

ASSIGNING CRIMINAL RESPONSIBILITY TO DEFENDANTS WITH DISSOCIATIVE IDENTITY DISORDER

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I. INTRODUCTIONS

The concept of “one body, one person” is instrumental in most legal conclusions: determining contractual duties, tort liability, and criminal responsibility.¹ The court must abandon this philosophy, however, when assigning criminal responsibility to defendants with Dissociative Identity Disorder (DID) because it changes the fundamental concept of “one body, one person” to one body, many persons.²

Those with DID have the same capability of committing crimes as the general public.³ However, individuals with DID have disruptions in their effect, behavior, consciousness, memory, perception, cognition, and sensory-motor functioning.⁴ The court system must consider these disruptions when deciding whether defendants with DID are competent to stand trial, fair to punish, or responsible for crimes.⁵

Insanity is an affirmative defense only if the defendant can prove that “at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental illness or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.”⁶

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¹ Nancy K. Rhoden, *The Limits of Legal Objectivity*, 68 N.C. L. REV. 845, 854 (1990).

² Kevin Dawkins, *Dissociative Identity Disorder: “Persons”, “Personalities” and Criminal Responsibility*, 1998 N.Z. L. REV. 557, 557-58 (1998).

³ See generally Ty Culinier, *Dissociative Identity Disorder in Felonious Offenders: Two Case Studies*, 26 J. OFFENDER REHAB. 187 (1997).

⁴ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 292 (5th ed. 2013) [hereinafter DSM-5 MANUAL].

⁵ Mary Eileen Crego, *One Crime, Many Convicted: Dissociative Identity Disorder And The Exclusion of Expert Testimony In State v. Greene*, 75 WASH. L. REV. 911, 911-12 (2000).

⁶ Geoffrey Andreu, *Responsibly Irresponsible?: An Analysis of the Medically Noncompliant Offender’s Federal Insanity Defense*, 2017 CARDOZO L. REV. DE-NOVO 33, 42 (2017).

Ascertaining the defendant's state of mind at the time of the criminal acts can be especially difficult for defendants with DID.⁷

As it stands, media influences can mislead the general public on dissociation.⁸ Most clinicians "have received little or no training about dissociation and dissociative symptoms."⁹ This overall lack of understanding places defendants with DID at risk for injustices.

Currently, the legal system disagrees on how to determine criminal culpability for defendants with DID.¹⁰ However, there are three main approaches that courts use to determine a DID defendant's state of mind at the time of the crime: the alter approach, the host approach, and the unified approach.¹¹ None of these current approaches account for the complexities of DID. Instead, a hybrid of these concepts should be used for what this article will refer to as the "team" approach.

A. *Orndorff v. Commonwealth*

On March 20, 2000, Janice Orndorff called 911 and informed the operator that her husband pursued her with a baseball bat and a knife, and that she shot him in self-defense.¹² She established that she was still hiding in the house because her husband was still alive, he had gained possession

⁷ Richard J. Loewenstein, *Firebug! Dissociative Identity Disorder? Malingering? Or...? An Intensive Case Study of an Arsonist*, 13 PSYCH. INJ. & L. 187, 202 (2020), <https://link.springer.com/article/10.1007/s12207-020-09377-8> [<https://perma.cc/2D4A-YG2G>].

⁸ Paul F. Dell, *A New Model of Dissociative Identity Disorder*, 29 PSYCHIATRIC CLINICS N. AM. 1, 19 (2006) https://www.researchgate.net/publication/7247074_A_New_Model_of_Dissociative_Identity_Disorder/link/5a33ee830f7e9b10d8428c2d/download [<https://perma.cc/G4TN-PDX8>] [hereinafter Dell, *A New Model*].

⁹ Paul F. Dell, *An Interpretive Manual for the Multidimensional Inventory of Dissociation (MID) 9* (April 2020) (unpublished manuscript) (on file with author), <https://www.mid-assessment.com/wp-content/uploads/2020/05/An-Interpretive-Manual-for-the-Multidimensional-Inventory-of-Dissociation-MID-3rd-Edition.pdf> [<https://perma.cc/7KLC-XMKL>] [hereinafter Dell, *An Interpretive Manual*].

¹⁰ Marina Nakic & Paul Thomas, *Dissociative Identity Disorder in the Courtroom*, 40 J. AM. ACAD. PSYCHIATRY & L. 146, 147 (2012), <http://jaapl.org/content/40/1/146> [<https://perma.cc/8KHG-DYYG>]. ("There is currently no consensus within the legal system as to the extent to which individuals with DID can or should be held responsible for their actions.").

¹¹ Crego, *supra* note 5, at 921.

¹² *Orndorff v. Commonwealth*, 605 S.E.2d 307, 311 (Va. Ct. App. 2004).

of the gun, and he was trying to kill her.¹³ Over the next few minutes she oscillated between hysterics, crying out repeatedly, “[h]e is going to kill me,” while calmly explaining the shooting.¹⁴

One moment, Ms. Orndorff did not know who was on the phone, and then she would call the operator by name.¹⁵ She called out for her mother several times and appeared occasionally to be speaking directly to her mother.¹⁶ She told the operator her husband was on the kitchen floor and then did not know where he was.¹⁷ Then she forgot where she was.¹⁸

When the police officers arrived at the Orndorff residence, Ms. Orndorff appeared in the front doorway, disappeared back into the house, and then bolted out of the residence, screaming that her husband was going to kill her.¹⁹ That evening, Ms. Orndorff went from calmly answering officers’ questions, to hysterically crying and yelling, to accusing the police of killing her husband.²⁰

Ms. Orndorff’s unusual behavior persisted until, at the beginning of the penalty phase of her trial, she was finally evaluated by Dr. Fiester, an expert on personality disorders. Dr. Fiester determined she was incompetent to stand trial and ordered her committed to Central State Hospital.²¹ Dr. Fiester brought attention to the possibility of a dissociative identity disorder that “must be seriously considered and psychologically and psychiatrically ruled out.”²²

1. What is Dissociative Identity Disorder?

Dissociation is “a disruption in the usually integrated function of consciousness, memory, identity, or perception of the environment.”²³ DID has been officially accepted as a valid diagnostic category, as the American Psychiatric Association has included the disorder in the Diagnostic and

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 311-12.

²⁰ *Id.* at 312.

²¹ *Id.* at 313-14.

²² *Id.*

²³ Glenn Saxe, *Dissociation and Criminal Responsibility: A Developmental Perspective*, 10 S. CAL. INTERDISC. L.J. 243, 243 (2001).

Statistical Manual (DSM) since 1980.²⁴ According to the *Diagnostic & Statistical Manual of Mental Disorders V*, Dissociative Identity Disorder requires:

A. Disruption of identity characterized by two or more distinct personality states, which may be described in some cultures as an experience of possession. The disruption in identity involves marked discontinuity in sense of self and sense of agency, accompanied by related alterations in affect, behavior, consciousness, memory, perception, cognition, and/or sensory-motor functioning. These signs and symptoms may be observed by others or reported by the individual.

B. Recurrent gaps in the recall of everyday events, important personal information, and/or traumatic events that are inconsistent with ordinary forgetting.

C. The symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.

D. The disturbance is not a normal part of a broadly accepted cultural or religious practice.

E. The symptoms are not attributable to the physiological effects of a substance (e.g., blackouts or chaotic behavior during alcohol intoxication) or another medical condition (e.g., complex partial seizures).²⁵

However, the DSM presents an incomplete picture of DID.²⁶ Empirical literature documents 23 symptoms of dissociation which can be broken into three categories:²⁷

Criterion A: General symptoms of pathological dissociation

- General memory problems

²⁴ Colin A. Ross, *Errors of Logic and Scholarship Concerning Dissociative Identity Disorder*, 18 J. CHILD SEXUAL ABUSE 221, 226 (2009).

²⁵ DSM-5 MANUAL, *supra* note 4.

²⁶ Dell, *A New Model*, *supra* note 8, at 18. The description in the DSM “is deficient because it omits most of the dissociative phenomena of DID and focuses solely on alter personalities.” *Id.* at 1.

²⁷ *Id.* at 10-16.

- Depersonalization²⁸
- Derealization²⁹
- Posttraumatic flashbacks
- Somatoform symptoms³⁰
- Trance³¹

Criterion B: Consciously experienced intrusions of another self-state

- Child voices³²
- Two or more parts that converse, argue, or struggle
- Persecutory voices that comment harshly, make threats, or command self-destructive acts
- Speech insertion (unintentional or disowned utterances)
- Thought insertion or withdrawal
- Made or intrusive feelings and emotions³³
- Made or intrusive impulses
- Made or intrusive actions³⁴
- Temporary loss of well-rehearsed knowledge or skills³⁵
- Disconcerting experiences of self-alteration³⁶

²⁸ Joseph Nordqvist, *What are dissociation and depersonalization?*, MED. NEWS TODAY (May 17, 2019), <https://www.medicalnewstoday.com/articles/262888> [<https://perma.cc/9CZE-2TRS>] (“Depersonalization is specifically a sense of detachment from oneself and one’s identity.”).

²⁹ *Id.* (“Derealization is when things or people around seem unreal.”).

³⁰ Megan Hull, *Somatoform Disorders*, THE RECOVERY VILLAGE (last updated on Aug. 31, 2021), <https://www.therecoveryvillage.com/mental-health/somatoform-disorders/> [<https://perma.cc/CXT8-STHT>] (Somatoform symptoms “are characterized by physical sensations and bodily pain caused by mental illness.”).

³¹ Dell, *supra* note 8, at 4 (Trance states are “periods of nonresponsiveness during which the person manifests a blank stare.”).

³² *Dissociative Identity Disorder*, TraumaDissociation.com, <http://traumadissociation.com/dissociativeidentitydisorder> [<https://perma.cc/WM64-BTB3>] (last visited Sept. 16, 2021) (“Hearing a child’s voice - when no child is visible.”).

³³ *Id.* (Made or intrusive feelings and emotions are “unexpected surges of feelings that are puzzling.”).

³⁴ *Id.* (Made or intrusive impulses and actions do not feel like the impulses and actions of the individual, and the individual may be or may not be fully aware of it at the time.).

³⁵ *Id.* (For example, “forgetting where you live or how to drive or do your job.”).

³⁶ *Id.* (Self-alteration is “suddenly, inexplicably feeling that your body, thoughts, or urges belong to someone else or are not yours.”).

- Profound and chronic self-puzzlement³⁷

Criterion C: Amnesia/fully dissociated intrusions into executive functioning and self

- Time loss
- Coming to
- Fugues³⁸
- Being told of disremembered actions
- Finding objects among their possessions
- Finding evidence of one's recent actions³⁹

From these symptoms, two types of dissociative phenomena emerge: “switching from one personality to another with concomitant amnesia” and “intrusions into executive functioning and sense of self by alter personalities.”⁴⁰ These dissociative intrusions “can affect one’s conscious awareness and one’s experience of one’s body, world, self, mind, agency, intentionality, thinking, believing, knowing, recognizing, remembering, feeling, wanting, speaking, acting, seeing, hearing, smelling, tasting, and touching.”⁴¹

DID is overwhelmingly caused by childhood trauma.⁴² In fact, “DID patients have the highest rates of childhood trauma, particularly combined sexual, physical, and emotional abuse, of any clinical population studied.”⁴³ Dissociation is a coping strategy in dealing with severe childhood trauma including “loss, abuse, neglect, family violence, natural disasters, disease, poverty, and warfare.”⁴⁴

³⁷ *Id.* (The individual does not understand why they feel and behave as they do.).

³⁸ *Id.* (Dissociative fugues involve the loss of awareness of one’s identity and travel to an unusual place without any memory of the journey or its purpose.).

³⁹ Dell, *An Interpretive Manual*, *supra* note 9, at 12.

⁴⁰ Dell, *A New Model*, *supra* note 8, at 7.

⁴¹ *Id.* at 8.

⁴² Ross, *supra* note 24, at 222.

⁴³ Loewenstein, *supra* note 7, at 189.

⁴⁴ Ross, *supra* note 24, at 222.

Many studies show that most people experiencing dissociation were sexually or physically abused.⁴⁵ Specifically, these abusive experiences include incest, rape, sexual molestation, sodomy, cutting off sexual organs, inserting objects into sexual organs, cutting, bruising, beating, hanging, being locked in closets and cellars, and neglect.⁴⁶

“Children can be broken much easier than adults, particularly by torture, seduction, hatred and rape, or even by indifference and the deprivation of love and care.”⁴⁷ Children left alone to deal with extreme trauma require massive, and even mind-distorting, defensive operations to continue to think and feel.⁴⁸ The separation within the mind occurs to “insure survival.”⁴⁹

The identities formed are often called “alters.”⁵⁰ It is commonly recognized that a “host” personality lives among the identities that carry the individual’s given name and appears to the world as the “person.”⁵¹ The entire person, including all identities, can be referred to as a “multiple.”⁵²

DID shows a broad range of functional capacity, as a person with DID could have from two to two hundred identities and varying levels of control of the identities.⁵³ The specific characteristics of each identity and the interaction between them is unique to each individual with DID.⁵⁴

Identities are not always aware of the existence of other identities and may not always retain the memories of another identity acting in control of the body.⁵⁵ However, DID is the “most severe diagnosable disorder on the continuum that can in most cases be totally remediated.”⁵⁶ Thus, it is important to understand how defendants with DID function to obtain proper rehabilitation through the criminal justice system.

⁴⁵ See *id.* at 224. (A Canadian study with 102 participants found 90.2% of patients reported sexual abuse and 74.9% reported physical abuse; four other studies with 741 DID patients reported 68%-90.2% experienced sexual abuse and 88.5%-96% experienced physical abuse.).

⁴⁶ Culiner, *supra* note 3, at 191.

⁴⁷ *Id.* at 192.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Dawkins, *supra* note 2, at 557.

⁵¹ *Id.*

⁵² Crego, *supra* note 5, at 914.

⁵³ Loewenstein, *supra* note 7, at 190; Crego, *supra* note 5, at 913.

⁵⁴ Crego, *supra* note 5, at 914.

⁵⁵ *Id.*

⁵⁶ Culiner, *supra* note 3, at 189.

2. *Whether Identities Are Distinct Entities?*

When the American Psychiatric Association first added Multiple Personality Disorder to the DSM-III in 1980, it required the existence of two or more “distinct personalities.”⁵⁷ Later on, in 1994, not only was Multiple Personality Disorder changed to DID, but the term “personalities” was thought to be too isolating and was replaced with “identities.”⁵⁸ Some define these identities as “imaginary constructs” and equate them to no more than symptoms of dissociation.⁵⁹ This view is an overcorrection from the DSM-III. Additionally, in 2013, the term “distinct personalities” was put back into the diagnostic manual.⁶⁰

When a multiple is triggered, and cannot cope with a situation, there is a “complete, unconscious, and involuntary change to an alter personality, and that alter may remain in control for an indeterminate amount of time.”⁶¹ During this time, the alter identity will have its own pattern of perceiving, relating to, and thinking about the environment and self.⁶²

Alters may have their own name, age, race, gender, sexual orientation, personal history, voice, wardrobe, job, social circle, vocabulary, values, beliefs, talents, handwriting, and even their own spoken languages.⁶³ Even more measurable physical differences can exist between identities such as rashes, scars, allergies, and injuries that appear in some identities and disappear in others.⁶⁴ Certain identities have epilepsy, eating disorders, or color blindness, while others do not.⁶⁵ Studies have even shown differences in IQ, visual acuity, eye shape and curvature, blood flow patterns, and blood

⁵⁷ Dawkins, *supra* note 2, at 565.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ DSM-5 MANUAL, *supra* note 4, at 291.

⁶¹ Mark E. Hindley, *United States v. Denny-Shaffer and Multiple Personality Disorder: “Who Stole the Cookie from the Cookie Jar?”*, 1994 UTAH L. REV. 961, 983 (1994).

⁶² *Id.*

⁶³ Jeff Smythe, *Uninvited Guests Crash a Party for One: Multiple Personality Disorder and the Criminal Law’s Derision toward Multiples*, 6 J.L. SOC’Y 179, 183 (2005); Philip Stevens, *The mirror has two faces: dissociative identity disorder and the defence of pathological criminal incapacity—a South African criminal law perspective*, 32 MED. & L. 33, 43 (2013).

⁶⁴ Daniel Goleman, *Probing the Enigma of Multiple Personality*, N.Y. TIMES, June 28, 1988, at C1.

⁶⁵ *Id.*

pressure between identities.⁶⁶ It is common to experience what appears as a medical miracle during DID therapy due to these physical differences.⁶⁷

Although the identities vary greatly in each multiple, the most common type of alter is that of a child.⁶⁸ If a multiple switches to the personality of a child, they will display the characteristics of a child in both thought and action.⁶⁹

In *State v. Greene*, the jury determined that the identity with control at the time of the attack was Tyrone, an alter approximately three to four years old.⁷⁰ The victim, a psychotherapist and registered nurse specializing in psychiatric mental health care, who also treated Mr. Greene as part of a sex offender treatment program, was prepared to testify that the alter in control at the time of the attack was a child.⁷¹ Our society regularly assigns different levels of criminal responsibility to children, as opposed to adults, as shown by the criminal system created entirely for juveniles.⁷²

Identities are sensitive to intrapsychic, interpersonal, and environmental stimuli that can suddenly change their behavioral or emotional state.⁷³ The term “switching” describes changing from one identity to another.⁷⁴ The transition between identities is often triggered by stress⁷⁵ and may result in sudden and dramatic changes in behavior, mannerisms, physical gestures, posture and tone of voice.⁷⁶ Though, switching to certain personalities can be less noticeable if they are only partially independent and exhibit only limited individual characteristics.⁷⁷

⁶⁶ Smythe, *supra* note 63, at 183; Goleman, *supra* note 64.

⁶⁷ Culliner, *supra* note 3, at 199 (A DID patient that had severe chronic back pain was unresponsive to several medical procedures and had to use a girdle and a cane. This pain completely disappeared after vocalizing and dealing with his trauma through therapy.).

⁶⁸ 984 P.2d 1024, 1027 (Wash. 1999).

⁶⁹ Hindley, *supra* note 61.

⁷⁰ *Greene*, 984 P.2d at 1030.

⁷¹ *Id.* at 1025-26, 1030.

⁷² See Frances Reddington, Age and Criminal Responsibility, 1 JIJIS 105 (2002).

⁷³ Loewenstein, *supra* note 7, at 190.

⁷⁴ Smythe, *supra* note 63, at 185.

⁷⁵ Stevens, *supra* note 63, at 42. See also Jared Slater, *Can Dr. Jekyll Sign for Mr. Hyde: Examining the Rights of Individuals Suffering from Dissociative Identity Disorder in Civil Contexts*, 24 S. CAL. REV. L. & SOC. JUST. 241, 253 (2015) (When the body is in a stressful situation, “it is common for the host to retreat and let a more dominant personality surface.”).

⁷⁶ Smythe, *supra* note 63, at 183.

⁷⁷ *Id.*

Each identity is created to perform specific psychological tasks for the body.⁷⁸ For example, one identity might be needed to keep the memories of the abuse, another to protect their body from future abuse, another to feel the residual anger, another to contain sexual urges, another to inflict self-punishment, and another to numb physical pain.⁷⁹ This separation of responsibilities and abilities renders it difficult to make a unified decision.⁸⁰

A multiple is a “series of split-off centers of consciousness, each performing its own acts based on its own wishes and beliefs, divorced from the concerns and issues of the others.”⁸¹ This demonstrates a significant lack of control within a multiple.

Amnesia is experienced frequently with DID, both regarding personal history and when switching between identities.⁸² This is called interpersonality amnesia, where events experienced by one identity are retrievable as a memory to that same identity, but not necessarily to other identities.⁸³ Alters are separated by “amnesia barriers,” but the leakage of memory between identities differs.⁸⁴

⁷⁸ Sabra McDonald Owens, *The Multiple Personality Disorder (MPD) Defense*, 8 MD. J. CONTEMP. LEGAL ISSUES 237, 244 (1997).

⁷⁹ *Id.*

⁸⁰ See Jane Hart, *Conquering Each Day with Dissociative Identity Disorder*, NAT’L ALL. ON MENTAL ILLNESS: NAMI BLOG (Jan. 22, 2019), <https://www.nami.org/Blogs/NAMI-Blog/January-2019/Conquering-Each-Day-with-Dissociative-Identity-Disorder> (Where an individual with DID describes her experiences with decision-making as “constantly being pulled in different directions with every decision... like having a committee inside my head letting me know how they would handle things if they were ‘fronting,’ or in control.”).

⁸¹ Saxe, *supra* note 23, at 249.

⁸² Dawkins, *supra* note 2, at 557; Dell, *A New Model*, *supra* note 8, at 2 (“Amnesia is the most frequently reported dissociative symptom of DID.”). “At least 10 different manifestations of amnesia have been reported in persons who have DID: (1) time loss, (2) fugues, (3) being told of disremembered actions, (4) temporary loss of well-practiced knowledge or skills, (5) finding objects among one’s possessions, (6) amnesia for childhood, (7) amnesia for personal identity, (8) strangers know the person, (9) objects are missing and (10) finding evidence of one’s recent actions.” *Id.* at 2-3.

⁸³ Eric Eich et al., *Memory, Amnesia, and Dissociative Identity Disorder*, 8 AM. PSYCH. SOC’Y 417, 417 (1997).

⁸⁴ Hindley, *supra* note 61, at 966; Eich et al., *supra* note 83, at 421.

Similar barriers exist with communication between identities as well.⁸⁵ Some identities report hearing voices⁸⁶ or experiencing seemingly independent thoughts that conflict with their own beliefs.⁸⁷ Others are completely unaware of the existence of other identities, let alone conscious of their criminal acts.⁸⁸ The legal person rarely knows that the identities even exist.⁸⁹ Even if one identity is aware of another, they still may not have control over the other identity's actions.⁹⁰

For all these reasons, identities are seemingly distinct entities. However, the fragmentation of identities is closely constructed to the patterns of thinking, feeling, and acting that regularly fluctuate in all individuals.⁹¹ An average person experiences various complex emotions, thoughts, and reactions to external stimuli.⁹² These same emotional and behavioral states in a person with DID are distinguished by (1) intensity, (2) lack of modulation and (3) lack of generalization of information and sense of self.⁹³

An unfragmented mind can experience fleeting thoughts and emotions that are still under the control of the individual, and do not manifest extreme changes in behaviors and conduct in response. A person with DID cannot maintain a sense of self between these states and often cannot transfer information between these states.⁹⁴

Instead of perceiving DID as fragmentation of the brain, DID can also be viewed as an alternative developmental pathway where the traumatized

⁸⁵ Eich et al., *supra* note 83, at 421.

⁸⁶ Dell, *A New Model*, *supra* note 8, at 5. (“At least three different referents for auditory hallucinations are present in a population of patients who have DID. These are: (1) hearing the voices of alter personalities, (2) the auditory component of dissociative flashbacks, and (3) genuinely psychotic auditory hallucinations. Some report experiencing visual hallucinations as well.”). “At least three possible referents for visual hallucinations exist: (1) seeing or visualizing alter personalities (either in the mind or externally), (2) the visual component of dissociative flashbacks, and (3) genuinely psychotic visual hallucinations.” *Id.* at 6.

⁸⁷ Loewenstein, *supra* note 7, at 192. Individuals with DID sometimes “do hear voices, but they have reframed or rationalized them (eg, “it’s me,” “it’s just my conscience”). Dell, *A New Model*, *supra* note 8, at 3.

⁸⁸ Smythe, *supra* note 63, at 190.

⁸⁹ Culiner, *supra* note 3, at 192.

⁹⁰ Hindley, *supra* note 61, at 966.

⁹¹ Saxe, *supra* note 23, at 245.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 245, 249-50.

individual fails to develop a consistent sense of self across behavioral or emotional states.⁹⁵ The trauma experienced by an individual with DID disrupts the normal metacognitive processes involved in developing a subjectively unified self, and consequently, discrete behavioral and emotional states are not integrated and coordinated.⁹⁶

Thus, the issue that many courts have, and the question that juries want to answer is: are identities truly separate entities from each other and from the legal person? The answer is both yes and no. They are neither separate nor are they the same. They are not a revolving door of completely independent actors, but they are different self-states within a system, either in coordination or in conflict with one another.⁹⁷

DID is difficult for courts and juries because understanding DID requires the use of non-binary concepts.⁹⁸ Many defendants with DID will not truly be “guilty” or “not guilty.” Courts must use an approach that balances several factors and deals appropriately with concepts that fall “in between” binary viewpoints of the human mind. That being said, none of the existing approaches allow for this.

3. *Levels of Self*

The question of whether a multiple is criminally responsible cannot be answered simply by examining the separate identities.⁹⁹ The court must not only consider the alters, but also the underlying relationship between the alters.¹⁰⁰ This includes all of the identities’ abilities to modify and control the legal person’s thoughts and behaviors.¹⁰¹ The whole person must be examined in order to determine the malicious forces, the adaptive forces, and the individual’s overall “balance of power.”¹⁰²

⁹⁵ Loewenstein, *supra* note 7, at 189.

⁹⁶ *Id.*

⁹⁷ *Id.* at 190.

⁹⁸ See *State v. Lockhart*, 542 S.E.2d 443, 447 (W.Va. 2000) (“It makes no sense to say, or to hold in any case that I can conceive of, that DID is a defense to a criminal act. It makes no sense. It would be contrary to all logic, and I would urge our court to not venue into that quagmire.”).

⁹⁹ Judith G. Armstrong, *The Case of MR. Woods: Psychological Contributions to the Legal Process in Defendants with Multiple Personality/Dissociate Identity Disorder*, 10 C. CAL. INTERDISC. L.J. 205, 206 (2001).

¹⁰⁰ *Id.* at 218.

¹⁰¹ *Id.*

¹⁰² *Id.*

A diagnosis of DID does not automatically render someone not criminally responsible, nor is it automatically ruled out.¹⁰³ To evaluate a multiple's criminal responsibility, one must understand the multiple's "self."

"[T]he self of the multiple is as divided and discrete as a light particle, or as continuous and connected as a light wave."¹⁰⁴ So, do multiples consist of different persons, a single person, or many interacting person-like parts? Yes.¹⁰⁵ There are three levels of "self" within a multiple, all of which need to be included in a court's analysis of a multiple's criminal responsibility.¹⁰⁶

The first level is that of the distinct persons, or identities. Each of these individuals have their own "memories, skills, emotional expressiveness and manner of relating."¹⁰⁷ The transition between such individuals may include rapid blinking, facial changes, changes in voice or demeanor, or disruption of thought.¹⁰⁸ This external behavior is often how an individual is diagnosed with DID, and this external behavior is what will be apparent in interviews with the criminal defendant.¹⁰⁹

The second level is an understanding that DID is the disorder of a single person.¹¹⁰ The alters emerge from an "underlying defensive process: a nonconscious, nonvolitional, and ultimately unsuccessful, effort to master painful experiences by dividing them into memory compartments."¹¹¹ There are studies to suggest that amnesia between alters is usually not complete.¹¹² There is leakage of memory between alters, which suggests that there can be understanding, influence, and consciousness between altered states.¹¹³ Ongoing therapy for multiples relies heavily on this second level of understanding because it attempts to deal with stressors of the individual that elicit the reactive behaviors, switching, formation of, and control by the alters.¹¹⁴

The third level is the most important level of understanding, and the most difficult for judges and juries to understand. This third level recognizes

¹⁰³ *Id.* at 221.

¹⁰⁴ *Id.* at 210.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Smythe, *supra* note 63, at 42.

¹⁰⁹ Armstrong, *supra* note 99, at 210.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 211.

¹¹³ *Id.*

¹¹⁴ *Id.* at 210-11.

that “the mind of the DID individual is subjectively structured as a complex, dynamic, adaptive self-state system that . . . evolves developmentally.”¹¹⁵ Within this individual, struggling with DID, under what appears to be chaotic and uncontrollable dissociation, there exists a system that operates according to rules.¹¹⁶

There is a “method in the madness” which can explain seemingly random behaviors as part of a self-structure.¹¹⁷ This self-structure is different for each multiple, but it holds the answer to whether the legal person and the identities together as a whole have control or understand the nature and quality of their actions.¹¹⁸ Alters are rarely aware of other personalities within the body, but there are cases where they are conscious of others and are able to communicate and coordinate with each other.¹¹⁹

This is where the court should direct their main focus: the degree of control a legal person has over switching to alternative states, the degree to which the individual can maintain a given state in the face of stressful stimuli, and the degree to which information is shared between the alters.¹²⁰ This holds the whole human being responsible for the criminal behavior.¹²¹

Instead of a thorough, objective analysis of the defendant’s self-structure, courts often assign criminal responsibility through misunderstanding and bias, as seen in *Orndorff v. Commonwealth*.

B. Orndorff v. Commonwealth

After her childlike alter was revealed to Dr. Fiester, Ms. Orndorff was committed during the penalty phase of her trial.¹²² After eight months in treatment, Ms. Orndorff filed a motion for new trial after newly discovered evidence of her DID diagnosis, and the court allowed the defense to present evidence to support the motion.¹²³

Dr. Paul Frederick Dell, a clinical psychologist specializing in dissociative disorders, examined Ms. Orndorff several times, diagnosed her

¹¹⁵ Loewenstein, *supra* note 7, at 190.

¹¹⁶ Armstrong, *supra* note 99, at 211.

¹¹⁷ Loewenstein, *supra* note 7, at 192.

¹¹⁸ Armstrong, *supra* note 99, at 211-12.

¹¹⁹ Smythe, *supra* note 63, at 183.

¹²⁰ Saxe, *supra* note 23, at 249.

¹²¹ Loewenstein, *supra* note 7, at 203.

¹²² *Orndorff v. Commonwealth*, 605 S.E.2d 307, 314 (Va. Ct. App. 2004).

¹²³ *Id.*

with DID, and identified three specific personalities: Jacob, a strong, angry, male protector; Jean Bugineau, who spoke French; and Janice Nanney, a twelve-and-a-half year old girl.¹²⁴ Dr. Dell testified that her switching was clear over the 911 call, and he did not believe she was malingering.¹²⁵ Dr. Van Gorp, an authority in the field of malingering detection, also diagnosed Ms. Orndorff with DID and testified he was convinced she was not faking her symptoms.¹²⁶

Dr. Richard Loewenstein, a psychiatrist and authority in trauma disorders and dissociative disorders, concurred in the diagnosis of DID, and had an encounter with the protector personality who refused to give his own name but called Janice “The Kid,” the child Janice “Squirt,” and Jean “Frenchman” or “Frog.”¹²⁷ Despite his usual “high index of suspicion for [malingering], especially in a forensic context,” Dr. Loewenstein ruled out malingering.¹²⁸ The protector personality did have a very clear recollection of what happened the night of the shooting, despite Janice having no memory of the shooting whatsoever.¹²⁹

According to Jacob, Mr. and Ms. Orndorff were fighting and Janice poured beer on his head.¹³⁰ Then, Jean and Jacob together grabbed the gun, shot Mr. Orndorff, and kept shooting to protect Janice.¹³¹ Jean left Mr. Orndorff bleeding on the floor for several minutes, and Janice still did not know her husband was dead.¹³²

These experts explained to the jury how DID generally begins with childhood trauma, the switching process, the lack of control, the accompanying amnesia, and the systematic self-structure of a multiple.¹³³ Dr. Loewenstein testified regarding Ms. Orndorff’s childhood abuse.¹³⁴ Her

¹²⁴ *Id.*

¹²⁵ *Id.* at 315. Malingering is “the act of feigning disability or illness, usually to avoid some undesired obligations or to achieve some real or imagined personal benefit.” Smythe, *supra* note 63, at 186.

¹²⁶ *Orndorff*, 605 S.E.2d at 315.

¹²⁷ *Id.* at 316.

¹²⁸ *Id.*

¹²⁹ *Id.* at 317.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

sons testified about their experience with her unusual forgetfulness, and sudden changes in behavior.¹³⁵

Dr. Daniel Sheneman was the attending psychiatrist for the behavioral unit at Central State Hospital, where Orndorff was committed during trial, and a rebuttal witness for the prosecution.¹³⁶ Neither he or the other member of Ms. Orndorff's treatment team had any experience with dissociative disorders and did not perform any psychological testing during her eight month stay.¹³⁷ Despite seeing Janice's child identity appear on several occasions, he claimed she did not meet the criteria for DID.¹³⁸ This exchange occurred on cross-examination:

Counsel: Now, you suggested that the DSM criteria for dissociative identity disorder required three personalities?

Witness: I said more than one. I think you have to have two or more.

Counsel: Well, Ms. Orndorff as Ms. Orndorff is one personality; is she not?

Witness: Yes.

Counsel: And Ms. Orndorff as a twelve-year-old is another distinct personality; is it not?

Witness: If you are under the opinion that that is an alter; yes.

Counsel: So, it only requires one alter, am I right? That's what the diagnosis requires, not two?

Witness: Two or more distinct identities. So, I guess technically that is correct.

Counsel: So, if you said that it required more than one alter, you would be wrong, am I right?

Witness: It requires two or more personalities.

¹³⁵ *Id.*

¹³⁶ *Id.* at 318.

¹³⁷ *Id.*

¹³⁸ *Id.*

Counsel: If you said it required two alters, you would be wrong, right?

Witness: I guess that is correct.¹³⁹

Dr. Sheneman also claimed that being hit and locked in closets by her mother as a child was not “significant” child abuse for Janice to have DID.¹⁴⁰

The only experts for the prosecution were not familiar with dissociative disorders.¹⁴¹ Ms. Orndorff’s defense counsel gathered three experts that specialized in dissociative disorders, personality disorders, and malingering.¹⁴² The rebuttal testimony showed a lack of understanding of even the basic definition of DID in the DSM, and it did not recognize obvious symptoms of DID.¹⁴³ The defense experts testified to Ms. Orndorff’s childhood abuse and how that formed her DID, and the defense corroborated this with personal history and testimony of those who have known her well over several years.¹⁴⁴ Rebuttal testimony simply claimed her childhood abuse was not traumatic enough with absolutely nothing to substantiate such a conclusion.¹⁴⁵

The prosecution also called Angela Valentine, who shared a cell with Ms. Orndorff at the detention center before she was committed.¹⁴⁶ She testified that Ms. Orndorff told her that “at any God given time she could be five or twelve, whenever she wanted to be, and she was going to beat the doctors at Central State.”¹⁴⁷ The defense experts testified that this type of statement is not at all out of character for a multiple because multiples often fear their symptoms and want to believe they have control over their dissociation when, in fact, they do not.¹⁴⁸ Ms. Valentine saw Ms. Orndorff act like she did not know what was going on and then a few seconds later be back to herself to being hysterical one minute and then suddenly coming back to her senses.¹⁴⁹ These seemingly contradictory behaviors are entirely

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 316-21.

¹⁴³ *Id.* at 318.

¹⁴⁴ *Id.* at 314-15.

¹⁴⁵ *Id.* at 318.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 316.

¹⁴⁹ *Id.* at 318.

consistent with a diagnosis of DID as well as all of the defense's expert testimony.

Based on this evidence, the jury still convicted Janice Orndorff of second-degree murder, and the court sentenced her to thirty-two years in prison with a three-year firearm specification.¹⁵⁰ Ms. Orndorff then refiled her motion for a new trial on the basis of newly discovered evidence of a mental illness that would sustain an insanity defense with an affidavit from Dr. Loewenstein stating that Ms. Orndorff was insane at the time of the offense.¹⁵¹ The judge denied this motion because she failed to show that she could not have obtained that evidence, which was in her control, for use at the trial through due diligence.¹⁵² It was not until Dr. Fiester saw her child identity at the beginning of sentencing that DID was even considered.¹⁵³ In immediate response to this delayed diagnosis, Ms. Orndorff retained three experts in the field who provided substantial evidence to establish an insanity defense.¹⁵⁴

The judge expressed concern with the timing of this evidence, stating, "It was not until she actually had been convicted by the jury that apparently she acted in such a manner that [DID] was even possibly considered."¹⁵⁵ Defense experts testified that complex symptoms of DID do not always manifest outwardly until you see the person repeatedly, which was consistent with Ms. Orndorff's conduct during trial.¹⁵⁶

The judge also stated, "[i]n part, I conclude that [such evidence] would not produce opposite results on the merits at another trial because the jury did, in fact, hear all this."¹⁵⁷ This is the main problem that persists in courts today. Even with the defense's substantial evidence, judges, juries and some experts deny that DID exists or that it could temporarily render a person unable to understand the nature of their actions.¹⁵⁸ This bias against and

¹⁵⁰ *Id.* at 319.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 321-22.

¹⁵⁴ *Id.* at 321.

¹⁵⁵ *Id.* at 320.

¹⁵⁶ *Id.* at 323.

¹⁵⁷ *Id.* at 319.

¹⁵⁸ See *Humphreys v. Chatman*, 2016 Ga. Super. LEXIS 2034 (Mar. 10, 2016). Despite trial counsel providing the jury with information regarding defendant's dissociative episodes and memory loss since adolescence, expert testimony from clinical psychologist and social history with police reports, hospital records, school and prison records, showing DID, and

(continued)

misunderstanding of individuals with DID is demonstrated in many court opinions.¹⁵⁹

The appeals court found that Ms. Orndorff met the requirements to obtain a new trial based on the newly discovered evidence and reversed and remanded the case.¹⁶⁰ Yet, in 2010, the Court of Appeals ultimately held that the circuit court did not abuse its discretion in denying Orndorff's motion for a new trial.¹⁶¹

This tendency to fear what we do not know and dismiss what is complex leads to egregious injustice in courts.¹⁶² Courts struggle "to reconcile the

defendant's sister's testimony as to defendant's childhood abuse, defendant was still sentenced to death. *See also* State v. Nicholas, 155 N.E.3d 304, 311 (Ohio Ct. App. 2020). After multiple evaluations by psychologist, it was determined that 14-year-old defendant suffered from DID, he was not malingering, and an alter, Jeff, murdered his father's girlfriend. *Id.* Both the psychologist and the GAL recommended that defendant remain in the juvenile system as he is likely to recover after a few years of rehabilitation. *Id.* at 328. Instead, defendant was transferred to adult court and was sentenced to life in prison with three years for a gun specification, even though the prosecution had no evidence to suggest defendant could not be treated effectively in the juvenile system. *Id.* at 304.

¹⁵⁹ Harris v. State, 424 S.W.3d 599, 605-08 (Tex. 2013) (concluded that the trial court did not abuse its discretion when excluding expert testimony on DID when the emphasis of rebuttal expert's argument was that "the idea of multiple personality disorder is really a pretty bizarre idea"); People v. Piumelli, 2009 Cal. App. LEXIS 1115, at *2 (Feb. 11, 2009) (ruled that the trial court did not abuse its discretion in limiting the expert testimony regarding defendant's DID not to allow the use of the words "conscious" or "unconscious" despite the use of "consciousness" in the definition of DID in the DSM); People v. McSwain, 259 Mich.App. 654, 676 N.W.2d 236, 246 (Dec. 9, 2003). The rebuttal expert used the fact that defendant signed the prison forms using her legal name to prove she was not a multiple and disagreed with defense experts that someone with DID could appear normal at school or work: ("I think it's very unlikely, I think that this would be a very disabling condition if you really had it. That it would prevent a person from doing most of the things that ordinarily you have to do to live, work, be in a relationship, and so on and so forth. I think it would be very difficult to completely keep it under wraps, so that even a layman interacting with the person would not come away from the interaction saying, 'There's really something the matter with this person.'") *Id.* at 247.

¹⁶⁰ Orndorff, 605 S.E.2d at 326.

¹⁶¹ Orndorff v. Commonwealth, 691 S.E.2d 177, 182 (Va. 2010).

¹⁶² Nicholas, 155 N.E.3d 304, 340 (the court of appeals stated they were simply "not inclined" to apply any other test but the narrow alter approach).

impact of dissociative identity disorder.”¹⁶³ Judges and juries must be properly educated about DID, such that when there is a criminal defendant rendered insane at the time of their crime by DID, the court can properly evaluate and accept such evidence without bias or misunderstanding.

C. Goals of Punishment

“When multiples break the law, the courts must carefully weigh the goals of punishment (general and specific deterrence, retribution, rehabilitation and incapacitation) with moral considerations of excusing the bad conduct of those who have no control over their actions.”¹⁶⁴

In opposition to popular culture’s depiction of criminal law, the insanity defense is hardly used, and even when it is asserted, it is rarely successful.¹⁶⁵ A diagnosis of DID does not render a defendant “insane” for sentencing purposes; the insanity defense is limited to the defendant’s mindset at the time they committed the offense.¹⁶⁶ As it stands, most multiples are convicted and imprisoned because of stigmatization of, and a lack of understanding of, the disorder.¹⁶⁷

Deterrence is the theory that punishment will prevent some people from committing crimes.¹⁶⁸ The rationale of deterrence is without merit when it comes to a defendant with DID who generally lacks control of their actions.¹⁶⁹ Additionally, the only identities who could be deterred by punishment are the acting identities.¹⁷⁰ Punishing the body and remaining identities, who may not have any awareness of the acting alter’s intent or

¹⁶³ United States v. Field, No. 6:13-cr-257-Orl-40TBS, 2017 U.S. Dist. LEXIS 73215, at *18 (M.D. Fla. May 15, 2017).

¹⁶⁴ Smythe, *supra* note 63, at 189.

¹⁶⁵ See *id.* at 201 (“[T]he insanity defense is used in less than one or two percent of all American criminal cases. Furthermore, when the insanity defense is asserted at trial only one third of insanity pleas are successful”); Helen M. Farrell, *Dissociative Identity Disorder: No Excuse for Criminal Activity*, 6 CURRENT PSYCHIATRY 33, 34 (2011), <https://www.mdedge.com/psychiatry/article/64330/personality-disorders/dissociative-identity-disorder-no-excuse-criminal?sso=true> [<https://perma.cc/D25Q-KKNZ>] (“An insanity defense is raised <1% of felony cases, and is successful in only a fraction of those.”).

¹⁶⁶ Smythe, *supra* note 63, at 201 (“When the insanity defense is asserted at trial, the relevant time frame for the inquiry is the defendant’s frame of mind at the time the alleged criminal offense occurred.”).

¹⁶⁷ *Id.* at 205.

¹⁶⁸ David Crump, *Deterrence*, 49 ST. MARY’S L.J. 317, 318 (2018).

¹⁶⁹ Smythe, *supra* note 63, at 205.

¹⁷⁰ Hindley, *supra* note 61, at 994.

action, might not punish the acting alter at all.¹⁷¹ Also, many times the acting alter is acting out with the purpose to punish the body, or punish the legal person.¹⁷² Thus, additional punishment from the court will not deter those acting alters from continuing to act in such a manner.¹⁷³

Retribution, more appropriately conceptualized as “just deserts,” subjects the offender to certain deprivations because he or she deserves it in response to their wrongful conduct.¹⁷⁴ This goal of punishment is not served with a multiple because there are identities that may not have any awareness of the wrongful conduct. The concept of retribution is consistent with “the utilitarian refusal to punish nonoffenders, even though punishing them may effectively deter others.”¹⁷⁵ This instead supports a more liberal approach in granting the insanity defense for DID defendants.

The third goal of punishment, incapacitation, seeks to incapacitate the possible dangers associated with the defendant.¹⁷⁶ This will be accomplished by hospitalization just as well as it would with imprisonment.¹⁷⁷

Incapacitation relies on the belief that human actions follow a pattern.¹⁷⁸ This also supports granting the defendant treatment instead of prison time because of prior successes in treating DID.¹⁷⁹ “When DID is actively treated by knowledgeable and experienced clinicians the recovery success rate is 91–94%.”¹⁸⁰ However, if dissociation is not addressed, success rates are 2–3%, and inappropriate therapeutic intervention can worsen dissociative symptoms.¹⁸¹ It is likely that incarcerated multiples will not receive proper treatment for their disorder in prison.¹⁸² Thus, if the criminal acts were remotely a result of the defendant’s DID, treatment will be productive in

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ James O. Finckenauer, *Public Support for the Death Penalty: Retribution as Just Deserts or Retribution as Revenge*, 5 JUST. Q. 81, 92 (1988).

¹⁷⁵ Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. REV. 973, 1005 (1985).

¹⁷⁶ Hindley, *supra* note 61, at 995.

¹⁷⁷ *Id.*

¹⁷⁸ Athula Pathinayake, *The Effectiveness of the Objective of Incapacitation: Is It a Myth?*, 21 J. GENDER RACE & JUST. 333, 347 (2018).

¹⁷⁹ Culiner, *supra* note 3, at 189.

¹⁸⁰ Dell, *An Interpretive Manual*, *supra* note 9, at 8.

¹⁸¹ *Id.*

¹⁸² Smythe, *supra* note 63, at 205.

stopping those patterns of behavior where imprisonment will change nothing.

Additionally, a defendant may be committed for an indefinite amount of time, or until treatment proves effective, extinguishing the threat of a dangerous personality.¹⁸³ Thus, commitment supports the goal of incapacitation because it will last until the defendant's behavior patterns change, as opposed to imprisonment, which is limited to a specific sentence and will not change such patterns.

With a defendant who is a multiple, the prevailing goal of criminal punishment is rehabilitation.¹⁸⁴ Primarily, "the best interests of the defendant are not served by a guilty verdict, since there is little chance the multiple will receive the proper treatment for the disorder in prison."¹⁸⁵ Treatment "provides the multiple with the opportunity to become whole, provides society with a healthy citizen, and extinguishes the threat of a dangerous personality."¹⁸⁶

Because multiples are born from trauma, and exist to withhold, repress and internalize that trauma, there is an inevitable predisposition and high likelihood of an eventual outburst of pent-up tension that often includes some type of criminal action.¹⁸⁷ Though the personalities were initially created to protect the individual, as time goes on, these personalities who took on this individual's pain, distress, and rage, may start to cause trouble within the individual, and may become suicidal or homicidal.¹⁸⁸

This is why it is so important for the courts to appropriately evaluate the defendant's disorder. If the criminal action is a result of the disorder, our society has a duty to help and rehabilitate those whose trauma and abuse has caused a lack of control, making them inculpable for their actions.

There is a societal presumption that by claiming the insanity defense, a defendant will have no consequences or will quickly be released from a mental health facility.¹⁸⁹ In reality, research shows that over an eight-year period, only fifteen percent of those acquitted with an insanity defense were

¹⁸³ *Id.* at 206. ("Since society does not deem civil commitment as punishment, the individual may be committed for an indefinite period of time or at least until the treatment ends."); Hindley, *supra* note 61, at 995.

¹⁸⁴ Smythe, *supra* note 63, at 205.

¹⁸⁵ *Id.* at 198.

¹⁸⁶ Hindley, *supra* note 61, at 995.

¹⁸⁷ Culinier, *supra* note 3, at 191.

¹⁸⁸ *Id.* at 192.

¹⁸⁹ Hindley, *supra* note 61, at 996.

released without any restraint.¹⁹⁰ In fact, the average time that a defendant acquitted with an insanity defense is detained is over nine years.¹⁹¹ Research shows that those acquitted with an insanity defense “actually spend almost double the amount of time that defendants convicted of similar charges spend in prison settings and often face a lifetime of post-release judicial oversight.”¹⁹² Even still, “tax payers will likely pay more money to support a multiple in a state prison than in a mental health facility.”¹⁹³ Thus, acquitting a DID defendant under the insanity defense is not forgoing consequences for the crimes committed, but is the most reasonable solution in favor of rehabilitation if the court finds that the DID contributed to the crimes. Such an acquittal is justified in DID cases “because it best serves the public and the multiple.”¹⁹⁴

D. Current Approaches

Many functions of our criminal justice system are based on Blackstone’s fundamental concept that states: “[i]t is better that ten guilty persons escape than one innocent suffer.”¹⁹⁵ Theories for punishment require at least a “relationship between the individual who committed the offense and the one who is to be punished.”¹⁹⁶ When a defendant has DID, it is almost impossible for the court to punish the identity without also punishing someone innocent of the offense, whether it be the legal person or another identity.¹⁹⁷ The risk of condemning innocents alone is enough incentive to find a proper approach to assigning criminal responsibility to defendants with DID. The approach we see most often in courts today is the alter approach.

1. Alter Approach

The alter approach bases criminal responsibility “on the state of mind of the alter in control at the time of the crime.”¹⁹⁸ This analysis requires a

¹⁹⁰ *Id.* at 996-97.

¹⁹¹ *Id.* at 997.

¹⁹² *Id.*

¹⁹³ Smythe, *supra* note 63, at 205.

¹⁹⁴ Hindley, *supra* note 61, at 994.

¹⁹⁵ C. Ronald Huff, *Wrongful Conviction and Public Policy: The American Society of Criminology 2001 Presidential Address*, 40 *CRIMINOLOGY* 1, 3 (2002).

¹⁹⁶ Hindley, *supra* note 61, at 990.

¹⁹⁷ *Id.*

¹⁹⁸ Crego, *supra* note 5, at 922.

determination of which personality committed the offense, and an examination of that personality's state of mind at the time of the offense.¹⁹⁹

Here, the alter is deemed to act as the agent of the legal person.²⁰⁰ The agent, or alter, directly binds the legal person who is responsible for the alter's actions.²⁰¹ Regardless of any lack of knowledge or control over the transaction into which their agent has entered, the whole person is on trial.²⁰² This is the most common approach in state appellate courts.²⁰³ This is likely the most common approach because it is the closest to a standard assessment of mens rea.²⁰⁴ Yet, no multiple has been found not guilty by reason of insanity under this approach.²⁰⁵

The alter test was applied in *State v. Grimsley*, which convicted the defendant of driving under the influence of alcohol.²⁰⁶ The defendant argued because the host lacked control over the alter's actions, those actions were not conscious or voluntary.²⁰⁷ Because the defendant only had a minimal recollection of what the alter did at the time, she was unable to give sufficient information regarding the alter's culpability.²⁰⁸ The court found there was not sufficient evidence to suggest the alter in control at the time of the act was not acting consciously or voluntarily.²⁰⁹

In reversing the lower court, the appeals court stated there was "only one person accused of drunken driving. 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."²¹⁰

The court came to the same conclusion in another case regarding a multiple driving under the influence. In *State v. Dumas*, an expert testified that an alter was in control for the crime of driving a vehicle under the

¹⁹⁹ *State v. Lockhart*, 542 S.E.2d 443, 454 (W. Va. 2000).

²⁰⁰ John Dawson, *The Alter as Agent: Multiple Personality and the Insanity Defence*, 6 PSYCHIATRY PSYCHOL. & L. 203, 205 (1999).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Dawkins, *supra* note 2, at 558.

²⁰⁴ Crego, *supra* note 5, at 923; *Staples v. United States*, 511 U.S. 600 (1994) (Mens rea is an accused's knowledge of the facts that make their conduct illegal.).

²⁰⁵ Smythe, *supra* note 63, at 190.

²⁰⁶ 444 N.E.2d 1071 (Ohio Ct. App. 1982).

²⁰⁷ *Id.* at 1075.

²⁰⁸ *Id.* at 1076.

²⁰⁹ *Id.*

²¹⁰ *Id.*

influence of alcohol.²¹¹ However, the defendant testified that all of her alters would have known it was wrong to drink and drive and hit a car containing another person, so the trial court did not lose its way in assigning criminal responsibility to defendant despite her diagnosis of DID.²¹²

The court similarly placed responsibility on the acting alter in *Kirkland v. State*. Here, the court accepted that the defendant was a multiple but held that the identity who committed the act of robbing banks “did so with rational, purposeful criminal intent and with knowledge that it was wrong.”²¹³

The specific alter approach inherently ignores the dynamics of the switching process.²¹⁴ Switching can occur in a matter of seconds as an involuntary response to some type of emotional stimuli such as psychological stress or intra-personal conflict.²¹⁵ This places criminal responsibility on the seemingly arbitrary state of the multiple’s mind, on the alter who happens to be out at any given time, triggered by uncontrollable stimuli.²¹⁶

Also, there may be no way to communicate a particular choice once another alter has taken control of the body.²¹⁷ Even if one identity can communicate their choice to the acting alter, once the alter is in control of the body, that choice can be ignored.²¹⁸ Thus, taking this approach punishes a person for things he or she cannot control. Society consistently holds those accountable only when they are deemed morally culpable and does not hold those accountable who cannot exercise free will.²¹⁹ This concern is addressed in the host approach.

2. Host Approach

The host approach bases criminal culpability on “the host personality’s awareness of the alleged criminal actions taken by alter personalities and the

²¹¹ *State v. Dumas*, 2012 Ohio App. LEXIS 56, at *1 (Jan. 12, 2012).

²¹² *Id.*

²¹³ *Kirkland v. State*, 304 S.E.2d 561, 565 (Ga. Ct. App. 1983).

²¹⁴ Dawkins, *supra* note 2, at 563.

²¹⁵ *Id.*

²¹⁶ *Id.* at 563-64.

²¹⁷ Jared Slater, *Can Dr. Jekyll Sign for Mr. Hyde?: Examining the Rights of Individuals Suffering from Dissociative Identity Disorder in Civil Contexts*, 24 S. CAL. REV. L & SOC. JUST. 241, 253 (2015).

²¹⁸ *Id.*

²¹⁹ Hindley, *supra* note 61, at 968.

host's ability to control the alters."²²⁰ Thus, "if the host was unaware of an alter's actions and had no ability to stop the alter, then the host is not criminally responsible."²²¹

The host approach includes more consideration of the unique function of a mind with DID by focusing on the identity that has the most psychological control.²²² It allows a DID defendant to invoke an insanity defense if the host "did not know of, or could not control, the commission of the crime."²²³

The trial court decided in *United States v. Denny-Shaffer*, that because evidence concerning the alters was lacking, the insanity defense was rejected and related instructions would not be submitted to the jury.²²⁴ The defendant was charged and convicted of kidnapping a baby from a hospital, despite the court agreeing that the host personality was not in control during the kidnapping.²²⁵ However, on appeal, the court found there was enough evidence to allow the jury to decide whether the insanity defense applied to the host personality.²²⁶

In *State v. Nicholas*, the defendant maintained that the court should adopt the standard of host responsibility from *Denny-Shaffer*.²²⁷ The court instead affirmed the trial court's conviction and sentencing of life in prison because defendant knew of the personality who committed the crime, Jeff, and understood the moral culpability of Jeff's actions.²²⁸ The court did not consider defendant's ability, or lack thereof, to control Jeff's actions when refusing to use the host approach.

Yet the host approach does not take into consideration the intricacies within the mind of a multiple. With the severe lack of control found in most multiples, this should render almost every criminal defendant with DID guilty only by reason of insanity. Thus, we turn to the third theory: the unified approach.

²²⁰ Crego, *supra* note 5, at 922-23.

²²¹ *State v. Lockhart*, 542 S.E.2d 443, 454 (W. Va. 2000).

²²² Smythe, *supra* note 63, at 190.

²²³ Hindley, *supra* note 61, at 962.

²²⁴ 2 F.3d 999, 1004 (10th Cir. 1993).

²²⁵ *Id.* at 1006.

²²⁶ *Id.* at 1022-23.

²²⁷ 155 N.E.3d 304, 335 (Ohio Ct. App. 2020).

²²⁸ *Id.* at 340.

3. *Unified Approach*

The unified approach makes no legal distinction between hosts or alters which holds the entire body responsible for the actions of any single personality.²²⁹ Regardless of the number of personalities involved, “one body equals one person, and it is that one person’s mental state that is at issue.”²³⁰ This test looks at the mental state of all of the alters at the time of the crime and can devolve into an attempt to evaluate the mental state of each alter at the time of the crime.²³¹

This approach is based on the premise that “because any one of the alters or the host may be criminally responsible for the offence, the sanity of each must be assessed individually.”²³² Under this approach, a DID defendant will be found insane if any of the identities are unable to appreciate the nature and quality or the wrongfulness of his or her acts, whether or not that identity was in control at the time the crime was committed.²³³

In *State v. Woodward*, the court used the unified approach to convict a minister of four counts of first-degree burglary, four counts of first degree rape, and eight counts of first degree sexual offense.²³⁴ An identity came out during the trial and attempted to give exculpatory testimony for defendant.²³⁵ The court stated that “[t]here was only one person accused of rape,” and refused a new trial based on the alter’s testimony.²³⁶

The unified approach ultimately does not take into consideration alters at all and stands firmly in the thought that “one body contains only one person.”²³⁷ Thus, we must look to international approaches for guidance.

4. *International Approach*

Though New Zealand ultimately adopted the specific alter approach in *R v. Hamblyn*, there are some valuable points made here to guide us moving forward with a single, new, comprehensive approach.

In *Hamblyn*, the appellant was charged on twenty-seven counts of using checks with the intent to defraud during two separate series of transactions

²²⁹ Crego, *supra* note 5, at 923, 925.

²³⁰ *State v. Lockhart*, 542 S.E.2d 443, 454 (W. Va. 2000).

²³¹ Loewenstein, *supra* note 7, at 203.

²³² Dawkins, *supra* note 2, at 564.

²³³ *Id.*

²³⁴ 404 S.E.2d 6, 12 (N.C. Ct. App. 1991).

²³⁵ *Id.* at 10.

²³⁶ *Id.*

²³⁷ Smythe, *supra* note 63, at 194.

spanning periods of several months.²³⁸ Appellant was examined by two psychiatrists who “[b]oth agreed that she suffered from DID, that it is a disease of the mind, and that she was not malingering.”²³⁹ But the two psychiatrists disagreed on whether “appellant’s condition rendered her incapable of understanding the nature and quality of her acts or of knowing that they were morally wrong.”²⁴⁰

Two alters, Mark and Ruth, performed the acts in the first series of transactions, and two other alters, Deborah and Donna, performed the acts in the second series of transactions.²⁴¹ The psychiatrists determined from interviews that Mark and Ruth behaved independently of each other and did not know the host personality existed, Deborah knew of Ruth’s activities, but Donna was unaware of the other alters.²⁴² The defense psychiatrist interpreted this pattern of dissociation to mean that appellant herself could not understand the nature and quality of the acts of the alters and was insane at the time of the offenses.²⁴³

The Crown psychiatrist, however, looked more broadly at the functionality of appellant and her alters altogether and disagreed.²⁴⁴ Based on the Crown psychiatrist’s observations and interviews, he found that the DID was not the cause of the offenses.²⁴⁵ Although the dissociation did occur at such times of stress as the offenses and blocked off the memory of committing those offenses, the behavior was still motivated.²⁴⁶ It is not always the case that dissociation is completely uncontrollable, but that a person could “learn to dissociate as a coping mechanism so that dissociation became part of the individual’s personality and recognizable behavioral pattern.”²⁴⁷

Thus, in the case of appellant, the Crown psychiatrist determined that the dissociation was a learned behavior, and the host could still be culpable for such acts made by the alters because the dissociation was at least somewhat controlled.²⁴⁸ Appellant adapted with her condition such that she

²³⁸ Dawkins, *supra* note 2, at 559.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 560.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 560-61.

²⁴⁶ *Id.* at 560.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

became “a person who committed certain crimes of apparent dishonesty, who could not tolerate that knowledge in the person of the ‘main host’ and therefore committed them in another guise and identity.”²⁴⁹

Although New Zealand ultimately adopted the specific alter approach, there are several parts of the court’s discussion that are essential in developing a new approach. When a DID case is presented, the main question the court must ask is “whether the symptoms of the disorder – disruption of the normally integrated functions of consciousness, memory, identity, and perception – are relevant to the defendant’s ability to have understood the nature and quality of the offending conduct to have known that it was morally wrong.”²⁵⁰ In order to answer this question, the court must look at all three levels of understanding the multiple’s “self.”

In the context of *R. v. Hamblyn*, on the first level of understanding, there were four specific alters who were aware and intentionally committed crimes.²⁵¹ On the second level of understanding, these four alters were symptoms of the legal person’s disorder, and the legal person did not remember committing such acts.²⁵² The defense psychiatrist’s analysis of the third level found that defendant’s symptoms regarding her consciousness, memory, identity, and perception rendered her “insane” at the time the offenses were committed.²⁵³

The Crown psychiatrist found that despite a loss of consciousness, memory, and identity, the legal person as a whole purposefully used her loss of consciousness, memory, and identity, to protect herself from such conduct.²⁵⁴ This is part of the third level of understanding of self. Even though she exhibited all these symptoms, evaluating the system between the legal person and her identities rendered her able to understand the nature and quality of the acts at the time they were committed.²⁵⁵

E. Changes

There are three simple rules we obtain from the existing approaches to defendants who are multiples that remain as we evolve with a greater understanding of DID: “(1) only one person is on trial; (2) the issue relates to that person’s state of mind as affected or characterized by specific

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 567.

²⁵¹ *Id.* at 550; Armstrong, *supra* note 99, at 210.

²⁵² Dawkins, *supra* note 2, at 559-60, 563, 566; Armstrong, *supra* note 99, at 210.

²⁵³ Dawkins, *supra* note 2, at 560, 567; Armstrong, *supra* note 99, at 211.

²⁵⁴ Dawkins, *supra* note 2, at 560; Armstrong, *supra* note 99, at 211.

²⁵⁵ Dawkins, *supra* note 2, at 560.

symptoms of dissociation; and (3) the point of assessment is the time of commission of the offense.”²⁵⁶ Outside of these rules, there are several changes that must be made.

1. Change Perspective of “Host”

One issue with the way courts currently deal with DID defendants is that they appear to only take into consideration “hosts” and “alters.” The use of the term “host” connotes that there is one primary identity and all others are secondary.²⁵⁷ This connotation is misleading and has little evidentiary basis.²⁵⁸

“The host [personality] is generally not the original personality; the original personality is . . . characterized as having been ‘put to sleep.’”²⁵⁹ Courts currently evaluate the criminal responsibility of multiples as if the “host” is the legal person, and this is very misleading to juries who very likely have not heard of DID, let alone understand its complexities. It is important to understand that the host is not the same as the legal person.

Operating out of the premise that only one person is on trial, the majority of courts have found historically that the one person on trial is “the host” or “an alter.” The court should approach the evaluation with the premise that they are assigning criminal responsibility to the legal person, the original personality.

Although this original personality, or the legal person, may not be present for hours, weeks, or months at a time,²⁶⁰ and lack awareness and control of the other personalities, it is the body they share with the other identities that will either get the proper treatment or go to prison. The legal person is the one who experienced the original trauma which led to the dissociation. The legal person is the one whose brain adapted to protect itself from its surroundings. The legal person is ultimately the one who has to deal with the consequences of their dissociation. The courts should evaluate the totality of the circumstances of the individual’s disorder, but the goal is to evaluate the criminal responsibility of the “whole human being.”²⁶¹

²⁵⁶ *Id.* at 567-68.

²⁵⁷ Loewenstein, *supra* note 7, at 193.

²⁵⁸ *Id.*

²⁵⁹ Hindley, *supra* note 61, at 964.

²⁶⁰ *Dissociation and Dissociative Disorders*, MIND FOR BETTER MENTAL HEALTH 1, 2 (2019), <https://www.mind.org.uk/media-a/2936/dissociation-and-dissociative-disorders-2019.pdf> [<https://perma.cc/Y2RN-CH9S>].

²⁶¹ Loewenstein, *supra* note 7, at 217.

It is also important to understand that the “hosts” referred to in the courts can change over time.²⁶² New personalities are created in the face of hardships and trauma even after the initial dissociation and into adulthood.²⁶³ New personalities are also created in the healing process as the alters begin to communicate and work together for the functionality of the individual as a whole.²⁶⁴ Thus, identities with the most control, otherwise known as “the host,” can change in response to changes in lifestyle or important events.²⁶⁵

The term “host” is altogether misleading and should be eliminated from the DID vernacular in criminal courts. Using this term furthers a misunderstanding that the personality that has the most control over the body is the legal person. It also furthers a misunderstanding that there is one personality that has the most control over the body, and that this single personality is a constant in the multiple’s life. These presumptions automatically hinder the court’s ability to appropriately evaluate the personality structure essential to the third level of understanding of the multiple’s “self.”

It is still important to be able to evaluate the different levels of control within the individual’s personality system. So instead, the court should adopt the term “main(s)” to describe what was previously known as “the host.” With this change in vocabulary, and additional jury instruction, the court can take into account that there may be one personality with the majority of control at the time of the offense (“a Main”), multiple personalities that shared the majority of control at the time of the offense (“The Mains”), and it is likely that the identity, or identities, with the majority of control have changed since the offense in the face of a brand new stressor: trial. This allows for a more open-minded approach and does not limit the court’s view of a defendant’s personality structure.

2. *Change to Team Language*

The specific alter approach does accept the premise that alters are distinct entities, but focuses too much on their individuality and not on the overall system. This is an oversimplified approach with the wrong goal in

²⁶² *Id.*

²⁶³ Smythe, *supra* note 63, at 185.

²⁶⁴ *Cooperation, Integration, and Fusion*, DID RESEARCH, (Dec. 10, 2017), <https://did-research.org/treatment/integration> [<https://perma.cc/N4NF-NC4B>].

²⁶⁵ Smythe, *supra* note 63, at 185.

mind. It is not just the mindset of the acting alter that needs to be taken into consideration, which is why the court needs to implement “team language” in cases with DID defendants.

The ultimate goal of DID treatment is not necessarily to become one single personality again.²⁶⁶ There is a degree of integration necessary to deal with the initial trauma that caused the dissociation, and for the alters to communicate with each other in order for the legal person to function appropriately.²⁶⁷ Sometimes treatment appears as “group or family therapy for a single individual.”²⁶⁸

However, just because someone still has multiple personalities does not mean there is complete unawareness, lack of control, or lack of communication.²⁶⁹ A defendant can be mostly integrated in how they feel emotions, react to situations, make decisions and act on those decisions, and still have multiple personalities.²⁷⁰ The court does need to evaluate the intent of the acting alter, in addition to the personality structure, the system of rules from which they operate, and therefore, the criminal responsibility of the group as a whole.

If courts continue to use the specific alter, host, and unified approaches, they are ignoring many important factors in the DID analysis. Using “team language” regarding identities changes the jury’s perception of a DID defendant and allows for an easier transition from a black-and-white understanding to the middle gray area we find with multiples that can be so difficult to understand.

Courts can get a deeper understanding of the third level of the multiple’s “self” by looking at their level of integration, understanding and awareness of each other, communication with other, and ability to take control of the body. This third level of understanding is consistent with a “team” approach when trying to evaluate the defendant’s alters. By using terms like “team,” “group,” “them,” “together,” or “as a whole,” the court can see the bigger picture instead of focusing on a single alter or a single host. This change in language and perception will obtain more accurate results in support of criminal goals of punishment and rehabilitation.

²⁶⁶ *Cooperation, Integration, and Fusion*, *supra* note 264.

²⁶⁷ *Id.*

²⁶⁸ Loewenstein, *supra* note 7, at 192.

²⁶⁹ *Cooperation, Integration, and Fusion*, *supra* note 264.

²⁷⁰ *Id.*

3. Evidentiary Support

Looking to New Zealand's discussion in *R v. Hamblyn*, the only evidence submitted that the host was separate, unaware, and insane at the time of the offenses were two interview videos where she appeared to be "extremely articulate, clever and manipulative."²⁷¹ The only proof that the host had no memory or knowledge of the offenses was simply her statements to the psychiatrists that she did not remember committing the offenses.²⁷² Although the specific alter approach was ultimately adopted, the defendant's lack of evidence was specifically discussed, suggesting that if she were able to support certain declarations with evidence that the court may have allowed a different result.²⁷³

Consistent with existing punitive theories of criminal responsibility, "the defendant bears the burden of proving insanity by a preponderance of the evidence."²⁷⁴ However, courts are not in agreement on what should or should not be admitted into evidence when it comes to DID defendants.²⁷⁵

"[E]ven the courts that have found that DID can be the basis for an insanity defense are in agreement that a DID diagnosis, without more, is insufficient."²⁷⁶ A forensic determination should be made based on the totality of the data including comprehensive review of psychiatric, medical, social service, prison records, educational records, police reports, deposition and witness testimony, forensic laboratory data, extended and repeated periods of observation and evaluation, and psychological assessments.²⁷⁷

Over the years, several courts have admitted expert testimony about DID.²⁷⁸ This is essential to objectively establish the existence of the disorder in a defendant, evaluate for malingering, and investigate the personality structure within the multiple to explain the intricacies of DID symptoms and their relation to the nature and degree of awareness and control within the individual.²⁷⁹ Because DID is not congenital, nor the residual effect of

²⁷¹ Dawkins, *supra* note 2, at 561.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ Crego, *supra* note 5, at 919.

²⁷⁵ See generally *State v. Greene*, 960 P.2d 980 (Wash. 1998); *State v. Halcomb*, 510 N.W.2d 344, 351 (Neb. Ct. App. 1993).

²⁷⁶ *State v. Lockhart*, 542 S.E.2d 443, 454 (W. Va. 2000).

²⁷⁷ Loewenstein, *supra* note 7, at 204.

²⁷⁸ Crego, *supra* note 5, at 925.

²⁷⁹ Armstrong, *supra* note 99, at 221.

another disease, experts should be able to find reliable evidence that the disorder exists within the individual.²⁸⁰

In order to establish the existence of DID in a defendant, the psychiatrist should meet with the defendant on several occasions, beginning with a structured diagnostic interview or SCID-D-R.²⁸¹ This type of interview assesses the frequency, nature, and severity of the five core dissociative symptoms in the DSM: amnesia, depersonalization, derealization, identity confusion, and identity alteration.²⁸² It has proven effective in distinguishing between patients with different dissociative disorders, patients with other psychiatric disorders, and attempts at malingering.²⁸³ This is a semi-structured interview which has proven more effective than other unstructured or highly structured equivalents, and does not include hypnosis, leading questions, or other standardized instruments which knowingly create inaccuracies in evaluation.²⁸⁴ The SCID-D-R specifies the structure of the interview and the progression of questions, utilizing standardized clinical questions that are nonleading, that proceed from general to specific, offering a reliable scoring method for quantifying symptom severity, while allowing for individualized follow-up questions based on a patient's answers.²⁸⁵ Many studies prove the effectiveness of diagnosing DID is within the same range as diagnosing schizophrenia, major depressive episode, substance abuse, and other accepted Axis I disorders.²⁸⁶

The evaluating psychiatrist should also use the Multidimensional Inventory of Dissociation (MID), which measures an individual's dissociative symptoms on multiple scales.²⁸⁷ This diagnostic aid is a self-administered test that requires a follow-up interview with the

²⁸⁰ Hindley, *supra* note 61 at 983.

²⁸¹ Armstrong, *supra* note 99, at 222.

²⁸² Marlene Steinberg et al., *Recognizing the Validity of Dissociative Symptoms Using the SCID-D-R: Guidelines for Clinical and Forensic Evaluations*, 10 C. CAL. INTERDISC. L.J. 225, 227 (2001).

²⁸³ *Id.* at 229.

²⁸⁴ *Id.* at 234-35; Armstrong, *supra* note 99, at 222.

²⁸⁵ Steinberg et al., *supra* note 282, at 227-28.

²⁸⁶ Ross, *supra* note 24, at 224-25 (201 adult psychiatric inpatients, excluding those with prior dissociative disorder diagnoses, for blind interviews by multiple individuals to prove an acceptable diagnostic range; study of 20 patients with DID, 20 patients with panic disorder, 20 patients with eating disorders, and 20 patients with schizophrenia were given structured interviews to find 18 out of 20 DID patients were correctly diagnosed and no other patients were incorrectly diagnosed with DID.)

²⁸⁷ Dell, *An Interpretive Manual*, *supra* note 9, at 10.

psychiatrist to score and interpret correctly.²⁸⁸ The advantage of using the MID is that it measures all twenty-three empirically documented dissociative symptoms on seventy-four scales, as opposed to just the five mentioned in the DSM and corresponding SCID-D-R.²⁸⁹ This evaluates an individual's dissociation broadly and deeply, in order to get a picture of all three levels of "self."²⁹⁰

Malingering is "the act of feigning disability or illness, usually to avoid some undesired obligations or to achieve some real or imagined personal benefit."²⁹¹ Malingers tend to only report one or two different identities and will concentrate more on their legal troubles during these interviews.²⁹² True multiples will likely try to hide their symptoms because the purpose of the personalities is to protect the individual.²⁹³ They may even behave in self-defeating ways that can undermine their defense.²⁹⁴ To remove the factor of malingering, it is best for the expert to evaluate the defendant more than once for consistency of symptoms.²⁹⁵

The expert must also establish consistency in their symptoms of amnesia.²⁹⁶ The interviewer must repeat information that has been discussed in detail to observe the patient's patience in response from alter to alter to determine if there are amnesic barriers and which personalities have amnesic barriers.²⁹⁷ If performed properly, these periods of evaluation and observation can be accurate enough even to determine that a defendant has a legitimate diagnosis of DID but is also exaggerating certain symptoms to benefit their defense.²⁹⁸

Additionally, the MID validity scale assesses the most common response biases:

- Defensiveness/Minimization: denial or minimization of symptoms
- Rare Symptoms: bizarre and unlikely symptoms

²⁸⁸ *Id.* at 5-6.

²⁸⁹ *Id.* at 7.

²⁹⁰ *Id.* (The MID has correctly diagnosed 87-93% of DID cases.).

²⁹¹ Smythe, *supra* note 63, at 186.

²⁹² *Id.* at 186-87.

²⁹³ *Id.* at 187.

²⁹⁴ Loewenstein, *supra* note 7, at 204.

²⁹⁵ Armstrong, *supra* note 99, at 222.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ Loewenstein, *supra* note 7, at 213, 216 ("In my assessment, Ms. Neely was shown to be cold, calculating, manipulative, self-centered, criminal human being with an unexpected amount of control over her behavior, including control over symptoms of her disorder.").

- Emotional Suffering: negative emotional reactivity
- Attention-seeking: too-ready disclosure and/or overemphasis of symptoms
- Factitious Behavior: exaggeration of frank malingering of symptoms, trauma, and abuse
- Manipulativeness: covert strategies to meet emotional needs.”²⁹⁹

Although “[d]issociative symptoms are overwhelmingly internal and subjective,”³⁰⁰ there can be observable symptoms that should be recorded by the evaluating expert that signify “switching” including eye rolling, bursts of blinking, and sudden changes in rapport.³⁰¹ Several prior psychiatric diagnoses, especially Bipolar I, Bipolar II, and Borderline Personality Disorder, can serve as objective evidence of untreated and undiagnosed dissociative symptoms.³⁰² If the defendant has received treatment for DID prior to the crime, this is important to understanding the personality structure.³⁰³ “The capacity for control of dissociative and posttraumatic symptoms improves with appropriate treatment that emphasizes coordination, collaboration, and cooperation among self-states and teaches techniques for managing dissociative and posttraumatic symptoms.”³⁰⁴

From there, one should look for objective evidence of abuse and dissociation from before the criminal act. This includes school, medical, and social service records from the defendant’s childhood, and interviews with people who have observed the individual’s behavior over time.³⁰⁵ It is likely that such individuals will not know the defendant had multiple personalities, but that they have observed rapid personality shifts, trance states, and amnesia in the individual.³⁰⁶ Though there is a heavier weight of evidence from disinterested parties, those individuals closest to the defendant can provide information that the defendant themselves might not even be aware of.³⁰⁷

²⁹⁹ Dell, *An Interpretive Manual*, *supra* note 9, at 30.

³⁰⁰ *Id.* at 11.

³⁰¹ Armstrong, *supra* note 99, at 222.

³⁰² Dell, *An Interpretive Manual*, *supra* note 9, at 8.

³⁰³ Armstrong, *supra* note 99, at 223.

³⁰⁴ Loewenstein, *supra* note 7, at 217.

³⁰⁵ *Id.* at 209. *See also* Smythe, *supra* note 63, at 186 (True multiples “are much more likely to have long histories of prior unsuccessful medical treatment or therapy.”).

³⁰⁶ Armstrong, *supra* note 99, at 209.

³⁰⁷ *Id.* at 221-22.

Many of these defendants will be undiagnosed and may intentionally try to conceal their personalities to protect themselves.³⁰⁸ This makes personal testimony an important factor that should be taken into consideration along with medical interviews and other objective evidence.³⁰⁹

In *State v. Halcomb*, the court decided that “statements provided voluntarily by any of the defendant’s various alters were admissible against the entire body.”³¹⁰ This, like the diagnostic interview, detailed self-assessment, objective pre-crime records, observable symptoms, and testimony by those who know the defendant, should be a factor used in the evaluating process. Statements made by the alters should not be used simply to condemn a defendant but should be taken into consideration in exploring the personality structure. It is important to know if the alters making the statements are trustworthy, what the alters know about each other, and what motives they may have within their system. It is important to understand the relationships between the identities and if they know other identities exist within their system.

F. Conclusion

In assigning criminal responsibility to an individual, the court aims to support goals of criminal punishment and spare the innocent. All three existing approaches to assigning criminal responsibility to defendants with DID fail to do this. All three existing approaches further misunderstandings about the disorder. All three existing approaches operate out of a black-and-white view, when DID fundamentally is not black or white. Multiple distinct individuals acting with different beliefs, desires, and agendas, in one shared body, is much more than just yes or no, black or white, guilty or innocent.

We do take a few agreed tenets from historical attempts to evaluate DID defendants: (1) only one person is on trial; (2) the issue relates to that person’s state of mind as affected or characterized by specific symptoms of dissociation; and (3) the point of assessment is the time of commission of the offense.

This new “team approach” is designed to bridge the gap between society’s binary perception and the chaos within a multiple to appropriately assign criminal responsibility to defendants with DID. It begins with experts

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ Crego, *supra* note 5, at 925.

and jury instructions implementing a new vernacular in the criminal court regarding multiples. It must be clear that the original personality is the legal person. Alters are created out of trauma and are distinct individuals from the original personality.

Often the original personality is gone for long periods of time and certain alters have a majority of the control. These alters are called “mains” and they can change over time. In each case the alters have varying levels of awareness, consciousness, memory, identity, and communication between one another.

The court must make it clear to juries that they are evaluating the entirety of the individual’s personality structure, analyzing all three levels of “self,” but they are assigning criminal responsibility only to the original personality, the legal person.

Criminal cases with DID defendants automatically weigh heavily towards a rehabilitative solution based on public policy, actual costs, and a high probability and measurable success of treatment effecting actual change and healing for defendants. But this decision of acquitting a defendant under an insanity defense relies on whether the disorder actually contributed to the crimes.

The alters are individual actors, but they are simultaneously symptoms of the legal person’s dissociation. The jury is to evaluate expert evidence, diagnostic interviews, objective records in the defendant’s past, and personal testimony (including that of the alters) to determine whether the criminal act stemmed from a symptom of dissociation which rendered the legal person unable to understand the quality and nature of the actions at the time of the crime, or whether the criminal act stemmed from an intentional act of one or more individual agents working together in a system. The court’s perception should be adjusted to view the multiple as a group of individuals, with the capabilities to work as a team to function within the legal person’s body, in order to simplify inevitable complexities within a multiple and grant each defendant understanding, and a fair trial.