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UNCONTROLLABLE URGES AND IRRATIONAL PEOPLE

Stephen J. Morse*

A single strong desire is often enough to leave a man no peace. If he is seized by two contrary desires at the same time, the effect can easily be imagined.

Alessandro Manzoni[†]

INTRODUCTION

INCARCERATION, whether in a prison or a treatment facility, requires weighty justification in a society committed to the protection of civil liberty. The United States Supreme Court has recognized, in both the criminal and civil contexts, that citizens have immense interests in liberty and in freedom from other adverse social consequences, such as stigma.² The basic justification for criminal confinement is that a culpable offender has been convicted of a crime; the basic justification for involuntary civil

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[†] Alessandro Manzoni, *The Betrothed* 316 (Bruce Penman trans., 1972) (1840).

² E.g., *Addington v. Texas*, 441 U.S. 418, 425–26 (1979) (recognizing that civil commitment is a “significant deprivation of liberty” that can cause “adverse social consequences,” such as stigma, which can have a “very significant impact on the individual”); *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (emphasizing, in dictum, that civil commitment is a “massive curtailment of liberty”); *In re Winship*, 397 U.S. 358, 363–64 (1970) (stating that due process requires imposition of a “beyond a reasonable doubt” standard in criminal trials because defendants have “at stake interests of immense importance”—liberty and freedom from stigma). See generally Sherry F. Colb, *Freedom From Incarceration: Why Is This Right Different From All Other Rights?*, 69 N.Y.U. L. Rev. 781, 787–94 (1994) (arguing that liberty is a fundamental right).

confinement is that the person is not responsible for his or her potentially dangerous conduct.³ The danger a person may pose is a justification for criminal and civil confinement, but our society does not permit preventive confinement for social safety based on dangerousness alone.⁴ The criminal and civil confinement systems thus leave a "gap" in their ability to confine dangerous agents.⁵

³ Stephen J. Morse, *Neither Desert Nor Disease*, 5 *Legal Theory* 265, 267-70 (1999).

⁴ *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) ("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment."). There are limited exceptions, such as denial of bail to some dangerous defendants, but even such exceptions are few and are strictly time limited. See *United States v. Salerno*, 481 U.S. 739 (1987). The quarantine of people with uncontrollable infectious diseases is another exception, but the basis for such an incarceration is not dangerous human action. *Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 387 (1902) (affirming the power of the states to enact quarantine laws for the safety and protection of the health of their inhabitants).

⁵ See Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 *Psychol. Pub. Pol'y & L.* 250, 256-58 (1998). See generally Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, With Particular Reference to Sexually Violent Predator Laws*, 7 *J. Contemp. Legal Issues* 69, 92-93 (1996) (describing the *Foucha* problem concerning the preventive detention of dangerous but sane individuals).

In a recent Commentary, Professor Paul Robinson suggests that various criminal justice methods that substantially enhance criminal incarceration, such as habitual offender laws, are being used improperly to fill the gap. He claims that such methods are a form of pure preventive detention because enhanced prison terms are disproportionate to the offender's desert. Professor Robinson proposes that rather than "cloaking" preventive detention in the guise of criminal punishment, social safety and respect for criminal law would be better served if the law straightforwardly segregated proportionate punishment and preventive detention and adopted post-conviction civil commitment based solely on dangerousness. He claims that using civil commitment to protect society in the segregated system would provide more checks on unjustified loss to liberty than would using the criminal justice system to impose disproportionate sentences. Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 *Harv. L. Rev.* 1429, 1429-32 (2001).

I agree that many criminal justice practices impose harsh and disproportionate punishments and that perhaps pure preventive detention would be justified by public safety concerns, if predictive accuracy were sufficiently great. See Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 *B.U. L. Rev.* 113, 141-51 (1996) (accepting the potential theoretical justifiability of pure preventive detention to promote public safety but arguing that, under current conditions, it would be unjustifiable because it dehumanizes detainees and because current predictive techniques are inaccurate). I see little reason to believe, however, that the allegedly beneficial "protections" of indefinite civil commitment would effectively protect liberty. For example, I strongly doubt that a periodic review of sexually violent people civilly committed solely for dangerousness at the end of a prison term would lead to

Undoubtedly, dangerous citizens who have committed no crime or who have completed their sentences must be left at liberty if they are responsible.

Sexual predators fall into the gap between criminal and civil confinement. They are routinely held fully responsible and blameworthy for their behavior because they almost always retain substantial capacity for rationality, they remain entirely in touch with reality, and they know the applicable moral and legal rules. Consequently, even if their sexual violence is in part caused by a mental abnormality, they do not meet the usual standards for an insanity defense.⁶ For the same reason, they do not meet the usual non-responsibility standards for civil commitment and retain the competence to make rational decisions about treatment. Moreover, in most cases in which civil commitment is justified, most states no longer maintain routine indefinite involuntary civil commitment but instead tend to limit the permissible length of commitment.

To fill the gap, Kansas and a substantial minority of other states⁷ have adopted a form of indefinite involuntary civil commitment

earlier release than enhanced prison terms. Although pure preventive detention proceedings are civil and thus should require application of a "least intrusive means" principle, I doubt that many courts would be likely to find means less intrusive than confinement sufficient to protect the public from criminals with a history of sexual violence. Moreover, why should pure preventive detention require prior criminal or other dangerous conduct as a substantive, rather than as an evidentiary, criterion? If the civil commitment is preventive confinement based on future dangerousness alone and is not deserved punishment for past conduct, there is no need to rely on prior conduct at all. Pure preventive detention is likely to be a greater intrusion on liberty and even more costly than enhanced criminal punishment. The Supreme Court is right to hold that preventive detention should not be based on dangerousness alone. Finally, unenhanced but substantial prison terms for seriously violent offenders both are deserved and would protect the public by incapacitating the offender.

⁶ Consider the remarks of Justice Owen Dixon of Australia in *King v. Porter* (1933) 55 C.L.R. 182, 187:

[A] great number of people who come into a Criminal Court are abnormal. They would not be there if they were the normal type of average everyday people. Many of them are very peculiar in their dispositions and peculiarly tempered. That is markedly the case in sexual offenses [sic]. Nevertheless, they are mentally quite able to appreciate what they are doing and quite able to appreciate the threatened punishment of the law and the wrongness of their acts, and they are held in check by the prospect of punishment.

⁷ Brief of the States of Illinois, Alabama, Arizona, California, Delaware, Florida, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Oklahoma, Pennsylvania, South Carolina, Washington and Wisconsin as Amici Curiae in Support of Petitioner at 2 n.1, *Kansas v. Crane*, 534 U.S. 407 (2002) (No. 00-957) (stating that sixteen states have enacted mentally abnormal sexual

that applies to "sexually violent predators who have a mental abnormality or personality disorder."⁸ The Kansas definition of a sexually violent predator, which is similar to those that other states have adopted, is "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence."⁹ The state may impose this form of civil commitment not only when a person has been charged with or convicted of a sexual offense but also after an alleged predator has completed a prison term for precisely that type of sexually violent conduct. Commitment is for an indefinite period, and thus potentially for life, although an annual review of the validity of the commitment is required.

In *Kansas v. Hendricks*,¹⁰ the Supreme Court rejected a substantive due process challenge to the constitutionality of the Kansas statute. The majority's primary rationale was that the Kansas criteria were similar to civil commitment criteria that the Court had long approved.¹¹ The Court emphasized that states were free to use any terminology they wished and did not need to use the specific nomenclature of any professional group, such as psychiatrists.¹² Thus, Kansas was permitted to make "mental abnormality," which is not a recognized diagnostic term in psychiatry or psychology, a predicate for commitment. The Court properly looked beyond labels, however, to determine what potentially justifiable ground for civil commitment the criterion represented. In this case, civil commitment was justified because the mental abnormality or personality disorder criterion limited confinement

to those who suffer from a volitional impairment rendering them dangerous beyond their control. The Kansas Act . . . requires a

predator commitment laws). As of 1998, more than 520 people were committed in the twelve states that had then adopted such commitment laws. Roxanne Lieb & Scott Matson, Wash. State Inst. for Pub. Policy, Sexual Predator Commitment Laws in the United States: 1998 Update, at i (1998), available at <http://www.wa.gov/wsipp>.

⁸ Kan. Stat. Ann. §§ 59-29a01-59-29a20 (Supp. 2000). Kansas amended its statute after *Kansas v. Hendricks* was decided. The version of the statute considered by the Court, which can be found at Kan. Stat. Ann. § 59-29a01-59-29a15 (1994), applied to mentally abnormal sexual predators.

⁹ Id. § 59-29a02(a).

¹⁰ 521 U.S. 346 (1997).

¹¹ Id. at 357-58.

¹² Id. at 358-59.

finding of future dangerousness, and then links that finding 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. . . . The precommitment requirement of a "mental abnormality" or "personality disorder" . . . narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.¹³

Thus, loss of control was apparently the crucial non-responsibility condition. Indeed, this was precisely the type of problem allegedly exhibited by Hendricks, who had a history of multiple convictions for sexual molestation of children and who described himself as having uncontrollable urges to molest children when he was stressed. According to Hendricks, only death could prevent those urges from occurring.

In *Kansas v. Crane*,¹⁴ the Supreme Court was asked to decide "[w]hether the Fourteenth Amendment's Due Process Clause requires a state to prove that a sexually violent predator 'cannot control' his criminal sexual behavior before the State can civilly commit him for residential care and treatment."¹⁵ In *In re Crane*,¹⁶ the Supreme Court of Kansas had again addressed its sexual predator commitment criteria to decide whether substantive due process, as interpreted in *Hendricks*, required an inability to control dangerous conduct as a predicate for commitment. Crane had been committed because the commitment trial court found beyond a reasonable doubt that he suffered from a mental disorder that made him likely to re-offend. According to the trial court, Kansas did not have to prove an impairment of volitional control.¹⁷ The Kansas Supreme Court reversed, pointing to the United States Supreme Court's repeated use of the concept of lack of control to justify its decision in *Hendricks*.¹⁸

The State argued that *Hendricks* does not suggest that a control defect is the exclusive constitutional criterion for sexual predator

¹³ *Id.* at 358 (internal citations omitted).

¹⁴ 534 U.S. 407 (2002).

¹⁵ Petition for a Writ of Certiorari to the Supreme Court of Kansas at i, *Kansas v. Crane*, 534 U.S. 407 (2002) (No. 00-957).

¹⁶ 7 P.3d 285 (Kan. 2000).

¹⁷ *Id.* at 287-88.

¹⁸ *Id.* at 289-91, 294.

commitments. Rather, *Hendricks* should be understood as limited to its facts, which solely concerned a control problem. Moreover, the control standard is so inherently deficient that it cannot rationally be the sole constitutional standard. Thus, any causally predisposing link between a mental abnormality, especially a personality disorder, and sexual violence (the "causal link" standard) should be sufficient. Crane argued that *Hendricks* provides a clear, limiting, and exclusive standard for the constitutionally permissible commitment of alleged predators and that the standard Kansas suggested was too broad. Crane thus presented a watershed opportunity for the Supreme Court to clarify both the non-responsibility condition that justifies civil commitment of mentally abnormal sexual predators and the constitutional limits on preventive detention.

Justice Stephen Breyer's majority opinion rejected pure preventive civil detention based on dangerousness alone and held that substantive due process required "proof of serious difficulty in controlling behavior" as a predicate for the civil commitment of mentally abnormal sexual predators.¹⁹ Although the Court constitutionalized the lack of control standard, it rejected the argument that the lack had to be "total or complete" because such a standard was unworkable.²⁰ The Court reiterated that both the mental abnormality or personality disorder criteria²¹ and a lack of control criterion²² were necessary to narrow the class of persons eligible for confinement. These strict eligibility requirements prevent such commitments from becoming mechanisms for retribution or deterrence, which are justifications for criminal punishment but not for civil commitment.²³ The Court noted that, in *Hendricks*, the presence of an undeniably serious mental disorder that created a "special and serious lack of ability to control behavior" was crucial to justify the civil nature of the commitment.²⁴

Defining the quantum of lack of control necessary to justify these onerous civil commitments thus assumes supreme constitu-

¹⁹ *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867, 870 (2002).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

tional importance, but the *Crane* opinion provides little guidance. The relevant language is worth quoting in full:

In recognizing that [lack of control is required], we did not give to the phrase "lack of control" a particularly narrow or technical meaning. And we recognize that in cases where lack of control is at issue, "inability to control behavior" will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.²⁵

The Court characterized this language as a description of the inability to control behavior in a "general sense."²⁶

The Court recognized that this is not a precise constitutional standard, but asserted that constitutional safeguards of liberty in mental health law "are not always best enforced through precise bright-line rules."²⁷ The Court defended this assertion with two arguments. First, states have considerable discretion to define the mental abnormalities and personality disorders that are predicates for civil commitment. Second, psychiatry, which informs but does not control mental health law determinations, is "ever-advancing," and its "distinctions do not seek precisely to mirror those of the law."²⁸ Consequently, Justice Breyer concluded, the Court has provided constitutional guidance in the area of mental health law "by proceeding deliberately and contextually, elaborating generally stated constitutional standards and objectives as specific circumstances require."²⁹ Finally, the Court implied, but did not decide, that the Constitution does not require that a serious control problem must be caused by a volitional impairment. The Court

²⁵ *Id.*

²⁶ *Id.* at 871.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

suggested that an emotional or cognitive impairment that caused a sufficient control problem would also pass constitutional muster.³⁰

Justice Antonin Scalia's dissent argued that *Hendricks* held that a causal link between a mental abnormality or a personality disorder and a propensity for sexual violence necessarily implied that there was a control problem.³¹ The jury verdict of commitment that the Court reinstated in *Hendricks* contained no independent finding of a control problem. The constitutionally acceptable finding of loss of control in *Hendricks* "must . . . have been embraced within the finding of mental abnormality causing future dangerousness."³² Justice Scalia defended this conclusion by noting that agents who are dangerous because they suffer from a mental abnormality are not deterrable.³³ Thus, the dissent, too, accepted the non-responsibility criterion for civil commitment and rejected preventive confinement for dangerousness alone, but disagreed with the majority about what legal criterion implied lack of control. For Justice Scalia, the causal link was sufficient to demonstrate the requisite lack of control. Consequently, he rejected the majority's view that the Constitution requires an independent finding of lack of control in addition to a mental abnormality and a resultant propensity for sexually violent behavior.

The dissent also noted that the majority had reopened the question, which it claimed *Hendricks* had closed, of whether a volitional impairment was the constitutionally required cause of the necessary control problem.³⁴ It argued that *Hendricks* made clear that other causes, including emotional impairments, would also be acceptable. To hold otherwise would make little sense because cognitive and emotional impairments could surely cause a loss of control.

Finally, Justice Scalia scolded the majority for the vagueness of the control standard it adopted.³⁵ He conceded that the mental abnormality or personality disorder criterion and the resulting

³⁰ Id. at 871-72.

³¹ Id. at 874 (Scalia & Thomas, JJ., dissenting).

³² Id.

³³ Id. at 874; cf. *King v. Porter* (1933) 55 C.L.R. 182, 187 (Dixon, J.) (asserting that most sexual offenders are deterrable by the threat of punishment).

³⁴ *Crane*, 122 S. Ct. at 874-75.

³⁵ Id. at 875-76.

propensity for violence criterion were both coherent and, with the assistance of expert testimony, within the capacity of a normal jury to determine. But he chided the majority's control standard as being so vague that it will give trial judges "not a clue" about how to charge juries.³⁶ He speculated that the majority offered no further elaboration because "elaboration . . . which passes the laugh test is impossible."³⁷ Justice Scalia wondered whether the test was a quantitative measure of loss of control capacity or of how frequently the inability to control arises.³⁸ In the alternative, he questioned whether the standard was "adverbial," a descriptive characterization of the inability to control one's penchant for sexual violence. The adverbs he used as examples were "appreciably," "moderately," "substantially," and "almost totally."³⁹ According to Justice Scalia, none of these could provide any guidance.

In short, *Crane* upheld the crucial non-responsibility criterion for involuntary civil commitment by imposing a lack of control standard, but left open the constitutional meaning of lack of control. Thus, we can expect that there will be much legislative and judicial activity in the states about the definition of lack of control and that the Supreme Court will ultimately have to provide more precise guidance. *Crane's* vague definition of lack of control and its recognition that the states retain considerable leeway to define mental abnormality, and, presumably, also to define lack of control, imply that most state definitions will be constitutionally acceptable. For example, as this Essay will argue,⁴⁰ the definition of mental abnormality that the Court approved in *Hendricks* is virtually incoherent as a definition of "abnormality," yet *Hendricks* accepted it without comment. The majority's reference to the nature of the alleged predator's diagnosis and to the severity of the disorder as factors that would bear on lack of control—the only two variables the

³⁶ *Id.* at 876.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* It is easy to agree with Justice Scalia that such terms are vague and unhelpful, but they are precisely the types of modifiers used generally in civil commitment statutes to describe the likelihood of future dangerous conduct required for commitment. I assume that Justice Scalia would distinguish the validity of such terms to describe an amount of control capacity from their use to describe a clearly statistical standard, such as the risk of future violence within a given time period.

⁴⁰ See *infra* notes 77–82 and accompanying text.

Court mentioned—offers little specific direction. Consequently, the Court is likely to defer to almost any state definition. Indeed, if a state explicitly defined the causal link to embrace control problems, the causal link standard would probably be acceptable, notwithstanding *Crane*'s requirement for an independent lack of control criterion.⁴¹

This Essay will argue that neither the control standard as usually understood nor the standard of a causal link between mental abnormality and sexual violence is the appropriate, limiting non-responsibility criterion.⁴² Substantive due process requires a more conceptually defensible and workable limiting standard to justify the massive deprivation of liberty that indefinite involuntary civil commitment imposes. Although the Essay will propose a reinterpretation of the control criterion, nothing the Essay will suggest is strictly inconsistent with *Hendricks*, *Crane*, and other Supreme Court cases.

Part I of the Essay will explain why non-responsibility is a necessary predicate for justifiable civil commitment and will describe the role mental disorder plays. It demonstrates generally that non-responsibility is not entailed either by a causal link between mental abnormality and further behavior or by the accurate predictability of future behavior. Causation—even causation by an abnormal variable—and predictability are not proxies for non-responsibility.

Part II will examine the causal link standard as it has been and may in the future be applied specifically to sexual predator commitments. Although *Crane* seems to reject a pure causal link criterion, I believe that the causal link might nonetheless be constitutionally permissible as a proxy for loss of control. For example, suppose the state defines the loss of control criterion for commitment as "any propensity for sexual violence that is caused by a mental abnormality or personality disorder." Although this might appear to be a patently impermissible attempt to avoid the strictures of *Crane*, nothing in the reasoning of *Hendricks* or *Crane* would bar this criterion if a legislature or court explicitly found that

⁴¹ See *infra* text accompanying notes 42–44.

⁴² Although the Essay is motivated by the control issue that *Hendricks* and *Crane* raise, and much of the discussion is therefore focused on sexual conduct, the analysis of control problems is fully generalizable to all alleged control problems, such as those stemming from addictions or from mental disorders generally.

the causal link embraced sufficient lack of control. After all, the Court concedes that psychiatry is an ever-advancing but still inexact science and that the states have considerable leeway to define the commitment criterion. And there is certainly intuitive logic to support the conclusion that the causal link necessarily implies serious loss of control. This would be especially true if the linking abnormality were itself serious, as it virtually always will be.⁴³ Moreover, two Justices, Justice Scalia and Justice Thomas, believe that the pure causal link necessarily does "embrace" a loss of control. Thus, the causal link standard must be addressed.

I conclude that, in general, this standard, even when it relies on a recognized mental disorder, is vastly over-inclusive as a non-responsibility standard, and, properly understood, it is not a non-responsibility standard at all. The *Crane* majority correctly rejected the pure causal link standard, and future judicial decisions should continue to reject it, even if there is an explicit recognition that it allegedly embraces lack of control. Moreover, the Kansas criterion of "mental abnormality" is obscure, circular, mostly incoherent, and cannot adequately guide either legal decisionmakers or expert witnesses upon whom decisionmakers rely so heavily. Causal link standards in general and Kansas's criterion in particular cannot appropriately limit the scope of sexual predator commitments. They also pose a general threat to civil liberty.

Part III will consider the loss of control criterion for non-responsibility. In principle, this is a non-responsibility criterion that is independent of both mental abnormality and of a causal link between mental abnormality and legally relevant behavior. Thus, a serious loss of control standard hypothetically could be used to limit the class of potentially sexually violent people who may be involuntarily civilly confined.⁴⁴ I argue, however, that the standard is conceptually unclear, scientifically and clinically unverifiable, and practically unworkable. Consequently, courts and legislatures should reject a loss of control standard, as it is often used in common parlance.

The last Part of the Essay will suggest and defend an irrationality standard for sexual predator commitments and analogous types of

⁴³ See *infra* notes 66–68 and accompanying text.

⁴⁴ See, e.g., *Kansas v. Crane*, 534 U.S. 407 (2002).

confinement. Lack of capacity for rationality is both the quintessential mental abnormality and the most central and coherent non-responsibility standard that both the law and ordinary morality employ. Furthermore, this common sense standard can be fairly and workably applied to identify those agents who are genuinely not responsible. Lack of capacity for rationality is a genuine and limiting non-responsibility standard that would meet substantive due process requirements for the justification of involuntary civil commitment of sexual predators. Moreover, people with substantial rationality defects will also typically come within the class of people who, in common parlance, cannot control themselves. In all other cases of sexual violence, the criminal justice system is the appropriate means to protect society from dangerous people.

I. THE GENERAL JUSTIFICATION FOR CIVIL COMMITMENT: MENTAL ABNORMALITY AND NON-RESPONSIBILITY⁴⁵

Involuntary civil commitment is justified in those cases in which a mental abnormality predisposes a person to dangerous conduct and the abnormality sufficiently compromises the person's rationality and responsibility for such conduct. The reason for the conjunctive criteria of predisposing causation and non-responsibility is crucial to understanding the justification for involuntary civil commitment. The maximal liberty our society accords to adults flows essentially from the capacity for rationality that most adults possess.⁴⁶ Our capacity for reason is the ground that supports autonomy and freedom, including the paradoxical freedom to be a potentially dangerous agent. This is not only the dominant view in our jurisprudence, but it is also normatively desirable. It treats most adults as agents and not just as creatures to be manipulated to achieve

⁴⁵ I limit discussion to commitments that are justified by the state's police power to prevent dangerous conduct against others because that is the ground for committing mentally abnormal sexual predators. Further, discussion is limited to the relation of mental abnormality to dangerous behavior and non-responsibility. The Essay does not discuss the constitutionality or advisability of specific dangerousness standards themselves.

⁴⁶ I recognize that this assertion implicates many deep issues in political theory that this Essay cannot address and that the capacity for reason is not the sole ground for liberty and autonomy. Nonetheless, I believe the assertion is an accurate positive account of prevailing norms of law and morality and is sufficient for the purpose of this Essay.

consequential ends, such as social safety. It also respects personhood and human dignity. Our capacity for reason explains why our society does not confine for dangerousness alone but instead requires either the commission of a crime or non-responsibility.

The capacity for reason criterion does not mean that an agent must act rationally to be responsible. After all, much human action is irrational, arational, foolish, and even automatic or habitual. Nonetheless, a guiding assumption of law and morality is that most agents retain the capacity to be guided by reason and it is their duty to exercise that capacity when important interests are at stake.⁴⁷ If they retain that capacity, they may be held responsible.

If agents are not responsible, however, because they are not capable of being guided by reason in a particular context, then special legal rules that express and impose the consequences of non-responsibility apply to them. Such legal rules include various incompetencies, legal insanity, and involuntary civil commitment. We do not preventively confine even the most dangerous agents unless they have been convicted of a crime or are not responsible. Involuntary civil commitment is morally and legally justifiable only if a citizen subject to such commitment is not responsible for the dangerous behavior that creates the need for confinement. The crucial question, then, is the relation of mental abnormality to non-responsibility.

First, consider the case of a potentially violent person with a mental abnormality that is unrelated to the agent's violence potential. Such an agent is simply a potentially violent person who happens to have a co-occurring mental abnormality. The abnormality is no more relevant to the violence potential and to the agent's responsibility for potential violence than the color of the person's eyes. Because we do not preventively confine citizens on the ground of dangerousness alone, there is no justification for committing such people.

When mental abnormality is causally related to legally relevant behavior, such as violent, future conduct, two effects are possible:

⁴⁷ Consider, for example, which leg one puts through one's underpants first. It is hard to imagine behavior that is more automatic, more thoughtless, or more habitual. Nothing turns on which leg is first, however. If serious consequences were to flow from this choice, virtually all agents would retain sufficient capacity for reason to cause themselves to pay attention and to break the life-long habit, if necessary.

the abnormality may play a predisposing causal role, and the abnormality may undermine the agent's responsibility for the legally relevant behavior. Consider first how a mental abnormality may operate as a predisposing cause of behavior. A mental abnormality does not cause legally relevant bodily movements to become mere biophysical mechanisms, like the jerk of an arm that an uncontrolled neurological disorder may produce. Abnormal thoughts, desires, perceptions, and the like are not simply irresistible mechanical causes of further conduct, even if, ultimately, biophysical explanations can be given for them (and for normal thoughts, desires, and perceptions). Rather, such abnormalities create irrational reasons for action or compromise the agent's general capacity for rationality. A mental abnormality thus sometimes plays a causal role by affecting the agent's practical reasoning that leads to the legally relevant behavior. If such irrationality had not existed, the legally relevant behavior would have been less likely to occur. A mental abnormality is not a necessary cause of legally relevant behavior—and it is virtually never sufficient—but it may be a strongly predisposing cause.

Mental abnormality also sometimes plays a causal role by undermining the agent's capacity for self-control or by causing an agent to "lose control." Although this is a common form of usage, I suggest in Part IV that this explanation of the causal role of mental disorder is confused or better explained in terms of rationality.

Rationality and irrationality are continuum concepts. In some cases, causal abnormality may undermine the capacity for rationality sufficiently to warrant the further conclusion that the agent was also not responsible for the behavior the abnormality caused.⁴⁸ Whether the agent was suffering from a mental abnormality⁴⁹ and

⁴⁸For a discussion of the criteria for rationality, see *infra* notes 103–104 and accompanying text and *infra* text accompanying note 117.

⁴⁹This Essay does not enter highly technical philosophical and psychological debates about the validity of a disorder or disease conception of mental abnormality. It will simply assume that a sound defense of such a conception can be provided and that mental abnormalities are entities that exist in nature and are not simply social constructions. This assumption is of course controversial. See Ian Hacking, *The Social Construction of What?* 100–04 (1999) (discussing whether "mental disorder" is a biological or a social construction). See generally Allan V. Horwitz, *Creating Mental Illness* (2002) (providing a history of the modern development of the concept of mental disorder and a critique of much modern diagnostic practice, based on social

how much irrationality it produced are factual questions, but determining how much rational capacity one must lack to conclude that an agent is not responsible is a normative question. The degree of irrationality required might vary from context to context. For example, the amount of irrationality that would permit a finding of incompetence to contract need not be the same as the amount necessary to avoid criminal liability. Nonetheless, it should be clear that the lack of capacity for rationality necessary to support involuntary civil confinement should be substantial, especially if such confinement is indefinite. Whatever irrationality standard is applied, however, it is crucial to recognize that conclusions about causation and non-responsibility are independent.

Consider, for example, a case in which mental abnormality plays a causally predisposing role in the agent's potential for violence. Suppose that, as the result of a recognized mental abnormality, the agent is suspicious,⁵⁰ has problems controlling anger and impulses,⁵¹ or has detached interpersonal relations.⁵² Such characteristics, especially if they are relatively extreme, may indeed predispose a person to act violently by making it harder for the agent to bring reason to bear. Why, however, should those characteristics also entail that the agent is not responsible if the agent does act violently? People with such characteristics, like sexual predators, will seldom succeed with an insanity defense. Although these signs and symptoms of mental abnormality may compromise the capacity for rationality, as do normal conditions such as stress or fatigue, they virtually never do so sufficiently to undermine responsibility.

constructivist accounts). Nonetheless, the assumption that mental disorders are valid entities is the dominant view within the mental health professions. Although legislators and judges may be aware of problems with the conceptual, scientific, and clinical understanding of mental disorders, they are unlikely to reject the dominant view.

⁵⁰ Suspiciousness is a symptom of both paranoid personality disorder and schizotypal personality disorder. See Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 694, 701 (4th ed. & Text Revision 2000) [hereinafter *DSM-IV-TR*]. Whether there is an underlying disorder independent of the symptom or whether the disorder is constituted by the symptom is often a fraught question. See *infra* text accompanying note 66. I simply accept the dominant view that there must be some type of underlying abnormality.

⁵¹ Anger and impulse control problems are symptoms of borderline personality disorder. *DSM-IV-TR*, *supra* note 50, at 710.

⁵² Detached interpersonal relations are a symptom of schizoid personality disorder. *Id.* at 697.

Whether a predisposing factor is produced by a mental disorder or by some other "normal" or "abnormal" cause makes no difference to whether the agent is responsible. A cause is just a cause, and causation *per se* is not an excuse, whether the causation is "normal" or "abnormal." If causation were an excuse, no one would be responsible for any conduct, because all behavior is caused by multiple variables not within the agent's control.⁵³ A genuine non-responsibility condition, such as sufficient lack of rational capacity, must also be present. If it were not, confinement would be justified by dangerousness alone. A predisposing mental disorder would then be nothing more than a cause, like any other potential cause, that helps us to predict dangerousness.

Many people with severe mental disorders that predispose them to legally relevant conduct are responsible for their conduct because they retain sufficient capacity for rationality to be considered competent or blameworthy. For example, it is a commonplace in criminal law that many defendants suffering from mental disorders that predispose them to crime are considered sufficiently rational to be held responsible and are punished. Hendricks and Crane are examples of defendants with predisposing mental disorders who were convicted and punished for their conduct. Conduct that is properly considered a sign or symptom of an underlying disorder is nonetheless human action, and no conclusion about non-responsibility is entailed. We cannot simply infer non-responsibility without begging the question of what should count as an excusing condition.⁵⁴ Indeed, the American Psychiatric Association explicitly warns that psychiatric diagnoses and criteria entail no legal conclusions about responsibility or even about whether an agent meets legal criteria for the presence of a mental disorder.⁵⁵ The mental abnormality must also compromise the agent's rationality because deficient capacity for rationality is the genuine condition for non-responsibility.

⁵³Michael S. Moore, *Causation and the Excuses*, 73 Cal. L. Rev. 1091, 1112-14 (1985); Stephen J. Morse, *Culpability and Control*, 142 U. Pa. L. Rev. 1587, 1592-94 (1994).

⁵⁴Herbert Fingarette & Anne Fingarette Hasse, *Mental Disabilities and Criminal Responsibility* 55-65 (1979).

⁵⁵DSM-IV-TR, *supra* note 50, at xxxii-xxxiii, xxxvii.

Consider the analogy of the insanity defense. The criteria for the dominant, "cognitive" insanity defense tests include a mental abnormality that causes a further, necessary defect in rationality. For example, the *M'Naghten* test requires that the mental abnormality cause the person not to know the nature and quality of the act or not to know that it was wrong.⁵⁶ The cognitive criteria of the American Law Institute's Model Penal Code test require mental abnormality to produce a lack of substantial capacity to appreciate the criminality or wrongfulness of one's act.⁵⁷ Again, conclusions about irrationality caused by abnormality and about responsibility are related but independent from one another. A causal relation between abnormality and other behavior does not entail that the agent is not responsible for the other behavior. The presence of a causal link is an over-inclusive indicator of non-responsibility.⁵⁸

Although our society might be considerably safer if we were willing to confine predictably dangerous agents, predictability is also not per se a criterion of non-responsibility. We are incontrovertibly responsible for much behavior that is entirely predictable. Successful human interaction would be impossible if this were not true. Furthermore, understanding the causes of behavior may enhance the predictability of that behavior, but this does not necessarily undermine responsibility. For example, there is a strong correlation in our society between poverty and certain forms of crime, and many people think that poverty is a cause of such criminal conduct. Poverty is thus a risk factor and increases the predictive likelihood that a poor person will commit some types of crime. It would be illogical and disrespectful, however, to claim

⁵⁶ *M'Naghten's Case*, 10 Cl. & F. 200, 210 (H.L. 1843) (Eng.).

⁵⁷ Model Penal Code § 4.01(1) (1962).

⁵⁸ Failure to recognize the over-inclusiveness of a simple causal relation as a criterion for non-responsibility was the fatal flaw in the infamous "product" rule for legal insanity adopted by the United States Court of Appeals for the District of Columbia. *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954) (adopting the rule that the defendant is excused if the unlawful act was the "product" of mental disease or defect), overruled by *United States v. Brawner*, 471 F.2d 969, 989-95 (D.C. Cir. 1972) (adopting components of the Model Penal Code standard). All insanity defense trials in federal courts are now governed by the test Congress adopted in 1984. 18 U.S.C. § 17(a) (2002) (adopting a cognitive test and requiring the presence of a "severe" mental disease or defect).

that poverty per se renders poor criminals non-responsible.⁵⁹ Poverty is just a cause, albeit a cause that enhances predictability. Whether mental disorder or any other "normal" or "abnormal" cause enhances the predictability of any behavior does not mean that the agent is less responsible for the behavior. Predictability per se, whether or not enhanced by causal understanding, does not undermine responsibility.⁶⁰

Civil commitment is a massive intrusion on liberty that can be justified only by limiting it to cases in which an agent is genuinely not responsible for legally relevant conduct, such as violent behavior. Causation, whether by normal or abnormal causes, and predictability are not per se proper non-responsibility criteria. This Essay therefore turns to alternatives.

II. THE CAUSAL LINK STANDARD

Kansas argued in *Crane*, and the dissent agreed, that a causally predisposing link between mental abnormality and sexual violence should be a constitutionally acceptable limiting criterion for the involuntary civil confinement of sexual predators.⁶¹ The preceding Part argued generally that causal link standards are poor proxies for non-responsibility. This Part specifically considers and rejects the validity of causal link standards for non-responsibility.

Causal link standards appear facially plausible, especially if they are coupled with a recognition that the link embraces a control problem. After all, if mental abnormality—by definition a behavioral defect—predisposes an agent to engage in sexually violent

⁵⁹ Some have argued that poverty or deprivation is per se an excusing factor, but such arguments confuse causation with excuse and are ultimately unpersuasive. See Stephen J. Morse, Deprivation and Desert, in *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law* 114, 140–54 (William Heffernan & John Kleinig eds., 2000) (reviewing and rejecting the various arguments for why poverty or deprivation per se should excuse).

⁶⁰ As noted previously, desires for social safety might justify pure preventive detention, if predictive accuracy were sufficiently great, but preventive detention would be pure because predictability does not per se undermine responsibility. See *supra* note 4.

⁶¹ *Crane*, 122 S. Ct. at 875–76 (Scalia, J., dissenting). See also *In re Leon G.*, 26 P.3d 481 (Ariz. 2001), in which the Arizona Supreme Court held, contrary to the Kansas Supreme Court's decision in *Crane*, that an independent control defect is not required by substantive due process as a predicate for involuntary civil commitment of sexual predators and that the causal link standard is constitutionally acceptable.

conduct, the abnormality must undermine control capacity either directly or indirectly by compromising rationality. Nonetheless, this Part argues that, even if the required predicate abnormality is a recognized, arguably severe disorder, as Justice Breyer's *Hendricks* dissent suggested,⁶² the causal link is vastly over-inclusive as a general criterion for the necessary non-responsibility condition that justifies preventive civil confinement. Moreover, neither *Hendricks* nor *Crane* specifically required that the mental abnormality had to be a severe, recognized mental disorder. Consequently, the type of mental abnormality criterion adopted by Kansas and other states, which the Court accepted, is not only over-inclusive; it also places essentially no non-responsibility limit on commitment. The criterion is so broad that it applies to any person who commits sexual violence, and, more generally, it applies to all behavior, normal and abnormal alike. It is not a definition of abnormality at all.

As Part I demonstrated, a causally predisposing link between mental abnormality and legally relevant behavior is neither a necessary nor sufficient non-responsibility criterion.⁶³ In particular, identifying a cause for behavior, including an abnormal cause, does not mean that the agent cannot control the behavior. Causation is not per se an excusing condition; causation is not the opposite of control; the causal link between abnormality and conduct is not mechanistically inexorable; and it is simply not the case that all conduct causally influenced by mental abnormality also indicates a sufficient defect in rationality to warrant the conclusion that the agent was not responsible.⁶⁴ The causal link simply describes the causation of action. Although all actions are caused, not all actions are generated by lack of control capacity or by substantial rationality defects. As Part I also demonstrated, predictability, even when enhanced by causal understanding, is also not a non-responsibility condition per se. Even if behavior caused by an abnormality is more predictable than the same behavior caused "normally," it does not follow that abnormal causation is a non-responsibility condition. Moreover, demographic and behavioral variables, espe-

⁶² *Kansas v. Hendricks*, 521 U.S. 346, 375–76 (1997) (Breyer, J. dissenting).

⁶³ See *supra* Part I.

⁶⁴ Indeed, causal mental abnormality can paradoxically increase rationality. For example, mild but diagnosable manic states might heighten an agent's clarity of thought and perceptual powers.

cially past history, are far more likely to be valid predictors than purely clinical or psychopathological variables.⁶⁵

There is also a conceptual problem with the standard picture of the causal link, which is that an "underlying" disorder causes the allegedly "symptomatic" legally relevant behavior. In the case of many disorders potentially linked to sexual violence, the causal link is tautologically automatic. The necessary and sufficient criteria for the disorder are precisely the behaviors that are supposedly caused, and there is no evidence of an independent "underlying" disorder. For example, if an agent has a sufficiently strong desire for "abnormal" sex objects⁶⁶ or other "abnormal" sexual behavior and causes harm by acting on it, the agent will be deemed to be suffering from a recognized and severe sexual disorder,⁶⁷ but there is no underlying disorder separate from the desire and conduct itself. To take another example, if an agent has a history of many signs of irresponsible and antisocial conduct, this will be sufficient to warrant the recognized diagnosis of "Antisocial Personality Disorder."⁶⁸ Once again, however, there is no disorder distinct from the behavior that causes the behavior. I am not denying that there may be "underlying" biological, psychological, and sociological causes for such behavior. Indeed, there are such underlying causes for all behavior. I am suggesting that there is reason to believe that for many personality disorders and the other types of behavioral abnormalities sexual predators present, there may not be any identifiable, underlying, biological or functional abnormality that would gener-

⁶⁵ James Bonta et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 *Psychol. Bull.* 123, 139 (1998).

⁶⁶ I place the term "abnormal" in scare quotes because at present there is no adequate, uncontroversial theory of the normality or abnormality of desires. Robert Nozick, *The Nature of Rationality* 139-40 (1993) ("At present, we have no adequate theory of the substantive rationality of goals and desires..."). Psychiatry and psychology are not exceptions. Recall that, as recently as the early 1970s, psychiatric orthodoxy held that a sexual preference for an adult member of one's own sex was a symptom of a psychiatric disorder. See Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 44 (2d ed. 1968). In 1973, the Association *voted* to exclude homosexuality per se as a recognized disorder. There had been no scientific or clinical advances that supported the change, however. What changed were the values of the majority of psychiatrists. See Stephen J. Morse, *Crazy Behavior, Morals & Science: An Analysis of Mental Health Law*, 51 *S. Cal. L. Rev.* 527, 557-58 (1978).

⁶⁷ DSM-IV-TR, *supra* note 50, at 535, 566-76.

⁶⁸ *Id.* at 701-06.

ate the conclusion that the behavior is clinically abnormal rather than socially deviant, immoral or the like. Finally, even if there were "underlying" causes that satisfied a plausible definition of psychiatric or psychological abnormality, it would not mean that the conduct should be excused. All patterns of desire and conduct are caused by something, an abnormal cause is also just a cause, and causation does not per se entail non-responsibility.

Consider the application of the foregoing conceptual feature of some psychiatric diagnoses to the case of mentally abnormal sexual predation. If an agent strongly desires and has a history of sexual predation, the causal link is established by definition because the predator is mentally abnormal by virtue of being a predator. The predisposing cause, sexual desire, and the legally relevant sexually violent conduct that satisfies the dangerousness criterion together also satisfy the requirements of abnormality and a causal link. Not all predators who satisfy the causal link standard should be committed because many are responsible, but if the causal link standard is the criterion for commitment, it will always be demonstrable. All sexual predation dangerous enough to justify the dangerousness criterion for preventive confinement will also warrant a diagnosis. Evaluators and trial courts could claim that not all predators who meet the causal link standard are committable even though all suffer from a serious abnormality, but on what legally justifiable grounds could they reach such a conclusion if the causal link is the standard? All sexually dangerous agents could be found to have a serious control problem. By necessity, decisionmakers would be imposing their own private, subjective criteria, based, one assumes, on considerations of danger and perhaps non-responsibility, but such decisionmaking would be legally arbitrary and unacceptable. Limiting the causal link standard by requiring that the predator suffer from a recognized predisposing mental disorder will not solve the circularity problem.

Furthermore, most of the recognized disorders that will apply in cases of sexual predation are not promising candidates as predicates for non-responsibility. The recognized disorders that are likely to support a finding of the causal link—such as the paraphilias, impulse disorders generally, and personality disorders—are precisely those that raise the circularity problem most acutely. They do so because they are marked primarily by abnor-

malities of desire, conduct, and pervasive behavioral or affective "style,"⁶⁹ rather than by relatively discrete, severe abnormalities of cognition, perception, and affect.⁷⁰ In these cases, both the conclusion concerning abnormality and the inclusion of the conduct as the criteria for a recognized disorder will inevitably be affected by considerations of social context and values in addition to more neutral, scientific, and clinical criteria for abnormality, such as significant dysfunction or distress.⁷¹ In short, it is simply harder to characterize conduct and personality disorders as "diseases," even if the conduct is relatively extreme and harmful.⁷²

"Personality disorder" is a recognized category of psychiatric diagnoses,⁷³ but people with personality disorders rarely suffer on that basis alone from the types of psychotic cognition or extremely severe mood problems that are the standard touchstones for a finding of non-responsibility. Most are perfectly in touch with reality, their instrumental rationality is intact, and they have adequate knowledge of the applicable moral and legal rules that apply to their conduct.⁷⁴ Although their abnormalities might make it harder

⁶⁹ For example, The Diagnostic and Statistical Manual of Mental Disorders defines a personality disorder generically as "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment." DSM-IV-TR, *supra* note 50, at 685.

⁷⁰ As the text suggests, most sexually violent agents are not motivated by psychotic reasons. Furthermore, sexual predator commitments will be unnecessary for sexually violent agents who are grossly out of contact with reality because they will be legally insane and committable on that basis. See *infra* text accompanying note 81.

⁷¹ See DSM-IV-TR, *supra* note 50, at xxx-xxxii (stating a generic definition of mental abnormality).

⁷² As my clinical teachers taught me, most mental disorders are things that people "have," but personality disorders are what people "are." Although imprecise, this formulation helps one understand why characterizing some of the latter as disorders or diseases is difficult.

⁷³ DSM-IV-TR, *supra* note 50, at 685.

⁷⁴ In many cases, the conduct that is the basis for the diagnosis does not *per se* cause the person distress. For example, an agent whose conduct warrants the diagnosis of Antisocial Personality Disorder may be distressed by the reactions of the police, creditors, and others, but the conduct itself might not be distressing. Similarly, many sexually violent predators are not distressed by their desires, but they are distressed by the condemnation and punishment society and the law impose. Moreover, the degree of distress or impairment such disorders cause is very much a function of the particular social, moral, and legal regime in which the person lives, which once again suggests the highly value-relative nature of the judgment of disorder in these cases. See, e.g., Ellen Barry, *Despite Therapies, Pedophilia Eludes Cure*, Boston Globe,

for them to behave well, they seldom manifest the grave problems that might satisfy an insanity defense or even warrant a common-sense excuse on the ground that the person cannot “help” himself or herself. Even if the term “personality disorder” were interpreted broadly to include paraphilias, disorders of impulse control, or other recognized disorders that might apply to sexual predators, the term would still be over-inclusive as a predicate for non-responsibility in the case of most sexually violent people.

The causal link standard’s general over-inclusiveness as a non-responsibility criterion and its circularity problems are especially problematic in the criteria for commitment that Kansas and other states have adopted.⁷⁵ Recall the basic definition of a mentally abnormal sexual predator: “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.”⁷⁶ A “mental abnormality” is defined as a “congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.”⁷⁷ This basic definition requires one of two types of abnormality—personality disorder or mental abnormality, as Kansas defines this term—to satisfy the critical non-responsibility justification for involuntary confinement. Unless these abnormalities produce or are the equivalent of non-responsibility, the causal link between abnormality and predation does no legal justificatory work, and the definition simply describes an agent who is “caused to be” dangerous. After all, every dangerous agent is caused to be dangerous by some set of causal variables, and “caused” dangerousness alone is insufficient to justify involuntary commitment. Just because behavior is caused does not mean that it cannot be controlled. Thus, the

Feb. 14, 2002, at A1 (reporting that one therapist, frustrated by the inability to change the motivation of pedophiles, recommended that some should move to societies where social and legal constraints on non-coercive pedophilic practices are less severe than in our society); see also *supra* note 66 (discussing homosexuality).

⁷⁵ The Kansas criteria are identical or similar to those in other sexual predator commitment statutes. See, e.g., Wash. Rev. Code Ann. §§ 71.09.020(1), (2), (4), (12) (West 2002). The analysis herein of the Kansas criteria extends a previous treatment. Morse, *Fear of Danger, Flight from Culpability*, *supra* note 5, at 260–61.

⁷⁶ Kan. Stat. Ann. § 59-29a02(a) (Supp. 2000).

⁷⁷ *Id.* § 59-29a02(b).

terms "personality disorder" and "mental abnormality" must be the ground for non-responsibility, in addition to being part of the necessary causal link.

We have already seen that personality disorder is an over-inclusive criterion for non-responsibility and is not a promising predicate for non-responsibility in any case. Therefore, let us turn to consideration of Kansas's idiosyncratic non-responsibility criterion, "mental abnormality." The term "mental abnormality" is not a recognized diagnostic term, but, as we have seen,⁷⁸ the Supreme Court in *Hendricks* properly noted that states are free to define legal criteria as they wish, and the criteria for sexual predator commitments are surely legal. States consequently need not be bound by the criteria employed by extra-legal groups, such as psychiatrists and psychologists. The only question is whether the criteria adopted are rationally calculated to achieve a justifiable purpose. In this case, the justifiable purpose is to identify those dangerous sexual offenders who are not responsible. But "mental abnormality," as Kansas defines it, could not possibly satisfy this goal because it would apply to every person who is potentially sexually violent, whether or not the person's conduct warranted a recognized diagnosis. The "mental abnormality" criterion is obscure, circular, and mostly incoherent.

The definition states that a person is abnormal if any genetically inherited/prenatally acquired (congenital) or environmental (acquired through life experience) variable that affects the person's emotional or volitional ability predisposes the person to engage in criminal sexual misconduct. It is not clear what is meant by "emotional" or "volitional" ability. Neither word is a term of art or a technical term in the behavioral or philosophical literature. The former has a common sense, intuitive meaning, but the concept of volition is extraordinarily vexed.⁷⁹ If it refers to the ability of an agent to execute his or her intention, predators have no volitional

⁷⁸ See *supra* text accompanying note 12.

⁷⁹ The meaning of volition is controversial in philosophy and psychology. See Michael S. Moore, Act and Crime: *The Philosophy of Action and Its Implications for Criminal Law* 113-65 (1993) (providing the most extensive discussion of volition in the legal literature, criticizing the view that volitions are desires, and arguing that a volition is an intention to execute a basic action).

disability whatsoever.⁸⁰ If it refers to states of desiring or wanting, it is redundant with the requirement of a "predisposition" to criminal sexual violence.

Furthermore, predisposing cognitive variables are evidently excluded from Kansas's definition, probably because cognitive problems are rarely factors in abnormalities of desire. If they were, as in the case of manifest delusions, standard non-responsibility conditions, such as gross irrationality, would obtain. For example, Justice Scalia's *Crane* dissent raises the hypothetical case of a man with a will of steel who delusionally believes that every woman he encounters is inviting crude sexual advances.⁸¹ Such an agent would probably meet even a narrow, cognitive criterion for legal insanity. In a fundamental sense, the agent does not know what he is doing or does not know that what he is doing is wrong because he delusionally believes that his crude advances are justified by the woman's consent. This defendant could be indefinitely committed using traditional and relatively uncontroversial post-insanity acquittal commitment. Although gross cognitive impairments tend to be clearly identifiable and might render agents dangerous and non-responsible, their exclusion from the mental abnormality definition in the sexual predator criteria does not present a practical problem.

Holding aside, then, both a clear understanding of what the statute means by emotional and volitional abilities and any consideration of cognitive abilities, what else would predispose any agent to any conduct—sexual or otherwise, normal or abnormal—if not biological and environmental variables that affect the agent's emotional and volitional ability? In other words, the definition is simply a partial, generic description of the causation of all behavior, and it is not a limiting definition of abnormality. All behavior is (partially) caused by emotional and volitional abilities that have themselves been caused by congenital and acquired characteristics. The condition that makes sexual predation mentally abnormal—congenital or acquired causes of a predisposition—applies to all behavior and is, thus, vacuous. It certainly cannot explain why the inevitable presence of congenital and acquired causes of a predisposition means that the agent cannot control and is not responsible

⁸⁰ See Fingarette & Hasse, *supra* note 54, at 61.

⁸¹ *Kansas v. Crane*, 122 S. Ct. 867, 875 (2002) (Scalia, J., dissenting).

for action that expresses the predisposition. Indeed, according to this criterion, no one would ever be responsible for any conduct.

The Kansas criterion is entirely dependent on the requirement of a specific predisposition to commit sexually violent offenses to limit the definition to sexual predators, but it is not a definition of mental abnormality even in the case of sexually violent people. If any agent who has a predisposition to commit sexual offenses is mentally abnormal, as the definition implies, then the definition of mental abnormality is circular, and abnormality does not independently provide even part of the necessary causal link. The definition presupposes what it is trying to explain. Moreover, such a circular definition collapses the clichéd but important distinction between “badness” and “madness,” which is precisely the distinction the definition is meant to achieve to justify civil rather than criminal commitment.

The criterion suffers from further defects. It is strange to define a mental abnormality by reference to the penal code. Such a reference suggests that legislative expansion or contraction of the scope of criminalization of sexual offenses would inherently expand or contract the scope of what counts as mentally abnormal and what automatically satisfies the causal link. The definition also requires that the predisposition to sexual violence must “menace” others to a sufficient degree. This requirement implies that some sexually violent offenses might not constitute a menace to the health and safety of others.⁸² But if so, why are such offenses criminalized? Furthermore, the degree of menace required, like the definition of a sexual offense, is a normative moral and legal standard. In what way is a normative legal standard of dangerousness a rational part of the definition of mental abnormality rather than the product of such abnormality?

In sum, the criteria in the Kansas statute that establish non-responsibility, personality disorder, and mental abnormality, are

⁸² In a personal communication, Sherry Colb points out that the “degree of menace” may refer to the statistical likelihood that the predator will act rather than to the harm the conduct will produce. The statutory language is ambiguous, but I think the latter is the more natural reading. Even if it does refer to statistical risk, the amount of risk required is a normative, legal issue. Electronic Correspondence from Sherry Colb, Professor of Law, Rutgers School of Law at Newark, to Stephen J. Morse, Professor of Law, University of Pennsylvania (Dec. 22, 2001) (on file with the Virginia Law Review Association).

vastly over-inclusive non-responsibility or control criteria, and the definition of mental abnormality is both obscure and virtually incoherent. The causal link standard in general and the Kansas criteria in particular are not non-responsibility standards. They cannot conceivably limit involuntary civil commitment only to those potential predators who cannot control themselves and are, thus, not responsible for their potential sexual violence. Using such criteria, virtually every predator would be both convictable and committable. The loss of control standard should be rejected for the reasons Part III provides, but at least it attempts to be both a genuine non-responsibility and limiting standard. A fortiori, and contrary to Justice Scalia's assertion in *Crane*, the causal link standard is even less acceptable because it is not and cannot be either a limiting or non-responsibility standard. The causal link standard permits involuntary civil commitment for dangerousness alone and must be rejected.

In addition to over-inclusiveness, causal link standards invite potentially misleading expert testimony. The causal link between mental abnormality and legally relevant conduct is established, in brief, by demonstrating that the agent has an irrational reason for action that mental disorder produced and that the agent's irrational reason was at least in part a cause of the legally relevant behavior. The agent's reason for action and whether it is produced by mental disorder are factual questions; whether that reason was a cause of behavior within the agent's practical reason is a common-sense conclusion; whether that reason was evidence of sufficient lack of capacity for rationality to warrant an ascription of non-responsibility is a normative, legal question. Excellent mental health clinicians can help to identify an agent's mental states, including an agent's reasons for action, but they beg the responsibility question if they simply conclude from a causal link, as many do, that the agent cannot control himself or is non-responsible. The problem is that, when disease or disorder are implicated in the causation of behavior, the misleading, question-begging metaphor of mechanism—the thought that behavioral symptoms are simply mechanisms and not actions—always threatens to intrude and to predispose decision-

makers to infer non-responsibility.⁸³ Thus, the causal link standard's conceptual problem of over-inclusiveness will be potentiated in practice by expert testimony concerning disorder and disease. Finally, genuinely helpful expert testimony about the "mental abnormality" criterion, as Kansas defines it, is impossible because the criterion is so obscure and unmoored from any sound clinical or scientific foundation.

The broader implications of the causal link standard are also extremely disquieting. If the causal link standard is constitutionally acceptable, the logic of *Hendricks* and *Crane* implies that all people charged with or convicted of violent offenses who have some mental abnormality that predisposes them to commit those offenses are potentially committable. This would still be true if an adequate, non-circular definition of mental abnormality were provided because even then a causal link does not entail non-responsibility. The problem would be exacerbated if the Kansas definition of "mental abnormality" were accepted. All predispositions to commit offenses would satisfy Kansas's causal link between mental abnormality and legally relevant behavior because all predispositions to commit legally relevant behavior are seriously abnormal.

Suppose, for example, that a state wished to apply an involuntary commitment law to a class of dangerous people broader than sexual predators, such as "mentally abnormal violent predators." Using the Kansas definition of a sexual predator as a model and making only two changes—omitting the two references to sex—the definition of a violent predator would be this: "any person who has been convicted of a violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the repeat acts of violence." Otherwise, let us assume, the statute is indistinguishable from the Kansas statute, except that it gives a more adequate definition of mental abnormality. Other than its scope of application, this statute is conceptually and legally indistinguishable from the Kansas commitment statute that passed constitutional muster in *Hendricks*. Depending in part on how broadly or narrowly the "violent offenses" criterion was interpreted,⁸⁴

⁸³ The metaphor of mechanism is discussed in more detail at *infra* text accompanying notes 87–88.

⁸⁴ For example, the Supreme Court has previously been untroubled by using the threat of a relatively minor property crime as the predicate for a finding of

it would permit the indefinite involuntary civil commitment of an immense proportion of criminals who would otherwise be sentenced to prison or released after serving a full prison term. For example, large numbers of people in prison, especially males, meet the diagnostic criteria for Antisocial Personality Disorder.⁸⁵ Indeed, conduct that violates the penal code is precisely the type of conduct that justifies the diagnosis. Satisfying the causal link standard for commitment would present little problem in such cases, threatening liberty broadly. The *Crane* majority was cognizant of this problem and imposed an independent control criterion to avoid it.⁸⁶ For the reasons this Essay gives, however, I doubt that the independent control criterion will be an adequate prophylactic.

I recognize that our society seems specially to fear sexual violence and that, at present, the motivation to create broad civil commitment schemes to confine violent criminals generally may not exist. The lack of such motivation is a historically contingent fact, however, rather than a principled objection. Thus, causal link standards represent a real and persistent threat to liberty.

The causal link standard is a potentially profound, broad threat to liberty, to the distinction between crime and disorder, and to the consequent distinction between civil and criminal confinement. As *Crane* correctly recognized, the causal link standard does not satisfy substantive due process. In the future, courts should not be blinded by necessarily non-substantive, cosmetic changes in causal link commitment criteria that appear to embrace a serious control problem. Substantive due process should require a genuinely limit-

dangerousness to support continued involuntary commitment of a person acquitted by reason of insanity. See *Jones v. United States*, 463 U.S. 354, 365 (1983).

⁸⁵ David T. Lykken, *The Antisocial Personalities* 4–6 (1995); Vernon L. Quinsey et al., *Violent Offenders: Appraising and Managing Risk* 75–76 (1998) (noting also that almost all prisoners have some diagnosable mental disorder). But see Lee N. Robins et al., *Antisocial Personality, in Psychiatric Disorders in America: The Epidemiologic Catchment Area Study* 258, 260–61 (Lee N. Robins & Darrel A. Regier eds., 1991) (finding that only a minority of arrested persons met criteria for anti-social personality).

⁸⁶ E.g., *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867, 870 (2002) (noting that 40 to 60 percent of the male prison population may be diagnosed as having Antisocial Personality Disorder). Commentators have also recognized the implications. See, e.g., Mara Lynn Krongard, *A Population at Risk: Civil Commitment of Substance Abusers After Kansas v. Hendricks*, 90 Cal. L. Rev. 111 (2002) (claiming generally that *Hendricks* unjustifiably broadened the scope of civil commitment and that substance abusers as a class are at specific risk for commitment).

ing and workable non-responsibility standard as a predicate for involuntary civil commitment. The next Part suggests that a genuinely independent control standard appears to satisfy the non-responsibility condition, as *Crane* held, but that this standard is scarcely more conceptually satisfactory or workable than a pure causal link standard.

III. "UNCONTROLLABLE URGES"

It is common to say of people that they generally lack self-control or that they lost control on a specific occasion. Depending on the circumstances and the applicable moral and legal standard imposed, such locutions are used both to ascribe blame and to excuse the agent. In the case of Leroy Hendricks, for example, the criminal justice system blamed and punished him for yielding to his allegedly uncontrollable urges; the sexual predator commitment system in effect excused him, found him non-responsible, because it committed him on the ground that he could not control precisely the same urges and related conduct that led to the ten-year prison sentence for sexual molestation that preceded his commitment. But how could it be fair to hold responsible and punish an agent for yielding to urges that are impossible or supremely difficult to control? This Part of the Essay claims that our ambivalence about control problems is caused by a confused understanding of the nature of those problems and argues that control or volitional problems should be abandoned as legal criteria. On conceptual and scientific grounds, loss of control, as usually understood, is not an adequate limiting, non-responsibility standard for involuntary civil commitment. On practical grounds, it will impose almost no limit on commitment.

Let us begin with the phenomenology of an alleged control problem. Suppose that a person has a powerful desire to do something that it is unwise, immoral, or illegal.⁸⁷ That is, the agent really, really, really wants to do something wrong. Imagine an agent with extremely strong sexual desires who is in a situation of great temptation. Hold constant the agent's subjective strength of desire and temptation in the following scenarios. If the situation is the privacy

⁸⁷ Other terms might be substituted for "desire," such as "urge," "impulse," or "want," but, for all practical purposes, they are synonymous in this context.

of the bedroom with one's consenting spouse, the agent is lucky, and there is no problem of wisdom, morality, or legality. But suppose that the other is a willing stranger, but neither has the means to engage in protected sex. Or suppose that the agent is in a hotel room with the willing spouse of another. Finally, suppose that the agent is Leroy Hendricks, in the company of an attractive child.

In all four cases the agent intensely desires to have sex, but why might we conclude that any of them is not responsible for his or her sexual behavior? In the latter three cases the person had a good practical, moral, or legal reason not to engage in sex, but the strength of the desire was by hypothesis the same in all four cases. Sexual desires, like all desires, might be produced by genetic predisposition, by socialization experiences, by particular situations, or by a host of other causes, but a desire is simply a desire, however it is produced. Desires and temptations, whether "normal" or "abnormal," may be strong or weak, persistent or sudden. It is of course easier, in the colloquial sense, to behave wisely, morally, and legally if an agent does not have suddenly arising, strong desires to behave unwisely, immorally, or illegally. Moreover, failure to satisfy strong desires can cause very unpleasant feelings, such as tension, anxiety, and frustration. Nonetheless, what does it mean to say that an agent "can't help it" when the agent yields to strong desires that will cause unpleasant feelings if they are not satisfied?

If an agent's body is literally forced to move, say, by operation of a genuine reflex, then the agent, for legal purposes, has not acted at all, because the law's concept of action requires intentional bodily movement. Conduct caused by strong desires, however, is surely human action and not a biophysical mechanism. Note, too, that the strength of the desire, and not its normality or abnormality, is what motivates the conclusion that perhaps the agent cannot help himself. The alleged abnormality of a desire is not a proxy for its strength. After all, we would not conclude that an agent who yields to a weak desire cannot help himself, even if the desire is abnormally caused or abnormal in itself.

In the examples, the agent's instrumental practical reason seems entirely unimpaired. The agent strongly desires sex, a desire that is both common and easy to understand, and believes that sexual contact with an available other will satisfy the desire. So, the agent forms the intention to have sex and acts on the intention. When

Leroy Hendricks's hand alights on the body of a child, that effect is not simply a neuromuscular spasm, and it is instrumentally rational in light of Hendricks's desires and beliefs. Furthermore, virtually all agents who yield to strong and even sudden or surprising desires to behave unwisely, immorally, or illegally fully recognize, as Leroy Hendricks admittedly did, that yielding is wrong. Even if the conduct is the symptom of a recognized disorder, agents who yield in such circumstances appear quintessentially responsible for their conduct. It is nonetheless often claimed that they "couldn't help it" and should therefore be excused or treated as non-responsible.

Two doctrines in criminal law negate responsibility because the agent allegedly acted "involuntarily": the absence of an act and compulsion or duress. Let us consider whether either legal meaning of "involuntariness," which seems to be synonymous with lack of capacity to control oneself, can help us understand what we mean conceptually by loss of control. An agent is clearly not even *prima facie* responsible, unless the agent's harmful bodily movements are intentional actions. Even if an agent acts intentionally, he will be held non-responsible if he acts in response to compulsion or duress, because he has been placed in a hard choice situation. We could not fairly hold him accountable for yielding to a sufficient threat.

In the case of no action, the bodily movement is literally involuntary, literally a mechanism, because it is caused by something other than the agent's practical reason that produces an intention. In the case of duress, however, involuntariness is both metaphorical and a legal label affixed to agents who are considered non-responsible. In either case, if the agent causes harm, we conclude that the agent could not help it, and we hold her non-responsible. Again, in the case of no action, the agent literally could not help it. In the case of duress, she could help it, but we cannot fairly expect her to help it, and thus we say, metaphorically, that she could not and ascribe non-responsibility. Can either theory explain loss of control, as this standard is used, when evaluating the responsibility of sexual predators?

I believe that the metaphor of mechanism is the most misleading source of the intuition that some people cannot control some desires, especially if we believe that the desires are produced by neurochemical or other brain abnormalities. This mechanistic meta-

phor is powerful because mechanistic events are not proper objects of responsibility ascription. Thus, if action that “yields” to a strong “abnormal” desire is “just like” a biophysically involuntary bodily movement, then yielding is apparently not responsible action. This is simply an analogy, however, and it is flawed. Recall that a desire is simply a desire, whether it is caused by biological abnormalities or the alignment of the planets. There is no literal physical compulsion, as there is in cases of reflex, spasm, and the like. It is literally true that an agent cannot help a reflexive bodily movement, but is it true that an agent cannot help acting to satisfy at least some strong desires in some situations?

To cash out the mechanistic metaphor, examples of the following kind are given.⁸⁸ Assume that an agent needs to urinate, but is unable to find an appropriate place to do so. As time passes and the bladder continues to fill, the desire to urinate will become increasingly powerful and unpleasant. At some point, however, the person’s bladder will empty because the pressure on the urethral (urinary) sphincter will mechanically force it to open; he or she will no longer be able to “hold it in,” no matter what the cost might be for doing so. For example, suppose the agent is threatened with death for permitting his bladder to empty. The agent will surely exercise control for a very lengthy period, but all agents will finally empty their bladders because, ultimately, voiding will be a product of literally uncontrollable mechanism. The sphincter “fails” because the physical pressure on it is too great.

Strong desires are allegedly analogous to the full bladder. Increasing desire is analogized to increasing pressure on the sphincter, and we are supposed to conclude that people are no more responsible for yielding to some desires than they are for emptying their bladders. But desires are not physical forces, actions are not mechanisms, and people are not sphincters. There are no “desire units” that will finally mechanistically force the “action switch” to flip if enough “desire units” are added. Assuming that Leroy Hendricks wants to live, if we threaten him with immediate death

⁸⁸This specific example was first suggested by an anonymous participant at a conference. One can endlessly devise such examples. See, e.g., Stephen J. Morse, *Hooked on Hype: Addiction and Responsibility*, 19 *L. & Phil.* 3, 28–30 (2000).

for touching a child, he will not touch a child.⁸⁹ The analogy to literal mechanism fails, but if the mechanistic picture is in one's head, it is easy to conclude that the sexual predator cannot control himself.

Now let us consider whether a compulsion or duress theory can explain the conclusion that some agents who suffer from intense and allegedly abnormal desires cannot control themselves. Assume that an agent is being threatened with a horrible death unless he kills two people. At some point, it will seem almost impossible not to yield to the threat. Almost any agent might yield, no matter what the cost might be for doing so.

Duress is an excuse to crime only if an agent is threatened with death or grievous bodily harm, a person of reasonable firmness would yield in the situation, and the agent is not at fault for placing herself in the threatening situation.⁹⁰ Thus, we might finally excuse the agent but not because the agent had a volitional or control problem. Again, the agent's reasoning is intact, and his will, his volition,⁹¹ operates effectively to save his life by forming and acting on the intention to kill the hapless victims. The reason to excuse the agent would be that he faced a dreadfully hard choice for which he

⁸⁹ See Judith V. Becker & John A. Hunter, Jr., *Evaluation of Treatment Outcome for Adult Perpetrators of Child Sexual Abuse*, 19 *Crim. Just. & Behav.* 74, 82 (1992) (noting that probation and its supervision are effective in reducing "atypical" sexual conduct). Becker and Hunter also report other research indicating that sexual offenders commit many more sexual offenses than those for which they are arrested. This too suggests that sexual offenders are able to "control themselves" when the risk of apprehension is substantial.

What reasons would have motivational salience in an individual case is of course an open question, and individual agents will respond to different reasons. For example, drug addicted pregnant women who will not otherwise forego drugs are more likely to remain abstinent and to attend full day treatment if they are paid regularly with a voucher system to do so. See, e.g., Hendrée E. Jones et al., *The Effectiveness of Incentives in Enhancing Treatment Attendance and Drug Abstinence in Methadone-Maintained Pregnant Women*, 61 *Drug & Alcohol Dependence* 297 (2001). The point is simply that the actions of sexual offenders are actions, not mechanisms, and thus potentially reason-responsive.

The example in the text might also suggest that if it takes a gun to one's head to motivate a person not to engage in certain actions, then it must be very hard not to perform those actions. Again, this is, in a colloquial sense, best explained in terms of a rationality defect, as Part IV explains, but it does not mean that there is anything wrong with the agent's will.

⁹⁰ Model Penal Code § 2.09(1) (1985).

⁹¹ See Moore, *supra* note 79, at 113-65.

is not responsible, and we could not fairly expect him not to yield when threatened with death.

The agent faced with the threat of frustration of strong internal desires is essentially claiming an "internal duress" excuse. But is the frustration of desire the equivalent of the experience of death, grievous bodily harm, or agonizing pain? Unlike the literal involuntariness of mechanism, the metaphorical involuntariness of duress is a continuum concept. Frustration and related unpleasant feeling states may be psychologically painful, but even if the desire and its strength are not the agent's fault, think how much psychological pain must be threatened to consider an agent not responsible for sexual violence. Note, further, that if the agent's primary reason for yielding is the positive pursuit of pleasure rather than the avoidance of threatened psychological pain, then there is no hard choice and "internal duress" would not obtain.

If non-culpable hard choice is the reason why we might excuse some agents who yield to strong internal desires, this non-responsibility condition would be rare in general and in the case of sexual predators in particular. Almost all agents predisposed to yield to strong desires to do wrong, especially serious wrongs like sexual violence, would be considered responsible because the threat of psychological pain will seldom be sufficiently great to excuse. And again, even if we did excuse agents for this reason in some cases, there is no control defect. The agent's will operates effectively indeed to end the psychological pain by satisfying the desire. The non-responsibility condition, if one obtains at all, would be a sufficiently hard choice the agent faces through no fault of her own.

Loss of control as a non-responsibility condition is a colloquial concept that gains undeserved credibility when it is analogized to "involuntariness" caused by mechanism or most cases of duress. Nonetheless, is there a residual, common sense meaning of loss of control that makes sense? Human beings can be subject to strong desires that leave them feeling subjectively unfree and that appear to have coercive motivational force. Indeed, in many cases, the desires or urges may be experienced as "ego-alien," as if they were being imposed on the agent rather than being part of the agent. It is surely harder to behave well when one has strong desires to do wrong because the prospect of satisfaction is so pleasant, the pros-

pect of frustration is so painful, and the combination of these prospects tends to diminish our ability to be able to bring reason to bear about what we should do. But desires and fears of frustration and related feeling states are once again not physical forces that literally force one's body to move if they reach sufficient intensity. They work through the agent's practical reason.⁹² Part IV explains that loss of control is much better understood as a rationality problem than as a volitional defect.

Loss of control, as an independent state or condition that undermines responsibility, does not gain much support from related scientific or clinical data. Loss of control is not a technical term, but empirical research concerning addictions, impulses, impulsivity, and disorders of impulse control is probably the most relevant to the legal meaning of loss of control. In basic and clinical science, however, there is no consensus about the conceptual meaning, the definition, or the measurement of these terms.⁹³ Some definitions are simply question-begging about the agent's ability to control his or her conduct. For example, the American Psychiatric Association defines the "essential feature" of an impulse control disorder as, "the failure to resist an impulse, drive, or temptation to perform an act that is harmful to the person or to others."⁹⁴ But why does the person fail to resist, and is the reason one that suggests that the person is not responsible for the failure? The Diagnostic and Statistical Manual of Mental Disorders explains further: "[T]he individual feels an increasing sense of tension or arousal before

⁹² Most self-control mechanisms we use to control the untoward effects of our desires are techniques that facilitate the use of reason, prevent us from acting when we act "unthinkingly," or prevent us from being in situations in which we recognize that we act unthinkingly.

⁹³ E.g., Morse, *supra* note 88, at 8 (noting that there is no consensus definition of "addiction"); James D. A. Parker & R. Michael Bagby, Impulsivity in Adults: A Critical Review of Measurement Approaches, *in* Impulsivity: Theory, Assessment, and Treatment 142, 142 (Christopher D. Webster & Margaret A. Jackson eds., 1997) (stating that there is no consensus definition of impulse and describing the low correlation between various research measures of impulsivity).

⁹⁴ DSM-IV-TR, *supra* note 50, at 663. Examples of such disorders include pyromania, kleptomania, and pathological gambling. The primary mental disorders sexual predators have—paraphilias and Antisocial Personality Disorder—are not specifically categorized as disorders of impulse control, but, like substance dependence and abuse, they share many features with disorders of impulse control. *Id.*

committing the act and then experiences pleasure, gratification, or relief at the time of committing the act. Following the act there may or may not be regret, self-reproach, or guilt.⁹⁵ But does the presence of increasing tension or arousal mean that the agent cannot control himself, and can we validly measure such states and the supposed loss of control?

In this general area of research, good objective measures of the operative terms, such as tension and arousal, often do not exist, and thus make valid empirical research impossible. Measures with some apparent validity often do not correlate. In a crude, common-sense fashion, we can estimate the strength of a desire by observing how much the agent is willing to sacrifice to satisfy it, but this is a far cry from a repeatable, objective, independent measure of strength of desire.⁹⁶ Even when the research is good, in the absence of a successful account of "uncontrollability," research cannot tell us whether failure to resist is "controllable" because the research concerns human action and not mechanisms.⁹⁷ This research does not investigate how many "desire units" are necessary mechanically to flip the "action switch."

I am not making the unjustifiably skeptical claim that good research has taught us nothing in the domain of behavioral control. Indeed, we know a great deal about the variables that contribute to what Professor Thomas Schelling memorably describes as the "intimate contest for self-command."⁹⁸ For example, all things being equal, agents who discount time steeply or who are reward-

⁹⁵ Id.

⁹⁶ See Dennis M. Donovan, Assessment of Addictive Behaviors: Implications of an Emerging Biopsychosocial Model, *in* Assessment of Addictive Behaviors 3, 6 (Dennis M. Donovan & G. Alan Marlatt eds., 1988).

⁹⁷ There have been attempts to measure loss of control directly, but these efforts have been question-begging failures because they circularly include loss of control as one of the criteria for the inability to control oneself. See Stephen J. Morse, From *Sikora* to *Hendricks*: Mental Disorder and Criminal Responsibility, *in* The Evolution of Mental Health Law 129, 161-62 (Lynda E. Frost & Richard J. Bonnie eds., 2001).

⁹⁸ Thomas C. Schelling, Choice and Consequence 57 (1984). See generally George Ainslie, Breakdown of Will (2001) (applying hyperbolic discounting theory to problems of willpower and loss of control and claiming that defects of the will are distinguishable from rationality defects); Albert Bandura, Self-Efficacy: The Exercise of Control (1997) (providing an overview of the field and a presentation of "self-efficacy" theory); Howard Rachlin, The Science of Self-Control (2000) (providing a review of research and a theoretical account of self-control based on "teleological behaviorism").

insensitive are more likely to behave wrongly than agents who discount time shallowly or who are reward-sensitive. Unfortunately, however, we have no scientific measure of whether, ultimately, an agent can control himself, and rational capacity defects are the variables that, in most cases, cause an agent to find it difficult to control himself.⁹⁹ It was precisely for these types of reasons, for example, that during the ferment of insanity defense reform in the early 1980s, the American Psychiatric Association recommended abolition of the control or volitional prong of the insanity defense.¹⁰⁰

Even if there were such independent entities as irresistible desires, which I deny, we cannot distinguish between an irresistible desire and one simply not resisted. I fully believe Leroy Hendricks when he reports that he subjectively feels that his urges are "uncontrollable," and experiencing some urges as ego-alien may seem to increase those urges' coercive motivational salience.¹⁰¹ Nevertheless, despite the honesty of subjective reports of alleged uncontrollability, we do not know whether this is objectively the case. Such subjective feelings, however honest they may be, cannot substitute for conceptual and empirical demonstrations that people genuinely cannot control themselves.

Loss of control as a non-responsibility condition is so conceptually unclear and empirically unresolved that it invites unhelpful, potentially misleading, and conclusory expert testimony when it is raised. All too often, "expert" opinions about whether an agent was capable of self-control are based on a purely common-sense evaluation that anyone could perform, informed implicitly or explicitly by the expert's private, subjective moral view about

⁹⁹ See H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 32-33 (1968) (explaining that the criminal law is much more cautious about granting, excusing, or mitigating conditions based on "defects of the will" than on "defect of knowledge" because the former are vaguer and more subjective).

¹⁰⁰ Am. Psychiatric Ass'n Insanity Def. Work Group, *Statement on the Insanity Defense*, reprinted in 140 *Am. J. of Psychiatry* 681-88 (1983). The American Bar Association reached the same conclusion for the same reason. *Am. Bar Ass'n, ABA Criminal Justice Mental Health Standards* 330, 339-42 (1984).

¹⁰¹ The crucial term in the addiction literature to describe such feelings is "compulsive" or "craving." See, e.g., Alan I. Leshner, *Addiction is a Brain Disease, and It Matters*, 278 *Sci.* 45, 46 (1997). But see Morse, *supra* note 88, at 4-19 (questioning the preceding definition).

whether the agent should be held responsible. They are clearly not based on expert, scientifically, or clinically grounded understandings or measurements of lack of control. Moreover, such experts are usually mental health professionals who almost always support their opinions with diagnoses of disorder or disease, thus facilitating the misleading metaphor of and analogy to mechanism. After all, diseases are mechanisms. We do not hold malignant cells responsible for metastasizing, and we do not hold people with cancer responsible for failing to prevent metastasis. As we have seen, however, human action is not pure mechanism, even if it is the symptom of a disorder, but expert testimony inadvertently blurs this crucial distinction. The loss of control standard, therefore, has the further defect of permitting, and even encouraging, unhelpful and potentially misleading expert testimony.

The criminal justice system is the appropriate mechanism for control of responsible predators. Agents who are not responsible for their predatory sexual violence may properly be confined involuntarily, but such a massive deprivation of liberty should be inflicted only on those predators who are genuinely not responsible. The difficulty is defining the criteria for non-responsibility. Even if a state seems to impose a genuinely independent, serious lack of control problem criterion, as *Crane* requires, the definition of such a problem is so inevitably amorphous that this criterion will impose no practical limit on abnormal sexual predator commitments. Mental health professionals will have no difficulty adjusting their expert testimony to support the conclusion that virtually any sexually violent offender meets the serious lack of control standard. Moreover, there is nothing in the language of *Hendricks* and *Crane* that would permit an appellate judge to overturn a jury verdict of serious loss of control, except, perhaps, in extreme, obvious cases.¹⁰² Loss of control as an independent non-responsibility condition simply will not suffice on conceptual, scientific, and practical grounds.

¹⁰² Such cases would probably be marked by an alleged predator's history that is entirely inconsistent with a colloquial control problem and by patently deficient expert testimony. I assume, however, that such cases would be rare, especially if there were a history of sexual predation.

IV. LACK OF RATIONAL CAPACITY: A LIMITING AND WORKABLE NON-RESPONSIBILITY STANDARD

This Part argues that the lack of the capacity for rationality is the central and normatively proper non-responsibility criterion in both law and ordinary morality. It can be applied workably and fairly and leaves room for moral, political, and legal debate about the appropriate limits on responsibility. The "control" language used in *Hendricks*, *Crane*, and other cases and statutes is metaphorical and better understood in terms of rationality defects. Human beings control themselves by using their reason. If they cannot use their reason, it is very difficult to behave properly. No logical or legal reason prevents a court from understanding and interpreting "control" problems as rationality defects. Indeed, *Crane's* invitation to the states to find emotional or cognitive sources of control problems suggests a potentially broad understanding of lack of control.

Lack of capacity for rationality is almost always the most straightforward explanation of why we colloquially say that some people cannot control themselves when they experience intense desires. More important, it is a genuine and limiting condition of non-responsibility rather than a metaphoric ground. Both decisionmakers and experts would understand the issues and their tasks more clearly if lack of capacity for rationality were the standard in sexual predator commitment cases. At least some potentially sexually violent people may indeed lack substantial capacity for rationality when confronted with persistent, intense sexual desires. If so, they are not responsible for their sexual conduct, and they may justifiably be involuntarily committed if future violence can be predicted with sufficient accuracy.

If we consider the legal and moral standards of responsibility most broadly, it is clear that the capacity for rationality is the primary criterion and that the lack of such capacity is the foundational criterion for non-responsibility. Only lack of rationality can explain the diverse conditions that undermine responsibility, including, among others, infancy, mental disorder, dementia, and extreme stress or fatigue. For example, children do not become more responsible as they mature simply because they grow older, taller, or heavier; they become more responsible because an increase in the capacity for rationality, including its emotional component, accom-

panies normal development through childhood and adolescence. Mental disorder, dementia, and extreme stress do not turn people into automatons or mechanisms. Such conditions, for which the agent is generally not responsible, undermine the capacity for rationality.

In law and morality, when a person makes a plea for mitigation or excuse from the ordinary consequences of behavior, the agent is virtually always claiming that his or her capacity for rationality was non-culpably undermined in the context in issue. When the law considers civil and criminal standards of competence—such as competence to contract or competence to stand trial—or criminal standards of responsibility—such as the insanity defense or “diminished capacity”—the underlying reason for non-responsibility that justifies such rules is the lack of capacity for rationality. Indeed, as I argue below, if one examines closely most cases of alleged “loss of control,” they essentially raise claims that, for some reason, the agent could not “think straight” or bring reason to bear under the circumstances.

Brief reflection on the concept of the person that law and morality employ and on the nature of law and morality suggests that the capacity for rationality must be the central condition of responsibility. What distinguishes human beings from the rest of the natural world is that we are endowed with the capacity for reason, the capacity to use moral and instrumental reasons to guide our conduct.¹⁰³ For adults, the capacity for rationality is the quintessential condition of mental “normality,” and the lack of the capacity for rationality is the quintessential condition of “mental abnormality.” Law guides human conduct by giving citizens prudential and moral reasons for conduct. Law would be powerless to achieve its primary goal of regulating human interaction if it did not operate

¹⁰³ See John R. Searle, *End of the Revolution*, N.Y. Rev. of Books, Feb. 28, 2002, at 33. Professor Searle writes:

Once we have the possibility of explaining particular forms of human behavior as following rules, we have a very rich explanatory apparatus that differs dramatically from the explanatory apparatus of the natural sciences. When we say we are following rules, we are accepting the notion of mental causation and the attendant notions of rationality and existence of norms The content of the rule does not just describe what is happening but plays a part in *making it happen*.

Id. at 35.

through the practical reason of the agents it addresses and if agents were not capable of rationally understanding the rules and their application under the circumstances in which the agent acts.¹⁰⁴

Responsibility is a normative condition that law and morality attribute only to human beings. We do not ascribe responsibility to inanimate natural forces or to other species. Holding an agent responsible means simply that it is fair to require the agent to satisfy moral and legal expectations and to bear the consequences if he or she does not do so; holding an agent non-responsible means simply that we do not believe the agent was capable in the context in question of satisfying moral and legal expectations. The central reason why an agent might not be able to be guided by moral and legal expectations is that the agent was not capable of being guided by reason. Again, it is not a condition of responsibility that an agent was guided by reason or acted rationally in a given situation. It is sufficient if the agent retained the capacity for rationality.

Lack of compulsion or lack of duress is also a condition of responsibility, and compulsion or duress are non-responsibility conditions. Compulsion and duress do not excuse because the agent lacks the capacity for rationality. They excuse because the agent is placed in an extremely hard choice situation through no fault of her own, and we believe that it is not fair to ask the agent to bear the ordinary consequences for yielding to a threat. If the situation of compulsion or duress is so deranging that it renders the agent irrational, then the core irrationality criterion of non-responsibility will obtain. Most duress standards in civil and crimi-

¹⁰⁴ See Scott J. Shapiro, *Law, Morality, and the Guidance of Conduct*, 6 *Legal Theory* 127 (2000). This view assumes that law and morality are sufficiently knowable to guide conduct, but a contrary assumption is largely incoherent. As Professor Shapiro writes:

Legal skepticism is an absurd doctrine. It is absurd because the law cannot be the sort of thing that is unknowable. If a system of norms were unknowable, then that system would not be a legal system. One important reason why the law must be knowable is that its function is to guide conduct.

Id. at 131.

As Professor John Searle put it: "One condition of rule-guided explanations is that the rules have to be the sorts of things that one could actually *follow*." Searle, *supra* note 103, at 35.

I do not assume that legal rules are always clear and thus capable of precise action guidance. If most rules in a legal system were not sufficiently clear most of the time, however, the system could not function.

nal law are extremely limited and do not apply in the vast majority of cases in which an agent asks to be excused from the ordinary consequences of behavior.

Law and morality consistently use the lack of capacity for reason as the central non-responsibility criterion. It is a thoroughly familiar standard that is applicable in a wide variety of legal, moral, and everyday contexts. The ordinary, common-sense notion of rationality we use is a congeries of abilities, including the ability to perceive relatively accurately, to reason instrumentally, to evaluate one's actions in the light of reasons, to weigh appropriate considerations, and the like. It also includes the capacity to feel appropriate emotional responses and to use those emotions to decide what one has reason to do.

No consensual, technical definition of the capacity for rationality exists in law, morality, philosophy, or the behavioral sciences, but this does not compel the conclusion that the law should abandon the common sense, everyday understanding of the capacity for rationality that we all apply routinely and successfully in the ordinary course of daily affairs, including in moral evaluation. One need not await a consensual definition of rationality from philosophers, economists, or psychologists to recognize that young children and people suffering from delusions suffer from major rationality defects and, therefore, are not responsible for some behaviors. One may also, without a consensual definition of rationality, understand that people under severe stress usually cannot reason as well as they can when they are not stressed and perhaps should be partially excused for improper behavior. Indeed, successful human interaction and flourishing would be impossible if people were generally unable to understand the practical reasoning of others and to make assessments of the capacity for rationality. In contrast, as Part III implies, although we also talk colloquially about and appear to have an everyday understanding of loss of control, we do not, in fact, have a good understanding of what we mean by lack of control; successful human interaction does not depend on successfully assessing control capacity. Rationality assessment is crucial to human existence; control assessment is not.

One might demand a more precise, uncontroversial definition of the capacity for rationality than the common sense concept just described, but such a demand would be unreasonable. The common

sense concept of rationality that we all employ is grounded in ordinary human experience and in understanding of practical reason and its critical role in human interaction. It is a normative standard that is always open to revision. We all everywhere and always use the ordinary notion of the capacity for rationality to evaluate the conduct of ourselves and of others. It could not be otherwise for creatures like ourselves. To require more in ordinary, practical human interaction, including the operation of our legal system, would be impossible and unnecessary. The burden of persuasion should be placed squarely on those who wish to abandon the lack of capacity for rationality as the core non-responsibility condition. We are justified in asking for compelling reasons both to abandon the present standard and to adopt an alternative.

An attractive feature of the account of the capacity for rationality as the touchstone of responsibility is that it does not commit one to any particular political, moral, or legal regime of responsibility. Indeed, it makes normative debate about how much capacity is necessary for responsibility possible by providing the proper criteria for such debate. The capacity for rationality is a continuum concept, and different amounts of the capacity might be required, depending on the context and on the individual and social interests at stake. Rationality standards for responsibility can thus vary geographically and temporally in response to evolving moral, political, and legal understandings.

Our society is morally, legally, and constitutionally committed to the immense importance of individual liberty. Such a powerful commitment suggests that a severe defect in the capacity for rationality should be required to warrant a conclusion of sufficient non-responsibility to justify indefinite involuntary civil confinement. Let us therefore turn to an analysis of how the lack of capacity for rationality standard would apply in the case of sexually violent predators.

Most sexually violent agents are firmly in touch with reality, instrumentally rational, and fully aware of the applicable moral and legal rules. The criteria for the recognized diagnoses that would probably apply to most sexual predators, the paraphilias and personality disorders such as Antisocial Personality Disorder, do not include cognitive defects that would lead to plausible claims to the

contrary.¹⁰⁵ Predators who do not suffer from a recognized disorder do not suffer from severe cognitive or mood defects because such defects virtually always would justify a diagnosis of a recognized disorder. Furthermore, although predators' sexual desires and behavior may be statistically abnormal and morally objectionable, predators are instrumentally rational when they satisfy those desires.

One might claim that the sexual predators' desires are themselves irrational. We do talk colloquially about the abnormality of desires, especially if most people cannot understand such desires, if the desires are intense, and if the desires are for goals that will cause the agent substantial interpersonal or legal trouble. Further, there have been philosophical attempts to make sense of talking about the substantive rationality of desires. These efforts have failed, however, because it is impossible uncontroversially to classify desires as irrational in themselves,¹⁰⁶ and loose, colloquial usage cannot substitute for persuasive analysis when important matters of public policy are at stake. If a desire seems abnormal, it is natural to assume that there is some abnormal underlying cause. Even if some desires are considered a symptom of recognized mental disorders, however, it is not conceptually required that the desires be irrational or that the agent lack the general capacity for rationality when the agent acts on those desires.

In sum, it appears that most mentally abnormal sexual predators are fully responsible for their sexually predatory conduct, even if they suffer from a serious, recognized disorder, and, thus, they may fairly be criminally convicted for their sexual crimes.¹⁰⁷ But, for the same reason, most such predators do not meet the necessary non-

¹⁰⁵ See, e.g., DSM-IV-TR, *supra* note 50, at 566 (stating the "essential features" of the paraphilias: "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving" inappropriate objects of sexual desire and contact, such as children).

¹⁰⁶ Nozick, *supra* note 66, at 139–40.

¹⁰⁷ Recall Justice Scalia's argument in *Crane* that predators who meet the causal link standard are not deterrable and are, thus, distinguishable from ordinary recidivists, presumably because the predators are not responsible. *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867, 874 (2002) (Scalia, J., dissenting). Because most predators will satisfy the causal link standard, one wonders if Justice Scalia meant to imply that almost none are criminally responsible and should be acquitted at a criminal trial by reason of insanity, thus obviating the need for predator commitments.

responsibility standard that might justify involuntary civil confinement. Therefore, I am claiming that, holding the agent's capacity for rationality constant, the eligibility for punishment and the eligibility for involuntary civil confinement are mutually exclusive.¹⁰⁸

There is one argument about the lack of capacity for rationality that might apply in a limited number of sexual predation cases. These would include cases in which the agent's desire is so powerful and insistent that it genuinely compromises the agent's ability to think straight, to bring reason to bear on why the person should not act to satisfy the desire.¹⁰⁹ In a rather straightforward sense, some people in the throes of intense desires may be genuinely unable to think of anything except satisfying the desire. The build-up of the desire and its non-satisfaction may cause further distracting and often unpleasant feeling states, such as anxiety, irritation, excitement, tension, and the like. If an agent cannot think of anything else and strongly desires satisfaction, it is much more likely that the agent will act, especially if there is no immediate external circumstance, such as a police officer at the elbow, to concentrate the agent's attention. In such cases, fundamental components of rationality, such as the capacities to think clearly and to evaluate self-consciously one's reasons for action, may be severely compromised. The agent may find it extremely difficult to contemplate alternatives or coherently to weigh alternatives.

Let us apply this analysis to the case of the sexual predator. Urges will arise, temptations will certainly occur, and opportunities to act on those urges and temptations will inevitably present themselves, despite attempts to avoid urges, temptations, and opportunities. Depending on the situation and on the agent's mental condition, the agent may be subject to the kinds of difficulties just described and may act with diminished capacity for rational thought at that moment. Even then, the predator is not entirely reward-insensitive, and some reasons will affect him. Assuming that the predator wants to live, a gun at his head will give him sufficient reason not to assault others, and he will not do so.¹¹⁰

¹⁰⁸ I borrow the term "eligibility" from Kyron Huigens, *Solving the Apprendi Puzzle*, 90 Geo. L.J. 387, 419-20 (2002) (discussing eligibility for punishment).

¹⁰⁹ See Morse, *supra* note 88, at 38-40.

¹¹⁰ As Dr. Johnson famously said, "Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." James Boswell, 2 *The*

Nevertheless, this kind of brute "management" technique is not generally feasible, and the predator may indeed find it exceptionally hard to bring reason to bear on some occasions.

Assuming that intense sexual desires can sometimes substantially compromise rationality and, thus, potentially can negate responsibility for acting on those desires, a fundamental question remains: Is the agent suffering from a rationality defect nonetheless responsible because he has placed himself in the situation in which rationality may be compromised, and is he aware of the usual consequences of diminished rationality? Even if intense urges of certain kinds are properly characterized as symptoms and are not the agent's fault, no agent always experiences those urges with the requisite intensity to diminish rationality. Between periods when the urges are intense, most agents are capable of substantial rationality.

If an agent knows from experience that the urges are recurrent and that on previous occasions the agent has acted on those urges in a state of diminished rationality, the agent also knows during more rational moments that he is at risk for acting in such a state in the future. It is a citizen's duty in such circumstances to take all reasonable steps to prevent oneself from acting wrongly in an irrational state in the future, including drastically limiting one's life activities if such an intrusive step is necessary to prevent serious harm. If the agent does not take such steps, the agent may indeed be responsible, even if at the moment of acting he suffers from substantially compromised capacity for rationality. The situation would be analogous to the case of a person who suffered from a physical disorder that recurrently produced irrational mental states or blackouts during which the person caused harm, but who did not take sufficient steps to prevent such harm in the future. We would surely not excuse such an agent.¹¹¹ Even if it is predictable that the agent will not take those steps and will behave non-responsibly and dangerously in the future, recall that predictability is not per se a

Life of Samuel Johnson, LL.D. 360 (Macmillan & Co. 1912). See also *supra* note 89 (discussing the gun hypothetical).

¹¹¹ See, e.g., *People v. Decina*, 138 N.E.2d 799 (N.Y. 1956) (upholding the conviction for culpable homicide of the driver of an automobile who suffered from epilepsy, experienced a seizure that caused unconsciousness, and caused death while unconscious).

non-responsibility condition.¹¹² Thus, many of the predators who become substantially irrational at the time of their sexual assaults may nonetheless be responsible and may deserve conviction, but their condition might not warrant indefinite involuntary civil confinement.

Another important consideration concerning the rationality of sexual predators concerns the relation between psychopathy and sexual violence. Although the criteria for psychopathy are somewhat controversial, it is best characterized as a psychological abnormality marked by, *inter alia*, an incapacity for empathy, guilt, and remorse, and by impulsivity, egocentricity, and chronic violations of social, moral, and legal norms.¹¹³ The condition is not synonymous with the recognized disorder, Antisocial Personality Disorder ("APD"), that the Diagnostic and Statistical Manual of Mental Disorders contains, but some people with psychopathy meet the criteria for APD, and some people with APD also suffer from psychopathy.¹¹⁴ The lack of capacity for empathy, guilt, and remorse is one of the factors that differentiates the two conditions. This lack of capacity is a necessary feature of psychopathy but not of APD. Otherwise, unless they have a co-occurring psychotic disorder, people with psychopathy are entirely in touch with reality, instrumentally rational, and know the applicable moral and legal rules. They simply do not "get" the point of morality and cannot be guided by it. They are guided only by the fear of sanctions.

Now, suppose that the predator lacks the capacity for empathy, guilt, and remorse. Such affective capacities provide people with the best reasons and motivation not to harm others. For most citizens, conscience and empathy are the most powerful prophylaxes against wrong conduct and are much more powerful than fear of

¹¹² Compare the case of a recidivist felon who always commits crimes under the influence of mind-altering substances that the felon takes for the purpose of bolstering his courage. Although the felon knows that the substances will diminish his rationality, and we know that substance use and subsequent irrationality is an entirely predictable *modus operandi*, the felon would be criminally responsible and not civilly committable.

¹¹³ See Robert D. Hare, *Psychopaths and Their Nature: Implications for the Mental Health and Criminal Justice Systems*, in *Psychopathy: Antisocial, Criminal and Violent Behavior* 188 (Theodore Millon et al. eds., 1998).

¹¹⁴ Alv A. Dahl, *Psychopathy and Psychiatric Comorbidity*, in Millon et al., *supra* note 113, at 291-92.

the criminal sanction. If these capacities are lacking, it is plausible to argue that the agent lacks moral rationality and is not responsible, even if the agent is in touch with reality otherwise and knows the moral rules in the narrowest sense.¹¹⁵ In criminal law, of course, lack of these capacities is not an excusing condition, although such a defect surely predisposes an agent to do wrong.¹¹⁶ Thus, although some sexual predators may lack conscience and empathy because they also suffer from psychopathy, in our legal culture, psychopathy is not a promising normative ground for non-responsibility.

It would, of course, be possible to claim that a lack of capacity for conscience and empathy is adequate ground for the conclusion that the agent is sufficiently irrational and non-responsible to justify indefinite civil commitment. The civil commitment and criminal justice systems can employ different rationality standards. But if an agent is sufficiently rational to deserve criminal conviction and punishment, the most intrusive, afflictive actions the state can impose on a citizen, the agent is surely rational enough to be left at liberty until the agent commits a crime or becomes genuinely non-responsible. Civil commitment should be justified only in cases in which the agent's rationality is sufficiently impaired also to avoid criminal responsibility.¹¹⁷

So far, it appears that application of the lack of the capacity for rationality standard leads to the conclusion that most sexual predators are responsible for sexually violent conduct. In some cases, however, we may plausibly infer that sexual predators may have a general, rather than an intermittent, time-limited defect in the capacity for rationality that might genuinely undermine responsibility for sexually predatory behavior. For example, suppose the preda-

¹¹⁵ See Susan Wolf, *Freedom Within Reason* 121 (1990); see also David Gauthier, *Morals By Agreement* 327–28 (1986) (arguing that moral conduct requires agents to have an “affective capacity for morality,” described as the capacity to have their “emotions and feelings engaged by what they recognize as moral considerations”).

¹¹⁶ Model Penal Code § 4.01(2) (Proposed Official Draft 1962).

¹¹⁷ This might suggest that civilly committable sexual predators who have been convicted should have been acquitted by reason of insanity and then committed on that uncontroversial ground, thereby obviating the need for sexual predator commitments. In some cases, however, it is possible that, although the predator was responsible at the time of the crime, the predator's condition deteriorated thereafter, and he is no longer responsible at the time of commitment. I assume that such cases would be few. Furthermore, increasing age diminishes the probability of violent conduct.

tion has been frequent, it has previously led to conviction and imprisonment, and incarceration is a profoundly unpleasant experience for the predator. Such a history is precisely the type that justifies a recognized psychiatric diagnosis. Even in the absence of psychotic cognition, in some cases continued predation simply may not make rational sense either to the predator or to anyone else. The predator may have no reasonable explanation for why he did not tie himself to the mast, did not take the preventive measures necessary to avoid hated imprisonment. The agent simply cannot think straight about what to do, even when not aroused, and continues to put himself in harm's way without, apparently, the rational capacity to deliberate about how to avoid such situations.

One can speculate about the mechanism that produces a general lack of capacity for rationality in such cases, but such speculation is less important than the recognition that a small number of sexual predators may have a rationality defect that extends generally over the domain of sexual behavior. These cases will be worrisome because the predator will otherwise seem responsible. Depending on the history, however, a conclusion of non-responsibility about sexual behavior may be warranted, and involuntary civil commitment might be justified. Leroy Hendricks may have presented precisely this case. I assume that such cases will be few, and that, in many of them, the predator should have been acquitted by reason of insanity and uncontroversially committed on that ground.

In addition to being the best positive and normative explanation of non-responsibility, lack of capacity for rationality also may be easily and reliably evaluated. It is an ordinary, everyday, common sense standard that we all use all the time to evaluate the behavior of ourselves and others. Lay people may not know the causes and correlates of rationality defects, but they surely know such defects when they see them. Rationality defects are the core of a mental health professional's clinical expertise. The inability of mental health science fully to understand the biological, psychological, or sociological causes of rationality defects does not prevent lay people and experts alike from effectively evaluating the capacity for rationality. Human beings recognized incomprehensible irrationality in others long before they had an inkling of the genuine causal variables that might produce such a state.

Using a rationality standard will permit mental health professionals readily to explain and legal decisionmakers easily to understand the precise behavioral grounds for inferring that an agent suffers from rationality defects. What is primarily required is simply a thick description of the agent's cognitive, emotional, and behavioral functioning, and, ultimately, of the agent's reasons for action. Good clinicians are trained to obtain such thorough descriptions by careful clinical evaluation using multiple data sources, and they are the raw materials that all people use to assess rationality. Experts evaluating the rationality standard will be able to avoid the type of unscientific, conclusory reasoning that marks conclusions about control defects, and legal evaluation will be uncontaminated by confusing, metaphorical evidence. Finally, legal decisionmakers can decide, without confusion, whether an agent's functioning meets the applicable, normative standard of lack of rational capacity, because evaluating rationality against some normative standard is essentially the same type of assessment of rationality that all people make all the time.

In sum, lack of capacity for rationality is the best explanation of and the most workable standard for non-responsibility. It is also the best explanation of what we really mean when we say that an agent cannot control himself. Control standards should be understood in terms of rationality defects. When used to assess whether sexually violent people may be involuntarily civilly committed, the irrationality standard will provide a morally, politically, and legally justifiable limiting condition for the massive deprivation of liberty that results.

CONCLUSION

Liberty and safety are precious to human flourishing, but efforts to protect both can conflict. Our society protects itself by criminal punishment and involuntary civil commitment, but both represent massive intrusions on liberty that require weighty justification. Thus, we limit criminal incarceration to those agents who have culpably committed a crime, and we limit involuntary commitment to those agents who are not responsible for their legally relevant behavior, such as dangerous conduct.

Constitutional limitations on the state's power to confine citizens based on our concern for liberty inevitably mean that the protec-

tion of social safety cannot be seamless and that security will be compromised. Some dangerous but responsible agents must remain free until they commit a crime or until they become non-responsible for their potential danger. As a result, our justifiable, appropriate fear of the harms such people may cause creates strong incentives to devise means to confine them preventively. Pure preventive detention on grounds of dangerousness alone is an anathema in a free society, however, and we should not loosen the standards of non-responsibility to sweep into civil confinement responsible agents who should more appropriately be incapacitated by criminal sentences. As Justice Anthony Kennedy warned in his concurrence in *Hendricks* and as all the Justices in *Crane* apparently agreed, civil commitment should not be used to impose punishment or to avoid the effects of deficiencies in the criminal justice system, such as improvident plea bargains, which might cause the legally required but objectionably early release of dangerous criminals.¹¹⁸

States could, of course, achieve essentially indefinite confinement through the criminal justice system by imposing life sentences on sexual offenders. There would be no constitutional objection under current proportionality jurisprudence,¹¹⁹ and many would accept that such sentences would be deserved. Thus, perhaps we should not worry about the potentially extensive reach of various control criteria for the civil commitment of sexual predators because sexually violent offenders will remain incarcerated for very long periods in any case. But this would be an unacceptably skeptical, consequential approach to the danger sexual predation presents.¹²⁰

¹¹⁸ *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 856, 862 (2002) (Kennedy, J., concurring); *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997). Indeed, Crane himself was sentenced to a relatively brief term of imprisonment as a result of a plea bargain under circumstances that might otherwise have justified a prison term of thirty-five years to life. In re Crane, 3 P.3d 285, 287 (Kan. 2000).

¹¹⁹ *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding a sentence of life imprisonment without possibility of parole for a first-time offender convicted of possessing 672 grams of cocaine and holding that the Eighth Amendment contains no proportionality guarantee applicable to terms of imprisonment, except, perhaps, for a ridiculously extreme case such as life imprisonment for a parking violation).

¹²⁰ This objection also bears a stunning resemblance to past claims that the insanity defense should be abolished because people acquitted by reason of insanity are incarcerated in any case. See Joseph Goldstein & Jay Katz, Abolish the "Insanity Defense"—Why not?, 72 Yale L.J. 853, 864–70 (1963). These claims were misguided

The law sets moral standards and should be clear about which agents are responsible. Moreover, if sexual dangerousness were treated virtually exclusively within the criminal justice system, legislators would be forced to confront and to defend, in the political process, the sentences they are willing to impose on sexual offenders, rather than sweeping this morally-fraught question under the psychiatric rug. Finally, prosecutors would be forced straightforwardly to evaluate the strength of their cases and would not be able to rely on civil commitment to remedy the effects of weak cases or improvident plea bargains.

Indefinite involuntary civil commitment should be imposed only if an agent is genuinely non-responsible. Causal link standards, which require only that some mental abnormality predispose the agent to sexually violent conduct, are not limiting conditions, even in principle, because a causal link does not entail non-responsibility. Moreover, lay people commonly but erroneously infer non-responsibility from the presence of a causal link, so this standard may be prejudicial and confusing, as well as over-inclusive. The causal link standard thus poses an unacceptable threat to civil liberty because it would permit the indefinite involuntary civil commitment of large numbers of alleged predators who are in fact responsible and who should be incapacitated by appropriate criminal punishment.

Loss of control is a limiting standard in principle for justifiable involuntary commitment, but it is conceptually confused and fails to provide adequate guidance either to experts who evaluate alleged sexual predators or to legal decisionmakers who must decide if an alleged predator is not responsible. Although the majority in *Crane* properly rejected a pure causal link standard and sought a genuinely limiting standard that would identify non-responsible sexual predators, the serious lack of control standard cannot satisfy the purpose for which it was designed. It will provide no practical limit to civil commitment of sexually violent people.

Lack of capacity for rationality is the best and most workable non-responsibility standard. It provides a proper limitation on the scope of involuntary commitment and the most understandable, practical guidance to mental health professionals and legal deci-

sionmakers. Control defects should be understood and adjudicated in terms of rationality defects, which are the best explanation of control problems. The rationality standard thus provides the best safeguard both of civil liberty and of the distinction between civil and criminal justice.