

Criminal Responsibility: What is it? Why Should I Care?— Part One Philip J. Kinsler, Ph.D.

Are dissociative patients responsible for their behaviors? Should the ‘whole person’ have to go to jail, or lose child custody, for the actions of a ‘part?’ Should courts presume that dissociative patients are not responsible for criminal or other bad actions because they have a ‘mental illness?’ In a person with multiple ‘sources of action’ vying for control, how do we conceive of responsibility? Is it even right to conceive of persons with DID as actually having multiple somewhat independent sources of action? These questions go to the core of our concept of personal identity, and of responsibility for behavior. The issue is further complicated by the fact that legal viewpoints and clinical theories do not easily converge.

In the Anglo-American legal tradition, a person is punished not just for what they do, but for their intentions at the time. If a person is driving responsibly in a snowstorm, hits a patch of ice, slides into another car, and someone is killed, we do not charge them with murder. They had no criminal intention and they were driving in a reasonable and not reckless way. It is an accident. If a four-year-old child plays with a lighter and the curtains catch fire, we do not charge them with arson. They are too immature for us to expect that they will know the likely consequences of their actions.

Generally in the Anglo-American tradition, we punish four different kinds of actions... purposeful actions; knowing actions; reckless actions; and negligent actions. A purposeful action is something one does with a conscious desire to do so. A knowing action is one where the person is aware that their action will have a likely result. If a person shoots at passing cars they know their action is likely to get someone hurt, even if they are not intending to shoot a particular driver of a certain car. A reckless action is one where a person consciously ignores a substantial risk—they pass at 85 on a two lane highway. A negligent action is one where a person doesn’t take reasonable care in a situation— such as cutting off serving alcohol and taking the car keys of someone stumbling drunk in your bar or restaurant.¹²

Dissociative patients have contact with criminal, civil, and family courts. The author has personally worked on three murder cases, and other major criminal cases such as aggravated assaults and/or robberies, in which dissociative patients were defendants. The author has also seen a number of less serious, repetitive misdemeanor cases involving dissociative patients—disorderly conduct, disturbing the peace, repetitive simple assaults

¹ Model Penal Code Selected Provisions downloaded from: www1.law.umkc.edu/suni/CrimLaw/MPC_Provisions/model_penal_code_default_rules.htm

² The author is aware that justice systems based on a magistrate or inquisitorial system may define these issues differently and would welcome a contribution from international members of the society who live within such a system, to describe how their system functions.

and so on. Our patients also appear in family courts while going through divorces and arguing for child custody. They have a tendency to be re-victimized and/or to sometimes have contentious therapy outcomes. These may lead to malpractice suits and/or licensing board actions.

Some authors have proposed that dissociative patients *should have a presumption that they are not guilty by reason of insanity* because, by definition, there is a barrier up between different parts of the mind, and one should not punish innocent parts for the actions of an alter they did not control.³

On the other hand, clinically, we try to tell our clients that their **system as a whole** is responsible for behavior. While this may aid our clinical work in helping internal cooperation and communication; and in encouraging cohesion, is it fair legally? Let's look at an example.

Ms. X was severely abused by her father as a child for many years. After raising her own children, she fulfilled a life-long dream to get training in one of the health care professions. We'll change details to protect confidentiality while preserving the core of the events. Let's say she became a nurse/anesthetist. Some female patients found expensive jewelry missing after this nurse came in to do consultations around anesthesia... generally people receiving much pain medication and in and out of consciousness. The thefts were eventually traced back to our nurse/anesthetist. She claimed no memory of the events. The author was asked to evaluate her. As the author was conducting the evaluation, she would appear in age-appropriate clothing one day, in different, child-like clothing another time, and in extremely sexually provocative and unprofessional clothing another time. She presented the author with stolen rings that 'she did not know how' came to be in a saucer by her bed. She claimed no memory of taking them. While she'd had much therapy, and carried a PTSD diagnosis, there had never been a diagnosis of dissociative disorder. Her attorney wanted to know if she was legally insane.

Here's how the case went: Interviews with her family showed that there were long conversations between Ms. X and family members that Ms. X claimed never happened. Ms. X was seen by her then significant other dressing in the provocative clothing and leaving their bedroom in the middle of the night, and coming back hours later. A DES was ≈ 34. She noted that people in restaurants and bars would come up to her calling her Amy, which was not her name. A conversation with an elder daughter indicated that sometimes talking to her mother 'was like talking to different people.'

The author carefully tape-recorded an examination session in which he asked with no hypnotic induction whether there was any other part of the mind who might talk to him. A very angry voice answered about what a 'piece of crap' this woman was and how 'she'

³ Saks & Behnke, Jekyll on trial

deserved to be punished. The voice said that she had ‘gotten her into trouble’ because she ‘didn’t deserve’ her job as a nurse/anesthetist because their father had known ‘what a piece of crap’ she was. This alter described going to bars, picking up men, sometimes waking up in their beds not remembering how she got there, and said she was called Amy. Amy laughed out loud about the predicament that the core or host personality was in.

So, in this matter we have a person who did the actions—she did the crime. But was she morally culpable? It was a done on purpose *by a part of her mind, who knew what ‘she’ was doing*. The other parts of her mind were amnesic. Guilty or insane?

If we take the usual clinical position, the ‘system’ is responsible for the actions of the whole. However, in this case the ‘system’ had neither awareness nor conscious control over the actions of an alter personality.

Unlike on TV, more than 97% of criminal cases in the United States are resolved via plea bargain. In this case, an eventually convinced prosecutor allowed the client to plead to a misdemeanor theft charge with no jail time, and required mental health treatment as part of her probation. The judge said ‘I’m not going to hold *you* responsible for what *Amy* did.’⁴

Let’s look at another case. This young woman also had a ‘horrible life disorder’ that included multiple foster homes; an adoption that failed by a Caucasian family—the patient was African-American—and the experience of growing up virtually the only African-American person in a rural community. When examined, it was clear she had different ego states... a needy child, a raging and assaultive adolescent, a mature good student. However, she also had a life-long history of assaultive behaviors going back to the time she was in the primary grades. She was arrested for an assault on another 20-something woman who she accused of trying to ‘steal her boyfriend.’ She aggressively assaulted this person. The analysis in this case turned out to be quite different. Assaultive behavior seemed to be a far larger and more pervasive part of the ‘whole person’ here. It ‘lived’ coherently in a far larger part of the person than in the prior example. In this case the person was judged criminally responsible and her dissociative disorder was seen as ‘less mitigating’ than the prior case.

This brings us to perhaps a *continuum of responsibility* for dissociative patients. We are all aware of patients with intense identity fragmentation, rapid switching, no consistent ‘host,’ persons in relatively constant turmoil with varying states vying for conscious control on a moment-to-moment basis. We might deem these people ‘incoherent.’ Their behavior does not arise from a coherent internal process but from a chaotic one. There is ‘no one

⁴ This might seem like a justified and terrific outcome—except the patient apparently did not get required treatment and was later re-arrested as part of a different on-going investigation.

in charge.’ The author argues that it is these ‘incoherent’ persons who should be found, depending on the factors in the individual case of course, not guilty due to a mental illness. Their behavior ‘passes’ the classic tests for incapacitating mental illness... it interferes with their understanding the nature and quality of what they are doing and/or with controlling their behaviors.

On the other hand, we are aware of dissociative patients who have co-consciousness, who have developed an over-arching sense of self-hood and an observing ego, who have internal checks and balances, and who are well along on the developmental tasks of integrating a self, an identity. These people may choose or allow some of their ‘less-nice’ feelings and ways of being to be prominent in whom they are. They might make a ‘coherent’ choice to be ‘a bad-ass.’

The author believes that the level of criminal responsibility, from insanity, to diminished capacity, to full personal responsibility, should vary with the degree of integration of the accused and the increasing wholeness of their personality. The greater the degree of personal coherence and unity, the greater the responsibility.

The author welcomes thoughts on these complex issues from other society members and would be happy to publish some of these in a future Forensic Forum. In part two of this column, we will examine some of the critiques of the ‘alters as independent sources of action’ stance taken by DSM-IV-TR; the idea that we should consider alters as ‘just metaphors’⁵

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⁵ See particularly Merckelbach, H., Devilly, G., & Rassin, E., Alters in dissociative identity disorder: Metaphors of genuine entities, *Clinical Psychology Review* 22 (2002) 481-487