

**Sex offender commitments and the “inability-to-control”: Developing legal standards and a behavioral vocabulary for an elusive concept.**

**By: Eric S. Janus\***

**I. INTRODUCTION**

For the past 60 years, courts have asserted that the use of “preventive detention” is safely limited to a small group of persons with a particular form of “mental disorder” – an “inability-to-control” their dangerous impulses. In its 1997 *Hendricks*<sup>1</sup> decision, the U.S. Supreme Court re-confirmed the vitality of this limit, repeatedly emphasizing inability-to-control as the central factor that supported the constitutionality of Kansas’ Sexually Violent Predator commitment law.

Yet there is good evidence that the “inability-to-control” concept lacks substance. Not one court has offered a useful definition of the concept in the sex offender commitment context. Commentators have for years criticized the concept, arguing that it has no empirical, observable foundation, and is based on unstructured

---

\* The author served as co-counsel in extended litigation challenging Minnesota's sex offender commitment statutes. Thanks to Bernard Nodzon for his assistance in preparing this manuscript. This chapter will appear, in slightly modified form, in *THE SEXUAL PREDATOR, VOL. II* (Schlank and Cohen, Eds).

<sup>1</sup> *Kansas v. Hendricks*, 521 U.S. 346 (1997).

moral guesswork.<sup>2</sup> Philosophers have long argued about what it means to say that a given person could – or could not – have acted otherwise than she did.<sup>3</sup>

The problematic nature of the inability-to-control concept means that it cannot function very effectively as a constitutional limit on civil commitment. In practice, the concept is used in a conclusory manner. Its vagueness is a sure sign that courts are unable – or more likely, unwilling – to assert clear legal standards for commitment.

The purpose of this chapter is to provide some tools and vocabulary for talking about “inability-to-control” more precisely. If courts articulate their inability-to-control standards with some clarity, there will be less arbitrariness and more accountability in sex offender commitments. Two kinds of clarity are required. First, the concept needs anchoring in the law. We must determine what features inability-to-control must display in order to perform its constitutional role in validating sex offender commitment laws. Second, it must be anchored in the real world. When a mental health professional assesses an individual for inability-to-control, what sorts of things should he or she look for? What sort of judgments must be made? And what can we learn from the literature about how sex offenders fit into the definition of inability-to-control?

What we will learn is that many, perhaps most, sex offenders might sensibly be said to exhibit *some* form of inability-to-control their behavior. After all, these are

---

<sup>2</sup> See Richard J. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 196 (1983).

<sup>3</sup> See LAURA WADDELL EKSTROM, *FREE WILL: A PHILOSOPHICAL STUDY* 21 (2000).

offenders who have repeatedly *failed* to conform their conduct to important social norms. But if the inability-to-control concept is to perform its constitutional role, it will be a significantly narrower concept, and will exclude the vast majority of sex offenders.

## II. THE LEGAL CONTEXT

When courts hold sex offender commitments to be constitutional, they almost always allude – more or less directly – to the concept of inability-to-control. Thus, it seems clear that inability-to-control, in some form, is part of the constitutional underpinnings for sex offender commitments. It is somewhat more difficult to tease out the constitutional reasons for this central role.

*Hendricks* is the most authoritative statement of the role of inability-to-control. In *Hendricks*, the United States Supreme Court upheld the constitutionality of the Kansas sexually violent persons commitment law. In doing so, the justices alluded repeatedly to inability-to-control. In a typical reference, the majority opinion states that the Kansas law is constitutional because it requires a “mental disorder” that “narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.”<sup>4</sup> In another key passage, the court alludes to “the existence of a ‘mental abnormality’ or ‘personality disorder’ that makes it difficult, if not impossible, for the person to control his dangerous behavior.”<sup>5</sup>

---

<sup>4</sup> *Hendricks*, 521 U.S. at 358.

<sup>5</sup> *Id.*

In *Hubbart v. Superior Court*,<sup>6</sup> the California Supreme Court specifically noted that the California commitment law requires proof of an “inability” to control dangerous behavior, and, for that reason, is consistent with *Hendricks*:

The statute then “links that finding [of dangerousness]” to a currently diagnosed mental disorder characterized by the inability-to-control dangerous sexual behavior. (*Hendricks*, . . . 521 U.S. 346, 358.) This formula permissibly circumscribes the class of persons eligible for commitment under the Act.<sup>7</sup>

The Minnesota Supreme Court has taken varied approaches to inability-to-control. In 1939, the court held that the state’s sex offender commitment law statute could be applied only to those who exhibited “utter lack of power to control” their sexual behaviors.<sup>8</sup> On review of *Pearson*, the supreme court held that allowing commitments for less severe conditions, “might render [the Act] of doubtful validity.”<sup>9</sup>

In 1994, when the Minnesota Supreme Court was again called on to pass on the constitutionality of this statute, it reaffirmed the vitality of the *Pearson* “utter lack of power to control” test, calling the condition a “volitional dysfunction which grossly

---

<sup>6</sup> 969 P.2d 584 (Cal. 1999)

<sup>7</sup> *Id.* at 597 (emphasis added).

<sup>8</sup> *See Minnesota ex rel Pearson v. Probate Court of Ramsey County*, 205 Minn. 545, 555, 297 N.W. 297, 302 (1939).

<sup>9</sup> *Minnesota ex rel Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 274 (1940).

impairs judgment and behavior with respect to the sex drive.”<sup>10</sup> In its 1999 *Linehan* decision, the Minnesota Court acknowledged that *Hendricks* established inability-to-control as a constitutional hallmark for sex offender commitment laws, but held that the only showing required was a demonstration of “inadequate control.”<sup>11</sup>

The Washington Supreme Court described the typical subject for sex offender commitments using the language of compulsion and attempts to control behavior.<sup>12</sup> Most recently, the Kansas Supreme Court reversed a commitment on the grounds that the trial judge had failed to instruct the jury that “inability-to-control” was a constitutional pre-requisite for commitment.<sup>13</sup>

The “inability-to-control” rubric has shaped the law of police power confinements for nearly 60 years.<sup>14</sup> For example, when Congress adopted a sex

---

<sup>10</sup> *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994), *cert. denied*, 513 U.S. 849 (1994).

<sup>11</sup> *In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999).

<sup>12</sup> *In re Young*, 857 P.2d 989, 1002 (Wash. 1993).

<sup>13</sup> *In re Crane*, No. 82,080, 2000 WL 966703, at \*6 (Kan. July 14, 2000).

<sup>14</sup> The weight of academic scholarship confirms the *Pearson* limits are constitutionally based. *See Developments in the Law: Civil Commitment*, 87 HARV. L. REV. 1190, 1233-34 (1974) (stating “police power commitment standards would appear to be unconstitutionally overbroad unless mental illness is interpreted to mean a condition which induces substantially diminished criminal responsibility”); Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL’Y & L. 161, 181 (1995) (noting commitment for “social control” is justified only for mental illnesses

offender commitment law in 1948, it carefully crafted the law to reflect the inability-to-control test of *Pearson*.<sup>15</sup> Despite the long history of reliance on inability-to-control in the constitutional analysis, courts have almost never provided any guidance on what the concept means and how inability-to-control is to be assessed. It is common for courts to rely on conclusory professional testimony, and on testimony about past criminal behaviors, without explaining either the behavioral or legal theories underlying their findings.<sup>16</sup> Without substantially greater clarity, the inability-to-control test is too vague to provide any real limits on sex offender commitments. This leaves the constitutionality

---

“undermining the capacity to direct . . . conduct within the constraints of . . . criminal justice system); Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 3 PSYCHOL. PUB. POL’Y & L. 534, 538 (1995) (declaring “for the purpose of commitment to a psychiatric hospital, a condition must be capable of so impairing functioning that the individual is unable to engage in rational decision making or to control his or her behavior”); ALLEN E. BUCHANAN & DAN. W. BROCK, *DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING* 329 (1989) (stating “If the dangerous mentally ill are justifiably [involuntarily committed], it must be because they are not capable of responsibly controlling their behavior that is dangerous to others as required by criminal prohibitions....[T]he requirement should be understood to be that persons' mental illness causes them to be both dangerous to others and not in control of nor thus responsible for their dangerous behavior as required under the criminal law.”).

<sup>15</sup> See S. REP. NO. 1377, at 6 (1948) (restricting commitment to those who are dangerous “because of their lack of power to control their sexual impulses”).

<sup>16</sup> See Eric S. Janus, *Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules-in-Use*, 8 STAN. L. & POL’Y REV. 71, 71-74 (1997).

of commitment laws in doubt. As Justice Kennedy warned in his *Hendricks* concurrence:

[I]f it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.<sup>17</sup>

### III. **CRITERIA FOR A LEGAL STANDARD FOR INABILITY-TO-CONTROL**

In this section, I set out criteria that any legal standard for inability-to-control should meet.

#### A. **The inability-to-control judgment must be grounded on observation.**

Inability-to-control is a construct which is, at least arguably, based on two negatives: that a person has no ability to refrain from (not do) certain actions. It is a commonplace that proving a “negative” is difficult, and like all similar concepts, inability-to-control must be ascertained by inference – it cannot be directly observed. Nonetheless, the judgment about inability-to-control must be grounded on observations. These may be of two sorts. Some may be observations of behavior (or reports of behavior), and others may psychological facts, ascertained through interview and testing of the sort normally relied upon by mental health professionals.

---

<sup>17</sup> Kansas v. Hendricks, 521 U.S. 346, 373 (1997).

**B. The standard contains a normative component.**

Certain sets of observations will support the conclusion that the person lacks the ability to control his or her actions. But the conclusion is not a simple *factual* inference; it also includes a *normative* or value judgment. An example will demonstrate the difference. If we observe a person perform a certain task – say balance her checkbook – we are entitled to conclude that she has the ability to balance a checkbook. “Ability” is a construct, but it can be inferred directly from observed behavior. A judgment of “inability” is similar in one way: it too must be inferred from observation. A key observation in this inference will be information about how hard the person *tried* at the task before *giving up*. If she tried “hard enough,” then we conclude that she *couldn't* (lacked the capacity) rather than simply wouldn't. Note that the judgment about what level of effort is “enough” is a normative or value judgment. Note, as well, that the judgment of incapacity is essentially a judgment of excuse. The normative judgment has to do with how hard we expect a person to try before we will excuse her non-performance as beyond her control, and thus not her fault.<sup>18</sup>

The complexity of the incapacity judgment means that its multiple strands must be teased apart in the legal context. This is necessary so that decisions that are essentially normative are not delegated *sub rosa* to mental health professionals. Thus, a valid definition of inability-to-control should specify the inference rules that mental health

---

<sup>18</sup> See Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1588 (1994).

professionals use, and should distinguish fact-based judgments from the normative or moral judgments that inform the incapacity characterization.

**C. The standard must grow out of the role that inability-to-control plays in the constitutional justification of sex offender commitments.**

The discussion in the prior two sections focused on producing a judgment about incapacity that is based on facts, clearly articulated inference rules, and distinctly stated moral or normative judgments. In addition, of course, the judgment of inability-to-control must meet the legal standards required by the Constitution.

As mentioned above, ascertaining the legal standards for inability-to-control is problematic because the courts have avoided any substantive discussion of the legal theory underlying inability-to-control. My reading of the cases, and of commentary on the cases, suggests that an inability-to-control standard must meet two criteria to perform its requisite constitutional role.<sup>19</sup>

First, it must *narrow* the class of persons eligible for civil commitment. Courts have made clear that civil commitment is not – and must not become – the primary means of dealing with antisocial behavior. That role is reserved for the criminal justice system. As the Minnesota Supreme Court put it:

Substantive due process forecloses the substitution of preventive detention schemes for the criminal justice system, and the judiciary has a

---

<sup>19</sup> Eric S. Janus, *Foreshadowing The Future of Kansas v. Hendricks: Lessons from Minnesota's Sex Offender Commitment Litigation*, 92 NW. U. L. REV. 1279, 1288 (1998).

constitutional duty to intervene before civil commitment becomes the norm and criminal prosecution the exception.<sup>20</sup>

Further, of the two constitutional pillars for civil commitment (mental disorder and dangerousness), it is clearly the mental disorder element that must serve this narrowing function. Since criminal activity by definition poses a danger, it is only the mental disorder element that can narrow the civil commitment group. In *Hendricks*, the United States Supreme Court emphasized this role for mental disorder:

The precommitment requirement of a "mental abnormality" or "personality disorder" is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.<sup>21</sup>

Note that this “narrowing” criterion does not help explain why any *particular* group (say mentally disordered dangerous people) is eligible for commitment. Its function is to insure that only a small group can get committed. To the extent that a given definition of inability-to-control would allow the commitment of a large group of dangerous persons, then that definition would fail this constitutional test.

How narrow should the commitment category be in order to meet constitutional muster? As a beginning benchmark, courts can look at the actual practice of states with sex offender commitment laws. In these states, commitments range between 1% and

---

<sup>20</sup> *In re Linehan*, 557 N.W.2d 171, 181 (Minn. 1996).

<sup>21</sup> *Hendricks*, 521 U.S. at 358.

6% of released sex offenders.<sup>22</sup> Thus, as a rough guide, definitions of inability-to-control that would apply to more than 6% of sex offenders would exceed the narrowing function that marks the *de facto* outer limit of civil commitment in the United States.

Second, the definition of inability-to-control must serve to *justify* civil commitment.<sup>23</sup> That is, the inability-to-control definition must provide the explanation for why the commitment group can be civilly committed, whereas the vast majority of others – including others who are similarly dangerous – cannot be. The Supreme Court has twice alluded to this role for the mental disorder element. In *Hendricks*, the Court said:

This admitted lack of volitional control, coupled with a prediction of future dangerousness, *adequately distinguishes* Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.<sup>24</sup>

---

<sup>22</sup> See Eric S. Janus & Nancy Walbek, *Sex Offender Commitments in Minnesota: A Descriptive Study of Second Generation Commitments*, 18 BEHAV. SCI. & L. 343, 348 (2000); Samuel Jan Brakel & James L. Cavanaugh, *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N. M. L. REV. 69, 81 (2000)

<sup>23</sup> See Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 161, 169 (1995); Robert F. Schopp & Barbara J. Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAV. SCI. & L. 437, 445 (1995).

<sup>24</sup> *Hendricks*, 521 U.S. at 360.

And in *Foucha*, the Court struck down the state's use of civil commitment, in part because:

the State does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct.<sup>25</sup>

The identification of a “justifying” element of inability-to-control is the most difficult aspect of the analysis. Essentially, the mental disorder element must support an explanation for treating the commitment group differently from non-mentally-disordered (but equally dangerous) persons who may not constitutionally be locked up for preventive detention. What kind of “mental disorder” justifies taking away rights which people without that disorder have as a matter of course?

Two distinct approaches can tie the notion of mental disorder to a justification for civil commitment. I call them the principle of “criminal interstitiality” and the “jurisprudence of difference.”<sup>26</sup>

Under the principle of criminal interstitiality, civil commitment is justified as a tool to address antisocial violence to the extent that it addresses violence that is unreachable by the criminal law. In this context, this means violence which is *excused*

---

<sup>25</sup> *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992).

<sup>26</sup> See Eric S. Janus, *Toward a Conceptual Framework for Assessing Police Power Commitment Legislation: A Critique of Schopp's and Winick's Explications of Legal Mental Illness*, 76 NEB. L. REV. 1, 35 (1997); Eric S. Janus, *Hendricks and the Moral Terrain Of Police Power Civil Commitment*, 4 PSYCHOL. PUB. POL'Y & L. 297, 313 (1998).

because the actor has a serious mental illness. This violence is “interstitial” to the criminal system – it falls into an area that the state cannot reach through the criminal law. The state’s interest in self-defense is enough to justify the state in using an alternate system to address the violence. Thus, one constitutional standard for inability-to-control would be the standard for criminal non-responsibility. Some jurisdictions incorporate a “volitional standard” for criminal excuse; others do not, and rely instead on a “cognitive” standard. In any event, under this theory, only those individuals whose inability-to-control would excuse them from liability for their sexual crimes would meet the constitutional standards for commitment. Note that this standard also is congruent with the “narrowing” criterion, in that it retains the primary position in the social control effort for the criminal law. It is not irrelevant to note that most of the men who have been committed as sex offenders have been held liable for their criminal behavior, and would thus not qualify under such a standard for commitment.<sup>27</sup>

The second possible way to connect mental disorder with a constitutional justification for civil commitment rests on the assignment of a degraded civil status to a class of persons who are “different” in some critical way from the norm. We are accustomed, for example, to according “incompetent” people a different (and diminished) set of civil rights – they are often deprived, for example, of the right to make their own decisions about important life events. To the extent that inability-to-control is a marker for a similar sort of status – one that results in a diminished civic personhood – then the diminished set of rights accorded to the targets of civil commitment might be

---

<sup>27</sup> See, e.g., Janus & Walbeck, *supra* note 22, at 350.

justifiable. For example, “free will” is thought to be an essential characteristic of human personhood. To the extent that inability-to-control and “free will” are viewed as incompatible ascriptions, then inability-to-control would mark diminished personhood. Baumeister et al. place self-regulation at the center of the notion of “self.”<sup>28</sup> “No cognitive, motivational, emotional, or behavioral theory about the self can pretend to be complete without addressing the issue of self-regulation.”<sup>29</sup> Similarly, Eshete characterizes “freedom” in the philosophical sense as “self-mastery.”<sup>30</sup> Thus, a serious dysfunction of the capacity for self-control marks a serious defect in the moral self, and thus may justify diminished status for the individual.

Or, to think about it another way, if a person lacks the capacity to control his antisocial behavior, one can say that his essence is “dangerousness” – it flows inexorably from who he is, rather than being the result of personal choice or environmental conditions. But an individual whose essence is “dangerousness” is different in kind from the norm – which we assume to entail choice, and hence responsibility, for evil actions.<sup>31</sup>

---

<sup>28</sup> ROY F. BAUMEISTER ET AL, *LOSING CONTROL: HOW AND WHY PEOPLE FAIL AT SELF-REGULATION* 6 (1994).

<sup>29</sup> *Id.*

<sup>30</sup> *See* Andreas Eshete, *Character, Virtue and Freedom*, 57 *PHILOSOPHY* 495, 497 (1982).

<sup>31</sup> *See generally* SHARON LAMB, *THE TROUBLE WITH BLAME: VICTIMS, PERPETRATORS, & RESPONSIBILITY* (Harvard University Press 1996).

In sum, inability-to-control will meet one of the justificatory criteria if it either excuses the actor from criminal liability, or places him or her in a status of degraded personhood. Clearly, both of these are normative judgments, which need to be made based on standards articulated by courts of law.

#### IV. DISTINGUISHING AND DISCARDING CONCEPTS

In order to propose a typology of inability-to-control, I want to distinguish and discard several ideas about inability-to-control that are either inapplicable or unhelpful in our context. We can then move on with greater clarity to a usable definition of the concept.

First, there are several types of behavior that are beyond the control of the individual in trivial ways that ought not to interest us in this discussion. Thus, the kind of behavior that is the subject of sex offender commitments is not accidental or “automatic” (like sleepwalking). Nor does it, like a blink, involve a reflexive response to an external stimulus.<sup>32</sup> Nor is it “involuntary” like laughter, anger, shame, and fear.<sup>33</sup> Rather, it is clearly under the conscious control of the individual, and, more to the point, is intentional action by the person.<sup>34</sup> If inability-to-control is to have any applicability to our legal

---

<sup>32</sup> See Gene M. Heyman, *Resolving the Contradictions of Addiction*, 19 BEHAVIORAL AND BRAIN SCIENCES 561, 561 (1996).

<sup>33</sup> See STEVEN PINKER, *HOW THE MIND WORKS* 546 (W.W. Norton & Co. 1997); Robert M. Adams, *Involuntary Sins*, XCIV THE PHILOSOPHICAL REVIEW 3, no. 1 at 3 (1985).

<sup>34</sup> See Morse, *supra* note 18, at 1588.

context, then it must refer to actions that are not simply reflexive or automatic. As I shall develop below, I believe that the most fruitful way of talking about inability-to-control is as an impairment of the individual's ability to regulate his or her own behavior.

Next, I want to discard three concepts which, though commonly used especially in legal contexts, are unclear and confusing. Since we can discuss inability-to-control without using these concepts, we ought to avoid their use. First, I propose that we discard the notion "volition" and not focus on "volitional dysfunction."<sup>35</sup> "Volition" is a confused concept with no agreed-upon meaning. To some, it refers to the psychological function that "executes" the person's intention or choice. Morse shows clearly that in most cases where we want to say that a person lacks control, that function is unimpaired.<sup>36</sup> That is, the person does, indeed, execute what he or she intends or chooses. Alternatively, "volition" may be a synonym for "intention," in which case it again has little or no applicability to our interest, since all sexual offending is certainly "intentional."<sup>37</sup> Finally, some authorities define "volition" as "the capacity to

---

<sup>35</sup> Cf. *In re* Blodgett, 510 N.W.2d 910, 915 (Minn. 1994), *cert. denied*, 513 U.S. 849 (1994); *In re* Crane, No. 82,080, 2000 WL 966703, at \*6 (Kan. July 14, 2000).

<sup>36</sup> Morse, *supra* note 18, at 1617.

<sup>37</sup> See, e.g., GEORGE MACDONALD FRASER, *FLASHMAN AT THE CHARGE* (1990), in which narrator Colonel Harry Flashman writes of the run-up to the great Charge of the Light Brigade: "suddenly, without the slightest volition on my part, there was the most crashing discharge of wind, like the report of a mortar... 'Can you not contain yourself, you disgusting fellow?' [ says

exercise choice or will”<sup>38</sup> or the “act or the power of making a choice, or decision; will.”<sup>39</sup> This, in turn, might refer to two separate ideas: the person’s ability to “choose otherwise,” which is a complicated concept that adds no clarity to the discussion (see below); or the notion of strength of will, or willpower. This is a more useful concept, understandable to all from everyday usage. Instead of using the opaque term “volition,” we ought to speak directly about the sort of strength we call “willpower.” I discuss this concept below.

Second, we should not use the concept of “caused behavior” as a defining characteristic of inability-to-control. This concept is often confused for inability-to-control. It is assumed that if certain behavior is “caused” by a given psychological condition, that the person had no “control” over the behavior. But this approach proves too much. All human behavior is “caused,” but we nonetheless insist that humans have control over their behavior, at least in general. It may be that we will want to say that certain kinds of “caused” behavior evidence inability-to-control – for example if it is “caused” by a particular kind of mental disorder. But then the real work will be done by our characterization of the mental disorder, not by the attribution of “causation.”

---

Cardigan].” To which Flashman replies: “My lord, I cannot help it – it is the feverish wind, you see.” *Id.* at 102.

<sup>38</sup> *In re Crane*, 2000 WL 966703, at \*6.

<sup>39</sup> George S. Howard & Christine G. Conway, *Can There be an Empirical Science of Volitional Action?*, AMERICAN PSYCHOLOGIST, November 1986, at 1241, 1242.

And just as being “caused” does not make behavior beyond an individual’s control, so too being “caused” by a mental disorder does not *ipso facto* justify that ascription:<sup>40</sup>

[T]he fact that an individual’s presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual’s degree of control over the behaviors that may be associated with the disorder. Even when diminished control over one’s behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.<sup>41</sup>

The American Psychiatric Association’s Task Force on the Use of Psychiatric Diagnoses in the Legal Process emphasizes the disconnect between mental disorder and the inability to control behavior:

It is rare for mental disorders to be associated with incapacities which obviate the possibility that the patient can make more than one behavioral response to a situation. Because some element of choice (however difficult that choice may be) is usually present, it is rarely correct to talk about behavioral symptoms as “involuntary” or “beyond the patient’s control.”<sup>42</sup>

Finally, we need to address, at least briefly, the concept of “could not have done otherwise.” It is often said that a person did not have the ability to control her

---

<sup>40</sup> Further, the notion that given behavior is “caused” by a mental disorder is itself an extremely problematic conclusion to draw. *See, e.g.,* Virginia Adige Hiday, *Understanding the Connection Between Mental Illness and Violence*, 20 INT’L J.L. & PSYCHIATRY 399, 412 (1997).

<sup>41</sup> *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxiii (4th ed. 1994).

<sup>42</sup> Seymour L. Halleck, M.D., et al., *The Use of Psychiatric Diagnoses in the Legal Process: Task Force Report of the American Psychiatric Association*, 20 BULL. AM. ACAD. PSYCHIATRY LAW 481, 493 (1992).

behavior unless she could have behaved otherwise than she did.<sup>43</sup> The concept of “ability to act otherwise” is just as opaque as the inability-to-control concept, has essentially the same meaning and adds no clarity to any discussion. It should not be used in any discussion of inability-to-control that is attempting to gain clarity.

Nonetheless, the phrase can offer an insight into the kind of evidence that supports the inability-to-control judgment. Whenever we make an inability-to-control judgment, we make it within a set of “givens,” what might be called “auxiliary assumptions.”

To understand this, recall the famous story of Martin Luther: “Here I stand,” Luther said. “I can do no other.”<sup>44</sup> Of course, this is not a situation in which anyone would conclude that Luther could not control his behavior. Quite the opposite – he was in perfect control of his behavior. Nonetheless, we are prepared to credit Luther’s own account that he could not have chosen otherwise.

This seeming paradox – we hold that Luther could control his behavior even though he could not have chosen otherwise than he did – reflects shifting auxiliary assumptions. The premise that Luther was in control of his behavior – was exercising free will – reflects our judgment that people are responsible for (have the ability to shape) their personalities and character. The statement that he could not do otherwise, on the other hand, reflects a narrowing of context. We are saying that *given his*

---

<sup>43</sup> See EKSTROM, *supra* note 3, at 21.

<sup>44</sup> DANIEL C. DENNETT, *ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING* 133 (1983).

*personality, values and beliefs*, Luther could not have chosen otherwise. Thus, the judgment of whether a person “could have chosen otherwise” will depend on what the auxiliary assumptions are – how large the context for the decision is. I will discuss this further below.

## V. A PRIMER ON SELF-REGULATION

Before proposing a typology of inability-to-control, it will be useful to set out two underlying concepts about self-regulation.

### 1. Parallel and complex processes

Human beings are complex organisms who have parallel psychological processes occurring. Although we tend to talk as if a “person” has only one “self,” it is clear, both from our subjective experience and from the perspective of psychologists, that we harbor parallel and often competing processes.<sup>45</sup> As Pinker puts it: “Self-control is unmistakably a tactical battle between parts of the mind.”<sup>46</sup> Thus, one part of a person may “want” to engage in sexually inappropriate behavior, while another part “wants” to avoid it.

### 2. Hierarchy of processes

Note that we use different language depending on which of these wants prevails. If the avoidance impulse wins, then we say that the person was able to “control” or regulate his sexual impulse. On the other hand, if the sexual impulse wins, we

---

<sup>45</sup> BAUMEISTER, *supra* note 28, at 7.

<sup>46</sup> PINKER, *supra* note 33, at 419.

characterize this as a failure of self-control; we rarely say that the person successfully controlled his impulse to act responsibly. This suggests that we rank the parallel and competing processes in a hierarchy. Inherent in the discourse of inability-to-control is the notion that certain desires are “higher” than others.<sup>47</sup>

Thus, when we talk about regulating or controlling ourselves, what we mean is that the “higher” processes prevail over the lower.<sup>48</sup> This explains how we can say that a person is “unable” to regulate her own behavior despite the fact that it is her brain, and in fact, her mind, that is sending electrical signals (brain) and intentions (mind) to her limbs.

In the limited space of this chapter, I do not intend to explore the nature of this hierarchy of values.<sup>49</sup> It may be that this notion has deep philosophical roots,<sup>50</sup> or that the valuing of certain kinds of processes over others is an arbitrary social construct, or that it is adaptive in some evolutionary sense and hence a part of the “normal” or “natural” psychology of humans.<sup>51</sup> All I am asserting here is that the question of ability

---

<sup>47</sup> Charles S. Carver and Michael F. Scheier, *Principles of Self-Regulation: Action and Emotion*, in 2 HANDBOOK OF MOTIVATION AND COGNITION: FOUNDATIONS OF SOCIAL BEHAVIOR 12 (Richard M. Sorrentino & E. Troy Higgins eds., 1996).

<sup>48</sup> BAUMEISTER, *supra* note 28, at 8.

<sup>49</sup> *See generally* Morse, *supra* note 18.

<sup>50</sup> Eshete, *supra* note 30, at 498 (arguing that “The condition for the possibility of self-mastery is to be found in the ordering of desires.”).

<sup>51</sup> BAUMEISTER, *supra* note 28, at 7.

to control oneself appears to have to do with the individual's ability to govern or regulate his or her behavior according to "higher" processes.

## VI. A PROPOSED TYPOLOGY OF INABILITY-TO-CONTROL

Having set this background, I now propose a typology of inability-to-control. I suggest that we mean one of three things when we say that a person lacked the ability to control his or her behavior. The first two of the types arise out of the existence of parallel and competing processes within the person, and for that reason I refer to them as "bifurcated self" theories of inability-to-control.

*Type I incapacity, the "strong urges" paradigm*, focuses on the strength of the uncontrolled impulse, and posits that it is so strong that it could not be resisted. This type is akin to the "irresistible impulse" concept that has, in the past, influenced criminal excuse theory<sup>52</sup> and also characterized outdated psychoanalytic models of the sex offender.<sup>53</sup>

*Type II incapacity, the impaired self-regulation model*, focuses on the person's skills and strength of self-regulation, and posits that this self-regulatory capacity is inadequate to control the impulse.

Types I and II are, in one sense, simply two different perspectives on the same phenomenon. The meanings they convey, however, differ in these three important ways:

---

<sup>52</sup> See Judith A. Morse & Gregory K. Thoreson, *United States v. Lyons: Abolishing the Volitional Prong of the Insanity Defense*, 60 NOTRE DAME L. REV. 177 (1984).

<sup>53</sup> See, *infra* note 58.

First, there is a suggestion that the portion of the process that each focuses on is deficient or abnormal or disordered. Thus, in the irresistible impulse model, it is posited that even a person of normal ability could not resist the abnormally strong impulse, while in the self-regulatory deficiency model, there is no necessary suggestion that the impulse is abnormally strong. Second, the type I category, but not type II, is generally discussed as if it referred to an “objective” standard – the point of reference is the “normal” capacity to resist, not the particular individual’s. Third, type I (irresistible impulse) carries with it a stronger cache of excuse, in part because of the “objective” connotation, but also because we tend to think of impulses as arising involuntarily, whereas we tend to hold people responsible for the level of proficiency at self-regulation that they have developed in their lifetimes.<sup>54</sup> Thus, whether a person’s failure to control gets characterized as a strong impulse or weak control mechanism depends, I suggest, a great deal on whether we are prepared to excuse his or her behavior.

*Type III inability-to-control* is a unified self theory, which I call character or personality based inability-to-control. On this theory, the person’s behavior is so central to his or her character or personality that we are prepared to say that he or she could not have acted differently. But as the discussion of the Martin Luther example above shows, this is a very problematic formulation, because it applies to many of the actions of normal people.

---

<sup>54</sup> See BAUMEISTER, *supra* note 28, at 6. *But see* LAMB, *supra* note 31, at 92 on holding people responsible for their emotions.

A modified approach to this theory would apply the ascription of inability-to-control only where the individual's personality or constitution is somehow abnormal. Some older theories of criminality, for example, viewed criminal behavior as inevitably arising from certain types of (abnormal) personalities.<sup>55</sup>

But "mental disorder" *as a general category* is not sufficient to ascribe inability-to-control to the individual. Psychiatrically, "mental disorder" is not a concept that entails a loss of ability to control.<sup>56</sup> Nor does "mental disorder" automatically provide an excuse for criminal behavior.<sup>57</sup> Further, even though research now suggests that aggressive behavior has a significant degree of heritability, "other factors such as choice and volition are more important in explaining behavior" and "we must allow for the salient ability of humans, as compared to other species, to shape and choose their environments – in effect to use free will – in order to cope with and compensate for the pre-existing vulnerabilities."<sup>58</sup>

---

<sup>55</sup> See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 124 (Norton 1981) (referring to Lambroso's theory that "born criminals cannot escape their inherited taint").

<sup>56</sup> See AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 165 (4th ed. 1994).

<sup>57</sup> Abraham Rudnick & Amihay Levy, *Personality Disorders and Criminal Responsibility: A Second Opinion*, 17 *INT'L J.L. & PSYCHIATRY* 409, 411 (1994); Stephen Rachlin et al., *The Volitional Rule, Personality Disorders and the Insanity Defense*, 14 *PSYCHIATRIC ANNALS* 139, 140 (1984).

<sup>58</sup> David Goldman & Diana H. Fishbein, *Genetic Bases for Impulsive and Antisocial Behaviors – Can their Course Be Altered?* in *THE SCIENCE*,

“Mental disorders” are not, however, irrelevant to the determination of inability-to-control. A mental disorder may involve impairments of the various capacities that help a person exercise self-regulation. It is at that *functional* level that our attention should be directed.

## VII. APPLICATION TO SEX OFFENDERS

In this section of the chapter, I explore in somewhat more detail how each of the types might apply to sex offenders. I begin with the important caveat that sexual offending, and sex offenders, are heterogeneous.<sup>59</sup> Further, although some researchers propose typologies for sexual offenders,<sup>60</sup> there is no claim that all individuals who exhibit some characteristics of a category share all of them. Thus, ascriptions of

---

TREATMENT AND PREVENTION OF ANTISOCIAL BEHAVIORS CIVIC RESEARCH INSTITUTE, 9-1, 9-13 (Diana H. Fishbein ed., 2000).

<sup>59</sup> See Robert A. Prentky & Raymond A. Knight, *Classifying Sexual Offenders: The Development and Corroboration of Taxonomic Models*, in THE HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER 27, 27-28 (W.L. Marshall et al. eds., 1990) [hereinafter Prentky & Knight]; Robert A. Prentky & Raymond A. Knight, *Identifying Critical Dimensions for Discriminating Among Rapists*, 59 J. OF CONSULTING AND CLINICAL PSYCHOL. 643, 643 (1991) [hereinafter Prentky & Knight, *Identifying*].

<sup>60</sup> See generally Prentky & Knight, *supra* note 58 (surveying both offender and nonoffender sexual aggression research for evidence about which dimensions should be included in multivariate models that attempt to discriminate rapists from nonrapists); Stephen M. Hudson et al., *Offense Pathways in Sexual Offenders*, 14 J. OF INTERPERSONAL VIOLENCE 779 (1999) [hereinafter Hudson et al.] (classifying sexual offenders into three major pathways of offenses).

inability-to-control for an individual offender ought not to be made based on diagnostic or descriptive category membership, but rather based on individualized observation of that individual.

**A. Strong impulses**

In what is perhaps the most stereotypical view of sexual violence, the offender is seen as driven by strong and ultimately uncontrollable sexual urges.<sup>61</sup> Thorne and Haupt, writing in 1966, described rapists as characterized by the “standard psychoanalytic interpretation of high sex drive repressed from consciousness by strong Super Ego and resulting in episodes of failure of impulse control associated with intense conflict and guilt.”<sup>62</sup> The Washington Supreme Court, described the sex offenders who are subject to civil commitment using similar language:

[They experience] recurrent, repetitive, and compulsive urges and fantasies to commit rapes. These offenders attempt to control their urges, but the urges eventually become so strong that they act upon them, commit rapes, and then feel guilty afterwards with a temporary reduction of urges, only to have the cycle repeat again. This [is a] cycle

---

<sup>61</sup> See Diana Scully & Joseph Marolla, *Convicted Rapists' Vocabulary of Motive: Excuses and Justifications*, 31 SOCIAL PROBLEMS 530, 530 (1984) (criticizing the characterization, since 1925, of “irresistible impulse” and “disease of the mind” as the causes of rape).

<sup>62</sup> Frederick C. Thorne & T.D. Haupt, *The Objective Measurement of Sex Attitudes and Behavior in Adult Males*, 22 JOURNAL OF CLINICAL PSYCHOLOGY, 395, 402 (1966).

of ongoing urges, attempts to control them, breakdown of those attempts, and recurrence of the sex crime.<sup>63</sup>

In a similar vein, Brooks characterizes the proper subjects of civil commitment as limited to sex offenders exhibiting “uncontrollable pathological rape.” “[A] rapist selected for civil commitment,” he argued, “should have a recurrent, compulsive urge and a pathological need to repetitively carry out psychologically driven rape.”<sup>64</sup>

This paradigm describes at best only one type of sexual offending; other types of offending are inconsistent with this description. Several researchers have attempted to produce typologies of sex offenders. These typologies help to put the notion of strong sexual urges in perspective. Knight identifies four primary motivations for sexual offending: opportunity, pervasive anger, sexual gratification, and vindictiveness.<sup>65</sup> These motivations “appear to be related to enduring behavioral patterns that distinguish particular groups of offenders.”<sup>66</sup> Only one of the types relates to sexual urges, although two of the others relate to other sorts of impulses (anger and vindictiveness). In the fourth type, “opportunity,” “the sexual assaults appear to be impulsive predatory

---

<sup>63</sup> *In re Young*, 857 P.2d 989, 1002 (Wash. 1993) (emphasis added).

<sup>64</sup> Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. Puget. Sound L. Rev. 709, 732 (1992).

<sup>65</sup> See Raymond A. Knight, *Validation of a Typology for Rapists*, 14 J. OF INTERPERSONAL VIOLENCE 303, 311 (1999) [hereinafter Knight].

<sup>66</sup> *Id.*

acts that are controlled more by situational and contextual factors...than by sexual fantasy or explicit anger at women.”<sup>67</sup>

Similarly, Prentky differentiates between offending characterized by “lifestyle impulsivity” and offending involving “frequent uncontrollable sexual urges, preoccupation with gratification of sexual needs, multiple paraphilias, a high sexual drive, obsessional thinking about sex, and detailed offense planning.”<sup>68</sup> He points out that the former (“lifestyle impulsivity”) is highly correlated with antisocial behavior and recidivism, and that the second is “less clearly associated with reoffense risk.”<sup>69</sup>

Berlin draws the same distinction, between child molesters who act out of “aberrant sexual drive” and those who act “because of a generally antisocial attitudes or because of malicious disregard for the well-being of others.”<sup>70</sup>

Hudson et al. develop a typology of sex offenders that includes types that are inconsistent with the strong urges paradigm.<sup>71</sup> Hudson et al. distinguish between

---

<sup>67</sup> *Id.*

<sup>68</sup> *See* Letter from Robert Prentky, Massachusetts Treatment Center, to Eric S. Janus, Professor of Law at William Mitchell College of Law (undated) (on file with author).

<sup>69</sup> *Id.*

<sup>70</sup> *See* Fred S. Berlin, *Special Considerations in the Psychiatric Evaluation of Sexual Offenders Against Minors* (on file with author).

<sup>71</sup> *See* Hudson et al., *supra* note 60, at 793.

“appetitively driven” offense pathways and “impaired-regulation” models of offending.<sup>72</sup> The most frequent type they describe does not fit into the strong urges paradigm because it involves a positive attitude towards offending, includes explicit decisions to offend, arises out of a basically happy affective state, and, after the offense, concludes with a commitment (to self) to continue the offending behavior. This description does not fit with the typical “strong urges” model because there is no growing internal pressure to act, no attempts to control, and no regret or feeling bad afterwards. Rather than representing an impaired ability to control behavior, this pathway, in Hudson et al.’s description, represents an example of “expert” or skilled performance.<sup>73</sup>

In contrast, the second most common pathway in Hudson et al.’s study is more consistent with the strong urges paradigm. It arises out of negative affect (feeling bad), covert planning (rather than explicit planning), negative evaluation of the offending behavior, and resolve not to offend in the future.

Paraphilia, in the Diagnostic and Statistical Manual of Mental Disorders (hereinafter DSM-IV) definition, is characterized by recurrent, intense sexually arousing fantasies, sexual urges, or behaviors...[that] cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.<sup>74</sup> As Schneider and Irons note, this definition accommodates intense “urges,” but could be

---

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 41, at 523.

satisfied by “intense behaviors” as well, and says nothing about failed attempts to control the urges.<sup>75</sup> Closer to the mark of the stereotypical model is “impulse control disorder” whose essential feature Schneider and Irons interpret as “the failure to resist an impulse, drive, or temptation to perform an act that is harmful to the person or to others.”<sup>76</sup> The DSM-IV requires that “[t]he individual feels an increasing sense of tension or arousal before committing the act and then experiences pleasure, gratification, or relief associated with the activity.”<sup>77</sup> Schneider and Irons add: “Following the sexual acting out, there may or may not be regret, self-reproach, or guilt.”<sup>78</sup> Note that nothing in the DSM-IV definition of Impulse Control Disorder requires a finding of “inability,” rather than simply “failure,” to control.

Even more central to the stereotypical model is the notion of “sexual addiction.” Addiction is generally held to be characterized by three central features. Schneider describes the “key elements of any addictive disorder as loss of control, continuation despite adverse consequences, and preoccupation or obsession.”<sup>79</sup> Sexual offending

---

<sup>75</sup> Jennifer Schneider & Richard Irons, *Differential Diagnosis of Addictive Sexual Disorders Using the DSM-IV*, 3 SEXUAL ADDICTION & COMPULSIVITY 7, 10 (1996).

<sup>76</sup> *Id.*

<sup>77</sup> See AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 41, at 523.

<sup>78</sup> Schneider & Irons, *supra* note 75, at 10.

<sup>79</sup> See *id* at 16.

is sometimes compared to or characterized as an addictive process.<sup>80</sup> In fact, the classic definition of addiction sounds very much like the strong urges paradigm of sexual offending referred to above, and commonly is thought to involve a loss of control over behavior.<sup>81</sup> It is also thought to involve intense urges that the addict is “unable” to control or resist. Heyman points out that addiction is described in diagnostic manuals as “‘out of control’ or ‘compulsive’.”<sup>82</sup> In the context of drug use, he writes, these phrases mean

that drug use persists despite a wide array of ensuing legal, medical, and social problems; and that after periods of abstinence, however long, addicts relapse. In other words, according to authoritative clinical opinion, addiction is not simply frequent drug use, it is loss of control over drug use.<sup>83</sup>

Ivey and Simpson assessed the “subjective meaning of child abuse from the perpetrators’ perspective.”<sup>84</sup> They say that pedophiles are “obsessed by sexual fantasies about children and feel compelled to engage in opportunity-seeking and risk-

---

<sup>80</sup> Judith Lewis Herman, *Sex Offenders: A Feminist Perspective*, in THE HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, & TREATMENT OF THE OFFENDER 177, 184 (W.L Marshall et al., eds., 1990).

<sup>81</sup> *See id.* at 185.

<sup>82</sup> *See* Gene M. Heyman, *Resolving the Contradictions of Addiction*, 19 BEHAV. & BRAIN SCIENCES 561, 561 (1996).

<sup>83</sup> *Id.*

<sup>84</sup> Gavin Ivey & Peta Simpson, *The Psychological Life of Paedeophiles: A Phenomenological Study*, 28 S. AFR. J. PSYCHOL 15, 15 (1998).

taking behavior in order to fulfill their compulsive desire to sexual contact with children.”<sup>85</sup> They describe pedophilic behavior as having an “addictive quality” characterized by unsuccessful “attempts to curb” the pedophilic behavior.<sup>86</sup> Carnes asserts that “a prototypical case of the incestuous father” involves “sexual addiction.”<sup>87</sup> He asserts (though without citation of research support) that “many abusers are sex addicts.”<sup>88</sup> He describes the “sexual addict” as “no longer able to manage or control” his “sick relationship to sexual behavior.”<sup>89</sup> “The individual is [] drawn into an addictive cycle of sexual preoccupation, ritualization, compulsiveness, and despair that is self-perpetuating and eventually takes over the person’s life.”<sup>90</sup>

How shall we evaluate a claim that a particular person’s sexual urges are so strong that he or she “could not control” them? Of course, this inquiry must start with an examination of the subjective or phenomenological experiences of the offender. Relevant evidence is how strongly the urge or compulsion is felt and how hard the offender tried to resist.

---

<sup>85</sup> *Id.* at 17.

<sup>86</sup> *Id.* at 19.

<sup>87</sup> Patrick J. Carnes, *Sexual Addiction*, in *THE INCEST PERPETRATOR: A FAMILY MEMBER NO ONE WANTS TO TREAT* 126, 126-27 (Anne L. Horton et al. eds., 1990).

<sup>88</sup> *Id.* at 127

<sup>89</sup> *Id.* at 128.

<sup>90</sup> *Id.* at 129.

But for two main reasons, these subjective reports can only be the beginning. First, there are credibility issues.<sup>91</sup> Offenders may be expected to shape their reports of these subjective data to serve their own interests. But here is a paradoxical twist. The normal “bias” in self-reporting is to minimize responsibility by disclaiming the ability to control. In their study of convicted rapists, for example, Scully and Marolla found that 83% of their subjects viewed themselves as “nonrapists”. More than half of those, while admitting their involvement, “explained themselves and their acts by appealing to forces beyond their control, forces which reduced their capacity to act rationally and thus compelled them to rape.”<sup>92</sup>

Second, we must make a judgment about whether the urge should be characterized *as a constitutional matter* as one that the individual “could not” have resisted. When it comes to sexual offending, commentators are uniformly dubious about characterizing sexual impulses as “irresistible.” They point out that other people resist similar impulses, or that this individual resists at some times.<sup>93</sup> This sort of analysis

---

<sup>91</sup> See Hudson et al., *supra* note 60, at 782.

<sup>92</sup> See Scully & Marolla, *supra* note 61, at 541-42. See also BAUMEISTER, *supra* note 28, at 232 (stating “the perpetrators of violence may prefer to describe their aggressive impulses as strong than to describe themselves as weak”); LAMB, *supra* note 31, at 65 (noting “the legal system encourages people to describe violent impulses as uncontrollable, because more lenient penalties are used ...”).

<sup>93</sup> LAMB, *supra* note 31, at 67-69.

emphasizes the “objective” view of uncontrollability.<sup>94</sup> Further, commentators point out that the behavior in question is, after all, under the control of the individual. As Baumeister et al. put it with respect to the unsuccessful dieter: “Someone may claim that she cannot control her eating, but do her jaws really move up and down to chew the food against her will?”.<sup>95</sup> But this point is a bit unfair – no one claims that acting according to a very strong impulse is somehow automatic or not under the intentional control of the individual. Much more to the point is the third response, put forth by Baumeister, et al., that acquiescence is a central feature of failure to resist strong impulses.

Although it is very difficult to obtain decisive empirical data regarding the issue of acquiescence, we suspect that acquiescence is the norm, not the exception. It is rare that human behavior is the result of inner forces that the person is entirely helpless to stop or control.<sup>96</sup>

Popular concepts of self-regulation failure depict people becoming overwhelmed by irresistible impulses that they are powerless to control....A more accurate view may be that people do feel that their strength is depleted and their capacity overwhelmed, and so they decide

---

<sup>94</sup> See BAUMEISTER, *supra* note 28, at 232 (stating “If, as we have suggested, that belief is objectively false – in other words, if violence can indeed usually be controlled and overridden – then people must allow themselves to be carried away by such impulses in order to act on them”).

<sup>95</sup> *Id.* at 134.

<sup>96</sup> *Id.* at 30.

to give up trying to control themselves. Then they go on and take an active role in indulging their impulses.<sup>97</sup>

Of course, the mere fact that there is acquiescence does not mean that the inability-to-control ascription is inapposite. Rather, as argued above, the presence of acquiescence simply highlights what I have written above: the inability-to-control judgment is a heavily normative or moral judgment. Baumeister et al. remind us that resisting strong urges and impulses takes strength; one must “try,” must exert effort. A person might be

merely tired, rather than fully exhausted, and in such circumstances, the person may choose to allow self-regulation to fail, because the tiredness makes the exertion of self-control that much more unappealing. The person does not wish to put forth the effort that would be required for successful self-regulation.<sup>98</sup>

The question presented here, then, is: how much effort do we expect a person to exert before we say that his violent and abusive acts were beyond his control? Morse makes a similar, though not identical argument: he frames the question as how much pain we expect a person to endure before we judge their “giving in” as beyond their control.<sup>99</sup> The answer, clearly, is that we expect people to exert maximum effort to avoid sexual violence. It seems clear that *any acquiescence* by an individual ought to negate the inability-to-control ascription when the impulse in question leads to sexual violence. As Baumeister et al. conclude: there is “abundant evidence that self-regulatory failure is

---

<sup>97</sup> *Id.* at 247.

<sup>98</sup> *Id.* at 30.

<sup>99</sup> *See Morse, supra* note 18, at 1588.

something that people actively acquiesce in, and that therefore should not excuse violent, addictive, delinquent, or other socially undesirable actions.”<sup>100</sup>

Heyman, writing in the context of drug addiction, makes an argument about addiction that is, at its core, similar: addiction is a preference rather than a disease. He refers to the “long-standing debate whether addiction is best classified as an involuntary state, for example, a disease, or a voluntary state, that is, a preference.”<sup>101</sup> Advocates of a disease model of addiction characterize it as involuntary: “The loss of control signifies a victim state that reflects an alteration of brain function by alcohol or drugs that is not under the conscious volitional control of the individual.”<sup>102</sup>

Heyman disputes the disease theory, concluding that “the behaviors that comprise addiction are voluntary even though their net consequences are aversive.”<sup>103</sup> He argues that addictive behaviors result from “bookkeeping schemes” – i.e., choice mechanisms – that operate at a more local rather than overall level.<sup>104</sup> As the contingencies and consequences change, so too does the relative effectiveness of local

---

<sup>100</sup> See BAUMEISTER, *supra* note 28, at 251.

<sup>101</sup> See Gene M. Heyman, *Resolving the Contradictions of Addiction*, 19 BEHAV. & BRAIN SCIENCES 561, 562 (1996).

<sup>102</sup> See *id.* at 565 (quoting N. Miller & J. Chappel, *History of the Disease Concept*, 21 PSYCHIATRIC ANNALS 196, 197 (1991)).

<sup>103</sup> *Id.* at 574.

<sup>104</sup> *Id.* at 571.

versus overall “value functions.”<sup>105</sup> He concludes: “the idea that addiction is a choice, albeit a less than optimal one, implies that addicts should be helped to make better decisions and not excused as helpless victims of a disease.”<sup>106</sup> Addictive is best understood not as “involuntary” disease-like behavior, but rather the consequence of an individual’s preferences or choices, made according to a value calculus that is local rather than “overall.”

Heyman’s view of addictive behavior is consistent with that of a number of sexual violence researchers. For example, Herman puts forth an addiction model of sexual violence, stating “one can not assume that [a sex offender] has any reliable internal motivation for change. The offender may have lost effective control of his behavior . . . .”<sup>107</sup> But she states that offenders have not lost “moral and legal responsibility” for their behavior, and emphasizes that “both compulsive and opportunistic offenders are keenly sensitive to external controls” such as “vigorous enforcement of existing criminal laws.”<sup>108</sup>

Marshall’s view is in accord:

It is our view that sexual offenders are not suffering from any disease and that their behavior is not out of their control . . . . In fact, it is clear from an

---

105 *Id.*

106 *Id.* at 573.

107 Herman, *supra* note 80, at 185.

108 *Id.* at 188.

examination of the behavior of these men that their offending is very well controlled.<sup>109</sup>

Pithers, as well, agrees:

Offenders are informed that urges do not control behavior. Rather, giving in to an urge is an active decision, an intentional choice for which he is responsible.<sup>110</sup>

Should courts make the moral or normative judgment that sexual abuse that fits the “strong urges” paradigm is properly described as “beyond the control” of the individual? Baumeister et al. warn against this conclusion, arguing that it is imperative that people be

exhorted to regard their behavior as controllable whenever possible. If the view prevails that self-regulation failure is something that happens to an individual and excuses his or her subsequent behavior, then gradually the culture itself will come a context that supports – and in a powerful sense encourages – such failures.<sup>111</sup>

Lamb, writing specifically in the context of sexual and domestic abuse, argues that “men’s lack of control over their sex drive” is “the dominant discourse of sexuality

---

<sup>109</sup> W.L. Marshall *et al.*, *Present Status and Future Directions*, in HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, & TREATMENT OF THE OFFENDER 389, 391 (W.L. Marshall et al. eds., 1990).

<sup>110</sup> William D. Pithers, *Relapse Prevention with Sexual Aggressors: A Method for Maintaining Therapeutic Gain and Enhancing External Supervision*, in HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, & TREATMENT OF THE OFFENDER 343, 345 (W.L. Marshall et al., eds., 1990).

<sup>111</sup> BAUMEISTER, *supra* note 28, at 251.

widely believed and accepted in our culture.”<sup>112</sup> “This vision of male sexuality makes it appear as if choice is overwhelmed by urge.”<sup>113</sup> She warns against this view: “We as onlookers collude in this transformation to passivity when we begin to see the perpetrator as object rather than subject of his acts.”<sup>114</sup> As Scully and Marolla argue, the “irresistible impulse” model of rape “has contributed to the vocabulary of motive that rapists use to excuse and justify their behavior.”<sup>115</sup>

### **B. Impaired self-regulation model**

A second model for inability-to-control focuses on the process by which human beings regulate their own behavior. Incapacity describes deficits in the self-regulatory process, rather than the “irresistible” strength of urges or impulses. The study of self-regulation is well developed and provides a vocabulary for describing and assessing deficits in self-control. The most common approach to sex offender treatment, the relapse-prevention cognitive-behavioral approach, makes use of self-regulation concepts, and a number of researchers are applying a more extensive self-regulation model to sexual offending in general.<sup>116</sup>

---

<sup>112</sup> LAMB, *supra* note 31, at 76.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 78.

<sup>115</sup> Scully & Marolla, *supra* note 61, at 542.

<sup>116</sup> *See* Hudson et al., *supra* note 60, at 794.

## 1. The self-regulation model

“Self-regulation,” a term akin to “self-control,” is “any effort by a human being to alter its own responses.”<sup>117</sup> “Self-regulation prevents [the] normal or natural response from occurring, and substitutes another response (or lack of response) in its place.”<sup>118</sup> Humans have “multiple processes or levels of action,”<sup>119</sup> which operate simultaneously or in parallel.<sup>120</sup> Self-regulation results in one process “overriding” another – and thus assumes that these parallel processes are in competition with each other.<sup>121</sup> The concept of self-regulation assumes a hierarchy among the multiple processes. Self-regulation occurs when a “higher” process overrides a “lower” one. “When the reverse happens, it is *failure* of self-regulation.”<sup>122</sup> “Higher” processes involve “longer time spans, more extensive networks of meaningful associations and interpretations, and more distal or abstract goals.”<sup>123</sup> Thus, the concept of self-regulation entails a normative component, a differential valuing of the multiple processes of the human being. There is no assumption that the “lower” processes are not

---

<sup>117</sup> BAUMEISTER, *supra* note 28, at 7.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 8.

<sup>121</sup> *See id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

intentional or controlled by the individual. Rather, they are the “normal or natural” responses of the person and thus will be exhibited in the absence of the “effort” at self-control.<sup>124</sup>

The self-regulatory model posits three important ingredients for self-regulation: First, the individual must have standards, “abstract concepts of how things should be.”<sup>125</sup> “When standards are unclear, ambiguous, lacking, or conflicting, self-regulation will be less effective.”<sup>126</sup> Second, there must be a mechanism for monitoring.<sup>127</sup> People must “pay attention to what they are doing.”<sup>128</sup> Third, people must have some way of “operating on themselves in order to bring about the desired changes or responses.”<sup>129</sup> Competition among potential responses is an important feature of the model, and people may experience this competition as an “inner conflict.”<sup>130</sup>

There are three areas in which self-regulation can fail: First, “there can be a problem with knowing the standards, a problem with monitoring the self, or a problem

---

<sup>124</sup> *See id.* at 7.

<sup>125</sup> *Id.* at 9.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

with making the self conform to them.”<sup>131</sup> Baumeister et. al. add that “[e]mpirical evidence supports the view that self-regulation is severely hampered by conflicting standards.”<sup>132</sup> A second prominent cause of self-regulation failure is ineffective self-monitoring,<sup>133</sup> which may produce behavior that reflects “impulses and feelings that would normally be held in check.”<sup>134</sup> Lastly, alcohol or drug use reduces self-awareness, the “essence of the monitoring function,” and thus result in self-regulation failure.<sup>135</sup>

Self-regulation involves a concept of strength that is akin to the “commonsense concept of willpower.”<sup>136</sup> It is not simply that the “stronger” of two competing processes wins. Rather, this sort of strength “involves both mental and physical exertion.”<sup>137</sup> A person may lack the requisite strength in several different ways. He or she may be “chronically weak,” with an underdeveloped self-regulatory capacity. Such a person should be able to strengthen this capacity over time.<sup>138</sup> Second, a person may

---

131 *Id.* at 14.

132 *Id.* at 15.

133 *Id.*

134 *Id.* at 16.

135 *Id.* at 17.

136 *Id.*

137 *Id.*

138 *Id.* at 19.

be exhausted because he or she has had to confront stressful or demanding circumstances.<sup>139</sup> Finally, as discussed above, the impulse to be controlled may be so strong that even a person of normal strength could not resist it.<sup>140</sup>

## 2. Self-regulation and sexual offending

Ward and Hudson use a theory of self-regulation in the context of sexual offending.<sup>141</sup> They identify three styles of “dysfunctional self-regulation” in the context of sexual offending. First, an individual may simply fail to regulate his behavior, referred to as under-regulation.<sup>142</sup> Second, he or she may *misregulate* – choose strategies of regulation that “backfire and ultimately result in a loss of control.”<sup>143</sup> The third style, in contrast, involves *effective* self-regulation. It is the individual’s choice of goals and “associated values and beliefs” that lead to sexual aggression, rather than a failure of self-regulation.<sup>144</sup>

Ward and Hudson trace the sequence of events that can lead to sexual offending. The sequence usually begins with some event in the person’s life that triggers

---

139 *Id.*

140 *See id.* at 20.

141 Tony Ward & Stephen M. Hudson, *A Self-Regulation Model of Relapse Prevention*, in REMAKING RELAPSE PREVENTION WITH SEX OFFENDERS: A SOURCEBOOK 79, 80 (Richard D. Laws et al., eds., 2000).

142 *Id.* at 84.

143 *Id.*

144 *Id.*

“the emergence of a desire for offensive sex or maladaptive activities and emotions associated with these desires.”<sup>145</sup> Note that the “impulse” which is triggered need not be a “sexual” urge. It could be “happiness, curiosity, sexual arousal, anxiety, and anger.”<sup>146</sup>

From this point, Ward and Hudson identify four main patterns of sexual offending. The “avoidant-passive pathway is characterized by both the desire to avoid sexual offending and the failure to actively attempt to prevent this from happening.”<sup>147</sup> This involves under-regulation. These individuals attempt to manage their desire for abusive sex through “denial or simple and ineffective attempts to distract themselves.”<sup>148</sup>

The “avoidance-active” pathway involves an active attempt to avoid sexual offending.<sup>149</sup> However, the techniques used by the individual are ineffective and paradoxically “increase the probability of an offense occurring.”<sup>150</sup> These individuals “possess the ability to plan, monitor, and evaluate their behavior, but lack knowledge concerning the likely effectiveness of the coping response selected.”<sup>151</sup>

---

<sup>145</sup> *Id.* at 88.

<sup>146</sup> *Id.* at 89.

<sup>147</sup> *Id.* at 91.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 92.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

The “approach-automatic” pathway involves behavior that “is relatively impulsive and only planned in a rudimentary way; it is basically a mirror image of the avoidant-passive relapse process in that the goals and the associated strategies are unlikely to be under attentional control and are activated by situational features.”<sup>152</sup> The fourth pathway is called “approach-explicit” and involves “conscious, explicit planning and well crafted strategies that result in a sexual offense.”<sup>153</sup> This pathway involves competent self-regulation but “inappropriate, harmful” goals, standards and attitudes.<sup>154</sup>

In both of the “approach” pathways, part of what leads to harmful self-regulation is inappropriate standards for behavior. In their study of rapists, Scully and Marolla found that a significant portion of the men sought to *justify* their sexual violence. The researchers concluded that “convicted rapists have learned the attitudes and actions consistent with sexual aggression against women.”<sup>155</sup> These men raped “because their value system provided no compelling reason not to do so. When sex is viewed as a male entitlement, rape is no longer seen as criminal.”<sup>156</sup>

Ward and Hudson discuss the mechanisms by which self-regulation fails. Though the level of discussion is more detailed than can be discussed here, it is

---

152 *Id.*

153 *Id.*

154 *Id.* at 93.

155 Scully & Marolla, *supra* note 61, at 530.

156 *Id.* at 542.

worthwhile to note a bit about what they say for the lessons it teaches. For example, they give the following description for one specific pathway to reoffending:

Offenders who are following the avoidant-passive pathway will be struggling with conflicting goals at this point. The contact, or anticipated contact, with a victim will activate goals linked to offending behavior, and they are likely to be experiencing increasing sexual arousal. The offender may attempt to disguise his real intentions, probably through a narrowing of attention or a movement down to a lower level of behavioral control, probably the program level. The result of control at this more concrete level is that behavior is more automatic and "mindless" and likely to reflect well-rehearsed or habitual sequences of action. The functional autonomy of control at this level means that self-evaluative processes are effectively disengaged.<sup>157</sup>

The points to be made here are that it is possible to take apart or deconstruct the processes of sexual offending and identify their component parts. Second, having done so, the aspects of behavior that impeded self-regulation can be identified. Here, for example, it is the well-rehearsed and "automatic" or "mindless"<sup>158</sup> nature of the behavior, coupled with the disengagement of the self-evaluative functioning that contributes to the failure of self-regulation. Finally, this kind of deconstruction helps

---

<sup>157</sup> Ward and Hudson, *supra* note 141, at 94.

<sup>158</sup> Hudson uses the term "automatic" to refer to well-"scripted" sequences of behavior. Charles S. Carver and Michael F. Scheier point out that even such "automatic" behaviors are under the control of the individual. See Charles S. Carver & Michael F. Scheier, *Principles of Self-Regulation: Action and Emotion*, in 2 HANDBOOK OF MOTIVATION AND COGNITION: FOUNDATIONS OF SOCIAL BEHAVIOR, 1, 10 (TORY HIGGINS & RICHARD M. SORRENTINO EDS., 1990).

expose the legal question, which is whether this form of self-regulation failure meets the constitutional requirements for civil commitment.

Ward and Hudson go on to discuss the abstinence violation effect (AVE). This is the reaction that some persons experience when they are trying to refrain from some undesirable behavior (abusive sex, drinking, etc.), but commit a “lapse,” some step that places them closer to relapse. Hudson et al. point out that if the offender identifies a factor that is internal, such as lack of willpower or weak personality, as the cause for the lapse, “there is little reason to expend energy and he is, therefore, more likely to relapse and offend sexually.”<sup>159</sup> Baumeister et al., make the same point:

if the person attributes the lapse to internal, stable, and global factors that are perceived to be uncontrollable (e.g., there is a lack of willpower or the person has a disease), then the probability of relapse is heightened. The person perceives that there is little reason to continue trying to control what is uncontrollable, or the person concludes that he does not have the necessary skills to control behavior.<sup>160</sup>

One of the consequences of the AVE is that individuals “give up attempting to control their behavior.” (Self-regulation model)

One of the major ways in which some sex offenders’ self-control is impaired is their impulsivity. Knight and Prentky identify one of the four main motivations for rape as “opportunistic” in which “the sexual assault appears to be an impulsive, typically unplanned, predatory act, controlled more by contextual and immediately antecedent

---

<sup>159</sup> Hudson et al., *supra* note 60, at 78.

<sup>160</sup> BAUMEISTER, *supra* note 28, at 141.

factors than by any obvious protracted or stylized sexual fantasy.”<sup>161</sup> Knight and Prentky’s measure for stable, trait-like impulsivity – lifestyle impulsivity – is highly predictive of sexual reoffense.<sup>162</sup> They point out that this construct is related to the DSM-IV Antisocial Personality Disorder and Hare’s Checklist of Psychopathy.<sup>163</sup> It is defined as a “pervasive and enduring pattern of poor impulse control and irresponsible behavior.”<sup>164</sup>

3. Do deficits in self-regulation meet the constitutional standard for inability-to-control?

To meet constitutional standard, an individual’s inability-to-control must satisfy two criteria. First, the inability-to-control must be of the sort that is applicable only to a *narrow* segment of people whose dangerousness might qualify them for civil commitment. Second, the inability-to-control must *justify* the use of civil commitment, “adequately distinguish[ing] [the individual] from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.”<sup>165</sup>

As a general matter, the kinds of self-regulatory failure that characterize sexual offending do not narrow the group eligible for civil commitment, and do not provide a

---

<sup>161</sup> Prentky & Knight, *supra* note 59, at 44.

<sup>162</sup> Prentky & Knight, *Identifying*, *supra* note 59, at 649.

<sup>163</sup> *See id.* at 648.

<sup>164</sup> *Id.*

<sup>165</sup> *Hendricks* 521 U.S. at 360 (emphasis added).

means of distinguishing sex offenders from the great mass of other criminals. In fact, the impulsivity that marks many sex offenders is the hallmark of general criminality. Further, though the consequences of self-regulatory failure among sex offenders are horrendous, the *mechanisms* involved may not differ *in kind* from the garden-variety failures that impair people's ability to obey the law, quit smoking, lose weight, stop gambling, or achieve any difficult, long-horizon goal. As Baumeister et al. observe, "Self-regulation failure has been implicated as possibly the single greatest cause of destructive, illegal, and antisocial behavior."<sup>166</sup>

It is worth emphasizing that self-regulatory failure *identifies* sex offenders with other criminals. Knight and Prentky report that the proportion of sex offenders who exhibit impulsivity is high – 40% in their study – which was “consistent with previous research.”<sup>167</sup> They show that their measure for stable, trait-like impulsivity – lifestyle impulsivity – is highly predictive of future sexual reoffending.<sup>168</sup> But the very same trait, life-style impulsivity, is a “relatively robust predictor of reoffense risk across domains of criminal behavior.”<sup>169</sup>

More generally, one of the most widely accepted general theories of criminality, that of Gottfredson and Hirschi's, argues that criminality arises from an underlying deficit

---

<sup>166</sup> BAUMEISTER, *supra* note 28, at 12.

<sup>167</sup> Prentky & Knight, *Identifying*, *supra* note 59, at 648.

<sup>168</sup> *See id.* at 649.

<sup>169</sup> *See id.*

in self-control.<sup>170</sup> Poor self-control is widely thought to be a “stable and robust predictor of reoffending among the general criminal population.”<sup>171</sup> As Baumeister et al. point out: “the most important generalization about crime and criminality is that they arise from lack of self-control. Most crimes are impulsive actions, and most criminals exhibit broad and multifaceted patterns of lacking self-control.”<sup>172</sup> Substantial research shows that the majority of incarcerated criminals are diagnosable with either antisocial personality disorder<sup>173</sup> or attention deficit hyperactivity disorder,<sup>174</sup> both of which are centrally characterized by impulsivity.

---

<sup>170</sup> See Daniel A. Krauss et al., *Beyond Prediction to Explanation in Risk Assessment Research: A Comparison of Two Explanatory Theories of Criminality and Recidivism*, 23 INT’L J.L. & PSYCHIATRY 91, 98 (2000).

<sup>171</sup> Robert J. McGrath, *Sex Offender Risk Assessment and Disposition Planning: A Review of Empirical and Clinical Findings*, 35 INT’L J. OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 328, 338 (1991).

<sup>172</sup> BAUMEISTER, *supra* note 28, at 11-12.

<sup>173</sup> See Stephen D. Hart et al., *The Psychopathy Checklist: An Overview for Researchers and Clinicians* 103, 105, in 8 ADVANCES IN PSYCHOLOGICAL ASSESSMENT (J. Rosen & P. McReynolds eds., 1991) (stating that 75-80% of criminals are diagnosable with antisocial personality disorder); Rosalie Wells, *A Fresh look at the Muddy Waters of Psychopathy*, 63 PSYCHOL. REP. 843, 846 (1988) (80%); James S. Wulach, *Diagnosing the DSM-III Antisocial Personality Disorder*, 14 PROF. PSYCH.: RES. & PRAC. 330 (1983) (75-80%); P.J. Clayton et al., *Psychiatric Disorders and Criminality*, 227 J. AM. MED. ASSOC. 641-642 (1974) (90% of felons have a “psychiatric disorder;” 70% are “sociopathic”).

In short, the kind of self-regulatory failure that characterizes many sex offenders does not distinguish them from the general criminal population, but rather is a unifying feature of criminality. We do not excuse people whose antisocial behavior arises from a lack of self-control – this is precisely what we condemn in the criminal justice system. This sort of self-control problem does not mark sex-offenders as different in kind from other humans, but as suffering from the kinds of weaknesses that are inherent in being human.

### **C. Character/personality model**

It remains to consider what I have called the type III inability-to-control – the character/personality model. Let us consider a sex offender who falls into Ward and Hudson’s approach-explicit category. This is a sex offender who desires to continue abusive sex and actively plans for it. How should we classify this person with respect to control-capacity? There are two sound reasons for refusing to ascribe an inability-to-control. First, this person exhibits some skill at self-regulation, rather than a self-regulation deficit. He exhibits many of the characteristics that we associate with deliberate, under-control behavior, such as careful planning<sup>175</sup> and explicit decision

---

<sup>174</sup> Wendy Richardson, *Criminal Behavior Fueled by Attention Deficit Hyperactivity Disorder and Addiction*, in *THE SCIENCE, TREATMENT AND PREVENTION OF ANTISOCIAL BEHAVIORS CIVIC RESEARCH INSTITUTE 18-2* (Diana H. Fishbein ed., 2000)

<sup>175</sup> Prentky et al. state that planning the offense is one of the most frequent precursors to offenses by child molesters, being exhibited by 73% of the sample in one study. See Robert A. Prentky et al., *Child Sexual Molestation: Research Issues*, U.S. Department of Justice, June 1997 at 8.

making. Second, because he *desires* to continue offending, there is an absence of evidence from which one could conclude that he lacks the capacity to control his behavior. Since he has *not yet tried hard to stop*, we have no basis for judging whether he could refrain from offending if he tried “hard enough.”

The only potential basis for ascribing an inability-to-control to this person is the character/personality model. The argument will be that his offending is so much a part of his personality, so ingrained in his values and personal goals, that he “could not act otherwise.”

This is, of course, a rhetorical move that could be made with anyone at any time. We are all, after all, who we are. If we say that the pedophile lacks the ability to control his behavior because his behavior is determined by his personality, then we must say that we *all* lack that ability. This is a dangerous rhetorical move, since it undercuts the general assumption of free will and moral responsibility, absolving the individual of responsibility for his or her own character.

Most thoughtful commentators reject this move. We hold people responsible even when (especially when) they act “in character” because we judge that their current character – and hence their current behavior – is a consequence of choices they have made. People who lack the internal strength to alter their behavior “could build up their strength over time by practicing self-control or learning to regulate themselves effectively.”<sup>176</sup> Discussing “sexual predators” in his popular-press book “Obsession,”

---

<sup>176</sup> BAUMEISTER, *supra* note 28, at 33. Cf. David Ballard et al., *A comparative Profile of the Incest Perpetrator: Background Characteristics, Abuse*

John Douglas reflects this common understanding of sex offender behavior. On the one hand, he writes, “The sexual predator commits his individual crimes in the way he does because it is what he must do to satisfy himself. It’s who and what he is – the proverbial case of the leopard not being able to change his spots.”<sup>177</sup> But two pages later, he says of the same people, they have “made choices, rather than being hapless victims of adverse environments.”<sup>178</sup>

The point is that we make inability-to-control judgments in a particular context, using a particular set of “auxiliary assumptions,” specifications of the “givens” in the question whether the individual “could have chosen otherwise.” The legal question this presents is: in what context is the inability-to-control judgment to be made? I suggest that, in our society, we generally make inability-to-control judgments in a fairly wide context. We generally hold people responsible for their character and personality and for developing the strength of character to control their impulses.<sup>179</sup>

---

*History, and Use of Social Skills, in THE INCEST PERPETRATOR: A FAMILY MEMBER NO ONE WANTS TO TREAT* 43, 57 (Anne L. Horton et al., eds., 1990) (finding that 76.6% of child molesters believed that something could have been done prior to the sexual assault to prevent it).

<sup>177</sup> John Douglas, *OBSESSION: THE FBI'S LEGENDARY PROFILER PROBES THE PSYCHES OF KILLERS, RAPISTS AND STALKERS AND THEIR VICTIMS AND TELLS HOW TO FIGHT BACK* 107 (1998).

<sup>178</sup> *Id.* at 109.

<sup>179</sup> For a complete discussion, see Morse, *supra* note 18, and Bruce J. Winick, *Sex Offender Law in the 1990s: a Therapeutic Jurisprudence Analysis*, 4 *PSYCHOL. PUB. POL'Y & L.* 505, 514 (1998). Winick states: “we think it fair to hold people responsible for their own personalities....” Winick, *supra*, at

## VIII. CONCLUSION

Inability-to-control is not a concept that is hopelessly beyond the reach of a rational judicial process. What is needed are three concrete steps to cut through the fog. First, we need to stop using the opaque and confusing terms such as “volition” and “cause.” Second, we need to focus attention on the basic psychological processes that comprise self-regulation. Third, we need to recognize that ascribing inability-to-control to a person means making normative and legal judgments. Having observed and described the mechanisms by which self-regulation fails *in a particular individual* to prevent sexual violence, courts must determine whether this form of dysfunction justifies the conclusion that the individual was *unable* to control his behavior.

To meet clear constitutional standards, courts must insure that their formulation of inability-to-control is a narrow one. A careful, concrete assessment of the self-regulatory failure that leads to sexual offending will show that much of it is identical to that which characterizes the general criminal population. A definition of inability-to-control which sweeps so broadly cannot pass constitutional muster.

---

514. He goes on to argue that “[e]xcusing people from responsibility because of their personality traits must be rejected for the same reason that arguments based on determinism or universal causation must be rejected: its acceptance ‘would require a complete restructuring of our sense of ourselves as responsible agents, our moral practices more generally, and, not least, our system of criminal justice.’” *Id.* at 514 n. 48 (quoting Morse, *supra* note 18, at 1594). Morse adds: “The law assumes that people who are characterologically thoughtless, careless, [etc.] can be expected to control themselves and should be held accountable if they violate the law.” Morse, *supra* note 18, at 1602 (quoted in Winick, *supra*, at 514).

In setting the threshold for attaching the authoritative legal label of “inability-to-control, courts will do well to keep in mind that this ascription may contribute to a “subculture of violence ... [that] does support and reinforce the belief that violent impulses cannot be resisted or controlled.”<sup>180</sup> It also likely contributes to the “dominant discourse of uncontrollable male sexuality.”<sup>181</sup> As the inability-to-control metaphor gains currency, men who aim to refrain from sexual abuse may “re-evaluate their goals and decide that they lack the ability to refrain from further sexual abuse and therefore continue offending.”<sup>182</sup>

A broad and careless use of the inability-to-control rubric undercuts the constitutional legitimacy of sex offender commitments and supports the outmoded, and excuse-laden idea that male sexual impulses are beyond their control.

---

<sup>180</sup> BAUMEISTER, *supra* note 28, at 232.

<sup>181</sup> LAMB, *supra* note 31, at 76.

<sup>182</sup> Ward and Hudson, *supra* note 141, at 97.