

# *Analysis and Commentary*

## Assessing the Criminal Responsibility of Individuals with Multiple Personality Disorder: Legal Cases, Legal Theory

Stephen H. Behnke, JD, PhD

**This article discusses the criminal responsibility of individuals diagnosed with multiple personality disorder (MPD). First, it reviews how courts understand and assess criminal responsibility. Second, it gives an overview of how courts have applied the doctrine of criminal responsibility to individuals with MPD. Third, it explains what legal theorists say about this question. Finally, it uses a case example to illustrate how various theorists would assess the responsibility of a criminal defendant with MPD.**

Courts have struggled with how to assess the criminal responsibility of individuals suffering from multiple personality disorder (MPD).<sup>\*</sup> The crux of the problem is

that Anglo-American theories of responsibility developed largely before MPD and other forms of severe dissociation were understood. Traditional rules of criminal responsibility, which do not speak to the unique phenomenology of MPD, have left judges, juries, and even experts in a quandary about what to do with these strange and challenging cases.

In this article, I hope to provide: first, a review of how courts understand and assess criminal responsibility; second, an overview of how courts have applied the doctrine of criminal responsibility to individuals with MPD; third, an explanation of what legal theorists say about this question; and finally, a case illustrating how various theorists would assess the

---

Dr. Behnke is an instructor in psychiatry, Harvard Medical School, and Chief Psychologist, Day Hospital Unit, Massachusetts Mental Health Center, Boston, MA. Address correspondence to: Dr. Stephen H. Behnke, c/o MMHC, 74 Fenwood Road, Boston, MA 02115.

<sup>\*</sup> The most recent version of the Diagnostic and Statistical Manual, DSM-IV (rev 4, 1994), changes the name from "multiple personality disorder" (MPD) to "dissociative identity disorder" (DID). This article adheres to the former (multiple personality disorder), primarily because the language of the cases discussed (all of which were decided before DSM-IV was published) is consistent with the previous nomenclature: courts have talked about assessing the criminal responsibility of *personalities* rather than of *identities*. The use of the term multiple personality disorder is based, therefore, on reasons having to do with ease of reading and consistency rather than on a theory about the etiology or nature of this disorder.

responsibility of a criminal defendant with MPD.

### Criminal Responsibility

The foundation of Anglo-American criminal law is based upon the notion of moral blameworthiness. Only individuals who are culpable should be punished for their crimes. As the centuries have passed, the law has come to view criminal culpability as consisting of two elements: a bad act (*actus reus*) and a bad state of mind (*mens rea*). Put simply, a crime happens when a person does a bad thing for a bad reason. If either an *actus reus* or a *mens rea* is absent, no crime has been committed. From the law's point of view, the individual is not blameworthy and, therefore, no punishment will ensue.

The two conditions that vitiate criminal responsibility arise from a deficiency in either an *actus reus* or a *mens rea*. Defects in an *actus reus* lead to the defense of "involuntariness"; defects in *mens rea* lead to the defense of "insanity." If a criminal defendant is insane, or if the defendant's act is involuntary, he is excused from criminal responsibility.

In the United States, the insanity defense generally derives from the M'Naughten rule: the individual did not know the nature, quality, or wrongfulness of his act. The M'Naughten rule has been refined in certain respects. Today, many jurisdictions hold a defendant insane if he lacked "substantial capacity" to "appreciate" the wrongfulness of his act. Other jurisdictions add a volitional prong to the insanity defense, so that an individual who lacks substantial capacity to conform his behavior to the requirements of the

law is also considered insane. An individual who is floridly psychotic, and kills out of a paranoid belief that he is under life-threatening attack, would fall squarely within the purview of the insanity defense.

The defense of involuntariness speaks to the quality of the act with which the defendant has been charged. The defense is premised upon the idea that the act is not the product of the individual's agency. Unlike rules for the insanity defense, no formal standard exists for assessing what renders an act involuntary. Rather, courts and legislatures have listed acts that they simply deem involuntary. Examples of such acts include sleepwalking, acts committed under hypnosis and posthypnotic suggestion, reflexes, and seizures. Courts have referred to individuals acting under such conditions as "unconscious."

Defendants with MPD have relied on both the insanity defense and the involuntariness defense, and courts have been left in a quandary about how to respond. The problem for criminal courts is that neither involuntariness nor insanity speaks clearly to the central feature of MPD: dividedness. Courts and commentators have struggled with the relevance of this dividedness to criminal responsibility. Certain theorists have argued that the dividedness of MPD is highly relevant to the question of moral blameworthiness, the very foundation of criminal responsibility. Others have argued that the dividedness of MPD serves as a distraction from the essential elements of a crime: whether an individual formed, and acted upon, a criminal intent.

### The Law

Courts have used one of three analyses to assess the criminal responsibility of individuals with MPD. The first analysis looks to the mental state of the alter personality "in control" at the time of the crime. In *State v. Grimsley* (1982),<sup>1</sup> an example of the first analysis, Robin Grimsley was charged with driving under the influence of alcohol. Ms. Grimsley's defense, based upon her diagnosis of MPD, was that at the time of the crime Jennifer, her secondary personality, was in control of her behavior. In responding to this claim, the *Grimsley* court reasoned that "It is immaterial whether she was in one state of consciousness or another, so long as in the personality then controlling her behavior, she was conscious and her actions were a product of her own volition. The evidence failed to demonstrate that Jennifer was unconscious or otherwise acting involuntarily" (447 N.E. 2d at 1076).

The *Grimsley* court looked to the defendant's alter personality in control at the time of the crime—Jennifer—and assessed the quality of that personality's act. For this reason, the *Grimsley* court's method of analysis can be referred to as the "alter in control" approach.

The second analysis used by courts to assess the criminal responsibility of individuals with MPD is found in *State v. Rodrigues* (1984).<sup>2</sup> In *Rodrigues*, the court began its analysis by explaining that "The law governs criminal accountability where at the time of the wrongful act the person had the mental capacity to distinguish between right and wrong or to con-

form his conduct to the requirements of the law" (679 P.2d at 618). The *Rodrigues* court then reasoned that "Since each personality may or may not be criminally responsible for its acts, each one must be examined under the American Law Institute (ALI)-Model Penal Code (MPC) competency test" (*id.*). The court's conclusion, that each alter may or may not be criminally responsible for the wrongful act and so must be assessed independently of all other alters, can be referred to as the "each alter" approach. This approach is incomplete, insofar as the *Rodrigues* court never discussed what implications finding a single alter guilty—or innocent—held for criminal responsibility. Nevertheless, the court was clear that the criminal responsibility of each alter should be assessed separately.

The final method of assessing criminal responsibility for individuals with MPD is found in *U.S. v. Denny-Shaffer* (1993).<sup>3</sup> Bridget Denny-Shaffer was convicted of kidnapping an infant and transporting him across state lines. At trial, the judge disallowed the insanity defense for lack of evidence. The appeals court ruled that the trial court had erred by not submitting to the jury the question of whether the defendant was insane at the time of the crime. Most interesting was how the appeals court reached its conclusion.

The appeals court first held that the trial court's approach—the alter in control approach—was "unreasonable in restricting the focus of the court and jury narrowly to the alter or alters cognizant of the offense, and ignoring proof that the dominant or host personality was not

aware of the wrongful conduct" (2 F.3d at 1014). The appeals court then reasoned that, from the evidence presented, a trier of fact could find that "the host or dominant personality was unable to appreciate the nature and quality or wrongfulness of the conduct which the alter or alters controlled" (2 F.3d at 1016). The appeals court concluded that, for the purposes of the relevant insanity statute, the term "defendant" could be understood as meaning "the host or dominant personality and his or her appreciation of the nature, quality, and wrongfulness of criminal conduct" (*id.*). Because of its focus on the mental state of the host personality, the *Denny-Shaffer* court's method of assessing criminal responsibility can be referred to as the "host" approach.

Other approaches to assessing the criminal responsibility of individuals with MPD are variations on these three. In *State v. Wheaton* (1993),<sup>4</sup> for example, the court discussed the "specific" and "global" alter approaches to criminal responsibility. The "specific alter" approach asks "whether the alter that was in executive control at the time of the offense meets the M'Naghten standard" (850 P.2d at 510), and so is equivalent to the alter in control approach. The "global alter" approach, which results in a finding of insanity "whenever the host personality is not in executive control or co-conscious at the time of the offense (*id.*), is the same as the host approach. The alter in control, each alter, and host approaches fully capture how courts have assessed the criminal responsibility of individuals with MPD to date.

## Legal Theory

A number of theorists have urged courts to adopt one or another of these three positions. Two commentators who represent opposite ends of the spectrum on the question of criminal responsibility, Elyn R. Saks (with S. H. Behnke, 1997)<sup>5</sup> and Stephen H. Behnke (1997)<sup>6</sup> support positions that no court has yet completely embraced. Other commentators have urged positions that fall somewhere in between Saks and Behnke, and hew more closely to what courts have actually done.

Saks<sup>5</sup> has argued that individuals with MPD are generally not responsible for their crimes, for two reasons. First, she argues that alter personalities are enough like persons that the criminal law should treat them like persons. According to Saks, alter personalities have many of the elements of personhood; her position is supported by writings in philosophy, which establish criteria for determining whether an entity is a person, and by psychological research, which demonstrates important psychological and physiological differences between alter personalities. Saks reasons that, to the extent that this way of viewing alters is correct, a single innocent alter is sufficient to vitiating criminal responsibility. Saks bases her reasoning on a fundamental tenet of Anglo-American law: 10 guilty individuals should go free before a single innocent individual is punished. The innocence of a single alter outweighs the guilt of many others.

Saks<sup>5</sup> makes a second argument on behalf of the general nonresponsibility of individuals with MPD. In a careful exam-

## Criminal Responsibility of Persons with MPD

ination of acts that are considered nonvoluntary by the criminal law, she convincingly shows that such acts share an important feature: all result from a deeply divided consciousness. Saks points out that dividedness is the defining characteristic of MPD. She concludes that this dividedness must serve to vitiate criminal responsibility for individuals with MPD, no less than dividedness of mind vitiates criminal responsibility for individuals who sleepwalk or who act under hypnotic or posthypnotic suggestion. While Saks will find some individuals with MPD responsible for their crimes, in the majority of cases either the ontological status of alter personalities or dividedness of mind will serve to excuse the individual with MPD from criminal responsibility.

Saks<sup>5</sup> critiques current case law on two grounds. The host approach is flawed by giving a privileged status to the host personality. Saks points out that the alter playing the role of the host personality may change over time, and that alters other than the host may play equally prominent roles in the individual's psychic life. For Saks, the innocence of *any* alter personality—not just that of the host—is relevant to the question of criminal responsibility. By ignoring the fact that alters other than the host may be innocent of wrongdoing, *Denny-Shaffer* fails to go far enough.

Saks<sup>5</sup> critiques the alter in control approach on more theoretical grounds. The problem with this approach from her point of view is that the alter in control at the time of the crime is treated like a person, while other alters are not. The difference in how alters are treated pre-

sents a profound inconsistency: if the alter in control is a person, who may be guilty or innocent of wrongdoing, then other alters are persons as well, who may likewise be guilty or innocent of wrongdoing. If alters other than the alter in control are innocent of wrongdoing, they should not be punished. Saks argues that the law cannot hold both positions; either *all* alter personalities should be accorded the status of persons, or *no* alter personalities should be accorded this status. Based on her concept of alter personalities, Saks would choose the former, and have the criminal law treat all alter personalities like persons.

Saks<sup>5</sup> argues that her rule for the general nonresponsibility of individuals with MPD does nothing other than bring the law to its logical conclusion. She points out that while both the alter in control and host approaches accord the status of personhood to a specific alter, each approach is inconsistent, and therefore flawed, in not applying this status uniformly to all alters in a given individual. She also argues that moral culpability—the basis in Anglo-American jurisprudence for holding an individual responsible for a crime—cannot be imputed to an individual who, because of a deeply divided mind, is unable to form a true *mens rea*. Saks concludes that assessments of criminal responsibility that follow her rule will be consistent both with themselves and with the values that underlie the American system of criminal law.

Stephen H. Behnke<sup>6</sup> takes a position diametrically opposed to Saks. Behnke argues that the presence of MPD will rarely be dispositive on the question of

criminal responsibility. Behnke bases his position on what he sees as two fundamental principles behind any assessment of criminal responsibility involving an individual with MPD: alter personalities are not persons, and only a person can form and act upon a criminal intent.

Behnke offers a single, albeit far-reaching, critique of current case law. In his view, the alter in control, each alter, and host approaches, while seemingly distinct ways of assessing responsibility, all share a fundamental flaw: each approach treats an alter personality as if it were a person. According to Behnke, confusing personality with person leads to precisely the quandary in which courts now find themselves. That is to say, by elevating alter personalities to the status of persons, courts are left with an unanswerable question: *whose* mental state must be assessed? Whether a court chooses the alter in control or the host personality is based more upon chance than upon theory; if alter personalities are considered people, the alter in control or host approaches are equally plausible ways of assessing criminal responsibility.

Behnke<sup>6</sup> proposes that courts keep foremost in mind the distinction between person and personality. Given that only people can act, that only people are conscious or unconscious, and that only people can be criminally responsible, a court should never be in the position of assessing the mental state of an alter or the quality of an alter personality's act. Rather, courts should assess the mental state of a person, or the quality of a person's act, at the time of the crime. Alter personalities are then seen as what, in

Behnke's view, they actually are—mental states. That the individual may experience other mental states, during which he may be amnesic for a criminal act, does not serve as an automatic excuse from criminal responsibility.

Behnke responds to Saks based upon his view of alter personalities. To Saks' contention that alter personalities are persons, or are like persons in ways relevant to the criminal law, Behnke replies that alter personalities are aspects of persons that have been split off, or were perhaps never integrated with, the core of the individual's psyche. Treating alter personalities like persons merely emphasizes this split, thereby exacerbating the very pathology at issue. To Saks' contention that the dividedness of MPD precludes true *mens rea*, Behnke replies that an individual with MPD is perfectly capable of forming and acting upon a criminal intent. If a criminal intent has been formed and acted upon, a crime has been committed. Because only a person can commit a crime, courts are mistaken in their attempt to determine whether to assign responsibility for the crime to the alter in control, to the host personality, or to all of the alter personalities. The crime belongs to the individual with MPD. Because the crime belongs to the individual with MPD, that person should be found criminally responsible.

Other commentators have taken positions that represent some compromise of the positions taken by Saks and Behnke. Sabra Owens (1997),<sup>7</sup> for example, recommends that courts adopt the host approach. Owens argues that this approach most effectively addresses the needs of all

## Criminal Responsibility of Persons with MPD

the parties concerned: of defendants, because the uniqueness of MPD is acknowledged and given a place in our criminal jurisprudence; of society, because individuals with MPD receive treatment and return as safe, healthy, members of the community; and of the legal system, because courts have a consistent, predictable way of assessing these cases. From Saks' point of view, Owens fails fully to appreciate the personhood of alter personalities; from Behnke's point of view, Owens fails to appreciate that the host personality is a personality, and not a person.

### Case Example

The following case example, taken from *U.S. v. Denny-Shaffer*, illustrates how Saks, Behnke, and Owens would assess the criminal responsibility of an individual with MPD.

Ms. Denny-Shaffer, posing as a medical student from the University of New Mexico, entered a local hospital nursery and kidnapped an infant, Kevin Chavez. She then embarked upon a journey that took her across the southwest United States to Texas, then north to Minnesota, and finally back to New Mexico. Along the way, Ms. Denny-Shaffer presented Kevin as her own child both to a former boyfriend, with whom she wished to reunite, and to her family. Ms. Denny-Shaffer told the former boyfriend that he was Kevin's father. Ms. Denny-Shaffer was apprehended following a phone call to a former work supervisor in which she stated that during her time away from New Mexico she had given birth, and was returning home with her new baby. The

supervisor, aware of the Chavez kidnapping, alerted the state police who were able to locate Ms. Denny-Shaffer and the infant, despite Ms. Denny-Shaffer's attempts to hide Kevin.

The psychiatric testimony indicated that Ms. Denny-Shaffer suffered from MPD. Psychiatrists judged that malingering was not a plausible explanation for her actions, in large part because her psychiatric history was highly consistent with a diagnosis of MPD. The testimony from psychiatrists indicated that Ms. Denny-Shaffer had a number of personalities, which included Bridget, Rina, Mother Superior, Paul, Bird, a part which was female and little but which had no name, and Gidget, the host personality. Based upon expert testimony, it appeared that the alter personalities Rina and Bridget controlled Ms. Denny-Shaffer's conduct at the time of the kidnapping and travels, and that other personalities, such as Bird and Paul, were neither aware of nor participated in any of the wrongful acts. The testimony from the experts was inconclusive about what role Gidget, Ms. Denny-Shaffer's host personality, played in the kidnapping.

Saks,<sup>5</sup> Behnke,<sup>6</sup> and Owens<sup>7</sup> would focus on different aspects of the case to assess the criminal responsibility of Ms. Denny-Shaffer. Important for Saks would be those alter personalities that were not aware of, and did not participate in, the kidnapping. In Saks' way of thinking, these innocent alter personalities would serve to excuse Ms. Denny-Shaffer from criminal responsibility. According to this reasoning, it would be unjust to hold re-

sponsible alters who had nothing to do with the kidnapping.

Saks would make a second argument on behalf of Ms. Denny-Shaffer's nonresponsibility. Saks would point out that significant aspects of Ms. Denny-Shaffer's psyche—the innocent alters—neither participated in nor planned the crime. Because these aspects of her psyche were not brought to bear on the decision-making process, it cannot be said that Ms. Denny-Shaffer formed a *mens rea*. What happened, rather, was that parts of her psyche formed a criminal intent, while other parts of her mind were kept from making their influence felt as the criminal intent was acted upon. Ms. Denny-Shaffer should therefore be excused from criminal responsibility.

Behnke would focus on Ms. Denny-Shaffer's mental state at the time of the crime. Ms. Denny-Shaffer refers to this mental state by proper names: Rina and Bridget. Behnke would assess whether, when in the mental state of "Rina" or "Bridget," Ms. Denny-Shaffer met the relevant test for insanity or whether her acts could be characterized as involuntary. According to this way of thinking, a psychotic delusion during the course of the kidnapping—perhaps that the child was in imminent danger of life-threatening harm—would serve as the basis for an insanity defense. Likewise, a claim that at the time of the act Ms. Denny-Shaffer was under hypnotic or posthypnotic suggestion, or that she was sleepwalking, would buttress a claim that her act was involuntary. Behnke would point out, however, that the extent of Ms. Denny-Shaffer's planning, her attempts to elude

the police, and the length and duration of her travels, are inconsistent with claims that she was insane, or that her acts were involuntary, at the time of the crime.

Behnke would respond to Saks by arguing that the presence of an "innocent" alter is not relevant to whether Ms. Denny-Shaffer is responsible for this crime. Relevant is Ms. Denny-Shaffer's mental state at the time of the kidnapping, notwithstanding that Ms. Denny-Shaffer refers to this mental state by proper names. Behnke would also object to Saks' position that Ms. Denny-Shaffer did not form a true *mens rea*, insofar as her "innocent" alters did not plan for or participate in the crime. Behnke would argue that once a *mens rea* had been formed, and an *actus reus* followed, a crime was committed. Once a crime had been committed, a person (the defendant, Ms. Denny-Shaffer) was properly held responsible for that crime. That Ms. Denny-Shaffer experienced mental states other than that which she was experiencing at the time of the kidnapping is irrelevant to the question of criminal responsibility.

Owens would look to the mental state of the host personality at the time of the crime to assess whether Ms. Denny-Shaffer was responsible for kidnapping Kevin Chavez. Owens would ask whether the host personality, "Gidget," had any knowledge of the crime and, if so, to what extent Gidget participated in the kidnapping. If Gidget were not aware of the crime, and so had not formed a *mens rea*, or if Gidget's acts were involuntary, Ms. Denny-Shaffer would be found not criminally responsible. In Owens' view, this

## **Criminal Responsibility of Persons with MPD**

way of approaching the problem recognizes that Ms. Denny-Shaffer suffers from a true mental disorder, raises the possibility that Ms. Denny-Shaffer will be treated and return to the community, and offers the court a consistent way to assess the criminal responsibility of Ms. Denny-Shaffer and other defendants with MPD.

### **Conclusion**

The lack of consensus over how to handle cases involving criminal defendants with MPD has left judges, juries, and experts in a quandary. The central disagreement concerns which aspect of the defendant's psyche is to be assessed; the answer to this question is what distinguishes the differing positions of legal theorists and the differing conclusions in legal cases. The challenge is the complexity of the issue, which implicates law, psychiatry, ethics, and philosophy. The

complexity is also what explains our continuing fascination with the problem of MPD and criminal responsibility.

### **Acknowledgments**

The author would like to thank Thomas Gutheil and Elyn Saks for their helpful comments and suggestions on earlier drafts of this article.

### **References**

1. *State v. Grimsley*, 444 N.E.2d 1071 (Ohio Ct. App. 1982)
2. *State v. Rodrigues*, 679 P.2d 615, (Haw. 1984), cert. denied, 469 U.S. 1078 (1984)
3. *United States v. Denny-Shaffer*, 2 F.3d 999 (10th Cir. 1993)
4. *State v. Wheaton*, 850 P.2d 507 (Wash. 1993)
5. Saks ER, Behnke SH: *Jekyll on Trial: Multiple Personality Disorder and Criminal Law*. New York: New York University Press, 1997
6. Behnke SH: Confusion in the courtroom: how judges have assessed the criminal responsibility of individuals with MPD. *Int J Law Psychiatry* 20:1-18, 1997
7. Owens SM: Criminal responsibility and multiple personality defendants. *Ment Phys Disabil Law Rep* 21:133-43, 1997