g., *Kropinski v. World Plan Exec. Council*, 853 F.2d 948, 957 (D.C. Cir. 1988); *United States v. Fishman*, 743 F. Supp. 713, 719-20 (N.D. Cal. 1990).

¹⁰⁹ One significant problem the character-based theory faces turns the argument in the text on its head: *no one* is responsible for her character, so it is unjust to blame, in effect, for character. Advocates of the character-based theory attempt to deal with this problem in a variety of ways—for example,

theory, multiples are not likely to lose their defense on this basis. Whatever may be said about *multiples*' being responsible for the existence of their characters—and there may be nothing to say for it—individual *alters* are not responsible for the other *alters*' existence. Guy may consent to being brainwashed, but *John* does not consent to the creation of Joe.

If the character-based theory of responsibility has merit, John would seem to have an excuse for Joe's act, just as Pete would for Paul's: the act does not reflect on his character. Such a theory may be necessary if John and Joe are not different people. John *cannot* say "I am not guilty because Joe did the act," for that would be to say "I am not guilty because another part of me did the act"—and why would *that* mean no guilt? John *can*, however, say "I am not guilty because the act of that part is no reflection on *me*—we have different characters." The character-based theory, then, explains why John is innocent of Joe's crime, though they are not different people, provided we can say that they have different characters.

2. The View That Multiples Have Different Characters

But can we say that? To do so we must defend two propositions: (1) that Multiple has different personalities, and not just one complex, deeply split personality; and (2) that as a result he has different characters. The first seems clearly true: Multiple's personalities do not seem parts of one, complex whole.¹¹⁰ While ordinary people's personalities are often complex, having different parts or aspects—we call them "traits"—we have little difficulty thinking of them as one complex whole, even when they conflict: sometimes the person is (say) grouchy, sometimes placid.

For two reasons, Multiple's personalities are more like the separate personalities of two people, John-1 and Joe-1, than like the one complex personality of someone who is sometimes grouchy and sometimes placid. First, Multiple's different personality traits seem to cluster into wholes: he is not just sometimes peaceable

by arguing that people are responsible for not *changing* their characters, even if they are not responsible for the characters they initially find themselves with—but we need not concern ourselves with this problem here.

¹¹⁰ But some theorists suggest that they are. I consider that view's implications in part IV, *infra*.

and sometimes aggressive, but sometimes peaceable/friendly/hardworking/generous, and sometimes aggressive/unfriendly/lazy/mean. We have a conflict not between isolated traits, but between entire clusters of traits. This is striking because the division reaches almost every trait he has—and it is hard to make sense of a unity in the face of such extensive dividedness. In addition, clusters or aggregations of traits are themselves suggestive of whole personalities; and indeed, multiples' different personalities are often reported to be rich and fully developed—just like ordinary personalities.

Second, the amnesia boundaries between different alters, as well as their identification of themselves *as* different selves, seem even more clearly to point to alters' status as distinct personalities, rather than parts of one complicated personality. Amnesia seems fairly important, for not having access to what is going on in another personality is partly what defines it as other. Access is what people do not have to *other people's* personalities, and what they *do* have to their own personalities even if they are conflicted or fractionated. Similarly, identifying oneself as single, and distinct from others, is crucial to a personality's oneness.¹¹¹ Under this view, multiples' multiple self-identifications translate into multiple personalities.¹¹²

If multiples have many personalities, do they also have many characters? Some claim that "character" refers particularly to *moral* traits, and that the character-based theory of responsibility requires an act to reflect on one's *moral* nature for one to be criminally responsible.¹¹³ If this is true, the question is whether multiples can be understood to be one *kind* of person morally, and thus have one character, despite their many different personalities.

I suggest not. The most plausible interpretation of MPD is that each of a multiple's personalities has its own distinctive cluster of moral traits. The idea of a kind of "group moral character" here is implausible for all the reasons that undermine the notion of a "group personality": the deep divisions between the clusters of

¹¹¹ Recall McInerney's definition of one person. See McInerney, *supra* note 81, at 204-25.

¹¹² All of this is to suggest that true multiples' distinguishing features are important to the question of individuating personalities—although of course I have not fully worked out a theory of what factors are critical to individuating personalities.

¹¹³ See BRANDT, *supra* note 101, at 471-74; NOZICK, *supra* note 101, at 374-80.

moral traits, the amnesia boundaries between them, and the different senses of self that attach to each. Thus, multiples have different characters by virtue of their different personalities, even if the terms “personality” and “character” refer to different things. John is not guilty of Joe’s act, then, because it does not reflect on his character.

3. The Impermissibility of Punishing Innocent Alters

Before John can prevail upon us not to put him in jail, however, he must explain why punishing an innocent alter is impermissible. This question also arose implicitly in my earlier discussion, in which I assumed Joe and John were different people.¹¹⁴ I will now address the question of punishment that I left implicit there: what attributes of personhood make punishing innocents wrong? On reflection, it will emerge that these attributes apply to innocent alters as well as to innocent people.

The first reason punishing innocent people is impermissible is that they suffer—they feel pain—and a purpose of punishment is to cause suffering. We even have scruples about confining (say) porpoises, though they are less than persons, because porpoises feel pain. Alters like John, however, no less than full persons, also feel pain.

Second, punishing innocent people is impermissible because punishment thwarts their projects—a unique pain that is a loss to society no less than to them. John, if not a unique person, is a unique alter. Imprisonment is as likely to thwart his projects and therefore his flourishing as it is a whole person’s. Thwarting an alter’s projects should thus require as much justification as punishment—the deliberate infliction of suffering—requires in the case of a whole person.

Finally, punishing innocent people is impermissible because they are self-reflective creatures, and punishment is a serious affront to their self-concepts. Unlike porpoises, they are aware that their confinement has a retributive purpose, and thus they suffer not only from losing their freedom, but also from knowing that people feel anger and contempt for them. An alter, too, is a self-reflective being. Punishing her is therefore bound to affront her image of herself. Not only does she feel the pain of imprisonment as a first-order matter, but her self-concept is affected as a second. She has become degraded both in society’s eyes and in

¹¹⁴ See *supra* part II.

her own. The insult to the alter thus reverberates: to the pain of the immediate injuries is added the pain of a damaged self-image.

But why, one may ask, are not all these things true of other parts of people as well? Parts of people can suffer—or can they? Do we want to say that the “child” part of Albert felt the pain of his parents’ rejection, or that *he* did? Parts of people can perhaps also be thwarted. But do they have projects? Is it Alan’s greedy part whose project is to become a millionaire before age thirty, or is it *Alan*? Even if we *can* say that parts of people suffer and have projects, they certainly do not have self-concepts, and thus do not suffer degradation of their self-concept—and that is perhaps the severest injury punishment inflicts.

Finally, the characteristics I have described do not insulate the *guilty* from punishment. We are perfectly happy to punish guilty murderers even though—perhaps because—they suffer, have projects to thwart, and have self-concepts to degrade. But we have seen no theory of responsibility that excuses *parts* of integrated people—deems them innocent—when those people commit crimes.¹¹⁵ John, by contrast, is innocent when Joe acts; and because John can suffer, has projects, and has a self-concept, it is impermissible to punish John for Joe’s act.

4. Philosophers’ Conceptions of the Morally Relevant Characteristics of Entities Entitled to Deference and Respect and the Criteria of Personal Identity Reconsidered

The reader may observe that the qualities I have attributed to alters are precisely those we ordinarily attribute to people. Thus alters, I have suggested, have projects, suffer, and have self-concepts—just like people. And so they cannot be punished if innocent—just like people. These observations may cause us to re-evaluate the Criteria of Personal Identity; the suggestion of personhood may be compelling here precisely because alters, under the best criteria of personhood, *are* different people. But the argument in the previous section should perhaps suggest, not that alters are different people, but that we unlink personhood from moral respect—that even things that are not persons may

¹¹⁵ In particular, the character theory of responsibility does not excuse ordinary people’s personality parts, because they are parts of one personality. By contrast, multiples’ personality parts are distinct, as I have argued, and each part’s acts only reflect on that part’s character.

still be entitled to respect. Philosophers are making similar arguments in several other contexts today.

These philosophers' discussions are relevant in several ways to my claim that alters share in the attributes of personhood that would make punishing them, if innocent, morally wrong. First, these thinkers propose criteria of personhood according to which, in essential respects, alters *are* (but other bits of people are not) persons worthy of respect, even though, because of our Criteria of Personal Identity, *we* deny that they are separate persons.¹¹⁶ Second, they propose reasons for thinking that certain beings that do not meet their criteria for persons are nevertheless entitled to some deference and respect, even though not on the basis that they possess full rights governing our treatment of them.¹¹⁷ These arguments alert us that lack of separate personhood does not dispose of the question of how we shall treat beings so characterized.

Joel Feinberg distinguishes between descriptive and normative personhood.¹¹⁸ Descriptive definitions of the term "person" are purely conventional or common-sensical, while normative definitions are moral or legal: "To be a person in the normative sense is to have rights, or rights and duties, or at least to be the sort of being who could have rights and duties without conceptual absurdity."¹¹⁹ As it turns out, to be a person in the normative sense, as described by Feinberg, is actually to possess the qualities of persons in the descriptive sense:

It is because people are conscious; have a sense of their personal identities; have plans, goals, and projects; experience emotions; are liable to pains, anxieties, and frustrations; can reason and bargain, and so on—it is because of these attributes that people have values and interests, desires and expectations of their own,

¹¹⁶ See, e.g. Feinberg, *supra* note 67, at 186-88; Peter Singer, *Animals and the Value of Life*, in MATTERS OF LIFE AND DEATH, *supra* note 67, at 218, 234-36.

¹¹⁷ See, e.g. Feinberg, *supra* note 67, at 214-15; Kenneth E. Goodpaster, *On Being Morally Considerable*, 75 J. PHIL. 308, 310 (1978); Singer, *supra* note 116, at 251-55; Donald VanDeVeer, *Whither Baby Doe?*, in MATTERS OF LIFE AND DEATH 213, 234 (Tom Regan ed., 1986).

¹¹⁸ See Feinberg, *supra* note 67, at 186-88. And on the criteria of personhood, see Daniel Dennett, *Conditions of Personhood*, in THE IDENTITIES OF PERSONS, *supra* note 68, at 175, who also includes self-consciousness as one of the criteria, thus permitting a distinction between alters and other parts of persons.

¹¹⁹ See Feinberg, *supra* note 67, at 186.

including a stake in their own futures, and a personal well-being of a sort we cannot ascribe to unconscious or nonrational beings. . . . Only because of their sense of self, their life plans, their value hierarchies, and their stakes in their own futures can they be ascribed fundamental rights.¹²⁰

In this normative sense, of course, neither fetuses nor infants in the first two years of life are persons.¹²¹ Nevertheless, for utilitarian reasons, we should protect the lives of infants.¹²² In short, there are reasons to treat even entities less than persons with some degree of respect.

Feinberg's analysis supports the argument that alters have a right not to be punished, if innocent, for they *at least* share with persons their morally relevant attributes. Most importantly, alters—unlike other parts of people—have a self-concept that punishment can damage, and have projects and plans that punishment can thwart. Of course, they are also conscious, can reason, and can feel pleasure and pain, perhaps *along with* other parts of people. Feinberg would no doubt count alters as people, and he may have the better argument. But even if we deny this, and insist that personhood requires a separate bodily substrate, we should still conclude that alters share the attributes of personhood that are morally relevant to punishing them.

Peter Singer argues that personhood is a convincing point at which to locate a right to life.¹²³ Singer understands a person to be a self-conscious being, aware of itself as a distinct entity existing over time. Some of the higher animals may be persons according to this criterion, and some very defective human beings are not. Most importantly, only if a being is aware of itself as a distinct entity, with a past and future, is it capable of having desires about its own future—in particular, the desire for continued existence and hence the possibility of fulfilling its other desires.

Singer next argues that even some beings that are not persons have a meaningful right to life—if less than that of a person—and have lives of some value. For this to be the case, the beings must be sentient—able to experience pleasure and pain. Thus Singer concludes that “the life of any being likely to experience more pleasure than pain is of value and not to be sacrificed without

¹²⁰ *Id.* at 197.

¹²¹ *Id.* at 197-98.

¹²² *Id.* at 189-99.

¹²³ Singer, *supra* note 116, at 218, 234-40.

good reason.”¹²⁴

Singer’s position has consequences for us. For we can argue that alters, but not other bits of people, have self-concepts as entities with a past and future, and so have not only the right to life, but also a right not to be punished unjustly—for punishment, again, will thwart their continuing desires. (Indeed, insofar as they have self-concepts as continuing existents, they will fear that the suffering punishment entails will persist over time—they will anticipate a *future* of suffering—and so be harmed that much more.) Singer, of course, calls such entities persons. We can disagree but still insist that the *parts* of persons they represent share with persons the characteristics that give them rights against unjust punishment.

Both Singer’s and Feinberg’s analyses impose a duty not to harm entities that are less than persons. Other authors reach the same conclusion. Donald VanDeVeer, for example, agrees that only beings that possess self-consciousness have a robust right to life, but argues that beings that possess sentience have *moral standing*.¹²⁵ Because such beings have the capacity to suffer, they have a right “not to be deliberately and unfairly caused to suffer.”¹²⁶ Kenneth Goodpaster goes even further than Singer. He argues against the sentence criterion; for Goodpaster, to *possess life* is to have standing in the moral sphere.¹²⁷ All of these views, then, suggest that certain beings less than persons have a meaningful moral claim not to be harmed.

Even if we claim that alters are not separate persons, then, they still have the morally relevant characteristics of persons, such as self-awareness over time, that give them rights. Even if we have misidentified the morally relevant characteristics of persons, entities less than persons may make *some* moral claims on us, although such claims may be defeated more easily than claims based on rights. Alters, moreover, may make claims of greater weight than other parts of persons. If some animals, fetuses at certain stages, and irreversibly defective human beings partake to some extent of the rights and responsibilities of persons, it is not surprising that alters—with their own self-identities, memories, and projects—do so as well. If this position is plausible, alters, fully as much as true

¹²⁴ *Id.* at 270.

¹²⁵ VanDeVeer, *supra* note 117, at 234.

¹²⁶ *Id.*

¹²⁷ Goodpaster, *supra* note 117, at 316-22.

persons, deserve not to be imprisoned if they are innocent of wrongdoing.

B. The Role of Knowledge and Control

Once we recognize that alters may be entitled to moral respect even if they are not persons, we might be able to exonerate multiples on more traditional grounds—grounds that do not rest on the character-based theory of responsibility. After all, the character-based theory is but one theory—and is in the minority. The more common theory—the act theory—is that an act is excused if the actor did not have the capacity or a fair opportunity not to act.¹²⁸ Even under the act theory, however, John may have an excuse: he may meet the traditional insanity test.¹²⁹

To meet the insanity test, John must show he did not have the capacity to do otherwise because he did not know the nature of the act, or he could not control it.¹³⁰ More specifically, two scena-

¹²⁸ One recent commentator has suggested that the character-based theory and the act theory are not competing theories, but answers to different questions posed by a taxonomy of the excuses. See Michael Corrado, *Notes on the Structure of a Theory of Excuses*, 82 J. CRIM. L. & CRIMINOLOGY (forthcoming 1991) (manuscript on file with the U.C. Davis Law Review). The act theory sets out the criteria for or a unifying mark of excuses, while the character-based theory explains why that mark is significant. *Id.* at 3. This is an interesting suggestion, and has the virtue of underscoring that the character-based and act theories generally come out the same. *Id.* at 15-22. For example, narrowly “out of character” acts will not excuse under the character-based theory, because one’s character in the larger sense tolerated or accommodated the act; and the same result obtains under the act theory. Corrado’s suggestion, however, is not wholly convincing, because in some cases on the margin the two theories come out differently. Being slipped a character-altering drug is a prime example. Thus the character-based theory and the act theory do compete over some cases, and I suggest the character-based theory more nearly accords with our intuitions about how those cases should come out.

For an interesting discussion of different theories rationalizing the excuses of duress and infancy, see Martin L. Levine, *Excuse: Duress and Excuse: Infancy*, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 729, 733 (Sanford H. Kadish ed., 1983).

¹²⁹ I frame Multiple’s exoneration in terms of the insanity defense instead of the involuntariness defense because the former applies to *all* of the guiltless states the alters might be in, and not just to the guiltless state in which the alter is not coconscious when the act occurs. See *infra* note 131.

¹³⁰ See Elizabeth J. Delgado, Comment, *Vietnam Stress Syndrome and the Criminal Defendant*, 19 LOY. L.A. L. REV. 473, 482-83 (1985) (defining two major tests for insanity excuse in United States). The insanity tests also

rios are possible: (1) John was coconscious¹³¹ when the act occurred; and (2) he was not. In the first scenario, John did not know the nature of the act because he thought that, not he, but another person, was performing it; and even if he knew the nature of the act, he probably had no control over it. In the second scenario, John had no idea that the act was even occurring, and so he could hardly control it.

How does this argument run? Imagine first the scenario in which John is coconscious with Joe as Joe commits the act. John believes that it is not *he* who is acting, but another person, Joe. At worst he has the *delusion* that his body houses many people, and his delusion that it is not he who is acting, but rather Joe, renders the action non-culpable. John does not allow himself to do wrong while realizing that he is acting—thus ignoring the sanctions prescribed for murder. Instead, he is not aware of who is acting—he is not aware of the true nature of the act. In essence, if a person does not know she is acting, she can hardly be faulted for failing to prevent the act.

This case is similar to and can be contrasted with the case of *ordinary* delusional belief that another is acting. Suppose Sarah believes that she is not committing murder—although in fact she is—but that her friend, Samantha, is. Because of her delusional belief, Sarah is not self-consciously doing wrong: she is not repudiating our inherited value system and ignoring our criminal sanctions. Once again, if she does not know she is acting, she can hardly be faulted for failing to prevent the act. Contrast Karen, who delusionally believes that she is her friend, Kate, as she acts. Karen is responsible for the act, because her identity is irrelevant to whether she commits the act; so long as the actor, Karen,

require a defendant to show that her inability to know the nature of or control her act resulted from her mental illness. But in Multiple's case, we may ask, "who has the disorder?" Clearly "Multiple"—the human being—is one answer. But what about John and Joe—are they not separately normal? A quick answer is that they are not, insofar as they share a body with another personality, and so are often at cross-purposes with themselves. Still, this is an interesting question that deserves more careful consideration in its own right. Once again the phenomenon of MPD stretches our current conceptual apparatus.

¹³¹ See Beahrs, *supra* note 23, at 100 (defining coconsciousness as "the existence within a single human organism of more than one consciously experiencing psychological entity, each with some sense of its own identity or selfhood . . . and with separate conscious experiences occurring simultaneously with one another within this human organism").

avows that she is doing the act, it does not matter who she thinks she is. The law is clear that some delusions are simply irrelevant to whether an act is criminal.

We might compare Sarah and Samantha on the one hand, with Karen and Kate on the other, in terms of the legal doctrine that a delusional belief excuses a crime only if the belief, *if true*, would excuse the crime. If it were true that, not Sarah, but a different person, Samantha, committed the act, Sarah would have an excuse. But there would be no excuse if Karen, *as Kate*, committed the act.

We are not assuming in this argument that John is a different person from Joe, but just that John, an alter, *thinks* a different person, Joe, is acting. Consider that we do not have to assume that Sarah and Samantha are different people. Indeed, we may assume the opposite—that Samantha does not exist. Yet Sarah is still not responsible for what she thinks Samantha is doing. What is critical is simply that *Sarah* thinks a different person, Samantha, is acting, and therefore *she* is not responsible for failing to avert the act—*she* is not, in her own eyes, the actor. Karen, by contrast, thinks not that a different person is acting, but that *she* is a different person as she acts; and therefore *she* is responsible for failing to avert the act.

What about the case—more common, no doubt—in which John is not coconscious with Joe when the murder takes place? Does John then lose his insanity defense? The case in which John is not coconscious when the act takes place is perhaps even easier than the case in which he is. For in this case we can say simply that John lacked all knowledge that the act was occurring. Obviously, if he failed to know the nature of his act in this sense, he could hardly prevent the act from occurring.

John meets the traditional insanity test, then, on the basis that he did not know the nature of the act: either he thought another person was doing it, if he was aware it was going on; or he was unaware it was going on. Even if John was aware of the nature of the act—because, say, he knew he was a multiple, and correctly interpreted that another *alter* was acting—he may nonetheless meet the test because he could not control the act. If he could control it, he should be liable: Joe performed the act without an excuse, and John allowed it to be performed without an excuse. Ordinarily, however, a multiple's personalities *have* no control over what the other personalities do—or even over who will present at any particular time.

At this point, however, a problem arises. Why should we say that if any alter did not know the nature of the act, or could not control it, a multiple is not guilty? Should we not rather say that if the alter who committed the act knew its nature and could control it, the multiple is guilty? After all, while John did not know the nature of his act, and could not control it, Joe did and could. Should we say then that Multiple is guilty?

The conflict between these two views mirrors a conflict in the law on multiples' responsibility. In some courts' view, if *any* alter did not know the nature of the act, or could not control it, the multiple is not guilty.¹³² These courts err in asking whether any alter did not know that the act was wrong¹³³—rather than that the act was occurring. Their clear position, however, is that any alter's lack of guilty knowledge spells the multiple's innocence. In other courts' view, a multiple is innocent only if the alter who performed the act meets the insanity test:¹³⁴ if Joe knows the nature of his act, Multiple is guilty.

The first view is the better view. It takes appropriate account of the nature of alters as person-like entities that deserve deference and respect, and it comports with the law's position on sleepwalking.¹³⁵ Acts sleepwalkers commit are not crimes, because sleepwalkers are not conscious when they act—just as John is not conscious when Joe acts. The normal, waking self is submerged when the sleepwalker acts. Yet the "sleeping self" acts with knowledge and intent; her actions are too complicated to be simple reflexes, and too goal-directed to be simple motions. Some, if only unconscious, mentation must be governing the sleepwalker's actions. If this is so, our reason for excusing sleepwalkers is not that no "mind" governs their actions—that they act without

¹³² See *supra* note 8 (citing cases that consider sanity of each of a multiple's personalities in determining criminal liability).

¹³³ See, e.g., *State v. Rodrigues*, 679 P.2d 615, 619-20 (Haw.), *cert. denied*, 469 U.S. 1078 (1984); *State v. Grimsley*, 44 N.E.2d 1071, 1076 (Ohio Ct. App. 1982).

¹³⁴ See *supra* note 10 (citing cases that consider sanity of alter that committed the act).

¹³⁵ See Jeffrie G. Murphy, *Involuntary Acts and Criminal Liability*, 81 ETHICS 332, 333 (1971). Sleepwalking, or any somnambulistic action, is commonly recognized as a defense to criminal conduct. *Id.*; see, e.g., *Lewis v. State*, 27 S.E. 659, 665 (Ga. 1943); *Fain v. Commonwealth*, 78 Ky. 183, 188-89 (1879); *State v. Williams*, 252 S.E.2d 739, 744 (N.C. 1979); *King v. Cogdon* (Vict. 1950) (unreported), discussed in Norval Morris, *Somnambulistic Homicide: Ghosts, Spiders, and North Koreans*, 5 RES JUDICATAE 29, 29-31 (1951).

knowledge and intent. Rather, we excuse them because their ordinary, waking selves do not govern their actions. As one court put it, Ms. Cogdon's act in axing her daughter while sleepwalking was not "her" act.¹³⁶

Traditional sleepwalking doctrine, then, aims to protect the normal waking self from the consequences of the sleeping self's acts. It is not enough, for criminal liability, that a human being perform an act: we do not just grab bodies and put them in jail, even when they act in coordinated, directed ways. Rather, if the normal, waking self will suffer the punishment for the crime, it must itself have perpetrated the act: it cannot have been unconscious.

Sleepwalking doctrine, then, suggests that excusing multiples if they have any innocent alters is correct.¹³⁷ Joe may have known the nature of his act, but so does the sleeping self. We still want to protect John and the normal, waking self from the consequences of his confrere's criminality.¹³⁸

¹³⁶ See *King v. Cogdon* (Vict. 1950) (unreported), discussed in Morris, *supra* note 135, at 30.

¹³⁷ Indeed, not only sleepwalking doctrine suggests this; so does the view, in insanity doctrine, that a person who commits a crime delusionally believing another is committing it is exonerated. It seems unfair that someone who delusionally believes another is acting should be exonerated for her crime, while an alter should not. The alter believes another alter, which she takes as another person, is acting—even though it is just herself under another description. The alter and the delusional person are materially ignorant in the same way. It is true that the delusional person does not act with a part of herself that consciously has the required knowledge, while Multiple does. But surely the delusional person is acting with a part of herself that at least *unconsciously* has the required knowledge—the delusional person is just like the sleepwalker in this respect. If this is so, then whether the knowledge is conscious or unconscious is the only difference between the delusional person and Multiple—which seems a rather tenuous basis for distinguishing the two cases.

¹³⁸ If we are worried about punishing the waking self for what the sleeping self has done, why are we not worried about punishing the sleeping self for what the waking self has done? The answer, I think, is that the sleeping self does not have those characteristics of alters that make punishing them unjust when they are innocent. The sleeping self does not *suffer* from the punishment. Nor does the sleeping self have projects that the punishment thwarts (to the extent it has projects at all, they can be carried out wherever the person happens to be sleeping). Finally, the sleeping self does not have a self-concept that is degraded by the punishment. We are simply less concerned about punishing *this* kind of a part of a person than about punishing an alter.

Of course, the normal waking self is clearly a person who deserves our attention and respect. Is the same true of alters? The answer, as I argued earlier in this section, is "yes." Joe and John, even if not different persons, are themselves different structures in Multiple's mind; and we have seen reason to think that some entities-less-than-persons *are* entitled to deference and respect. John believes himself to be a different person from Joe—he has his own sense of self; he is separated from Joe by amnesia boundaries; and he is fully and richly developed, just like a person. He rightly says that he did not know the nature of the act or could not control it—and so *he* is not blameworthy. Yet, as we saw in the last section, he will suffer from punishment, his projects will be thwarted, and his self-image will be degraded. If he is innocent of wrongdoing, it is unfair to punish him—even though he is not an innocent person, but just an innocent alter.

IV. IF MULTIPLES CONSIST OF ONE PERSON WITH ONE COMPLEX PERSONALITY, ARE THEY RESPONSIBLE FOR THEIR CRIMES AND ARE THEY COMPETENT TO BE PUNISHED?

I have suggested that the most plausible interpretation of the reality of MPD—that it involves rich, complex personality configurations, separated by amnesia barriers, with their own senses of self—is that multiples have many separate personalities. But perhaps my suggestion is wrong. Perhaps we should individuate personalities on the basis of ownership: one personality per person. Or perhaps MPD's genesis suggests a better interpretation: Multiple is one person who, through various defensive maneuvers, splits his one personality into different parts. As discussed above, two theories of responsibility can exonerate one alter from responsibility for what another has done if multiples have many personalities: the character-based theory and the act theory. Supposing that a multiple has one complex personality makes these theories more problematic. If the best interpretation of Multiple's condition is that he has one complex personality, we need to reconsider his criminal liability.

A. Alternate Interpretations of Personality

Certain modern psychoanalytic theories may suggest that Multiple is one person with one complex personality. Consider, for example, Roy Schafer's proposal for a new action language for

psychoanalytic metapsychology.¹³⁹ Schafer proposes that all psychic phenomena, conscious or unconscious, ego or id, are things that an agent “does.” Thus, instead of saying that “a person’s id impulses overcame her defenses,” we should say that “she began acting aggressively/sexually even though she had been trying to contain her desires so to act.” While Schafer purports to recommend a way to speak of these phenomena, we may take him as defining the phenomena.

Schafer’s recommendation rests on the assertion that the Freudian metapsychological language is archaic and anthropomorphic (speaking, for example, of the *id*’s doing something, as if it had a mind); such language belongs to a biological/organismic framework that does not bear fruit. Indeed, Schafer’s “action” language not only avoids the confusion that the primitive Freudian language creates, but is also more faithful to the aims and practices of clinical psychoanalysis. Psychoanalysts want their patients to see that they actively bring about their problemated lives, though often in unconscious ways. Thus the traditional language permits a patient to disclaim responsibility that the “action” language rightly lodges in the patient herself.

The importance of Schafer’s recommendation is that he would see multiplicity as a condition that the multiple herself actively brings about; *Multiple* splits himself in such a way that he now acts John-like, now Joe-like. Moreover, because Schafer rejects the anthropomorphic language that populates *ordinary* individuals’ minds with many person-like agencies, he might similarly reject the idea that a *multiple* consists of a number of person-like agencies.¹⁴⁰ Instead, a multiple is one person, who sometimes acts

¹³⁹ ROY SCHAFFER, A NEW LANGUAGE FOR PSYCHOANALYSIS 3-15 (1976). “Metapsychology” is the “[b]ranch of theoretical or speculative psychology concerned with theories, hypotheses, or phenomena that are largely beyond the realm of empirical verification.” HAROLD I. KAPLAN & BENJAMIN J. SADOCK, COMPREHENSIVE GLOSSARY OF PSYCHIATRY AND PSYCHOLOGY 118 (1991).

¹⁴⁰ Schafer does not actually address the multiple’s case, and he might believe that in generating different alters, multiples *do* in fact generate multiple personalities—or even people. That is, a *multiple*’s mind’s subsidiary agencies are rightly anthropomorphized, for they are different people or at least people-like entities. Each sub-entity *acts* in various ways, for example, to protect herself—it is just that more than one entity now does the acting. One suspects, however, that Schafer would prefer to speak of the one person, Multiple, who splits himself in a variety of ways. To be consistent with the “action” language, the different personalities are then

one way, sometimes another. The accent is on the one individual who performs the various actions that constitute, among other things, her defenses.¹⁴¹

best conceptualized as different ways or modes of the person's acting, rather than as different things or entities.

¹⁴¹ Robert Stoller's discussion of the multiplicity of his patient, Mrs. G, is consistent with Schafer's theory. See ROBERT J. STOLLER, *SPLITTING: A CASE OF FEMALE MASCULINITY* (1973). Significantly, he concludes that Mrs. G *herself* acts to create the other personality; that she does so to express forbidden desires without owning that they are hers; and that her multiple personality traits are, in essence, all parts of *her*.

Interestingly, in his chapter "Who is Belle?," Stoller argues rather that *each of us* is "an assembly of minds." See ROBERT J. STOLLER, *SEXUAL EXCITEMENT: DYNAMICS OF EROTIC LIFE* 187 (1979) [hereafter STOLLER, *SEXUAL EXCITEMENT*] (quoting SCHAFFER, *supra* note 139, at 86). That is, in each of us "multiple voices—personages—[are] all present and speaking at different levels of consciousness within the same person." *Id.* at 186. Stoller notes that Freud's anthropomorphism troubles Schafer, and comments that, "while for Schafer this is a fatal flaw, for me 'an assembly of minds' is a naturalistic description that any theory must work with, not ignore or deny." *Id.* at 187. Stoller reads W.R.D. Fairbairn and Melanie Klein as having similar views, *id.* at 189, and sees both the dream and the super-ego as signs that everyone, without exception, is ego-split at the deepest levels. *Id.* at 188 (citing W.R.D. FAIRBAIRN, *AN OBJECT-RELATIONS THEORY OF THE PERSONALITY* 98 (1952)). Stoller, then, both asks "Do we all suffer multiple personalities?" and treats the multiple Mrs. G as decidedly one.

Other theorists seem clearly to subscribe to the "different personalities" view of multiples. Indeed, the disorder's name itself suggests the "different personalities" view. Even a Kohutian has repudiated the "one personality" view. Thus Michael Ferguson argues that Heinz Kohut's concept of the mirror transference best describes MPD patients' behavior and psychological needs. See Michael Ferguson, *Mirroring Processes, Hypnotic Processes, and Multiple Personality*, 13 *PSYCHOANALYSIS & CONTEMP. THOUGHT* 417, 418 (1990) (citing HEINZ KOHUT, *THE ANALYSIS OF THE SELF* 115-25 (1971)). Most importantly, he rejects the view that different alters represent "different aspects of a common underlying matrix," that a "common substrate" exists beneath the various alters, that the alters represent "split-off portions of one original total personality." *Id.* at 444 (citations omitted). These ideas encourage a therapist to "play down the individuality of the separate alter selves. This, in [Ferguson's] opinion, is to deny the alter personalities the very mirroring response they are so painfully seeking; the recognition and acceptance of themselves as individuals in their own right." *Id.* Thus even a Kohutian can reject the "one personality" view of MPD.

B. Responsibility

Consistent with Schafer's theory, we must no longer focus on John and Joe, but instead must focus on *Multiple*—on *his* responsibility and guilt. "Joe" and "John" are really just ways that Multiple acts, and we should not anthropomorphize them. Thus we must not ask if John can be held liable for what Joe did—as if John were a separate entity—but rather if Multiple-as-Joe/John is liable if one aspect of him—the "John" aspect—is arguably innocent.

We have seen two theories under which Multiple might be exonerated:¹⁴² that an excuse exists when a bad act is not connected to a bad character; and that an excuse exists when the actor lacked the capacity or a fair opportunity to avoid the act. Under the first theory, multiples do not have an excuse if they have one complex, deeply divided personality: Multiple-as-Joe's act reflects on Multiple-as-John's character, because they have in fact the same character—the "Joe/John-character."¹⁴³

Under the second theory, multiples' responsibility is less clear. One could say that the argument that multiples lack knowledge and control holds even if John and Joe are not separate personalities, but merely parts of one complex, deeply divided personality. That is, they are still parts of a person that deserve deference and respect: they suffer, have projects and a self-concept, and should not be made to suffer if they have done nothing wrong. But one might have difficulty speaking in this manner about mere facets of one person's single personality. Under this theory, John and Joe are not even separate entities. The one entity here is *Multiple*, and it is his knowledge and responsibility that one should examine.

¹⁴² Could one also argue that Multiple is less bad than the ordinary criminal because he repudiates evil so strenuously as to create a whole other personality facet, insulated from the rest, to put his badness in? With a large part of his personality, he cannot even acknowledge what he has done. We may be less angry at evildoers who cannot, as it were, live with themselves. But we may also be *more* angry at them: Multiple has created a personality facet that is enabled, by virtue of its insulation from the rest of his personality, to do evil with impunity. He may have created a Saint, but he has also created a Monster. Moreover, the identified factors would seem to go to mitigation and aggravation, not to exculpation and inculpation.

¹⁴³ One could alternately argue that Multiple's one personality is so fragmented as not truly to be a personality at all (*cf.* the "no person" view, *infra* note 149); or that it is so fragmented that, though it qualifies as a personality, acts will not *reflect* on that personality's character. I take the view here, rather, that the character defense is unavailable to Multiple if he has one complex character, but these alternatives are also plausible.

Thus the question is whether Multiple-as-Joe/John has the requisite knowledge and control, not whether John does.

We then have a clear problem if we want to exonerate Multiple; for can we not say that Multiple-as-Joe/John has the guilty knowledge if Joe does? Or perhaps he both knows and does not know (for while Joe knows, John does not). In the situation of mixed mental states, the law generally prefers to find competency or sanity rather than the reverse: if a person has both a rational and a grossly irrational reason for acting (say a patent delusion), the rational reason controls, and the act is deemed rational.¹⁴⁴ If this is so, Multiple's mixed mental state does not insulate him from liability.

Two points, however, run counter to this conclusion. First, the doctrine on mixed mental states is not necessarily sound. Consider that one might, with most of oneself, *not* have the requisite knowledge; should a glimmer of knowledge be enough for us to discount the effects of the ignorance? If not, perhaps we should attempt to assess the quality of one's state of mind on balance, rather than adopt the rule that any amount of knowing suffices. Indeed, if we are to have rules at all, why not adopt the rule that any significant *ignorance* suffices for ignorance?

Second, the *nature* of the mixed mental state in the multiple's case differs significantly from its nature in other cases of conflict. When ordinary people have conscious conflicts—even ordinary irrational people—they are aware of the terms of the conflict; as such, they can make their best determination of which side of the conflict should prevail. But a multiple does not just switch from knowing to not knowing, aware of her conflict. Instead, she lives in states of not knowing that are altogether insulated from knowledge: she is not even aware that there is an issue. Unaware of the issue, she cannot search out the truth and affirm the right and good.

This is not just another way of saying that an autonomous, self-contained part of Multiple does not know and should not be made to suffer. It is instead a way of saying that Multiple-as-Joe/John has, in himself, pockets of ignorance that may be incompatible with our saying that *he*, as a *whole*, is guilty; at least he lacks the opportunity to adjudicate the conflict he faces, and to allow rea-

¹⁴⁴ For examples of this doctrine in the context of wills, see, e.g., *In re Estate of Yett*, 606 P.2d 1174, 1176 (Or. Ct. App. 1980); *In re Meagher's Estate*, 375 P.2d 148, 150 (Wash. 1962).

son to prevail. Because of this, he may be said to lack responsibility for the act's occurrence. When one knows an act is occurring—or even might be occurring—one can generally do something about it; but when one suffers such distinct gaps in knowledge that we conclude that one does *not* “know,” or “know” sufficiently,¹⁴⁵ one has much less control over the act. And how can we blame a person for not stopping an act she does not sufficiently know is occurring? If a person lacks unity and continuity of mind, significant parts of herself cannot participate in the decision to act or not act. Responsibility may be incompatible with such self-contained, autonomous parts of the self being completely innocent of guilty knowledge.

Indeed, the sleepwalking cases may make precisely this point: it is not (just) that we want to protect the innocent part of the person from punishment; it is also that the person as a whole, if she suffers distinct gaps in knowledge, should not be said to “know,” and is therefore not guilty. This may also be the best interpretation of another relevant class of cases—the “blackout” cases.¹⁴⁶ Because of the blacked-out part's distinct gaps in knowledge, the person cannot bring enough of herself to bear on the existence or continued existence of an act to be guilty. The multiple's case is exactly the same.

¹⁴⁵ Certainly Multiple has no knowledge at all when in his states of not-knowing—again, he does not then even know there is a conflict. But even when not in those states, their existence in him may be sufficient reason for us to conclude that he, as a whole, does not sufficiently “know.”

¹⁴⁶ A blackout is a transient dulling or loss of vision or consciousness due to temporary impairment of cerebral circulation or retinal anoxia, traumatic emotional blows, or intoxication. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 227 (1986). A number of jurisdictions allow an unconsciousness defense to excuse criminal acts committed during a blackout. In *Smith v. Commonwealth*, 268 S.W.2d 937, 938 (Ky. 1954), for example, the defendant claimed that during the automobile accident that killed the victim, he suffered a blackout. The court acknowledged that the unconsciousness defense may be available to defendants who blacked out while committing the crime. *Id.* at 938-39; *cf.* *Burnett v. Commonwealth*, 284 S.W.2d 654, 658 (Ky. 1955) (defense not available where defendant chooses to become unconscious by drinking); *Sellers v. State*, 809 P.2d 676, 683 (Okla. Crim. App.) (influence of satanism does not bring defendant within unconsciousness defense), *cert. denied*, 112 S. Ct. 310 (1991). Less commonly, though a blackout (generally alcoholic) does not relieve a defendant of criminal responsibility for her conduct, it may negate any specific intent necessary to establish guilt. *See, e.g., People v. Daly*, 553 N.Y.S.2d 589, 591 (N.Y. Sup. Ct. 1990).

C. Competency to Be Punished

Even if one rejects this theory of Multiple's nonresponsibility, Multiple may nevertheless escape punishment: if the alter in control during a crime provides the measure of the criminal's sanity, the alter in control during punishment should provide the measure of the convict's competency to be punished. Multiples may in fact be incompetent to be punished if the alter presenting during the punishment disavows responsibility for the act—if she says, and believes, "*I did not do the act.*"¹⁴⁷

While this article does not attempt a full and detailed account of competency to be punished, we can at least say that, to be competent to be punished, one must be aware of why punishment is just—of why one deserves punishment. We do not want to say a person is incompetent to be punished if she merely disagrees with the law, or thinks she has been wrongly found guilty because (say) non-credible testimony falsely persuaded the jury. To have a firm and fixed delusion that one did not do the act is different from thinking one did do it, but should not have been convicted, or that the act should not be considered a crime. If a person thinks she did not do the act, the punishment simply does not make sense to her: she did nothing wrong, either in her own eyes or in society's (if only society knew the truth). By contrast, if a person is aware of why she deserves punishment, she has the opportunity to repent of the crime. At the very least, she understands why others are angry, and the retributive purpose of punishment is fulfilled.

Multiples are not the only ones who are incompetent to be punished according to this view. So is a person who is delusional after the fact about who committed the crime—who delusionally believes, that is, that someone other than she did it. This person is clearly responsible. Yet if she cannot admit to herself that she committed the act, she may not be competent to be punished—in the same way as the multiple. Similarly, a person who suffers

¹⁴⁷ It is true that a person who recognizes that she is a multiple can resign herself to being incarcerated on the theory that her sister alter deserves it—just as an innocent siamese twin can. She does not acknowledge that she *deserves* the confinement, however, but just that confinement is necessary. This does not make her competent to be *punished*—and recall that we *are* punishing the entire person under this theory. Instead, she simply acquiesces in a confinement imposed on her for instrumental reasons alone. Thus the multiple is not competent to be punished, because the alter cannot accept that *she* deserves punishment.

from amnesia and cannot remember her crime—or her entire past—is also incompetent to be punished in this way. Finally, anyone with delusions that, if true, would make her punishment unjust—for example, that she was an infant—would also be incompetent to be punished.

Nor is this the place to argue that those who are incompetent to be punished should be hospitalized until they are competent; but it is worth saying that this position is clearly coherent. Indeed, the Supreme Court has determined that, constitutionally, states may impose capital punishment only on the competent.¹⁴⁸ Thus, even if we reject all theories of multiples' nonresponsibility, multiples may still be incompetent to be punished. Because John is wholly unable to accept the crime as his, he may not be a fit subject for punishment.¹⁴⁹

¹⁴⁸ See *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986).

¹⁴⁹ Michael Moore and Kathleen Wilkes have suggested a final theory for exonerating multiples. According to this theory, multiples are insufficiently rational to be persons at all; at best, they are defective persons. See MICHAEL S. MOORE, *LAW AND PSYCHIATRY* 406 (1984); Wilkes, *supra* note 83, at 344-45. If the criminal law requires that a *person* commit an act for it to be criminal, then multiples are not guilty of violating the criminal law. "Person," under this theory, is a forensic term. And this theory does not involve only minimal conceptions of personhood—persons as self-conscious beings or beings that possess a soul; it involves a robust conception of personhood. To be a person, according to this theory, one must be a rational agent. If Multiple fails to be a person under this view, he is exonerated—all of him. Under this theory we would not punish Joe even if that became physically possible. Under the other theories we have considered, by contrast, we exonerate Multiple to protect John from punishment, but would punish Joe if we *could*.

This theory requires a full-blown account of the kinds of irrationality that vitiate personhood. It would appear that requiring consistency in an agent's ends—which multiples conspicuously lack—is to require too much. One philosopher has proposed that capacity for second-order beliefs and desires is the criterion for personhood. See Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5, 6 (1971). And perhaps multiples are insufficiently able to have beliefs about their beliefs and desires about their desires (for when in one personality multiples lack access to other personalities' beliefs and desires). For an interesting attempt to spell out the conditions of moral agency that render one an addressee of the criminal law (though not in the context of MPD), see Arenella, *supra* note 101, at 60-61. Arenella focuses on the ability to respond emotionally/morally and the capacity for critical self-reflection. The "no person" view deserves more serious consideration, but will not be considered further here.

V. IS MULTIPLICITY SIMPLY A MATTER OF DEGREE: ARE WE
NOT ALL MULTIPLE TO SOME EXTENT—AND ARE WE
NOT THEN ALL SOMEWHAT NONRESPONSIBLE
FOR OUR CRIMES?

A. *Addressing the Problem Given What We Know*

1. Non-Pathological Multiplicity

This article has argued, under any of a number of different theories, that multiples should not be deemed responsible for their crimes. But are we not all multiple to some extent?¹⁵⁰ If so, does anyone evidencing multiplicity have an excuse—or at least a partial excuse—for her crime?

Consider the non-pathological multiplicity that sometimes exists in ordinary people. Theorists describe, first, some unusual signs of multiplicity. For example, some people can perform the feat of automatic writing.¹⁵¹ While attending to a task with one part of her personality, such a person can write continuously, as if automatically, with another. A person under hypnosis can

¹⁵⁰ For psychiatric commentators who take this position, see, e.g., BEAHRs, *supra* note 48, at 3; Beahrs, *supra* note 23, at 102; Eve M. Bernstein & Frank W. Putnam, *Development, Reliability, and Validity of a Dissociation Scale*, 174 J. NERVOUS & MENTAL DISEASE 727, 727 (1986); Stewart Gabel, *Dissociative Phenomena and Monitoring of Self: Experimental, Clinical and Theoretical Considerations*, 6 INTEGRATIVE PSYCHIATRY 53, 53-54 (1988); Ernest R. Hilgard, *The Hidden Observer and Multiple Personality*, 32 INT'L J. CLIN. & EXPERIMENTAL HYPNOSIS 248, 250 (1984); Arnold M. Ludwig, *The Psychobiological Functions of Dissociation*, 26 AM. J. CLIN. HYPNOSIS 93, 94 (1983); A.Z. Orzeck et al., *Multiple Self Concepts as Effected by Mood States*, 115 AM. J. PSYCHIATRY 349, 349 (1958); Price, *supra* note 23, at 388. Robert Stoller gives some details of phenomena that are on a continuum with MPD. See STOLLER, *SEXUAL EXCITEMENT*, *supra* note 141, at 138. That MPD may be on a continuum obviously relates to the claim that all of us are multiple to some extent. See DONALD FREED, *FREUD AND STANISLAVSKY: NEW DIRECTIONS IN THE PERFORMING ARTS* (1964). For some philosophical essays on the idea that the individual is a set of sub-individuals, see generally THE MULTIPLE SELF (John Elster ed., 1986).

¹⁵¹ Automatic writing has long been of interest to psychologists and psychiatrists, who have seen it as an avenue to the unconscious mind. See, e.g., F.W.H. Myers, *Automatic Writing*, in 3 PROCEEDINGS OF THE SOCIETY FOR PSYCHICAL RESEARCH 1 (1885); see also Coons, *Diagnostic Considerations*, *supra* note 22, at 333 (discussing incidence of automatic writing as tool for diagnosing MPD). For a history of the subject and a discussion of current research, see generally ERNEST R. HILGARD, *DIVIDED CONSCIOUSNESS: MULTIPLE CONTROLS IN HUMAN THOUGHT AND ACTION* 131-54 (expanded ed. 1986).

become hypnotically deaf, when so instructed, but with another part of her personality, dubbed the "hidden observer," can hear and record every sound.¹⁵² Theorists suggest that the hidden observer phenomenon may not be that uncommon, and it is certainly not pathological.¹⁵³

Less unusual manifestations of multiplicity are pervasive. We think of everyone's personality as having different parts. Dave will sometimes get in an angry state of mind or "ego-state"—"Dastardly"—while at other times he is his more normal, peaceable self. A discrepant part of everyone's personality occasionally asserts itself. Similarly, people change: while before his near-death experience, Mark was obsessively concerned about the future, now he lives each day to the fullest and has stopped his chronic worrying. Has Mark become a different person?

What about a person who has radically reformed? While Bob committed a murder at age twenty, when he is caught thirty years later he has a family and a responsible job, gives fully of his time and money to many charities, and has utterly repented his past barbarousness. Has Bob become a different person?

Some theorists in fact suggest that uncharacteristic states of mind and significantly altered personalities are not the only traits that demonstrate multiplicity. Rather, multiplicity is the norm in our lives: we are all like orchestras, with many, and distinct, parts that make up the whole.¹⁵⁴ A conductor may organize the orchestra, but it is still an orchestra. This conception makes some intuitive sense. People not only display uncharacteristic states of mind, but show different characteristics at different times—they are different on the job and at home, different with one set of friends and another. One's personality in fact encompasses a whole range of facets that reveal themselves at different times.

If this is so, we face a clear problem: nearly everyone evidences some multiplicity, but we cannot say that nearly all crimes are excused. In fact the law holds that people who act in uncharacteristic ego states, and people who have reformed, can be tried and punished for their crimes. But do the theories that excuse multiples support that position, and is it a good position for the law to hold?

¹⁵² See, e.g., HILGARD, *supra* note 151, at 185-215.

¹⁵³ See *id.*

¹⁵⁴ See BEAHR, *supra* note 48, at 3; Beahrs, *supra* note 23, at 111-12.

2. Responsibility of Non-Pathological Multiples

The first thing to notice is that the non-pathological multiple's case cuts differently under each theory. Under the first two interpretations of multiplicity (that alters are different persons or different personalities), alters are clearly distinguishable from parts of ordinary personalities, and we need not excuse the ordinary person if we excuse multiples. Thus, if multiples consist of groups of people, John is not guilty for what Joe did because John and Joe, by the best Criterion of Personal Identity, are literally different people. Under this interpretation, non-pathological multiplicity poses no problem. We are not tempted to say that different ego states or reformed people are literally different people. Thus, while Bob's personality may have changed to some degree, his memories and other psychological characteristics remain continuous.¹⁵⁵

If multiples consist rather of one person with many different personalities, we can also easily distinguish them from people who evidence non-pathological multiplicity. Non-multiples do not have numerically distinct characters: Dave, even though he gets in an angry ego-state—"Dastardly"—should be said rather to have one complex personality. Unlike multiples' personalities, non-multiples' personalities are not separated by amnesia barriers, do not identify themselves as different selves, and are rarely rich or fully developed. In short, they lack those characteristics that I have argued are critical to individuating personalities. If this is so, only Multiple has many different personalities.

Dave/Dastardly, by contrast, has one complex personality, and Bob has a personality that has changed. Thus, Dave/Dastardly will act in ways that reflect on his one complex personality, while Multiple has no one complex personality for an act to reflect on. Under this interpretation of Multiple's liability, then, pervasive non-pathological multiplicity does not mean pervasive nonresponsibility.

Under the third theory, by contrast, a multiple has one complex, if deeply divided personality that differs from other people's complex personalities only in degree. This theory may cause more problems in differentiating multiples from the rest of us:

¹⁵⁵ When non-multiples do lose their memories, or change radically in their personalities, we may wish to say they are literally different persons. In those cases we *should* excuse them for their past acts. These cases, of course, will be very rare.

why are we not all multiples? And why do the arguments I invoke in part IV not apply to all of us, so that we are all nonresponsible?

If the third theory suggests that multiplicity is merely a stage on a continuum, where non-pathological multiplicity ends and MPD begins is primarily a question for psychiatrists. For many psychiatrists, as noted, MPD requires amnesia barriers. Multiples' different senses of self also distinguish them from non-multiples. Beyond that, psychiatrists simply observe the personality parts' degree of separateness, development, and richness; and distinguishing a true multiple from someone who merely has a very complicated personality will often be extremely difficult.

The amnesia barriers between alters, and their different senses of self, are once again what permit us to apply the arguments in part IV and find multiples innocent. These arguments will apply to non-multiples only rarely, and when they do, current law would probably exonerate them anyway—and their condition begins to approximate MPD.

Under the third theory, Multiple is innocent, I argued, inasmuch as he did not know the nature of his act. In his John aspect, he thought another person was performing it, or was unaware that it was going on. Similarly, he could not in his John aspect control the act, because he could not control the Joe aspect.

The theory that applies to Multiple is unavailable to non-pathological multiples: while alters conceive of themselves as literally different people (whatever the actual case may be), ordinary people generally do not. Thus Dave did not think a literally different person was committing the murder, but rather that *he* was committing it in an angry state of mind—Dastardly. Thus he did not fail to know the nature of his act in the way that John did.

Yet can Dave fail to know the nature of his act by being submerged, during the time of the act, by the Dastardly aspect—a situation similar to that in which John is not coconscious with Joe? If in fact this can happen, it does so only rarely: consider that the Daves of the world rarely come forward and proclaim their ignorance. Either, then, they actually did not exist when we supposed them to be “submerged,” or else they were not submerged behind *amnesia* boundaries. Once again, multiples' amnesia is significant.

On occasion, ordinary people *will* come forward and claim that they did not with parts of themselves know the nature of their acts. These people may just mean that they switched from con-

scious knowledge to conscious ignorance—a state distinct from multiples', who have pockets of ignorance. To the extent these people mean that they were in a personality-state that suffered a kind of "blackout" at the time of the act, and now suffer continuing amnesia, we have seen that current law would probably exonerate them. Indeed, they then begin to closely approximate the multiple's condition and probably *should* be found innocent.

Non-multiples, then, may very rarely be exonerated under the "knowledge" theory. Somewhat the same can be said about the "control" theory: rarely will one ego state be unable to control the actions of others. Thus Dave may have had little or no control over Dastardly: the ascendance of the angry ego-state—the strength of the anger—may have meant that Dave was helpless to prevent the act. The difference between multiples and normal people with distinct ego-states is that multiples' alters can rarely all control the other alters' acts, while most normal people do not lose control over themselves when in diverse ego-states.

I also considered the theory that, if the alter presenting during punishment did not accept the fact that she had committed the act, she would not be competent to be punished. And this theory is *not* available to Dave, for Dave, again, does not think that he did not do the act—he simply thinks that he was in an angry state of mind when he did it. Multiples' different senses of self—at worst, their *delusion* that they consist of different people—make them incompetent to be punished. But non-pathological multiplicity does not render others incompetent to be punished.

The different theories of multiples' nonresponsibility yield different conclusions about the responsibility of people in diverse ego-states, or people who have reformed. I have suggested that if the *latter* will be nonresponsible on a particular theory grounding multiples' nonresponsibility, then—given the law—that theory must be rejected.

But perhaps existing law is simply wrong. Perhaps people in uncharacteristic ego-states, or people who have truly reformed, should not be responsible—or at least not punished—for what they did. In the case of reform, for example, we could hold that the criminal's act does *not* reflect on the reformed person's character. Or we could ground the conclusion of nonresponsibility on a variant of the different person theory, which says that what matters is not personal identity, but rather psychological continuity and connectedness. Because the reformed person may have little connection psychologically to her past self, it might be unjust to

punish the reformed person, or to punish her as much as she would have deserved as her earlier self.¹⁵⁶ Under either theory, the law should alter its stance when a criminal has truly reformed. This is not the place to defend this interpretation further, but it is important to note that it is plausible.

If all of this is so, it is possible to acknowledge that almost all people evidence some multiplicity without holding that almost no one is criminally responsible. As in other areas of insanity where pathology is only a matter of degree, useful distinctions are nevertheless possible.

B. *What We Would Like to Know*

My analysis has taken place thus far in a state of some ignorance. I have presented alternative theories that produce different cases for multiples' nonresponsibility. And these alternative theories generate a greater or lesser ability to distinguish multiples from people evidencing non-pathological multiplicity.

The key question we would like to answer is how we should construe multiples' alters. Do multiples consist of literally different people? Are they rather one person with numerically and qualitatively distinct personalities? Or are they one person with one very complex, deeply divided personality? Depending on how we conceptualize multiplicity, different legal theories ground multiples' exoneration—and some may find some theories more compelling than others.

Another key question we would like to answer is the nature of the multiplicity that ordinary people evidence, and how to distinguish ordinary people's complex personalities from multiples'. I assumed above that there are good reasons to think multiples have numerically distinct personalities—but that ordinary people

¹⁵⁶ See PARFIT, *supra* note 68, at 326; Dresser, *supra* note 68, at 427-35 (adhering to view that reformed person might deserve less punishment, and citing authorities for lesser punishment in that and other cases of profound change).

Note that the question of punishing the repentant person partakes of a paradox. The repentant person *accepts* responsibility for her past act. She owns the act as hers. Being repentant is partly *constituted* by a willingness to accept punishment. The more the repentant person accepts punishment, the less willing we may be to impose it. While *she* says "that was I," *we* say "that was a different person." In short, we are inclined to deprive the repentant person of exactly what she needs in order to take her repentance seriously: punishment.

do not. But perhaps the multiplicity of ordinary people is in fact very close to that of multiples. And if there is reason to construe the diverse ego-states as literally distinct personalities, then ordinary people no less than multiples may have a character-based excuse.

The questions we want answered are at least partly empirical. Take the question of whether multiples have many personalities, or one deeply divided personality. Scientists *may* discover that personality is a function of some kind of neurochemical substance in the brain, or an instantiation of some neurophysiological structure. And it may be possible to distinguish, numerically and qualitatively, such substances or structures one from another. We could conceivably count personalities on this basis—much as we could (perhaps) count persons if one human body housed two fully and normally functioning brains.

If neurophysiological resolution of this dispute seems rather fantastic—or at the least very far off—other kinds of scientific data and theories could aid us in resolving the dispute. It might be relevant to determine whether multiples have a “memory trace” personality that stands behind the phenomenological personalities, seeing all and knowing all. If they do, perhaps we should identify this “memory trace” personality as the person and hold that *her* liability suffices for the multiple’s. It might also be relevant to learn more about dissociation: is there one agency in the mind associated, say, with such a memory trace personality that does the dissociating? Do dissociated contents tend to stay apart—much as wood does if split—or do they tend to recohere—much as mercury does if split?¹⁵⁷ On a higher level of generality, theories of the etiology of personality could help us decide whether multiples have one complex personality or a number of

¹⁵⁷ See Ferguson, *supra* note 141, at 438. Ferguson distinguishes between “the kind of dissociation of consciousness that occurs in a hypnotic process, and the permanent ossification of fragments of conscious experience into self-contained subselves that carry an identity and a continuity of their own inaccessible to the primary personality.” *Id.* The latter he calls “splitting,” which, he suggests, results in “permanent alterations in the functioning of the mental apparatus that are not easily reversible.” *Id.* at 439. This “implies alterations in the functioning of the underlying neurological substrate.” *Id.* These alterations await scientific confirmation, however: “[t]he neurological understanding of anxiety and its effect on the nervous system is not yet in, and ultimately that is what will either confirm or refute this point of view.” *Id.*

different personalities; we would look at the origins of the personalities to determine their numbers.

Indeed, more data of the kinds that are already available on MPD would help us answer our questions. For example, how firm are the amnesia barriers between alters? Experiments suggest that neutral material does generalize across personalities—that only rich, affectively-laden material is forgotten.¹⁵⁸ We need to know whether this is because such material is hard for the alternate personalities to process, or because it is easy to keep separate from other material and therefore easy to “forget”—in other words, because the material lends itself to the feigning of amnesia, conscious or unconscious.

Again, how separate are the personalities—to what extent do identifiable groups of traits cluster without slipping over the boundaries into the other personalities? Evidence suggests that they are very separate indeed, but we need to design experiments to test whether slippage occurs. Finally, how firm are alters’ senses of self? Again, evidence suggests that multiples’ alters do truly conceive of themselves as separate people, and not as split-off facets of one personality. We need to conduct tests to verify this, however. Indeed, to answer all of these questions we need to design further experiments; anecdotal evidence will not suffice.

The questions I am asking are not solely empirical, however. They also have a conceptual component. The questions “what is a personality?” and “how do we count personalities?” depend for their answers on theories about personalities—not just facts. The theories will of course take account of the facts. They will also attempt to mesh with bigger theories about the mind in general—indeed, about the universe itself. Of course, the fact that these questions have a conceptual component does not mean that the answers are purely arbitrary or conventional, and that nothing should turn on them. Theories about whether fetuses are persons, for example, will advance discussions of abortion even though they have a conceptual component.¹⁵⁹

To best resolve the question of multiples’ liability, we need more empirical evidence and scientific theorizing about MPD and

¹⁵⁸ See, e.g., Ludwig et al., *supra* note 45, at 306; Nissen et al., *supra* note 45, at 130-31.

¹⁵⁹ Some commentators in fact question the proposition that theories about whether fetuses are persons will advance discussions of abortion. See, e.g., Bernard Williams, *Which Slopes Are Slippery*, in *MORAL DILEMMAS IN MODERN MEDICINE* 126 (Michael Lockwood ed., 1985).

non-pathological multiplicity from psychologists and psychiatrists, as well as more conceptual analysis from philosophers. We need in short to know whether the best interpretation is that multiples consist of different people, of numerically and qualitatively distinct personalities, or of one complex, deeply divided personality. Based on the *current* state of knowledge, I think we can conclude that multiples have at least distinct personalities, if not that they are distinct persons. Indeed, the disorder's very name suggests that the experts in the field conceptualize the disorder in that way. The arguments in this article about individuating personalities suggest the same.

If this interpretation is correct, multiples are not guilty of their criminal acts, either on a character-based theory of responsibility, or because they do not know the nature of their acts or could not control them. Even without further scientific and conceptual development, we now know that under a variety of theories, multiples should be exonerated; we just do not know which theory is the best.

VI. A REBUTTABLE PRESUMPTION THAT MULTIPLES ARE NONRESPONSIBLE

This article has discussed several theories according to which multiples should be exonerated. The key point about these theories for present purposes is that they apply to a multiple merely by virtue of her *being* a multiple. Unlike others acquitted by reason of insanity, a multiple does not have to meet further conditions to be exonerated—these conditions are embedded in the disorder itself.¹⁶⁰

Being non-responsible for a criminal act is, of course, not uncommon in the criminal law. But what is unique to the multiple's case is that she will virtually always be nonresponsible. Of course, some people who were not truly multiples could *claim* to be multiple, so the prosecution must always have the opportunity

¹⁶⁰ Note that the difference between MPD and other psychiatric diagnoses is in part a function of our conceptual schema. "MPD" names the end-point on a continuum of dissociative disorders, while, "schizophrenia," for example, names a range of disorders on a continuum of thought disorders. If we had a special name for the kind of schizophrenic disorder on this continuum that is exculpatory—say "Wild-Beast-Schizophrenia"—people with this disorder would virtually always be nonresponsible, just as is the case now with MPD.

to prove malingering.¹⁶¹ But once a person establishes that she is a multiple, in most cases that is all we will need to know to exonerate her. A multiple can almost *never* responsibly commit a crime, and a mere finding that a defendant has MPD will result in her exoneration. MPD is the only disorder whose presence alone is sufficient for a defendant's nonresponsibility.

As strong as the case for exoneration is, the state will be able, in exceptional circumstances, to convincingly refute the multiple's nonresponsibility. The law should therefore adopt a rebuttable, rather than a conclusive, presumption of nonresponsibility. In this section I will consider two issues. First, under what circumstances might the state be able to demonstrate that a multiple is responsible—and thus undermine this article's arguments in favor of nonresponsibility? And second, if multiples are nonresponsible in the vast majority of cases, what shall we do with multiples upon learning of their multiplicity? Must we leave them free, even if we can be reasonably sure they will commit further crimes?

The first case in which the prosecution could rebut the presumption of nonresponsibility is where all of a multiple's alters know about and acquiesce in the crime; in effect, they all tell the criminal alter that it is acceptable for her to commit the evil deed.¹⁶² Guilt is especially appropriate if the alters could have prevented the criminal act—for example, some multiples in treatment can call up alters at will, and so presumably could call up a law-abiding alter. There could also be other bases to infer acqui-

¹⁶¹ On distinguishing true cases of MPD from malingerers, see, e.g., Ralph B. Allison, *Difficulties Diagnosing the Multiple Personality Syndrome in a Death Penalty Case*, 32 INT'L J. CLIN. & EXPERIMENTAL HYPNOSIS 102 (1984); Phillip M. Coons, *Iatrogenesis & Malingering of Multiple Personality Disorder in the Forensic Evaluation of Homicide Defendants*, 14 PSYCHIATRIC CLINICS N. AM. 757 (1991); Richard P. Kluft, *The Simulation and Dissimulation of Multiple Personality Disorder*, 30 AM. J. CLINICAL HYPNOSIS 104 (1987); Martin T. Orne et al., *On the Differential Diagnosis of Multiple Personality in the Forensic Context*, 32 INT'L J. CLIN. & EXPERIMENTAL HYPNOSIS 118 (1984); John G. Watkins, *The Bianchi (L.A. Hillside Strangler) Case: Sociopath or Multiple Personality?*, 32 INT'L J. CLIN. & EXPERIMENTAL HYPNOSIS 67 (1984).

¹⁶² A problem seems to exist, in that multiples' alters are not equally *culpable* under this theory, so we would theoretically be required to apportion blame and punishment: one alter actually *committed* the crime, and the others were only accessories. But accessories and principals are often given the same punishment, and even if not, trying to fine-tune punishment to this degree might be carrying things too far.

escence. Cases of acquiescence, however, are likely to be so rare as to be almost non-existent: one reason multiples' functioning is often impaired is that their different personalities clash (or at least are at odds) with each other.

A second showing that would rebut the presumption of nonresponsibility would be the following: the host personality¹⁶³ commits the crime and stands trial, and the appearance of other alters is so extremely limited that punishing the person/body does not seem problematic—it causes a trivial harm. While this might in principle be a reason to rebut the presumption of nonresponsibility, this case, too, is likely to be so rare as to be almost non-existent.¹⁶⁴ Perhaps more importantly, what obtains at the time of the trial—namely, limited appearances of innocent alters—may not obtain at the time of punishment: guilty alters may take special pleasure in letting innocent alters suffer.

A third case that would rebut the presumption of nonresponsibility would be that of a well-organized multiple. Take the case of a multiple who has a ringleader alter in addition to well-established lines of responsibility for different tasks. We could arguably hold such a multiple liable on a theory of group liability: each alter has sufficient knowledge and control over the others that group liability makes sense. Indeed, it need not be that *all* the alters were aware of the other alters, still less of what each was doing and thinking. To attribute group liability, we do not require that each member of other types of organizations know what the other members are doing.

Indeed, while most therapists aim for the alters' integration, some aim only for organization of this kind.¹⁶⁵ And once again, multiples sufficiently organized in these ways could be held liable for crimes as groups. As in the case of the other exceptions discussed, however, this state of affairs is likely to be very unusual.

Could we also hold a multiple liable if she knows she is a multiple—especially if she is aware that she may have a dangerous alter? She then knows that another alter may be committing crimes or doing other wrongs when she is not conscious—and should be liable for failing to take preventive action. Consider,

¹⁶³ The "host personality" is the "alter that has executive control of the body the greatest percentage of time during the given time under consideration." Wilber & Kluft, *supra* note 46, at 2216.

¹⁶⁴ Indeed, MPD's diagnosis might require a threshold of significance, so that we could say that this defendant was not a multiple at all.

¹⁶⁵ Cf. Braun, *supra* note 48, at 215.

for example, that if one knows that one is epileptic, one can be guilty of committing vehicular homicide, even if the act of homicide occurs during a seizure and is therefore not voluntary: the act of *driving* was. Similarly, a multiple who is aware of her condition performs a culpable act simply by failing to take measures to ensure that no criminal acts are committed.

This theory, however, faces a doctrinal snag: the doctrine regarding epilepsy seems to have no analog in ordinary insanity cases.¹⁶⁶ An insane person does not become guilty simply by virtue of her failure, while capable, to protect against becoming insane and then committing criminal acts. If she is insane enough to be nonresponsible, she will be found not guilty by reason of insanity, rather than guilty of (say) manslaughter on a negligence-based theory.

Is this doctrinal distinction between involuntariness and insanity sound, or is the treatment of insanity simply a gap in the criminal law? I suggest it is sound. A person who drives knowing she has untreated epilepsy is much more negligent than a person who remains in the community with an untreated mental illness. The risk of injury if an untreated epileptic drives is large and plain, while predicting dangerous acts from mere mental illness is very hard to do. Experts claim they cannot make such predictions.¹⁶⁷ Do we want to charge lay people with the responsibility for making them, on pain of criminal liability?¹⁶⁸

¹⁶⁶ An epileptic who knowingly discontinues her anti-epileptic medication may be held responsible for her criminal act despite the ability to meet the criteria for the insanity or involuntariness defense at the time of the crime. *See, e.g.,* *People v. Grant*, 360 N.E.2d 809, 815-16 (Ill. App. Ct. 1977), *rev'd on other grounds*, 377 N.E.2d 4 (Ill. 1978). However, a mentally disturbed individual who knowingly discontinues anti-psychotic medication will be exculpated for a subsequent crime. *See, e.g.,* *State v. Johnson*, 753 P.2d 154, 155 (Az. 1988) (defendant, after voluntarily discontinuing anti-psychotic medication, beat neighbor to death while in state of psychosis; held not guilty by reason of insanity). *But see* Michael D. Slodov, Note, *Criminal Responsibility and the Noncompliant Psychiatric Offender: Risking Madness*, 40 CASE W. RES. L. REV. 271, 273 (1990) (arguing against exculpating such defendants).

¹⁶⁷ *See, e.g.,* JOHN MONAHAN, *PREDICTING VIOLENT BEHAVIOR* 28 (1981) (noting that psychiatrists are wrong in 60% of longterm predictions of violent behavior).

¹⁶⁸ It may be claimed that the MPD patient presents a special case. She can be completely sane in intact alters, and know that she is extremely dangerous while in another alter, while an ordinary insane person may have become too disorganized to appreciate her insanity, and the danger she

If the probability of injury is greater when an untreated epileptic drives than when a mentally ill person remains in the community, effective steps to prevent the injury are far more costly in the case of the mentally ill. We ask the epileptic merely to take her medicine or refrain from driving. We ask the mentally ill person—particularly the MPD patient, for whom there is no effective medication—to commit herself to a mental hospital. Asking an unmedicated epileptic not to drive is not too much to ask, while asking someone to suffer the “massive curtailment of liberty”¹⁶⁹ that commitment represents is too much to ask. One is criminally liable for driving while epileptic, but not for being in the community while mentally ill, because we simply cannot penalize people for failing to do what only the most saintly would do.

If all of this is right, there are some very limited exceptions to the rule that multiples are not responsible for their criminal acts. Except for these very rare cases, multiples are always criminally nonresponsible, and a rebuttable presumption of nonresponsibility is entirely appropriate.

The next question is what we should do with people once we learn that they are multiples, given that they are virtually *per se* nonresponsible. The clear answer is that we should institutionalize them, like other mentally ill people, if they are dangerous, and encourage them to seek treatment if they are not.

We can clearly commit multiples once they have engaged in criminal behavior: while they may seem quite intact in some or even many of their alters, they are mentally ill and may be dangerous.¹⁷⁰ The intact alters belong to a person as a whole who is

presents, by the time it is patent. If this is so, we might very well hold MPD patients to the voluntariness doctrine that applies to epilepsy, and not have a similar doctrine for ordinary insane patients.

This suggestion, however, is implausible. Ordinary mentally ill patients can sometimes know that they need to take steps to protect against danger. Especially people who have been insane in the past—and, say, discontinued their medications—may recognize possible danger and fail to take steps. Consider the schizophrenic who always commits acts of violence when off her medication, yet achieves complete remission when on her medication. She can be even more certain of violence at the point of stopping her medication—when she, too, is in a completely intact mental state—than can the multiple with a violent alter. Thus the rule that applies to ordinary insane people should also apply to multiples.

¹⁶⁹ *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (footnote omitted).

¹⁷⁰ Are they, however, dangerous *because* they are mentally ill? Arguably so: if all the alters were integrated into one personality, that one personality

seriously disturbed, and will no doubt come to recognize that fact; as *one* person, they are a very ill person. Moreover, institutionalization seems by far the best outcome if a multiple has committed a crime, for, as we have seen, multiples are eminently treatable.¹⁷¹ Thus, unlike many criminally insane people, multiples stand to benefit a great deal from their hospitalization. In a matter of a few years, they are likely to be well, and therefore released.

Commitment is inappropriate, by contrast, for those multiples from whom we simply have no reason to fear danger. Most, when they learn of their multiplicity and the possibility of help, will voluntarily seek intensive outpatient treatment. When they cannot afford such treatment, the state should step in to provide the funds. But since most multiples are not dangerous, a mere diagnosis of multiplicity should not warrant commitment to a mental hospital, even if such people will be found nonresponsible if they commit crimes.

When we *do* know a multiple is dangerous, even if she has not yet committed a crime, we may institutionalize her. Indeed, perhaps *relaxing* the dangerousness requirement makes sense in a multiple's case. If a psychiatrist has seen evidence of a truly dangerous or criminal alter—one who might attempt or commit a crime of serious violence—we should be able to institutionalize the multiple. This is so even if no evidence of that alter's existence can be elicited at the time of the independent psychiatric evaluation and the commitment hearing—indeed, even if the patient has been in an intact alter for some time.¹⁷² We know that

would have a good deal more control over what acts are done. Unintegrated, multiples lose the ability to bring most of their resources to bear against the possibly small part of them that is criminal.

¹⁷¹ It may be objected, however, that substantial evidence suggests that *involuntary* treatments are much less likely to be successful than voluntary; and this is especially true of treatments like psychotherapy that do not act directly on one's brain. On the other hand, while multiples' hospitalization may be involuntary (though probably preferred to prison), their treatment is not likely to be: most multiples want to be cured—the disorder is unpleasant, and the cure is not objectionable on its own account. If they want to be cured *and* they want to be released from the hospital, they will have every incentive to cooperate in the treatment.

¹⁷² If the harm is less serious, the usual rule requiring that the danger be patent should control. In other words, if the threatened harm is not very significant, recent evidence of the dangerous alter's existence would be necessary.

the danger still lurks. Thus, we would lower the dangerousness threshold in a multiple's case on the grounds that—unlike most other mentally ill people—she will not be criminally responsible if she commits a crime, and, more importantly, that a safe, effective treatment is available to cure her. I am not completely convinced that this position is warranted, but it is at least arguable.

The argument that we can civilly commit dangerous or criminal multiples may seem to finesse a number of important issues by adopting the view that multiples are one person. Thus I said that “multiples are mentally ill and may be dangerous.” But *John* is *not*. If we suppose that multiples' alters are different persons, or even just different personalities entitled to deference and respect, how can we justify institutionalizing John, who is a separate person neither mentally ill nor dangerous? If the answer is that we can reason with him that he needs to be hospitalized because Joe is dangerous, why can we not equally reason with him that he needs to be imprisoned on the same grounds? Does not institutionalizing John raise the same problems as imprisoning him?

One may make a number of points in response to this argument. First, *John* is arguably mentally ill. True, he is not psychotic—his thought processes are intact—but being psychotic is not a condition of being mentally ill. Arguably, sharing a body with another person as a result of psychological processes is sufficiently disabling as to constitute a mental illness.

But *John* himself is *not* dangerous, so he does not meet the commitment criteria. But while punishment requires desert, preventive detention may not require a fine-grained analysis of individual danger—or danger at all times. Consider that we institutionalize dangerous psychotics even though they may have lucid moments in which they are not only not dangerous, but also entirely sane; the need to protect against the danger justifies their continued incarceration, because we cannot monitor such patients closely enough to give them freedom only when sane. Similarly, to protect against Joe's dangerousness we must institutionalize *John*.

Indeed, suppose an entire family unit were deranged, but only one member dangerous. If the only way to incapacitate the dangerous member, and treat the entire unit, were to commit the family, we might well do that. In the same way, I suggested that we might institutionalize siamese twins in a non-retributive institution to protect ourselves from the dangerous twin. And the

non-dangerous twin does not even get the benefit of any treatment, while John—and the family—does.

And that is the final point. Imprisonment in a retributive institution does not benefit John in any way, and may even be ipso facto punishment. By contrast, hospitalization promises to provide him with a great deal of benefit: he will be cured. The relative benefits and harms of the two sorts of confinement are vastly different. Thus institutionalizing John may be justified on a *quid pro quo* theory (in return for his loss of liberty he is cured), while his imprisonment may not.¹⁷³ In all, committing Multiple seems permissible even if John is a separate person in his own right.

CONCLUSION

One of the tacit assumptions on which our criminal law rests is that a criminal is one person who has one body and one personality. As philosophers have demonstrated by hypothesizing transplants of brain traces and personalities, departure from that assumption can, initially at least, confound our intuitions about assignment of blame and therefore about criminal responsibility. MPD, which mimics the puzzle cases in important ways, challenges us to resolve our confusion in the context of an actual trial that may result in severe punishment.

I have argued that, on the basis of current knowledge, we should adopt a rebuttable presumption that multiples are not responsible for their crimes.¹⁷⁴ This stance is appropriate

¹⁷³ Indeed, I suspect that many multiples will willingly consent to treatment for their disorder, even in a hospital, when they discover that the treatment itself is relatively cost-free and provides a great deal of benefit. Thus commitment will not be necessary, and the problems raised above will not even arise.

¹⁷⁴ Whether they are also generally incompetent—cannot make contracts or wills, say—must be left for another time. For now, I will say only that whether they *should* be generally incompetent is far from clear. If one alter spends a lot of money on a house, and the other alter has strong objections to spending the money in this way (for example, is afraid to be alone at night in houses as opposed to apartments), should that alter have to live with the consequences of what the first did? On the other hand, many multiples seem very intact in some alters, and it seems rather severe to completely disable them. Indeed, declaring a multiple generally incompetent means that the alters will have to live with the consequences of the decisions of some wholly *other* person—the guardian—which hardly seems to improve their situation.

Even if we decided that we do not want to declare multiples generally

whether we conceive of a multiple's alters as separate people, separate personalities, or separate parts of one deeply divided personality. The disorder's many and striking symptoms—especially the amnesia that hides alters from one another—both set MPD apart from ordinary mood swings and militate strongly in favor of the case for nonresponsibility.

One of the lessons of a close examination of MPD is that responsibility requires at least a minimal degree of unity and continuity in a person's mental life. We cannot, of course, require the ability to integrate experiences completely, either in the present or over time. All of us suffer from mild ambivalences and conflicts, and most of us are responsible for our acts. But responsibility cannot coexist with a true cleavage in the mind—dissociation so complete that even the appearance of conflict is obliterated.

A second lesson is that to focus on the character, rather than the body that acts, is appropriate for purposes of our assessments of blame. My argument in favor of multiples' exoneration has rested in part on a Psychological Criterion of Personal Identity and the character-based theory of responsibility. And if the Psychological Criterion and the character-based theory produce results that, upon reflection, seem fair for multiples, they will probably produce results that are fair for other defendants as well. Once we have sharpened our analytic tools to understand MPD's implications for the criminal law, we may find ourselves better able to resolve other perplexing issues such as the limits of group liability and the implications of mixed mental states.

A third important lesson of this study is that we must tailor our judgments about responsibility with great care. Just as a failure to

incompetent, it is not clear that my insanity analysis would force us to. I am committed to the view that we should not alter the level of competency required as between different competency areas when one area involves more important decisions than another. See Elyn R. Saks, *Competency to Refuse Treatment*, 69 N.C. L. REV. 945, 992-98 (1991). But this is not to say that we should not alter the level of competency required when different *interests* are at stake in different contexts—for example, the security of transactions in the contracts area. Moreover, it may be too simplistic to say that insanity is simply incompetency to commit a crime. We may have different concepts for purposes of insanity doctrine and incompetency doctrine because the concepts of insanity and incompetency are different. For example, to be sane (but not competent) is perhaps to be blamable, which may require a relationship of one's act to one's character. I leave a more complete discussion of these issues to another time.

diagnose MPD will result in improper medical treatment, a failure to establish it legally will result in an inappropriate assessment of criminal responsibility. It may be that crowded dockets and misplaced fears of malingering will tempt some courts and lawyers to disregard evidence of MPD along with evidence of other disorders and defenses that make the administration of justice more complex and more expensive. Yet only by forcing ourselves to pay careful attention to the way multiples present themselves, as well as to the possibility of other valid defenses, can we achieve the fairness that our criminal law is designed to produce.

