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"After These Horrendous Crimes, that Creature Forfeits his Rights":
The Sexually Violent Offender as Exceptional Criminal

By

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"After These Horrendous Crimes, that Creature Forfeits his Rights": The Sexually Violent Offender as Exceptional Criminal

By

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B.A., Yale University, 2004

Advisor: Rosemarie Garland-Thomson, Ph.D

An abstract of
a dissertation submitted to the Faculty of the
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Abstract

"After These Horrendous Crimes, that Creature Forfeits his Rights":
The Sexually Violent Offender as Exceptional Criminal
By Cyd Cipolla

This project argues that sex crime laws created in the United States over the past two decades have been overwhelmingly influenced by the category of the sexually violent offender, who is also called the sexually violent predator. This project uses feminist, queer and disability theory to examine the sexually violent offender as a form of sexuality and to critique the structures changed by this sexuality. Each chapter examines a different aspect of this figure: that the concept of the sexual predator is directly related to the inheritance of a certain criminological concept of moral insanity (the subject of Chapter One), led to a shift in the use of forensic psychiatry in response to public fears about the untreatably mentally ill (the subject of Chapter Two), has created a system in which all sex offenders are considered preternaturally dangerous and incurable (the subject of Chapter Three), constituted a new form of monstrosity and the embodiment of evil (the subject of Chapter Four). Using feminist and queer theories of sexual identity as a material somatic truth that is revealed through behavior and action, it is possible to see how the sexuality attributed to the sexually violent offender is a form of criminal sexual identity (the subject of Chapter Five).

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This dissertation is dedicated to the memory of Anthony Napoli, Mary Paulmari Napoli, Joseph "Jazzy" Cipolla, and Helen Genovese Cipolla. I carry you all in my heart.

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Introduction

This project began as an investigation into the connection between desire and pathology. Fascinated by the line between preference and compulsion, I set out to find the point at which the drive for fulfillment becomes a dangerous one. At the time, the breaking of the Catholic Church sex abuse scandals in Boston dominated news media, and everywhere I heard discussions about the benefits and dangers of forced celibacy. Many theorists, both inside and outside of academia, argued that these sorts of perversions were to be expected from an organization that restricted sexual activity in otherwise healthy men.[1] These arguments state explicitly that celibacy creates pedophilic homosexuals. Implicitly, however, they hold that male sex drive can become twisted into something dangerous if not allowed regular outlet. I took this assumption as my entry point into understanding the link between desire and danger.

I began to amass research on different types of sexual pathologies, including pedophilia. After noticing an alarming amount of literature devoted to both the overlap of and distinction between the categories of *sex offender* and *pedophile*, I devoted some time to discovering at what point in the history of US criminal law these terms became connected. I read about the Washington Community Protection Act of 1990 and the way it changed sex crime legislation in the United States. This is how I discovered the subset of legislation that allows for the civil commitment of people deemed *sexual predators* and *sexually violent offenders*,[2] labels that I argue are, among other things, legally interchangeable but not necessarily identical.[3]

I thought, originally, that the project would most appropriately develop in the field of gender theory rather than sexuality. Of all of the several thousand people held in

institutions as sexually violent offenders, only three are women.[4] A project focused on these three women as exceptions would highlight how gendered, more specifically how male, the concepts of the sexually violent offender and the sexual predator are.[5] This argument would require a working feminist and queer theoretical analysis of sexual crimes and their connections to pathology, especially in the context of the United States since 1990. Such theory did not exist in abundance at that time. I set out to develop it on my own, and this dissertation is the result.

This dissertation analyzes the category of the *sexually violent offender* and the related but not necessarily congruous figure of the *sexual predator* through the lenses of feminist, queer, and disability theories.[6] The twinned archetypes of the sexual predator and the sexually violent offender have driven sex offender laws created in the United States since 1990, laws which are generally recognized as both ineffectual and impossible to remove or critique. I argue that these archetypes are representative of a sexuality connected, inextricably, to a certain concept of insanity, even though these people are not technically insane under the law or in medical diagnosis, and that this exceptional sexuality, combined with the use of metaphors like *predator*, contributes directly to both the immovability and the ineffectiveness of these laws.

The significance of my argument to sexuality studies, feminist theory, queer theory, and disability theory, is that the sexually violent offender is an example of *criminal sexual identity*—an identity encapsulating people imagined to have sexual drives and desires so overwhelming they threaten the safety of everyone around them. Criminally sexual people are defined as, among other things, mentally abnormal, preternaturally dangerous, irrevocably predatory, and compulsively violent. Those

considered criminally sexual include anyone who is convicted or accused of sex offenses under the law and who is determined, either by psychological diagnosis or by legal opinion, to have committed those crimes because of an ongoing mental state or sexual drive. This project focuses on the small category of sexually violent offenders, but the category of criminally sexual people contains people convicted for a wide variety of offenses. The concept of a specifically criminal sexual identity applies equally to people convicted of attempted murder diagnosed with violent sadism and people convicted of rape diagnosed with coercive desire disorders.[7] *Criminal sexual identity* is a way to examine the presumption that any form of repetitive sexual crime must be driven by an attendant paraphilic or sexual desire.

In addition to providing a rubric for future study of sex crimes from a queer feminist perspective and bringing theories about normality and pathology from disability theory into conversation with criminology in a new way, the concept of *criminal sexual identity* acts as a foil to more libratory trends in queer theory and sexuality studies.[8] Libratory theory argues that the way to address moralism around sexuality is to discuss sexuality openly, objectively, and as something over which law and medicine should have no claim. These arguments are evident in the early work of sexuality scholar Gayle Rubin, provide foundation for the arguments of political actors in the Gay Liberation movement, and underpin the poststructuralist destabilization of identity itself exemplified by philosopher Judith Butler.[9]

This study does not aim to overturn libratory queer theory. The libratory work of queer activists has been extremely effective: the American Psychiatric Association removed homosexuality and various other gender disorders from the *Diagnostic and*

Statistical Manual of Mental Disorders (DSM),[10] and the US Supreme Court decriminalized sodomy in 2003. This study also does not argue in favor of feminist theory over queer theory, or vice versa.[11] Instead, this dissertation claims that it is necessary at the current moment, in the era of the sexual predator, to maintain space for the liberation of sexuality while acknowledging that it is a system with limits. Doing so requires utilizing feminist theories of systemic sexual violence alongside queer analysis and destabilization of sexual identity.

This project, true to its root as an investigation of desire and danger, focuses on a type of sexuality that is frightening by definition. It analyzes discourses that frame criminal sexual identity as dangerous, perverse, and monstrous. Because these characteristics are fundamental, criminal sexual identity allows for a queer feminist analysis of sexual danger, perversion, and monstrosity without disrupting the argument that sexual behavior between consenting adults should not be pathologized. It is a way to recognize that certain sexualities are still considered mental illnesses, even though homosexuality was removed from the DSM. It is a way to recognize that certain sexualities are still subject to legislation, even though sodomy was decriminalized. And it is a way to recognize that these sexualities, including that of the violent rapist, the sadist, and the pedophile, are treated using the scaffolding that was erected to study the homosexual, the pervert, and the sodomite, a connection usually used to highlight the inhumane treatment of lesbian, gay, bisexual, and transgender (LGBT) people.[12]

To that end: this dissertation examines the concept of the sexually violent offender in five ways, showing at all points the exceptionality of this figure and, ultimately, how this exceptionality translates to a form of sexual identity. The first

chapter looks at the sexually violent offender as descendant of the nineteenth-century figures of the moral imbecile and the sex criminal. The second chapter argues that the mental abnormality of the sexually violent offender, exemplified by Earl Shriner and codified in the Washington Community Protection Act of 1990, is a new form of criminal mental illness. The third chapter is a study of the sexually violent offender through the archetype of the sexual predator, on which all sex offender laws have been based from 1990 to the present. The fourth chapter examines tropes where the sexually violent offender is depicted as a monstrously evil being, arguing that these tropes both incorporate and exploit Christian theological concepts. Finally, the fifth chapter takes all of these in the context of feminist and queer theory and argues that the sexually violent offender is a prime example of criminal sexual identity.

In studying these figures, I move in and through various disciplinary languages and methods.[13] Each of the following chapters is different in tone. Although both are historical, Chapter One is a study in the history of forensic medicine while Chapter Two is a work of legislative history. Chapter Three utilizes literary methods of textual analysis, where Chapter Four is a work of religious studies and theological rhetorical analysis. The final chapter, Chapter Five, is a work of feminist and queer theory. I employ certain major theoretical tenets throughout, most notably questions of what it means to be normal or human from disability theory and a critical theory based hermeneutic of suspicion. The next sections outline the theoretical aims of this project, summarize the contents of each chapter, define the major terms and methods I employ, and clarify some of the more technical areas of law in order to make these disciplinary transitions and themes clear.

Interdisciplinary Studies and the Language of Law

Although the terms *sexually violent offender* and *sexual predator* technically refer to the same legal category, since the creation of the category in law the concept of the *sexual predator* has come to mean many things: a person, an identity, a history, a diagnosis, a set of laws, and a cultural specter. This project uses the formation of these categories within the law and their dissemination throughout American culture as an occasion to talk about the development of institutional structures and how these structures have formed and been formed by sex and sexuality. There can be no question, however, that legal definitions and legal language dominate, since this project focuses on a category which originated in the law and which the law continues to control.

The sexually violent offender is represented as evil, sick, predatory, deviant, and criminal, and as such these representations draw on the formation of sexuality in religion, medicine, science, law and criminology. Law, religion, medicine, and science have widely disparate narratives, disciplines, and sets of texts. They are similar, however, in that they are all languages human beings use to structure the materiality of human lives around order and disorder. Additionally, although it is difficult to tease them apart, forensic psychiatry is very deeply intertwined with sexology, medicine and the practice of medicine with the moral imperatives of religion, and science with the structures of culture. All are overseen by legal and ethical ideals and, in turn, frame the law. To examine the sexually violent offender is to examine the institutions that exist to understand, define, discover, control, treat, cure, and contain him—including, for example, understanding why sexually violent offenders are almost always seen as male.[14] This project accomplishes this by examining the language used to describe him and how

that language has shifted in response to him, and in the majority of cases this language is that of law. Through law humans aim to resolve the often-irreconcilable conflict between the desire of communities to protect themselves and the rights of individual people.

A brief illustration of the use of law to protect communities from dangerous sexuality: in June of 2011, the Alabama legislature passed a set of revisions to the Alabama Sex Offender Registration and Community Notification Act. In strict legal terms, these revisions increased surveillance for sex offenders, widened the net of people who were required to register, restricted both where sex offenders could work and where they could live following release from prison, and set especially high penalties for a group identified within the law as "sexually violent offenders."[15] The legislature introduced the new restrictions with a series of justifications.

> Sexually violent offenders also cause increased concern for law enforcement. These predators are repeat sexual offenders who use physical violence, offend on multiple victims, and prey on children. Due to their likelihood to engage in future sexually violent behavior, they present an extreme threat to the public safety. The legislature declares that its intent in imposing additional tracking and monitoring requirements on sexually violent predators is to assist law enforcement in carrying out their duties and, most importantly, to protect the public, especially children.…Sex offenders, due to the nature of their offenses, have a reduced expectation of privacy. In balancing the sex offender's rights, and the interest of public safety, the legislature finds that releasing certain information to the public furthers the primary governmental interest of protecting vulnerable populations, particularly children. Employment and residence restrictions, together with

> monitoring and tracking, also further that interest. The legislature declares that its intent in imposing certain registration, notification, monitoring, and tracking requirements on sex offenders is not to punish sex offenders but to protect the public and, most importantly, promote child safety.[16]

Alabama's law is only the latest in a decades-long push in the United States to increase penalties for sex crimes and heavily monitor the actions of those released from prison, where legislatures passed statutes like this to give communities power to protect themselves and diminish the rights of people deemed to be dangerous. It is important to note that within the quoted text that there is specific focus on the extreme threat posed by "sexually violent offenders." This is a group Alabama lawmakers define as having several distinct characteristics: they are predatory, even named as predators in the act; they are more likely than other offenders to reoffend; and they are specifically dangerous to children. Note also that the law states outright that people who engage in sex offenses have a reduced expectation of privacy, more so than any other type of criminal offender, and uses this reduced expectation as a justification for the proliferation of information about them. And finally, note that the legislature frames these laws, despite their hyperbolic and absolute condemnation of sexual crimes, not as punishment, but as measures for the protection of the community.

These aspects of law highlight the exceptionality of sexually violent criminals within the United States. There are no equivalents for non-sexually violent crimes, and this project will show that there cannot be. The factors that make sex crime law unique rely on presumptions about a particular but widely understood concept of sexual desire as pathological dangerousness. These laws are based on specific understandings about

sexual identity and sexuality: that it is possible to gain knowledge of someone's true nature by ascertaining the sexual acts he or she engages in regularly (and this may be in contrast to his or her stated identity), that sexuality is particularly dangerous to children, and that the forces that drive sexual object choice and sexual activity are singularly difficult to overcome or control. Above all, these laws rely on a sense that a perverted sexual drive is dangerous to the community, and so anyone believed to possess one must be neutralized.

This law further emphasizes the inherent danger of perverse sexual drive with the interchange of the legal term *sexually violent offenders* with the more hyperbolic metaphor *sexually violent predators*. It is understood that a sexual predator preys on the weak; he is monstrous, inhuman, desperate to fill his own needs, and unapologetic for his actions. Viewed rhetorically, the sex offender is to be feared, while the sexual predator is to be reviled.

Despite the widespread recognition and use of the term *sexual predator*, both inside and outside of the criminal justice system, the concept originated with a highly specific and very small group of criminals. Sexually violent predators, or sexually violent offenders, were originally defined as a group of sex offenders who suffer from mental abnormalities that make them more likely to re-offend. In many jurisdictions, these offenders are institutionalized indefinitely after completing their criminal sentences. The concept of civilly committing sexually violent offenders originated with the Washington Community Protection Act of 1990, although, currently, similar laws exist in twenty states and at the federal level. [17] Other states, such as Alabama, do not civilly commit these offenders, but simply use the terms *sexually violent offender* and *predator* to refer

to the worst type of sex offenders. This use demonstrates how far the category has spread and how salient the figure of the sexual predator has become.

This project considers the events surrounding the creation of the first sexually violent offender legislation, the institutions that preceded it, and the spread of the category of the sexual predator occurring afterward. As such, it is a study of the way language and materiality intersect in the concept of sexuality. In the two decades that have passed since the creation of the category of the sexually violent offender, the connected concept of the sexual predator has spread far beyond the limits of this strict legal category. He has become a representation of not only the worst kind of criminal offender, but of the dangerousness of sexuality itself. In turn, the sexually violent offender, as a figure that is inextricably a legal category, has shaped not only the way officials legislate sexuality, but also the way doctors medicalize it, and the way community members moralize it.

Sexuality Studies, Queer Theory, and Feminism

This project examines both the structures used to understand the sexually violent offender as a form of sexuality and the structures changed by the sexuality attributed to the sexually violent offender. Sex and sexuality are, as many queer theorists and scholars of sexuality point out, a mechanism by which acts become identity.[18] The concept of sexuality is also about deviance, the process of embodiment, and how we understand ourselves, both in ourselves and in relation to others. In the end, I argue the sexually violent offender has a wide impact not only because of his singularly dangerous construction, his hyperbolic being, but because of the way sexuality is understood as a criminal, medical, and moral concept. The cultural figure of the sexual predator, and his

legal counterpart the sexually violent offender, are just one part of a larger concept wherein acts constitute materiality, and where immoral acts render one absolutely, irredeemably, immoral.

Initially, the sexual predator and the sexually violent offender emerge most fully through the lens of sexuality because sexuality is the mechanism by which criminal violence becomes a disease. Understanding the nature of the legal and medical category of criminal sexual identity contributes to a greater understanding of the causes and responses to sexual violence, and as such this project serves as both argument for the necessity of feminist, queer, and disability theoretical intervention into the fields of criminology and cultural studies of law and crime and as an example of a project where such an intervention is possible.

Utilizing sexuality studies and feminist theory also has broader methodological and theoretical benefits. Seeing the sexual predator as a category of sexuality, and specifically as a sexual identity, and using feminist and queer theory in order to interrogate that category, allows this project to be widely interdisciplinary. Sexuality is a unique concept of human behavior in many respects: the rigid boundaries we set around it, the morals we construct to gain control over it, the medicine we use to treat it, the science we use to understand it, and the laws we use to regulate it. All of these reflect how we understand ourselves in the context of sexuality, identity, gender, and sexual behavior.

Looking at sexual predators through the lens of sexuality also reveals something about sexuality itself. The final chapter and conclusion of this project argue that sexually violent offenders have gained a criminal identity related, in both form and function, to

sexual identity. The feedback between the systems of criminal identity and sexual identity functions to such an extent that sex offenders can be considered to have a distinct identity, which I call *criminal sexual identity*. The formation of criminal sexual identity has gone largely unexamined by queer and feminist theorists. Recognizing criminal sexual identity could fundamentally alter the way we theorize sexuality.

Past debates about the criminalization of sexuality focused exclusively on marginal cases. Some highlight morality and the privacy consenting adults should have to themselves, such as Gayle Rubin, who, in *Thinking Sex*, levies critiques against anti-sodomy and anti-incest laws. Others focus on the ever-shifting ground of what it means to consent and be an adult, such as Stephen Angelides' critiques of power in student-teacher sex crime laws, or the legal debates around juvenile sex offender laws and statutory rape. Both Elise Chenier's *Strangers in Our Midst* and Rebecca Kunzel's *Criminal Intimacy* highlight how being criminal in and of itself creates a hazy form of sexuality. These investigations are indebted to foundational work on the construction of the sex pervert and its relation to homosexuality, such as George Chauncey's *Gay New York*. I do not want to debate the boundaries of criminal law or push the grounds of morality in this way, as these efforts have not actually reduced the impact of medicalization, pathologization, and criminalization on sexuality. They have merely moved certain identities a little further from the reach of the hospital and the prison.

A focus on sexual crimes and criminals highlights how the logic behind sexual predator laws stands in stark contrast to feminist work on violence and sex. Much of the work of feminist scholars on gendered violence focuses on the systemic and culturally coded nature of sexual violence. Yet, the sex crime laws passed since 1990 focus

increasingly on strangers and the role of libido, and, correspondingly, all discussions about issues of violence, power, and dominance are recast in terms of paraphilia and individual sexual predilections. The blame is solely on the perpetrator in these new discussions, a shift made easier when the presumed victims of these crimes are children, as discussed in the second chapter. This shift, as many critics have noticed, has the side effect of making it even harder to prosecute acquaintance rape cases.[19]

The fact that sex, gender, and sexuality are deeply embedded in human cultural practices has been a central tenet of women's, gender and sexuality studies since Simone de Beauvoir began *The Second Sex* by asking, "What is woman?" Nowhere else is the formation of culture in reaction to gender, sex, and sexuality more apparent than in the pathologization and criminalization of different forms of sex and different sexual identities. This is why Michel Foucault seizes on the homosexual in the nineteenth century,[20] why Lee Edelman talks about futurity and the death drive,[21] why Gayle Rubin uses the legislation of sex to justify the creation of sexuality studies,[22] and why Judith Butler framed gender as a trouble.[23] Queer theory is named as such because it is a field born from the abnormal. It is about giving agency to the people who have been marginalized by structures of medicine, law, and religion and their attendant categories of disease, disorder, and immorality.

But, despite all of these assertions, feminist theory, queer theory, and sexuality studies have not been used to understand the category of the sexual predator because these fields are largely driven by liberation. Sexual liberation works to reorganize the moral attitude around sexuality, but it cannot allow us to recognize the dangerousness of sexuality and the vileness we associate with certain forms of it. A queer theory based in

liberation reframes the debate as one of inclusion. The work of libratory queer theory has expanded the category of acceptable human sexual diversity to include all sorts of formerly pathologized, fetishized, and medicalized forms of behavior. Including the overtly violent sexual criminal in the current libratory model risks all of this work, and it does so unnecessarily.[24]

Other forms of discussing sexuality already exist. Consider the construction of sexuality in evangelical megachurches preaching abstinence. Consider the construction of sexuality presented by television shows such as *Law and Order: Special Victims Unit* or *Criminal Minds*. Consider the construction of sexuality that is included in every reiteration of the Defense of Marriage Act. These are all constructions of a sexuality that is all-consuming, dangerous, corrupting, and vile, and this is the sexuality most clearly personified in the figure of the sexual predator. Despite all the work done to distance gays and lesbians from the concept of the pervert, developmental biology treats homosexuality and pedophilia together as part of the same larger category of non-procreative sexual behaviors. In order to address the way law regulates sexuality, the way science researches it, the way medicine treats it, and the way religion frames it, it is necessary to have a concept that addresses the violence, damage, and horror of sexuality, and does so without undoing all of the libratory work of queer theory and LGBT civil rights activists.

This project focuses on the sexually violent offender because, by and large, the boundaries of this category are not debatable. They commit crimes no one argues are not crimes, the survivors of these types of assault are universally recognized as survivors, and the people who commit these crimes are indefensible and are, especially in the cases of people who are civilly committed under the laws, well documented as incurable within

the psychiatric community. I show that it is that indefensibility which makes them such a vitally important category. It is their unarguably criminal sexuality that provokes hyperbolic reactions, which, in turn, serve to highlight and underpin the fear sexuality provokes. The case of the sexually violent offender heightens that fear, sharply and almost unbearably, but just as the concept of the sexual predator has spread beyond the category of the sexually violent predator as defined in the law, so too has the fear of uncontrollable sexuality gone far beyond this indefensible category.

Chapter Outline

The following chapters argue that the exceptional treatment of sexually violent offenders stems from the fact that the sexually violent offender, as a criminal identity, represents the reemergence of innate criminality fused with concepts of sexuality and sexual identity. The fact that the law attributes innate, static, criminal identity to sexually violent offenders is directly related to the inheritance of the nineteenth century concept of *moral insanity*, to a shift in the use of forensic psychiatry in response to public fears about the untreatably mentally ill, to their representation in the law as predators who target children, to the symbolic portrayal of these men as monsters and the embodiment of evil, and to the concept of sexual identity as a material somatic truth that is revealed through behavior and action. Simultaneously, because of the assumed connection between danger and irresistible sex drive, sexuality makes the criminal identity of sexually violent offenders both irrevocably dangerous and corrupting to the social body.

The first chapter, “Morality, Free Will and Responsibility for Criminal Actions” examines the category of the sex offender as a distinct type of criminal insanity in which mental disorder renders the perpetrator more responsible for his or her actions rather than

less. This is due, in part, to the way nineteenth century criminologists utilized the concept of *moral insanity* when the distinction between sexual and non-sexual crime first occurred. The so-called born criminal of criminal anthropology emerged concurrent to the advent of psychoanalysis and the categorizing of the first serial killers as sexually motivated. I trace the role of responsibility and moral insanity as they are used in discussions of criminal actions in the work of Enlightenment penal reformers Jeremy Bentham and Cesare Beccaria, early American forensic psychiatrists Isaac Ray and Benjamin Rush, criminal anthropologist Cesare Lombroso, and sexologist Richard von Krafft-Ebing. This chapter follows the creation of a category of criminal where free will is, at best, locked in a losing struggle with sexual drive, at worst, is completely subservient to it. In the United States, this ultimately results in sexual psychopath laws, which, in turn, decline in popularity during the anti-psychiatry movement of the 1960s and 1970s. By the 1980s, they are overwhelmingly seen as a tool by which the medical profession can intervene to treat individuals rather than as an explanation for criminal behavior.

The second chapter, "Preventive Corrections: Earl Shriner and the Creation of the Washington Community Protection Act," examines the representation of mental illness, mental disorder, and sexual deviance in the Washington Community Protection Act of 1990 (WCPA). I focus on the public outcry over a violent crime committed by a repeat sexual offender, Earl Shriner, demonstrating how the media represented him as suffering from an incurable, untreatable, but recognizable mental disorder. It was this representation of mental disorder that laid the foundation for the legal category of the sexual predator. At the same time, questions about volition and sex drive remained

central. During the bill hearings, professionals testified that since the sexual predator and the sexually violent offender have total volitional control, they are not mentally ill according to predominant forensic understandings of the term. The resulting law defines the mentally abnormal sexual predator as ill enough to justify his continued commitment, but sane enough to allow his punitive incarceration first. This is one of the crucial contradictions contained within the figure of the sexual predator, which, as I argue in the chapters that follow, highlights an underlying paradox in the treatment of all forms of criminal sexuality and, ultimately, sexuality generally.

Sex crime laws modeled after the WCPA proliferated throughout the United States through the 1990s.[25] Chapter Three, "The Most Vile Example: Framing the Sexual Predator in the United States," argues that this spread of laws diffused the category of the sexual predator by focusing on the metaphoric weight of the label *predator*. What began with the WCPA in 1990 and widened with the nationalization of sex offender laws was a shift not only toward the quarantine of highly sexually dangerous individuals, but also the casting of all sex offenders as potentially deserving of such quarantine. The national concept of the sexual offender is that he is a deceptively normal-looking individual, overwhelmingly male, who harbors highly dangerous desires and preys on children, resulting in a category undergirded not by an actual psychiatric or criminal category, but by the images and representations of sexual predators. The measures taken to protect communities from violent, pedophilic sex offenders are applied to all sex offenders, and all sex offenders are assumed to be potential predators.

Predator laws, despite overwhelming criticism, continue to grow in scope because they are a response to fear of an evil, sexual monster. The use of the words *evil* and

monster to describe these sexual predators marks them as inhuman. These terms invoke religious systems, theological symbols, and rituals of exorcism and sacrifice. Chapter Four, "Evil and Monstrosity: The Dehumanization of Violent Sexual Offenders" is a comparison of two theological frameworks as they are applied to the sex offender: sex offenders as evil monsters, and sex offenders as sacrificial scapegoats. I argue that calling sex offenders evil actually places them beyond redemption, a concept incompatible with dominant concepts of evil and sin as they operate in Christian theology. In contrast, the Christian theological trope of the scapegoat addresses both the violence done by these individuals and the violence done by the community in the name of protecting others from harm. This is a more holistic and compassionate understanding of sexual violence at both the personal and communal level.

Finally, in Chapter Five, "Criminal Sexual Identity," I argue that the category of the sexually violent offender is the result of the conflation of not only criminal acts and criminal identity, but sexual acts and sexual identity. What these individuals do and what they desire defines who they are. Criminal sexual identity merges the contemporary model of sexual orientation with models of sexual compulsion and criminal deviance, and the recent theories of feminist science studies and systems theory feminism allow for a full interrogation of this merge. Even though many sexual acts, and their attendant identities, have been depathologized and decriminalized, such analysis shows these systems are still vitally linked.

Methods and Structure

Interdisciplinary training in feminist theory, medical humanities, and religious studies allows me to utilize a broad field of theoretical frameworks and to understand the

significance of the sexually violent offender as a legal, medical, and moral category. As this project is, at heart, a project about the cultural work of language, I use critical textual analysis to examine the use of language in different disciplines and eras. Critical theorist Michael Foucault's concept of genealogy guides the structure of this investigation. In the 1990 preface to *Gender Trouble*, Judith Butler gives a definition of a Foucauldian genealogy that has been widely influential in sexuality studies and queer theory.

> A genealogical critique refuses to search for the origins of gender, the inner truth of female desire, a genuine or authentic sexual identity that repression has kept from view; rather, genealogy investigates the political stakes in designating as an *origin* and *cause* those identity categories that are in fact the *effects* of institutions, practices, discourses with multiple and diffuse points of origin.[26]

This project explores the concept of the sexually violent offender, and his attendant criminal sexual identity, as the effects of institutions and projects set up to understand him. The criminal sexual identity of sexually violent offenders, an identity created by laws and process, inspires such fear that the laws created to contain them pass not only without protest and largely unexamined, but also are welcomed by the community and, in some cases, by the criminals themselves. Used in this sense, this project is a genealogy.

It is also thematically appropriate to use Foucault's method here, as Foucault subverted the history of medicine in large part by looking at criminal insanity. Foucault's first books are about madness, murder, and the law. He came upon sexuality later for the same reason I did: the way that criminologists and psychiatrists treated sex crime in the nineteenth century so perfectly captures the melding of criminality and illness

represented by the sexually immoral person. This melding is very important both in criminology and in feminist theory.

A genealogy done on Foucault's terms either explicitly or implicitly asks why it is that the institutions so bent on removing something from existence want to know its origin yet, despite these desires, never find the origin of, nor succeed in destroying, the object they detest. In his studies of madness, sexuality, power, and knowledge, Foucault maintains an agnostic relationship to origins in his methodologies.[27] In the *Order of Things*, he explicitly shifts the focus away from the search for beginning points by asking why it is necessary to know where something came from.[28] Both Foucault and Butler see genealogy as an attempt to avoid the reification of categories, done largely through introducing doubt to destabilize any totalizing or overarching historical narrative.

Despite these relevant issues, I hesitate to claim this work is genealogical because of the overtones the term has come to have in recent usage.[29] Any project labeled as a genealogy risks becoming a project that suggests, by implication, that the object of study is a cultural illusion or mass delusion. Such a project would require a glib refusal to acknowledge the impact of sexual violence generally. Retreating too far into poststructural theory, and doing it too dogmatically, leaves one unable to address the questions of mental health policy and public safety. I tread a very careful line of criticism and keep in mind the following. First, introducing an analysis of biopower does not alter the fact that crime prediction algorithms work. Second, questioning the origins of psychiatric predictions of dangerousness does not dissuade those who are compiling future crime databases, nor does it undermine the fact that medicating or institutionalizing people who suffer from violent psychosis prevents harm. Finally,

criticizing the overreach of sexually violent offender laws does not belittle the fact that intervention into the lives of high-risk criminals often prevents future victimization.

Although I employ discursive and textual analysis, this project does ultimately argue for a more materialist approach to understanding the languages of law, religion, and medicine, especially as they relate to sexuality. Despite the fact that a desire for more effective and ethical policy decisions and scientific research guides all of my work, I cannot help but note that changing sex crime law and forensic psychiatry seems an unachievable goal. The very immovability of these laws forms the backbone of my dissertation, as I argue that understanding material effects means understanding resistance to change. Over the last two decades hundreds of legal scholars and psychiatrists have criticized this legislation to no avail, and it is my contention that these tactics will not work until we understand the unique nature of sex crimes and the mechanisms of sexual desire more fully. Currently, a system of representation, a history of sexual psychology and a fear of moral corruptibility attached to deviant sexuality guide the prosecution of sex crimes. Scholars of feminism, gender, and sexuality have been critiquing these points for decades. In the end, this project suggests that perhaps scholars of sexuality, psychiatrists who treat sex criminals, and legislators who attempt to understand sex crime would benefit from reconsidering the construction of all deviant sexualities, including criminal ones, as sexual identities.

Boundary of the Human

This dissertation uses disability theory throughout. Critical points of intervention include the troubling of concepts like *normality* and what it means to be human or inhuman. Outlined in these terms, this project traces the formation of an identity, that of

the sexual criminal, and how it sits on the boundary of human. This also means I must, at points, use difficult or outdated terminology, and refer to classifications of people that, although historically accurate, are not necessarily useful in contemporary discourse nor empowering to those being classified.

The first chapter discusses the boundaries of humanity in the use of the concept of free will in criminology. Criminology, in its nineteenth century Lombrosian incarnation, focuses on criminals as individuals distinct from the abstract concepts of criminal law and criminal punishment.[30] Researchers drew heavily on eugenics, putting forth theories about the degeneration of the moral sense and arguing for the sterilization of criminals as a measure to protect future generations. This is the same era that, according to Lennard Davis and other disability studies scholars, gave birth to the concept of the disabled body.[31]

Criminal sociology has largely replaced criminology in the late twentieth and early twenty-first century, with the examination of criminal individuals shifting fully under the purview of psychiatry. The second chapter focuses on how definitions of dangerousness set the boundaries of humanity in forensic psychiatry and psychiatric representations. The third chapter exposes how the resulting category of the sexual predator is used in determining the treatment of criminals. Both involve complex interactions between people who are diagnosed with diseases and people believed to embody disease categories. These are central concepts in the field of disability studies.[32]

The fourth chapter critiques how criminologists, legal theorists, and even psychologists use theology and religious symbols, particularly those from Christianity, to reinforce and maintain the categories of the human and the inhuman. Here, I touch on the

boundaries of monster theory, a field that is heavily intertwined with disability studies, particularly in regard to concepts of wonderment and freakery.[33] However, the term *monster* as it is used to refer to sexual criminals departs radically from the historical uses of the term employed in most disability theory. This departure is the basis of my analysis.

Definitions and Terminology

The terms of this dissertation are very specific, and as it is a study of language, precision in meaning is vital. This section outlines the most important terms and working definitions, as well as cases where quotation or historical location make some ambiguity necessary. The confusion of terms surrounding sexually violent offenders is a central reason the category is significant. For example, throughout most US news media there is a common misconception that all sex offenders are pedophiles. This project focuses on the implicit and explicit connections between pedophilia and sex offenses to explore why that misconception exists and uncover the particular effects that misconception has.[34] Yet, amidst this slippage of language, I aim for consistency and clarity, and ask readers to keep the following definitions in mind.

Pedophilia is a paraphilic disorder diagnosed according to the criteria in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV).[35] It is one of a handful of official psychiatric diagnoses used to civilly commit sexually violent offenders.[36] Diagnosis of pedophilia specifies that the sexual object is a prepubescent child, generally fewer than twelve years of age. Diagnosis can be made on the basis of recurrent and distressful fantasies alone and does not require engaging in sexual behavior with prepubescent children. Within US news media reports, however, the word *pedophile* is used as a catchall for anyone charged with or convicted of inappropriate sexual

behavior with a minor, generally someone under the age of sixteen or eighteen. This usage is confusing, as the diagnosis refers to desire as well as to actions and requires a different age range.

Child molester is used in both public and legal discourse to describe sex offenders who engage in sexual acts with children. Both the definitions of *acts* and *child* are intentionally vague within legal statutes. Although in some states people can be charged with or convicted of child molestation, generally the charge is *child sexual abuse*. Molestation is also used within legal discourse as a description of behavior required for other convictions. As the category child molester is neither strictly diagnostic nor criminal, it appears sparingly.

Sex offender refers to a person in the United States who has been charged with, arrested for, or convicted of a sex crime, and who is subject to restrictions such as public registration and community notification. Sex crime definitions and restrictions placed on sex offenders vary from state to state. In an ideal system, crime definitions and restrictions function in a state-internal structure where the severity of the restrictions reflects the types of crimes categorized as sex crimes. This is not always true, nor are these systems externally congruent. This has led to many well publicized accounts of sex offenders who seem to be the victims of Draconian punishments: people convicted of behaviors that are no longer illegal (e.g., sodomy) who are still subject to restrictions, or people convicted of a minor sex crime in one state with graduated restrictions who, upon moving to a second without graduated restrictions, are suddenly subject to harsher penalties.

In contrast, a *sexually violent offender* is someone who has been convicted of and served a sentence for a non-capital sexual crime who is deemed, by a combination of prison officials, psychiatric consultants, and a presiding judge, to constitute such a continuing threat to the public that he or she is committed to a criminal psychiatric facility *after* the completion of his or her full sentence. As the point of the law is to continue containment after the end of a criminal sentence, people who commit sexual crimes for which they receive life sentences, or the death penalty, are not eligible. References to the sexually violent offender indicate a member of the class of people who are held under these laws.

The original term in the Washington Community Protection Act of 1990, the first civil commitment law, is *sexually violent predator*. State statutes use varying terms, such as *violent sexual predators* and *sexually violent persons*. Although other academic work on the subject refers to this group of people as sexual predators, that is not done here except where rhetorically necessary, such as in the discussion of the events surrounding the creation of the category in 1990, or when quoting laws directly.

In contrast, when term *sexual predator* appears in this project, it is usually used as a term in and of itself, and italicized when stylistically permissible. The term also, occasionally, refers to the phenomenon or figure of the sexual predator. To reduce disruption and maintain readability, I do not employ quotation marks indicating distrust or skepticism every time I use the word *predator* in this second way, and I ask that readers understand that, despite the absence of these indicators, I do not condone using this word to refer to people or classes of people.

As a final note, gender neutral or combined pronouns appear whenever possible in referring to the class of sex offenders generally. It is important to note, however, that the specific legal class of sexually violent offenders was initially composed entirely of men. Since then, only three women have been incarcerated as sexually violent offenders. It remains part of both the public discourse and the scientific study of these offenders that they are male, and in this work the use of male pronouns reflects that public discourse. Although this project focuses on sexuality, the gendered identity of these categories is just as important to their exceptional status. This dissertation lays the groundwork for a discussion of gender, and I intend to take up that discussion in later work.

Historic and Diagnostic Terms

When examining the historical category of criminal anthropology, several different but not always distinct categories emerge: *moral insanity*, *moral mania*, *moral derangement*, *moral idiocy*, *defective delinquency* and *degenerate delinquency*. All of these affect later theories of criminality, but it is difficult to trace exactly how theorists either rejected or expanded upon each concept. I maintain historically correct language and attempt to use the labels the theorists themselves use whenever possible, which creates several possible issues.

First, it means using historically correct terms, like *moral imbecile*, repeatedly. I do not use quotation marks nor do I note the problematic nature of these labels at each turn, but I recognize that these terms carry different meanings today than they did when they initially appeared. Readers should understand that these are historical categories and read accordingly. Terms like *idiot*, *imbecile*, and *pervert*, like the term *predator*, now have significance far beyond their initial classificatory purposes.

Second, and perhaps more problematically, since many researchers worked in tandem, these categories overlap both chronologically and definitionally. It is often extremely difficult to tease out the precise difference between, for example, the diagnoses *moral idiocy* and *moral insanity*. I have not been meticulous in this, largely because both theorists and handlers of criminals themselves were purposely imprecise. This is particularly true, as historian Nicole Rafter notes, when the person using the category has a social imperative to distance him or herself from the category they name.[37]

> When [late nineteenth century] criminal anthropologists referred to "the criminal class," they meant sometimes only criminals and sometimes all members of the lower classes.…When superintendents of mental retardation institutions used terms like moral imbeciles and the feebleminded, they meant sometimes only a subset of the unfit and sometimes all the unfit, their referents constantly expanding and contracting. In both cases the terminology was imprecise because it was a way of indicating a univers[al] through a particular, of discussing all social problems by speaking of one. In the same way criminal anthropologists define the born criminal as but one of several criminal subtypes while often equating that term with all criminals.[38]

There is a similar difficulty in understanding how the contemporary legal categories of mental disease and mental defect relate to each other and to the medical category of mental disability and the psychiatric category of mental illness. Even if there were equivalence between *mental disease*, *mental illness*, *mental defect* and *mental disability*, illnesses and disabilities are distinct in both the systems where they are defined and the mechanisms for treatment. This difficulty only compounds with the addition of varied

historical categories. Sometimes, forensic psychiatrists discuss people they call *morally deranged* or *degenerate* as if they are mentally ill, implying to the contemporary reader that have an acquired illness rather than an innate one. At other times, these same forensic psychiatrists discuss criminals as if they are mentally disabled, implying to the contemporary reader there is an inborn or sudden deficiency.

Finally, despite this historical shift in meaning and signification, there is sometimes an overwhelming similarity in symptomology between categories. Case studies across periods describe strikingly similar disease features and yet give these categories different labels at different points. This similarity can lead the reader to assume continuity, that is, to connect these symptoms together as proof of an underlying disorder that occurs in all periods and populations and argue that any historical difference is merely a semantic one. This dissertation aims not to argue for strict disease continuity, but instead to show how labels, such as that of *moral insanity*, are applied, and to whom.

Mental Illness and Responsibility

Insanity in the law is distinct from insanity in a psychiatric sense in as much as legislators and judges are not held to psychiatric standards when creating law.[39] Despite the fact that the law does not necessarily have to reflect medicine, insane people are subject to different forms of law than sane people. Criminal conviction has two portions: *actus reus*, the criminal act, and *mens rea*, the guilty mind. *Mens rea* includes a measure of how much, if at all, the accused was aware of his or her actions both before and as he or she committed the crime. This, in turn, indicates the degree of responsibility he or she bears for the criminal act.[40] Understandably, *mens rea*, and by extension culpability, is complicated if the accused is declared to be mentally ill or mentally incompetent.

Sexually violent offenders are exceptional because they are a class of people who are recognized as suffering from a form of legal insanity that does not mitigate *mens rea*, but which, in fact, ensures that they are declared to be of guilty mind. As such, the application of mental illness categories to sexually violent offenders is complex. The next section is a brief overview of how mental illness functions in US law, as these distinctions are vital throughout the dissertation.

The law uses psychological concepts to determine incompetence, argue that someone is not guilty by reason of mental disease or defect, determine diminished capacity, or declare someone a danger to self and others. The standard of competence determines whether someone can participate in legal proceedings. Not guilty by reason of insanity can be offered as a criminal defense, the diminished capacity is a mitigating factor that can reduce a criminal sentence. The last standard, danger to self or others, is the standard for involuntary or civil commitment. The definition of insanity in the law differs in each of these standards, and, also, may incorporate cognitive, emotional, or behavioral impairment, depending on not only the type of offense and the context under which it was committed, but also the jurisdiction, the admissibility of scientific evidence, and the timeline of discovery.[41]

Sexually violent offenders must be competent to stand trial, not insane, in full capacity, but still constitute a danger to others significant enough to justify indefinite commitment. People who commit violent crimes and are declared incompetent, diminished in capacity, or a danger to self and others are already subject to civil commitment, as Chapter Two explains in more detail. The rules that determine when someone may be declared not guilty by reason of insanity, and why these rules do not

apply to sex offenders, in contrast, are more complex.

There are two major standards for determining legal insanity in jurisdictions that allow the insanity defense: the *cognitive test* and the *control test*. The cognitive test, where the standard is whether the defendant knew right from wrong, is the most common. It dates back to the 1843 trial of Daniel M'Naghten, who attempted to assassinate the British Prime Minister because of paranoid delusions. The judges in the case asked that there be a general set of rules to use to determine whether a person suffering from mental delusions should be considered responsible for his own actions. The resulting set of rules became the standard for a plea of insanity in most English-speaking countries that accept an insanity defense, including most of the United States. They are still used in many areas. The M'Naghten rules are called the *cognitive test* because they focus on cognitive capacities. According to these rules, the standards of right and wrong are a matter of intellectual knowledge, not capability to heed that knowledge. Having strong urges to commit deviant sex acts is not, in and of itself, enough to pass the cognitive standard, and so in most states sex offenders are not considered legally insane.[42]

The *control test*, also known as the *irresistible impulse test*, is rarer, and allows for a person to be found not guilty by reason of insanity if they can prove that they could not control their behavior, even if they knew what they were doing was wrong. This test was first adopted in the United States by Alabama and eventually appended to the M'Naghten rules in various states. In 1962, the American Law Institute published the Model Penal Code, which incorporated both the M'Naghten standard for capacity and the *irresistible impulse* test. This is framed as a failure to control, as "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental

disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."[43] Most of the United States adopted this dual standard for a declaration of not guilty by reason of insanity, and it is part of the federal penal code.

This changed significantly after the trial of John Hinckley. In 1981, Hinckley attempted to assassinate president Ronald Reagan and was declared not guilty by reason of insanity under the inability to conform standard of the Model Penal Code. This led to widespread criticism of the insanity defense. Most of this criticism focused on the fact that, as one lawyer argued in 1983, psychiatry and psychology had found "no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred."[44] This period of criticism culminated with the Insanity Defense Reform Act of 1984, which, among other changes designed to make an insanity defense more difficult to mount, severely restricted the use of the inability to conform and irresistible impulse standards.[45] Therefore, although irresistible sexual drive could, theoretically, be considered under the control test or irresistible impulse test, most jurisdictions no longer allow this argument.

Sexual desire disorders do not count as mental illness when it comes to determining culpability, but they do introduce the issue of future dangerousness and are considered evidence for civil commitment trials. For example, legal scholars Anita Schlenk and Joel Dvoskin demonstrate how forensic experts draw a line between mental illness and personality disorder with the testimony offered during the trial of Jeffrey Dahmer.

During that trial, psychiatrist Fred Berlin testified that Dahmer was 'insane' and

> not responsible for his actions; however, forensic psychiatrist Park Dietz stated that, in his opinion, "the thing that makes people willing to commit offenses for gratification of sexual arousal is exactly the same thing that makes others willing to commit robbery in order to get more money." Dietz testified that Dahmer was mentally disordered due to paraphilias, alcoholism, and personality disorders but not legally insane, and he noted that he draws a distinct line between psychotic mental illness and other disorders such as pedophilia or antisocial personality disorders.[46]

The difference between the destruction of volition by mental illness and that by sexual disorder is that the loss of volition due to a mental illness is considered, within the law, to be both permanent and totalizing, while the loss of volition due to sexual desire is limited and periodic. This is why having a sexual desire disorder can render you a *danger to self and others*, but not actually make you not guilty by reason of *mental disease or defect*. Or, in short, according to US law, sexual impulse control disorders are relevant in the issue of lifetime civil commitment, but not relevant in the criminal court.

These laws consider sex drive to be a force so strong that it overrides volition in otherwise sane people. Chapter Two shows how insanity and mental illness were used in the creation of the first violent sexual predator laws, and in Chapter Three shows how these ideas about sexual disorder and mental illness spread to define all sex offenders. Theories of sexual disorder and mental illness drive laws that forbid sex offenders from using the Internet, owning pornography, living near playgrounds, and working in schools. The idea here is that sex offenders seem normal until their deeper secret sexual desires are awoken. The justification for singling out certain sex offenders as irrevocably

dangerous and criminally insane has roots going back over two centuries of penal reform.

The following chapter addresses this history.

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[1] The work of A. W. Richard Sipe is particularly illustrative. A. W. Richard Sipe, *Celibacy in Crisis: A Secret World Revisited* (New York: Brunner-Routledge, 2003); ———, *The Serpent and the Dove: Celibacy in Literature and Life*, (Westport: Praeger, 2007); ———, *Sex, Priests, and Power: Anatomy of a Crisis* (New York: Brunner/Mazel, 1995).

[2] *Community Protection Act*, Revised Code of Washington § 71.09.010 (referred to from this point on simply as *Community Protection Act*). Note that the use of the word *violent* in these pieces of legislation does not indicate that these criminals are more violent than other types of sexual criminals. All crimes that involve an offense against a physical body are violent crimes: battery, homicide, robbery, false imprisonment, and all sex crimes. Sexually violent offenders are not different from sex offenders because they are violent, because, technically, all sex offenders commit violent crimes. (This may, in fact, be why many states opt for the term *sexual predator*, as it removes this potential confusion). What separates sexually violent offenders from sex offenders is the designation of a mental abnormality that makes them dangerous and likely to offend again. That said, it is the case that sexually violent offenders are sometimes, but not always, considered dangerous on the sole evidence that they are convicted of crimes that involve severe levels of violence, such as forcible rape or sexual torture. In other cases, however, they are considered mentally abnormal and dangerous because of the age of their victims, or, in still others, because of the number of victims. Within the larger class of violent crimes, however, all sex crimes are seen as dangerous and pathological in a specific way, and this project focuses on the particular class of sexually violent offenders as the clearest representation of this dangerousness.

[3] See page twenty-five for an explanation of how I use the terms *sexually violent offender* and *sexual predator.*

[4] This is still an active investigation. The three women in question are: Charlotte Mae Thrailkill, of California, sentenced to fourteen years in prison for lewd and lascivious acts with five different children; Laura Faye McCollum, of Washington, who admitted to sexually abusing more than fifteen children, both girls and boys; and Rhonda Bailey, of Minnesota, committed after serving prison time for coercive sex with boys aged twelve and thirteen and molestation of a four-month-old child.

[5] I use male pronouns when referring to the sexual predator and the sexually violent offender throughout this dissertation as a way to indicate the overwhelming maleness of this category. I use more gender inclusive language when talking about sexual offenders and people suffering from paraphilias, although in both cases the majority of people in those categories are male.

[6] As opposed to, for example, examining the exceptionality of sexually violent offenders as archetypes of a particular form of violence.

[7] *Paraphilic coercive disorder* has been proposed for inclusion in the DSM-V. At the time of this writing, its inclusion is not yet confirmed. Prior use of the diagnosis of paraphilia NOS (not otherwise specified) as an explanation for serial rapists has been

well documented. Thomas K. Zander, "Commentary: Inventing Diagnosis for Civil Commitment of Rapists," *Journal of the American Academy of Psychiatry and Law* 36, no. 4 (2008).

[8] What I am calling the libratory trend in queer studies is, in many ways, a direct result of the split between feminist and sexuality studies that originated in the 1980s. This split, often called the sex wars, pitted so-called sex positive feminist theorists like Gayle Rubin against so-called sex negative feminist theorists like Catherine MacKinnon. The argument, in its most reductive form, says it is impossible to examine the gendered aspects of sexual violence and sexuality and to see how sexual violence is tied inextricably to compulsive heterosexuality while also championing the true moral equality necessary for sexual liberation. Or, put more succinctly, it is virtually impossible for one field of theory to argue for the existence of a rape culture so insidious as to make most heterosexual sex rife with coercion and violence while simultaneously advocating the right of consenting adults to participate in sadomasochism.

[9] When I identify myself as a scholar of Women's, Gender, and Sexuality Studies, as someone who does queer, feminist and disability theory, and as someone who specifically studies sex crimes, people often assume that the goal of my project is to justify the actions of violent sex criminals or to liberate the sexual predator. This particular assumption, that a queer feminist reading of sexual criminals is likely one that would argue for greater forgiveness for pedophilia, is a product of the libratory trend in queer theory.

[10] All references made here to the DSM refer to the DSM-IV-TR unless otherwise specified. The DSM-V revision process occurred concurrently to the writing of this dissertation, but closed before I completed and deposited the document. I refer at points to discussions about these latest revisions, including references to disorders that are expected to be included, but, as the DSM-V has not yet been published these references are all made tentatively.

[11] I, in fact, do not want to continue to advocate for the existence of such a split, although I understand that my own narrative reifies it.

[12] It is in this last point where I plan to develop future work. The methods of control exercised over really dangerous sexual behaviors and compulsions today are the same ones used to control homosexuality, and I question whether they should be, given that, by all accounts, these methods were ineffective. In the end, it is impossible to address the ineffectiveness of the medical treatment of pedophilia or the ineffectiveness of sex crime legislation without first acknowledging that these systems are linked. Here, the concept of criminal sexual identity is vital. See Chapter Five and the conclusion of this project for a more detailed discussion.

[13] Proper citation is paramount in interdisciplinary work. Here, I follow the guidelines of the sixteenth edition of *The Chicago Manual of Style* for most citations, and, according to those guidelines, use the Harvard Law Review Association's *The Bluebook: A Uniform System of Citation* for legal cases and public documents. I make departures from these rules occasionally when adding clarity for the reader or information for future researchers.

[14] I focus on the sexual identity of the sexually violent offender, but the gender identity of these offenders is equally vital to their position in culture. Most sexually violent

offenders are male, and so the figure of the sexual predator is male. The affects of this are multivariate: the three women civilly committed as sexually violent predators have life-long issues with housing, the diagnostic schemas for committing sexually violent offenders include disorders that largely affect men (pedophilia, anti-social personality disorders, etc.), the research into these disorders is almost entirely done with male patients, and the fear of sexual predators focuses largely on men who live alone. The gendered element also affects the definition of violence. Despite the technical legal definition of all sex crime as violent crime, the concept of violence attached to sexual violence outside of a legislative context is one of overt, physical violence: torture, mutilation, or forced rape. In the cases of the three women arrested under these statutes, and for most of the women arrested for violent sex offenses generally, the definition of violence is a strict legal one. That is, according to many state statutes, sexual molestation of a child under the age of five is considered a more seriously violent crime than molestation of an older child. This is related to many discussions about how the violence of women is qualitatively different from the violence of men. See: Meda Chesney-Lind and Lisa Pasko, *The Female Offender: Girls, Women, and Crime* (Thousand Oaks: Sage Publications, 2004) and Anna Motz, *The Psychology of Female Violence: Crimes against the Body* (New York: Routledge, 2008).

[15] Alabama State Code, (Act 2011-640, §2, Section 15-20A-2).

[16] Alabama State Code, (Act 2011-640, §2, Section 15-20A-2).

[17] Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington and Wisconsin.

[18] Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (London ; New York: Verso, 2004); Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, (New York: Routledge, 2006); Michel Foucault, *The History of Sexuality*, (New York: Vintage Books, 1988); Eve Kosofsky Sedgwick, "Axiomatic," in *Epistemology of the Closet* (Berkeley: University of California Press, 1990).

[19] Leading, also, to a recent shift in anti-rape campaigns on college campuses, where Take Back the Night Campaigns and Sexual Assault Awareness trainings focus increasingly on the duty perpetrators of these crimes have in preventing them.

[20] Foucault, *The History of Sexuality*.

[21] Lee Edelman, *No Future: Queer Theory and the Death Drive*, (Durham: Duke University Press, 2004).

[22] Gayle Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality," in *Culture, Society and Sexuality: A Reader*, ed. Peter Aggleton and Richard Parker (Philadelphia: UCL Press, 1999).

[23] Butler, *Gender Trouble*.

[24] The efforts of queer theorists and theorists of sexuality studies to create an ever more liberated and liberating sexuality have only further alienated and condemned the sexual predator.

[25] Including, but not limited to: New Jersey's 1994 criminal sex law revisions, collectively called Megan's Law, the national Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act in 1994, and the Pam Lyncher Sexual Offender Tracking and Identification Act, passed in 1996.

[26] Butler, *Gender Trouble* (emphasis in original).
[27] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1979); Foucault, *The History of Sexuality*; ———, "About the Concept of the 'Dangerous Individual' in 19th-Century Legal Psychiatry," *International Journal of Law and Psychiatry* 1, no. 1 (1978); ———, *History of Madness*, ed. Jean Khalfa, trans. Jean Khalfa and Jonathan Paul Murphy (New York: Routledge, 2006); ———, *Psychiatric Power: Lectures at the Collège De France, 1973–1974* ed. Jacques Lagrange, trans. Graham Burchell (New York: Palgrave Macmillan, 2006); ———, *Abnormal: Lectures at the Collège De France, 1974–1975*, ed. Valerio Marchetti and Antonella Salomoni (French), Arnold I. Davidson (English), trans. Graham Burchell (New York: Picador, 2003).
[28] ———, *The Order of Things: An Archaeology of the Human Sciences*, (London: Tavistock Publications, 1970).
[29] Foucault's careful agnosticism is too often translated into, or practiced as, atheism. In these uses, genealogy is a form of ground-razing theory, a systematic argument that there is, in fact, nothing there. There is no man behind the curtain, no pig in the poke, no cat in Schrödinger's box (and aren't we all so foolish for being concerned about whether the cat was alive or dead?). I hesitated for a long time before naming this as a genealogical project, as I am not comfortable with any implication that the men I describe here are not real, and many of my thoughts about this issue are contained in the conclusion, Exception and Continuum.
[30] Foucault, as mentioned in Chapter One, traces a shift in the understanding of crime from what the crime was to who committed it. In *History of Madness* in particular, Foucault links the shift from bad deeds to bad people to a shift from theological and religious doctrine to psychiatric opinion. According to this genealogy, evil went out of the world in the middle ages and was replaced by madness.
[31] Lennard J. Davis, "Constructing Normalcy: The Bell Curve, the Novel, and the Invention of the Disabled Body in the Nineteenth Century," in *The Disability Studies Reader*, ed. Lennard J. Davis (New York: Routledge, 2010).
[32] Colin Barnes, *Exploring the Divide: Illness and Disability* (Leeds: Disability Press; University of Leeds, 1996); Tom Shakespeare, *Disability Rights and Wrongs* (New York: Routledge, 2006).
[33] Rosemarie Garland-Thomson, *Freakery: Cultural Spectacles of the Extraordinary Body* (New York: New York University Press, 1996); Lorraine Daston and Katharine Park, *Wonders and the Order of Nature, 1150–1750* (New York: Zone Books, 1998).
[34] Many of the cases that galvanized the shift in sex offender law toward the containment of sexual predators were crimes against children. Most national and regional laws bear the name of the child victims in memory, and so the origins of sex crime laws are explicitly linked to the protection of children, even when they extend to non-child victims My focus here on crimes against children and pedophilic violent sex offenders should not be read as totalizing. The violent predatory rapist is as much a figure of fear, the subject of myth, and a demonized monstrous character as the pedophilic offender. This as particularly true the closer his crimes are to the rape myth of a violent attacking stranger, as feminist scholars such as Brownmiller and Dworkin have noted. My work is deeply indebted to work that has been done in this area. The campaign to include "paraphilic

coercive disorder" in the DSM-V demonstrates the significance of forensic psychiatry to defining sex crimes, and although in many ways the crimes of pedophilic offenders are unique, the concept of criminal sexual identity has wider application in understanding the prosecution of cases of stalking and forcible rape. I am indebted, here, to the feminist work on rape cases, such as Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (New York: Simon and Schuster, 1975); Andrea Dworkin, *Intercourse* (New York: Free Press, 1987); ———, *Our Blood: Prophecies and Discourses on Sexual Politics* (New York: Harper and Row, 1976); ———, *Woman Hating* (New York: Dutton, 1974); ———, *Pornography: Men Possessing Women* (New York: Perigee Books, 1981); and Andrea Dworkin and Catharine A. MacKinnon. *Pornography and Civil Rights: A New Day for Women's Equality* (Minneapolis: Organizing Against Pornography, 1988).

[35] "Diagnostic criteria for Pedophilia: (A) Over a period of at least six months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age thirteen years or younger). (B) The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty. (C) The person is at least age sixteen years and at least five years older than the child or children in Criterion A." Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR), http://www.psychiatryonline.com, accessed April 26, 2009. The DSM-V, to be published in May of 2013, includes updates to this definition.

[36] Other diagnoses include paraphilia not otherwise specified and forms of anti-social personality disorders. Additionally, the newest edition of the psychiatric Diagnostic and Statistical Manual of Mental Disorders (DSM-V) may include *paraphilic coercive disorder* as a condition requiring further research, and I except this will be in wide use for civil commitment of sexually violent offenders.

[37] The imprecise use of scientific terms as a case of metaphor is discussed in detail in Chapter Three.

[38] Nicole Hahn Rafter, *Creating Born Criminals* (Urbana: University of Illinois Press, 1997), 119.

[39] The US Supreme Court upheld this distinction in Kansas v. Hendricks, 521 U.S. 346 (1997).

[40] According to the Model Penal Code of 1981, there are four possible states of mind. One may commit a crime purposely, knowingly, recklessly or negligently. There is a fifth category called strict liability, which is used for crimes in which state of mind is irrelevant, i.e. parking violations, and in statutory crimes. See the Model Penal Code, section 2.02 (2).

[41] And I am not even mentioning the automatism defense, which is allowed in cases where the crime was determined to be reflexive or unconscious.

[42] This does not necessarily stop defense lawyers from trying to do so, most famously in the trial of Jeffrey Dahmer. Dennis M. Doren, "Inaccurate Arguments in Sex Offender Civil Commitment Proceedings," in *The Sexual Predator: Law and Public Policy, Clinical Practice*, ed. Anita Schlank (Kingston: Civic Research Institute, 2006).

[43] The ALI also adopted the language of "mental disease or defect," which was first introduced in the New Hampshire Durham Rule. New Hampshire was the only state that did not adopt the M'Naghten rules, and currently still uses the Durham Rule. The

Durham rule was adopted more widely for a brief period between 1952 and 1972. For a full history of the insanity defense in the United States, see Herbert Fingarette, *The Meaning of Criminal Insanity* (Berkeley: University of California Press, 1972).

[44] Richard J. Bonnie, "The Moral Basis of the Insanity Defense," *American Bar Association Journal* 69, no. 2 (1983). For general arguments against the control test, see the work of Stephen J. Morse.

[45] Interestingly, scholars in neuroethics and neurolaw have recently advocated the increased use of the control test because of advances in neuroscience. Most argue that it is possible to obtain admissible scientific evidence of frontal lobe dysfunction and impaired impulse control. See: Richard E. Redding, "The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century," *American University Law Review* 56 (2006); Steven Penney, "Impulse Control and Criminal Responsibility: Lessons from Neuroscience," *International Journal of Law and Psychiatry* 35, no. 2 (2012); and Adam Lamparello, "Using Cognitive Neuroscience to Predict Future Dangerousness," *Columbia Human Rights Law Review* 42 (2011). These authors argue that it is unjust to hold someone with such an impairment to be more responsible for his or her actions than someone with cognitive impairment, as this is "tantamount to saying that some brain lesions are morally superior to others." Harold V. Hall, "Criminal-Forensic Neuropsychology of Disorders of Executive Functions," in *Disorders of Executive Functions: Civil and Criminal Law Applications*, ed. Harold V. Hall and Robert J. Sbordone (Boca Raton: CRC Press, 1998), 72.

However, even authors arguing for a neuroscientifically-based control standard draw a distinction between impaired impulse control and compulsive disorders, including sexual desire disorders. Neurolaw scholar Richard Redding puts pedophilia in the category of "compulsions, extreme desire, or inner cravings," which he argues are distinct from "the inability to inhibit highly impulsive, reactive episodic behavioral responses due to substantial FLD [Frontal Lobe Disorder], a very different kind of impairment." (Redding, 92). This form of argument holds that compulsive behaviors result from extremely strong desires rather than from neurological damage to inhibition, and thus it is unlikely that these new standards, if ever enacted, would apply to sex crimes.

[46] Dennis M Doren, "Inaccurate Arguments in Sex Offender Civil Commitment Proceedings," in *The Sexual Predator: Law and Public Policy, Clinical Practice*, ed. Anita Schlank. (Kingston: Civic Research Institute, 2006).

Chapter One

Morality, Free Will, and Responsibility for Criminal Actions

> Dr. Grigson from Texas, known as Dr. Death, described [a type of violent criminal] as a sociopath, which used to be described as a psychopath, which used to be described as a moral imbecile, and so on. Before that they were called warlocks and witches, but I'm not sure; I think they're the same people.
>
> —Norval Morris[47]

In 1992, Norval Morris gave the opening address for a symposium on the state of Washington's Violent Sexual Predator law at the University of Puget Sound. He, perhaps somewhat glibly, traced a history of violent criminals through the ways human society recognized the uncontrollable and dangerous within their ranks. He concluded this history by pointing to Washington's newly created category of the "sexually violent predator" as the most recent incarnation.[48] The history of this category, however, is neither as simple nor as straightforward as Morris makes it out to be. Although the current category of sexually violent offender is deeply indebted to the categories of sociopath, psychopath, and moral imbecile, it is also as equally related to the defective delinquent, the born criminal, and the homosexual.

All of the categories Morris mentions are alike because they are all, in one way or another, beyond salvation. Similarly, the sexually violent offenders of Washington are considered so dangerous they are not just incarcerated, but put in a special facility on an island, built and designed for this singular purpose. These offenders do not go to the

penitentiary, where by definition one is penitent, or even to the department of corrections, where one is rehabilitated. The criminals described as sexually violent offenders are essentially quarantined.

This contemporary category of the sexually violent offender presents a unique manifestation of the question of free will, culpability, and resistance against sexual impulses that directly informs the formation of criminal sexual identity. Sexual criminals are treated as more abhorrent and dangerous than non-sexual criminals because those treating them believe that sexual desire disorders corrupt the moral sense in a stronger and more fundamental way than other mental disorders. This chapter shows the development of this sense of moral corruptibility throughout the history of incorrigibly sexually diseased criminals, and, in particular, how the concepts of moral insanity and the born criminal influenced the creation of sex crime. I examine how responsibility, free will, morality and insanity are used in discussions of criminal punishment in four historical disciplines: the dispute with theological moralism in Enlightenment penal reform, the argument for exception in the case of moral insanity as presented by early forensic psychiatrists, the generalization of the moral insanity exception to all criminals by criminal anthropologists, and the transposition of this criminological understanding of moral insanity on to sexual psychopathy. I briefly summarize American criminology and forensic psychology after Lombroso, bringing us into 1989 where the next chapter begins, and conclude with a discussion of the merits and pitfalls of predicting dangerousness.

Ultimately, this chapter shows that the concept of criminal sexual identity I pose is not just a unification of concepts of sexual identity and criminal identity, but a

reunification. As Harry Oosterhuis notes, the concept of sexual identity has long been tied to criminality both as evidence of moral perversion and as an indicator of moral corruptibility.[49] My inquiry follows the same lines as those of Oosterhuis, Michel Foucault, and Nicole Rafter in their writings on the history of forensic medicine and sexual deviancy.[50] All point to the middle of the nineteenth century as the era in which certain theological and religious categories of moral disobedience became scientific. For Foucault, this shift focuses around the homicidal monomaniac and the homosexual, for Rafter, this culminates with Italian criminologist Cesare Lombroso's creation of the "born criminal,"[51] while for Oosterhuis it ends with the designation of sexual identity. Their theories converge on the efforts of early psychiatrists, then called *alienists*, who began to argue that certain criminal sexual acts were the products of abnormal minds.

Professionals in the nascent field of mental disorders argued that people who committed such acts suffered from a disease they called *moral insanity* and should be considered separately from people who were being willfully disobedient. Following in these footsteps, criminal anthropologists and early criminologists used eugenic theories of degeneracy to examine whether people suffering from moral insanity also suffered from corresponding physical deformity, an association disability scholars are still trying to unhinge.[52] In the particular case of sexual psychopathy, medico-forensic specialists pointed to the diagnoses of moral degeneracy and moral insanity as evidence for their claims that the sexual drive could be perverted and defective, and, further, that such defects could be passed from parent to child.

There are competing theories about the function of psychiatry in this era. Alan Stone presents a history of forensic psychiatry as a science very interested in "getting

people off"[53] and its practitioners as ridiculed for that effort. In contrast, Michel Foucault presents psychiatry as a field born out of an interest in absolute guilt. In examining the early nineteenth century diagnosis of *homicidal monomania*, cited by Stone and Foucault as the first example of criminal insanity, Foucault calls it "a crime which is insanity, a crime which is nothing but insanity, an insanity which is nothing but crime."[54] Neither narrative is entirely correct, nor, to be fair, are the positions of the authors that different. The difference between Foucault's description of the psychiatrist as someone interested in proving guilt and Stone's of a medical doctor trying to prove innocence is a matter of emphasis, and whether someone sees forensic psychiatry as a method to "get people off" or to condemn the diseased to a lifetime of surveillance on the basis of moral principles depends a great deal on how one views the role of free will.

There can be no question that psychiatry has aided in the construction of criminal types in one significant methodological way: the role of direct observation. Usually when officials label a person as incorrigible, whether as a born criminal or a sexually violent offender, the labeling is based on the observations of the correctional officers, psychiatrists, and lawyers tasked with working with him or her. Most researchers model their arguments for recognition of a specifically criminal form of disease on clinical cases. The argument for moral insanity made by early forensic psychiatrists Isaac Ray and Benjamin Rush came from their own experiences with patients. Cesare Lombroso generalized the category of moral insanity to all criminals after making observations in prisons and courts. Richard von Krafft-Ebing based a large part of his classification of degenerative sexual disorders, the first taxonomy of sexual psychopathy, on his clinical neurological and psychiatric cases.[55]

That said, it is the case, as Stone argues, that as long as there have been psychiatrists examining a psychological cause of crime through clinical observation there have been critics who were apprehensive about the application of this theory to all of humanity. Stone traces this argument to a work by philosopher Immanuel Kant in which Kant makes an observation about mental illness in the case of criminal trials.

> For the question of whether the accused at the time of his act was in possession of his natural faculties of understanding and judgment is a wholly psychological question.…and *forensic medicine (medicina forensis)*—when it depends on the question of whether the mental condition of the agent was madness or a decision made with sound understanding—is meddling with alien affairs, which the judge does not understand.[56]

Kant argues that in cases of mad people committing crimes the court should properly refer to a philosopher rather than a practitioner of medicine. Kant footnotes an example of the decisions judges make when they step outside the realm of their understanding.

> Thus, in the case of a woman who killed a child out of despair because she had been sentenced to the penitentiary, such a judge declared her insane and therefore exempt from the death penalty—for, he said, he who draws true conclusions from false premises is insane. Now this woman adopted the principle that confinement in the penitentiary is an indelible disgrace, worse than death (which is quite false), and came to the conclusion, by inference from it, that she deserved death. As a result she was insane and, as such, exempted from the death penalty. On the basis of this argument it might easily be possible to declare all criminals insane, people whom we should pity and cure, but not punish.[57]

Kant's objection is difficult to overcome even today. Even if judges restrict their measures of what constitutes sound reasoning, as the M'Naghten rules outlined in the introduction attempt to do, there is still the problem that legal conviction requires some knowledge of what a person was thinking. There are not yet brain scans that can tell us what someone was thinking during an act in the past. Yet both American and British laws require proof of *mens rea*, the guilty mind, in order to convict in a criminal case, making the exact knowledge that Kant claims is beyond understanding required for valid criminal conviction. The following section examines why that is the case.

Enlightenment Morality and Penal Reform

The treatment of morality and the will shifted greatly during the Enlightenment. Philosophers such as Immanuel Kant and John Locke argued for a philosophical standard for human nature, including the moral principle, based in the concept of Reason rather than Christian Revelation. This opened the door for utilitarian thinkers Cesare Beccaria and Jeremy Bentham to argue for a reasoned, and secularly based, reform of the penal system.

In this section, I show how Beccaria and Bentham address the distinctions between church law and the state in the standards for so-called good behavior, demonstrating that while Beccaria left morality and intent as purely theological concerns, Bentham's later work argued for its incorporation into the code of law. Beccaria's theory of crime and punishment is general, as it is based in aggregate numbers and the relationship of the individual to the state. Jeremy Bentham, a close contemporary, developed Beccaria's principle of utility into a more extensive and detailed theory. Whereas Beccaria's 1764 work *An Essay on Crimes and Punishments* sets out a general

schema for how a government should operate if it took the theory of utility as basis, Bentham, writing in the late 1790s, works from the ground up, analyzing how individual motives and crimes are defined in such a state.[58]

In *On Crimes and Punishments*, Beccaria uses the principle of reason and the principle of utility to create a system of law. In this system citizens surrender a measure of liberty for security. The state can impinge upon this liberty when threatened. The proportionality of the punishment, Beccaria argues, is necessary for a balanced relationship between the state and its citizens. If a state punishes criminals too harshly, acts of punishment become acts of state-condoned violence that ultimately undermine the ability of the government to govern. The true measure of crime and the determinant of the strength of punishment is the harm done to the state and not the intent of the perpetrator, and so *mens rea* is unnecessary.[59] Beccaria leaves questions of individual morality to theologians.

> It is up to theologians to establish the boundaries between what is just and unjust with regard to the intrinsic wickedness or goodness of an action; by the same token, it is the task of the scholar of public law to determine what is just and unjust in a political sense, that is, what is useful and harmful to society. Neither task can ever prejudice the other, for everyone can see how purely political virtue must yield to the immutable virtue emanating from God.[60]

The individual reasoning behind any particular act, which would include a person's state of mind and volition while of committing a crime, relates to the acts intrinsic wickedness. As he argues that the state's purpose in punishing crime is to prevent harm to the state

and not to judge wickedness, Beccaria's system does not complicate the role of the moral by involving questions about individual motivation.

Bentham sees the utilitarian principle subsuming the theological rather than working alongside it. The will of God, Bentham argues, can never be known, only presumed. Given that fact, he concludes, then it must be presumed under one of the known principles, all of which are inferior to his proposed principle of utility. In several cases, his rejection of theological morality is overt: he sets the principle of utility against the principle of *asceticism*, which judges the appropriateness of a behavior according to the pain it causes. He also places utility in some ways opposite to the principle of *sympathy and antipathy*, in which all people do what they do because they themselves approve of it. Almost anything called a theological principle fits under either asceticism or sympathy and antipathy.[61]

In his criticism of each principle's usefulness as a universal organizational principle, Bentham includes examples from Christian theology as proof that they do not work. In the case of asceticism he describes the lives of certain monks who justify their abstentions and strenuous daily torment by saying it is the will of God that they suffer in the present so as to be rewarded in the future, that "for every grain of pain it costs us now, we are to have a hundred grains of pleasure by and by."[62] Asceticism, he concludes, may work for individuals but it was never meant to be pursued by large numbers, declaring "let but one tenth part of the inhabitants of this earth pursue it consistently, and in a day's time they will have turned it into a hell."[63]

To demonstrate what he calls sympathy and antipathy, Bentham gives accounts of people who attribute their ability to tell right from wrong to a wide variety of sources:

internal moral or common sense, understanding, the rule of right, the fitness of things, the law of nature, or "law of reason, right Reason, natural justice, natural equity, good order…any of them will do equally well." He also points out that some people will use a theological status to imbue their personal moral compass with authority. He calls these the "fairest and openest of them all….That sort of man who speaks out, and says, I am of the number of the Elect: now God himself takes care to inform the Elect what is right."[64] All these ways of thinking, he concludes, simply serve as "a cloak, and pretense, and aliment, to despotism…the consequence is, that with intentions very commonly of the purest kind, a man becomes a torment either to himself or his fellow-creatures."[65] These systems are not universally accessible but rather are an appeal to a divine authority in order to justify one group imposing their system of judgment on everyone else.

Bentham understands utility governed by pleasure and pain to be preferable to any of these theological systems because the desires to seek pleasure and avoid pain are universal. He argues even people who have motives that urge them to cause pain ultimately must be seeking pleasure out of it.

> Let a man's motive be ill-will; call it even malice, envy, cruelty; it is still a kind of pleasure that is his motive: the pleasure he takes at the thought of the pain which he sees, or expects to see, his adversary undergo. Now even this wretched pleasure, taken by itself, is good: it may be faint; it may be short; it must at any rate be impure; yet while it lasts, and before any bad consequences arrive, it is as good as any other that is not more intense.[66]

In general, no action can be considered good or bad in and of itself; such judgments rest only on a measurement of the pain or pleasure to which the action ultimately leads. This

system is simple and universally accessible. From it, Bentham builds an entire code of infractions and appropriate punishments.

According to Bentham's principle of utility, the purpose of legislation is to prevent crime, and thus the writers of law must try to persuade people to commit the smallest infraction possible, and do so with the smallest amount of legislation possible. Despite all of his arguments for universality, Bentham's sublimation of morality into the law does not actually extend to insane people. Bentham allows for very rare cases of false consciousness and madness in which his theory does not apply. People who are unable to understand the consequences of their actions may be considered sick, in which case they should be treated and not punished. He also allows that their actions could be unintentional, in which case they should receive a lighter punishment. Although Bentham's treatise predates the creation of the M'Naghten rules, these concepts are in keeping with the cognitive insanity standard used in the United States to this day.[67] In contrast, the early alienists of the next section point out that there exist people for whom committing criminal acts is a sign of madness in and of itself; that is, they argue there is a particular madness that manifests in committing crimes without an attendant cognitive impairment.

Early American Medical Studies of the Moral Faculty

Western medical doctors first raised the concept of *moral insanity* or *moral derangement* at the end of the eighteenth century. Moral insanity allows for a temporary or selective loss of the ability to reason. Morally insane people are generally sound in mind, but occasionally engage in unreasonable conduct. Although European researchers contributed much on the madness of criminals and the criminality of madness, I focus

here on the development of moral insanity in the treatises of two Americans: Isaac Ray and Benjamin Rush. The work of Ray and Rush influenced later American adoptions of criminological theory more than European work on the subject.[68] Benjamin Rush's work was foundational for American psychiatry, and his 1812 book, *Medical Inquiries and Observations upon the Diseases of the Mind*, was the first American psychiatric textbook. Isaac Ray, an early pioneer and champion of the forensic use of psychiatry, published his *Treatise on the Medical Jurisprudence of Insanity* in 1838. It became the standard for legal uses of medical diagnoses. Ray and Rush, alike in their focused application of moral insanity theory, saw their work not as an argument against the overarching principles of utilitarian penal reform, but rather as a remedy for a small group of people they argued should be exempt from the system entirely.

Medical practitioners who put forward theories of disorders of the mind during the early nineteenth century found themselves straddling the growing split between reason and revelation just as the penal reformers had before them. Philosophers and theologians had already staked claims in the ground of morality and human nature.[69] Ray and Rush's writings express the difficulty they had positing theories about insanity that were not theories about human nature in general. When defining what made moral insanity distinct from cognitive insanity, both Isaac Ray and Benjamin Rush had to define what it meant to make a moral choice in terms of both philosophy and theology.[70]

They also found that critics took their arguments for a diseased or defective moral faculty that was not the product of a defective body as arguments for a material, corruptible, and mortal soul, and, as a result, treated them with a degree of reluctance. It is one thing to have a sick mind since the mind can be located in the head, but another

thing entirely to have a sick moral sense. This meant, to some, that the soul itself could sicken and eventually die. Rush dismisses this issue by saying he does not understand what materiality has to do with mortality, while Ray says there is no reason to distinguish between the emotional stirrings of morality and the intellect.[71]

Despite these conflicts, the concept of a uniquely moral insanity proved to be a useful tool in understanding criminal actions and eventually functioned as a bridge between secular and religious theories of mind.[72] Early forensic psychiatry couched questions of moral aptitude in terms of scientific categories, taking an area of great religious interest and moving it out of theological language.

This work came at the very start of a new age of positivist empirical science and thus introduces the first arguments for criminal insanity based in empirical observation. The arguments both Ray and Rush make in support of the category of moral insanity rely on a sense of phenomenological truth. There is a sense throughout medical jurisprudence that the penal code is not adequate to address psychiatric patients because the people who wrote it had not actually seen mentally ill people with their own eyes. Both Ray and Rush cite John Locke's definition of madmen in *Essay Concerning Human Understanding* as an example of the ridiculous idea of insanity philosophers had. Madmen, according to Locke, "do not appear to have lost the faculty of reasoning; but having joined together some ideas very wrongly, they mistake them for truths, and they err, as men do that argue right from wrong principles."[73] For Ray, Locke's statement is an example of an over-reaching in the theory of rationality only possible because Locke had never made direct observation of the insane, for "if Locke had possessed any practical acquaintance with insanity, if he had even spent an hour in a well-managed hospital for the insane, he never

would have adopted this opinion, for nothing can be further from the truth than the idea that generally madmen reason correctly from wrong premises."[74]

This call for empirical evidence became central in the rise of positivism. Rush disagrees with Locke that the absence of a moral faculty in what both call savage nations is evidence of a natural state devoid of morality. He faults Locke for confounding moral faculty with reason. Rush argues that reason is an ability while the moral faculty is a capacity. Physical stimuli, including excessive climate, pain, excessive food and drink, and starvation, and by the acquisition of knowledge about certain things, such as the details of torture or cruelty or visions of violent scenes, particularly when exposed at a young age, can all affect the moral faculty. Rush argues people who suffer from a diminished moral faculty are diseased and punishment will not cure them.

Ray and Rush's arguments for the corruption of morality on scientific grounds include taxonomies of types of moral diseases. Often the categories rely on separating out will, or volition, from knowledge, or cognition. Rush, following a particular philosophical tenet about the difference between the will and the understanding, maintains that where dementia is a disease of understanding, impulsive actions and what he calls "moral derangement" are diseases of the will.[75] For Rush, these disorders are more or less involuntary: action without motive, or reflexive actions, are when "the arm or foot is moved convulsively without an act of the will, and even in spite of it,"[76] and moral derangement is "that state of the mind in which the passions act involuntarily through the instrumentality of the will, without any disease in the understanding."[77] That is, people who suffer from moral derangement act involuntarily while also being

intellectually sound. This is why they seem to act out quite suddenly, and, in cases of murder or suicide, violently.

For Rush, the moral faculty is a sensitive and motivational sense, "a capacity in the human mind of distinguishing and choosing good and evil, or, in other words, virtue and vice."[78] It is what dictates actions and is distinct from the concept of conscience, which is how a person forms opinions about actions. Those who suffer from moral derangement have a fully functioning conscience but no moral faculty, and thus are not able to use their opinions about actions to dictate their actual actions.

In his *Treatise on the Medical Jurisprudence of Insanity*,[79] Ray identifies the essence of moral mania as "criminal behavior committed by people who have no motive, cannot control themselves, and lack remorse."[80] Ray defines moral mania as distinct from intellectual mania in much the same way Rush distinguishes between the derangement of understanding and the derangement of will, arguing that people suffering from moral mania are not responsible for their behavior and should be treated for a disease rather than punished for a crime. People perceived as suffering from this disease cannot be held responsible for their actions because responsibility requires not only "a clear perception of the consequences of criminal acts," but also "the liberty, unembarrassed by disease, of the active powers which nature has given us, of pursuing that course which is the result of the free choice of the intellectual faculties."[81] But, where Rush included any diminishment of the intelligent faculties in his theory of derangement of understanding, Ray separates out mental disorders which are the product of injury or mental deficiency as *imbecility*. These are presented as distinct from *insanity*, echoing the distinction between competence and insanity in current US law.[82]

Both Ray's category of *moral mania* and Rush's category of *moral derangement* are disease categories where the major symptom is the committing of certain criminal acts despite an ability to tell right from wrong in other contexts. Yet both argue that people who suffer from moral derangement or moral insanity should not be subject to punishment because they are not ultimately responsible for their actions the way that non-morally deranged people are. In the next section, I show how moral insanity, rather than being a way to separate out those too ill to punish, actually became the basis for punishment in the rise of criminology and criminal anthropology.

Criminal Anthropology: *Insana Mens Insano Corpore*

Cesare Lombroso, born in Italy in 1835, founded the field of criminal anthropology in the late nineteenth century. Drawn from his psychiatric methods, his work is an empirical study of the criminal as a specific sub-type of human being complete with a separate physiognomy and culture.[83] As a form of positivist eugenics, his empirical method relied on an assumed connection between physical abnormalities and mental abnormalities. Lombroso believed one could reveal the inherited and heritable criminal potential of people by measuring their bodies. His multi-volume work *Criminal Man* argues that in order to effectively control crime the penal system must scale punishments according to the dangerousness of the criminal, not, as prior theories argued, according to the severity of the crime. To demonstrate how this would be done, he uses empirical methods to classify the criminal man as a sub-specie of human, specifically as a type of morally insane person incapable of exercising free will. He then presents a way to categorize criminals on a scale from the habitual and "occasional criminal," who would

respond to incarceration and re-training, to the incorrigible "born criminal."[84] He concludes that judges should use his taxonomy to properly calibrate punishments.

Lombroso argues that the criminal man cannot freely choose to obey the law. This directly challenges Enlightenment ideas of rationality as a basis for justice. The Lombrosian criminal, as a morally insane person, lacks the free will that had previously been associated with all human beings. Like Rush and Ray, Lombroso asserts that the best argument against the universality of reason and rationality is direct observation. Where Rush and Ray argued that direct observation of the insane made their differences stark, Lombroso argues the same is true for all criminal offenders.

> Those who have had direct contact with offenders, such as members of their families or prison wardens, know that they are different from other people, with weak or diseased minds that can rarely be healed. Psychiatrists in many cases find it impossible to neatly distinguish between madness and crime. And yet legislators, believing exceptions to free will to be rare, ignore the advice of psychiatrists and prison officials. They do not understand that most criminals really do lack free will.[85]

He did not set out to catalogue criminals as mentally ill by definition, and his earliest observations placed the criminal man somewhere between the sane man and the insane man. It is only after noting many similarities between the insane and the criminal that he noted "the distinction between crime and madness is something constructed not by nature but by society."[86] He eventually claims outright "moral insanity is a genus of which crime is a species."[87] A Lombrosian criminal suffers from an incurable strain of moral insanity

rendering him incapable of moral reasoning. He cannot be persuaded by normal social deterrents.

Lombroso places an emphasis on lack of free will to make the necessity of a new treatment of these criminals clear to judges and officials. He argues legislators could effectively prevent crimes by locking up the most dangerous criminals indefinitely rather than attempting to rehabilitate them. Lombroso's rejection of free will is the opposite of Kant's fear: rather than madness making everyone innocent, moral insanity makes everyone responsible, legally, if not philosophically.

Since Lombroso believes threat of punishment cannot overcome inherited criminal traits, punishment in his system is framed as either harsh treatment for or containment of disease rather than as deterrent to crime. Because his theory is most known in the case of the innate or born criminal, who is understood to be inveterate, these theories were generally seen as retributive rather than corrective. The earliest editions of the work focused almost exclusively on a category Lombroso calls the "incorrigible criminal," whom he argues must be sentenced for life by a jury "made up of the prison's director and doctors, as well as judges and members of the public."[88] The worst cases are beyond the reach of the penal system and "must be eliminated for our own defense, sometimes by the death penalty."[89] This stands in stark contrast to Beccaria, for whom any use of the death penalty ultimately undermines the state.

Lombroso's anomalous criminal man is atavistic rather than degenerate. In contrast to his contemporaries who argued for a theory of genetic degeneration in which less desirable traits became more pronounced over subsequent generations, Lombroso argues that the criminal is a case of arrested development either at the phylogenic or

ontogenic level. According to his research, born criminals are the product of an innate evolutionary mishap while latent or habitual criminals emerge because of an individual's halt in development over the course of his (or, less often, her) lifetime. As Nicole Rafter says in *Creating Born Criminals*, "when [Lombroso] recommended that born criminals be imprisoned for life or executed, his goal was to prevent crime in the current generation, not in the next."[90]

When American criminologists imported Lombroso's theory and merged it with eugenics, they obscured the distinction of a specifically atavistic criminal; however, neither Lombroso's original theory nor this new eugenic criminology correctly utilized heredity.[91] The new American criminologists recognized that "the criminal, if primitive morally and biologically, must also be backwards intellectually."[92] The Lombrosian *morally insane* became the *imbecilic*, making a psychological distinction purely physiological. The category of criminal insanity in the United States remained relatively unchanged until 1915 when the concept of psychopathy was born. As Rafter notes, the concept of the criminal psychopath was more Lombrosian than prior American criminological concepts. That is, according to early twentieth century American criminology, although the criminal psychopath is an inferior example of the species, his defect is not genetically heritable.[93]

The treatment of the mentally ill, including those suffering from psychopathy, changed with the use of psychiatry in law in the United States in the twentieth century, but biological and psychological determinism have returned in the classification and commitment of sexually violent offenders. This is, in part, because sexual criminals have a distinct lineage from other criminal offenders, originating with the classification of

certain sexual desire disorders by forensic sexologist Richard von Krafft-Ebing. Krafft-Ebing was both a contemporary and a colleague of Lombroso. The next section shows how Krafft-Ebing engaged in the empirical study of people convicted of sexual crimes by incorporating Lombroso's concept of universal criminal moral insanity into his theories of sexual degeneracy.

Sexual Psychopathy

Richard von Krafft-Ebing was a professor of neurology and psychiatry at the University of Vienna. He published *Psychopathia Sexualis* in 1886 and edited the subsequent editions until his death in 1902. The text was originally intended to "record the various psychopathological manifestations of sexual life in man and to reduce them to their lawful conditions."[94] In his book, Krafft-Ebing argues that the state too often treats sexual crimes as instances of moral corruption, incarcerating the perpetrators and forcing them to endure forms of rehabilitation that are doomed to fail. At the same time, he argues that judges and barristers misunderstand crimes because they do not know they are sexually motivated. Drawn from observations, case notes, and correspondence with anonymous individuals, his work is largely a compendium of cases divided into several major categories: general pathology, or long-term disorders, including physiological conditions such as genital paralysis and psychological conditions like abnormally high or abnormally low sex drives, sadism, and masochism; special pathology, or short-term or acquired conditions, including those comorbid to other psychiatric disorders like hysteria, mania, melancholia, and dementia, and those caused by head injury and advanced-stage syphilis; and forensic sexual pathology, including pederasty, frotteurism, sexually motivated theft, and homosexuality.[95]

Krafft-Ebing's taxonomy of sexually motivated criminals emerged concurrent to Lombroso's development of the born criminal. He published *Psychopathia Sexualis* while Lombroso was editing *Criminal Man*. In later editions the works draw on each other by both citing cases and using similar theories. Just as early forensic psychiatrists and criminal anthropologists based their theories on observation, Krafft-Ebing used people held in prisons as subjects to create categories of human sexual behavior and its deviances. At the same time, criminal anthropologists used Krafft-Ebing's theories of sexual deviancy to prove the sub-human status of criminals. For example, Lombroso argues that deviance from normal, that is productive, procreative behavior into abnormal sexual practices such sodomy, non-monogamy, promiscuity, and inversion is evidence of evolutionary inferiority, particularly in the case of female criminals.[96]

Krafft-Ebing works within the basic parameters of criminal anthropology when he argues for the empirical and individual study of criminals and for a consideration of the moral capacity of the perpetrator rather than the severity of the crime. Because he focused on specifically sexual behaviors, however, he dealt with both sexual perversions that were not necessarily overtly criminal, such as excessive onanism, and criminal acts that had not necessarily been considered sexual, such as the serial theft of female undergarments. Working at this boundary of the perverse and the criminal allowed Krafft-Ebing to consider the concept of *moral perversion* in a manner distinct from the way criminal anthropologists had been utilizing *moral insanity*.

Like Lombroso, Krafft-Ebing acknowledges that public punishment for criminal actions must serve two purposes: maintaining order in the community and rehabilitating the criminal. He emphasizes that a judge who is in charge of meting punishment for a

sexual crime sees these goals at their most extreme. Since "the preservation of chastity and morals is one of the most important reasons for the existence of the commonwealth," he argues a judge must go to lengths to uphold the morality of a community by punishing "perverse sexual acts."[97] Yet, Krafft-Ebing cautions that the judge who is dealing with an individual who suffers from a perverted instinct has little chance of actually correcting the problem through judicial means, since "so powerful a natural instinct [as the sexual one] can be but little influenced by punishment."[98] That is, Krafft-Ebing says both that it is of utmost importance to the community that a sex crime be punished, but also that that punishment has the least likely chance of affecting the criminal in question. That a false conviction would permanently damage the individual's honor further complicates the balance. A judge, he concludes, must consider both the interests of society and the individual.

For Krafft-Ebing, forensic examination offers help to judges in this situation by determining whether a criminal committed an act out of *immorality* or *abnormality*. Where Lombroso's concept of abnormality is consistently physical or anthropological, for Krafft-Ebing abnormality means a perversion of feeling or instinct.

> The *nature of the act* can never, in itself, determine a decision as to whether it lies within the limits of mental physiology. *The perverse act does not of itself indicate perversion of instinct*. At any rate, the most monstrous and most perverse sexual acts have been committed by persons of sound mind. *The perversion of feeling must be shown to be pathological*. This proof is to be obtained by learning the conditions attending its development, and by proving it to be part of an existing general neuropathic or psychopathic condition.[99]

Krafft-Ebing's insistence on the presence of both act and state of mind mirrors the forensic necessity for *mens rea* and *actus reus*. Krafft-Ebing makes the field of medical forensics distinct from that of criminal anthropology because he focuses on the forensic standards of state of mind and action in the diagnosis of disease. He differs from earlier forensic psychiatrists who were interested in determining when someone's state of mind made them exempt from the law. He also distinguishes between original, congenital anomalies and acquired perversity in a way early forensic psychiatrists did not.

Krafft-Ebing popularized many categories of sexual psychopathy still in use today: hypersexuality, sadism, masochism, fetishism, frotteurism, and necrophilia.[100] He often used these categories to argue for the consideration of sexual motivation in the prosecution of crimes that were not overtly sexual. Although the majority of the cases he discusses are those where the criminal act itself is a sexual one, there is also a section on the ways that fetishism can result in non-sexual and non-violent criminal acts. Krafft-Ebing categorizes the sexual fetishism of "hair-despoiling," "theft of female linen," and shoe or silk thefts as an *irresistible impulse*.[101]

> It cannot be doubted that such individuals are the subjects of deep mental taint. But, to assume an absence of mental freedom and consequent irresponsibility, it must be proved that there was an irresistible impulse, which, either owing to the strength of the impulse itself or to the existence of mental weakness, rendered control of the criminal perverse impelling force impossible.[102]

Krafft-Ebing describes a form of pathological fetishism where sexual impulse is fixated on certain parts of the body or inanimate objects to the exclusion of almost everything else. Krafft-Ebing was not the first psychiatrist to observe this phenomenon, or to name it

as such. Lombroso, following Alfred Binet, had also used the term in this way. Krafft-Ebing, however, was the first to note its forensic application. In doing so, he groups paraphilic sexual impulse under the umbrella of uncontrollable acts rather than the cognitive impairment implied by concepts like *moral derangement* or *imbecility*. Later criminology would move away from biological criminality, but sexually motivated crimes retain the label of irresistible impulse to this day.[103]

Moving Beyond Biological Criminology

Lombroso may have claimed a theory of atavism that was distinct from degeneracy theory, but his definition of the criminal is still based in biological determinism. As eugenics fell out of favor moving into the middle of the twentieth century, so too did taxonomies of humans that placed some groups of people evolutionarily lower than others, including the field of criminal anthropology. Two competing criticisms emerged. The first, coming from psychology generally but represented here specifically by psychoanalytic theorists, focuses concept of criminality further inward from the body, that is, to the brain and then the more abstract concept of mind. The second, coming from sociology generally and represented here by deviance and labeling theories, focuses the concept of criminality further outward, looking at criminality as a social disease and then, more abstractly, as a category created to enforce the morality of the controlling classes. Here, I demonstrate how two subsequent theories of human behavior, the psychoanalytic system of sexual instinct and sociological deviance and labeling theory, both critiqued and then departed from Lombroso's definitions of crime. I compare and contrast these critiques by examining the categories of criminality each system addresses.

Despite criticisms, two aspects of Lombroso's criminal man can be found in criminology today. First, Lombroso identified criminals as part of a subculture with its own rules and codes. The idea of criminal subculture became an integral part of the growing field of sociological criminology. Even today, researchers study criminals and offenders as both products of and participants in particular cultures. Second, Lombroso's definition of the criminal framed a connection between criminal behavior and insanity. He identified certain types of criminals as people who were immune to the pressure of social norms. Rafter describes the path from Lombroso's born criminals to the contemporary, and roughly analogous, psychopath as a retreat in the location of the criminal capacity from the body to the brain to the mind: from degeneracy to feeblemindedness to psychopathy.[104] The next sections explore how subsequent theoretical approaches criticized Lombroso's definition of the criminal while still retaining some elements of it.

Crime and Freudian Psychosexual Development

Both criminal anthropological work and medio-forensic studies in the style of Krafft-Ebing count sexually deviant behavior as a measurable marker of difference, either atavistically or morally. Sigmund Freud's theory of psychosexual development directly challenges the assumption that sexual deviation is proof of qualitative difference. In *Three Essays on the Theory of Sexuality*, he explicitly rejects degenerate and innate theories of inversion. The behavior of inversion, he argues, exists in different cultures and at different points in history with radically variable frequency. According to Freud, a cautious researcher can only apply the concept of innate inversion selectively to the most egregious and persistent cases. The very existence of less persistent and egregious cases

disproves the universality of this theory; according to Freud's logic, it is impossible to have an innate cause of behavior only some of the time. Born inverts, or by extension, born criminals, cannot exist on a continuum. Yet Freud observes, as Lombroso did before him, that human behavior exists on just such a continuum.

Freud explains this variance in behavior with a system where he separates sexual instinct from sexual object choice. [105] In this theory, while the choice of objects varies according to formative experiences of childhood, and is not attributable to evolutionary, biological flaws, the presence of the instinct itself is universal. Freud's system explains why there are different sexual proclivities in varying degrees throughout the human population.

Psychoanalytic theories of criminal behavior follow the same pattern. Melanie Klein argues "acts of criminality invariably stem from disturbances in childhood," and that the increased analysis of children would result in a direct reduction of arrests and criminal psychiatric commitments.[106] This intervention, according to historian Alan Stone, altered the psychiatric and psychological measure of crime in a specific way because "psychoanalysis not only challenged the unity of the self, it privileged a certain account of virtues and vices which made the will a minor actor in the moral drama of life."[107]

Despite these direct and indirect engagements, forensic psychotherapy is a recent phenomenon.[108] Studies in forensic psychotherapy examine criminal acts, including sexual crimes, in terms of psychological and psychosexual development. Theorists classify varying degrees of severity without marking certain criminals as total aberrations, making all humans are more or less perverse, and more or less criminal.

Crime in Deviance and Labeling Theory

After Lombroso, criminologists eventually stopped measuring the attributes of criminals as biological abnormality separated from mental immorality, but continued to examine criminality anthropologically as a subculture. Taking the study of criminality as a social phenomenon, the emerging field of sociology redefined criminality in terms of deviance and judged criminals on a very Lombrosian continuum. The difference between the sociological concept of deviance and Lombroso's taxonomy of criminals is that deviance theory measures the reaction of others to a particular behavior, or the acceptability of that behavior, rather than marking the inherent threat that behavior poses to overall public safety. Sociologists by mid-century began questioning where the standards of so-called acceptable behavior came from. In a shift that came to be known as *labeling theory*, theorists argued that the categorization of behaviors into acceptable and unacceptable, including the classification systems of criminology itself, directly impacted the behavior of criminals.

Labeling theorists pointed out that the distinction between degeneracy and deviance was not always a strict one. Although sociological deviance theory abandoned physiognomy as proof of difference between the deviant individual and the normal individual, deviance remained a quality possessed by an individual. It was simply measured by their sociological distance from some cultural norm of behavior, rather than being mapped on the body. Labeling theorists, particularly those studying social interactionism, argued that deviance theory itself was part of the problem. Deviance theory, degeneracy theory, and Lombroso's anthropological criminology were all criticized as forms of institutionalized moral control.[109]

Stanley Cohen, a sociologist most famous for the creation of the concept of *moral panic*, describes this move as a shift from canonical criminology that "saw the concepts it worked with as authoritative, standard, accepted, given, and unquestionable" to a skeptical revolution that "when it sees terms like 'deviant' it asks 'deviant to whom' or 'deviant from what?'"[110] In *Folk Devils and Moral Panics*, Cohen argues it is not only sociological categories that can create criminal behavior, but also public reactions to a perceived threat. He describes this reaction as moral panic, and points out the role of the media in creating a public panic. In his study, news media focus on the presence of dangerous teenage gangs, and this both inspires teenagers to behave in a certain way and re-categorizes previously unmarked teenage behavior as indicative of deviance. Once such concepts of labeling theory are taken into account, whether you are a sociological researcher, a newspaper reporter, or an anthropologist, it becomes entirely impossible to tell the difference between discovering a form of deviance and creating it.

The main critique sociological theorists make of Lombroso's definition of the criminal is that it does not adequately allow for the dynamics of a social system. At first, sociology expanded the concept of criminal subcultures to examine how these subcultures could promote criminal actions. Later sociological theorists incorporated the concepts of labeling and relativism when arguing that an incorrigible criminal in one setting may be a perfectly responsible citizen in another (as, for example, a political revolutionary), and vice versa. This expansion finally included the actions of the sociologists themselves.[111]

Both the psychoanalytic and the sociological critique are similar in that they raise objections to the concept of deviancy and its relation to what is normal, a concept that,

itself has a complicated history. Further, both argue, albeit in different ways, that actions are not indications of types of personhood. Criminals are not atavistic subhumans who react differently to the opportunity for crime because of a biological deformity. Rather, they are subject to the same developmental, psychological and social processes as everyone else. The judgment of deviance is entirely dependent on what society wishes to elevate as normal.[112]

Conclusion: Contemporary Criminology and the Search for Dangerousness

Criminologists since Lombroso, both in the sociological and psychological traditions, have always asked the same basic questions: who are the people who do these things, and why do they do them? How researchers ask these questions defines both the scope of research and the applicability of results. The sociological critique and the psychoanalytic critique generally describe different types of criminal offenses. Although there are occasional areas of overlap,[113] for the most part labeling theorists examine less serious and less violent forms of crime than do psychiatrists. Where the path criminal psychology takes after Lombroso ends with the category of the psychopath, the path sociology takes from the born criminal leads to the category of the juvenile delinquent.

Nicole Rafter characterizes the psychiatric study of criminality as a "search for the essence of dangerousness" wherein basic questions of criminality are framed as a search for this essence and a way to contain it: "Are there individuals who are intrinsically dangerous? By what signs can they be recognized, and how can one react to their presence?"[114] On the other hand, Cohen contrasts the standard behavioral questions about deviance—Why did they do it? What sort of people are they? How do we stop them doing it again?—to the definitional questions of labeling theorists.

> Why does a particular rule, the infraction of which constitutes deviance, exist at all? What are the processes and procedures involved in identifying someone as a deviant and applying the rule to him? What are the effects and consequences of this application, both for society and the individual?[115]

In one system, the search for criminals is a question about the root of evil; in the other, it is a question about the structures of society. The first continually narrows in scope, looking for ever-more essentially dangerous criminals. The second continually widens in scope, following the consequences as they ripple outward through culture. When it comes to the categorization of violent sexual criminals, these sets of questions often operate independently. The next two chapters demonstrate that this separation is to the detriment of all involved.

The next chapter focuses on the creation of the Washington Community Protection Act, a set of laws designed to define and neutralize a specific type of highly dangerous sexual criminal. Despite the fact that the impulse behind this law is undoubtedly one informed by psychological understandings of crime, psychopathy, and sexual disorders, the law itself is neither psychologically based nor supported by the psychiatric community. The third chapter, "The Most Vile Example," shows how the category of the sexually violent offender or sexual predator has come to control our treatment of all sex offenders. Both the codification of the category and its control over all sex crime law happened even though studies into the impact of sexual crimes showed, and continue to show, that the most effective response is one of widespread intervention and therapy. The vast majority of sexual violence is not perpetrated by pathologically insane, immoral, and irreparably sexually deviant criminals, nor is it motivated by

paraphilic disorders alone. Most sexual violence happens within families, between friends, lovers, and acquaintances, and is motivated by a complex array of psychological and social factors. Yet sex crime laws are designed to target, identify, predict, and contain a very small number of sexual criminals.

It is true, however, that there exist a small number of pathologically motivated sexually violent offenders who are repeatedly and unabashedly categorized as the most monstrous, most evil, and most dangerous of all criminal types. These are exceptions, and thus, treated exceptionally. Within this category of the exceptional sexually violent offender, it is possible to see Isaac Ray's *moral imbecile*, Lombroso's *born criminal*, and Krafft-Ebing's *sadistic pederast*. In fact, it is also possible to imagine that our capability to identify and predict the behavior of these individuals may someday improve. New neurotechnology has spurred a reinvigorated interest in the criminal brain.[116] In the early 1990s, as laws targeting sexually violent offenders were weathering their first constitutional challenges, there were lawyers who complained the study of predicting dangerousness was barely better than phrenology.[117] Neuroscience, all superficial and unflattering comparisons to phrenology aside, makes the science of studying criminal brains and predicting human behavior newly plausible.

Yet the reality remains that there is an imperfect fit between legal and medical uses of the concept of mental illness that has been well documented, even in the DSM itself.[118] Psychiatrists and psychologists cannot accurately predict dangerousness or risk.[119] Mental health professionals agree about the difficulty of assessing dangerousness generally[120] and specifically in the case of sexually violent offenders.[121] The courts have consistently recognized the problems associated with predicting dangerousness, but have

maintained that even though these predictions are difficult and imperfect, they are nonetheless an "essential element" of the criminal justice system.[122] This particular argument was articulated during the hearings for the Washington Community Protection Act, where a staff member noted "judges make exceptional sentences based on predictions of future dangerousness all the time. So does the parole board. So even though the ability to predict future dangerousness is poor, we are doing it."[123]

The reliance on a, perhaps nonexistent, ability to predict dangerousness combines with the lack of effective diagnostic tools and the fear of what sex offenders represent to form a system in which there is immense pressure to incarcerate offenders, a dearth of proper data with which to make that determination, and a growing lack of sympathy for the offenders themselves. This leads "corrections officials, psychologists, prosecutors, judges, [and]] juries to push the process as far as the law will allow."[124] Critics frame the resulting problem of false positives, that is, that statistics show that most people who are incarcerated would not commit future crimes if they were given liberty, as both a civil libertarian issue where "it is morally wrong to detain three or more individuals in order to prevent only one of them from re-offending," and as a strict numbers game, where prison overcrowding in the United States is so endemic that "the tendency to over-predict dangerousness places an impossible demand on the penal system."[125] Others have noted that incarceration has been shown to increase the likelihood of recidivism.[126]

In the end, the danger of false positives is considered less potentially harmful than a released prisoner who attacks an innocent person. Legal scholar Alexander Brooks argued, at the same 1992 symposium where I began this chapter, that "a mistaken decision to confine, however painful to the offender involved, is, in my view, simply not

morally equivalent to a mistaken decision to release. There is a significant difference between the two. One is much less harmful than the other."[127] In another speech, Brooks called it a value question, "which group are you more interested in protecting, the women and children on one hand, or the sex offenders on the other?"[128] When reduced to this very simple equation, it is hard to argue that non-criminal people are not worth more, particularly when the opposing group is one comprised entirely of criminals whose actions, as the next chapter explores, are deemed to be voluntary.[129]

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[47] Norval Morris, "Keynote Address: Predators and Politics," *University of Puget Sound Law Review* 15(1992): 517.
[48] *Community Protection Act*.
[49] Harry Oosterhuis, *Stepchildren of Nature: Krafft-Ebing, Psychiatry, and the Making of Sexual Identity* (Chicago: University of Chicago Press, 2000).
[50] Rafter, *Creating Born Criminals*; Nicole Hahn Rafter, *The Criminal Brain: Understanding Biological Theories of Crime* (New York: New York University Press, 2008); Foucault, *Discipline and Punish: The Birth of the Prison*; ———, *The History of Sexuality*;———, *Abnormal: Lectures at the Collège De France, 1974–1975*; ———, *Psychiatric Power: Lectures at the Collège De France, 1973–1974*; Foucault, Hocquenghem, and Danet, "Sexual Morality and the Law."; Oosterhuis, *Stepchildren of Nature: Krafft-Ebing, Psychiatry, and the Making of Sexual Identity*.
[51] Cesare Lombroso, *Criminal Man*, trans. Mary Gibson and Nicole Hahn Rafter (Durham, NC: Duke University Press, 2006).
[52] Davis, "Constructing Normalcy: The Bell Curve, the Novel, and the Invention of the Disabled Body in the Nineteenth Century."
[53] Alan A. Stone, *Law, Psychiatry, and Morality: Essays and Analysis* (Washington, D.C.: American Psychiatric Press, 1984), 65.
[54] Foucault, "About the Concept of the 'Dangerous Individual' in 19th-Century Legal Psychiatry," 6.
[55] In general the turn toward eugenic criminology at the end of the nineteenth century grew directly out of the prison reform system. Prison officials found certain of their charges resistant to all attempts at rehabilitation, and proposed that perhaps their criminal nature was both innate and unfixable. Rafter, *Creating Born Criminals*, 11.
[56] Immanuel Kant, *Anthropology from a Pragmatic Point of View*, trans. Robert B. Louden (Cambridge, UK: Cambridge University Press, 2006), 108 (emphasis in original).
[57] Ibid.
[58] The works cited here were all published posthumously from 1838 to 1843.
[59] And, indeed, modern Italian criminal law does not require any argument for *mens rea.*
[60] Cesare Beccaria, *On Crimes and Punishments and Other Writings*, ed. Aaron Thomas, trans. Aaron Thomas and Jeremy Parzen (Toronto: University of Toronto Press, 2008), 7.

[61] "Revelation is not therefore a separate principle: this title can only be given to what does not require proof, and which may be employed to prove everything else." Jeremy Bentham, *The Works of Jeremy Bentham* (London: W. Tait, Simpkin, Marshall, 1843), 13.
[62] Ibid., 4.
[63] Ibid., 6.
[64] By the Elect he means, very clearly, a Calvinist. Ibid., 9.
[65] Ibid.
[66] Ibid., 48. At the time, Bentham saw sexual pleasure as a neutral motive. In contemporary discussions of sexual offenders, this pleasure is always understood to be a sexual pleasure. The worst offenders are those who act out of sadistic impulses; they are understood to be the worst because sexual desire and sexual pleasure are assumed to be the strongest drives and the hardest to overcome. This understanding of sexual motive comes from Krafft-Ebing.
[67] See page 28 for a discussion of the history of the insanity defense.
[68] Rafter, *The Criminal Brain: Understanding Biological Theories of Crime*.
[69] A problem Alan Stone says is emblematic of psychiatry in general: "The problem is and has always been for psychiatry—it is only a theory of madness or is it also a more general theory of human nature? Or is it even possible in principle to make such a distinction? Can one explain madness without explaining human nature?" Stone, *Law, Psychiatry, and Morality: Essays and Analysis*, 221.
[70] Rush, for example, cites both Paul, via *Romans 1:14*, and Cicero's *Oratio pro Milone.*
[71] Ray seats the moral sense in the head, which is just one of the assumptions that leads Stone, a century later, to claim, "Isaac Ray got lost in the mind-brain trap and never got out." Stone, *Law, Psychiatry, and Morality: Essays and Analysis*, 63.
[72] Rafter, *The Criminal Brain: Understanding Biological Theories of Crime*, 37.
[73] John Locke, *An Essay Concerning Human Understanding*, (London: T. Longman, B. Law and Son, 1796), 94. Ray, Rush, and Prichard refer to this particular remark of Locke's. Prichard introduces the quotation by saying "Mr. Locke made a remark which has often been cited." James Cowles Prichard, *A Treatise on Insanity and Other Disorders Affecting the Mind* (London: Sherwood, Gilbert and Piper, 1835), 3.
[74] Isaac Ray, *A Treatise on the Medical Jurisprudence of Insanity* (Boston: Little, Brown and Company, 1853), 156.
[75] Benjamin Rush, "Lecture XVI: On the Study of Medical Jurisprudence," in *Sixteen Introductory Lectures to Courses of Lectures Upon the Institutes and Practice of Medicine* (Philadelphia: Bradford and Innskeep, 1811), 380.
[76] ———, *Medical Inquiries and Observations Upon the Diseases of the Mind* (Philadelphia: John Grigg, 1830), 262.
[77] Rush, "Lecture XVI: On the Study of Medical Jurisprudence," 380.
[78] Benjamin Rush, *An Inquiry into the Influence of Physical Causes Upon the Moral Faculty* (Philadelphia: Haswell, Barrington, and Haswell, 1839), 1.
[79] The first edition was printed in 1836. Citations here are from the revised 3rd edition, first printed in 1853.
[80] Rafter, *The Criminal Brain: Understanding Biological Theories of Crime*, 30.
[81] Ray, *A Treatise on the Medical Jurisprudence of Insanity*, 261.

[82] He attributes the discovery of this disease to Philippe Pinel's studies at the Pitié-Salpêtrière Hospital.
[83] Lombroso published five editions of Criminal Man between 1876 and 1897, each one incorporating new data and responding to criticisms. What I present here is drawn from the most recent English translation (Duke University Press, 2006), which incorporates all five editions.
[84] Lombroso, *Criminal Man*, 289.
[85] Ibid., 45.
[86] Ibid., 84.
[87] Ibid., 217.
[88] Ibid., 145. I note this in particular because it is strikingly similar the procedure used in the United States for the commitment of a violent sexual offender, or violent sexual predator, where the group who makes the determination typically includes the head correctional officer, the prison psychiatrist and either a judge or grand jury.
[89] Ibid., 354.
[90] Rafter, *Creating Born Criminals*, 11.
[91] For more, see Rafter, *Creating Born Criminals* at page nine. American criminology, as other theories influenced by eugenics in this era, were heavily racialized. See Dorothy E. Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (New York: Pantheon Books, 1997).
[92] Rafter, *Creating Born Criminals*, 11.
[93] Rafter notes there is a gendered difference in the dissemination of ideas: female criminals and male criminals were categorized differently, and their particular physical manifestations interpreted differently. Ibid., 12.
[94] Richard von Krafft-Ebing, *Psychopathia Sexualis: With Especial Reference to the Antipathic Sexual Instinct: A Medico-Forensic Study*, trans. Franklin S. Klaf (New York: Arcade Pub, 1998), xxi.
[95] Krafft-Ebing had differing ideas about the prosecution of these behaviors, and makes a particularly strong argument against criminalizing homosexuality.
[96] In both *Criminal Man* and its companion text *Criminal Woman* Lombroso defines prostitution as a crime specific to women because of their distinct sexuality, arguing, for example, that all female criminals are by nature prostitutes: "We saw how sexuality can be exaggerated in female born criminals; this is one of the traits that makes them similar to men. Due to it, all women born criminals are prostitutes. While prostitution may be their least significant offense, it is never absent. Eroticism is the nucleus around which their other characteristics revolve." Cesare Lombroso and Guglielmo Ferrero, *Criminal Woman, the Prostitute, and the Normal Woman*, trans. Nichole Hahn Rafter and Mary Gibson (Durham: Duke University Press, 2004), 185.
[97] Krafft-Ebing, *Psychopathia Sexualis*, 333.
[98] Ibid.
[99] Ibid., 335, (emphasis in original).
[100] Krafft-Ebing calls hypersexuality *hyperaesthesia.*
[101] The original German is "unwiderstechlicker Zwang," that is, irresistible compulsion. Irresistible impulse would be *unwiderstechlicker Impuls*. In context: "Daran, dass derartige Attentäter psychisch schwer belastet sind, kann nicht gezweifelt werden. Zur

Annahme geistiger Unfreiheit und damit der Unzurechnungsfähigkeit muss aber der Nachweis erbracht werden, dass unwiderstehlicher Zwang, sei es im Sinne eines impulsiven Aktes, sei es durch Schwachsinn, der eine Beherrschung des strafbaren perversen Antriebes unmöglich machte, vorhanden war." Richard von Krafft-Ebing, *Psychopathia Sexualis: Mit Besonderer Berücksichtigung Der Conträren Sexualempfindung* (Stuttgart: Verlag von Ferdinand Enke, 1898), 332.

[102] Krafft-Ebing, *Psychopathia Sexualis,* 363.

[103] Redding, "The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century."; Penney, "Impulse Control and Criminal Responsibility: Lessons from Neuroscience."

[104] Rafter, *Creating Born Criminals*, 167.

[105] Sigmund Freud, *Three Essays on the Theory of Sexuality*, trans. James Strachey (New York: Basic Books, 2000).

[106] Charles W. Socarides and Loretta R. Loeb, *The Mind of the Paedophile: Psychoanalytic Perspectives* (New York: Karnac, 2004), xii.

[107] Stone, *Law, Psychiatry, and Morality*, 222.

[108] For a history of the relationship between psychoanalysis and criminology, see the introduction to the Forensic Psychotherapy Monograph Series published by Karnac. For an early application of psychoanalytic theory to criminality, see John Bowlby's 1947 study "Forty-Four Juvenile Thieves: Their Characters and Home-Life."

[109] "Foucault wrote that the old model of deviance was merely oppressive 'middle-class morality' dressed up in sociological language." Anne B. Hendershott, *The Politics of Deviance* (San Francisco: Encounter Books, 2002), 5.

[110] Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (London: MacGibbon and Kee, 1972), 12.

[111] Joel Best, *Deviance: Career of a Concept* (Belmont, CA: Thomson/Wadsworth, 2004).

[112] Lennard J. Davis, *Enforcing Normalcy: Disability, Deafness, and the Body* (London: Verso, 1995).

[113] Hendershott, in *The Politics of Deviance,* and Socarides, in *The Mind of the Paedophile*, specifically highlight pedophilia as an area that would benefit from deviance theory and psychoanalytic theory, respectively.

[114] Rafter, *Creating Born Criminals*, 5.

[115] Cohen, *Folk Devils and Moral Panics*, 13.

[116] Rafter, *The Criminal Brain.*

[117] Symposium, "Critical Perspectives on Megan's Law: Protection vs. Privacy," *New York Law School Journal of Human Rights* 13, no. 1 (1996): 70.

[118] "When the DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a mental disorder, mental disability, mental disease, or mental defect. In determining whether an individual meets a specified legal standard (e.g., for competence, criminal responsibility, or disability), additional

information is usually required beyond that contained in the DSM-IV diagnosis. This may include information about the individual's functional impairments and how these impairments affect the particular abilities in question. It is precisely because impairments, abilities, and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability." Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR), http://www.psychiatryonline.com, accessed April 6, 2011.

[119] "The state has never presented evidence in a sexual predator case of development of a body of medical knowledge and expertise *either* 1) identifying a personality disorder or mental abnormality that makes one likely to commit sexual acts of violence, or 2) demonstrating that mental health professionals are able to predict with certainty that people with such disorders or abnormalities will in fact commit acts of violence." Robert C. Boruchowitz, "Sexual Predator Law—the Nightmare in the Halls of Justice," *University of Puget Sound Law Review* 15, no. 1 (1992): 842.

"We cannot with complete accuracy identify those individuals who are dangerous, and second, the unusual decision-making process will inevitably be skewed in favor of incarceration." Julie Shapiro, "Sources of Security," *University of Puget Sound Law Review* 15, no. 1 (1992): 848.

See also, generally: John Douard, "Loathing the Sinner, Medicalizing the Sin: Why Sexually Violent Predator Statutes Are Unjust," *International Journal of Law and Psychiatry* 30, no. 1 (2007): 46; Nathan L. Pollock, "Accounting for Predictions of Dangerousness," *International Journal of Law and Psychiatry* 13, no. 3 (1990); Gary Gleb, "Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings," *UCLA Law Review* 39 (1991); Stephen J. Morse, "Blame and Danger: An Essay on Preventative Detention," *Boston University Law Review* 76 (1996); Marie Bochnewich, "Prediction of Dangerousness and Washington's Sexually Violent Predator Statute," *California Western Law Review* 29 (1992); Rebecca Frank Dallet, "*Foucha v. Louisiana:* The Danger of Commitment Based on Dangerousness," *Case Western Law Review* 44 (1993); Eric Janus, "Civil Commitment as Social Control: Managing the Risk of Sexual Violence," in *Dangerous Offenders: Punishment and Social Order*, ed. Mark Brown and John Pratt (New York: Routledge, 2000); and Roderic Broadhurst, "Criminal Careers, Sex Offending and Dangerousness," in *Dangerous Offenders: Punishment and Social Order*, ed. Mark Brown and John Pratt (New York: Routledge, 2000).

[120] The APA filed an amicus brief in the 1983 case *Barefoot v. Estelle* stating that "The unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession." Barefoot v. Estelle, 463 U.S. 880, 919 (1983). For historical studies about the prediction of dangerous, see John Monahan, "The Clinical Prediction of Violent Behavior," in *Crime and Delinquency Issues* (Rockville: U.S. Dept. of Health and Human Services, 1980); Robert Menzies et al., "The Dimensions of Dangerousness Revisited: Assessing Forensic Predictions About Violence," *Law and Human Behavior* 18, no. 1 (1994).

[121] Andrew J. Harris, *Civil Commitment of Sexual Predators: A Study in Policy Implementation*, Criminal Justice (New York: LFB Scholarly Pub., 2005).

[122] Justice Stevens held that, "it is not easy to predict future behavior. The fact that such a

determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system." Jurek v. Texas 428 U.S. 262 (1976), p 274–75.

[123] House Judiciary Committee, *Governor's Task Force on Predatory Offenders,* Regular Session, January 16, 1990. In context:

> Rep. James Hargrove: "Didn't we have testimony saying that there is a less than 40% accuracy rate in predicting this stuff? I understand they want to not let anybody slip through the cracks by at least looking at everybody, but is there any effective [way] or did we have any testimony that there was any effective risk assessment tool available at all? Or are we asking the department to do something that is at best arbitrary and hoping that that will give us some more security?"
>
> Staff: "As far as I know there is no other testimony before the committee than the about the frailty of predicting future dangerousness. It's a frail approach. However, we do by law require the departments and judges and police to make predictions on future dangerousness, you know. The involuntary commitment act requires a finding of whether or not the person is going to be dangerous. The insanity statute requires the jury to make a finding of whether or not the person will be dangerous. If we adopt this new civil commitment law we will require them. Judges make exceptional sentences based on predictions of future dangerousness all the time. So does the parole board. So even though the ability to predict future dangerousness is poor, we are doing it."

I made these transcriptions of audiotapes, so all punctuation and inflection is interpretive and my own. See the twenty-third note of Chapter Two for more information about the audio files held in the Washington State Legislative Archive.

[124] Harris, *Civil Commitment of Sexual Predators: A Study in Policy Implementation*, 131–32.

[125] R. A. Prentky and Ann Wolbert Burgess, *Forensic Management of Sexual Offenders* (New York: Kluwer Academic/Plenum Publishers, 2000), 106.

[126] "Some percentage of those who were not dangerous prior to incarceration become dangerous as a result of incarceration." Ibid.

[127] Alexander D. Brooks, "The Constitutionality and Morality of Civilly Committing Violent Sexual Predators," *University of Puget Sound Law Review* 15, no. 1 (1992): 753.

[128] Symposium, "Critical Perspectives on Megan's Law: Protection vs. Privacy," 130.

[129] David Boerner argued this position in defense of the WCPA, at the State Senate Law and Justice Committee and House Judiciary Committee, *Joint Public Hearing*, Regular Session, January 4, 1990: "Well, what the evidence shows is that when we attempt to predict future violence, we over-predict, we predict that some people will be violent who in fact won't be. That raises of course the moral costs of depriving someone of their liberty who wouldn't have done something, and of course the fiscal costs. We believe we have addressed both of those by our narrow definition and by our limitation to persons who have previously been convicted or who have been found to have committed acts of

sexual violence, we've limited the moral costs. We are not talking about anyone subject to this act who hasn't done it before. We have provided for the full panoply of procedural protection…it will be difficult to prove that a person fits under this act, and it should be, but it will not be impossible."

Chapter Two

Preventive Corrections:

Earl Shriner and the Creation of the Washington Community Protection Act

On May 22, 1989, county prosecutors in Tacoma, Washington, charged Earl Kenneth Shriner with the abduction, rape, and attempted murder of seven-year-old Ryan Alan Hade.[130] Within days, media focus shifted from the boy's recovery and his mother's grief to Shriner's criminal history. Shriner had recently been released from prison, "despite warnings from psychiatrists that he had sadistic, homicidal fantasies about children and was a danger to society."[131] His prior arrests for violent and sexual crimes were put forward as evidence both of his continuing dangerousness and of the failure of the justice system to address that dangerousness adequately. Most of the community believed, as Tacoma police sergeant Stan Mowre said in a press conference shortly after Shriner's arrest, that "his fashion is to do this sort of thing. Sex offenders always re-offend."[132] County Prosecutor John Ladenburg expressed the frustration many of the people of Tacoma felt about the way the criminal justice system worked: "We've got to wait for the guy to commit a major offense [before we can put in him in prison], when everybody knows he's going to re-offend."[133] If people like Shriner were so obviously dangerous, if they were so evidently mentally ill, why were they not being incarcerated or institutionalized? Helen Harlow, the mother of Shriner's victim, put it succinctly: "We have preventive medicine. How come we don't have preventive corrections?"[134]

Within months of Shriner's arrest, Washington's governor, Booth Gardner, created the Governor's Task Force on Community Protection to assess the current system and recommend changes.[135] He specifically instructed them to examine the feasibility of

creating a system to identify and contain the most dangerous criminals.[136] The Washington legislature based the Washington Community Protection Act of 1990 on the Task Force's recommendations. This bill was the first piece of US legislation aimed specifically at identifying and containing "a small but extremely dangerous" group of sex offenders identified in the Act as "sexually violent predators."[137] According to this legislation, sexually violent predators are people who have committed certain types of sexual crimes and suffer from a form of mental abnormality or personality disorder that makes it likely that they will continue to commit these types of crimes.[138] Offenders who have completed their criminal sentences and are deemed to be sexually violent predators are transferred to a special center where they are held indefinitely.[139]

Holding someone for crimes he or she may commit, rather than crimes of which he or she has been convicted, is normally considered preventive detention and is a violation of the Constitution.[140] The system used to contain sexually violent predators avoids Constitutional challenge because it is a form of involuntary civil commitment, which, prior to 1990, had only been used for the short-term containment of mentally ill people. In essence, it is the use of civil law to fill gaps in criminal law.[141] The language of the Washington Community Protection Act (WCPA) uses the medical aim of diagnosis and treatment to identify the most dangerous sex offenders among those about to be released and keep them contained. This new and unique criminal type, the *sexually violent offender* or *sexually violent predator*, is a criminal mentally disordered enough to be committed but sane enough to stand trial. This chapter shows how the creation of this criminal class both shifted the focus of forensic psychiatry and created a new category of legal insanity.

In creating the subgroup of sexual criminals now known as sexually violent offenders and using the medical-sounding terms *mental abnormality or personality disorder* to identify them as a group worthy of lifetime detention, the authors of the WCPA shifted the use of forensic psychiatry in US sex offender legislation from an *intervention model*, in which the primary goal is to identify and treat people suffering from sexual deviance in order to curtail future violent crimes, to a *containment model*, in which the primary goal is to remove these people from the general population.[142] Lawmakers designed previous sex crime statutes to offer treatment to dangerous sex criminals who had been diagnosed as sexual psychopaths. With the WCPA, the state moved toward containing violently dangerous sex criminals as predators because they cannot be treated.[143] More specifically, and as defined in the statute, they are "unamenable to existing mental illness treatment modalities."[144]

In order to be considered a form of civil commitment, the law had to contain enough medical language to be regulatory rather than punitive.[145] To create this containment model without running afoul of the Constitution or the mental health community, the Washington legislature made the legal category of *mental abnormality* distinct from the psychiatric category of *mental illness*. This new category was never intended to be a psychiatric category and does not use any actual psychiatric diagnoses as model. Rather, it is based on the popular representation of sexual criminals as disturbed.

None of the shifts I describe here were viewed as groundbreaking at the time. State legislatures are not bound by the definitions used by the psychiatric community, even when it comes to concepts like mental illness. The original proposal of the Governor's Task Force emphasized that the recommended civil commitment scheme

would rest on a clarification of the state's relationship to the mental health system, in particular, the use of mental illness.[146] They argued that although the concept of mental illness as defined by psychiatry and psychology was related to the concept of mental illness as used in the law, these two concepts were not necessarily co-extensive.[147] States had the power, they concluded, to interpret what kind of mental disorders would qualify for civil commitment on their own. This argument formed the foundation for subsequent sex offender civil commitment statutes, as most are modeled on the WCPA.[148]

Why this distinction between the mental abnormality of violent sexual predators and the mental illness of psychiatric patients is necessary is made very clear in the statute itself: mentally ill people who commit crimes are already eligible for commitment under existing statutes. *How* the distinction is made is another matter. Mental abnormality is not simply an expansion of the category of mental illness. The definition departs from the traditional legal concepts of mental illness significantly with regard to the role of volition and its relationship to recidivism. A sexual predator both chooses to commit violent sexual crimes and cannot be reasonably expected to stop choosing to do so, and this forms one aspect of his criminal exceptionality. In the end, mental abnormality, the standard on which the legal class of sexual predators hinges, functions as a modern re-imagining of what Michel Foucault called the most fundamental forensic psychiatric category: homicidal monomania. Foucault describes monomania as "a crime which is insanity, a crime which is nothing but insanity, an insanity which is nothing but crime."[149] The supposed mental abnormality of sexual predators is a disease that causes one to commit sexual crimes, the primary symptom of which is the committing of sexual crimes.

Here, I take Earl Shriner as a case study to demonstrate how both the media and the legislature represented the class of people who would eventually become sexually violent offenders as suffering from an incurable and untreatable, but recognizable, mental disorder. I argue that it was this representation of disorderliness that laid the foundation for the legal categories of sexual predator and mental abnormality. The communities around Washington saw Shriner as a dangerously and untreatably sexually deviant person who fell into a gap in the system, a man who, as one Task Force member testified, was "literally preparing plans for future sex crimes that he was going to commit."[150] The Governor's Task Force created, and the legislature passed, the civil commitment portion of the WCPA to close that gap. Because Shriner was proof that there was some inadequacy in the system, he was used as the model of a sexual predator. Similarly, the particular sickness so readily attributed to Shriner by the media after his arrest became the model of what constitutes mental abnormality. The civil commitment portion of the WCPA reflects the public disgust over the horrendousness of Shriner's crime, disbelief at the mental health system's reluctance to label Shriner as mentally ill, and the certainty that Shriner was not unique. Those who testified at the bill hearings reminded legislators of the threat men like Shriner posed and implied that, without significant action, even worse things might happen.

The creators of the WCPA utilized medical language and medical representation to contain sexually violent predators without violating the Constitution. This tactic is not unlike what Harlow when she compared preventive corrections to preventive medicine, not preventive detention.[151] The legislators argued that this group of people was to be contained for treatment purposes, not as punishment. They did so while claiming that

sexually violent predators, unlike the larger inclusive groups of sex offenders and violent offenders, were specifically dangerous because they did not respond to current treatment models, and, therefore, needed to be contained. The legislature of Washington effectively created a disease category, *sexually violent predator*, which is not recognized by the psychiatric community. In adopting this disease category and imposing quarantine on those contained within it, legislators made the primary goal in the commitment of sexual predators the protection of the community rather than any interest in treating patients. In the end, when it comes to avoiding violations of the Constitution, it does not matter if what makes these men dangerous is impossible to treat as a mental disorder. It also does not matter if what makes them dangerous is not recognized as a mental illness in the DSM. It only matters that it looks like one.

Terms, Parameters, and Timeline

This chapter centers on the time between Shriner's arrest on May 22, 1989, and the signing of the Community Protection Act into law in February 1990. The Governor's Task Force convened shortly after Shriner's arrest and held public meetings throughout the state to solicit public comments about violent crime and sexual assault. Concurrently, media reports about Shriner's crime and criminal history filled local newspapers. The Task Force presented their recommendation for new state legislation to a special joint session of state house and senate committees in the first week of January 1990. The proposals went to house and senate committees concurrently between January 8, 1990, and January 21, 1990. As usually happens with bills before they become law, the house and senate versions of the bill differed slightly. Committees reconciled these differences before the bill was passed on to the governor's office in February 1990. I used the written

accounts of Task Force members, the Task Force report itself, and audio tapes of the committee hearings, committee working sessions and Senate and House floor debates held in the Washington State Legislative archives to construct this timeline.[152]

The concept of the sexually dangerous stranger goes back at least another decade, dating to the disappearance of Etan Patz in New York City in 1979. This case was the first in the United States where there was widespread media attention to the possibility that a small child could be kidnapped for sexual purposes.[153] Prior to the Patz case, the prime suspects in missing child cases were lonely, childless women looking to make families for themselves.[154] This case was followed by coverage of a series of child murders in Atlanta and widespread coverage of the kidnapping of Adam Walsh in Florida in 1981 (after whom the Adam Walsh act is named). Adam Walsh's father was particularly vocal about the possibility that his son had been kidnapped by a pedophile.[155] Media interest in these cases led to a general sense within the United States that sexually predatory and pedophilic men were victimizing missing children. The Earl Shriner case was a landmark case because Ryan Alan Hade survived the attack. It was one of the first cases that where such victimization occurred but where the perpetrator did not commit an offense that made him eligible for life in prison.

In this chapter, I draw a distinction between disorders that are curable, disorders that are treatable, and disorders that are recognizable but are neither curable nor treatable. These distinctions are not always easily made. Both the psychiatric community and the legal community agree that men like Shriner are potentially incurable. Before 1990, existing sex criminal statutes recommended, and sometimes required, treatment for people who were amenable to it. Since psychiatrists usually diagnosed criminals with

incurable disorders, many people were incarcerated indefinitely when they were ordered to receive treatment until they were cured. This issue had been part of public discourse since the mid-1970s, and many of these laws were repealed in the years before Shriner's arrest in 1989.

Regardless of ostensible curability, both these specific sexual criminal laws and the general involuntary civil commitment laws were designed only for people who were amenable to treatment. The psychiatric community objected laws requiring them to house and treat people who they considered untreatable; therefore, people who were untreatable or who would not participate in their own treatment were incarcerated. Incarceration of this form could not be indefinite and they were eventually released. Since Shriner was unamenable to treatment, it was this second problem that became the focus of the community outcry after his arrest. Community members expressed frustration that the system had no option but to release someone who was so recognizably and dangerously sick. The answer provided by the WCPA was to classify certain people as having a coherent, *recognizable* mental disorder that causes them to commit acts of sexual violence. According to the WCPA, this mental disorder does not have to be curable or treatable, the person who has it does not have to agree that he or she has the disorder or that he or she ought to participate in any treatment.

The second important theme I employ is the concept of medical representation, which functions in two ways. First, there is the public representation of Shriner as one example of a whole class of mentally disordered and dangerous people not adequately contained under prior laws. Second, there is the representation of this particular disease category in the text of the WCPA itself. Ultimately, it was the representation of Shriner's

deviant sexual criminality and, by extension, the pathological sexual criminality of all sexually violent offenders that formed the foundation of the representation of mental disorder in the WCPA. It is important to understand the influence of representation, particularly the representation of Shriner, in the creation of the WCPA. As many authors have noted, sex crime legislation utilizes the language of mental disorder but is driven by public reactions to crimes more than psychological discoveries or evaluations.[156] Studies have shown that policymakers draw their understanding of sex offenders from the media.[157] In fact, the importance of the media's role in reporting about Shriner's history, and sex crimes in general, was noted repeatedly throughout the hearings.[158] One senator even thanked the members of the media for their work during a floor debate.

The third and final relevant theme is sociologist Stanley Cohen's concept of *moral panic*. Cohen defines a moral panic as a period "in which a condition, episode, person or group of people emerges to become defined as a threat to societal values and interests."[159] The events that occurred in Washington after Shriner's crime display classic signs of moral panic and this had led many theorists to conclude the Washington Community Protection Act is a prime example of moral panic legislation.[160] Most of these analyses focus on the representation of criminals (and types of crime) as reprehensible rather than as incurably and untreatably sick. They also conclude (or assume) the WCPA was drafted hastily and without consideration for the forensic psychiatric implication. Close analysis shows otherwise: the creators of the WCPA were extremely precise in their language. Although the legislators did not foresee all the implications of the changes they made, the creation of a new form of forensic psychiatry as well as a unique system of psychiatric and juridical power was not a byproduct of a

hastily written bill. It was a deliberate process. The concept of mental abnormality was particularly purposeful and exacting. Those involved in the creation of the WCPA acted calmly, thought rationally, and sought to examine why the system was inadequate, rather than trying to find one person to blame. That is, they acted exactly the way we would hope a government would react in a time of crisis.

A History of Incarceration

Governor Gardner's Task Force on Community Protection was made up of mental health professionals, representatives from the criminal justice system, legislators from the state house and senate, and community activists. In preparing their recommendation for reform, the members of the Task Force combed through Shriner's record to determine whether he had been released in error.[161] They concluded that there were no errors made; the system simply was not sufficient to deal with people like Shriner and, in fact, never had been. Task Force members concluded that the system needed an entirely new category designed specifically to hold someone like Earl Shriner. Their recommendation was to expand the scope of involuntary civil commitment to apply to this new category. In this section, I show how this inadequacy of the system came down to the fact that the laws used to charge and sentence Shriner only allowed for mental disorders that were treatable; Shriner's disorder, if he even had one, was untreatable.

The WCPA was the first piece of legislation designed to label sex offenders according to their potential for harm, but it was not the first piece of legislation designed specifically to target sexual criminals, nor was it the first law to consider sex crimes as indicative of an underlying psychological disorder. Shriner had been held under almost every incarnation of sex crime law that existed in Washington before 1989, a fact that

was highly publicized in the week following his arrest. The May 23 issue of the *Morning News Tribune*, the largest local paper, ran a front-page photo of Shriner in a holding cell above the headline "System Just Couldn't 'Keep' Suspect." That day's issue also featured a comprehensive timeline of his arrests, convictions, and sentences.

Shriner had been incarcerated for twenty-two of the previous twenty-four years. He served four different sentences in connection with six victims. All his prior crimes resembled his attack on Hade, whom he raped, sexually mutilated, throttled with a rope, and left for dead. Shriner was first arrested at the age of sixteen for the attempted strangulation of a seven-year-old girl in 1966. After his conviction he led authorities to the body of a fifteen-year-old girl who had been strangled, presumably by him. He served ten years and was released in 1976 only to be incarcerated again in 1977, when he pleaded guilty to assault and kidnapping for the abduction of two sixteen-year-old girls. He was released in 1987, and then arrested again and held for three months for stabbing a sixteen-year-old boy in the arm. After his release, he was arrested and held for another three months for the unlawful imprisonment of a ten-year-old boy who was beaten and tied to a fence post. He was released in December of 1988, seven months before the attack on Hade.

According to news media reports, at in his first trial in 1966, court records described sixteen-year-old Shriner as "mildly retarded."[162] He was committed to the Rainier School in Buckley, but school authorities "felt he was too dangerous for them to handle" and they transferred him to Western State Hospital in 1968.[163] During this time, Shriner was categorized as a "defective delinquent,"[164] a term which dates back to the nineteenth-century roots of criminology when criminal anthropologists created the

concepts of moral insanity, moral idiocy, defective delinquency and degenerate delinquency to explain criminal acts.[165] Although common language use today draws a distinction between insanity and idiocy, the former being mental illness and the latter being mental disability, early criminologists often did not make such a distinction. Thus, although Shriner's categorization implies that his issue was one of a more permanent mental disability rather than a form of mental illness, the application of the label *defective delinquent* puts him in the larger category of the so-called morally insane.

As discussed in the previous chapter, the system of punishment suggested by criminal anthropologists was more akin to treatment for a disease than to deterrent to crime. Criminal anthropologists made a distinction between "occasional criminals" who would respond to treatment, incarceration, or re-training, and the incorrigible "born criminals."[166] Cesare Lombroso, a pioneer in the field, argued the born criminal must be sentenced for life or be put to death by a jury "made up of the prison's director and doctors, as well as judges and members of the public."[167]

The United States criminal justice system had moved away from use of criminal anthropology or biological criminality by 1966. When Shriner was committed as a defective delinquent it is likely the state was simply using an existing juvenile statute rather than actually diagnosing him as a form of born criminal. Even without direct connections to biological criminality, the label still carries rhetorical significance, especially since it was resurrected in media reports to describe Shriner after his 1989 arrest.[168]

In 1977, Shriner was arrested and charged with first degree assault and kidnapping. He pleaded guilty. The judge in the case suspended the sentence, a maximum

of ten years for each offense, “to determine if [the] petitioner would benefit from psychological therapy."[169] After four weeks, officials from Eastern State Hospital determined that Shriner was “not suited for the hospital’s sexual psychopath program.”[170] The judge re-instated his original sentence citing that the petitioner had been declared “unamenable to treatment."[171] Unlike the category of the sexually violent predator on which this chapter focuses, the category of the sexual psychopath has origins in psychiatry, and, as such, “the psychiatric condition of sexual psychopathy was enlisted with the goal of subjecting sex offenders to medical treatment.”[172] The explicitly stated goal was to catch the psychopath early in his escalation to murder and intervene with treatment by offering hospital commitment as an alternative to prison, sometimes for an indeterminate length of time.[173]

Just as in the defective delinquent statutes that predated them, sexual psychopath laws make a distinction between treatment and cure. Even those originally involved in the passage of the sexual psychopath laws did not expect that violent sexual criminals would be cured in a psychiatric institution, only that they would receive treatment. Some states used this distinction to detain sexual psychopaths indeterminately by requiring that they should remain in these facilities until cured.[174]

The judge and prison officials used sexual psychopath laws in Shriner’s case exactly as they were designed. Since they were a way to remove treatable sexual deviants from the penal system, Shriner was not eligible because he was not treatable. Ralph Smith, the county prosecutor in the 1977 case, said later that he disagreed with any notion that Shriner should receive medical treatment. In Smith’s assessment, treatment was an

act of sympathy. “I didn’t have any sympathy; I felt he should go to the walls,” he said in a 1989 interview. “I wouldn’t have minded if he didn’t survive [prison].”[175]

Shriner’s 1977 trial came during an era marked by significant shifts in public conceptions of psychiatry, the severe limitation, and sometimes complete eradication, of the institutionalization of those deemed mentally ill, and significant societal shift in sexual morality. These shifts were just beginning to influence sexual psychopath statutes when Shriner was arrested. Earlier in the same year, the Group for the Advancement of Psychiatry published a report determining that “special sex offender legislation as an approach to sex psychopaths has failed and consequently should be repealed.”[176] They argued that the legislation had failed because, despite the fact that its stated goal was to provide treatment to sexual psychopaths, it was often used to hold people indefinitely on the grounds that they could not be cured. Many states repealed standing sexual psychopath statutes on the recommendation of similar reports. If the people held in these centers could not be adequately treated, then the laws were not accomplishing their intended goal and many men and women were being unjustly incarcerated.

Washington legislators passed a variety of sentencing reform statutes in 1984 that changed the way Shriner was treated upon his release in 1987 and throughout his two subsequent arrests.[177] Since Shriner was never formally convicted of a sex offense, when he was released in 1987 he was not asked to report to a local psychiatric facility for outpatient treatment. Media reports after the attack on Hade two years later stated that many of the local law enforcement officers had gone out of their way to attempt to warn members of the community only to find that their hands were tied.[178]

Prison officials attempted to have him institutionalized under Washington's civil commitment statute after his release in 1987, even going so far as to take him directly to Western State Hospital for an involuntary seventy-two-hour commitment. They ultimately failed.[179] News media reports after his 1989 arrest attributed this failure to "some disagreement between mental health experts as to whether pedophilia is a mental illness."[180] Upon later review, the Governor's Task Force found that this failure was not due to any ineptitude of the criminal justice system, but rather because the civil commitment system "was not designed for the long-term confinement or treatment of individuals with mental disorders or abnormalities that manifest themselves by episodic acts of sexual violence."[181] Civil commitment laws, like sexual psychopath laws, existed to separate out people who were dangerous because they suffered from treatable illnesses and give them that treatment. It stands to reason that someone who could not be treated should not be put in a hospital.[182]

In the end, public commentators, the Governor's Task Force, and the legislators all concluded that, in Shriner's case, "the criminal and social service system *didn't* break down" but rather worked exactly the way it was supposed to work. [183] The result reached by a correctly applied system was the release of Shriner back into the community with full impunity to re-offend. Members of the Task Force wanted to draft a piece of legislation that would give law enforcement "the means to detain sexually violent predators whose confinement is not ensured by our current laws."[184] Constitutionally, however, criminal law had been stretched to the limit, so the solution offered by the Task Force to the legislature was a modification of civil commitment. If, they concluded, the

state recognized these offenders as suffering from something like a mental illness, then indefinite civil commitment could be applied, regardless of curability or treatability.

When they presented their findings during legislative hearings, members of the Task Force explained they had designed the new civil commitment scheme with Shriner in mind. Norm Maleng, chair of the Task Force, began his testimony before the Washington House Judiciary Committee by noting that there existed a certain type of released criminal "who is going to continue to be dangerous. Maybe the Shriner type of person. And that is why we provide for a safety valve for those type of people which is the civil commitment scheme."[185] David Boerner, chair of the Subcommittee on Civil Commitment, echoed this aim in front of the Senate Law and Justice Committee, testifying that the "paradigm case is the Shriner case, where he served every day of his ten year sentence for assault in the second degree, but was perceived by everyone to be very, very dangerous."[186] Assistant Attorney General Douglas Walsh, chairman of the Attorney General's Executive Committee on Sexually Violent Offenders, testified that his panel had reached the same conclusion as the Governor's Task Force, noting that "civil commitment is not a panacea, but it is a necessary tool to give to prosecutors so that they can effect public safety in those rare circumstances, we hope to be rare circumstances, where the Shriners of the world have not given us jurisdiction under the criminal process."[187]

Representation, Mental Disorder and the Sexual Predator

The Washington legislators who passed the WCPA created the category of the sexually violent predator, abandoning the older idea of a psychopath who must be treated in favor of the concept of a mentally abnormal predator who must be quarantined for the

protection of the general population. In the following section, I demonstrate that the legislature created this category both as a direct response to and as a means of incorporating the rhetoric of community and media representations of Shriner, and similar sex offenders, as untreatably and incurably mentally disordered. Legislators, like the public, were guided by the overwhelming sense that there was a disconnect between the readily observable abnormality of Shriner's behavior and the reluctance of mental health professionals to institutionalize him as mentally ill. Therefore, they abandoned the older definition of mentally ill for their own category of mental abnormality, effectively substituting the public representation of mental disorder for an actual psychiatric category.

In the first five days after Shriner's arrest the local newsrooms saw what an editor would later call a "gut-wrenching reaction that erupted immediately and fully."[188] Local newsrooms received hundreds of letters and phone calls from community members outraged over the attack and over "a legal and mental health system that let a known, violent pedophile with a twenty-four-year history of abusing children walk in and out of custody five times."[189] Printed reactions characterized Shriner as a man with "compulsive, addictive behavior,"[190] to a "monster"[191] and a "sick animal."[192] Shriner was portrayed as part of a larger group of "violent deviants,"[193] men without conscience who "are sexually aroused by torture, maiming and killing,"[194] and "people so deviant that no system wants them."[195] Community members called on legislators to find a way to lock up sex offenders for life, and one specifically called for the creation of "an institution that serves only one purpose: to keep the chronic sex criminal away from society."[196]

In some cases, those who called for such measures emphasized the distinction between cure and treatment. In a newspaper interview published the week after Shriner's arrest, psychologist Michael Comte argued that sex offenders could be treated but not cured. When pushed by the interviewer to comment on Shriner's case specifically, however, Compte admitted that, from what he understood, Shriner could not be treated. "We just don't know how to treat homicidal and sadistic sexual offenders," he said, "nor do we know how to treat predatory rapists."[197] In others, this distinction was blurred, as when police officer Stan Mowre testified during a special legislative session in Olympia that there was "only one [sex offender] that I know that was cured, and that's the rapist I shot and killed in the line of duty." The audience responded to Mowre's testimony with "thunderous applause."[198]

On May 30, a little over a week after Shriner's arrest, community leaders and sexual assault counselors held a town hall meeting in the Tacoma City Light Auditorium. City officials took the chance to speak to the community about their growing concerns, and, overwhelmingly, these concerns centered on the state's treatment of the mentally ill.[199] Compte reiterated his opinion that when it comes to "the sadistic, homicidal child molester, the pedophile—we don't know how to treat them…. All we can do is lock them up."[200] According to the article on the meeting that ran in the *Oregonian* the next morning, one city official argued that they needed to "eliminate the gap between the mental health system and the criminal justice system." Another, County Prosecutor John Ladenburg, suggested building "a mental health prison," a suggestion that drew a large cheer. Officials also suggested "more widespread and explicit warnings about sex

offenders" and "publicizing their names once they have completed prison terms." One unnamed woman in the audience suggested "the death penalty for the untreatable."[201]

According to the account that ran in the newspaper the next morning, most of the panelists at the town hall meeting, including the county prosecutor and the police chief, agreed: "state legislators must adopt a law to divide sex offenders into the treatable and the untreatable. Then, after the treatable get out of prison, they must be supervised for life. The untreatable offenders should be locked up for life."[202] The members of this panel believed the inadequacy of the system came down to the ability to assess treatability, monitor the treatable, and contain the untreatable.

Shifting the focus of legislation from intervention to monitoring and containment, however, was not as simple as this panel made it out to be. Where the popular media coverage mentioned previously could simply make the argument that Shriner was beyond help and should be locked up forever, the legislature found itself in a much more complicated position. Many psychiatrists, including some who testified at the legislative hearings, pointed out that it is simply not within the purview of the mental health system to contain individuals for whom there is no treatment. There has to be some hope of treatment in order to civilly commit someone legally. Mental health professionals continued to press the point that Shriner was not actually mentally ill in any way that justified institutionalization.

It is clear from the committee hearings about the bill that many who testified considered Shriner's mental disorder to be self-evident, and the fact that the mental health system did not consider him mentally ill was ludicrous. That the very untreatability of his disorder itself made him ineligible for commitment was the worst sort of irony.

Legislators saw the reluctance of psychiatry to recognize his behavior as a coherent mental illness as a convenient loophole, one that they could close with this legislation. Representative Insley of the house called this loophole the "Godzilla Defense:" a type of "psychiatric testimony that [says] 'well sure, he's a monster, but he's not mentally ill.' And I think we need a definition that will address that."[203] The limits of mentally ill as a category had become clear, but there was no other medical category that would encompass all the people contained in the legal category of sex offenders.[204] Medical diagnosis in general had proved insufficient to contain the perceived threat posed by repeat offenders like Shriner. To respond adequately to public outcry, the legislature would have to create new legal sanctions to ensure that these so-called monsters would be treated as mentally disordered.

Many of the legislators predicted, quite accurately, that the constitutionality of this expanded form of civil commitment would hinge on the precise language they used. The definition of a sexually violent predator had simultaneously to demonstrate that the individual in question was mentally disturbed in such a way as to make him or her dangerous and in need of treatment; to explain why that individual was not eligible for commitment as a mentally ill person; and to show why most forms of treatment were not actually working. Creating a definition that fit those parameters would allow the legislature to use the process of civil commitment, a process designed around treatment and intervention, as a tool to address people like Shriner, who were considered untreatable.

Legislators began by navigating the distinction between treatable and untreatable. Some of those who testified in support of the WCPA noted, as the media and the public

had, that the older systems used to treat sexual criminals failed precisely because of the presumption of treatability. Thelma Struck and Paul Krouse, testifying for the Department of Social and Health Services, pointed out that the current programs were designed to offer treatment and could not be applied in cases where no treatment existed. They added that, first, such treatment-based laws presumed that the objective of commitment was release,[205] and second, that the faculties used to house people committed under these statutes were not equipped to deal with extremely violent, high-risk criminals.[206] David Boerner argued that the problems these systems were designed to handle, namely those cases where "short-term interventions using medication primarily can be effective at arresting or even curing," were simply not the same as those posed by individuals like Shriner.[207] In Shriner's case, and in those future cases imagined to be like his, the goal was not short-term intervention. Rather, Shriner had been introduced into the mental health system as a way to ensure he was never released into the community.

Some legislators were still concerned with the mental health community's insistence that these individuals were untreatable. Much of this concern focused on the fact that sexually violent predators, the individuals in need of this new form of commitment, were defined in the original bill as suffering from a mental abnormality *or* personality disorder. Since mental abnormality was still undefined, the only precise psychiatric language in the proposal was the phrase *personality disorder*, a disorder that, as they understood, was untreatable.[208] This untreatability opened any statute using the term *personality disorder* to criticism on constitutional grounds because, at the time, it was understood that the law only allowed civil commitment under the expectation of treatment.[209] Using a psychological disorder that psychiatrists generally agreed they

could not treat would put their new statute in a precarious position. When one observer pointed out that it seemed disingenuous to declare people untreatable and then commit them for treatment, Maleng clarified.

> We did not say that. What we said was that they did not fit the classic, technical definition of mental illness but they did have a mental abnormality and that they had to be dealt with. And also, we never said that they weren't treatable. With some, we may not have evidence that they can be cured at the present time but we should treat and we should continue to research those types of efforts.[210]

Mental abnormality avoided the problems associated with the term *personality disorder* because there was no consensus or evidence that mental abnormalities were untreatable—just that there was not yet a treatment for them. With this distinction, Maleng not only introduces a vital difference between untreatable and not-yet-treatable, but also connects it to a difference between a mental abnormality and the psychiatric definition of mental illness. According to this argument, there is a frustrating disconnect between the obviously disturbed behavior of people like Shriner and the mental health system's diagnosis of them. Without adequate diagnosis there is no research into treatment.[211] Boerner testified that it was that aspect of the Shriner case, that he was "clearly a problem and clearly very dangerous but he doesn't suffer from a classic mental illness," which led the Task Force to conclude that the newly recognized class of "sexually violent predators are, by and large, not mentally ill."[212] Lucy Berliner of the Harborview Sexual Assault Center[213] and Task Force Chair Norm Maleng echoed this conclusion.

Boerner was careful to add, however, "that doesn't mean that there's nothing wrong with these people…by definition, by virtue of their behavior, they're

demonstrating that there are things wrong with them." The original bill as proposed by the Task Force relied on the self-evident nature of what was wrong with these individuals to justify their commitment. The actions of the men in question, Shriner foremost among them, were taken as proof of a mental abnormality in and of themselves. During committee hearings, several legislators expressed concern over the absence of a precise definition of mental abnormality, and Boerner attempted to justify leaving it undefined, first stating: "It is defined by its product. That it makes the person likely to engage in predatory acts of sexual violence."[214] A few days later, he argued that past actions were a good indication of future ones: "What it means is a condition that is expressed by the prediction, by the fear for what will happen in the future."[215]

Maleng urged the legislature to solve this disconnect by creating a distinction between an illness and a disorder. He framed illness as the purview of medical professionals and disorder as a place of legal intervention.

> Our involuntary commitment laws were not designed for the Shriners. That's why we have not come in and attempted to amend that law, which basically goes to the mentally ill, but to form a new form of civil commitment which is directly against sexual offenders, somebody who has a mental disorder, not a *mental illness*, a mental *disorder*, plus being dangerous to others, and I'm absolutely confident that our present civil commitment law would work against an Earl Shriner and that is exactly what it was designed to address.[216]

Later, the representatives tasked with amending the bill to emphasize the importance of eschewing the phrase mental illness would recall this distinction between illness and disorder.[217]

The solution to all of these issues lay in the concept of *mental abnormality*. In committee, the legislature added the following definition:

> "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional [rather than the cognitive] capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health or safety of others.[218]

In the end, the definition in the bill is not any less tautological than Boerner's argument for not having a definition at all. Mental abnormality is a condition that "predisposes the person to the commission of criminal sexual acts," a condition whose only symptom is the commission of those acts. Creating an official definition for a mental abnormality as distinct from a personality disorder does, however, serve a rhetorical function. It allows a non-psychiatric definition of mental disorder to justify civil commitment. The sexually violent predator, as a mentally abnormal individual, has a unique status on the boundary between medicine and law. This status—being mentally disturbed but not recognized as such and needing treatment which may not yet exist—is what allows the law to function as a form of preventive detention without running afoul of the Constitution.

Criticism and the Preservation of Volition

The Washington legislature's creation of the category of mental abnormality successfully created a definition of a mental disorder outside of the psychiatric system. As argued in the previous section, the explicit reason for distinguishing violent sexual predators from mentally ill people is to make it clear that the purpose of the law is to catch those who are not already being caught by the system. This justification is given in the bill itself. When they defined sexually violent predators as mentally disturbed, the

legislature never meant it to be a new psychiatric term,[219] but rather, at most, to broaden the definitions of mental illness used in the law. Both the Washington State Supreme Court[220] and the US Supreme Court accepted the broadening of this term as an appropriate use of state power,[221] allowing the legislature to avoid criticism from both psychiatrists and legal professionals.

The creation of this new concept of mental disorder also allowed the preservation of volition. At the time of the creation of the WCPA, lawyers and judges invoked mental illness as a way to mitigate guilt or validate a medical intervention. Psychiatric testimony could enter the courtroom in one of four ways. It is used in criminal trials to determine incompetency, insanity, or diminished capacity, and in civil trials to justify a temporary psychiatric hold on the grounds of dangerousness. Anyone held for involuntary treatment, found incompetent to stand trial, or found not guilty by reason of mental disease or defect is perceived in the law, or at least by the legislators who created the WCPA, as a person whose volitional capacities are compromised to such an extent that he or she cannot be held responsible for his or her behavior. The law considers people such as this to be people who cannot help themselves, who do not understand what they have done, who cannot be relied upon to seek treatment, and who could not reasonably be expected to stop themselves.

By contrast, dangerous sexual predators have full functional volition, they *choose* to commit crimes, which is why they can be punished first and then institutionalized. Despite the fact that the Supreme Court of the United States upheld it on the grounds that it is regulatory rather than punitive, the WCPA is, at heart, a backlash against the construction of the mentally ill criminal as someone not responsible for his actions.

Prosecutors and community members alike saw hospitalization as too good for criminals like Earl Shriner.

During the drafting of the WCPA, various people expressed trepidation about using a civil commitment scheme for these sexual criminals precisely because of the association between mental illness, impaired volition, and the arbitration of guilt. John La Fond, a professor at the University of Puget Sound School of Law, expressed concern that the civil commitment statute would not recognize responsibility. His concern rested on the presumption that sick people are not responsible.

> It seems to me the basic strategy for sex offenders is to treat them as responsible people, to treat their behavior as voluntary and morally blameworthy, and to punish them; not use a system of pure preventive detention or hospitalize them as sick.… Sex offenders are not mentally ill. And by this I mean they can control their behavior. They make choices. And it seems to me that they should be held accountable for those choices through the system of punishment.[222]

La Fond equates mental illness with lack of control and control of behavior with increased responsibility. Those who can control their behavior should be punished in the criminal justice system. Those who cannot should be sent to the hospital. To confuse the two, according to La Fond, amounts to not holding people responsible for criminal actions.

One representative went so far as to argue against the definition of mental abnormality as written in the statute because it was something "affecting the volition capacity."[223] This, she said, seemed to undermine the entire structure.

> The factor that they used to separate these disordered people, the psychopaths; from these mentally ill people was the ability to make a choice. The mentally ill people were on one hand not able to make the decisions, and that separated them from the psychopath, dangerous, disordered people that according to the psychiatrists do have the ability to make a decision.…We heard these people had that capacity, they chose for whatever reason within the other parts of their disconnected thought processes not to exercise it. There was a decision. The sexual predator had a choice not to commit the crime. That's why they were not mentally ill.[224]

Mental illness, in her understanding, necessarily impaired one's ability to make sound choices. Simply giving in to an impulse, regardless of the strength of that impulse, was punishable under the law.[225] Moving away from mental illness, in this representative's mind, meant regaining culpability.

The legislators and committee members drafting the bill were aware of the implications of creating a new category of mental abnormality that was not technically a psychiatric disorder. Representatives of the psychiatric community testified that people who do not have mental disorders could not be treated.[226] Attorneys and legal theorists, in particular La Fond, pointed out that if the people in question were not mentally ill, they could not be civilly committed, since detaining people who are not mentally ill is a form of preventive detention and is unconstitutional.[227]

The response to both critiques was to argue that the situation in Washington was so severe that it necessitated an extraordinary law. Casey Carmody, a community activist who testified in support of civil commitment, noted that the fact that the Task Force

resorted to an unconventional method was a "condemnation of the current system" and a sign of how desperate people had become to protect their communities.[228] Norm Maleng opened the hearings on the civil commitment portion of the bill by telling the assembled committee that civil commitment was the "only remedy" for "every one of the horrible tragedies you will be hearing about,"[229] framing the proposed widening of civil commitment as a panacea.[230] In his closing remarks, he acknowledged both critiques, but then reminded the legislators of the dire situation in Washington. Given the scope of these crimes, it was only expected that the laws created to contain them would be harsh. Once the situation was framed in this way objections from the legal and psychiatric communities served only to galvanize. All objections stood as proof that the legislature had fought fire with fire.

I have shown here how public backlash against the perceived inadequacies of legal and medical systems led to the creation of an exceptional category of legal diagnosis: the mentally abnormal sexual predator. Moreover, although the state maintained the guise of treatment in these preventive correction measures in front of the Supreme Court,[231] treatment was not their primary aim. In fact, the dominant medical metaphor to be found is that of the identification and containment of a contagion.

> The essential distinction is that this is not a punishment. This is a civil process that does not impose punishment on people. It confines them, it takes away their liberty, there is no question, but it's based on a fundamentally different premise. It isn't blaming them, it doesn't stigmatize, it protects us from them, and that's its basis. In effect it adopts the medical model that we use in the civil commitment process, that we use in public health, in those areas.[232]

The laws also imply that there exists, and that we must make use of, some external or professional system for determining who is to be feared. In shifting the standard for commitment from mentally ill to mentally abnormal, legislators moved the burden of proof, or the task of diagnosis, from the hands of psychiatrists to those of judges. There is, as of now, no visual marker or mechanical test for determining the diagnosis of sex offender.,[233] Diagnosis of a mental illness requires compliance with medical standards. Mental abnormality is a much more subjective categorization, a categorization that some have pointed out is so overbroad as to incorporate "every conceivable behavior."[234]

With the creation of this new category of mentally abnormal criminal, Washington legislators gave the state the right to confine, regardless of psychiatric opinion, anyone it deemed a public danger. As one author put it, "this is not to say that medical discourse is not invoked; the rationale remains that sex offenders are 'sick.' The difference is that we no longer need psychiatrists to tell us how they are sick."[235] Or, as another author put it, the law "offered a de facto criminal sanction, but one justified in terms of a civil medical matter."[236] The legislature of Washington created a unique medico-legal system, and then, when attacked by both the legal and the psychiatric community, claimed it was neither criminal nor therapeutic in nature.[237]

Conclusion: The Significance of Sexual Violence

In the two decades since the WCPA, legislation targeting sexually violent offenders has been implemented in twenty of the United States and at the federal level. It has been heralded as a new era in the age of sex crimes, one marked by a particular melding of medical and legal language. Sex criminals generally, and civilly committed sexually violent offenders specifically, are treated as "qualitatively different from other

types of offenders."[238] The overwhelming assumption in these cases is that people who are sexually dangerous belong by default in the mental health system[239] because the sexual component of their crimes indicates their dangerousness is of a particularly compulsive and pathological form.

The legislature of Washington deliberately created a new sub-category of criminal mental illness, one in which insanity, reinterpreted as mental abnormality, is an indicator of guilt rather than an excuse for what would otherwise be punishable criminal behavior. The explicit question of volition was primary in this definition, but there was also an implicit emphasis on the strength of the sexual drive as something so compelling and so strong as to overcome a volitional sense in an otherwise technically sane individual.

The category of the sexual predator frames sexual motivation as just such an overwhelming and irresistible drive. The importance of sexual motivation in the creation of this new civil commitment scheme can be seen most sharply by the reactions to what would happen if these laws were applied to non-sexual crimes. After the final decision in *Kansas v. Hendricks* upholding the civil commitment of sex offenders as constitutional, Thomas J. Weilert, Hendricks's attorney, wrote a critique of the law offering what another legal theorist called a "rather chilling scenario of where *Hendricks* could lead."[240] This scenario consists of a reprint of the definitions of sexually violent predator and mental abnormality as they appear in the WCPA with the word sexual removed throughout.[241]

This chapter highlighted how the WCPA's shift in the use of forensic psychiatry was a shift from an intervention model toward a public health model of containment. Yet we remain faced with the question of the effects of using the public health model for

psychiatric disorders, particularly when those psychiatric disorders are sexual in nature. One effect pertinent to the project at hand is that this model makes perversity itself something that needs to be quarantined. Foucault gave an interview in 1978 about exactly this potential in the regulation of sexual criminal dangerousness.

> Now what we are defining and, therefore, what will be found by the intervention of the law, the judge, and the doctor, are dangerous individuals. We're going to have a society of dangers, with, on the one side, those who are in danger, and on the other, those who are dangerous. And sexuality will no longer be a kind of behavior hedged in by precise prohibitions, but a kind of roaming danger, a sort of omnipresent phantom, a phantom that will be played out between men and women, children and adults, and possibly between adults themselves, etc. Sexuality will become a threat in all social relations, in all relations between members of different age groups, in all relations between individuals. It is on this shadow, this phantom, this fear that the authorities would try to get a grip through an apparently generous and, at least general, legislation and through a series of particular interventions that would probably be made by the legal institutions, with the support of the medical institutions. And what we will have there is a new regime for the supervision of sexuality; in the second half of the twentieth century it may well be decriminalized, but only to appear in the form of a danger, a universal danger, and this represents a considerable change. I would say that the danger lay there.[242]

As a longtime scholar of the particular melding of medical and legal language that exists around sexuality, Foucault, in this interview, was remarking on what he saw as a

possibility for the medico-forensic control of sexuality on the basis of danger and protection. In fact, what Foucault identifies here, and, indeed, what came to pass beginning with the WCPA, was that sexuality would be invoked as a phantom or a specter of fear and that, in the face of that fear, legislators would draft laws that went to unforeseen lengths.

On the one hand, the drafting of the WCPA is the story of a community who felt that the voices of victims had gone unheard. People felt that their government, at best, had failed them; at worst, it saw them as guinea pigs on which to unleash dangerously ill sex offenders to test if they were cured yet. It is, in some sense, the story of the triumph of citizens over system, of grassroots over bureaucracy, of real people's lived experience over rigid, clinical, pragmatic interpretations.

On the other hand, it is the moment Foucault's "new regime for the supervision of sexuality" was realized.[243] According to some, this is the moment the United States government first began to use the language of psychiatry to justify the elimination of undesirables.[244] According to others, the actions of the Washington legislature are but one example of how the legislative process minimizes the threat of systemic, culturally coded violence when concentrating focus on the danger posed by individuals like Shriner. Laws like the WCPA highlight the necessity of containing that danger and neutralizing it, but they come at the cost of comprehensive attention to intrafamilial and interrelational abuse. For these critics, the drafting of the WCPA is a story of how the language of careful, complex inquiry into the causes of sexual violence, coupled with a sense of righteous indignation, produced a law that, instead of addressing either, simply scapegoated a very small and indefensible group of people.

In the end, it is not just the sexual nature of the crimes, but the indefensibility of the offenders that becomes important. Earl Shriner is a man who caused immeasurable suffering—not only to Ryan Allan Hade and his family, or to his six other victims, or to the community of Tacoma, but also to his own family, who took custody of him time and time again, only to watch him re-offend and end up back in jail. In the face of that history, it is, perhaps, easier to understand why the law created to contain him is so extraordinary.

Yet these laws are troubling, because, beyond their expressive purpose, what they define is not a criminalized sexual identity, but a criminal sexual identity: an identity gained through the commission of sex crimes and deserving of lifetime incarceration. As Foucault said in 1978, sexuality may well be decriminalized, but it has appeared here in the form of danger—universal danger. Despite the American Psychiatric Association's reluctance to include coercive non-consensual sex as a paraphilia in the DSM, that is, their refusal to recognize this group of violent sexual offenders as members of a coherent disease group—despite the entire mental health community's pull back from the pathologization of sexual drives and desires—the legislature can step in and do it for them, and can do so in the name of protecting a community in the time of crisis.

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[130] Hade remained nameless throughout the sentencing and trial because of his age; he was referred to in the media simply as "The Little Boy" or "The Little Tacoma Boy." It was not until after Hade's death in 2005, of unrelated causes, that Shriner's victim's name was publicly released. Paul Sand, "A Life Too Short, but Lived in Full," *The News Tribune*, June 22, 2005.
[131] "Mother of a Sex-Crime Victim Ponders a System That Failed," *San Diego Union-Tribune*, June 4, 1989.
[132] Donna De La Cruz, "Tacoman Pleads Innocent in Sexual Assault on 7-Year-Old Boy," *The Oregonian*, May 23, 1989.
[133] Gary Larson, "System Just Couldn't 'Keep' Suspect," *The Morning News Tribune*, May 23, 1989.

[134] Sally Macdonald, "Mother Confident of Mutilated Boy's Recovery from Ordeal," *The Oregonian*, June 5, 1989.
[135] The full roster of the Governor's Task Force was: Norm Maleng, lawyer, King County prosecutor; Marlin Appelwick, lawyer and member of house of representatives; Ida Ballasiotes, mother of Diane Ballasiotes, president of SAVUS (Stop All Violent Unnecessary Suffering); Lucy Berliner. social worker; Rosemary Bippes, correction education specialist; David Boerner, law professor; Mary Margaret Cornish, developmental disabilities expert; Fran Dew, registered nurse; Anne Ellington, judge; Larry Erickson, sheriff; Helen Harlow, mother of Ryan Hade; John Ladenburg, county prosecutor; Roland Maiuro, PhD, clinical psychologist and professor; Yvonne Huggins-McLean, lawyer; Mike Patrick, police officer and member of house of representatives; Kent Pullen, Member of Senate; Chase Riveland, department of corrections; Robert Scherz, MD, psychiatrist; Robert Stalker, lawyer; Melba Sunel, occupation unknown; Dick Thompson, lawyer, DSHS; Trish Tobis, assault survivor; Paul Wert, clinical psychologist; and R. Lorraine Wojahn, senator.
[136] "The Task Force was created principally to answer one question: What gaps in our law and administrative structures allow the release of known dangerous offenders who are highly likely to commit very serious crimes?" Task Force on Community Protection, "Final Report to Booth Gardner, Governor, State of Washington," (Olympia, WA: 1989), II-20.
[137] The WCPA has three distinct but interrelated purposes: the first two, sex offender registration and community notification, changed the way sex offenders are tracked after release and became the basis of the nationwide laws commonly called Megan's Law. This chapter focuses on the third part, involuntary civil commitment, because although all three portions of the law presume that a history of sexual crimes is a predictor of dangerousness and use criminal history as a set of symptoms in order to diagnose a mental state of dangerousness, it is the final section that sets the criteria for the criminal category of sexually violent offenders.
[138] A note on language: *sexually violent predators* and *sexually violent offenders* are two names for the same group of people. Although generally I avoid using the term *predator* because of the metaphoric weight it carries, detailed in Chapter 3 of this project, I do use it in this chapter in order to make clear that I am referring to the text of the WCPA. *Sexually violent offenders* came into use later and so to use it would be incongruous with the historical events described here.
[139] The creation of a special facility is vital to the bill. It both assuaged the fear of mental health professionals who testified about the differences in facilities needed to deal with the different populations and the danger of exposing mentally ill people to sexual predators, but also maintained the appearance created by the law that this new population being defined was neither strictly criminal nor strictly psychiatric.
[140] Although this is not true in all cases. Apart from the PATRIOT act, the most notable exception is for holding someone who has been charged with a crime but not yet convicted. The purpose of holding a person so that they may stand trial is to prevent flight, which is a crime. The Supreme Court held that this type of preventive detention was allowed in United States v. Salerno, 481 U.S. 739 (1987).
[141] Douglas Walsh, AAG, State Senate Law and Justice Committee and House Judiciary

Committee, *Joint Public Hearing*, Regular Session, January 4, 1990. All quotations from these committee hearings are from transcripts I personally made from audio recordings. The original recordings are available in the Washington Legislative Archive. See note twenty-three, below, for more information about the archives.

[142] "When examined closely, the statutes [passed based on Washington's code] reveal that the underlying intent of the legislation is essentially to confine virtually all sexual offenders (not just violent sexual predators) for unlimited periods of time to protect the community." Lola Romanucci-Ross and Laurence R. Tancredi, *When Law and Medicine Meet: A Cultural View* (Dordrecht: Kluwer Academic Publishers, 2004), 44.

[143] I specify that this shift is one of the *primary* goal of the legislation both because containment was always a secondary goal with prior statutes and because the WCPA maintained that treatment was a goal in order to avoid violating the due process clause of the constitution.

[144] *Community Protection Act*.

[145] The distinction between regulatory and punitive is crucial for determining whether a statute is civil or criminal in nature. Kenneth Mann, "Punitive Civil Sanctions: The Middleground between Criminal and Civil Law," *The Yale Law Journal* 101, no. 8 (1992).

[146] "Final Report to Booth Gardner, Governor, State of Washington," IV-27.

[147] The same is true of the concept of insanity.

[148] Justice Thomas noted in *Kansas v. Hendricks,* the case that held the civil commitment of sexual predators to be constitutional, that the Court had "never required State legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Dangerous Sex Offenders: A Task Force Report of the American Psychiatric Association* (Washington, DC: American Psychiatric Association, 1999), 30.

[149] Foucault, "About the Concept of the 'Dangerous Individual' in 19th-Century Legal Psychiatry," 6.

[150] David Boerner, State Senate Law and Justice Committee and House Judiciary Committee, *Joint Public Hearing*, Regular Session, January 4, 1990.

[151] Other countries, such as Australia, New Zealand, and until recently Germany, allow preventive detention of sex offenders. See Dennis J. Baker, "Punishment without a Crime: Is Preventive Detention Reconcilable with Justice?," *Australian Journal of Legal Philosophy* 34, no. 1 (2009).

[152] All information from the Washington State Legislative Archives cited here was retrieved during a visit I made from March 7 to March 12, 2011. I accessed two bill files, Senate Bill 6259 (first entered January 24, 1990) and House Bill 2384 (first entered January 26, 1990). I also transcribed the audiotapes of the committees that met to discuss those bills, which are on magnetic cassettes arranged by date of hearing and name of subcommittee. Since then, the audio records of the senate committees have been digitized and are available in searchable archives at http://www.digitalarchives.wa.gov. The archivists are planning to digitize the House committees eventually, and future researchers should check the online source first.

[153] Joe Sterling, "Missing Child Case 'Awakened America'," (CNN.com: CNN, 2012).

[154] Lisa R. Cohen, *After Etan: The Missing Child Case That Held America Captive* (New York: Grand Central Pub., 2009).
[155] Hollis F. Johnson, "Media and the Creation of Myth: The Role of Print Media in the Popularization of Stranger-Danger Child Abduction" (master's thesis, Simon Fraser University, 1988).
[156] Philip Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* (New Haven: Yale University Press, 1998).
[157] Lisa L. Sample and Colleen Kadleck, "Sex Offender Laws," *Criminal Justice Policy Review* 19, no. 1 (2008); Jill S. Levenson and David A. D'Amora, "Social Policies Designed to Prevent Sexual Violence," *Criminal Justice Policy Review* 18, no. 2 (2007); Richard Gordon Wright, "Protection or Illusion: A Policy Analysis of Massachusetts and Federal Sex Offender Legislation" (PhD diss., University of Massachusetts, 2004).
[158] Attorney General Ken Eikenberry testifying for the State Senate Law and Justice Committee and House Judiciary Committee, *Joint Public Hearing*, Regular Session, January 4, 1990. In context: "I think one of the most important developments that has occurred in the past year is an acceptance, recognition, whatever we want to call it, on the part of the public, the media in describing these events, and everyone in discussing this problem that certain sexually violent offenders are dangerous people who will continue to be dangerous throughout their lives."
[159] Cohen, *Folk Devils and Moral Panics*, 9.
[160] Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America*; Romanucci-Ross and Tancredi, *When Law and Medicine Meet: A Cultural View*.
[161] David Boerner, "Confronting Violence: In the Act and in the Word," *University of Puget Sound Law Review* 15, no. 1 (1992).
[162] Debby Abe and Kim Severson, "Plea Entered in Hall Outside Jammed Court," *The Morning News Tribune*, May 23, 1989.
[163] Ibid.
[164] Cruz, "Tacoman Pleads Innocent in Sexual Assault on 7-Year-Old Boy."
[165] Part of the difficulty in teasing out what each of these categories is and how it was used lies in the fact that both theorists and handlers of criminals themselves were, perhaps purposely, imprecise. Rafter, *Creating Born Criminals*, 119.
[166] Lombroso, *Criminal Man*, 163.
[167] Ibid., 145.
[168] The use of the term *defective delinquent* in criminal contexts is also significant because it highlights the fact that criminal categories within the United States share a history with categories not only of mental illness, but mental disability. For more on the history of eugenics and disability theory in this era, see Davis, "Constructing Normalcy: The Bell Curve, the Novel, and the Invention of the Disabled Body in the Nineteenth Century." For more on the role of eugenics and the very different rubric used in this era to determine what a mental illness was, see Ian Robert Dowbiggin, *Keeping America Sane: Psychiatry and Eugenics in the United States and Canada, 1880–1940* (Ithaca: Cornell University Press, 1997).
[169] Boerner, "Confronting Violence," 525-60.The full case citation is: 95 Wn.2d 541; 627 P.2d 99; 1981 Wash. LEXIS 995. News media incorrectly reported in 1989 that "the judge ruled Shriner should be committed to the sexual psychopath program at Eastern

State Hospital." Abe and Severson, "Plea Entered in Hall Outside Jammed Court." The Governor's Task Force addressed this error.
[170] Bruce Rushton, "Past Sex Offender Suspect in Attack," *The Morning News Tribune*, May 22, 1989.
[171] 95 Wn.2d 541; 627 P.2d 99; 1981 Wash. LEXIS 995
[172] Simon A. Cole, "From the Sexual Psychopath Statute To 'Megan's Law': Psychiatric Knowledge in the Diagnosis, Treatment, and Adjudication of Sex Criminals in New Jersey, 1949–1999," *Journal of the History of Medicine and Allied Sciences* 55, no. 3 (2000).
[173] Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America*.
[174] See Paul Tappan's remarks on the Commission for the Study of the Habitual Sex Offender in 1949 as cited in Cole, "From the Sexual Psychopath Statute To 'Megan's Law'," 296.
[175] Larson, "System Just Couldn't 'Keep' Suspect."
[176] Group for the Advancement of Psychiatry, "Psychiatry and Sex Psychopath Legislation—the 30s to the 80s," (New York: Mental Health Materials Center, 1977).
[177] Shriner was incarcerated twice for non-sexual crimes between his release in 1987 and his attack on Hade in 1989. Both times, Shriner pleaded guilty in return for very short sentences. Neither of these trials made any difference in the applicability of civil commitment or sex offender supervision, nor did they change Shriner's eligibility for the so-called three-strikes law which allowed judges to give extraordinarily long sentences to adults convicted of three crimes. These sentencing reform acts limited their applicability to crimes committed before 1984, and Shriner had only been convicted of two crimes as an adult before that date. Boerner, "Confronting Violence."
[178] "Mutilation Suspect Reportedly Wanted to Cage, Kill Youths," *The Oregonian*, May 24, 1989; "Sex Offenders Freed without Notice to Communities," *The Oregonian*, May 27, 1989.
[179] Larson, "System Just Couldn't 'Keep' Suspect." The attempts made by officials involved with Shriner to push the existing laws to the limit, or to circumvent them, were unusual, but not unheard of. In 1989, authorities notified all the inhabitants of Mountlake Terrace, a small town in Washington State, that a recently released juvenile who was planning to return there had, while in the detention facility, drawn plans to abduct children from a local elementary school. They released his name and intended address. This case led to the creation of the Community Notification portion of the WCPA. Ron Judd, "Predators: Is Plan a Cure or Overkill?—Mountlake Terrace Man's Case Fuels Debate on Locking up Sex Offenders," *Seattle Times*, January 14, 1990.
[180] Kim Severson, "State Ran out of Options to Keep Shriner Off Street," *The Morning News Tribune*, May 27, 1989.
[181] Boerner, "Confronting Violence," 543.
[182] This use of mental health is a significant departure from the eugenics-based criminal procedures of the early twentieth century. I am focusing on the shift from intervention to containment model that happened in 1990, but it is important to keep in mind that the intervention model only came into widespread use in the 1950s. Until that time, the overarching theory about the treatment of the criminally insane was that of *elimination.* The eugenics of the late nineteenth and early twentieth century focused on encouraging

so-called better people to have larger families and to prevent those considered inferior specimens of humanity from breeding. Crime and criminal behavior, especially crime thought to be caused by mental deficiencies, were often considered a result of poor breeding. One way to remove these traits from the gene pool was to execute criminals, or, if that was not possible, to incarcerate them so as to prevent them from passing on their defective genes. Thus, even though there is a containment model at work, the purpose of containment was usually to eliminate the genetic line and to protect the human species in the long term, not to protect the community from an immediate threat.

[183] "Mother of a Sex-Crime Victim."

[184] Protection, "Final Report to Booth Gardner, Governor, State of Washington," IV-7.

[185] Norm Maleng, transcript of House Judiciary Committee, *Governor's Task Force on Predatory Offenders*, Regular Session, January 11, 1990.

[186] David Boerner, transcript of State Senate Law and Justice Committee, *Community Protection Legislation*, Regular Session, January 11, 1990.

[187] David Boerner, transcript of State Senate Law and Justice Committee, *Community Protection Legislation*, Regular Session, January 11, 1990.

[188] John Koemn, "Anguish Pours out for the Little Boy," *The Morning News Tribune*, May 28, 1989.

[189] Kim Severson, "Outrage over the Attack, over the System," *The Morning News Tribune*, May 24, 1989.

[190] Dick Mansfield, community member who found Hade after the attack, as quoted in Rushton, "Past Sex Offender Suspect in Attack."

[191] "An Offense that Calls for Outrage," *Morning News Tribune*, May 24, 1989.

[192] "Judicial System Let Child Down," Letter to the Editor, *Morning News Tribune*, May 25, 1989.

[193] "An Offense that Calls for Outrage."

[194] Michael Comte, interviewed by Melissa Stevenson, "Sex Offenders Can Be Treated but Not Cured, Doctor Says," *The Morning News Tribune*, May 27, 1989.

[195] Maureen McNamara, executive director of the Sexual Assault Center of Pierce County as quoted in Abe and Severson, "Plea Entered in Hall Outside Jammed Court."

[196] "System has failed," *Morning News Tribune*, May 28, 1989.

[197] Comte, interviewed by Stevenson, "Sex Offenders Can Be Treated but Not Cured, Doctor Says."

[198] Hal Spencer, "Witnesses Testify for Sex Offender Bill," *The Sunday Oregonian*, June 4, 1989.

[199] The state was already overhauling its mental health system and creating a new ward at Western State Hospital (where Shriner had once been held) for violent offenders considered incompetent to stand trial. Scott Wilson, "Champions of Mental Health Face the Challenge of Ensuring Change," *The Morning News Tribune*, May 28 1989. A few weeks prior, Governor Gardner had signed into law a six-year mental health reform plan designed to "move the moderately mentally ill out of overcrowded state institutions and bring them home, often into the neighborhoods where they grew up." "Improving Current Situation Next Hurdle in Mental Health Reform," *The Oregonian*, May 31, 1989.

[200] Dan Voelpel, "A Demand to Change System," *The Morning News Tribune*, May 31, 1989.

[201] Tim Klass, "Emotional Tacoma Crowd Backs Fast, Long Terms for Sex Offenders," *The Oregonian*, June 1, 1989.
[202] Dan Voelpel, "A Demand to Change System."
[203] Transcript of House Judiciary Committee, *Governor's Task Force on Predatory Offenders*, Regular Session, January 17, 1990.
[204] The inadequacy of medical diagnosis to achieve this particular legal aim is still an issue. For example, Thomas Zander argues that the efforts of psychologists testifying at sexually violent offender commitment trials can be seen as part of a long battle among mental health professionals about whether to identify the urge to rape as a mental disorder. Zander, "Commentary: Inventing Diagnosis," 464.
[205] Thelma Struck, transcript of State Senate Law and Justice Committee, *Community Protection Legislation*, Regular Session, January 11, 1990. In context, "there is a presumption in the statute that is currently law for involuntary treatment and I'll read from it, that we will 'provide prompt evaluation and short term treatment of persons with serious mental disorders.' So the presumption is that you will deprive a person of their civil liberties for the shortest time possible, give them treatment to either stabilize or cure their illness and restore their civil liberties."
[206] Paul Krouse, transcript of State Senate Law and Justice Committee, *Community Protection Legislation*, Regular Session, January 11, 1990. In context, "the traditional mental health system is not well suited for this population. First, it's based on the assumption that the individual can be treated and returned to society quickly. It essentially is a short-term commitment statue. Second, it does not provide or allow for the high levels of security that are necessary for this population. Third, mixing these two populations, the mentally ill and the sexual predator, is extremely explosive because it provides the sexual predator with a pool of vulnerable victims. And it's really quite inadequate for the traditionally mentally ill. The proposed new system is designed to recognize these differences. It provides for a longer term of confinement, it provides for a separation of the vulnerable from the predator, and it allows us to provide more security for the community, for the patient, and for our own staff. It also recognizes the rights of the mentally ill and the developmentally disabled by avoiding stigmatizing them by drawing the distinction between those who are sexual predators and those who are mentally ill or developmentally disabled."
[207] Boerner, transcript of State Senate Law and Justice Committee, *Community Protection Legislation*, Regular Session, January 11, 1990.
[208] The legislature amended the civil commitment statute years later and included a definition of personality disorder: "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment. Purported evidence of a personality disorder must be supported by testimony of a licensed forensic psychologist or psychiatrist." *Community Protection Act*.
[209] William Salen, Head of the Civil Commitment Division of the Seattle-King County Public Defender Association, from a transcript of State Senate Law and Justice Committee, *Community Protection Legislation*, Regular Session, January 11, 1990. In context, "I think there is significant issue with regard to treatment of individuals with

personality disorders, and that if, indeed, treatment is not possible for these individuals, I think that it may well occur that there will be challenges in the court system with regard to the provisions of this bill."

[210] Norm Maleng, transcript of State Senate Law and Justice Committee, *Community Protection Legislation*, Regular Session, January 12, 1990.

[211] An official mental illness has criteria listed in the DSM, and those criteria are used to allocate National Institute of Health (NIH) funds and to determine insurance coverage for treatment. As a result, mental illness research funding is usual available only for illnesses listed in the DSM. From the DSM-V website: "Another important role of DSM is to establish criteria for diagnosis that can be used in research on psychiatric disorders. Only by having consistent (reliable) diagnoses can researchers compare different treatments for similar patients, determine the risk factors and causes for specific disorders, and determine their incidence and prevalence rates. DSM disorders are also used as the basis for treatment indications by the FDA or and for clinical Practice Guidelines. DSM diagnoses are linked to the diagnostic codes listed in the International Classification of Diseases used by clinicians to report diagnoses to insurers for reimbursement, and to public health authorities for causes of illness and death." There are sections of the DSM dedicated to listing disorders purely for research purposes rather than diagnostic ones. In proposed revisions for the 5th edition, these are listed in Section III. http://www.dsm5.org/about/pages/faq.aspx, accessed May 26, 2012.

[212] Transcript of State Senate Law and Justice Committee and House Judiciary Committee, *Joint Public Hearing*, Regular Session, January 4, 1990.

[213] "It is quite true that sex offenders generally do not suffer from mental illness as we think of it classically, like such disorders as schizophrenia." Lucy Berliner, transcript of State Senate Law and Justice Committee, *Community Protection Legislation*, Regular Session, January 11, 1990.

[214] Transcript of State Senate Law and Justice Committee and House Judiciary Committee, *Joint Public Hearing*, Regular Session, January 4, 1990.

[215] Transcript of State Senate Law and Justice Committee, *Community Protection Legislation*, Regular Session, January 11, 1990.

[216] State Senate Law and Justice Committee, *Community Protection Legislation*, Regular Session, January 9, 1990, (italics added to indicate his original inflection).

[217] "As I recall the testimony that we heard from the psychiatrists who deal with these people who told that they were not treatable, that they had this personality disorder, they were dangerous, that we ought to capture them and keep them away from the public, that was they terminology they used, was anti-social behavior disorder. *Disorder* was the terminology that they used. It had nothing to do with mental illness." Transcript of House Judiciary Committee, *Governor's Task Force on Predatory Offenders*, Regular Session, January 17, 1990.

[218] *An Act Relating to Criminal Offenders*, Regular Session, SB6259, as found in the Washington Legislative Archives. The phrase "rather than the cognitive capacity" was in the Senate's form of the bill, but was removed in the House.

[219] Critics made much of this point following the bill's passage. Brooks, "The Constitutionality and Morality of Civilly Committing Violent Sexual Predators," 730.

[220] Brooks in Symposium, "Critical Perspectives on Megan's Law: Protection vs.

Privacy," 102.
[221] Kansas v. Hendricks, 521 U.S. 346 (1997).
[222] Transcript of State Senate Law and Justice Committee, *Community Protection Legislation*, Regular Session, January 11, 1990.
[223] *An Act Relating to Criminal Offenders*, Regular Session, SB6259, as found in the Washington Legislative Archives.
[224] Rep. Jean Brough, Transcript of House Judiciary Committee, *Governor's Task Force on Predatory Offenders*, Regular Session, January 17, 1990.
[225] This was, and still is, the basis of much of the Model Penal Code. Having an irresistible impulse is not viable as an insanity defense in most jurisdictions, and was not allowed in Washington in 1990, yet it became the standard for the civil commitment of sexual predators.
[226] In fact, much care went into designing the statute to read as a statute offering treatment, even though this was a treatment that did not yet exist.
[227] Most notably, John Q. La Fond, who critiqued the conclusions of the task force at the hearings: "I am interested frankly in the testimony offered Tuesday and today by members of the task force panel. I understand in their testimony they make the following assertions: Sex offenders are not mentally ill. Treatment is not the purpose of this program and we don't think effective treatment is available. Essentially the prevention of harm appears to be the sole purpose of this scheme. Let me put it to you bluntly, and it's time we talked about it, I think this is pure preventive detention." Transcript of State Senate Law and Justice Committee, *Community Protection Legislation*, Regular Session, January 11, 1990.
[228] Casey Carmody, Transcript of State Senate Law and Justice Committee, *Community Protection Legislation*, Regular Session, January 11, 1990.
[229] Norm Maleng, transcript of State Senate Law and Justice Committee, *Community Protection Legislation*, Regular Session, January 9, 1990.
[230] Even as Assistant Attorney General Walsh advised that it was not, at the State Senate Law and Justice Committee, *Community Protection Legislation*, Regular Session, January 11, 1990.
[231] Seling v. Young, 531 U.S. 250 (2001).
[232] Boerner, transcript of State Senate Law and Justice Committee and House Judiciary Committee, *Joint Public Hearing*, Regular Session, January 4, 1990.
[233] Although, researchers are searching. Michael C. Seto, *Pedophilia and Sexual Offending against Children: Theory, Assessment, and Intervention* (Washington, DC: American Psychological Association, 2008). In Seto's work, see pages 114–5 for studies on homosexuality and non-right-handedness and pages 121–2 for discussion of minor physical anomalies and pedophilia.
[234] Romanucci-Ross and Tancredi, *When Law and Medicine Meet*, 45.
[235] Cole, "From the Sexual Psychopath Statute To 'Megan's Law'," 312.
[236] Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America*, 192.
[237] The American Civil Liberties Union and the Washington State Psychiatric Association argued in *Seling v. Young* (2001) that the WCPA violated the double jeopardy clause of the constitution. The court held that since the aim of Young's imprisonment was

treatment, not punishment, the statute was civil in nature and as such did not constitute double jeopardy. The Supreme Court has since upheld similar rulings in Kansas v. Crane, 534 U.S. 407 (2002), and United States v. Comstock, 560 U.S. ____ (2010).

[238] George B. Palermo and Mary Ann Farkas, *The Dilemma of the Sexual Offender* (Springfield: C.C. Thomas, 2001), 169.

[239] The Governor's Task Force immediately rejected the use of indeterminate sentencing, which would have had a basis in criminal law rather than civil. Boerner, "Confronting Violence." Although the attorney general's office, which ran a parallel study, suggested returning to such forms of sentencing, representatives from the Task Force continued to object throughout the hearings, and the legislature ultimately ruled against it.

[240] Fred Cohen, "The Law and Sexually Violent Predators—through the *Hendricks* Looking Glass," in *The Sexual Predator: Law, Policy, Evaluation and Treatment*, ed. Anita Schlank and Fred Cohen (Kingston: Civic Research Institute, Incorporated, 1999), 7.

[241] Thomas J. Weilert, "Thoughts on the Cost of Freedom," *University of Kansas Law Review* 46 (1997).

[242] Foucault, Hocquenghem, and Danet, "Sexual Morality and the Law," 281. "The Danger of Child Sexuality", Foucault's dialogue with Guy Hocquenghem and Jean Danet, was produced by Roger Pillaudin and broadcast by France Culture on April 4, 1978. It was published as "La Loi de la pudeur" in RECHERCHES 37, April 1979. First published in English in Semiotext(e) Magazine (New York): Semiotext(e) Special Intervention Series 2: Loving Boys / Loving Children (Summer 1980), in a translation by Daniel Moshenberg. Citations here are from Michel Foucault, "Sexuality Morality and the Law," in *Politics, Philosophy, Culture: Interviews and Other Writings*. ed. Lawrence D. Kritzman, trans. Alan Seridan (New York: Routledge, 1988). As it is a transcript of a conversation between three people, but a citation to a specific book, I cite it as Foucault, Hocquenghem, and Danet, "Sexual Morality and the Law."

[243] Foucault, Hocquenghem, and Danet, "Sexual Morality and the Law," 281.

[244] Michael A. Rembis, "(Re)Defining Disability in the 'Genetic Age,': Behavioral Genetics, 'New' Eugenics and the Future of Impairment," *Disability and Society* 24, no. 5 (2009).

Chapter Three

The Most Vile Example:

Framing the Sexual Predator in the United States

The Washington Community Protection Act of 1990 (WCPA) marked the beginning of a new wave of sex offender legislation in the United States. The WCPA has served as the model for national sex offender registration and notification laws and as the foundation for residency and employment restrictions.[245] More importantly, it is in this era that the concept of the sexually violent offender and the sexually violent predator became entrenched in discussions about sex crimes, recidivism, and the responsibility of legislatures to protect children in their communities, which arose concurrently with new forms of sex crime law. In this chapter, I argue that fear of the predator overlays the concept of the criminal sexual offender generally and leads to ever-escalating penalties and restrictions for all forms of sex crimes. This escalation happens despite the fact that the sexually violent offender is the rarest type of sexual criminal.[246] In the end, contemporary sex crime laws are more symbolic than they are effective.[247]

Several high-profile crimes against children hastened the spread of sex crime laws between 1990 and 2005.[248] All of these crimes galvanized public outrage similar to the response to Earl Shriner in Washington State: news media focused on the criminal history of the perpetrators while community members began demanding that the location of sexually dangerous people be made public. The most significant of these cases was the murder of seven-year-old New Jersey resident Megan Kanka by Jesse Timmendequas in 1994.[249] Shortly after Timmendequas' confession, but before his trial, New Jersey's

legislature responded to public outrage by passing nine legislative measures directed at sex offenders and modeled on the WCPA.[250] By 1996, versions of this set of laws existed in every state and at the federal level.[251] They are almost always referred to collectively as "Megan's Law" in honor of Timmendequas' victim.[252] The sex offender laws in the United States created since the murder of Megan Kanka, written both in her name and in the names of other young victims,[253] are notoriously harsh and have proved virtually impossible to repeal.[254] Even within the subgroup of laws most resistant to critique, which includes most morality-based laws, sex crime laws, and laws designed to protect children, the new sex offender legislation modeled on the Washington Community Protection Act, and hastened by the passage of Megan's Law, is remarkably resilient.

This resilience can be traced directly to the way sex offenders are perceived by public commentators demanding legal sanctions. Community members framed their response to Megan's murder and demands for Megan's Law as justified by the abject horror personified in repeat sex offenders. During a debate about the creation of laws restricting where sex offenders could live, *New York Times Magazine* interviewed a man, David Smith, who lived next door to a registered sex offender.

> The court is telling us that this murderer, this rapist, has all these rights!" he proclaimed. "If that's the case, let him move next door to the judge! Two murders in Virginia. Three more molestations in New Jersey." He paused, but only for a breath, before he exploded again. "Our children are guinea pigs helping him with his therapy to see if he's cured! He's a time bomb. Community notification at least lengthens his fuse." Smith was reaching his crescendo. "We have a Frankenstein

> incarnate living down at the end of our driveway! After these horrendous crimes, that creature forfeits his rights![255]

David Smith's outrage was typical of this period. Smith expresses his anger at the fact that a registered sex offender was living next door, a man whose prior convictions he knew about only because of new provisions put in place by Megan's Law. He could not understand why his neighbor, a man convicted of child sexual abuse, still retained the right to live wherever he wanted. This was especially true when, as far as Smith understood, his ongoing therapy indicated he was uncured and likely to offend again. Smith believed that a history of sexual offenses indicated not only continuing immorality, and even monstrousness, but also a forfeiture of civil rights. Similar arguments echoed around the United States throughout the 1990s.[256]

What began with the WCPA in 1990 and widened with the spread of Megan's Law after 1994 was a shift toward not only the quarantine of highly sexually dangerous individuals, but also the casting of all sex offenders as potential and actual sexual predators. As a result, people arrested for sex crimes such as indecent exposure are lumped together with people convicted of child sex abuse. As a legal category, a discursive force, and a metaphor, the category of the sexual predator has spread far beyond the specific group identified by the WCPA; it not only frames legislation aimed at violent, pedophilic sex offenders, but also defines all sex offenders. The expansion of this category has had two major and deeply intertwined effects. First, as critics of the laws have noted at length, the sex offender statutes in the United States overgeneralize, distort the statistical reality of sexual violence, and are politically impossible to critique in any public or constructive way. Second, the public image of what and who a sex offender is

has been controlled by the idea of the sexually violent offender, not only in terms of the danger he poses to children, but also what he looks like, where he works, and the type of victims he chooses.

More than two decades have passed since the WCPA was signed into law, and today there is an observable disconnect between the group of people imagined to be controlled by sex offender laws and the actual group of people controlled by sex offender laws. Legislators support widening the scope of these laws because of the perceived target of *predators*, despite the fact that critics of the laws, including psychiatric and legal professionals, have voiced serious concerns about their effectiveness and the precedents they set. [257] Critics, noting the actual group effected by the laws and its contrast to he perceived group, argue that the laws are ineffective, difficult to implement and, sometimes, impossible to enforce. Some point out that they promote the very culture of fear that they claim to combat.[258] Legal scholar Denis Doren notes these laws function in a paradox.

> Even a cursory review of literature found in psychological and psychiatric publications would easily lead to the conclusion that these laws are regularly thought to be abominations both to society in general and to the scientific community in particular. In contrast, legislative bodies have promoted and passed such laws with little opposition.…Legislators and their constituents obviously believe that these laws are desirable and necessary, despite professional writings questioning their effectiveness, ethics, and scientific foundation.[259]

This paradox exists because it is not the small category of civilly committed sexually violent offenders that has controlled all sex crime laws in the United States since 1990,

but specter of the sexual predator. The fact that these two concepts, the sexually violent offender and the sexual predator, are not directly analogous causes practical issues. According to the logic used to craft the original statues of the WCPA, the threat of sexual violence is posed by a seemingly knowable quantity of people who are identified and civilly committed. The people imagined to inhabit this category are violent, criminal pedophilic offenders who abduct or imprison children unknown to them, sexually molest and torture their victims, and eventually kill them. This imagined threat is rooted in concrete, highly public examples. The actual group of sexually violent offenders does not include the much larger class of people diagnosed with various paraphilic disorders, including pedophilia, nor does it include men and women arrested for a variety of other sexual crimes like incest, exhibitionism, public indecency, and, until 2003, sodomy. These much larger groups are nonetheless implicated in all of the sex offender legislation passed in the United States after 1990, both rhetorically through association in the media, and literally, as they are subject to the resulting legal sanctions.

The disconnect between the imagined group and the actual group also means that the representations and metaphor systems used to portray the worst threat come to represent all offenders. Legal theorist Mona Lynch theorizes that the overuse of the word *predator* is a reaction to the way predators themselves seem to creep into culture, "just as disgust elicitors seem to seep and ooze across boundaries—the disgust reaction here appears indiscriminant rather than distinguishing between subtypes of sex offenders by true level of threat."[260] Lynch calls this phenomenon the "the shapelessness of disgust," a process wherein lawmakers imagine "the most vile example and generalized from that…legislating punitive responses that affect huge classes of criminal actors."[261] The

term *sexual predator*, which immediately elicits the most vile example of sexual crimes, has become incredibly widespread. This term refers now not only to people accused of actions would legally categorize them as sexually violent offenders in many states, but also to anyone who abuses children, and, in its broadest sense, to anyone who engages in sexually promiscuous behavior.[262]

Legislators use the term *predator* in increasingly complicated ways, bringing more and more people under the umbrella of the term both within the letter of the law and by association. Federal implementation of cyber-predator laws, which target sex offenders on the Internet, directly contributed to the use of the word *predator* to describe any sex offender who uses the Internet to find victims.[263] The most culturally salient example of this use of predator was the US television show *To Catch a Predator*, where members of the a video news team posed as underage boys and girls in online chat rooms and then filmed encounters with the men who made dates with them. Legislators themselves also misuse the term in hearings and debates. Representatives on the bill committees for the Adam Walsh Child Protection and Safety Act of 2006, a federal sex crime bill, repeatedly referred to the group of criminals the laws target as "predators" rather than as "sex offenders" or "sexual criminals."[264] The increased use of the word *predator* to describe criminals identifies them as a clear inherent threat that cannot be pitied or pardoned. Use of the term in bill hearings serves to drum up support, and its use in press releases makes the laws impossible to repeal or critique in any public way. John Q. La Fond, one of the first legal scholars to object to these new sex crime laws, notes: "no politician wants to face a sixty-second political attack on television by his campaign

opponent claiming 'he voted against community safety and in favor of sexually violent predators.'"[265]

In conceiving the category of the predator, the boundary between the clean and the unclean is presented as both rigid and objectively measurable.[266] In fact, the boundary is both subjective and increasingly blurred, partially because of the power of metaphors themselves and the amorphous nature of the metaphor of the predator. Calling someone a predator evokes a wider range of imagery than other criminal or medical substantatives, that is, although there are certain attributes connected to the label *thief*, these attributes almost all trace back to the act of theft and those who are imagined to practice it. In contrast, a *predator* exists aside from the criminal act of sexual abuse and assault. JoAnne Brown summarizes the power of metaphor in her work on intelligence testing.

> Metaphor, through its familiar literal referent, appears to offer self-evident, socially shared meaning to the unfamiliar. Yet it invites each listener to interpret its meaning personally, even privately.…Thus each listener is likely to interpret a given metaphor differently, yet also perceive that interpretation to be widely shared, without ever realizing that the consensus is created by the vagueness of the metaphor itself.[267]

Metaphors are, by definition, widely accessible and highly subjective. Each person who reads the words *sexual predator* projects his or her own image of what a predator is into the space created by the phrase. This image may be drawn from personal experience, based on media representation, or guided by subconscious fears. It may also pull in concepts from other realms where the term is used, such as carnivorous animals and

plants. The constitution of a sexual predator becomes dependent on the imagining of a sexual predator through the power of metaphor.

The sex offenders targeted by sexual predator laws are not the most common form of sex offender, but instead are, as legal scholar Eric Janus notes, "the men who lurk in the bushes and parking lots, attacking strangers without provocation or warning. They often seem to lack the essential empathy and conscience that mark human beings. They are 'monsters' and 'beasts.' "[268] Cultural theorists Laura Zilney and Lisa Zilney note the misrepresentation of all sex offenders as sociopaths occurs because of its coupling with the perception that most sex criminals are strangers to their victims: "Ask yourself why Americans are focused on crimes involving strangers when most sexual violations occur between people who are known or related to one another. The answer may lie in the fact that it is easier to demonize someone who is unknown."[269] The use of the metaphor *predator* not only widens the distinction between stranger and intimate sexual violence within the law, but, somewhat paradoxically, opens space for the demonization of all sex offenders assuming that all people who commit sex offenses commit them against random strangers.

This chapter explores three ways the category of the sexually violent offender has made the sex offender an exceptional criminal category because of the conflation of sexually violent offenders, particularly those who offend against children and those who are called predators, with all sex offenders. This conflation, supported by media overemphasis on high profile sexually violent offender cases, creates a distortion of the cause of sexual violence and invites increased punitiveness rather than efforts toward rehabilitation. First, since sexually violent offenders are defined in the law as both

incurably and untreatably dangerous, all sex offenders are treated as qualitatively different from other criminals because they cannot be rehabilitated. Second, the use of the term *predator* to describe all sex offenders alters the perception of who and what those sex offenders are, not only because it confuses legal and scientific categories but also because *predator* carries great metaphoric weight. When predatory offenders are conflated with predatory pedophiles, sex offenders are portrayed as particularly dangerous to children, regardless of whether they have actually been diagnosed with pedophilia or convicted of sex crimes involving children. When sex offenders are conflated with predators, sex offenders become hunters. Third, the people institutionalized as sexually violent offenders are generally white, male, and middle-class. These categories are traditionally unmarked within American culture and media, which creates a general perception that sex offenders are not visibly different from non-criminal people. This, in turn, supports proliferation of and support for national labeling and segregation systems. These systems serve to mark the otherwise unremarkable sex offenders so children, and other vulnerable people, know whom to avoid.

These three representations of the violent sexual offender—that he or she is incorrigible, predatory, and invisible—form the mold in which all sex offenders are cast. The final section of the chapter explores some of the effects of these representations. I give examples from critics who argue that when the general public perceives all sex offenders to be the same as the most vile example, it hinders accurate judgment of the causes and effects of non-stranger crimes, supports an ever-increasing net of surveillance, and, potentially, renders all sexual criminals untreatable by mere declaration.

Media Distortion, Incurability, and Populist Punitiveness

Legal scholar Eric Janus's book, *Failure to Protect*, argues that recent sexually violent offender legislation is flawed because it represents and reinforces a certain kind of sexual violence.

> These new laws—although well intentioned—are ill-conceived, bad policy. They were sold as innovative approaches to finding and incapacitating the worst of the worst, but there is little evidence they have succeeded in that important task. It is not simply that these new laws haven't been able to solve the problem of sexual violence. It is that our way of thinking about sexual violence is increasingly distorted…we are in a vicious cycle of bad policy, and we need to find a way out if we want to fight sexual violence more effectively.[270]

The fact that most laws are designed with the civilly committable sexually violent offender as model is increasingly difficult to see. Although sex offender notification and registration laws are widespread, the civil commitment laws that actually target sexually violent offenders are not. Recall from the previous chapter that the archetype for the sexually violent offender was Earl Shriner, who was declared, almost unanimously, to be both incurably and untreatably mentally disturbed in a way that made him dangerous to children. As the concept of the sexual predator comes to dictate the treatment of all sex offenders, one aspect of what Janus calls "ill-conceived, bad policy" is that sex offenders are considered to be both incurable and untreatable, even if they are not mentally ill.

Media overemphasis on certain types of sex crimes and new trends in penology both support this overgeneralization of all sex offenders as impossible to rehabilitate. Various studies note the ways news media in the United States present a distorted picture of crime in general[271] and sexually based offenses specifically.[272] These representations

of crime, particularly sex crime, affect both the formation of sex crime law and public support of those laws.[273] Zilney and Zilney, who write that the portrayal of sex offenders in the media "becomes problematic when an overwhelming majority of individuals get their 'reality' about crime from the television," reiterate this effect of the public representation of sexual crime.

> The 'reality' most citizens get about sexual offenders and sexual offenses becomes significantly skewed, and the policies and laws they support are based on this skewed perception. The media create fear, reinforce stereotypes and rape myths, and perpetuate misinformation about sexual offenders and sexual offenses. In response, the public has overwhelmingly supported laws that do not work to protect women and children from the types of sexual offenses by which they are most likely to be victimized.[274]

Richard Gordon Wright, in his book *Sex Offender Laws: Failed Policies, New Directions*, argues that when policymakers are influenced by media focus on specific, high-profile and highly dangerous individuals, it leads "to the neglect of the everyday sexual violence committed by known and familiar family, friends, and acquaintances," a choice he argues has "made the public less safe."[275] For Wright, a large portion of the issue is that legislators and law enforcement officials create systems that are tremendously expensive and yet ineffective. In the end, Zilney, Zilney, and Wright all note a similar trend: the systems designed to control sex offenders are ineffectual because the perceptions of sex offenders directly contradict the reality of violent sex crime. Since sex criminals are perceived to be untreatable, these laws are aimed at a threat that is so immense there is no

adequate prevention; yet, since sexually violent criminals are actually very rare, laws designed to catch them are so specific as to be generally inapplicable.

As covered in the first chapter, sexual criminals are the inheritors of both moral insanity and sexual psychopathy, and, as such, public policy frames them as both in need of intervention and completely immune to that intervention. Despite the fact that legislators created a new type of mental abnormality specifically in response to the perceived threat of sexually violent criminals, and funded the creation of facilities to house and explore possible treatment for this abnormality, sexually violent offender legislation has not actually resulted in the development of any significant treatment programs. This is because the laws themselves are not only based on but also further the idea that the sex offender is a qualitatively different type of criminal who is beyond help.

Jonathan Simon notes that the choice of the word *predator* in the law is one example of this qualitative difference.

> Behind the superficially consistent object of sex offender, a distinctly new and far more pessimistic vision has emerged. Sex offenders are the embodiment not of psychopathology, with the potential for diagnostic and treatment knowledge to provide better controls over such offenders, but of the monstrous and the limits of science to know or change people.[276]

Before 1990, the men, and occasional women, institutionalized for sex offenses were known as sexual psychopaths. The stated aim of sexual psychopath legislation was to intervene early on in a sexual criminal's career and, if possible, to reorient the criminal toward a normal, non-offending human life. Under these laws, offenders who could not be treated were not eligible for commitment. Although the label *sexual psychopath* is a

substantive title, since through it anyone suffering from sexual psychopathy becomes a psychopath, it is still a title tied to a known disorder.[277] In contrast, the label *sexual predator* indicates not a mental disorder that should be treated, but a state of dangerousness that must be monitored and contained. This is mirrored in the way sex crimes and sexual criminals are treated: as people who, by virtue of their identities, have fewer civil rights and must be treated as ongoing threats to public safety.

The shift away from criminal rehabilitation and toward lengthy, and in some cases permanent, incarceration is part of larger trends in American penology. Simon also notes the widespread use of the term *predator* itself, which, as he says, "has no foundation in either human science or criminal jurisprudence, indicates the implicit reference to popular emotions, including fear and the desire for vengeance." Although he calls the predator "a potent symbol of the state's willingness to exercise power, unmediated by treatment motivations or scientific norms,"[278] for Simon it is just one sign of a significant change in the focus of state power and the rise of an emphasis on what he calls "populist punitiveness."[279]

Legislation based on populist punitiveness, Simon argues, necessarily uneasily with new trends in penology, where there has been a shift toward rehabilitation, movements to repeal the death penalty, and increasing attention to the role incarceration has in recidivism. This clash is another source of the seemingly paradoxical relationship between the public support of sex offender laws and the widespread criticism they receive. Even though those who design and work within the penal system have become more interested in the social production of crime, mediation of harm, and therapeutic

intervention, sex offender laws serve to heap increasingly harsh penalties on a targeted group. According to Simon, where

> the new penology is concerned with high-risk populations; populist punitiveness is as obsessed as ever with specific dangerous individuals. The new penology treats crime as a normal fact of life to be managed; populist punitiveness insists on a zero-tolerance approach and believes that with severe enough sanctions, crime can and should be completely eliminated. The new penology speaks the language of managerialism and systems theory; populist punitiveness remains rooted in normative judgments about aberrational evil.…The result is an important transformation of the sex offender from the most obvious example of crime as disease back to an earlier conception of crime as monstrosity.[280]

The specific dangerous individual, by which he means the archetypal sexually violent offender, is a preternaturally dangerous and monstrous offender whose exceptionalism is highlighted by a system designed to rehabilitate and intervene. According to Simon's logic, if the general prison laws were deemed insufficient to handle Earl Shriner in 1990, the trends of the new penology mean prisons are even more ill equipped now.

Further, since registration laws make sex offenders easy to target and find, ramping up sex offender legislation is an easy answer to public campaigns asking for increased attention to the threat of sexual violence.[281] These systems exist in a feedback loop: populist punitiveness is fueled by media overgeneralization of the threat caused by sexually violent offenders, and the new laws, and the new categories of offenders they highlight, create fodder for the nightly news cycle. Through all of it, the term *sexual*

predator spreads, bringing with it, as the next section demonstrates, particular medical and metaphoric overtones.

Predatory and Pedophilic: The Power of Metaphor

As detailed in the previous chapter, the WCPA heralded a shift in forensic psychiatry from an intervention model to a containment model because it created a system to identify and contain those individuals deemed predatory. The laws may be shrouded in medical language, but the aim is not to cure, or even to treat.[282] The aim is to protect the community by identifying the most dangerous sex offenders so that they can be held indefinitely, and thus the purpose of the model has less to do with the offender himself and more to do with the broader community's need for protection from him. Despite the fact that these laws do not function therapeutically, sex offender laws do have some psychiatric basis. They were originally designed to mark, monitor and contain sexually violent offenders diagnosed with untreatable disorders and those for whom no specific sexual disorder diagnosis could be made, and this connection was made through the difficulty in diagnosing and treating certain subtypes of pedophilia.

Since 1990, sex offenders are viewed not only as mentally and sexually dysfunctional, but also as contagious or contaminating, specifically to children.[283] One indication of this shift is that the terms *sex offender* and *predator* are increasingly confused with the term *pedophile*.[284] Observations of sex offender trials report that participants in those trials often confuse sexual offenses and sexual disorders, leading to broad assumptions that anyone who rapes has a paraphilia or everyone who molests a child is pedophilic, and vice versa.[285] In some cases, the conflation is borne out of ambiguity, as when journalists covering sex crimes sometimes use the phrase *convicted*

pedophile to refer to a person who has prior convictions for sex crimes against children.[286] Like the somewhat less common but still used term *diagnosed predator*, a convicted pedophile is an amalgamation of legal and psychiatric categories. It is an effective rhetorical device, as the term refers to a solely legal entity while incorporating all of the metaphoric weight of a psychiatric category. A *convicted pedophile* is someone who has both been found guilty of past crimes, signified by his conviction, and who embodies the potential for future ones, signified by his sexual disorder diagnosis of pedophilia.[287]

Less ambiguous, however, are instances where the conflation is directly borne out of ignorance about psychiatric categories—as, for example, in this paragraph and footnote from (then) law student Jenny A. Montana's review article *An Ineffective Weapon in the Fight Against Child Sexual Abuse*.

> Megan Kanka's death outraged Mercer County, as well as the rest of New Jersey, when the residences discovered that the state permitted convicted sex offenders (6) to live anonymously in their communities. Only after Megan's death did authorities reveal Timmendequas' previous convictions for child sexual abuse.
>
> (6) The clinical name for a sex offender is pedophile.[288]

Montana compounds confusion by citing David Finkelhor's *A Sourcebook on Child Sexual Abuse* in this footnote, incorrectly implying that Finkelhor argues that sex offenders and pedophiles are the same thing. Although the conflation of *sex offender* and *pedophile* in newspaper reports is common, especially among public commentators, misinformation on this level is relatively rare.

The conflation of *predator* and *pedophile* is even more common than the conflation of *sex offender* with *pedophile*. Conflation occurs largely because the term

predator functions on a symbolic and representative level, but some legal scholars argue it is a necessary link because of intrinsic ties between the categories of *predator* and *pedophile*. The WCPA, the origin of the category, makes no mention of pedophilia or the age of victims, simply defining predatory acts as those "acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization."[289] It was only later that legal theorists argued that this definition of predatory was, in fact, drawn from a psychiatric distinction between incestuous and predatory pedophilia. In a symposium on Megan's Law, a presenter gave the following definitions of pedophiles to explain the use of the term *predator* in the law: "A predatory pedophile is one who consciously seeks out children for the purpose of obtaining sexual gratification from them to quench his desires. Incestuous pedophilia occurs when the pedophilic offense is committed against someone of blood or step-relation to the offender."[290] This presenter retrospectively linked predatory not to a distinction within psychiatric discourse generally, but specifically to the victimization of children. As the metaphor *predator* becomes more widely used in public media, popular culture and in other state legislation, the tie to psychiatric discourse is lost, but the certainty that these criminals are specifically dangerous to children remains.

One reason for the rapid spread of the term *sexual predator* is that the distinction between an incestuous offender and a predatory offender, and the resulting determination that predatory offenders are more dangerous, has nothing to do with the impact on the victim and everything to do with the threat posed to the community. There are many situations in which the adult who commits the offense is neither strictly predatory nor of blood or step-relation to the victim. These offenses are those where there is a close but

not familial relationship between adult and child. In these cases, the intent for the relationship itself becomes the determining factor. If it is determined that the sexual offense occurred through exploitation of an existing relationship, such as those children form with teachers, coaches, babysitters, or priests, then the offense is considered incestuous in nature, as the violation that occurred was the violation of trust with a single child and that child's family.[291]

If it is determined, on the other hand, that the offender in question pursued a particular job or settled in a specific area to access victims, he or she is considered to be a predatory offender. He or she has betrayed the trust of the entire community by taking a position to have access to that community's children,.[292] Whether or not it technically takes place in the context of a family, opportunistic abuse of children is not considered as dangerous as premeditated abuse. The term *sexual predator* very succinctly captures the increased threat that premeditated, extra-familial abuse poses to the community at large.

This threat is transposed constantly between the *predator* and the *pedophile*. Media portray pedophiles as deviants who target the weakest or most isolated member of a group—that is, as animalistically predatory. One of the earliest media reports about the disorder pedophilia described the way pedophiles found victims using predatory language, citing a "convicted pedophile" who said, "I would look at a schoolyard and find the child who was standing alone. The child who had thin clothes in winter, the child who was not as clean because the parents weren't taking good care of him."[293] Ideas about predation and victimization originated with psychologists attempting to document the behavior of patients, but were seized by media experts as an explanation for why some children were targeted and others were not.

In more recent descriptions, the preferred victims of pedophiles become part of the specific erotic fixation of the pedophile. George Palermo and Mary Ann Farkas present the pedophile as someone not just seeking out easy prey, but who desires lonely children because they epitomize a specific type of childishness.

> Preschoolers are often easy prey for pedophiles. Older children who are alone, who lack self-confidence and whose parents are not warm and caring, and not good listeners, may welcome the seductive pedophile who, because the children are young, small, pretty, and at times provocatively dressed, surround them with attention, interest, playfulness, and compliments. The pedophile is turned on by the innocence, the trust, the low self-esteem, the curiosity, and the vulnerability of the child. He may be a presence in the life of a lonely, vulnerable child who, in present-day society, may be perceived as a burden and not given due attention.[294]

In these descriptions, the behavior of pedophiles reads as recommendations for parenting: do not leave your preschoolers unattended, give your children lots of attention, do not let them form attachments to other adults.

Transitions in the language of the law take this relationship between the predatory pedophile and his innocent child prey as a model for the relationship between all sex offenders and their victims. Although legal commentators argue that the original uses of the term *predator* intended to refer to predatory pedophiles, and thus cite either the actions of men like Earl Shriner and Wesley Allen Dodd or the common conception of the pedophile, by the late 1990s the term *predator* had become a reference in and of itself. In 1997, Robert Teir and Kevin Coy used predator language in their article urging support of Megan's law, calling sexual predators are "a serious, recurrent, and difficult

problem facing our society." They urge that a community needs sex offender registries and notification laws "in order to protect its children from the threat of sexual predation that may literally exist right next door."[295]In Teir and Coy's analysis the victims in need of protection are still children, but because they argue for laws that affect all people convicted of sex offenses, and call all of them sexual predators, the targeted group of people who are thought of as liable to prey on children becomes much wider than the group signified by the term *pedophile*.

For lawyer and occasional columnist Andrew Vachss, the sexual predator is not simply a danger to children, but the entire human species.

> Chronic sexual predators have crossed an osmotic membrane. They can't step back to the other side—our side. And they don't want to. If we don't kill them or release them, we have but one choice. Call them monsters and isolate them. When it comes to the sexual sadist, psychiatric diagnoses won't protect us. Appeasement endangers us. Rehabilitation is a joke. I've spoken to many predators over the years. They always exhibit amazement that we do not hunt them. And that when we capture them, we eventually let them go. Our attitude is a deliberate interference with Darwinism—an endangerment of our species.[296]

For Vachss, the sexual predator should be demonized, hunted, and eliminated for the safety of the entire human species. Despite the hyperbolic nature of Vachss' comments, the sexual predator in his representation is, perhaps ironically, more truthful to the category of people who are actually included under laws targeting sexual predators. The threat Vachss describes, although embodied in the form of the chronic sexual predator, is

the threat of sexual violence, a violence that affects all people, regardless of age, race, gender or vulnerability.

This general sense of sexual violence, as a threat posed by sexual predators to all humans, has led recent scholars to an effort to confine the threat to a diagnosable, concrete group of offenders. This search indicates that is no longer an understanding that predators are actually already a discrete group of mentally abnormal sexual criminals. A group of legal scholars in 1999 wrote to describe the way clinicians working with sex offenders have discovered that there are certain people within the group who are especially predatory. They noted the appropriateness of the metaphor predator, because "when we think of predators we think of creatures hunting prey with stealth or violence, repeating over and over their assault on their target victims" and that these individuals deserve the label because they have "distorted beliefs about the rights of others, about consent, sexuality, honesty, anger, power or violence."[297] In this analysis of the term, somewhat ironically, the predator is seen as a subgroup of the sex offender who is uncovered through clinical analysis. He is the category discovered by the careful monitoring of sex offenders rather than the epitome of sexual violence and the reason monitoring began in the first place.

The label *predator* as it is currently used creates a qualitative difference between vulnerable humans and the sexually violent offender, and actually creates a system wherein the predatory sexually violent offender is an invading force that must be controlled through the intervention of medicine, law, and civil vigilance.[298] Unlike other systems used to categorize sex offenders in terms of deviance, criminality, and mental illness, the label *predator* does not operate on a continuum. These laws promote a

particular type of logic, namely that predators pose a threat and everyone else is in need of protection.

In the end, by using the term *sexual predator* to describe the group of people the laws are designed to target, these laws operate hygienically: they define the boundary between the clean, the normal, the innocent, the pure or the safe, and the unclean, the abnormal, the corrupted, the impure or the unsafe.[299] This shift in language, and in symbolic purpose, creates an atmosphere that makes the treatment of sexual disorders and paraphilias and the rehabilitation of sex offenders increasingly difficult, if not impossible. Predators are not people who are broken or suffering; these are animals that hunt and kill. The shift from the sexual predator as a specifically categorized and implicitly pedophilic person who epitomized the larger category of the sex offender to a dangerous threat secreted within that category leads directly to heightened surveillance of anyone labeled as a sex offender. The next section explores that shift.

The (In)Visibility of Sexual Offenders

One common perception of sex offenders is that they have no specific demographic; that sex offenders can look like anyone, and can be anywhere.[300] This perception presumes a very specific, and narrow, definition of what a so-called normal person should look like: white, middle-class, and male. It also presumes a correspondingly narrow idea of what a criminal person should look like. However false these perceptions may be, they combine to present a problem of identification. Since, as the previous section highlights, the group of sexually violent offenders or chronic sex criminals exists within the group of sex offenders, anyone who is convicted of a sexual crime could to be a dangerously violent and predatory person, yet both are imagined to be

unremarkable. Because sexual predators bear no obvious physical markers, sex offender registration and public notification systems are designed to make visible the otherwise invisible threat posed by all sex offenders.

The marking of sex offenders is necessitated by the fact that sexual predators are not visibly different from non-criminal people, a fact that is often seen as disturbing in and of itself. Many people who study of sex offenders and people who sexually abuse children note their strikingly normal appearance. In 1996 *New York Times Magazine* reporter Peter Davis visited a sex offender holding facility in New Jersey. What he found there surprised him, "men [who] were hardly examples of the standard prison population. They appeared to be less beaten by life, less pathological, far more educated, more likely to be middle class and, above all, anything but criminal. In other words, they look like us."[301] Davis's description implies that certain categorical distinctions can be made through visual markers: education level, medical diagnosis and conviction status. When Davis concludes, with surprise, that the men held in the sex offender portion of the New Jersey facility look like "us," he implies that a member of the standard prison population is visibly criminal and pathological, and, further, that these categories are tied to class and status. He assumes, and one can reasonably extrapolate he expects his readers to assume, that it is possible to tell whether someone is a criminal just by looking at him or her. For Davis this indicates a two-faced nature in these men as well as a disconnect between the face you can see and one you cannot see. Their outward appearance as normal, non-criminal, non-pathological men does not match their inner selves, selves that he says are "uncontrollably and aggressively perverse."

Richard Pryor notes a similar disparity in his interviews with men who sexually abused children.

> Unexpectedly, as I adjusted to walking in and out of a prison and to the initial challenges offenders made about my moral politics, I began to realize that most of the men were friendly, from my point of view likeable, and more often than not remorseful. They seemed more like men I have known in everyday life, albeit men who had committed unspeakable acts, but without glaring pathologies.[302]

When Pryor refers to pathologies as glaring he implies not only that pathologies are usually visually obvious, but that this particular pathology, the desire to harm children, should be particularly obvious. Like the men Davis observed, the men in Pryor's study constitute a contradiction because their pathology is not readily observable; a contradiction that is only possible if one assumes that outer normality should always match inner morality.

Sociologist Pamela Schulz also notes a dual personality in the introduction to her work on child molesters.

> The most common type of child molester is generally a fairly innocuous, unexceptional individual who doesn't look any different from you or me. He may lead a life that seems very similar to our own, except that for whatever reason, for whatever purpose, out of some mystifying and perverse impulse, he sexually molests children.[303]

Notice that Schultz's definition of a normal person is explicitly visually based, as she says, the child molester does not look different, and his life seems similar. One would assume that the possession of what she calls a mystifying and perverse impulse to harm

children would qualify a person as anything but *innocuous* and *unexceptional*, and yes these are the first words she uses to describe the common child molester. For Schultz, fact that these men do not *look* dangerously perverse trumps the fact that they *act* dangerously perverse.

An outwardly normal appearance makes sex offenders, and sexual predators, more dangerous, because not only does it aid in the spread of the category described in the previous section, but also because it makes determining exactly how many sex offenders there are dangerous. Palermo and Farkas emphasize invisibility in their examination of the particular threat posed by sex offenders, "who seem to fit into normal societal life… As life becomes more chaotic and communities increasingly dehumanized, the type of social setting that evolves is a good breeding ground for sexual predators, and a difficult one for their detection and apprehension."[304] They view the threat posed by sex offenders as particularly dangerous because its very invisibility makes it ubiquitous.[305] Further, when the invisible sex offender is combined with the anonymity of modern life, no one is beyond suspicion in Palermo and Farkas' argument.[306]

Recall that the groups of people described by all of these authors, whether they are identified as sex offenders or child molesters, are larger groups inclusive of the smaller, most dangerous category of the sexually violent, pedophilic, predatory offender. It is this smaller category that sex crime laws are designed to target. In jurisdictions that allow for civil commitment, popular perception of the invisibility of sexual deviance leads community members to distrust officials who make the determinations for civil commitment, since even the researchers who are tasked with studying these groups claim they are utterly unremarkable. In the state of Washington, the answer to community fear

that doctors and prison officials would overlook serious threats was to open up access to police rosters of sex offenders. This serves as a safety net, allowing community members to monitor sex offenders themselves in the event that the criminal justice system accidentally lets a very dangerous, normal-looking man out of prison.

In the intervening years, the concepts of sex offender registration and community notification have exploded, underpinning certain perceptions. First, a citizen needs access to police records to determine whether a sex offender is nearby. Second, that all sex offenders must be marked because, just as any person may actually be a sex offender, any sex offender may be a violent predatory pedophile. The members of the Washington state legislature who drafted the first community protection law designed it as a shield for police officers. Before its existence, several law enforcement professionals in the state were cited and sued for releasing confidential offender information. These officers intended to warn their neighborhoods about convicted sex offenders who they deemed to be particularly or especially dangerous. Community notification laws originally allowed police officers to make information from sex offender registry available at their discretion, which usually meant to anyone who requested it. Now, these laws protect the dissemination of information in less directly regulated ways, for example, there are mobile device applications that can show you, in real time, how close you are to the known address of a sex offender. The written law left the form of dissemination to the discretion of local authorities, and at first only the most dangerous criminals were subject to publicity. The current practice is to put information about sexual convictions in the hands of the public without any screening process whatsoever.

Notification laws garner a particular form of critique because of their association with populist vengeance. This is an association bolstered by the belief that the community must have as much information as possible to protect itself from an otherwise invisible threat. Legal scholars and professionals note that these laws are primarily designed to create a sense of security,[307] shame offenders,[308] or enact retribution or revenge.[309] Wayne A. Logan's *Knowledge as Power* gives an in-depth analysis of the significance of registration and notification as a major force in surveillance culture. Describing the growth of these laws out of a history of law enforcement criminal registration efforts, he calls the shift toward offender registration and notification as a "sea change in American social and political sensibility."[310] Logan highlights the notification aspect of these laws in particular, noting that granting the community access to police registries opens up "new avenues of social control."[311] The availability of sex offender registry information, combined with the fear of predators and the trend toward populist punitiveness, results in a system where legal sanctions increase in severity while decreasing in effectiveness. Populist vengeance fills in the resulting gap.

Effects of Predator-Based Legislation

Within the contemporary United States, media overemphasis on violent sexual crimes, the conflation of sex offender, predator and pedophile, and fear that despite their obvious sexual deviance, sex offenders are unrecognizable have all combined to create not only acceptance of, but also a demand for, a legal system that treats sex offenders as exceptionally dangerous criminals. The law marks these men and women as irrevocably perverse and allows for them to be held for life when possible, otherwise leaving them with few options for employment or living accommodations.[312] These extraordinary laws

have two major effects: a distortion of sexual violence and a severe limitation of mental health services for people convicted of sex crimes.

These laws locate true sexual violation as an act committed by an outsider when they use the predatory stranger as the archetypical violent sexual criminal. New sex crime laws frame this sort of sexual violence as the most serious even though assailants known to the victim commit the vast majority of sexual violence.[313] Legal scholar Michelle Earl-Hubbard notes that the laws "lull a community into a false sense of security, lessening their attention and concern and ultimately preventing their recognition of the dangers their children face from the intrafamilial or unregistered abuser."[314] Other law scholars point out that these laws make intra-relationship and intra-family abuse less serious, if not entirely invisible.[315] When policymakers are influenced by media focus on specific, high profile and highly dangerous individuals, they draft laws that reduce the safety of the public by de-emphasizing the most common and ubiquitous forms of sexual violence.[316]

These new laws obscure the work of feminist scholars who have argued for decades that sexual violence is a cultural and social phenomenon, rendering acts of violence within relationships invisible or hard to see as crime.[317] When violence is linked to predation, it makes rape and physical abuse occurring outside of a relationship seem more serious than that occurring within it. Janus marks this as one of the powerful effects of the construction of the sexual predator:

> We have come to think of these men as archetypical sex offenders and have shaped our public policy responses as if all sex offenders fit this mold. We are blind to the true nature of sexual violence in our society, which is far different from what we think it is…in the 1980s and 1990s feminist scholars such as

> Florence Rush, Mary Koss and Diana Russell have shown us that most sexual violence is perpetrated by acquaintances and intimates and family, not by strangers lurking in the dark. But this clear view is being obscured by new legal initiatives and media spotlights on 'the sexual predator.'[318]

Janus sees sexually violent offender statutes as overturning feminist work dating from the 1980s and 1990s, but this characterization of sexual violence also contradicts more recent feminist work on sexuality, aggression, and gender roles. Anne Cossins argues in her book *Masculinities, Sexualities, and Child Sexual Abuse* that framing sex offenders as radically impure predators obscures the connections between social constructions of masculinity and its connection to dominance and violent sexuality.[319] In *Engendering Violence*, Myra Hird argues that the focus on stranger crimes as a more valid form of sexual violence creates a system in which we remain relatively unaware of how endemic interpersonal violence is within relationships.[320] The use of the metaphor *predator* only heightens the distinction between stranger and non-stranger crimes, creating a caste system in which the men who are arrested for sexual violence against strangers are categorized as extremely abnormal. Both Hird and Cossins argue we should rather view these men as the product of a gender system that impacts everyone.

Calling sexual offenders *predators* defines them as a group to be feared, not rehabilitated. When a metaphor, which is by nature imprecise, is combined with the fact that the group of people these laws affect is, in fact, much larger than the group the laws depict, the effect is that therapeutic intervention for sex offenders becomes difficult, if not impossible. This is true not just for the small group defined in the law as sexual predators, but for all those associated with the larger label of sex offender. Psychologists

reviewing the treatment options available for sexually violent offenders in the state of Washington in the first few years after the new civil commitment law went into effect noted that the weight of the category, even at that early stage, often discouraged inmates from seeking help. Those incarcerated under the law see the label itself as punishment and refuse to engage in behavior that indicates that they agree with its application, and researchers note that many individual refuse treatment even when new legislation makes it available to them.[321]

Of course, the options for treatment are sparse and largely held to be ineffectual. In fact, as I argued in Chapter Two, legislation regulating sexually violent offenders is exceptional because of their perceived untreatability and incurability.[322] The lack of a consistent diagnosis, the danger of prison environment, and scarce psychiatric support already make therapy difficult for most sex offenders.[323] All of these conditions are only compounded by the psychological weight of the label of *sexual predator*.

This problem is self-perpetuating. The reaction of a community to the sexual abuse of a child is to contain the threat as swiftly as possible, usually by isolating the offender. This makes it extremely unlikely that any person who either harms children or thinks of doing so would ever voluntarily come forward to seek help:[324] The laws themselves, as one critic notes, send "a message of hopelessness that can only diminish the individual's motivation and ability to change.[325] Men convicted for these crimes also internalize the feeling that they are beyond help. Richard Pryor argues in *Unspeakable Acts* that legislation branding "all offenders as public deviants," as the current sex offender registries and community notification programs do, creates an atmosphere where sex offenders are under stress, isolated, emotionally strained and feeling powerless.[326]

These are, he notes, the exact conditions under which most of these men sexually abused children in the first place.

Even if mental health centers were to open their doors for volunteers, it is unlikely there would be any treatment for pedophilic desire other than quarantine. This is because so few cases of non-offending pedophiles have ever been studied. The only data available to researchers are drawn from individuals who have transgressed often enough to be reported and convicted. Few psychologists know how to teach these men to control their desires because they have seen few who successfully can. It is likely that many non-offending men who feel pedophilic desires are justified in their reluctance to come forward. Echoing the framers of the WCPA who saw their work as that of public health, the only option for treatment of sex offenders in the system at the moment is same as it for any incurable and dangerous disease: label them as infected, quarantine them, and hope the contamination does not spread.

Conclusion: Metaphors of Monstrosity

Metaphors of predation have widespread influence when used in the legislative process. They allow for the conflation of *sex offender* with *sexually violent offender* and *pedophile*, create an atmosphere in which laws are unduly harsh and overreaching, make offenders themselves feel untreatable and beyond pity, and encourage a culture of surveillance and vigilantism. Yet these metaphors do not fully account for the level of revulsion and suspicion with which criminal justice officials, legislators, and community members regard all sex offenders. To understand this perspective, it is necessary to examine the representation of sexually violent offenders as what I call *supernatural forces*: not only as animals, but as demons, not just as monsters, but as monstrously evil.

The monstrosity of the sex offender is indebted to older categories of the medical monster, to the monster as cultural spectacle, guided by the metaphor of the predator, and informed at all points by the diagnosis of pedophilia. It is also a legislated monstrosity. In his book *Foucault's Monsters and the Challenge of Law*, Andrew Sharpe argues that a monster invoked by the law by definition has committed a double breach: a breach of law requiring legislative action, and a breach of nature worthy of the label monster.[327] To breach law in the Foucauldian sense, or Foucault as employed by Sharpe, is to function in such a way as to render the law itself useless. The sexually violent offender, as he has been defined in US laws since 1990 and constructed through the label of *predator*, constitutes such a monster. He breaches law not simply because he commits violent sexual crimes, but because he poses a threat which, at least until 1990, was not recognizable under the law. The sexually violent offender, as he is defined, commits acts that he is both powerless to prevent and for which he is wholly responsible. This presents a paradox of culpability, at least as the US criminal code understands it, and renders him unknowable. The sexually violent offender breaches nature because he commits these acts due to a mental abnormality that, under the law, is assumed to be innate and immovable even though little else is understood about it. This assumption makes further inquiry pointless; since we already know sexually violent offenders are dangerous and use that information to quarantine them, knowing what made them that way makes no practical difference.

The monstrosity of the sex offender is, in a certain sense, a radically new kind of monstrosity that is utterly evil and reprehensible. The potential of a new monstrous sexual criminal emerging from discourse around sexual perversion and the protection of

children is not a new idea. Guy Hocquenghem and Michel Foucault articulated this possibility in 1978.

> There exists then a particular category of the pervert, in the strict sense, of monsters whose aim in life is to practice sex with children. Indeed, they become perverts and intolerable monsters since the crime as such is recognized and constituted, and now strengthened by the whole psychoanalytical and sociological arsenal. What we are doing is constructing an entirely new type of criminal, a criminal so inconceivably horrible that his crime goes beyond any explanation, any victim.[328]

At the heart of predator laws aimed to identify and control lays the assumption that these people *can* be identified and controlled. Monstrosity and evil, in contrast, invoke a specter of fear that is unimaginable, unfathomable and unintelligible.[329] This specter, by definition, can never be controlled or combated because it cannot even be fully articulated. Where the concept of the sexual predator is derived from the vilest examples of human behavior, the evil monster is something completely other, something entirely inhuman.[330] The next chapter examines how the evil and monstrosity of violent sexual criminals functions both inside and outside theological categories, and how, with greater theological understanding, it may be possible to see the monstrosity of sex offenders as a function of human interactions rather than as an utterly alien threat.

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[245] Community notification and sex offender registration are separate but related systems. *Registration* laws require sex offenders to register their home address with the authorities and to update regularly. Criminal registries, including sex offender registries, have existed in various forms within the criminal justice system for all of the twentieth century. These laws differ in three areas: the penalties levied for noncompliance, the persons required to register, and the length of time they must register after release. All of these vary from state to state. *Notification* laws usually protect police from lawsuits that

may result when the information is made public, although they sometimes contain guidelines for how registration information is to be released to the public and when.
[246] Mona Lynch, "Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation," *Law and Social Inquiry* 27, no. 3 (2002): 545.
[247] Kristen Zgoba et al., "Megan's Law: Assessing the Practical and Monetary Efficacy," (Trenton: New Jersey Dept of Corrections, 2008); Sarah Welchans, "Megan's Law: Evaluations of Sexual Offender Registries," *Criminal Justice Policy Review* 16, no. 2 (2005); Jill S. Levenson and Leo P. Cotter, "The Effect of Megan's Law on Sex Offender Reintegration," *Journal of Contemporary Criminal Justice* 21, no. 1 (2005); Naomi J. Freeman, "The Public Safety Impact of Community Notification Laws," *Crime and Delinquency* 58, no. 4 (2012); Sean Maddan et al., "Utilizing Criminal History Information to Explore the Effect of Community Notification on Sex Offender Recidivism," *Justice Quarterly* 28, no. 2 (2010); Richard Tewksbury and Elizabeth Mustaine, "Parole Board Members' Views of Sex Offender Registration and Community Notification," *American Journal of Criminal Justice* 37, no. 3 (2012); Lisa L. Sample, Mary K. Evans, and Amy L. Anderson, "Sex Offender Community Notification Laws: Are Their Effects Symbolic or Instrumental in Nature?," *Criminal Justice Policy Review* 22, no. 1 (2011).
[248] In the early 1990s this included the crimes of Westley Allan Dodd, Richard Allan Davis, and the continued investigation into the as-yet-unsolved abductions of Etan Patz and Jacob Wetterling.
[249] Timmendequas, recently released from New Jersey's Avenel Sexual Psychopath Treatment Center, lived in a house with two other convicted sex offenders in Megan's neighborhood. Public reaction to Megan's murder was similar to the reaction in Tacoma after the attack on Ryan Hade: the community was outraged that the police, despite knowing Timmendequas and his housemates were dangerous, had done nothing to warn the neighborhood or to protect local children.
[250] These laws are: (1) The registration of sex offenders and creation of a central registry, (2) community notification, (3) notification procedures for the release of certain offenders, (4) extended terms of incarceration for sexually-violent predators, (5) the consideration of murder for a child under fourteen as an aggravating factor in death penalty proceedings, (6) involuntary civil commitment of dangerous criminals, (7) lifetime community supervision, (8) the collection of a DNA sample from sex offenders for the creation of a DNA database and data bank, and (9) no good-time credits for sex offenders who refuse treatment. Symposium, "Critical Perspectives on Megan's Law: Protection vs. Privacy," n47.
[251] States vary as to the exact forms of these measures. Some are not called Megan's Law, instead named after a local child victim. Registration and notification procedures differ in scope and enforcement. The largest variation, however, is whether the laws include a sexual predator civil commitment statute. Different states have different rationales for adopting or omitting this portion of the statute, but one major factor was that the federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994, which stated that any state which did not create a sex offender registry would lose ten percent of its federal funding for fighting local crime. This encouraged

states to pass community notification and offender registration statutes, but did not specifically encourage civil commitment statutes. Currently, thirty of the fifty United States do not have a civil commitment statute for sexually violent offenders.

[252] The naming of statutes like this is also significant, as Jonathan Simon notes, "by placing Megan Kanka's presence literally in front of the law, the legislature assured that any consideration of it would have to confront Megan's death and popular feelings about it. This produced a number of different kinds of effects. It clearly raised the cost of political opposition. Even to discuss Megan's Law, one has to come immediately into the presence of Megan Kanka, her youth, her suffering, and her mortality." Jonathan Simon, "Managing the Monstrous: Sex Offenders and the New Penology," *Psychology, Public Policy, and Law* 4, no. 1-2 (1998): 462–3.

[253] Various named statutes have succeeded Megan's law. Laws of this type include Jessica's Law and Lauren's Law, both based in Florida, as well as the national laws named for Jacob Wetterling and Adam Walsh. Various authors have commented on the power of named statutes. Michelle L. Earl-Hubbard, "The Child Sex Offender Registration Laws: The Punishment, Liberty, Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990's," *Northwestern University Law Review* 90, no. 2 (1996): 861; and Nan Hunter, "Sexual Orientation and the Paradox of Heightened Scrutiny,": *Michigan Law Review* 102 (2004).

[254] Wayne Logan, in his book on community notification and offender registration laws, remarks on how impervious these laws are to criticism, saying "while the inconsistencies were reported by the mainstream media from the outset, the reports—unlike in the 1980s when, as noted, critical analysis of child abduction rates put the breaks [*sic*] on policy changes—had no effect. Likewise, unlike the 1950s, when expert opinion on the shortcomings of "sexual psychopath" involuntary commitment laws exercised some influence on the content of laws, such reservations got no traction in the 1990s with registration and notification." Wayne A. Logan, *Knowledge as Power: Criminal Registration and Community Notification Laws in America* (Stanford: Stanford Law Books, 2009), 99.

[255] Peter Davis, "The Sex Offender Next Door," *New York Times Magazine*, July 28, 1996.

[256] This national outcry about the inability of various police departments to notify and protect communities came on the heels of a decade dedicated to child abuse awareness. Various national campaigns against child abuse date to the 1980s and early 1990s, including the notorious Satanic Abuse awareness campaign (later proved to be largely based on false recovered memories). Cultural historians note his period as one in which the veil came off the secret of child sexual abuse. Sex offenders like Smith's neighbor arrived as an ideal focal point for the anger and fear these campaigns aroused. See James R. Kincaid, *Erotic Innocence: The Culture of Child Molesting* (Durham: Duke University Press, 1998); David Finkelhor, *Child Sexual Abuse: New Theory and Research* (New York: Free Press, 1984); and Ian Hacking, "The Making and Molding of Child Abuse," *Critical Inquiry* 17, no. 2 (1991).

[257] These laws have been critiqued heavily. Critics have challenged them in court as unconstitutional and law enforcement and mental health professionals alike have denounced them. They come under fire both because of overbroad application and

because they are difficult to implement. Litigation has caused minor shifts in the laws but the major tenets have been upheld. To date, the courts have held repeatedly that no sex offender registration, community notification, or civil commitment law violates any constitutional provisions, including due process, bill of attainder, ex post facto and double jeopardy. Almost unanimously, these decisions rest on the fact that sex crime law is meant to be regulatory or civil rather than punitive or criminal. Some legal scholars still argue that even under the standards for civil proceedings, registration and notification laws violate due process. Jane A. Small, "Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws," *New York University Law Review* 74 (1999).

[258] Some prosecutors who support registration and civil commitment argue for full or partial restrictions on notification for fear of constitutional issues and vigilantism, Fairstein in Symposium, "Critical Perspectives on Megan's Law: Protection vs. Privacy."; Small, "Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws." David Filler, among others, openly acknowledge that these laws jeopardized the "privacy and security" of offenders, but argue that this is a fair price to pay. Daniel Filler, "Making the Case for Megan's Law: A Study in Legislative Rhetoric," *Indiana Law Journal* 76, no. 2 (2001): 316. However, many do not object to violating the civil rights of convicted felons. As Robert T. Farley said at a symposium, "I think you have to keep in mind that when you commit a crime that is felonious in nature and that incarcerates you for a long period of time, you do not have the same level of civil rights that a person who has lived a good clean life does." "Critical Perspectives on Megan's Law: Protection vs. Privacy," 38. This is significant both as a legal point, as convicted felons are a special class whose right to due process is routinely and constitutionally obstructed, and as an expressive point, since no one wants to be seen as the protector of sexual criminals.

[259] Dennis M. Doren, "Being Accurate About the Accuracy of Sexual Offender Civil Commitment Evaluations," in *The Sexual Predator: Legal Issues, Assessment, Treatment*, ed. Anita Schlank (Kingston: Civic Research Institute, 2010), 3.

[260] Lynch, "Pedophiles and Cyber-Predators as Contaminating Forces," 558.

[261] Ibid.

[262] K. A. Duncan, *Female Sexual Predators: Understanding Them to Protect Our Children and Youths* (Santa Barbara: Praeger, 2010). In this book, the author devotes an entire section to the idea of the *cougar*, a slang term for an older woman who pursues young men.

[263] Legal theorist Mona Lynch notes the relationship between the pedophile and the predator, specifically the Internet cyber-predator, in legislative debates. Cyber-predator laws are an example of how the containment and contagion metaphors used around the civil commitment of sexual predators get applied to non-predators. The relationship between the cyber-predator and the sexually violent predator is rhetorical. The concept of the cyber-predator articulates a fear not only that sexual predators are hunting your children, but that they will invade your home and infect them via the Internet. This particular fear is a product of the late 1990s view of the Internet. What results is a much larger category of people, called predators, who are neither diagnosed nor contained, but who are still named and treated as such.

[264] Committee on the Judiciary, *Protecting Our Nation's Children from Sexual Predators and Violent Criminals: What Needs to Be Done?*, 1st, 2005.See also hearings on H.R. 764, H.R. 95, H.R. 1355, H.R. 1505, H.R. 2423, H.R. 244, H.R. 2796, and H.R. 2797, all available at http://www.judiciary.house.gov.
[265] John Q. La Fond, "Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control," *University of Puget Sound Law Review* 15, no. 1 (1992): 702.
[266] There is speculation that the first use of *predator* to refer to child sexual abusers was by Andrew Vachss in "How We Can Fight Child Abuse," *Parade Magazine* 1989. Andrew Vachss is an attorney who specializes in defending abused children. He has been a contributing writer to Parade magazine for decades and almost all of his pieces focus on the threat posed by sexual predators. He also credits himself for popularizing the term sexual predator.
[267] JoAnne Brown, *The Definition of a Profession: The Authority of Metaphor in the History of Intelligence Testing, 1890–1930* (Princeton: Princeton University Press, 1992), 13.
[268] Eric S. Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Ithaca: Cornell University Press, 2006), 2.
[269] Laura J. Zilney and Lisa Anne Zilney, *Perverts and Predators: The Making of Sexual Offending Laws* (Lanham: Rowman and Littlefield, 2009), xiv.
[270] Janus, *Failure to Protect*, 3.
[271] Yvonne Jewkes, *Crime and Media*, (London: Sage, 2009); Victor E. Kappeler and Gary W. Potter, *Constructing Crime: Perspectives on Making News and Social Problems*, (Long Grove: Waveland Press, 2006).
[272] Sarah Brown, *Treating Sex Offenders: An Introduction to Sex Offender Treatment Programmes* (Portland: Willan, 2005), 6; Zilney and Zilney, *Perverts and Predators: The Making of Sexual Offending Laws*; ———, *Reconsidering Sex Crimes and Offenders: Prosecution or Persecution?* (Santa Barbara: ABC-CLIO, 2009); Helen Benedict, *Virgin or Vamp: How the Press Covers Sex Crimes* (New York: Oxford University Press, 1992); Susan Caringella-MacDonald, "The Relative Visibility of Rape Cases in National Popular Magazines," *Violence Against Women* 4, no. 1 (1998); Kenneth Dowler, "Sex, Lies, and Videotape: The Presentation of Sex Crime in Local Television News," *Journal of Criminal Justice* 34, no. 4; and Jenny Kitzinger, *Framing Abuse: Media Influence and Public Understanding of Sexual Violence against Children* (Ann Arbor: Pluto Press, 2004).
[273] The representation of sex offenders also affects the way corrections officers treat these offenders, as many see these offenders as "significantly more dangerous, harmful, violent, tense, unpredictable, unchangeable, aggressive, weak, irrational, and afraid than non-sex offenders" and that such offenders evoke "highly charged emotional responses." John Bergman, "The Use of Ethics and Drama-Based Techniques to Modify Security Staff's Beliefs About Working with Sex Offenders," in *The Sexual Predator: Law and Public Policy, Clinical Practice*, ed. Anita Schlank (Kingston: Civic Research Institute, Incorporated, 2006), 2.
[274] Zilney and Zilney, *Perverts and Predators*, 84.
[275] "Policymakers have chosen to allow sex offender laws to be driven by the

demonization of offenders, devastating grief experienced by a subset of victims, exaggerated claims by law enforcement, and media depictions of the most extreme and heinous sexual assaults. As a result of this choice, a tremendously expensive criminal justice apparatus has been created, victims have been deprived of resources that could aid their recovery, and efforts to treat and manage offenders have been undermined." Richard Gordon Wright, *Sex Offender Laws: Failed Policies, New Directions* (New York: Springer, 2009), 4.

[276] Simon, "Managing the Monstrous," 467.

[277] The label sexual psychopath predates the development of the Psychopathy Checklist (PCL-R) and the popularization of the concept of the psychopath. For much of the history of sexual psychopathy the concept of a psychopath had a very different connotation than it now has. Before the PCL-R, the label psychopath could refer to anyone suffering from any mental disorder or, specifically, to someone diagnosed with a personality disorder. It now has forensic overtones and indicates sociopathy, or the absence of empathy or emotional acuity.

[278] Simon, "Managing the Monstrous," 458.

[279] Ibid., 455.

[280] Simon, "Managing the Monstrous," 456.

[281] The idea that particularly dangerous sex offenders are actually easy to target through legislation is, of course, a misperception. Because sexually violent offender commitment statutes are not federally mandated, but almost all other forms of sex crime law are, the archetypal sexually violent offenders are part of the general pool of registered sex offenders in most jurisdictions.

[282] "The language of the commitment legislation does not induce therapeutic optimism. On the one hand, the preamble to the Special Commitment Statute asserts that persons who meet the sexual violent predator criteria require long-term treatment but are unlikely to be 'cured', and, on the other, predicates release on a jury or court finding that the committed person's mental abnormality or personality disorder has changed such that the person is safe to be at large and, if released, will not engage in acts of sexual violence. It is, unfortunately, entirely unclear how a personality disorder an be changed through treatment because most of the defining features of personality disorder diagnoses (such as in DSM-III-R) are historical in nature." Vernon Quinsey, "Review of Sexual Predator Program: Community Protection Research Report," (Olympia: Washington State Institute for Public Policy, 1992), 4.

[283] People who want to protect children have an advantage in grass-roots campaigns, a fact that has been exploited to great success by opponents of gay, lesbian, bisexual and transgender civil rights.

[284] Most book-length analyses of either pedophilia or sex offenders begin with a distinction between these categories, intended to clarify what the author assumes is a common misperception. See the introduction of Seto's *Pedophilia and Sexual Offending against Children*. In my own experience, this is a very US-bound phenomenon. When I first began to present my research at conferences in the United States I found that members of the audience often did not know or recognize that this was a conflation, even if they themselves were doing it. In contrast, when I presented this work in Germany, I found I had to begin by explaining to he audience why pedophile and sex offender were

related at all.
[285] Doren, "Inaccurate Arguments in Sex Offender Civil Commitment Proceedings," 3.
[286] Putting *convicted pedophile* into the Lexis-Nexis Academics Universe News search engine generates only four instances before the arrest of Earl Shriner in 1989. The earliest use of the term was in relation to the abduction of Etan Patz, in an article detailing the possible involvement of the North American Man-Boy Love Association (NAMBLA). Bryce Nelson, "Etan Patz Case Puts New Focus on a Sexual Disorder, Pedophilia," *The New York Times*, January 4, 1983.
[287] It is possible that the terms *convicted pedophile* and *diagnosed predator* are the result of journalistic language where the aim is to convey as much as possible with as few words as possible. That is, the terms could refer to two different but related conditions—it is understood in this case that conviction could be for something other than pedophilia, so a "convicted pedophile" is a person who has pedophilic impulses who has also been convicted of sex crimes, perhaps sex crimes that involve children. Likewise, the diagnosed predator is a sexual predator who has been diagnosed with a related disorder.
[288] Jenny A. Montana, "An Ineffective Weapon in the Fight against Child Sexual Abuse: New Jersey's Megan's Law," *Journal of Law and Policy* 3(1994).
[289] *Community Protection Act*.
[290] Symposium, "Critical Perspectives on Megan's Law: Protection vs. Privacy," n826, internal reference to United States v. Surratt, 867 F. Supp. 1317, 1324 (1994).
[291] In a sense, the concept of incest operating within this distinction is based more on an older, Levi-Straussian system of tribal affiliation rather than a blood family one.
[292] All of the female sexually violent offenders who are currently incarcerated in the United States fall into this particular category.
[293] Nelson, "Etan Patz Case Puts New Focus on a Sexual Disorder, Pedophilia."
[294] Palermo and Farkas, *The Dilemma of the Sexual Offender*, 48.
[295] Robert Teir and Kevin Coy, "Approaches to Sexual Predators: Community Notification and Civil Commitment," *New England Journal on Criminal and Civil Confinement* 23 (1997), 426.
[296] Andrew Vachss, "Sex Predators Can't Be Saved," *New York Times*, Jan 5, 1993.
[297] Ted Shaw and Jaime R. Funderbunk, "Civil Commitment of Sex Offenders as Therapeutic Jurisprudence: A Rational Approach to Community Protection," in *The Sexual Predator: Law, Policy, Evaluation and Treatment*, ed. Anita Schlank and Fred Cohen (Kingston: Civic Research Institute, 1999), 2.
[298] The concept of the sexual offender as a contagion operates on various levels. First, there is a sense of a literal disease being spread: the pedophilic predator is not only at the mercy of an incurable and untreatable disease, but that disease is contagious, and he could spread that disease to children. Mona Lynch examines legislative hearings and the language in the drafts of proposed legislation and points out that "accepted wisdom among the speaking lawmakers was that they [sex predators] are indelibly contaminated and beyond redemption." Lynch notes that the prevailing sentiment of cyber-predator legislation is that sexual offenders are "essentially supernaturally dangerous and contaminating to the idealized social body." Lynch, "Pedophiles and Cyber-Predators as Contaminating Forces," 555. Theories that victims of sexual abuse were more likely (some even said guaranteed) to become abusers themselves bolstered this fear of

contagion in the early days of sex offender laws. See David Finkelhor, "Early and Long-Term Effects of Child Sexual Abuse: An Update," *Professional Psychology: Research and Practice* 21, no. 5 (1990); Kathleen A. Kendall-Tackett, Linda M. Williams, and David Finkelhor, "Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies," *Psychological Bulletin* 113, no. 1 (1993); Christine A. Gidycz and Christie Nelson Coble, "Sexual Assault Experience in Adulthood and Prior Victimization Experiences: A Prospective Analysis," *Psychology of Women Quarterly* 17, no. 2 (1993); Sue Boney-McCoy and David Finkelhor, "Prior Victimization: A Risk Factor for Child Sexual Abuse and for PTSD-Related Symptomatology among Sexually Abused Youth," *Child Abuse and Neglect* 19, no. 12 (1995). Second, there is the idea that the sexual predator has been corrupted and exposure to that corruption will harm children even if it does not infect them. In this sense, his status as a predator does not make him a contaminant, but a product of and a conduit to larger corruption. It is no wonder communities like that of Megan Kanka and Ryan Hade were so upset with their local law enforcement's inability to control the disease of sexual violence: the sexually violent offender, in this model, is not infected with a social disease; he is one.

[299] Mary Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (New York: Praeger, 1966).

[300] This characterization may also stem directly from the connection to pedophilia. Internal police memos from the early 1980s emphasized that pedophilia appeared in all demographic groups. Linda Deutsch, "The Kiddie Porn Network: Police, Courts Crack Down," August 21, 1982.

[301] Davis, "The Sex Offender Next Door."

[302] Douglas W. Pryor, *Unspeakable Acts: Why Men Sexually Abuse Children* (New York: New York University Press, 1996), 253.

[303] Pamela D. Schultz, *Not Monsters: Analyzing the Stories of Child Molesters* (Lanham: Rowman and Littlefield, 2005), 2.

[304] Palermo and Farkas, *The Dilemma of the Sexual Offender*, 110.

[305] Suzanne Fields, "Worrying About the Monster in Our Midst," *Dallas Morning News*, March 3, 1995.

[306] Or, at least no *man* is beyond suspicion: "Some studies, for example, consist of surface descriptions of offense situations: who is most likely to engage in such behavior, the types of acts most likely to be committed, the frequency of offending and the number of victims molested, the range of offense tactics most commonly used, and the kinds of fixed motives that most often operate. The conclusion drawn from this type of research about offenders is that they are nearly always men, generally men from every social grouping, or walk of life. No category of men as such is exempt from suspicion." Pryor, *Unspeakable Acts*, 6. Various authors have noted the huge gender disparity in arrests for sex offending. This disparity becomes even larger when one looks at sexually violent offenders and sexual predators. See: Donna M. Vandiver, "Female Sex Offenders: A Comparison of Solo Offenders and Co-Offenders," *Violence and Victims* 21, no. 3 (2006); Hannah Ford, "The Treatment Needs of Female Sexual Offenders," in *Female Sexual Offenders: Theory, Assessment and Treatment*, ed. Theresa A. Gannon and Franca Cortoni (Chichester: Wiley-Blackwell, 2010); Theresa A. Gannon, Mariamne R. Rose, and Franca Cortoni, "Developments in Female Sexual Offending and Considerations for

Future Research and Treatment," in *Female Sexual Offenders: Theory, Assessment and Treatment*, ed. Theresa A. Gannon and Franca Cortoni (Chichester: Wiley-Blackwell, 2010); Ryan C. W. Hall and Richard C. W. Hall, "A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues," *Mayo Clinic Proceedings* 82, no. 4 (2007); Frances Heidensohn, *Women and Crime* (London: Macmillan, 1985); Danielle Harris, "Theories of Female Sexual Offending," in *Female Sexual Offenders: Theory, Assessment and Treatment*, ed. Theresa A. Gannon and Franca Cortoni (Chichester: Wiley-Blackwell, 2010); Jacqui Saradjian, "Understanding the Prevalence of Female-Perpetrated Sexual Abuse and the Impact of That Abuse on Victims," in *Female Sexual Offenders: Theory, Assessment and Treatment*, ed. Theresa A. Gannon and Franca Cortoni (Chichester: Wiley-Blackwell, 2010); Jeffrey C. Sandler and Naomi J. Freeman, "Topology of Female Sex Offenders: A Test of Vandiver and Kercher," *Sexual Abuse: A Journal of Research and Treatment* 19, no. 2 (2007); and Myriam-Mélanie Rousseau and Franca Cortoni, "The Mental Health Needs of Female Sexual Offenders," in *Female Sexual Offenders: Theory, Assessment and Treatment*, ed. Theresa A. Gannon and Franca Cortoni (Chichester: Wiley-Blackwell, 2010).

[307] Caroline Louise Lewis, "The Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process," *Harvard Civil Rights-Civil Liberties Law Review* 31, no. 1 (1996); Earl-Hubbard, "The Child Sex Offender Registration Laws,"; and Montana, "An Ineffective Weapon in the Fight against Child Sexual Abuse."

[308] Toni M. Massaro, "Shame, Culture, and American Criminal Law," *Michigan Law Review* 89, no. 7 (1991); G. Scott Rafshoon, "Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process," *Emory Law Journal* 44 (1995): 1676.

[309] See remarks by John J. Gibbons, Chief Judge, United States Court of Appeals, Third Circuit and Linda Fairstein, Assistant District Attorney for Manhattan in "Critical Perspectives on Megan's Law: Protection vs. Privacy."

[310] Logan, *Knowledge as Power*, xii.

[311] Ibid., 84.

[312] Most states have laws that prohibit registered sex offenders from living within a certain radius of schools or public parks, severely limiting housing options and, in some areas, forcing registered sex offenders to become homeless.

[313] Leonore M. J. Simon, "Matching Legal Policies with Known Offenders," in *Protecting Society from Sexually Dangerous Offenders: Law, Justice, and Therapy*, ed. Bruce J. Winick and John Q. La Fond (Washington, DC: American Psychological Association, 2003).

[314] Earl-Hubbard, "The Child Sex Offender Registration Laws," 861.

[315] "It is clear that current legal policy has deleterious effects on current and prospective victims of sex crimes committed by acquaintances and relatives. Because of myths and misconceptions, policymakers are afraid of the stranger while ignorant of the danger to children and women that resides closer to home." Simon, "Matching Legal Policies with Known Offenders," 158.

[316] "Only about 3% of sexual abuse against children is committed by strangers, and just about 6% of child murders are committed by strangers. Indeed, the majority of children

who are sexually abused, physically abused, neglected, and killed in this country have suffered the harm from someone in the family." Lynch, "Pedophiles and Cyber-Predators as Contaminating Forces," 545.

[317] Shapiro, "Sources of Security," 846.

[318] Janus, *Failure to Protect*, 2.

[319] Anne Cossins argues that categorizing the molestation of children as a radically different form of sexuality does not take into account the extent to which the desire of older men for younger women has been normalized. Casting these men as predators, she argues, distracts attention from a larger more complex sex/power system, and thus makes it difficult to see how social systems of gender inform certain patterns of criminal sexual behavior. She concludes that it is necessary not only to ask how *these* men become something we want to catalogue as predators, but what that has to do with how men are socialized to become men in general. Anne Cossins, *Masculinities, Sexualities, and Child Sexual Abuse* (Boston: Kluwer Law International, 2000).

[320] Myra Hird's work focuses on how gender role stereotypes, such as the idea that men are naturally more violent than women, make interpersonal violence endemic to heterosexual relationships. Yet the ubiquitous nature of this gendered assumption makes women who experience violence less likely to speak up. Males are assumed to be aggressors, that is, more responsible for initiating, and females are assumed to be the limiters, that is, they are responsible for setting boundaries. This, argues Hird, creates a heterosexual dynamic in which interpersonal violence committed by men against women is an expected part of a relationship, and the personal violation inflicted by an outsider or stranger is taken as "real" violence. For example, when asked about situations in which they felt their personal safety had been violated, the young women Hird interviews readily described incidents with male strangers: being followed on a dark street, being grabbed at in public. Even though most women later revealed similar experiences with young men that they knew, they were much less comfortable categorizing their experiences as violations. Hird attributes this to two separate phenomena: first, that the public perception of the dangerous rapist is that he is a stranger. These young women did not immediately think of their experiences with men they knew as instances where they were in danger because friends and acquaintances are much less of a threat than strangers. Second, these women were less likely to discuss interpersonal violence at the hands of friends because they feared being held more responsible. A stranger who violates interpersonal boundaries is obviously an anomaly; when a friend or acquaintance does it the survivor feels he or she is at fault because she or he did not accurately negotiate the situation. Myra J. Hird, *Engendering Violence: Heterosexual Interpersonal Violence from Childhood to Adulthood* (Burlington: Ashgate, 2002).

[321] "The nature of the sexually violent predator legislation is in itself not conducive to inspiring motivation for treatment among residents. Residents perceive the law to be arbitrary and excessive. This perception certainly appears justifiable in cases where residents have actually been on the street and have been recommitted without parole violation and/or have sought treatment while serving their regular sentence and been denied it for a variety of reasons (e.g., length of sentence). It is, of course, extremely difficult to form a therapeutic alliance with an embittered clientele." Quinsey, "Review of Sexual Predator Program," 4.

[322] See also Prentky and Burgess, *Forensic Management of Sexual Offenders*.
[323] "The task of effecting behavior change in seriously characterologically disordered individuals is, in itself, considerable. When these individuals have not chosen treatment but are placed in treatment by the court (as is often the case), and when the treatment occurs in the context of dangerous prison environment where the goal is survival and not therapy (as is often the case), then the task becomes immeasurably more difficult. When the treatment provided is suboptimal, the conditions (i.e., prison) are highly problematic; and the therapists are inadequately trained and supervised, the task may well be impossible." Ibid., 145.
[324] "The stigma attached to registration may also prevent offenders from seeking treatment or the treatment from having any success. Most tragically, the fear of reprisal to an abuser or of exposing the fact of the child's own victimization to public scrutiny may prevent a child abused by someone he or she knows from coming forward, reporting the abuse, and receiving help." Earl-Hubbard, "The Child Sex Offender Registration Laws," 861.
[325] Bruce J. Winick, "A Therapeutic Jurisprudence Assessment of Sexually Violent Predator Laws," in *Protecting Society from Sexually Dangerous Offenders: Law, Justice, and Therapy*, ed. Bruce J. Winick and John Q. La Fond (Washington, DC: American Psychological Association, 2003), 328.
[326] Pryor, *Unspeakable Acts*, 275.
[327] By *law* Sharpe means human cultural or social law as distinct both from scientifically observable nature and a Catholic or theological understanding of natural law.
[328] Foucault, Hocquenghem, and Danet, "Sexual Morality and the Law," 277.
[329] In point of fact, the lack of a psychiatric diagnostic category for sexual predation, a lack that caused legislators in Washington to pass the WCPA, lends to the specter of fear. A diagnosis lends in understanding what is wrong with us. It is the naming, the recognition of the invasion, that restores us, in some way, to normal. The true abnormal is s/he who remains undiagnosed, uncategorized, and beyond understanding.
[330] Consider also that the people who make the laws are the ones who define *us,* and the men who make the laws are overwhelmingly white and middle class.

Chapter Four

Evil and Monstrosity:

The Dehumanization of Sexually Violent Offenders

> The early-modern, theology-infused monster has become, in this disenchanted age, the psychopath, the person with an anti-social personality disorder, and the sex offender.
>
> —John Douard[331]

The concept of the monster has a long intellectual history. The monster straddles the line between the frightening and the wondrous. Theorist Edward Ingebretsen refers to the monster as both "awful "and "awe-ful," from portentous birth to abject horror, from the object of scientific and medical study to a signifier of the divine.[332] Monsters appear in American culture as representations of the racial or ethnic other, as symbols for the evil side of human nature, as metaphors for hidden or repressed sinful and deviant desires, and as signals of the ever-shifting boundary between the human and the non-human.[333] Monsters are, at once, the symbol of everything human beings can never be and a sign of what we may become.

True to its shared etymology with the word *demonstrate*, a monster was historically a figure of wonder. Originally used to refer to hybrids, most often animal/human hybrids, the term is employed within both disability theory and feminist theory with various historical and cultural meanings. Yet the way the term is used to refer to sex offenders is almost entirely separated from this history: sex offenders are not

hybrids; they are entirely inhuman. They are not figures of wonder; they are figures of fear. Sex offenders are not alone in this new discourse of monstrosity that focuses on protection and security: there are also monstrously evil sociopaths and psychopaths alongside the monstrously inhuman pedophiles.[334]

The use of the word *monster* as a description of criminal sex offenders had become common enough by 1994 for Adam Sampson to note in his study of the penal system "the equation of sexual offender and monster is now firmly part of the public psyche,"[335] and, by 1998, for Jonathan Simon to declare: "Sex offenders are our modern day monsters."[336] The use of this language impacts the formation of sex offender legislation because the division between monstrous and human creates an atmosphere of "us vs. them"[337] and necessitates the creation of exceptional laws.[338] In fact, the linking of monstrosity and sex offending has become so ubiquitous that recent critics[339] combat it directly, urging lawmakers to set aside their personal feelings about the criminals involved and pass more equitable laws.[340]

The categories of monstrous difference as applied to violent sexual offenders explicitly and implicitly engage theological and religious themes. Theorists link the monstrosity of sexually violent offenders with the theological concept of *evil*. Some of this is due to the long tradition of equating the study of evil with the study of criminals, penal codes, and prisons. Sometimes it is a rhetorical move: Christopher Hibbert's 1963 history of crime and punishment, meant to be a popular text, is titled *The Roots of Evil*, and Jack Katz's 1998 book *Seductions of Crime* is subtitled *Moral and Sensual Attractions in Doing Evil*. For others, the connection between evil and crime is a matter of foundations. Historian Nicole Rafter, who has written several books about theories of

biological criminality, characterized the field as, ultimately, "a question about the origins of evil."[341] For the group of theorists I examine here, however, the fact that sex offenders are monstrous in a particularly evil way is a connection they make without the connections between evil and crime, a connection drawn necessarily by the use of the label monster, which, according to lawyer John Douard, "reflects the conviction that some conduct, especially deviant sexual conduct, is not only statistically abnormal, but also evil."[342]

Eric Kincaid, author of *Erotic Innocence*, sees the evilness of offenders as a necessary complement to the innocence of their presumed child victims. He frames the current imagining of sexual predators as a repetition of the classic gothic structure: evil and darkness prey on innocents, spurring mob violence, moral outrage, and even spawning the occasional misunderstood monster.[343] For both Kincaid and Philip Jenkins, author of *Moral Panic: Changing Concepts of the Child Molester in Modern America*, the labeling of sex offenders as monstrous is part of a larger cultural cycle. Those campaigning against the abuse of children see themselves on the side of virtue, always threatened by impending moral corruption, and so the child molester must be cast as the incarnation of evil.

This chapter uses religious studies and theology to evaluate two theological concepts used in understanding the monstrosity of the sexually violent offender: the monstrous embodiment of evil and the sexually violent offender as monstrous double. I examine the former in terms of Christian theological concepts of evil, most notably that of Augustine of Hippo, and examine the latter using René Girard's theory of mimetic desire and sacrificial violence. Although rhetorically different, both systems are excellent

representations of the new monstrosity of psychological criminals generally, and of sex offenders specifically, because they rely on a categorical difference between the sex offender and the non-criminal, non-offending human. Both serve to justify the extreme measures taken to protect humanity from sexually violent offenders.

The first section shows that the use of the word *evil* to indicate the abjectness of sexually violent offenders is incompatible with the dominant concepts of evil and sin as they operate in Christian theology. Sin and sinfulness are human universals, as they are only one piece of a larger Christian theological discussion about the relationship between humanity and divinity. This relationship is marked by the imperfection of human beings and the unconditional love of God. In contrast to this, when writers apply the labels of evil or sin to sex offenders it marks their *in*humanness. The result of this rhetorical move is evil without redemption, which marks a return to an older Manichean concept of evil, and justifies purging behavior.

The second section examines a parallel but almost contradictory movement in the categorization of sexually violent offenders as monsters who were once human but, through a ritual transformation process, become sacrificable monsters. This section uses René Girard's theory of mimetic desire, which he relates to the Christian theological trope of the scapegoat, to show how the sexually violent offender is the monstrous double of the normal human. The sexually violent offender becomes the stand-in for monstrous sexual potential. Girard's sacrificable monster serves a dual function in this particular theological model. First, to conquer the sex offender is to conquer the monster in oneself. Second, sacrifice of the sexually violent offender is necessary for the safety of all not only because of the threat embodied by the sexually violent offender himself, but because

sacrificing him palliates fear about systemic sexual violence. His human appearance and his inhuman transformation, once juxtaposed, justify this sacrifice.

I ultimately argue that the concept of sacrificial violence is both more useful and potentially beneficial than the label *evil*. Both rely on a boundary between the sexually violent offender and the human; in order to be evil or to function as a scapegoat, the sexually violent offender must be distinct from the human. Imagining the sexually violent offender as an evil monster incorrectly places the origin of his evil outside the system of human interaction, and thus all means taken by society to protect itself from the threat of sexual violence are seen as not simply necessary, but divinely justified. This justification functions symbolically even when the concept of evil is used outside the theological context. In fact, it functions in this way only outside a theological context. The concept of violent sacrifice, in contrast, exposes both how and why these offenders are punished and the effect that punishment has on both the sexually violent offenders and the society that condemns them.

Evil, Sin and Salvation

The word *evil* has become so linked in public discourse with the discussion of the most violent and most abject criminals that psychiatrist Michael H. Stone argues in his book *The Anatomy of Evil* that the definition of the word should be changed. Stone notes a particular disparity in that philosophers and theologians have a difficult time agreeing upon even "maddeningly vague" definitions of evil, but the majority of laypeople will not hesitate to identify the perpetrator of a violent sex crime as evil, and do so almost unanimously in the case of certain types of violent crime.[344] Members of the public who use this word to refer to criminals, Stone argues, "do so without much attention to the

supernatural, metaphysical, ineffable, 'occult' overtones with which the term is otherwise so loaded."[345] He suggests divorcing the term entirely from its theological roots and using it outright to refer to criminal types. And, perhaps unsurprisingly, sexually violent offenders make up the most dangerous categories in his taxonomy of evil.

Stone's argument resonates because moving evil out of a strictly Christian theological schema removes access to redemption and strengthens its power as a symbolic concept. As mentioned earlier, theological discussions of evil and the accompanying discourse on sin are always paired with a concept of grace and divine love. Removing evil from this context removes the balance afforded by that traditional association while retaining the symbolic and rhetorical power of the concept of evil and its threat to true, that is good, humanity. Taking away God does not take away the supernatural impact of evil. It removes the universal claim to humanity afforded by the human relationship to the divine. In a system where there is damnation but no salvation, the evil man is not savable.[346]

The category of evil, especially as it relates to the concept of sin and human nature, is a large and complex theological category. There are two fields within Christian theology that relate directly to evil and sin: *theological anthropology*, which is the study of humankind in relation to the divine, and *theodicy*, which is the discussion of how evil could exist in a world made by a perfectly good, omniscient, and omnipotent Creator. These two fields intersect in one of the earliest explanations for the existence of evil: that of St. Augustine of Hippo, who argues that since God could only have created things that were good, all evil in the world comes from the disobedience of man.

In the following section, I examine the category of Christian theological evil as it originated in the work of Augustine of Hippo with a focus on his arguments against the Manichees. I take this approach because representing sexually violent offenders as categorically evil monsters, driven to do evil things by an actively evil will, this reflects an ultimately unproductive shift back to a Manichean concept of evil as a positive force.[347] Without opportunity for redemption, and with the insistence on monstrosity, invoking evil in discourse around sexual predators effectually renders them beyond the reach of God; they are, in fact, impossible in a world where God created everything. Reconciling this issue requires resurrecting a force that is both opposed to God and generative. Evil in Manichean terms is a dark power from which monsters originate. The problem is that this invocation of absolute, generative, and oppositional evil is that reifies evil as undefeatable and unchangeable. A war waged on Manichean terms is both a war that cannot be won and a war in which all tactics are justified.

Augustine of Hippo's interpretations of Genesis are considered to be the foundation for the concept of sin within western Christianity.[348] In these interpretations, Augustine argues that the fall of humanity, the story of Adam and Eve, resulted in a distortion of nature. After the Fall, sin occurs in the world because human will is no longer properly aligned with divine will. Thus, we are neither driven nor pulled into sin by an active force of evil that originates, for example, with Satan or demonic control, but rather we sin because we do not correctly orient ourselves toward the path of good. Augustine defined sin and evil as the absence of good, as a negative rather than a positive, over and against the theory of evil proposed by a contemporary prevailing sect,

the Manicheans, who taught that humans were caught in a war between good and evil.[349] Augustine himself had been a follower of Mani in his youth.

He focuses on Genesis because of the primacy of cosmogony in Manichaeism. As a Gnostic religion, most of the doctrine is concerned with the acquisition of knowledge, and its practices were seen as based in pure reason and thus the antithesis to Christian mystery. The Manichean religion can be understood primarily through its creation story. Before the world as we know it existed, there were two major principles: that of good or Light and that of evil or Darkness. The forces of the Prince of Darkness invaded the Kingdom of Light, starting a battle, and the world was created by the carnage of this battle. The Manichees saw Darkness, or evil, as a force and a substance—the latter quite literally, as it was the physical matter of the world that trapped the forces of light. Humans, as beings made of matter, were condemned to suffer forever. The followers of Mani believed, as Augustine framed it, that the "soul is by nature what God is."[350] Those who followed the teachings of Mani would cultivate the spark of light, the model of God, within themselves, and in the afterlife they would become rarified and saved.[351] Thus, the savable humans were Godly, or Light, creatures weighted down by Dark bodies.

In *On Genesis: A Refutation of the Manichees*, Augustine analyses the text of Genesis to refute Manichean criticisms of Christianity and to directly contradict the creation story propagated by Mani. One of the major criticisms levied by the Manichees was that Christian theology did not accurately account for the presence of evil in the world. There is no question that bad things happen and bad people exist, the Manichees argued, and if Christians believe God created everything, then they must believe that God created evil. In contrast, the Manichee cosmogony stated that evil was the work of a dark

(i.e. evil) race, and, according to Augustine, the Manichees "have been taken in by their own fables, and have come to believe that there is a race of darkness, to which bodies belong, in their view, and the forms and souls in those bodies; and that is why they think darkness is an actual something."[352] Augustine's answer to them is simple. He argues darkness is not a substance, but an absence, "darkness is only perceived when we cannot see anything, just as silence is only perceived when we cannot hear anything.[353] Evil actions, by extension, are not the product of dark forces, but simply the absence of good, or divinely aligned, will. This answer went on to become the kernel of the traditional free-will defense. Humans are free to choose whether to follow the path toward the good; straying from or rejecting this path is the source of evil. [354]

Augustine distinguishes between the corrupted absence of good and the materially bad in his treatment of the human body. Where the Manichees saw embodiment as wholly temporary and wholly wrong, Augustine sees the human body as a gift of God that has been corrupted by the sin of Adam. Sin is felt in the body because we cannot interpret our own senses correctly. In contrast, the Manichees "find their own bodies displeasing, not because they bear the punishment of mortality that we earned by sinning, but to the extent of denying that God is the maker of bodies."[355] Augustine's concept of the body is of a body fraught with desire and tragically corrupted by the fall, something that had once been perfect once and, in Heaven, would be perfect again. This vision makes Augustine's conception of the body ultimately more painful than that of the Manichees, for, in Augustine's perception, we can never truly know if we are following the will of God. We must only try.

Augustine makes a vital distinction between imperfect and bad. As a whole, creation is very good, and although some things are more perfect than others are, imperfection does not make a thing bad. In fact, things cannot be bad in and of themselves, but can only be used for incorrect or bad purposes, and then only through the misaligned will of man.[356] This distinction is often obscured because, for Augustine, some functions of creation that would be seen as natural were utterly corrupted by the Fall. For example, the failure of the earth to produce crops is not a sign of the badness of the earth or proof that God has forsaken us, but that the perfect world has been utterly corrupted by human sin, that "the earth is yielding him thorns and thistles as a punishment, not as a mere fact of nature."[357] In Augustine's scheme, that which is unnatural is not that which does not occur in nature, but rather that which is misaligned with the will of God. The unnatural is bad because it is not the will of God. God cannot be responsible for anything bad in creation; that responsibility lies solely with the descendants of Adam.

In this reasoning, evil and sin enter the world, including in the Fall, through a sort of void—they exist only where good does not. God did not create evil, nor is it in keeping with God's intent for humans to sin or to act in evil ways. In the Manichean system, those who fall subject to bad urges are considered to be in the realm of dark forces and are radically different from those who perform good, non-sinful or virtuous acts. Rejecting this earlier doctrine, Augustine argues that human life is a long struggle toward alignment with Divine will, hampered by a clouded and imperfect nature made clouded and imperfect by the Fall.[358]

Free Will and Disobedience

Augustine's interpretation of the Fall answers what would later be called the central premise of theodicy: that is, how to reconcile the existence of evil with an omnipotent, omniscient, omnipresent and benevolent God. Augustine's use of the disobedience of Man is known as the *traditional free-will defense*. Those who hold to the Augustinian defense see the concept of free will, that is the ability to make choices free from constraint, as an ability given to humans by the Creator. Thus, even though God's will is oriented to the good, humans have the freedom to stray. Augustine's free-will defense is important to the defeat of the Manichees because it puts the responsibility for bad behavior squarely on the shoulders of humans themselves, rather than attributing it to the will of some substantive dark force.

The concept of free will and its relationship to responsibility, as we saw in Chapter One, is central to forming a theory of moral insanity. Although Augustine's free-will defense is fundamental to understanding his objection to the Manichees, the concepts of sin, will, and responsibility as they were incorporated into philosophy and psychology later also included many of the modifications made in the intervening centuries, particularly those of the protesting Reformers. This section shows how the doctrine of free will and human responsibility for evil function in Augustine. I then show, in broad strokes, how Martin Luther objects to the free-will defense while still maintaining human responsibility and how free will functions in the doctrine of double predestination drawn from the theology of John Calvin.

I present each of these basic categories to demonstrate that all answers to the theodicy question, whether they maintain free will or reject it in whole or in part, see their concept of will as universal. That is, it is not the case that some people have free will

while others do not. It is on this point where the labels of evil and monster as applied to sex offenders depart from theological understandings of culpability and free will. In contrast to Augustinian free will and the Lutheran and Calvinist rejections, when the label of irredeemable evil is applied to sex offenders it implies that they could not help but commit crimes even though normal people can. If human beings are understood to have free will, a creature that lacks free will is by definition not human. It is a distinction made as a contrast to the theological concept of universal humanity.

Augustine's argument for free will comes from two major aspects of this theology: first, that God did not create anything that was not good, and second, that sin and evil are the consequence of Adam's abuse of the true freedom and absolute afforded by God.[359] God's will is that we orient ourselves to the good, but God also granted us the freedom to turn away from that good. The freedom afforded by God to Adam and Eve allowed them to choose to disobey God's order. Augustine argues that this first act of disobedience fundamentally distorted human nature so that we can no longer help but to sin. Thus, to understand the importance of the voluntary quality in sin, for Augustine, it is necessary to understand not only why Augustine rejects the idea that evil could have been a natural thing but also how Augustine understands the Fall, from which all sin originates.

For Augustine, the Fall, and thus our experience of sin as action and our sinful state, is a process involving a complex relationship between pride, desire, consent, action and punishment. It begins with pride, without which we would not be in danger of sinning or deserving of punishment. In Chapter XI of Literal Commentary on Genesis, Augustine says that the devil would not have begun the temptation if there were not

already a chance of its success, "a certain self-aggrandizement that needed to be stamped on, so that, humiliated by sin, he might learn how false and unjustified was his presumptuous opinion of himself."[360] First pride wells up in and then temptation exploits our pridefulness. Our desire is roused and, if we are not mindful of it, our reason gives consent, and it is then that we have sinned. The punishment itself, however, of which the temptation is a first sign, is given all the way to the root. Pride makes us vulnerable to temptation, so when we are finally goaded into sin the punishment for that sin extends all the way back to the prideful precursor.

Augustine makes this more explicit in *City of God*, where he explains that although the first evil comes with pride and that there follows from pride a secret fall that we cannot fully understand or recognize, it is nonetheless the sin that happens openly that we recognize as a true transgression:

> The fall that happens in secret precedes the fall that occurs in full view, though the former fall is not recognized as such. For who thinks of exaltation as a fall, even though the falling away was already there, in the guilty desertion of the Most High? On the other hand, who could fail to see that there is a fall when there is an evident and indubitable transgression of a commandment?[361]

Following the consent of the reason, which happens because of that first, secret evil of self-exaltation, there is the sinful action, and only then comes the punishment and the humiliation. An action is only to be perceived as a willful disobedience if it is preceded by both a commandment and a prideful conviction that the commandment was given falsely. That is, we must have not only a rule to break that we understand we are breaking, but also pride enough both to not care about (or not believe in) the

consequences. Once pride has caused self-exaltation and the reason has consented to sin, sin has already occurred. This is true before the sinful action occurs.[362]

Augustine maintains, however, that there is no external force pushing or pulling the soul, and thus technically our will is free.[363] Yet in the conclusion of *On Genesis*, Augustine lists the Manichees most frequent questions: Why did God make man knowing he would sin? Why did he allow the devil access to Eve? Who made the devil? Again and again, the answer Augustine gives is that there is a willfulness or desire which is inborn and, paradoxically, comes from God: "The man was made, after all, that if he hadn't wanted to, he wouldn't sin" and "she was so made, after all, that if she hadn't wanted to she wouldn't have done so [allowed the devil access]," and finally, that the Devil made himself, for "it is not, you see, by nature but by sinning that he became the devil."[364] Augustine distinguishes between nature and action; sin itself is now, post-lapsarian, both a state and an action. It was possible for Adam and Eve, pre-lapse, to not sin. It is no longer possible for humans to live totally free from sin. All humans are born into the state of sinfulness because of the actions of Adam. This is the congenital, heritable, concept of Original Sin. That is, we each are born with a disrupted nature because we are the offspring of Adam.[365] For Augustine, humans have a clouded or imperfect nature because of the Fall of Adam, and thus do not see clearly how to orient themselves toward the good.

The presence of this internal motive originating in the sin of pride caused reformed theologians to take issue with Augustine's insistence on free will.[366] If God created everything, God then created that prideful root and bound the will of humans. In Augustine's system, however, this prideful root, this corruptibility, is the result of

Adam's transgression. Augustine's disordered state of nature must not be confused with a state in which human beings cannot choose not to sin. To Augustine, someone who does not, or cannot, choose to commit a sin is not actually sinning at all.[367] The Augustinian concept of free will is not just an explanation of the existence of evil and sin, but a definition.

The Protestant Objection: Bondage and Predestination

According to the Augustinian scheme, later modified by Saint Thomas Aquinas and other church scholars, although humans cannot clearly see the divine will, we can learn through life how to orient ourselves to the good. The process by which this happens differs greatly between Christian denominations. Generally, the process by which human beings become aligned to divine will is called *sanctification*, and the process by which humans are judged to be righteous is called *justification*. These terms became central during the Reformation, when reforming Protestants made two challenges to the existing Church doctrines about justification that are important to understanding free will in Enlightenment penal reform and anthropology. The first major rejection of the traditional free-will defense comes in Martin Luther's proclamation against the Catholic Church during the Reformation at the start of the sixteenth century.[368] The second came from John Calvin, a theologian and lawyer who led a reform movement in Switzerland in the latter portion of the sixteenth century, and published a set of texts called *The Institutes of the Christian Religion* in 1536.

The central issue for Protestants, both in Luther's time and in Calvin's, is the concept of justification, and to a lesser extent its relationship to the concept of sanctification. In Catholicism, there is an initial justification at baptism wherein the

congenital sin from Adam is washed away, but this can be lost in the case of mortal sin. Final justification does not occur until after death when the soul is judged before God. This final justification, Catholics argue, is based on a lifetime of good works. In contrast, Martin Luther introduces both the concepts of *justification by faith alone* and *predestination*. In this portion of Protestant doctrine, God imputes righteousness on the basis of faith, and thus can only be lost if there is a loss of faith.[369] John Calvin expands the concept of predestination and removes the necessity for continued faith, maintaining both that justification is an act of God alone and that it cannot be lost. Both doctrines turn justification into an action of God alone rather than a lifelong human undertaking. This distinction becomes important when thinking about the function of rehabilitation and penitence in crime and punishment as it defines the ability of humans to redeem themselves.

Both Luther and Calvin reject the traditional free-will defense while still maintaining that their interpretations are entirely in keeping with Augustine, because they point out that the free will accorded by the traditional defense is not actually very free at all. It is impossible that an omniscient God could not have known that humans would, will, and do sin. The new systems make the free will of humans unnecessary.

Luther's critique of Augustinian free will centers on the contradiction between an omniscient creator and a finitely perfect creation. That is, a truly omniscient creator would have known at the moment of Adam's creation that he would fall. Thus the nature we inherit as mortals is as God intended it to be from the beginning, and is not defective.[370] John Hick, a twentieth century theologian whose *Evil and the God of Love* details the objections various theologians have had to Augustinian theodicy, says that the

idea that humans were the source of evil makes God seem somehow dishonest, "the wanton paradox of man (the angels) being placed as finitely perfect creatures in a finitely perfect environment and then becoming the locus of the self-creation of evil *ex nihilo*."[371] Luther describes the will of man as a bound will. It is perceived as free in as much as we have choice, but our choices are limited. We are free *to* sin, but we are not free *from* sin. Thus our freedom is, in some sense, an illusion.

The Catholic Church responded to the objections in the documents produced at the Council of Trent. Not least among the doctrines canonized there is the existence of free will.

> Since all men had lost innocence in the prevarication of Adam… they were so far the servants of sin and under the power of the devil and of death, that [none] were able to be liberated or to rise therefrom, though free will, weakened as it was in its powers and downward bent, was by no means extinguished in them.[372]

The Catholic Church here maintains that a will bent downward by Original Sin, called the prevarication of Adam, is still a free will. This maintains the Catholic position that justification and sanctification are voluntary processes, since the will is necessary to establish volition.

Free will is vital to the doctrine of justification in the Catholic tradition because justification is a process accomplished by God and mortal together. Baptism washes Catholics clean as infants, but to maintain that state they must voluntarily undertake good works and strive for a more perfect union with God's will. It is expected that, as mortals, they will falter in this pursuit, and this is because the will, as Augustine argued, is distorted.[373] Augustine says, "man, himself, neither does absolutely nothing while

receiving that inspiration, since he can also reject it, nor yet is he able by his own free will and without the grace of God to move himself to justice in His [*sic*] sight."[374] The voluntary nature of this act remains important in Roman Catholic doctrine. It is represented most often in a line of sight metaphor: you cannot be seen by God unless God turns to you, but you also must turn to God yourself. Thus justification can be rejected or lost by mortal action, but it cannot be gained except through the working of human and divine together. That is, just as sin is voluntary by definition, as discussed in the previous section, so are justification and the process toward righteousness.

Once Luther introduces the argument for justification by faith alone, however, the issue of free will becomes less necessary. In both the Lutheran and Calvinist doctrines of justification, there is no need for human action.[375] Justification is an act of God and occurs for humans without need for the voluntary act of a free will; we become justified through faith and the will of God. Thus in Lutheran anthropology it is not necessary for humans to have complete free will to solve the issue of theodicy.

Calvin further modifies this process of justification and the involvement of free will in his *Institutes of the Christian Religion*. Calvin argues that since God knows at the moment of Adam's creation that he will fall, he also knows the destinies of each being. According to the strictest form of Calvinism, there are two classes of beings:[376] the elect, who are destined to be saved, and the reprobate, who are not. According to what is called the doctrine of double predestination, the members of each group are predestined, "by the decrees of God, for the manifestation of his glory, some…unto everlasting life, and others foreordained to everlasting death."[377]

Criminologists sometimes misrepresent Calvin's doctrine of predestination as a theology in which people are destined to be either good or evil. This is not exactly the case. Nor is it the case that any human being can know whether another is predestined to be evil or to sin. Further, although in the *Institutes* Calvin claims that you can never tell to which group any person belongs until final judgment, the Westminster Confessions declare you can be assured of yourself if you are devout.

> Men attending the will of God revealed in his Word, and yielding obedience thereunto, may, from the certainty of their effectual vocation, be assured of their eternal election. So shall this doctrine afford matter of praise, reverence, and admiration of God; and of humility, diligence, and abundant consolation to all that sincerely obey the gospel.[378]

Finally, all people have to obey the law even if they are not justified or part of the elect. Taking these two principles together creates a moral system in which people who believe they are elect (because they are devout) can dictate who is not elect and how they should behave.[379] It is important to note, however, that it is not simply the case that some people are predestined to be evil. To be reprobate is not the same as to be evil, nor is it the case that those people who are destined for damnation have any less control than those who are saved.

Evil and Criminals

Simon Baron-Cohen's recent book *The Science of Evil* attempts to remove evil from a religious context, noting that when it comes to describing human behavior, "evil is treated as incomprehensible, a topic that cannot be dealt with because the scale of the horror is so great that nothing can convey its enormity."[380] Despite Baron-Cohen's

insistence on evil's incomprehensibility, he presents a very flattened concept of evil when compared to the concept within theology.

The symbolic power of evil lies in the fact that the tie to religion can never be fully severed. The use of evil in Baron-Cohen's texts is meant to invoke the irrational—a sphere of discourse where reasonable and measured reactions are, on the whole, ineffective. He, like other authors, borrows from the Christian theological system but wants to operate outside it. Other authors who write about evil and crime, such as M. Scott Peck and Michael Stone, similarly acknowledge that the word has religious roots but ultimately do not draw on them. Authors such as Terry Cooper attempt to reconcile this use of evil to refer to human destructiveness with Christian theological discussions of evil and sin, and achieve varying results.[381] Yet the fact remains that when any of these authors use the word evil to describe criminal activity or criminals, they elide the complexity of the concept within Christian thought.

These analyses present evil embodied in criminals as unredeemable. In fact, evil violent sexual criminals are almost always those who are not only beyond help, but also beyond pity. Often news media depict the evil sexually violent offender as an utterly abject creature. Although psychologists and psychiatrists discuss evil in a more nuanced way, it is only a placeholder for the most horrible or the unimaginable.[382] Thus, although the criminological, metaphorical and psychiatric use of the word *evil* to describe criminals is related symbolically to Christian theological concepts, in actuality it is incompatible.

David Frankfurter notes in his work on ritual abuse throughout history that more harm is done, especially to children, in the name of purging evil than is done in the name of evil itself.

> Historically verifiable atrocities take place not in the ceremonies of some evil realm or as expressions of some ontological evil force, but rather in the course of purging evil and its alleged devotees from the world. From the most localized witch-finding movement to the most broad-scale attempts at genocide, it is the discourse of evil and monstrosity and of their *annihilation* that most consistently motivates participants—in moods of determination and ebullience—to unspeakable violence, evil.[383]

For example: all of the children hurt or killed during the Satanic Abuse scandals of the 1980s were hurt or killed during exorcism rituals, not during satanic rites. The specter of evil distorts perception, making things seem bigger and worse than they are, and causes those who fear it to do whatever is necessary to rid themselves of that evil, including putting children at risk. The specter of the demon looms so large it justifies any risk.

Frankfurter's work shows that it is useful to consider how powerful the specter of evil looms when looking at cases where, as he notes in an "unusually positivistic" move, the feared objects are "not real."[384] In the case of the rumored evil of sexually violent offenders, fear is so large that it makes suspect any plea for mercy. This fear, as theorists such as John Douard, Jonathan Simon, and Mona Lynch note, drives both vigilantism and the rapid spread of, and fervent support for, notification and registration laws, even as mounting evidence shows that these laws are not effective.[385]

There is another side to the concept of the sexually violent offender: there exist a small number of people who stalk, abduct, molest and murder children. Some of these people engage in this behavior repeatedly, and some literally ask to be locked up.[386] The crimes that these people have committed are both real and incomprehensible; they are outside the realm of the law and thus truly monstrous in a Foucauldian sense. Even if we reject a system that explains their motivations through the use of a Manichean evil force, it is still necessary to understand that encountering such incomprehensibility requires a form of psychological and social splitting, marking the behavior of these men as irrevocably bad. Labeling them as monsters and evil serves an important social, religious, and symbolic function as a way of categorizing and understanding the devastation their actions cause.

What I want to reject here is not that function, but the facile use of evil. In the end, theological categories of humanity and evil offer a complex and varied way to understand human behavior, even in its worst manifestations, and using the label *evil* to describe sexually violent offenders elides this complexity. Instead, I propose another religiously based theory of monstrosity and marking: René Girard's system of scapegoat and sacrifice.

The Sacrificable Monster

Most of the long history of the concept of *monstrous* within Western culture has been about a type of visible monstrosity: the human animal hybrid, the wondrous, and the freakish.[387] Two of the most foundational texts for the discussion of monstrosity and criminality, Michel Foucault's *Abnormal* and Georges Canguilheim's *Knowledge of Life*, discuss the criminal or law-breaching monster as a figure of monstrous embodiment. This

is why Andrew Sharpe, in *Foucault's Monsters and the Challenge of Law*, asks whether it is possible for the law to "countenance application of the monster label to individuals not considered monsters at birth."[388]

In contrast, the emphasis on the invisibility of sex offenders I discussed in the previous chapter shows that the monstrosity of the violent sexual offender is not the typical hybrid or freakish monster.[389] Sex offenders do not look monstrous. They look entirely, unsettlingly, normal. What the term refers to is an inner monstrosity, or, more specifically, the potential for monstrous behavior and a contained monstrous sexual desire. This behavior is defined primarily in terms of the threat it poses to the normal, non-monstrous community. As discussed earlier, since this monstrous desire, this inner monstrosity, is not visible, notification and registration laws function as system of marking and make his difference visible.[390]

The monstrousness of the sexually violent offender is invisible but not mutable. That is, the function of these marking systems and labels is to identify an inner monstrous desire that, once it is known, is understood to have always been present and also to be irremovable according to the logic used to justify legal sanctions. Further, since it is possible that any given person could harbor these desires and that any community could be found to contain such monsters, both this monstrosity and the necessity of interaction with it can be understood as universally possible for all human beings. According to René Girard's theory of sacrifice, identifying a sexually violent offender focuses the fear of this potential, understood as fear that oneself could be a monster as well as fear that one could encounter a monster, and resolves the tension through destruction of the point of focus.

In *Violence and the Sacred*, René Girard uses an anthropological form of religious studies to articulate a theory of sacrificial violence. He argues it is a ritual action performed to arbitrate violence within a community rather than an act of communication between humans and a deity. According to this system, desire for violence builds in the collective human experience until it reaches a breaking point. At this moment, which Girard calls the "sacrificial crisis," violent desire must be directed toward an appropriate victim in order to prevent the destruction of society as a whole.[391] Religious rituals surround the choosing of an appropriate sacrificial victim. This process ritually and regularly appeases the violence that otherwise would destroy social order. Girard argues that sacrifice functions as "an instrument of prevention in the struggle against violence,"[392] but what is prevented is the violence of society against itself, not the violent potential of the sacrificial victim.

The importance of Girard's theory for understanding the treatment of sexually violent offenders is a function of two particularities of his work. First, he has a very flexible notion of what constitutes a religious ritual. For Girard, the term *religious* encapsulates both rituals that are recognized as part of religion and those that perform the same function but which are not technically religious. His theory of a sacrificial crisis can be, and has been, used to describe social rituals outside formal church settings. Second, the sacrificed by definition must always be chosen from the ranks of what Girard calls the *sacrificable*: a particular sub-group of society who are both human enough to function metonymically and not human enough to distinguish their sacrifice from murder. The sexually violent offender is a human being who through his actions or the accusation of

actions gains the label *monster*, and who, as discussed in the last chapter, is visually indistinguishable from the non-sexually criminal human.

Various authors have used Girard's theory of displaced violence to explain the treatment of sexually violent offenders in the United States, particularly as a function of expressive justice, wherein laws are designed to express public outrage or condemnation rather than to effect change. Lawyer and legal theorist John Steele argues that expressive punishment functions as the heir to Girardian ritual or sacred violence, making the law "our modern social technology of violence."[393] He notes the spread of sex offender laws in the 1990s as one incarnation of Girardian expressive punishment, particularly because it is "pathological," is "inflicted randomly," "unjustly," and disproportionately against "socially marginalized scapegoats."[394] Other theorists have used the concept of the scapegoat more generally, either drawing directly from Girard[395] or from Giorgio Agamben's similar theory of *Homo Sacer*.[396] Both the concept of displaced violence and the ritualized function of the scapegoat are essential to Girard's theory and beneficial in understanding the symbolic function of the sex offender as monster. What is most applicable about Girard's theory, and what I focus on here, is his attention to the close relationship between the sacrificing and the sacrificed.

This section will examine the role of mimetic desire and evaluate the effectiveness of using Girard's literary and religiously based theory to understand the cultural and social reactions to sexually violent offenders, ultimately concluding that the sexually violent offender functions as a monstrous sacrificial other, and that articulating him as such leads to a deeper understanding of the social system of sexual violence. Sharp, in *Foucault's Monsters and the Challenge of Law*, makes a distinction between a

Foucauldian monster and a Girardian scapegoat, arguing that ultimately the Girardian scapegoat does not evoke the same sense of utter abject otherness as the Foucauldian monster because the scapegoat is always chosen from the realm of the human. This distinction functions well when the monsters under consideration are, as they are in Sharpe's study, defined by or presented as physically and visually abnormal: conjoined twins, transsexual individuals, and admixed human/animal embryos. This distinction is less useful, and less applicable, in cases where monstrosity is not visible. Girard's theory takes the non-physically abnormal monster as its subject, and thus it is a particularly useful theory when articulating why cultures label certain individuals monstrous even though they do not display monstrous embodiment.

Girard's Sacrificial Other

In Girard's theory, scapegoats or sacrificial victims are chosen from a group of "exterior or marginal individuals, incapable of establishing or sharing the social bonds that link the rest of the inhabitants… between these victims and the community a crucial social link is missing, so they can be exposed to violence without fear of reprisal."[397] Girard ultimately cautions against understanding the difference between the victim of sacrifice and the community as an absolute or objectively measurable one. Rather, it is a distinction made within the confines of the ritual itself through a process he calls the formation of the "monstrous double."[398] Such a victim must be alike enough to humankind to be a substitute within the ritual sacrifice and transgress the boundary between human and non-human freely.

> We should not conclude, however, that the surrogate victim is simply foreign to the community. Rather, he is seen as a "monstrous double." He partakes of all

> possible differences within the community, particularly the difference between within and without; for he passes freely from the interior to the exterior and back again. Thus, the surrogate victim constitutes both a link and a barrier between the community and the sacred. To even so much as represent this extraordinary victim the ritual victim must belong both to the community and to the sacred.[399]

In order to relieve the tension of violence building within society, the sacrificed must be able to metonymically symbolize all human violent potential. Yet the victim must also be discontinuous from the rest of society, and this difference must be communally recognized. This both justifies his sacrifice and contains the sacrificial crisis. Without sameness, the sacrifice will not function as a purging ritual. Without difference, sacrifice cannot be contained and all members of the human community would be in danger of destruction.

In fact, the differences between the sacrificed and those who sacrifice are often only perceivable by those within the ritual. The differences are not always so apparent from the outside. It is once this similarity is reached, once "all differences have been eliminated and the similarity between two figures has been achieved, we say that the antagonists are double. It is their interchangeability that makes possible the act of sacrificial substitution.[400] In a sense, the choice of victim is always somewhat arbitrary, and it is very likely that the person who leads the call for sacrifice may become the sacrificable in the next crisis. The process by which ritual actors identify the sacrificable victim requires a mirroring between those who call for the sacrifice and the chosen victim. Because of this mirroring, Girard says that the violence that drives these rituals could more comprehensibly be called "mimetic desire."[401]

In this scenario, there are two characters: the protagonist, who may perform the sacrifice or lead the charge for a sacrifice, and the antagonist, who is marked as sacrificable and ultimately killed. Labeling the antagonist as monstrous allows the protagonist to justify his or her sacrifice, even as he or she recognizes the similarity between him or herself and the target of sacrificial violence:

> The subject watches the monstrosity that takes shape between him and outside him simultaneously. In his efforts to explain what is happening to him, he attributes the origin of the apparition to some exterior cause. Surely, he thinks, this vision is too bizarre to emanate from the familiar country within, too foreign in fact to derive from the world of men. The whole interpretation of the experience is dominated by the sense that the monster is alien to himself.[402]

Marking the sacrificable helps the subject to make sense of an incomprehensible change both within himself and between himself and another. Yet the origin of the sacrificable makes it possible that anyone at any time could be marked this way. Ultimately, the differences identified during the sacrificial crisis are unstable.[403] In order to function as a true Girardian sacrificial crisis the oppressor must be able to become the oppressed and vice versa.

The ritual turns a labeling process into one of discovery. The monstrosity identified during the construction of the Girardian monstrous double is a symbolic and transitory type of monstrosity; it cannot be an innate monstrosity, but it is ultimately perceived as one. Once the community understands the monstrosity, once the ritual actors assign monstrosity to one of the doubles, it is retroactively innate. Participants come to understand not that the sacrificable has been turned into a monster by the ritual, but that

that the sacrificable was always a monster. The ritual of identification and naming is designed to convince participants that this monstrosity was there all along.

The Sexually Violent Offender as Sacrificial Other

The invisibility of the sexually violent offender makes him eligible as a sacrificial other in the Girardian system. His monstrosity threatening to the social order because it undermines an assumption often made in judging humanity that difference, particularly monstrous different, should be visible.[404] In Chapter Three, I discussed how the expectation of visible difference functioned in the panic around predatory criminal offenders and led to the creation of a marking system. Here, I focus on how this invisibility intensifies the fear surrounding the sexually violent offender, allowing for the transference of sexual panics from one source to another. This transference ultimately makes the sex offender a target for sacrificial violence.

The invisibility of the sex offender monster puts him into the realm of the uncanny, what Freud called the *unheimlich*.[405] In this sense, a monster is unsettling because he is unexpected but not quite foreign; the sex offender functions as a monster because he is almost familiar, but not quite. This particular form of monstrosity also suggests a fear of transformation rather than a fear of invasion. This is a fear not only that monsters may attack so-called "normal" humans, but that people we thought were normal humans might turn out to be monsters. Timothy Beal notes in *Religion and its Monsters* that this undermines a sense of security, that monsters are "figures of chaos and disorientation *within* order and orientation, revealing deep insecurities in one's faith in oneself, one's society and one's world."[406] The sex offender functions very literally as the invading dangerous anomalous other who has come from somewhere else and settled,

unbeknownst to us, in our backyards. Earl Shriner and Jesse Timmendequas were men recently released from sexual psychopath treatment centers living, unmarked by public law, in safe suburban neighborhoods. They are not recognizably different, and so their difference, once revealed, is all the more disturbing.

With the sexual criminal, the concept of the uncanny also functions on a figurative level. The monster is something foreign that has gotten inside these offenders themselves. On this level, monstrosity is an inhuman desire hidden in a human. The invading outside is a desire to sexually harm children, a desire so abjectly horrible it becomes the defining attribute not only of the violent sexual criminal actor, but the crime by which so many other crimes are defined.

Guy Hocquenghem described this precise aspect of sex crimes against children, and the fear of those crimes, in 1978:

> There exists then a particular category of the pervert, in the strict sense, of monsters whose aim in life is to practice sex with children. Indeed, they become perverts and intolerable monsters since the crime as such is recognized and constituted, and now strengthened by the whole psychoanalytical and sociological arsenal. What we are doing is constructing an entirely new type of criminal, a criminal so inconceivably horrible that his crime goes beyond any explanation, any victim.[407]

In this reading, the desire of sex offenders is an aim so primal and so overwhelming that it cannot remain hidden. This is yet another mark of the kind of monstrosity embodied by sex offenders, an inhuman thing which can masquerade as normal human to avoid detection, but whose true monstrous side will always eventually emerge. In fact, as

Frankfurter notes, even the rumor that someone in a community harbors secret desires is enough to trigger a fear response, one that he notes aligns the "bestial Other" with all the "dangers that we associate with the periphery of the world," and yet does so "while underlining *our* civilization and humanness."[408]As it is, the systems underline a point of contrast between the human and the nonhuman which serves not only to protect us, but also, as Frankfurter notes, to underline our own humanness. The particular horrendousness of the violent sexual offender stems from the fear that he may be human, and that his sexual desires, perverse as they may be, are only an example of a human being pushed to an extreme. This feared sexuality is, like the outward appearance of the sex offender, so familiar to us that it becomes even more frightening.

In *Unspeakable Acts*, Richard Pryor calls this phenomenon the "myth of abnormality."[409] He argues that if it were not for this mythology, a mythology kept in place by the metaphors of monstrosity, it would be much easier to recognize that these men are not radically different. Understanding that their experiences of sexuality and their perceptions of their own behavior are relatable to the experience of normal sexuality, specifically male sexuality, would allow for a more comprehensive treatment protocol, and, in his words, "leads to the obvious question, not about why men offend, but as has also been suggested by Scully and Marolla in regard to men who rape adult women, why some men do not."[410] For Pryor, it is necessary not only to ask how *these* men become something we want to catalogue as monsters, but what that has to do with how men become men in general. Casting these men as monsters also absolves non-offending men of responsibility for their complicity in a sexual system rife with systemic violence and dominance.

The media sensation around sex offenders, in itself, is perhaps a reaction against their unremarkable appearance. Because of the invisibility of these criminals discussed in the previous chapter, that is, their middle-classed white maleness, announcing the perversity of their inner desires is necessary in order to unmask their true monstrosity. As Sarah Brown notes in *Treating Sex Offenders*, making the sex offender qualitatively different from the normal human is comforting:

> The image of sex offenders portrayed by the media is of lonely, isolated men who offend in this way because they are "evil," "sick" or "mad" and ultimately different in some way from the "normal" members of society…"evil" loners who were born "bad" and thus were driven to commit the most heinous crimes, and who, ultimately, have no hope of rehabilitation. The pervasive and enduring nature of this image perhaps lies in the impression that as a society, we find it easier to believe crimes with motives we find hard to comprehend are carried out by "abnormal" individuals living at the fringes of our communities. A corollary of this is that we find it easy to believe, and gain comfort from the idea, that these offenders can be readily identified by some "abnormal" characteristic(s) that sets them apart from the "normal" population.[411]

An isolated, lonely man who preys on others becomes the evil monster who cannot be changed, but instead must be eliminated or inoculated. It is an image that serves not only to justify the harsh treatment of sex offenders, but also reinforces the boundary of humanness. Brown calls this image comforting because it allows for the recognition of the danger posed by these individuals without sacrificing any previously held image of

what it means to be human, and, thus, it serves to reify exactly what it means to be non-monstrous.

The revelation of the secret perversions of the sex offender solidify the safety, the utter humanness, of the white, male, middle-class subject because the sex offender is so often invisible and unremarkable. Anne Cossins notes in her work on masculinity and sexuality that the construction of the concept of the family man is as rigid as the construction of pedophile. As much as we are frightened by the predatory pedophile because he is abnormal, she argues we are perhaps more frightened by the incestuous father, so frightened, in fact that it is impossible to name this fear.[412] The fear of the sexually abusive man parading as a family man is sublimated into outrage against the sexually violent offender. Systems that place distance between sex offenders and humans without analyzing the purpose of that labeling obscure a deeper fear of the perverse possibility inherent in all of us.

Recognizing the actions of violent sexual criminal offenders as part of a human continuum of sexual behavior is difficult because it would emphasize the fact that a loved and cherished human being could commit these actions. John Douard, a New Jersey public defender with, in his words, "a case load made up entirely of sex offenders whom the state has, or is attempting to, civilly commit," criticizes the laws as not only expressive of fear and loathing, but an example of Girardian mimetic desire.[413] Here, the sex offender becomes a reflection of and a scapegoat for fears about the sexually monstrous potential of all humans:

> When I identify a monstrosity, I am engaged in an effort to prevent contamination of my self. The fear of contamination is nothing but the fear that I might become

> monstrous. By externalizing the monster, I make it possible to segregate and render harmless the violent desires that threaten my sense of identity as a person. More specifically, when I externalize my monstrous sexual desires. I can substitute the Other (in this case the sex offender) as a sacrificial alternative to self-destruction. By sacrificing the sex offender to the network of laws intended to render him harmless, I have sacrificed the surrogate victim of the violence I might otherwise turn on myself.[414]

In this sense, under the Girardian model the monstrous sex offender is sacrificed not only as a way to relieve mounting violent tension by directing that violence onto an appropriate victim, but also as the symbolic representation of an inner sexual desire. That is, the possibility for deviant sexuality emerging from any human is concentrated and deflected onto the violent sexual offender; his sacrifice makes it possible for the rest of the society to trust one another again.

Where, as noted earlier, John Steele argues that the use of expressive justice in contemporary criminal law is a masked incarnation of ritualized violence, Douard argues that it the medical language of sexually violent offender statutes which masks the ritual and sacrificial nature of the treatment of sex offenders.

> The sexuality of a sex offender is widely regarded as monstrous. We do not merely hate the sin; we hate the sinner, and we want the sinner to be removed from our presence, because the sex offender crosses boundaries that secure our sense of sexual identity and order. However, if law functions in part as the expression of disgust or horror, the result may be an unjust exclusion of sex offenders from the human community, or more precisely, the community of

> citizens who are regarded, by the United States legal system, as capable of acting as free and responsible agents. To mask the injustice of these statutes, what were once regarded as acts so evil they triggered horror, have been reframed as mad acts and fitting into a pattern of natural causes. But, mad or bad, sex offenders function as scapegoats.[415]

Using medical labels for madness allows not only the circumvention of the criminal justice system, as outlined in Chapter Two, but also for a way to categorize the sexually violent offender as a dangerous person instead of someone who has committed dangerous acts. For Douard, the always-contentious relationship between acts and status in the law is tied rhetorically to the Christian theological distinction between sin and sinner. Although some people use the phrase *love the sinner, hate the sin* in contemporary Christian discussions of homosexuality within the United States, this distinction breaks down when it comes to the sexuality of sexually violent offender—a person for whom there is little distinction between sin and sinner, between acts and status, and for whom sexual criminal acts have become a criminal sexual identity.

Conclusion: Evil, Sexuality and Violence

Girard's conception of violence itself takes on an agency theorized quite separately from the humans who enact it. He identifies violence as "the divine force that everyone tries to use for his own purposes and that ends by using everyone for its own[416]," and as a force which, if not redirected through ritual sacrifice, "overflows its confines and floods the surrounding area."[417] The ultimate aim of violence, if we take these two characterizations together, is destruction—indiscriminate and total.

Interestingly, he characterizes sexuality in the same way.

> Sexuality is one of those primary forces whose sovereignty over man is assured by man's firm belief in his sovereignty over it.…Sexuality is impure because it has to do with violence.…Like violence, sexual desire tends to fasten upon surrogate objects if the object to which it was originally attracted remains inaccessible; it willingly accepts substitutes. And again, like violence, repressed sexual desire accumulates energy that sooner or later bursts forth, causing tremendous havoc. It is also worth noting that the shift from violence to sexuality and from sexuality to violence is easily affected, even by the most 'normal' of individuals, totally lacking in perversion.[418]

The important insight here is not that violence (or desire) will overflow its confines if not appeased, but that to accept this as an actual mechanism of sexual desire is extremely problematic.[419] Yet sex offender laws build on this precarious premise. On one level, these laws allow for a ritual outlet of rage against the threat of sexual violence and the fear that any father, teacher or priest may be harmful by publicly selecting certain targets. Controlling dangerous criminals theoretically alleviates public fear and paranoia. On another level, sex offender laws assume that the sexual violence contained in the bodies of sex offenders themselves is predetermined. These criminal offenders are locked up precisely because they have been identified as individuals in possession of large and unappeased stores of sexual violence, which, if they were allowed freedom, would be channeled into acts against innocent victims. Whether they are called sexually dangerous persons, pedophiles, predators, monsters, or evil incarnate, in the end these labels all signify the same basic idea: people exist who possess dangerous sexual desires and that

such people must be defined by these desires. The next and last chapter argues that this process is the imposition of a uniquely criminal sexual identity.

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[331] John Douard, "Sex Offender as Scapegoat: The Monstrous Other Within," *New York Law School Law Review* 53 (2008): 32.
[332] Edward J. Ingebretsen, *At Stake: Monsters and the Rhetoric of Fear in Public Culture* (Chicago: University of Chicago Press, 2001); Edward Ingebretsen, "Monster-Making: A Politics of Persuasion," *The Journal of American Culture* 21, no. 2 (2004); Arnold I. Davidson, "The Horror of Monsters," in *The Boundaries of Humanity: Humans, Animals, Machines*, ed. James J. Sheehan and Morton Sosna (Berkeley: University of California Press, 1991); Daston and Park, *Wonders and the Order of Nature, 1150–1750*.
[333] Jeffrey Jerome Cohen, *Monster Theory: Reading Culture* (Minneapolis: University of Minnesota Press, 1996); Leonard Cassuto, *The Inhuman Race: The Racial Grotesque in American Literature and Culture* (New York: Columbia University Press, 1996); Anne McClintock, *Imperial Leather: Race, Gender, and Sexuality in the Colonial Conquest* (New York ; London: Routledge, 1995); Rosemarie Garland-Thomson, *Freakery*.
[334] Simon Baron-Cohen, *The Science of Evil: On Empathy and the Origins of Cruelty* (New York: Basic Books, 2011); Tom Mason, *Forensic Psychiatry: Influences of Evil* (Totowa: Humana Press, 2006); Henry Richards, "Evil Intent: Violence and Disorders of the Will," in *Psychopathy: Antisocial, Criminal, and Violent Behavior*, ed. Theodore Millon, et al. (New York: Guilford Press, 1998); Tom Mason, "An Archaeology of the Psychopath," in *Forensic Psychiatry*, ed. Tom Mason (Humana Press, 2006); and Stephen T. Asma, *On Monsters: An Unnatural History of Our Worst Fears* (New York: Oxford University Press, 2009).
[335] Adam Sampson, *Acts of Abuse: Sex Offenders and the Criminal Justice System* (New York: Routledge, 1994), 34.
[336] Simon, "Managing the Monstrous," 456.
[337] Joseph E. Kennedy, "Monstrous Offenders and the Search for Solidarity through Modern Punishment," *Hastings Law Journal* 51 (2000).
[338] Joelle Anne Moreno, " 'Whoever Fights Monsters Should See to It That in the Process She Does Not Become a Monster': Hunting the Sexual Predator with Silver Bullets—Federal Rules of Evidence 413–415—and a Stake through the Heart—*Kansas V. Hendricks*," *University of Florida Law Review* 49 (1997); Simon, "Managing the Monstrous."
[339] Most notably, Schultz, *Not Monsters*.
[340] Earl-Hubbard, "The Child Sex Offender Registration Laws," 861.
[341] Rafter, *Creating Born Criminals*, 1.
[342] Douard, "Sex Offender as Scapegoat," 36.
[343] Kincaid, *Erotic Innocence*, 76.
[344] Michael H. Stone, *The Anatomy of Evil* (Amherst: Prometheus Books, 2009), 15.
[345] Ibid.
[346] I do not wish to argue against this distancing directly as this is not primarily a theological project. There are theologians who argue, and I wholeheartedly agree, that humanity should not be awarded special status above other creatures, neither in terms of

some God-given privilege or some pseudo-scientific measure of superiority (or, to put it another, more theologically-minded way, that personhood is not equal to humanness). Removing God's gift from discussions of what constitutes a human is, for many, the first step toward this post-humanism. But, as many ethicists and theologians argue, one can have a vision of the diversity of the world that holds that human persons are guaranteed access to grace and redemption without making the claim that humans are privileged. Conversely, one can have an entirely secular and scientifically rigorous view of the natural world which privileges humans as the most advanced or evolved.

[347] In America and the United Kingdom, I would link the specific reemergence of this Manichean concept of evil to the rise of a certain theology in which demons and Satan are very active malevolent forces, usually represented in forms of evangelical Christianity and the Catholic charismatic movement. This connection was particularly evident during the Satanic Abuse Scandals in the 1980s. For a comprehensive discussion of religion in that era, see David Frankfurter, *Evil Incarnate: Rumors of Demonic Conspiracy and Ritual Abuse in History* (Princeton: Princeton University Press, 2006).

[348] Although all of the theologians I discuss here engage theodicy on Augustinian terms, that is, engage the free will debate, there are other ways to imagine the category of evil. Twentieth century theologian John Hick categorizes theodicy into two main types; the Augustinian, which is largely what is represented here, and the Ireanean, after Ireaneus, a second century theologian known for his arguments against Gnosticism. In Ireanean theodicy, according to Hick, the solution to the theodicy problem is an instrumental one. If we can show that evil has a purpose in God's creation, then it is acceptable for evil to exist. This is the form of the theodicy of Schleiermacher, and that of Hick himself.

[349] Although this did become the predominant theory of evil, it did not prevent the depiction of evil. Therefore, "despite the fact that, at the level of theological discourse, Augustine's account of the nature of evil was received into the tradition and became widely accepted as orthodox belief, depictions of evil in thousands of guises appeared everywhere…evil was felt as fact, something known and feared." Brian Horne, "Imagining Evil," excerpted in Jeff Astley, Ann Loades, and David Brown, *Evil: A Reader* (New York: T and T Clark, 2003), 66.

[350] Augustine, *On Genesis*, ed. John E. Rotelle, trans. Edmund Hill (Brooklyn: New City Press, 1990), 98.

[351] Two notes on Augustine: first, other than this very brief introduction to the Manichaean cosmogony, the views of the Manichees that I am using here are those that Augustine mentions in his text. There is no question that he is a biased source, but Augustine was a Manichee, and so he is disagreeing with his younger self. Second, Augustine worked primarily with the Vulgate, Jerome's Latin translation of the Greek Bible. The Vulgate has various translation problems, and so Augustine's exegesis sometimes goes into details that we do not find in our contemporary texts.

[352] Augustine, *On Genesis*, 43.

[353] Ibid.

[354] Although Augustine argues that evil is insubstantial, he allows that it has substantive effects. The absence of good and "the absence of order—the attempted perversion of what *is*—can be felt and depicted even while, paradoxically, we can say that it is an absence." Augustine noted that the negation of good that we call evil has effects,

particularly on the mind, which is unable to perceive clearly. Brian Horne, "Imagining Evil," excerpted in Astley, Loades, and Brown, *Evil: A Reader*, 69.
[355] Augustine, *On Genesis*, 98.
[356] Natural Law is the fundamental backbone of moral theology in Catholicism, and holds that if things are natural, that is according to the order of the Universe and its creator, than they are good and moral. There is a large body of work from Catholic moral theologians in bioethics dedicated to determining exactly what parts of science are the work of man, and thus subject to sin, and what parts are the discovery of nature, and thus without sin.
[357] Augustine, *On Genesis*, 100.
[358] For Augustine, one of the most important metaphors to understanding the state of human will after the Fall is that of blindness. It is an ableist metaphor, and so I have tried to avoid it as much as possible.
[359] Augustine's idea of freedom is absolute in a libertarian way; he argues that human beings have the ability to make decisions that are entirely undetermined. Although later detractors would argue that he is inconsistent (at best) in his defense of this type of freedom, he is hailed by some as one of the "great defenders of libertarianism." Thomas Williams, in his preface to Augustine and Thomas Williams, *On Free Choice of the Will* (Indianapolis: Hackett, 1993), xi.
[360] Augustine, *On Genesis*, 5.
[361] ———, *The City of God against the Pagans*, trans. R. W. Dyson, (New York: Cambridge University Press, 1998), 610.
[362] This is a complicated moment. Once Eve allows the suggestion of the serpent and her own examination of the tree to cause doubt in the intentions of God, she has, according to Augustine, already begun in sin. She has given the consent of her reason to engage in disobedience by questioning the motivations of God. The actual eating makes bodily, and, therefore, punishable, the pride which existed already in the taking of the fruit. In the moment before eating but after consent, she has both sinned already and not sinned yet.
[363] Augustine, *The City of God against the Pagans*.
[364] ———, *On Genesis*, 100.
[365] Augustine actually argues that the seed (or *homunculus*) of every potential human was present in the testes of Adam's body when he was punished, and it is thus that we inherit the sin.
[366] In addition, Augustine makes a troubling defense of this system in *The City of God against the Pagans* when he argues that the fall of the angels that preceded the fall of Man mirrored it, which led to, as Hick notes, "the basic and inevitable criticism… that the idea of an unqualifiedly good creature committing sin is self-contradictory and unintelligible." John Hick, *Evil and the God of Love* (New York: Harper and Row, 1966). God is ultimately responsible for the creation of evil, a problem Augustine himself realized. To solve this, he concluded that the angels who fell were not as perfectly good as the angels who did not fall.
[367] Thomas Aquinas follows this in *Summa Theologica*, quoting Augustine and arguing that only acts of the will can be considered sin, as opposed to the involuntary acts of the body.
[368] There were various controversies around the concept of free will during the

Reformation and the Counter-Reformation, including some proposed by Cornelius Jansen (the Jansenists) and Jacobus Arminius (the Remonstrants).

[369] It is slightly different in different denominations, for example, the Anglican and Episcopalian churches are closer to Roman Catholicism in that they have a split justification, while in the Methodist church the doctrine of justification is tied to the differentiation of *imputed* and *imparted* righteousness.

[370] Augustine maintains both that human nature is defective and that it is necessary good because it is God's creation—that is, the distorted human will that sins is both against nature and in accordance with it. As Augustine says, "though an evil will is not according to nature, but contrary to nature because it is a defect, it nonetheless belongs to the nature of which it is a defect, for it cannot exist except in a nature." Augustine, *The City of God against the Pagan,* 604. This seems to present a very obvious contradiction in Augustine's system.

[371] Hick, *Evil and the God of Love*, 180.

[372] Henry Joseph Schroeder, *Canons and Decrees of the Council of Trent*. (St. Louis: B. Herder Book Co., 1941) 30.

[373] Or, again, blinded.

[374] *Canons and Decrees of the Council of Trent*, 31.

[375] One major difference is that in Calvinism there is no discussion of faith either. "Those of mankind that are predestinated unto life, God, before the foundation of the world was laid…hath chosen in Christ, unto everlasting glory, out of his mere free grace and love, without any foresight of faith or good works, or perseverance in either of them." John H. Leith, ed. *Creeds of the Churches: A Reader in Christian Doctrine, from the Bible to the Present*. (Atlanta: John Knox Press, 1982) 198.

[376] *Beings* here refers to both humans and angels.

[377] *Creeds of the Churches*, 198.

[378] *Creeds of the Churches*, 199.

[379] Jeremy Bentham took issue with this particular aspect of Calvinism, as discussed in Chapter One of this project.

[380] Baron-Cohen, *The Science of Evil*, 5.

[381] For a particularly disastrous attempt at engaging a holistic account of sin with a profile of sexual offenders, see Palermo and Farkas, *The Dilemma of the Sexual Offender*.

[382] In fact, in M. Scott Peck's *People of the Lie,* he identifies one set of evil parents as such when they decide their son must suffer from some genetic, incurable disorder that makes him a common criminal rather than accept that they may need to go into family counseling.

[383] Frankfurter, *Evil Incarnate*, 224.

[384] Ibid., xiii.

[385] Lynch, "Pedophiles and Cyber-Predators as Contaminating Forces."; Jonathan Simon, "Megan's Law: Crime and Democracy in Late Modern America," *Law and Social Inquiry* 25, no. 4 (2000); Douard, "Loathing the Sinner, Medicalizing the Sin."; and Douard, "Sex Offender as Scapegoat."

[386] The most famous case is that of Westley Allen Dodd, arrested, charged and sentenced to death for the murder of three young boys. Court briefs quoted Dodd arguing for his own execution, saying "if I do escape, I promise you I will kill and rape again, and I will

enjoy every minute of it." Timothy Egan, "Illusions Are Also Left Dead as Child-Killer Awaits Noose," *The New York Times*, Dec 23, 1992.
[387] Fernando Vidal, "Extraordinary Bodies and the Physicotheological Imagination," in *The Faces of Nature in Enlightenment Europe*, ed. Lorraine Daston and Gianna Pomata (Berlin: BWV-Berliner Wissenschafts-Verlag, 2003); Davidson, "The Horror of Monsters."; Garland-Thomson, *Freakery*.
[388] Andrew N. Sharpe, *Foucault's Monsters and the Challenge of Law* (New York: Routledge, 2010), 13.
[389] There are also discussions of sexually monstrous individuals tied to a non-white sexuality, in which case the monster metaphor for otherness in these moral panics is tied to a more traditional outsider/insider concept of Otherness, such as the fear of black men contaminating white women in the Southern United States or colonialism and the fear of invasion of a so-called savage other.
[390] Despite this shift in the overarching use of the word monster from referring to a primarily visible abnormality to a primarily invisible abnormality, the link between physical abnormality and moral corruption has not completely disappeared. As disability theorist Lennard Davis notes, "the loose association between what we would now call disability and criminal activity, mental incompetence, sexual license and so on established a legacy that people with disabilities are still having trouble living down." Lennard J. Davis, *The Disability Studies Reader* (New York: Routledge, 2010), 37. In fact, current work within developmental biology and psychological studies seeks a link between what researchers see as disruptions in physical and mental progression, see Seto, *Pedophilia and Sexual Offending against Children*, 121.
[391] René Girard, *Violence and the Sacred*, trans. Patrick Gregory (Baltimore: Johns Hopkins University Press, 1977), 17.
[392] Ibid.
[393] John Steele, "A Seal Pressed in the Hot Wax of Vengeance: A Girardian Understanding of Expressive Punishment," *Journal of Law and Religion* 16, no. 1 (2001), 35.
[394] Ibid., 67.
[395] Tom Inglis, "Sexual Transgression and Scapegoats: A Case Study from Modern Ireland," *Sexualities* 5, no. 1 (2002).
[396] Dale Spencer, "Sex Offender as Homo Sacer," *Punishment and Society* 11, no. 2 (2009).
[397] Girard, *Violence and the Sacred*, 12.
[398] Ibid., 271.
[399] Ibid.
[400] Ibid., 158–9.
[401] "*Mimetic desire* is simply a term more comprehensive than *violence* for religious pollution." Ibid., 148 (emphasis in original).
[402] Ibid., 165.
[403] "An attempt is made to classify the monsters; but despite their initial disparities they end by resembling one another; no stable difference really serves to separate them. And there is really nothing very interesting to say about the hallucinatory aspects of an experience that for all practical purposes exists solely to divert attention from the

essential fact, which is that the antagonists are truly doubles." Ibid., 160.
[404] This assumption has long troubled people with extraordinary embodiment. For a discussion of the connection between morality and abnormality in disability studies, see the work of Lennard J. Davis and Rosemarie Garland-Thomson.
[405] Sigmund Freud, *The Uncanny*, ed. Adam Phillips, trans. David McClintock (London: Penguin, 2003).
[406] Timothy K. Beal, *Religion and Its Monsters* (New York: Routledge, 2002), 4.
[407] Foucault, Hocquenghem, and Danet, "Sexual Morality and the Law," 277.
[408] Frankfurter, *Evil Incarnate*, 131.
[409] Pryor, *Unspeakable Acts*, 271.
[410] Ibid., 272.
[411] Brown, *Treating Sex Offenders*, 6.
[412] "The social construct of the 'paedophile' is assigned all those qualities that are eschewed in fatherly masculinity; the 'paedophile' is the over-sexed, dangerous, predatory stranger who is likely to strike at any moment, even though victim report studies show that child sexual abuse by strangers is the *least* common form of child sexual abuse. This suggests that 'pedosexuality', as a stigmatized and deviant form of masculinity, is as much a social construct as 'family-man'-type masculinity." Cossins, *Masculinities, Sexualities, and Child Sexual Abuse*, 132.
[413] Douard, "Loathing the Sinner, Medicalizing the Sin," 36.
[414] Ibid., 45.
[415] Ibid., 37.
[416] Girard, *Violence and the Sacred*, 144.
[417] "Quand la violence n'est pas satisfaite, la violence continue à s'emmagasiner jusqu'au moment où elle déborde et se répand aux alentours avec effets les plus désastreux." René Girard. *La violence et le sacré*. (Paris: Bernard Grasset, 1972), 10.
[418] Girard, *Violence and the Sacred*, 34.
[419] Among other things, it supports the theory that rape is a consequence of not having enough proper sexual outlets.

Chapter Five

Criminal Sexual Identity

> Juridical discourse on sexuality always has two focuses: examination of the legitimacy of governmental actions and, often sub silentio, examination of the social acceptability of those persons who are the objects of the government's interventions.
>
> —Nan Hunter[420]

Since the removal of homosexuality from the DSM in 1974 and the decriminalization of sodomy in 2003, the relationship between sexuality, criminality, and madness in the contemporary United States has become less immediately relevant to studies in sexuality and work on sexual identity.[421] Sexual identity, as it is often extrapolated from Michel Foucault's work in *The History of Sexuality, Volume One*, is the transformation of acts into status. To claim a sexual identity is to formulate an idea of a permanent self, status, or being based on past commission of, or continuing desire to commit, certain sexual acts or have sex with certain types of people. In this sense, most contemporary gay, lesbian, bisexual and queer-identified people resist, with good reason, a connection between their own sexual identities and any concepts of madness, danger or criminal behavior.[422] Similarly, there has been a political distancing between these sexualities and identity-constituting sex acts considered to be morally and criminally abhorrent; particularly in the work done to expose the false social links between homosexuality and child molestation.[423]

The narrative of sexual identity presented in queer theory usually claims one of two sources: psychiatric illness or criminal status. But if the history of sexual identity

begins, as Foucault claims it does, with the classification of the homosexual by psychiatrist Carl Westphal in 1870, what happens to that identity once homosexuality has been depathologized? If the history of sexual identity was largely framed, as Harry Oosterhuis claims it was, by forensic sexologists like Krafft-Ebing, what happens to that identity when it is decriminalized? We are left with, on the one hand, an increasingly fluid concept of sexuality, represented by LGBT activism and queer theory, and, on the other, an extremely rigid classification of sexual criminals represented most clearly in the category of sexually violent offenders as it has emerged in the United States since 1990.

In the previous four chapters I explored a history of madness, crime, violence and sexuality: from the moral insanity of Krafft-Ebing's sexual psychopathy to the creation of the incurably mentally abnormal sex criminal, from the voracious sexual predator to the sacrificable violent sexual monster. The category of the sexually violent offender is one linked to madness without psychiatric support, evil without redemption, and incarceration without rehabilitation. This is a history that stands in stark contrast to the way the history of homosexuality way explores sexual identity as a formerly criminal and psychiatric category. The latter history is one of an increasing sexual liberation, while the former, the subject of this project, is one of utter desolation and destruction.

Despite this contrast, it is possible to frame the identity of sexually violent offenders, and, by extension, the identity of all sex offenders, as a form of sexual identity. The legal categorization of sexually violent offenders in the United States is a system in which prior criminal sexual acts are taken to constitute an ongoing dangerous status. This status is necessarily one that both resists treatment modalities and which psychiatrists do not recognize as mental illness, but it is still a status that fits the classic definition of a

deviant sexual identity. Just as the title *homosexual* is gained through the commission of specific homosexual acts, criminal sexual identity is an identity gained through the commission of specific criminal sexual acts. Yet this is an identity that starts from a place of fear and danger, and asks how far that danger goes: how dangerous is the sexuality of the predator, and how much does that danger affect the treatment of other sexualities?

Because the concept of criminal sexual identity is distinct from pathological sexual criminality, it highlights how violent and deviant sexuality function apart from the process of medicalization. I began this project by saying that sexuality was the mechanism through which violence becomes a disease. Sexual perversion allowed psychiatry to meld with the law, yet the concept of criminal sexual identity is no longer necessarily psychological. The previous four chapters have each emphasized how sexuality and sexual desire are used to understand sexually violent crime and to cast it as pathological specifically in the context of sexual desire disorders. That is, sexually violent offenders are not framed primarily as compulsively violent offenders, nor is their sexual deviancy treated as an addiction. They are considered pathological because of a perverse sexual drive.

When direct links to pathology are removed, as, for example in the legislative use of mental abnormality, a category without any specific psychological diagnosis, or in popular understanding where casting sex offenders as sick is considered an act of pity they do not deserve, these individuals are defined by that sexual drive alone. The creation of sexually violent offender civil commitment in 1990, with the attendant marking system, the formation of the metaphoric category of the sexual predator, the new forensic category of mental abnormality, and the subsequent ramping up of sex crime legislation

on a national level have all come together to create a system in which crime is linked directly to desire without the intermediary of madness.

Criminal sexual identity is distinct from criminalized sexual identity in that it is more than an examination of how certain sexualities are criminalized. It is a sexuality defined by criminal actions that cannot exist apart from a system of crime and punishment. Scholars of queer theory and sexuality have noted that the prohibition of certain sexual acts far predates the criminalization or pathologization of their associated identities. As Michael Warner says, "the world was homophobic… before it identified any homosexuals for it to be phobic about."[424] Criminal sexual identity goes beyond the increased surveillance of or penalties for particular sexual actions: it is the effective merging of sexual desire and *mens rea*. In legal terms, *mens rea*, or state of mind, is tied to culpability because how much the accused was aware of his or her actions before, and as, he or she committed a crime dictates how responsible he or she should be held. Criminal sexual identity imputes the most serious *mens rea*: that the accused committed the crime *purposely*.

> A person acts purposely with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
>
> (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.[425]

Desire, broadly construed, is a requirement of purposeful *mens rea*. The actor takes it as her goal to engage in a particular conduct in order to gain a particular result, and she understands the consequences of her actions because she, in fact, hopes those

consequences will arise. This is the very nature of perversions and paraphilias as they are defined within psychoanalytic and sexual psychopathic literature: a particular action is undertaken in order to achieve the attendant result. A violent criminal who is identified as sadistic necessarily engages in violent crimes purposely because it is his sexual desire to see people in pain. He gains sexual fulfillment from the result of his actions.

The use of sexual desire as motive is not new. Krafft-Ebing identified hundreds of fetish-driven sexual criminals for whom stealing, be it undergarments, shoes, or the act itself, brought sexual satisfaction. When sexual desire is used to explain the actions of sex offenders in the contemporary era, however, there is a cultural acceptance of stable and innate sexual identity that undergirds and bolsters it. This cultural acceptance emerged in the last few decades due to identity-politics-based work around sexual expression.[426] Through the mechanism of innate sexual identity, the sexual desire functioning as the sole motive for a crime becomes an intrinsic part of who the criminal actor is. Criminally sexual people are more responsible for their crimes and more likely to reoffend than other criminal people because of the existence of criminal sexual identity.

This chapter argues that feminist theories of gender and sexuality should be employed in order to understand the innate criminality of the sexually violent offender as a form of sexual identity that is constituted as a material somatic truth revealed through behavior and action. Criminal sexual identity is a category created by the languages of medicine, science and law, but it is best understood with the language of feminist and gender theory, both because of the wealth of information and insight such theoretical frameworks have around the concepts of sexuality, and because of the groundbreaking work done by feminist and gender studies theorists around identity formation. Whether

defined as a group of individuals held under the law or as a representational category, sexually violent offenders are the most prominent example of criminal sexual identity. Seeing criminal sexual identity through the language of feminist theory shows how criminal sexual identity has come to shape other sexual identity categories, psychiatrically, politically, legally and rhetorically.

Mounting such an intervention requires utilizing theories of gender alongside theories of sexuality. The past two decades have seen a division in the field of Women's, Gender, and Sexuality studies. Scholars such as Gayle Rubin, Eve Sedgwick and Janet Halley argue that the study of sexuality and the study of gender and feminist theory need to be separate. Consequently, both feminist and queer theorists have largely overlooked the structures of gender, sex and power that are deeply entwined in criminal sexual identity. Meanwhile, scholars in other fields have combined the works of scholars of sexuality and queer theory with feminist analysis of gender and power without realizing they are pulling from disparate fields.

This chapter shows the possibility for the reunification of gender and sexuality theories in two ways: showing, first, that many of the initial arguments made for separating sexuality studies from feminism are not applicable in the case of criminal sexual identity, and then exploring how this boundary has already begun to break down in the field of feminist science studies and the return to materiality. I begin with an argument for criminal sexual identity drawn from Michel Foucault, using both the theory of biopower and identity most utilized in feminist and queer theory and the concept of the *médico-légal* monster used by criminologists and those who examine the representations of crime. Then I examine three theorists whose arguments for a new theory of sexuality

are often taken to be foundational to splitting feminism from queer theory, and apply their arguments about a theory of sexuality to this emerging concept of criminal sexual identity. I start with Gayle Rubin's arguments in 1983 for the separation of gender, sex and sexuality and her call for a radical theory of sexuality. Her intervention is vital both because it opened the doors for examinations of sexuality and sexual identity entirely separate from gender, and because she wrote specifically about the criminalization of sexuality. I then turn briefly to Eve Sedgwick's "Axiomatic," the preface to her 1990 book *Epistemology of the Closet*. Sedgwick takes self-identification into account, a form of discourse not available to criminals and one of the factors which separated the classification of homosexuals and inverts by doctors from the post-Stonewall move for positive identity politics. Finally, I show how Judith Butler's 1990 argument in *Gender Trouble* for the destabilization of heterosexuality through an interrogation of sex/gender is only applicable to sexuality defined by the gender of object choice, and thus largely ineffective in discussions of other forms of sexuality and sexual identity categories.

Butler's shift to a realm of language incited a backlash from science scholars and catalyzed a return to materiality. The final section of this chapter shows how the theoretical shift of scholars of gender and sex differences impacted constructivist debates, and then concludes with the introduction of this new materiality. This renewed attention to the entanglement of matter and culture is especially useful in understanding the construction of criminal sexual identity and its relationship to medicine, law, and culture. I advocate for further work in this area, point out that, instead of reinvigorating debates about constructivism and essentialism, feminist materialism exposes that the mechanism relating sexual object choice to sexual identity is assumed to be identical for all

sexualities. When combined with a working theory of criminal sexual identity, this opens a space for questioning the way psychologists and criminologists are treating both sexual desire disorders and deviant sexual behavior.

Criminal Sexual Identity and Foucault

Michel Foucault wrote some of the earliest work theorizing the transposition of sexual acts into sexual identity.[427] His takes the concept of psychiatrically-divined criminal motive and makes it a crucial underpinning to his concept of *biopower*, an underpinning connected at almost all points through systems of sexuality. As his work is important both to studies in sexuality and histories of criminology, this section uses Foucault's concept of sexual identity as a foundation for criminal sexual identity in order to build on the way his work is already used in these fields. I begin with a short introduction into the use of Foucault in queer theory and theories of crime and criminality. I turn to Foucault's texts and show how the constitution of sexual identity described in volume one of *The History of Sexuality* compares to his description of the forensic psychiatric formulation of abnormal individuals in *Abnormal*. Taken together and applied in the contemporary context of the sexually violent offender, described in the previous chapters, these two systems give us a working concept of criminal sexual identity.

Queer and feminist theorists and scholars of criminology utilize Foucault's work extensively, albeit in very different and occasionally oppositional ways. Feminist and queer theorists examine the interplay of sex, law, and power in *The History of Sexuality*, to a lesser extent *Discipline and Punish*, and more recently, *History of Madness*.[428] In these analyses, sex crime legislation, as a consequence of modern state power, does not

come in the form of regal justice and violent scapegoating, but is a function of biopower—omnipresent and multivalent. This allows queer theorists to examine the insidious power of laws that do not seem, on their face, to be oppressive to queer people, such as anti-sodomy laws and the Defense of Marriage Act. Gayle Rubin articulates the importance of examining the function of sexual oppression in *Thinking Sex*:

> Sex is a vector of oppression. The system of sexual oppression cuts across other modes of social inequality, sorting out individuals and groups according to its own intrinsic dynamics. It is not reducible to, or understandable in terms of, class, race, ethnicity, or gender.…In its most serious manifestations, the sexual system is a Kafkaesque nightmare in which unlucky victims become herds of human cattle whose identification, surveillance, apprehension, treatment, incarceration, and punishment produce jobs and self-satisfaction for thousands of vice police, prison officials, psychiatrists, and social workers.[429]

There is no question that sexually violent offender legislation has functioned within and strengthened the system of sexual oppression. Correspondingly, there is a small but robust literature examining the role of biopower in the formation and application of sex crime law.[430]Critics point out that sex crime law disproportionately affects poor and non-white victims, sexual predator trials are Kafkaesque,[431] and that the treatment of sex offenders within the system is further complicated by the myriad of professionals they must encounter, all of whom bear varying degrees of revulsion and intolerance toward their charges.[432]

Criminologists, theorists of crime studies, and historians of forensic science generally take up a different strain of Foucault's writings on sexual criminality and

identity formation. This literature focuses on how the twinned history of psychiatry and law, often called the *médico-légal* system, allowed for the transition between acts and identity. Theorists using this system examine the abnormal individual who becomes monstrous rather than examining the systemic influence of discipline and biopower. Andrew Sharpe's work, in particular, argues for the necessity of seeing legal monsters as distinct from the monstrousness of the everyman, since "only some individuals or groups are, at any given historical moment, demonized by the term monsters. While we might all be monsters, we do not all bear the same relationship to this term."[433] Despite the different applications of Foucault's idea of a legal monster and his hypothesis of biopower, these concepts are in no way exclusive; they are two ways of seeing the same process. Criminologists and historians of psychiatry have focused on the result or consequence, where queer theorists have focused on the system. Put differently, scholars of crime and legal theory have used Foucault to examine how and why sexual monsters are categorized, while queer theorists have focused on how and why we might all be sexual monsters. The following section attempts to reconcile these two trajectories of thought around the concept of criminal sexual identity.

Feminist and queer analysts often cite *The History of Sexuality* as the source-text for sexual identity formation and the role of biopower. *Abnormal* takes the treatment of abnormal individuals within the criminal justice system as a similar point of intervention. In both texts, Foucault ultimately uses the history of the medical and criminal concepts of perversion to demonstrate the diffusion of power. In *The History of Sexuality*, Foucault argues that the homosexual was first constituted in the nineteenth century when homosexuality was transmuted from a series of acts into a totalizing identity:

> The nineteenth century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology. Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him; at the root of all his actions because it was their insidious and indefinitely active principle; written immodestly on his face and body because it was a secret that always gave itself away. It was consubstantial with him, less as a habitual sin than as a singular nature.…Homosexuality appears as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphrodism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.[434]

The form of power that made the homosexual visible, that in fact made an entire cadre of so-called perverts visible in this way, requires constant and careful observation. Foucault proposes and then rejects what he calls the repressive hypothesis, the idea that there was a Victorian repression of sexuality from which we, meaning modern individuals, have escaped. Rather, he says, this evidence of scrupulous examination demonstrates that the sexual body was, in the nineteenth century, receiving even more attention than ever before. The exercise of power requires this attention, whether that power is judicial or medical.

Foucault's descriptive language in *History* links the work of sexologists with that of criminal anthropologists. He cites the work of Krafft-Ebing and Rohleder explicitly as efforts to systematically categorize all perverts, as these men gave specific identities and species to minor sexual crimes such as sex with statues and leering at animals in zoos.

Beyond that, however, is his use of criminal anthropological language to describe the creation of the homosexual: that he has an "indiscreet anatomy," and a "mysterious physiology," that his inner perverse sexuality was "written immodestly on his face and body."[435] The homosexual species is a Lombrosian criminal species: a type of sub-human who can be recognized as such by his physical form, and independent of his actions.

This Lombrosian character of sexual perversion continues well beyond the era of criminal anthropology. In 1978, Foucault joined Guy Hocquenghem and Jean Danet in a panel to discuss the contemporary legal restrictions around child-adult sexual relationships as resting on a similar concept of a sexual species as the nineteenth century articulation of the homosexual.[436] One audience responder, Pierre Hahn, pointed out the similarity of recent psychiatric ideas to the ideas of Lombroso.

> This idea that legislation, the legal system, the penal system, even medicine must concern themselves essentially with dangers, with dangerous individuals rather than acts, dates more or less from Lombroso and so it is not at all surprising if one finds Lombroso's ideas coming back into fashion. Society has to defend itself against dangerous individuals. There are dangerous individuals by nature, by heredity, by genetic code, etc.[437]

In the time since this conversation occurred, scientific researchers have examined all of the mechanisms described by Hahn—nature, heredity, and genetic code—as possible sources of sexuality and sites for the origin of sexual dangerousness.

All of the criminological theories discussed in previous sections (the discourse of the born criminal, the delinquent, and the morally insane) aim to recognize a flawed or

criminal desire in certain abnormal individuals. In *Abnormal*, Foucault focuses the role of expert psychiatric testimony in criminal trials as the site of intervention for an entire *médico-légal*[438] system aiming to prevent and control the formation of these abnormal individuals. He argues that the *médico-légal* system rests on the measurement of two fundamental concepts: *perversion* and *danger*.

> On the one hand, there is the notion of "perversion" that will enable the series of medical concepts and the series of juridical concepts to be stitched together and, on the other, there is the notion of "danger," of the "dangerous individual," which will make possible the justification and theoretical foundation of an uninterrupted chain of medico-juridical institutions. [439]

Foucault argues that positivist psychiatric and psychological observation of criminal offenders not only measured these two concepts, but also provided a link between medical and legal interventions into behaviors judged to be undesirable within the community.

Foucault focuses on one agent of the *médico-légal* system, the expert psychiatric witness, and his role providing testimony as to the psychological profile of the accused. He argues that the expert witness actually functions as a mechanism by which a person can be put on trial for who they are as well as what they have done. Through psychiatric testimony a criminal act, something that in itself betrays weakness of judgment, also becomes evidence of a fundamentally corrupt desire.

> In other words, this analysis of the constant criminal desire makes it possible to fix what could be called the fundamental position of illegality in the logic or movement of desire. The subject's desire is closely connected with transgression

> of the law. His desire is fundamentally bad. But this criminal desire—and this is still regularly found in these expert opinions—is always the correlate of a flaw, a breakdown, a weakness or incapacity of the subject.[440]

Retaining correlation to the weakness of the subject, grounded by a specific crime, obscures the fact that the system actually punishes people for their way of being, and does so despite the fact that "there is no law against being affectively unbalanced or having emotional disturbances."[441] The judge ostensibly sentences the offender for the criminal action and the testimony of the psychiatrist is only one piece of evidence of guilt. Yet the nature of psychiatric testimony transforms the offender from someone who may or may not have committed this particular act to a person who commits these sorts of acts regularly, who more than likely committed this act, and who is probably going to do so again.

After establishing how criminal, perverse acts, whether sexually deviant or criminal, are taken as constitutive of an identity, and then how, in an endless feedback loop, the commission of particular perverse and dangerous actions becomes itself the motive of those actions,[442] Foucault goes on to describe how categorizing individuals in this way allows a "legally responsible individual [to be] replaced by an element that is the correlate of a technique of normalization."[443] For Foucault, the relationship between medical and legal processes, crystallized here in the moments in which a series of actions becomes an identity, is the point at which a criminal is no longer subject to punishment for a single crime and, therefore, no longer the recipient of a retributive justice. Instead, the criminal person is subject to a process of normalization, a process made possible through biopower. It is here where the concept of the sexually violent offender, the

particular system of law built around him, and the concept of sexual identity conferred to him by that system all break with the *medico-legàl* system.

In Foucault's analysis, the *médico-légal* system is a relationship between two systems that, on their face, are meant to be mutually exclusive: the medical system that is responsible for the insane, and the judicial system that is responsible for the criminal. Instead, he argues, "modern expert opinion has replaced the mutual exclusion of medical and judicial discourses by a game that could be called the game of dual, medical and judicial, qualification."[444] These two systems clash around the issue of *culpability*. The figure at the center of this game, the perverse and abnormal individual who is examined by the psychiatric expert and pronounced to be the possessor of a fundamentally bad desire, becomes, in Foucault's terms, responsible for everything and nothing.

> With his irregularities, his lack of intelligence, his failures, and his unflagging and infinite desires, a series of elements are constituted concerning which the question of responsibility can no longer be posed, or simply cannot arise, since ultimately, according to these descriptions, the subject is responsible for everything and nothing. He is a juridically indiscernible personality over whom, in the terms of its own laws and text, justice has but an object: the object of a technology and knowledge of rectification, readaptation, reinsertion, and correction. In short, the function of expert opinion is to double the author of the crime, whether responsible or not, with a delinquent who is the object of a specific technology.[445]

The author of the crime, then, becomes a figure who is at once irrevocably guilty, dangerous, and yet not fully responsible. Foucault's doubling of the criminal makes it possible for an entirely new technology to take place—an alternative to the old system of

"either prison or hospital."[446] This technology is the system of normalization, "a sort of protective continuum throughout the social body ranging from the medical level of treatment to the penal institution strictly speaking, that is to say, the prison, and, if it comes to it, the scaffold."[447] This protective continuum encompasses everyone; even those who are not explicitly criminal. Anyone determined to be in the narrow category of the sexually violent offenders are institutionalized, while his double, the specter of fear that any sex offender and anyone who looks like a sex offender may in fact be a sexual predator, gives rise to an entire system of protections that go all the way down to interpersonal interactions. Any single, white, middle-aged man who hangs around playgrounds but has no children of his own too often becomes suspect and finds his actions curtailed by the tendrils of a technique of normalization; not by the overt exercise of law, but by the suspicious glances of parents and nannies, and by his own fear at being categorized as *wrong*.

What is different, however, in the category of the sexually violent offender is that there is now recognition, within the law itself, of his in-between-ness that grants him responsibility for everything and nothing. The sexually violent offender is exceptional precisely because his madness makes him responsible for his crimes. The system created by violent sexual predator laws removes the mutual exclusion of madness and criminal with the constitution of the mentally abnormal individual. The definition of the mentally abnormal individual in 1990 crystallized a process Foucault described over a decade earlier; it was the final step in the assimilation of psychiatric opinion into the law. As noted in Chapter Two, the framers of the first sexually violent offender commitment law took as one of their foundational points the fact that, in the United States, the government

and the court of law have the right to define mental illness as they see fit. Legislators and judges are not, in fact, beholden to actual psychiatrists for expert psychiatric opinion. They did not just double the criminal actors; they doubled the experts themselves. The court where sexually violent offenders are tried is the "psychological and moral double" of the criminal court.[448]

Reuniting Gender and Sexuality

Criminal sexual identity lies at the center of a nexus of sex, gender, and power that has long been the focus of feminist theory. Scholars based both inside and outside women's, gender, and sexuality studies have recognized these connections. This includes those who utilize feminist methods: Nicole Hahn Rafter, who argues for the gendered dimensions of early criminological categories in *Creating Born Criminals*; Elise Chenier, who analyzes the gender/sex/power systems that emerged in Ontario prisons in *Strangers in Our Midst*; and Regina Kunzel, who uses the outsider status of incarcerated people to critique the construction of sexuality in *Criminal Intimacy*.[449]

Authors analyzing sex crimes and crimes against children often note the impact of feminist interventions into legal reform—particularly the anti-pornography and sexual abuse awareness movements of the 1980s. Some of these mentions are merely cursory; Philip Jenkins in *Moral Panic* and James Kincaid in *Erotic Innocence* highlight the strange convergence of feminist theory and conservative family values groups around the issue of child molestation in the 1980s. Others are more nuanced, such as that in Eric Janus's book *Failure to Protect*. Janus includes a chapter on the influence of feminist theorists Catherine MacKinnon and Andrea Dworkin on sex crime regulation in the 1980s, concluding that the sexual predator laws modeled on the WCPA after 1990 are a

sharp departure from the careful analysis of cultural sexual violence advocated by feminists of this era.

Despite all of these connections, the concept of criminal sexual identity as I outline it here has not yet been examined through a feminist lens. It is an important intervention to make because identity itself is a troubled category in women's studies and feminist thought. Its usefulness as a category of analysis has been extolled,[450] its limits debated,[451] its existence questioned.[452] Yet sexual identity is employed as a static concept, one with explanatory force, in the realm of criminology. Similarly, queer theory's rejection of identity as a mode for explaining the complexities of sexual expression and the force and power involved with sexuality have not stopped the use of sexual desire, sexual drive, and sexual object choice to define who a person is and predict how dangerous they will be to society.

Many feminist theorists and queer theorists, especially those working in the early days of queer theory, do specifically address the issue of criminalized sexuality or of sexual reform in the law. Although these discussions often rely on an underlying concept of sexual identity, none explicitly examine the system of sexual criminality as a system of identity formation. Further, because of a fundamental split within feminism between scholars of sexuality and queer theory and scholars of gender and representation, many of the discussions about identity formation which have occurred around gender and power have not yet been integrated into discussions of sexual identity within Women's, Gender, and Sexuality studies itself.

Many of the feminist theorists who worked at the intersection of gender, sex, and sexuality during the first decades of feminist thought highlighted heterosexism of the

previous models of sex difference. Some argued, as did the political group Radicalesbians or the theorist Monique Wittig, that the definition of woman is so dependent on her relation to man as to make lesbians a separate category altogether.[453] Others, most Catherine MacKinnon, argued that femininity is defined by female sexuality, and female sexuality cannot be anything but that which is constructed by male dominance.[454] In the 1980s and 1990s, however, scholars in the field of sexuality studies advocated a division between feminist theories of gender and the study of sexuality, often in reaction to the same debates around pornography and child sexual abuse that scholars of sex crimes note as important sites of feminist intervention into the law. The resulting field of queer theory works to destabilize the terms of sex/gender to intervene into heterosexist and unduly moralistic constructions of sexuality and sexual identity.[455]

Instead of attempting a wide analysis, I have chosen to focus on three particular feminist arguments for distinct sexuality studies: Gayle Rubin's *Thinking Sex*, Eve Sedgwick's *Axiomatic*, and Judith Butler's *Gender Trouble*. I have chosen these three works, first, because many theorists cited them as origin points for queer theory and the split from feminism, and, second, because although all three of them articulated extremely valuable insights when they were written, those arguments are no longer as applicable as they once were. The contrast in applicability of these arguments then and now highlights important points about the distinct formation of criminal sexual identity, both in its similarity to hetero/homo/bisexuality and in its deviations from it.

The final section engages the recent work done by feminist science scholars working to reunify sexuality and gender categories. Practically, and as I explain in the introduction to the final section at some length, I use these theories to understand

criminal sexual identity because sex criminals and pedophiles are the subject of scientific inquiry. I also do so because many feminist science scholars speak directly to the gender/sexuality split as a reaction against science. They argue that although the interventions made by Butler, Sedgwick, Rubin, and others who followed are intellectually important, they have begun to dominate the field of sexuality studies at the expense of investigation into the material reality of gender and sexual identity. These feminist science scholars argue for a true recognition of the importance of medical and psychological investigations into gender and sexuality.[456] It is within this field that the employment of criminal sexual identity can be done to greatest effect.

Gayle Rubin

Gayle Rubin's essay *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, first published in 1984, comments at length on the then-recent wave of anti-sexuality laws to make an argument for the limits of feminist theory and a call for a new intervention into the study of sexuality.[457] She argues that in feminism, sex and sexuality are too deeply ingrained in gender and gender politics for feminism to radically critique both gender and sexuality. As such, subsequent theorists take her essay as one of the fundamental fracturing points between feminism and sexuality studies, and as one of the foundational text for what came to be called queer theory. Rubin categorizes much of the right-wing legislation she discusses as an anti-sex fringe movement that became mainstream in the mid-1970s. The main charge of this initiative, nominally, is to protect children and families. The actual purpose and result, Rubin argues, is the policing of sexuality, and the marginalization and persecution of queer people. She highlights two

contemporary campaigns as problematic moral panics: the anti-BDSM movements in feminism and the use of AIDS as a justification for homophobia.[458]

The sexual cultural reformations and the sexual stratification that Rubin outlines in *Thinking Sex* remain part of theory today, not only in the continued debates on consent and legislation in BDSM practice and the treatment of AIDS patients, but also in debates over abstinence-only education and the controversy over birth control and abortion coverage in health care reform. What changed with the introduction of the violent sexual predator in 1990, however, was that the impetus to protect children merged with a fear of violent criminal recidivism: sexual predator laws, in their invocation of violence and predation, shifted the site of state intervention in sexuality from the realm of obscenity and vice and into the realm of kidnapping, assault and homicide. Despite the similarities Rubin noted in legislation in 1984, the legislation of the sexuality of these offenders today evokes a categorically different form of panic from the panic around teenage pregnancy, although both still involve the protection of children and, to a different extent, a paternalistic legislation of women's bodies.

Although Rubin wrote her article before this categorical shift and could not have accounted for it, the radical theory of sex she proposed has interesting overlaps when we consider it against the category of criminal sexual identity. This section examines the type of radical critique of sexuality called for in Rubin's *Thinking Sex* against the category of criminal sexual identity held at the core of sexually violent offender laws, ultimately showing that her reasons for separating feminist theory from the examination of sexuality do not apply for an examination of criminal sexual identity.

Rubin utilizes a moral panic analysis of sex crime laws in which ill-conceived laws, passed during periods of intense and focused panic, often end up targeting unrelated or marginal individuals.[459]

> Because sexuality in Western societies is so mystified, the wars over it are often fought at oblique angles, aimed at phony targets, conducted with misplaced passions, and are highly, intensely symbolic. Sexual activities often function as signifiers for personal and social apprehensions to which they have no intrinsic connection. During a moral panic such fears attach to some unfortunate sexual activity or population. The media become ablaze with indignation, the public behaves like a rabid mob, the police are activated, and the state enacts new laws and regulations. When the furor has passed, some innocent erotic group has been decimated, and the state has extended its power into new areas of erotic behaviour.[460]

She equates the crackdowns on prostitution and obscenity occurring during the years she wrote the article to the sex offender scares of the 1950s, noting that both that both were thinly veiled (if veiled at all) campaigns against homosexuality. She highlights the importance of invoking innocence in need of protection, as "no tactic for stirring up erotic hysteria has been as reliable as the appeal to protect children."[461] She notes, in particular, the "ill-conceived" and "misdirected" child pornography laws passed during a panic in the late 1970s that led to the unjust persecution of artists.[462]

Rubin acknowledges that it is difficult for her contemporary readers to sympathize with the plight of what she calls "actual boy-lovers," or "men who love underaged youth."[463] She predicts, "in twenty years or so, when some of the smoke has

cleared, it will be much easier to show that these men have been the victims of a savage and undeserved witch hunt."[464] Rubin does not, however, define what a boy-lover actually is; it can be inferred from context and from her reference to the activities of NAMBLA that she is talking about the group of men who profess a preference for boys between the ages of thirteen and seventeen. These men may or may not engage in sexual activity with such youth, and such sexual activity may or may not be criminal, depending on the local age of consent. She also does not engage in any discussion of the psychiatric category of pedophilia, an omission that is likely not avoidance or oversight, but rather an indication of how recent the phenomenon of criminalized pedophilia is. The first media mentions of pedophilia in relationship to criminal sexual abuse of children began around the time this article was published, and it is probable that the conflation of the psychiatric term *pedophile* with the legal term *sex offender* had not yet become as widespread as it is today.

Rubin's discussion of actual criminalized sexuality is limited to the issue of consent. She identifies sodomy and adult incest laws as two areas in which freely chosen sexual acts of consenting adults are criminalized simply because "some sexual acts are so disgusting that no one would willingly perform them."[465] This legal position is upheld by psychiatry and psychoanalysis, where the so-called incomprehensible choices of particular sexual dissidents are explained through traditional psychological means. Rubin objects to this framing of adult sexuality and argues that a radical new theory of sexuality must take into account the fact that such sexual deviants are free actors. She concludes with a call for the recognition of "the political dimensions of erotic life."[466]

Unlike those who engage in non-criminal but sexually explicit activities who are often collateral damage during moral panics, such as erotic photographers, those who engage in sodomy and incest are part of a larger mechanism of sexual identity. Engaging in these particular acts is taken, in the logic of the law, to be evidence of a compromised state of mind. Rubin argues for intervention into this categorizing by insisting these actors be recognized as having full functional volition. She holds, as do many queer theorists who engage in a similar tactic, that the state should not have the power to take away a consenting adult's right to participate in sexual acts unless those acts actually cause unintended and unwelcome harm. In these cases, the state has circumvented the rights of its citizens to make free choices based on moral convictions that certain sexual acts themselves are so abhorrent that they constitute, in and of themselves, a state of unwellness, and thus require legal intervention. Rubin urges recognition of the fact that this concept of insanity lies in an anti-sex morality system in order to rectify injustice.[467] Psychologically, it is an argument that aims to reconfigure the actions of the sexual deviant as the acts of a sane person, someone who is not rendered pathological simply by his or her particular sexual choices.

These forms of intervention proved eventually successful in the case of sodomy, which was decriminalized in the United States in 2003, almost twenty years after the publication of Rubin's article. Various other groups who find their form of sexual activity to be either medically or criminally suspect use similar tactics: asexuals, fetishists, and those who practice adult incest. However, this form of intervention is doomed to fail in the context of sexually violent offender legislation because the very construction of the sexuality of sexually violent offenders, as it is defined in legislation, is that they freely

choose their actions. These individuals are necessarily not mentally ill. The definition of sexually violent offenders takes the central claim of Rubin's critique and turns it into a justification for the continued incarceration of these individuals. It then relies on another standard, the protection of the community, to justify long-term incarceration. The use of sexual desire as motive in cases necessarily requires that these sexual actions are not indicative of insanity. If they were, these individuals would not be subject to criminal sanctions.

Rubin's second locus of intervention is to argue that feminist theory, in its deep indebtedness to the system of gender, is fundamentally limited in its ability to radicalize discussions of sexuality. "Because sexuality is a nexus of relationships between genders," she argues, "much of the oppression of women is borne by, mediated through, and constituted within, sexuality."[468] Owing to this enmeshment, her contemporaries advocated a feminist theory torn between the push to engage in sexual liberation, a liberation which included discussions of pornography and BDSM as points of sexual freedom, and the analysis of systems of gender and power, which held that much of heterosexuality was founded on male privilege and propagated through dominance play and pornography. Rubin articulates one of the chasms of feminist sexuality studies: it is difficult to reconcile the relationship of sexuality to violence and masculinity while both critiquing male power and promoting a pro-sex theoretical standpoint.

Considering feminist debates about essentialism and constructivism further complicates this chasm. Rubin argues for sexual constructivism against sexual essentialism; that is, she argues that sex (by which she means sex acts, sexuality, desire, and object choice) must be considered as a historically and culturally contingent entity

and not a pre-existing biological entity. Rubin's article argues for the absolute necessity of a constructivist view of sexuality, in fact saying that as a system it is "impervious to political analysis as long as it is primarily conceived as a biology phenomenon or an aspect of individual psychology." This standpoint remains a pillar of queer theory and queer activism today. Yet, as Rubin acknowledges, any theorist of the social construction and historical contingency of sexuality must necessarily place his or her work in conversation with theories of the social construction of race and gender because these are active feminist fields. In the end, her argument encourages theorists to consider sexuality as a constructed social entity that is both indebted to and entirely separate from systems of gender.

This second site of intervention also fails in the context of sexually violent offender legislation because it renders the sexual identity construction of these individuals invisible. The criminal sexual identity of sexually violent offenders is as deeply indebted to community reactions to violence as it is to understandings of pathological sexuality. When this is combined with the fact that most sexually violent offenders are biologically male, what emerges is a sexual identity that is intrinsically tied to sex, gender, and power in a way that inverts, or in some instances obviates, the separation Rubin advocates.

Rubin's interventions resulted in a split: on the one hand, a new field of theoretical sexuality studies poised to dismiss or ignore the creation of a criminal sexual identity because it dismissed the law from inception, and, on the other, a field of feminist studies which could examine the gender and violence aspects of criminal actions, but not the sexuality of them. Yet, as I have demonstrated in the preceding chapters, the

underlying mechanics of sexual offender laws rely on the very same "model of the instincts and their restraints" which Rubin argues it is necessary for sexual theorists to abandon.[469] In fact, as queer theorists have moved further from it, the science of sexual offending has gotten even more entrenched, and the monstrosity of sexual offenders more absolute and unyielding. These two trajectories are not only related, but entirely contingent.

Eve Sedgwick

In the introduction to *The Epistemology of the Closet*, Eve Sedgwick examines what she calls axioms of understanding sexuality. She focuses on these "less stable and identity-bound understandings," existing both between the poles of the set species of homosexual and heterosexual and within a field of what she calls "urgent homophobic pressure" to conform to the less deviant of the two poles.[470] For her, the issue with sexual identity is not that it is totalizing, but that it limits freedom in terms of self-identification. Sedgwick links desire directly to identity when she moves from self-description of sexual desire to sexuality as expressive of identity.

> To alienate conclusively, *definitionally*, from anyone on any theoretical ground the authority to describe and name their own sexual desire is a terrible consequential seizure. In this century, in which sexuality has been made expressive of the essence of both identity and knowledge, it may represent the most intimate violence possible. It is also an act replete with the most disempowering mundane institutional effects and potentials. It is, of course, central to the modern history of homophobic oppression.[471]

Sexually violent offenders, and other criminal offenders for whom sexual desire is used as a motive, do not name their own sexual desire. The legal and medical system assign it to them through interpretation of their actions, giving a criminal sexual identity to sex offenders. Sex offenders have absolutely no access to, nor control over, the system that gives them their identity. These individuals must not just live with the identity ascribed to them, but also are subject to treatment modalities according to the knowledge and access of those who name them.

Sedgwick's insistence on the importance of fluid self-identification is also significant in the context of mentally ill people seeking treatment. Theoretically, it is not possible to self-identify as the owner of a criminal sexual identity, yet often this identification comes with either the expectation of, or mandate for, psychological treatment. Many psychologists and sexologists argue that true clinical work cannot be done unless people begin to self-identify in this way, as therapy, most often, simply does not work with unwilling or uncooperative patients.[472] The stigma attached to being a sex offender, a sexual predator, or a pedophile prevents self-identification and, potentially, could produce enough psychological harm to outweigh any potential benefit of gaining control over one's identity.[473]

Fundamentally, though, this lack of self-identification means that much of the variation that exists within the LGB spectrum simply does not come up in discussions of criminal sexual identity. Gay, lesbian, and bisexual people resisted the categorization of their sexualities by psychological and legislative discourse from the time people first claimed these identities. The push for self-identification within the queer community centers on destabilizing the hegemony of criminal and pathological sexual identities

since, before the Silverlake and Stonewall riots, these were the only narratives of non-heterosexuality that existed.[474] Criminal sexual identity, in contrast, cannot be destabilized in precisely this way, partially because of the difficulties in self-identification discussed above, but also because, definitionally, criminal sexual identity is the criminal, pathological, and discursive remnant of the coming out process.[475]

Recognizing criminal sexual identity examines a different facet of particular circumstances: how the process of sexual specification began to codify and define identities beyond the poles of homo- and hetero-sexual. This process was always occurring in tandem with that of the formation of the homosexual species. The difference is that all that remains are people who have very good reasons not to self-identify or to coalesce politically around their sexual identities.

Sedgwick deconstructs the A/not-A construction of hetero/homo sexual, destabilization that has contributed significantly to the proliferation of criminal sexualities. The individuals who are marked as having criminal sexual identities are not viewed in terms of a binary, but rather as sexually desiring people oriented toward a specific object, idea, body type, or act. Their abnormality is specific. Generally, of course, these objects, ideas, body types, and acts are perverse, and so the concept of sexual orientation employed in the discussion of sex offenders and sexually violent offenders has not changed significantly since Krafft-Ebing first put forth a taxonomy of criminal sexualities. What has changed, however, is that now a concept of stable sexual identity underpins them.

Ironically, queer theory's systematic dismantling of stable identity reifies its existence among criminal people. The more queer activists and queer theorists argue

against the bifurcation of sexuality into hetero/homo, the more room they create for sexual identity formation around other orientations. The more distance queer activists and queer theorists put between themselves and those whose sexual acts are criminalized and pathologized, the more those newly formed sexual identities are subject to the same structures of bad science that queer activists have, for themselves, already rejected.

Judith Butler

The work of Judith Butler, particularly *Gender Trouble*, presents a set of deeply fascinating and utterly contradictory concerns for the concept of criminal sexual identity. *Gender Trouble* is an update to Rubin's 1975 essay *Traffic in Women*, noted earlier as the source of the sex/gender system. Rubin sets up how Freud, Levi-Strauss and Engels combine to describe the sex/gender system, and to this Butler adds a Foucauldian lens that destabilizes the terms, arguing that subjects are always the product of the processes that study them. Her contention in *Gender Trouble* is that the subject woman is produced by feminism and, therefore, subjugated by feminism, even as feminists sought for woman's liberation from oppression. Just as Foucault argued regarding the abnormal individual, Butler argues the law itself formulates its subject, and then the evidence of that formulation is hidden.

Butler's articulation requires recognizing it is not only the laws created to govern the sexually violent offender that create him, but all discourse, including that which attempts to deconstruct his existence. This mechanism of reproduction, of production, is entirely unavoidable, and even in noticing it we do not in any way alleviate its consequences.[476] And, in fact, critical legal and psychiatric authors analyze the ways in which the law produces the identity category of sexually violent offender, discursively

and actively.[477] They argue that people labeled as sexually violent offenders and predators find their own existence in the world to be hindered and bound by that label and, as such, the label itself becomes proscriptive.

Where Butler's intervention is relevant is in understanding how this deconstruction itself reifies these categories even as it works to undermine their existence. Critics of sexually violent offender statutes often fix the origin of the sexually violent offender, an origin that is always incomplete. As the previous chapters have shown, the category of the sexually violent offender may have entered law officially in 1990, but it includes theories first introduced more than a century before. Similarly, the reach of the category now goes beyond the technical legal boundaries, sweeping up both the lives of people convicted of any sexual offense and incorporating symbols from public health and religion. These diffuse meanings all have their own genealogies. The sexually violent offender is as much about the history of the monster, the contaminant, the rapist, the quarantine of the mentally ill, and the concept of legal volition as it is about sex crime law.

Butler's theory is limited because her destabilization of sexual identity as a category depends, deeply, on a destabilization of gender, even though she argues that relationship is not a contingent one.

> It is important for me to concede, however, that the performance of gender subversion can indicate nothing about sexuality or sexual practice. Gender can be rendered ambiguous without disturbing or reorienting normative sexuality at all…no correlation can be drawn, for instance, between drag or transgender and

> sexual practice, and the distribution of hetero-, bi-, and homo- inclinations cannot be predictably mapped onto the travels of gender bending or changing.[478]

Her argument holds true only if the definition of sexuality is limited to heterosexual, bisexual, and homosexual. Butler states that for her purposes, it is. It is not clear if by this she means to define by gender of object choice, which is ironic for a position articulating the separation of gender and sexuality. But even if the reader understands these identities in a broader sense and takes *homosexual* to mean one who is attracted to similarity between object choice and self, and thus *heterosexuality* to mean one who is attracted to difference of ones object choice to oneself, this statement is true, and Butler's intervention into sex/gender "can indicate nothing about sexuality or sexual practice."[479]

Butler's central question is "how do non-normative sexual practices call into question the stability of gender as a category of analysis?"[480] Again, from the context the reader must assume that by sexual practices she means the scope of hetero-, homo-, and bisexuality in which gender of the object choice and the gender of the subject define sexuality.

> Consider not only that the ambiguities and incoherences within and among heterosexual, homosexual, and bisexual practices are suppressed and re-described within the reified framework of the disjunctive and asymmetrical binary of masculine/feminine, but that these cultural configurations of gender confusion operate as sites for intervention, exposure, and displacement of these reifications. In other words, the "unity" of gender is the effect of a regulatory practice that seeks to render gender identity uniform through a compulsory heterosexuality.[481]

As much as Butler may insist, sexuality and sexual identity are not defined solely by the sex or gender identity of one's object choice. Her destabilization of a sexuality defined as gendered object choice does not transpose easily onto sexualities based on other types of object choice, such pedophilia or hebephilia, or onto sexualities defined by preferred practices or effects, such as sadomasochism. One could argue that if Butler's point is that any category can be destabilized, and thus any sexuality based on that category is also destabilized, then continued pressure around the definition of age of consent accomplishes something similar to Butler's aims. Indeed, this has been an occasional tactic of NAMBLA. In the end, however, all systems of sexual attraction are destabilized if the categories of attraction are fluid, so her argument, taken to this extreme, seems self-evident.[482]

In contrast, both the legal definitions of sex abuse and violent crime and the mechanisms of treatment offered bind criminal sexual identity to the matrix of sex/gender/power in less direct ways. For example, Butler says there is no predicting sexuality when transition of gender occurs, but this is the exact presumption used to justify giving female hormones to male sex offenders. Butler's work does not actually disrupt the fact that the categories of gender and sexuality are tied to the biological concern of sex, especially when it comes to forensic science.[483]

Arguments for performativity and the destabilization of categories work well when the categories under discussion are ones that work only through and within discourse and cultural attrition; categories like race, sexuality, and gender. All of these work in realms in which, in scientific terms, there is only a genotype but no phenotype. Once a phenotype is discovered, however, the disruption caused by the destabilization of

terms can only go so far.[484] Since *Gender Trouble* came out, there has been a growing critique of its terms in the field of feminist science studies, and some researchers have directly addressed the inapplicability of Judith Butler's destabilization of gender terms to the great majority of debates around Cartesian mind/body splits. These theorists point out that Butler simply pulled everything to the mind side rather than actually destabilizing the debate.[485] Others have begun to examine gender, sex, and sexuality through a lens of developmental systems theory, which has fundamentally restructured nature and nurture and, in some fields, reunited discussions around gender and sexual identity.[486] The next section examines the importance of Butler's intervention into feminist theories of social construction, noting the reaction she received within feminist science studies, and uses a return to materialism to argue for a reunification of gender and sexuality research.

Gender, Sexuality, Science and Materialism

For all practical purposes, the engagement of feminist science began with criticism of biological and sociobiological theories of sex difference. In the 1980s, concurrent with the backlash of the New Right against women's liberation, biologists claimed that the differences between men and women that Beauvoir and others had argued we must ignore were, in fact, absolutely necessary for human evolution. In *Myths of Gender*, Anne Fausto-Sterling responds directly to this rising literature, questioning the structural ordering of scientific work on social systems and the emphasis placed on biological origins.[487] She unpacks various scientifically based claims of gender difference, including claims of hormonal and evolutionary bases for gendered violent behavior.[488]

Fausto-Sterling's approach focuses on observable gender realities (that boys and girls behave differently) but she starts by critiquing the scientific evidence for those differences. She puts forward an argument that although biology is important, the evidence simply does not support attributing behavior to hormonal differences. Instead, she says, we should consider the body as the starting point for a much larger system of "action-reaction-interactions," what she would later call nesting dolls. She still maintains that, "for some forms of behavior, small average differences resulting from sex-related systems may become measurable,"[489] effectively incorporating the body into a system where biological sex becomes the marker of a social gender system rather than the explanation for it.[490] Fausto-Sterling also argues against seeing biology as *the* source of gender instead of *a* source. That is, the source of these biologically based myths may not be in method but scale: the issue is not thinking hormones are important, but overestimating their importance.

Fausto-Sterling wrote in the midst of what feminist scientist Evelyn Fox Keller called a dynamic instability within both science and feminism. Since Gayle Rubin introduced the sex/gender system as a critical tool in 1975, feminists have been exploring more and more how much of woman is made (her gender role) rather than born (her physical sex). By 1987, feminists treated gender so far from sex that it threatened to become entirely unrelated. Where Fausto-Sterling noted that sexing was as complicated as gendering, Keller points toward a world of theory were sex no longer even matters. In this world, the feminine is unanchored by the actual woman-body.

Concurrent to these trends in feminism, Keller argues, scientists realized that science was not a "mirror of nature," but the interpretation of humans beings who were

often biased. This led, she argues, to a form of feminism unable to reconcile with sex, and a form of science unable to reconcile with nature.

> In one direction, both gender and science return to a pre-modern (and pre-feminist) conception in which gender has been collapsed back onto sex, and science back onto nature. Under the other, we are invited to a post-modernist, post-feminist (and post-scientific) utopia in which gender and science run free, no longer grounded either by sex or by nature—indeed in which both sex and nature have effectively disappeared altogether. Attempts to occupy a 'middle ground'—either with respect to gender or to science—must contend not only with the conceptual difficulty of formulating such a position, but also with the peculiarly insistent pressures of a public forum urging each concept toward one pole or the other.[491]

Keller fears a feminism run by post-modernist "genderic anarchy" in which feminist work no longer requires actual women.[492] Men could accept the premises of feminist methods while simultaneously pushing women out of their fields. Her descriptions of the split in feminism and the difficulty of occupying the middle resound even today.

The rise of queer and sexuality studies in contradistinction to feminist discussions of gender and sex further complicated the growing split. In many ways, Keller's feared genderic anarchy came to be with the publication of *Gender Trouble* in 2000, although the fallout was perhaps not as dire as she predicted. Butler sets out to destabilize the very dichotomy Keller critiqued from: that gender is culture and sex is nature. Where Keller was apprehensive of any feminism where gender runs unanchored to sex, Butler embraces unanchoring as the best explanation of the system already in place.

To use an example relevant to the current project, a simplistic restatement of this theory would say that men are violent in part because we conduct research in order to find out why they are violent. There is no sexed human body that exists before the gendered discourse of violence is written about it, and on it, and "as a result, gender is not to culture as sex is to nature; gender is also the discursive/cultural means by which 'sexed nature' or 'a natural sex' is produced and established as 'prediscursive,' prior to culture, a politically neutral surface *on which* culture acts."[493] It is not a matter of separating gender from sex as a subject of study, but rather recognizing that we have constructed sex as if it existed before culture came along and put gender onto it. In fact, following the same logic, we act as if nature itself existed before culture put a name to it. According to Butler, sex is not the marker on which we anchor a system of gender, but rather gender is the system through which we create the anchor of sex.[494]

Susan Bordo countered Butler's intervention with her theory of gender-based pathologies as the "crystallization of culture."[495] In *Unbearable Weight*, Bordo argues that cultural stereotypes put gendered bodies in a double bind: be fearless, but still be feminine and sweet! Be aggressive and masculine, but learn that no means no! She concludes that such conflicting demands create forms of troubling gendered behavior that are then pathologized. Bordo also points out, as feminist science scholars were beginning to note robustly, that just because feminists abandoned the analysis of sexual difference as a concrete system does not mean it disappeared from academic inquiry.

> While feminists have been writing tomes on how diverse, fluid and fragmented sexual identity is, "the new science of the brain" (as *Newsweek* calls it) is declaring differences between men and women to be hard-wired. While we've

> been sitting at our computers, hotly churning out analyses of female desire, popular science—both "hard" and "social"—has been busy reestablishing that men are testosterone-driven, promiscuous brutes whom nature won't permit to keep their peckers in their pants.[496]

As much as Fausto-Sterling argues against the concreteness of sexed science, and Butler against the concreteness of sex or science, popular science has not ceased in the search for an explanation of sex and sexual behavior. In the end, however, Bordo sees these scientific claims as another cog in the system of cultural inscription of bodies. It is not until the emergence of systems-theory based feminist science work that material, or nature, began to reassert itself.

Systems and Synthesis

Where Butler and Bordo wished to upset the nature/nurture dichotomy by pulling more and more of the observed facts of the world from nature into the category of culture, systems feminists argue that the terms nature and culture refer to processes too radically entwined to be useful. In fact, the very process of pulling previously held natural categories into the realm of culture (as Butler does with sex) proves that the systems overlap so much as to be indistinguishable. This new theory allows feminist science scholars to move beyond not only the older concepts of nature versus nurture or nature versus culture but also the newer readings of discursive and social construction of matter. Myra Hird identifies this push as a "paradigm shift in our understanding of the relationship between nature and culture."[497] Some systems feminists, like Elizabeth Wilson and Vicki Kirby, began their careers in feminist theory by advocating this shift.[498]

Others, such as Fausto-Sterling, bridge the move from constructivism to systems theory.[499]

Systems feminist look at how what has been called nature, the physical, material part of the world, is not only *represented* by culture, as Bordo would argue, or *molded* by culture, as Fausto-Sterling argues, or even *imagined* by culture, as Butler argues, but a material reality *formed* by culture. Culture is not the lens through which we identify what is real; it is a real force that forms matter. For example, Susan Oyama explains that the distinction between biology and culture is, for her, "deeply odd.…when people ask about biology, though, their concerns tend to be mythological, not historical. Here I do not mean *myth* as wrong, or "bad science," (though it might be), but as a way of thinking that hankers after ultimate truth, eternal necessity, and legitimacy."[500] Oyama, and others like her, see the search for biological or scientific proof as a placeholder for a search for legitimacy and longevity. The rejection of that search is, in turn, both a fear of what legitimacy may be found (Anne Fausto-Sterling's fear of the rape gene in *Myths of Gender*) and who will employ that truth (Susan Bordo's fear of masculinity as defined and then formed by popular science in *Unbearable Weight*). Cultural processes are not just the visioning, and re-visioning, of physical matter through these cultural lenses, but forces that shape so-called natural processes.

Semiotics scholar Vicki Kirby takes this a step further, arguing against those who use an interaction model to attempt to circumvent the nature/culture divide. This interaction, she points out, is actually much like the theory Bordo posed: a citation may be given to the presence of a body, but in the end, culture is the all-encompassing force. Kirby does not shy away from the identification of woman with nature, but rather claims

that nature and culture are so intertwined as to be the same system. She concludes feminism would do well to take advantage of this identification.

> What happens if nature is neither lacking nor primordial, but rather a plenitude of possibilities, a cacophony of convers(at)ion? Indeed, what if it is that same force field of articulation, reinvention and frisson that we are used to calling "Culture"? Should feminism reject the conflation of "woman" with "Nature," or instead, take it as an opportunity to consider the question of origins and identity more rigorously?[501]

Kirby sees opportunity in aligning the feminine with a system as totalizing and pluralistic as nature, and suggests feminists re-examine their concept of essentialism, or to be more specific, their anxiety about essentialism. Concrete reality claims are, by necessity, a part of feminism, and in rejecting them, Kirby argues feminists have forgotten "that essentialism is the condition of possibility for any political axiology: the minimal consensual stuff that political action fastens on to is already essentialism in effect."[502]

Kirby's attempt to retrieve essentialism seems to many, including herself, to be incompatible with the perceived goals of the feminist project precisely because of feminism's association with constructivism. Kirby argues, however, that feminists created a system dedicated to the preservation of that very subjectivity which they named as oppressive in the first place. As similar as this sounds to Butler's destabilization, Kirby holds that, feminism, by definition, cannot engage in the poststructuralist use of theory as a politics of evasion, as much as Butler may have envisioned that we already have been doing this all along. Kirby sees all attempts to do so as further reification of a system which has been the source of oppression: by pretending we can avoid the association of

women with nature and thus her lesser status, we only serve to inscribe it further. If woman is not anything but that which has been constructed for her, the construction of a system cannot move women and men beyond the roles of oppressed and oppressor.

Feminist scholars Elizabeth Grosz and Elizabeth Wilson take up Kirby's critique. In *Volatile Bodies*, Grosz applies inseparability theory to a theory of bodies, in which she claims that the inside (or nature) and outside (or culture) of a body are the same.[503] The relationship between body and mind—sex and gender, body and spirit—is like a mobius strip; it may seem possible to distinguish between an inside and an outside, but once you start following the surface you realize it is all connected. In *Neural Geographies*, Wilson argues that feminism's somatophobia results in a limiting of feminism to arenas that concern the development of women and gender. If feminists are always working toward debunking myths of female nature, they do not apply the particular tools of feminist theory, such as emphasis on plurality, relations of power, theories of subject formation, the relationship between equality and difference, to what she calls the neutral areas (e.g., psychological research).

Materialism and Criminal Sexual Identity

The criminal sexual identity of sexually violent offenders is an ideal example of the ultimate failure of interactionism. Sex offenders are a group defined in large part by their mental abnormality, a category that resists easy reduction to mind/body dualism. The definition of mental abnormality makes no presumptions as to whether the abnormality is physically or psychologically triggered. Practically, this was done in order to define mental abnormality as distinct from mental illness. Expressively, the fact that mental abnormality has no scientific cause and needs no scientific cause indicates that

where it comes from does not matter. It does not matter whether these individuals were born this way or became this way because of their upbringing; it does not matter if the problem lies in a damaged lobe of the brain or in traumatic residue. These things do not matter because in the end the acts committed are so morally reprehensible that no claim of biological determinism or social construction could offer absolution.

Research into possible biological mechanisms for sexual orientation does not result in new forms of therapeutic jurisprudence for sex offenders. Instead, it offers ways to inoculate. A hormonal theory of criminal sexual motivation leads to calls for the castration of child sex abusers, a neurological theory leads to calls for prefrontal lobotomies, and so on. The construction of the sexually violent offender, the attendant spread of predator metaphors, and the casting of all sex offenders as evil and monstrous all but guarantee that any future discovery about the scientific basis of sexual desire will have a corresponding cry from those who wish to eliminate this threat as quickly and cleanly as possible. A systems theory analysis allows us to see how the identity of sexually violent offenders is both related to and dependent on other forms of sexual identity and, ultimately, helps to open up a space for constructive change.

Unlike sodomy laws and the sexual psychopath laws of the 1950s, the sex offender laws in the United States since 1990 were not created as a way to curtail the actions of marginal sexual deviants. They were designed to identify and eliminate the worst of violent sexual offenders in order to maintain a rigid moral boundary. Yet the laws are backed by the same theories about sexual identity formation that trace their origins back to mid-nineteenth century sexology, and the treatment plans offered to sex offenders are guided by the same therapeutic practices psychologists used, with little

success, on homosexuals in the mid-twentieth century. Chenier notes this in her work on sex crime law in Canada.

> Sex offenders must accept whatever model of sexuality their therapists operate from. Currently, treatment experts are moving toward an orientation model that posits that, like homosexuals, pedophiles are "sexually oriented" toward children. Just as the staff at the Outpatient Forensic Clinic concluded with respect to homosexuality, present-day thinking is that a pedophile's sexual orientation cannot be changed; the goal then is to teach them to live according to the social mores of their times. This is a frustrating development. The suggestion that there is a fixed sexual orientation has always been contested, and has been rejected by lesbian, gay, queer, and transgender activists and theorists since the days of gay liberation. It once again reinforces a heterosexual norm, and locates the problem of sexual assault and violence within the individual and, in the behavioural sciences, within his family, and ignores the way sex, gender, and power are linked in the broader social and cultural context.[504]

Arguments against sodomy laws that pointed out that the fundamental mechanics of sexuality they relied on were both incorrect and inaccurate were, and continue to be, applicable to the laws used to convict sexually violent offenders. Similarly, the arguments against the psychological treatment of homosexuality remain relevant to the psychological treatment of pedophilia and other criminal paraphilias. Yet these arguments gain no traction because the behavior of sexually violent offenders and pedophiles, unlike the behavior of homosexuals, is universally morally reprehensible.

To further complicate matters, recent LGBT identity campaigns have reinvigorated a form of essentialism. These campaigns posit that sexuality, like race or gender, is an Aristotelian accident of form. As such, it is just as fundamentally wrong to persecute someone for their sexuality as it is to persecute someone for their race or gender. There has been both feminist and queer theory critiquing the foundation of his standpoint, as gender theorists and critical race theorists have been refuting the fundamental and essential state of sex and race for decades.[505] Regardless of the countermovement, the push for essentialism in sexuality has led to several high-profile and well-funded scientific studies into the causes of homosexuality, most notably studies of genes, brains, and birth order.[506] Researchers frame these studies with the rhetoric of biological determinism and thus they are seen, by some, as triumphs in the fight for equal rights.

There is no question that greater understanding of human sexual behavior leads to wider acceptance. There has been a rush of recent news articles describe the widespread failure of the coercion therapy once promoted as a cure for homosexuality.[507] These articles contain a feeling of triumph of nature (whatever that may mean to each of us) over nurture. Many people assume the reason psychological treatments and behavioral modification therapies do not work is because gayness is innate in a way that cannot be reached psychologically. This is a monumental victory for the men and women who suffered in silence in these treatment programs, who internalized their inability to change and viewed it as their own personal failure. To people in these situations, scientific proof of innate sexual difference comes as a reprieve.

However, if emerging neuroscientific research were to uncover a biological basis for sexuality, or a correlation between a certain brain region and certain sexual thoughts, there would be some people who would see this as an opportunity to control undesirable sexual behavior. Queer and feminist critiques of science usually hinge on this potential outcome, resulting in an often-unstated premise that all scientific study of sexuality, regardless of purpose or field, is counterproductive to sexual orientation identity politics. This premise usually assumes the following: scientific study is equivalent to medicalization, which is, in turn, equivalent to pathologization. These critiques aim to unseat scientific claims about the origin of sexuality in order to protect a particular identity from being labeled abnormal and then cured or eradicated. Although these critiques have done important work to temper scientific inquiry into sexuality, and continue to raise awareness about the fact that sexuality is so complex and multivalent that researchers cannot adequately control for all variables, they tacitly reinforce the use of scientific research for the eradication of undesirable forms of sexuality.

Conclusion: Sex, Identity, and Mechanism

Leaving aside whether studies about somatic truths, such LeVay's "sexual brain," constitute good science, the fact is that their processes and results are often lifted wholesale into the study of criminal sexuality.[508] The transposition of research from homosexuality to criminal sexuality occurs because researchers assume all human sexual behavior shares a common mechanism. They assume that whatever process causes an individual to become attracted to the same sex bears at least a correlational relationship to the process that causes an individual to become attracted to children. They also assume that the processes that cause someone to be stimulated by sex acts are also the processes

that cause someone to be stimulated by violence and pain. These assumptions are not new, nor are they the sole purview of science—as noted in Chapter Four, the connection between sexuality and violence was fundamental to Girard. What is vital here is that these assumptions allow for trafficking of specific ideas across the chasm between criminalized and decriminalized sexual behavior, and that this trafficking is actually reinforced by queer theorists and LGBT activists who protest the pathologization of their sexual identities.

The increased application of materialism or systems theory makes it clear that this reinforcement is not entirely inadvertent. LGBT activists and queer theorists have a lot invested in rejecting connections between, for example, pedophilia and homosexuality. As a form of sexual identity, criminal sexual identity has roots in psychiatric, criminal and psychoanalytical discourses, and is currently implicated in neurobiology, psychological development, neuroscience, neuropsychology, behavior sciences and evolutionary biology. These implications stand, and continue to proliferate, not only because the general public sees sex offenders as vile and in need of eradication, but also because theorists of sexuality are so invested in denying the links between homosexuality and pedophilia that they ignore how these connections are actively operating. The treatment of abject sexualities in feminist and queer theory, or in many cases the lack of treatment of certain sexualities, effectively isolates sexually violent offenders from overt discourses of sexuality.

This is not about whether it is right or wrong to draw a line between homosexuality and criminal sexuality, but about the fact that there is a line at all. We, and here I mean not just humans but also scholars of sexuality and gender, may have drawn

the line ourselves, but that does not make it less concrete or any easier to remove. Nor does it mean that the line should be removed. Rather, scholars of sexuality and gender must confront the suggestion, latent already in our discourse, that perhaps these forms of sexual identity are *not the same* as other forms, and that this radical difference goes beyond just the most abject. We cannot begin to confront this until we recognize that the systems are there, and that they are, right now, radically intertwined.

As arguments about sexual object choice have pushed more and more for fluidity and fluctuation, the identity of sexual criminals, particularly that of sexually violent offenders, has become more fixed. Queer theorists and feminists are reluctant to address the existence of criminal sexualities as sexualities, yet scientific studies propose that we use the theories about the formation of gay and lesbian identity in order to better understand paraphilic disorders. If no one draws boundaries between forms of sexual identity and sexuality, researchers will continue to collapse them into single identity categories with single formative channels. In order to prevent this collapse, we must first acknowledge that it is happening, and in doing so, it is my hope that we will eventually come to examine the system that led us to put all these behaviors together in the first place.

Any analysis that assumes the processes and factors that create one type of sexual preference would necessarily create another should be suspect. This critical standpoint is an extension of both an older feminist critique of scientific studies that assumed what works for men will work for women, and that arm of queer critical studies which questions the validity of any work assuming gay and lesbian, not to mention bisexual, as equivalent. All factors indicate that they are not. Despite these critiques, which have

achieved some success, researchers continue to use the same processes once used to control homosexuality to root out pedophilia, and do so relatively undisturbed.

I posit that even if we were to allow that homosexual sex indicates homosexual identity, and criminal sexual acts indicate criminal sexual identity, it does not follow that the processes by which these identities are created and the meanings they have for being-in-the-world are identical. It does not even follow that they are similar. The entanglement of sexual preference and sexual object choice has been greatly overestimated. We group these identities together because they are sexual. We then move backward from that grouping to establish origin. Let us question that grouping itself, and let us do it openly rather than tacitly. It is entirely possible—in fact, it is probable—that similar yet parallel processes create all sexual behavior, including those that lead to violent sexual behavior, and it is also possible that they do not. The system is both varied and complex.

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[420] Hunter, "Sexual Orientation and the Paradox of Heightened Scrutiny," 1529.

[421] The category of sexuality usually encompasses, or sometimes functions as a stand-in, for several other concepts. Primary among these are sexual object choice, sexual desire, sexual identity, and the sex act itself. Sexuality can thus refer to preference for or history of engaging in particular acts, such as with members of the bondage, dominance, and sadomasochism (BDSM) community. It can also refer to a preference for a particularly embodied human, in terms of sex, such as with hetero or homosexuality, or extraordinary embodiment, such as with Devotees (a group that fetishizes disability). Sexuality can also refer to the expression of those preferences in a particular sexual life, such as in the phrase *healthy sexuality*, which refers not to identity but the practice of identity. When I say I focus on sexual identity, I am exploring sexuality as it relates to sexual object choice and identity, inasmuch as the two are related. I must also add some note on the position of asexuality in deference to my colleague Kristina Gupta, with whom I have been having a debate that has gone on for several years. Asexuality poses a fascinating question for me in the categorization of sexualities. We still have not settled whether asexuality is an identity that stands alongside gay/lesbian/bi/queer, an absence of sexual identity, a null object choice, or if it is one of the many sexual practices contained within LGBTQ identity.

[422] See, in particular, Robert J. Stoller et al., "A Symposium: Should Homosexuality Be in the APA Nomenclature?," *American Journal of Psychiatry* 130, no. 11 (1973). Of note also is the associated work of Evelyn Hooker, Judd Marmor, Del Martin, Richard Green

and Lewis Terman. Elise Chenier notes that forensic sexologists are often left out of this discussion, despite the fact that "forensic sexologists laid the groundwork for the campaign to remove homosexuality from the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* well before Hooker committed herself to taking a clear position against its pathologization." Elise Rose Chenier, *Strangers in Our Midst: Sexual Deviancy in Postwar Ontario* (Toronto: University of Toronto Press, 2008), 130.

[423] Margaret Schneider, "Educating the Public About Homosexuality," *Sexual Abuse: A Journal of Research and Treatment* 6, no. 1 (1993); Marc Elovitz, "Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research," *Duke Journal of Gender Law and Policy* 2 (1995); Gregory H. Herek, "Stigma, Prejudice, and Violence against Lesbians and Gay Men," in *Homosexuality: Research Implications for Public Policy*, ed. John C. Gonsiorek and James D. Weinrich (Newbury Park, CA: Sage, 1991).

[424] Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (New York: Free Press, 1999), 6.

[425] Model Penal Code, section 2.02 (2)a.

[426] Hunter, "Sexual Orientation and the Paradox of Heightened Scrutiny," 1529.

[427] Oosterhuis, *Stepchildren of Nature: Krafft-Ebing, Psychiatry, and the Making of Sexual Identity*.

[428] Steven Angelides, "Feminism, Child Sexual Abuse, and the Erasure of Child Sexuality," *GLQ: A Journal of Lesbian and Gay Studies* 10, no. 2 (2004); Tamsin Spargo, *Foucault and Queer Theory*, (Cambridge: Icon Books, 1999); Lynne Huffer, *Mad for Foucault: Rethinking the Foundations of Queer Theory* (New York: Columbia University Press, 2010).

[429] Rubin, "Thinking Sex," 160.

[430] Elise Rose Chenier, "The Natural Order of Disorder: Pedophilia, Stranger Danger and the Normalising Family," *Sexuality and Culture* 16, no. 2 (2012); Yoav Sapir, "Against Prevention? A Response to Harcourt's against Prediction on Actuarial and Clinical Predictions and the Faults of Incapacitation," *Law and Social Inquiry* 33, no. 1 (2008); Angelides, "Feminism, Child Sexual Abuse, and the Erasure of Child Sexuality."; Steven Angelides, "Historicizing Affect, Psychoanalyzing History: Pedophilia and the Discourse of Child Sexuality," *Journal of Homosexuality* 46, no. 1/2 (2003).

[431] Boruchowitz, "Sexual Predator Law—the Nightmare in the Halls of Justice."; Janus, *Failure to Protect.*

[432] Harris, *Civil Commitment of Sexual Predators: A Study in Policy Implementation*, 131.

[433] Sharpe, *Foucault's Monsters and the Challenge of Law*, 21.

[434] Foucault, *The History of Sexuality*, 43.

[435] Ibid.

[436] Foucault, Hocquenghem, and Danet, "Sexual Morality and the Law."

[437] Ibid., 283.

[438] *Medico-legàl* is the technical French term for what in the United States is called forensics, and specifically here forensic psychiatry. Translators often retain the original *medico-legàl* in order to convey that it has a much larger sense than the technical, and more precise, English term *forensic*. It is important to keep in mind, however, that

Foucault here is talking both about a larger blended medical-legal system and directly to a specific professional field.
[439] Foucault, *Abnormal*, 34.
[440] Ibid., 21.
[441] Ibid., 16.
[442] Therefore, Foucault concludes, the judge punishes "precisely these irregular forms of conduct that were put forward as the crime's cause and point of origin and the site at which it took shape, and which were only its psychological and moral double." Ibid., 17.
[443] Ibid., 25.
[444] Ibid., 32.
[445] Ibid., 21.
[446] Ibid., 33.
[447] Ibid.
[448] Ibid., 17.
[449] Regina G. Kunzel, *Criminal Intimacy: Prison and the Uneven History of Modern American Sexuality* (Chicago: University of Chicago Press, 2008).
[450] Linda Alcoff, *Visible Identities: Race, Gender, and the Self*, Studies in Feminist Philosophy (New York: Oxford University Press, 2006).
[451] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995); Kimberlé Crenshaw, *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New Press, distributed by W.W. Norton and Co., 1995).
[452] Judith Butler, *Giving an Account of Oneself* (New York: Fordham University Press, 2005); Butler, *Precarious Life: The Powers of Mourning and Violence*.
[453] Monique Wittig, "One Is Not Born a Woman," in *The Lesbian and Gay Studies Reader*, ed. Henry Abelove, Michèle Aina Barale, and David M. Halperin (New York: Routledge, 1981); Radicalesbians, "The Woman-Identified Woman," in *Out of the Closets: Voices of Gay Liberation*, ed. Karla Jay and Allen Young (New York: Douglas Links, 1972).
[454] Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989).
[455] Edelman, *No Future*; Elisa Glick, "Sex Positive: Feminism, Queer Theory, and the Politics of Transgression," *Feminist Review*, no. 64 (2000); Alexander Doty, *Making Things Perfectly Queer: Interpreting Mass Culture* (Minneapolis: University of Minnesota Press, 1993).
[456] Elizabeth A. Wilson, *Neural Geographies: Feminism and the Microstructure of Cognition* (New York: Routledge, 1998); ———, *Psychosomatic: Feminism and the Neurological Body* (Durham: Duke University Press, 2004).
[457] Originally published in 1984; the citations here are from a 1999 reprint.
[458] BDSM: bondage, dominance, and sadomasochism, AIDS: acquired immunodeficiency syndrome, the end result of infection by the human immunodeficiency virus, or HIV.
[459] Rubin attributes her theory of moral panic to Jeffrey Weeks, not to Stanley Cohen.
[460] Rubin, "Thinking Sex," 163.
[461] Ibid., 146.
[462] Ibid.

[463] Ibid., 147.
[464] Ibid.
[465] Ibid., 168.
[466] Ibid., 170.
[467] It is, incidentally, an extension of the same argument used to depathologize homosexuality in the 1970s, and was also taken up, although with less success, by pro-homosexuality psychologists during the sexual psychopath era. Chenier has an excellent discussion of how this argument took place between Canada and the United States in *Strangers in Our Midst*.
[468] Rubin, "Thinking Sex," 165.
[469] Ibid., 150.
[470] Sedgwick, "Axiomatic," 9.
[471] Ibid., 26 (emphasis in original).
[472] There is a researcher in Germany who does research with self-identified pedophiles, and there are various self-help groups for people who have been arrested for sexual crimes, although the latter has a taint of criminal responsibility that psychologists would argue is detrimental to real therapy because is very difficult to make clinical progress with a person who is in court-mandated therapy as they do not necessarily recognize that they have a problem.
[473] See Chapter Three.
[474] I refer, here, to the riots that occurred in Los Angeles and New York City in 1967 and 1969, respectively. The former was a series of demonstrations after a New Year's Eve police raid at Black Cat Tavern in the Silverlake neighborhood. This gave rise to the first gay pride organization and the publication of PRIDE newspaper, later renamed *The Advocate*. The latter was a similar, although much larger and better-known, series of violent demonstrations sparked by a police raid of the Stonewall Inn in Greenwich Village.
[475] Whether this makes criminal sexual identity ultimately subaltern in the sense in which Gayatri Spivak uses the term is a question for another time.
[476] It is this particular conundrum that led Susan Bordo to point out that poststructuralism was the "dream of nowhere," or a theory of destabilization that stably, paradoxically, smugly, asserts even its own instability. Susan Bordo, *Unbearable Weight: Feminism, Western Culture, and the Body* (Berkeley: University of California Press, 1993), 277.
[477] Boruchowitz, "Sexual Predator Law—the Nightmare in the Halls of Justice," 842; Douard, "Loathing the Sinner, Medicalizing the Sin," 46; Pollock, "Accounting for Predictions of Dangerousness."; Gleb, "Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings."; Morse, "Blame and Danger: An Essay on Preventative Detention."; Bochnewich, "Prediction of Dangerousness and Washington's Sexually Violent Predator Statute."; Dallet, "*Foucha V. Louisiana:* The Danger of Commitment Based on Dangerousness."; Janus, "Civil Commitment as Social Control."; Broadhurst, "Criminal Careers, Sex Offending and Dangerousness."; Shapiro, "Sources of Security," 848.
[478] Butler, *Gender Trouble*, xv.
[479] Ibid. This second definition, when taken to its furthest point, makes everyone more or

less heterosexual.
[480] Ibid., xi.
[481] Ibid., 43.
[482] Even age as an object choice creates an interesting system of shifting identity: one's identity as a pedophile or a gerontophile shifts not only with the age of one's partner but with ones own age. A twelve-year-old who desires other twelve-year-olds is not paraphilic. Similarly, there is no paraphilia to describe a seventy-year-old man's continuing desire for his seventy-five-year-old wife.
[483] This reminds me of the work of Linda Zerilli, who writes, "Both Butler and [feminist science studies theorist Anne] Fausto-Sterling see that we may well *know* something (for example, that there are bodies that do not conform to our concepts of sexual dimorphism) and continue to *act* as if we did *not know it* (for example, treat intersexed bodies as anomalies or exceptions that in no way disturb those concepts). But they sometimes seem to assume that it ought to be possible to throw our system of reference into question, all at once, by means of classically skeptical questions about the certainty of our knowledge of sex difference." Linda M. G. Zerilli, *Feminism and the Abyss of Freedom* (Chicago: University of Chicago Press, 2005), 40 (emphasis in original).
[484] This is particularly true in places like the contemporary United States where cultural discussions are informed by scientific discoveries—even if the translation from scientific report into journalism and layperson conversation sometimes leaves something to be desired.
[485] Vicki Kirby, " 'Feminisms, Reading, Postmodernisms': Rethinking Complicity," in *Feminism and the Politics of Difference,* ed. Sneja Gunew and Anna Yeatman, 20–34. (San Francisco: Westview Press, 1993).; ———. *Telling Flesh: The Substance of the Corporeal*. (New York: Routledge, 1997).
[486] Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (New York: Basic Books, 2000).
[487] Susan Oyama's book *The Ontogeny of Information: Developmental Systems and Evolution* first appeared in 1985, simultaneous with the first publication of *Myths of Gender.* Oyama addresses the relationship between genetic and inherited via a different lens, and Fausto-Sterling takes up Oyama's theory in her second book, *Sexing the Body*.
[488] Fausto-Sterling first published *Myths of Gender* in 1985. The quotations here are from the second edition, which has a new preface and an additional final chapter. The text of the chapters I quote here remains unchanged from the first edition.
[489] Anne Fausto-Sterling, *Myths of Gender: Biological Theories About Women and Men*, 2nd ed. (New York: BasicBooks, 1992), 152.
[490] For example, in her chapter on evolutionary biology, she focuses on the fact that sociobiologists work only in one direction—from the social to the biological—and assume that if you observe a behavior through generations, it has a genetic root. They explain the spontaneous appearance of new behaviors in stable populations with mutation, a process necessary for evolution. This is all well and good, Fausto-Sterling concludes, except for two things. First, there are political ramifications for finding a genetic basis for aggressive and criminal human behaviors such as rape. She expresses apprehension that the discovery of a rape gene would limit personal responsibility for action. Second, that the assumption of a genetic root for social behavior is just that—an

assumption. It is just as likely, clinically, that the behaviors are passed down supra-genomically: taught mother to daughter, father to son, inherited, but not necessarily coded in DNA.

[491] Evelyn Fox Keller, "The Gender/Science System: Or, Is Sex to Gender as Nature Is to Science?," *Hypatia* 2, no. 3 (1987): 38.

[492] Ibid.

[493] Butler, *Gender Trouble*, 10 (emphasis in original).

[494] For Bordo, the postmodern critical system, despite what its practitioners claim, has not gotten beyond the problems of Cartesianism, that fantasy of a brain in a box with a direct line to God. They simply replaced Descartes rejection of the body with "a new imagination of disembodiment: a dream of being everywhere." Bordo, *Unbearable Weight*, 277.

[495] Susan Bordo, *The Male Body: A New Look at Men in Public and in Private* (New York: Farrar, Straus and Giroux, 1999), 139.

[496] Ibid., 230.

[497] Myra J. Hird, *Sex, Gender, and Science* (New York: Palgrave Macmillan, 2004), 7.

[498] Vicki Kirby, in "Natural Convers(at)ions: or What if Culture was Really Nature All Along?," demonstrates the entanglement of nature and nurture by arguing precisely the opposite of what theorists like Butler argued.

[499] In the introduction of *Sexing the Body,* Fausto-Sterling explains that the recent adaptation of developmental systems theory by feminist theorists has fundamentally reoriented her own work. *Sexing the Body* is simultaneously an update of *Myths of Gender* and a biologist's response to Kirby, Wilson, and Grosz.

[500] Susan Oyama, *Evolution's Eye: A Systems View of the Biology-Culture Divide*, (Durham: Duke University Press, 2000), 139.

[501] Vicki Kirby, "Natural Convers(at)Ions: Or What If Culture Was Really Nature All Along?," in *Material Feminisms*, ed. Stacy Alaimo and Susan Hekman (Bloomington: Indiana University Press, 2008), 234.

[502] ———, "Corporeal Habits: Addressing Essentialism Differently," *Hypatia* 6, no. 3 (1991): 9.

[503] Elizabeth A. Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (Bloomington: Indiana University Press, 1994).

[504] Chenier, *Strangers in Our Midst*, 205.

[505] There is a large literature around critical race-based science, pointing out that the category of race is often a placeholder for another category of difference, e.g. national origin or socio-economic status. Some studies that examine race are actually examining the consequences of racism, in which case perception of a particular person as belonging to one category or another is a crucial distinction. Others are looking for a biological or genetic origin for diseases and disorders that seem to affect certain populations more than others; it is these that come under the harshest fire. The fact remains that the category of people who self-identify as a particular race do not share any overwhelming genetic or biological markers. The variation among that category is often much wider than the variation found between the categories of those who identify as white and those who identify as black.

This conundrum does not carry over to questions of sex and gender. Sex-based

scientific studies can very precisely and carefully control the boundaries of their category of inquiry, although that does not always happen. A sex-based study which is looking at the effects of chromosomes, for example a study interested in color-perception differences between men and women, need only separate its subjects into two categories: those who have Y chromosomes, and those who do not. Self-proclaimed gender identity does not enter into this study. (This example taken from an excellent color-perception study conducted by the people behind the webcomic xkcd. They blogged about the use of sex and gender in their study at blog.xkcd.com/2010/05/06/sex-and-gender/). Studies that seek to examine the effects of hormone levels work similarly. In the case of hormones and chromosomes, you have measurable physical characteristics which are linked to particular sexes, and which may also be linked to specific diseases or disorders. Because this category of measurable difference exists, all questions about sexual difference have the possibility of a biological or genetic answer. Thus, the category of gender, in as much as it is linked to sex, cannot ever be completely free of materiality, and questions about difference, whether they be statistical, physical or behavioral, are always haunted by the specter of that materiality.

On one level, cultural attrition affords significance to chromosomal arrangement—that is, it is only because there have long been cultural and social assignations made onto groups perceived as sexed differently that scientists even discovered an X and a Y chromosome. This small difference at the cellular level balloons out, and onto it are mapped many other cultural significances. A measurable difference exists, and since there are biological differences between sexes, and those who lie outside of those sexes are easily categorized and marginalized (and this is not in any way to dismiss the difficulties faced by trans and intersex people, but rather to say that those groups are just as rigidly defined within this system as are the sexes of male and female), and all of this categorizing and re-categorizing takes place on a regular basis, all questions about gender difference are shadowed, perhaps haunted, by materiality. This shadowing occurs within the categories of sex and gender in a way that it does not occur in other identity categories. Feminist interventions into questions about nature, nurture, gender and sex produce systems of thought which pay much closer attention to scientific methods than other forms of critical identity theory, so the interventions made by feminist science scholars are particularly relevant to the discussion of criminal sexual identity.

[506] Simon LeVay, "A Difference in Hypothalamic Structure between Heterosexual and Homosexual Men," *Science* 253, no. 5023 (1991); Dean H. Hamer et al., "A Linkage between DNA Markers on the X Chromosome and Male Sexual Orientation," *Science* 261, no. 5119 (1993); Ray Blanchard, "Fraternal Birth Order and the Maternal Immune Hypothesis of Male Homosexuality," *Hormones and Behavior* 40, no. 2 (2001).

[507] See Gabriel Arana's account of his own experience in ex-gay therapy at http://prospect.org/article/my-so-called-ex-gay-life and Robert L. Spizter apologizing for backing the idea at http://www.nytimes.com/2012/05/19/health/dr-robert-l-spitzer-noted-psychiatrist-apologizes-for-study-on-gay-cure.html.

[508] Simon LeVay, *The Sexual Brain* (Cambridge: MIT Press, 1993).

Conclusion

Exception and Continuum

Isaac Asimov's Foundation series, a work of science fiction from the 1950s, is set many thousands of years in the future, in a time when humans have expanded throughout the galaxy to form a massive empire.[509] The trilogy begins in the last days of this great Galactic Empire. A man named Hari Seldon designs a new field of research called psychohistory, a field guided by the principle that human beings act in collectively predictable ways. If the number of people involved is large enough, and if enough is known about historical events, practitioners of psychohistory can predict, with relative accuracy, the rise and fall of governments, the development of technology, and the systems of economic change. Seldon and his psychohistorians see that the Galactic Empire is approaching its end and that humanity will fall into a dark chaos for ten thousand years. They form a collective known only as the Foundation, tasked with guiding humanity through the fall of the empire into the darkness that follows, and helping to rebuild a new and better empire. Psychohistory predicts the actions of the Foundation will shorten the chaos from ten thousand years to a single millennium.

The first book details the first hundred years after the fall of the empire. The members of the Foundation receive several visits from holographic recordings of Seldon describing their situations with fascinating accuracy and offering them guidance. However, as good as psychohistory is at predicting the movements of civilizations, it is weaker and weaker when the actions of individuals are concerned. The second book exploits this weakness through a character known only as the Mule. The Mule is a mutant human endowed with superhuman abilities. He is entirely unaccounted for in the annuls

of psychohistory, and he pulls the work of the Foundation entirely off course. The Mule's exceptionality endangers all of humanity.

What are we to make of the Mule? Is he meant to represent the feared dictator—Hitler, Stalin, Napoleon, or Caesar? Or is he a prophetic figure, the harbinger of change—Martin Luther, Jesus, Abraham, or Muhammad? He certainly belongs to the ranks of these men, who, whether through megalomania or charisma, whether for divine intentions or nationalistic ones, command crowds and rouse revolutions. Yet the Mule is something else because he is not-quite-human. His name, a nickname but his only name nonetheless, is meant to represent his resemblance to the hybrid mule: neither horse nor donkey, and, in the case of the male, incapable of reproduction. He has powers that no other human has, but his sterility means he is not the kind of mutation that pushes forward Darwin's theory of evolution. His existence is a point of innovation and creation in a world rendered utterly predictable by the work of academics, and yet it is overshadowed by a sense of futility and destruction. Just when you think there is nothing new under the sun, Hari Seldon, the universe gives you the Mule.

So much of theory about difference is concerned with mapping the full continuum of human existence. Theories place humans on the continua of mental illness, sexuality, and disability. These types of theories ask us what the line is between A and not-A: when does the sane become the insane? When does bisexual become straight, or, for that matter, gay? Is it possible we are all on the spectrum? These theories focus on boundaries, the liminal, and negative space. They focus on the construction of abnormal by normal and vice versa. But what of the utterly, unpredictably, new? What of the

outlier so beyond our imagining that we have no category to address it? What of those things that appear and force us to reconsider all that we hold dear?

Anyone who has observed conversation between a mental health professional and a humanities scholar who works on cultural theory has observed some form of the impasse I am attempting to describe here. A cultural studies scholar will talk about the social construction of mental illness. The psychiatrist will answer by saying, "You clearly have never met a schizophrenic." The psychiatrist implies, first, that socially constructed things are not real in the way he believes things are real. And, to his credit, there are entire fields of deviance and labeling theory that suggest that calling certain acts criminal begets criminal activity, and that by labeling someone as sick you then cultivate an atmosphere in which they are encouraged to perform the role of the ill patient. Yet the other implication in the accusation "you have never met a schizophrenic" is that true madness is immediately recognizable, and that it bears no relation to the sane, the quirky, or the merely odd.

What I want to pose, what I want to consider here, as I close this project and move on to another, is how to address both of these at once. On the one hand, a good theory of difference and construction must allow for the existence of a continuum. On the other, it must allow for our affective response at encountering the utterly unrecognizable. It is frightening enough to see the Mule; to suggest immediately that he is not all that different from the rest of us is unfathomable. In fact, pushing for that recognition can create even worse problems, as the works of René Girard and John Douard describe.

Consider the story I have told here about the concept of the sexual predator. Earl Shriner was seen as so recognizably, immediately, frighteningly different that the

legislature had no choice but to create a new system to contain him, the civil commitment of sexually violent offenders, and a new label to describe him, the label of *sexual predator*. Like many categories do, these categories spread beyond their original extremely narrow application. People used *predator* as a general label for sex offenders, and then, eventually, for any sexually precocious and sexually aggressive individuals. Pedophiles are utterly different from "cougars," yet both are considered sexually predatory.[510] In examining this use of *predator*, my initial response is to describe a continuum. Yet one encounter with the utterly abject, one encounter with the utterly different, is enough to shake the foundations of any theory of overarching humanity. This is especially true of any theory attempting to include the sexually predatory human.

Although I have argued here for the recognition of the criminal sexual identity of sexually violent offenders, the fact remains that sex acts between adults exist in an entirely different moral category than sex acts with children, and have for a long time. Of course, homosexuality has been marked as deviant behavior for quite a long time, but history of sodomy laws shows that moral objections to homosexual activity had been eroding for many years before the laws were officially overturned.[511] Although there are still many cases in which people are branded as sex offenders for the commission of much lesser acts, their condition is considered an unfortunate and unintended consequence of sex crime law. In fact, it is considered unfortunate because they have been put in the same category as rapists and child molesters. The sexual behavior of the most vile sex offenders—forcible rape, child molestation, and sexual torture—is solidly on the other side of a great moral divide.

All scholars of human darkness, if I may be so bold as to use that phrase, encounter this great divide at one point or another. Some simply move the line a little further, as Schultz does in *Not Monsters*. Others, like Douard and Janus, take that fear head on. The darkness embodied by the figure of the sexual predator is not the banality of evil described by Hannah Arendt.[512] It is not bound up in the forces of evil Susan Neiman encounters in her alternate history of philosophy, as it is utterly unlike either the Lisbon earthquake or the Holocaust.[513] It is not, to dip back into literary metaphor again, the spreading darkness of fog that signaled breeding Dementors, the Nazgûl, and the old age and mediocrity that J. Alfred Prufrock sees at the start of his love song. This darkness is the darkness of the black hole; a tiny pinpoint of black that science tells us was, once, a great star, but now is so dense, its gravity so strong, it literally destroys light. The black hole does not block stars from view. It consumes them whole.[514] Such is the darkness of the Mule, and such is our response when encountering men like Earl Shriner.

Which is fine. It is absolutely fine. It is normal. It is expected. What I want to leave with, here, is the fact that although our response at first is to react to these incidents as anomalies, eventually everything tends toward entropy. Yes, it is true that my response to push for a continuity of humanity between the sexually violent offender and myself is one that comes twenty years after Shriner made headlines and without direct observation of the actions of a truly insane and dangerous person. But it is not ignorance or distance that causes this reaction. It is the fact that in the intervening two decades a continuum has already been set up. Despite the efforts of the Washington legislature in 1990, and despite the work of the department of corrections since then, the categories of the sexually violent offender and the sexual predator have been applied across the continuum, and our

responses to sexual criminals since 1990 have all been framed, in varying degrees of consciousness, as "How close is this crime to that of Shriner? How much is this man like him?" and, correspondingly, "How far is he from me?"

Which is fine. It is absolutely fine. It is normal. It is expected.

Except the things we say about sex offenders, the scrutiny of movements and the suspicion of young female schoolteachers or single male soccer coaches, simultaneously have everything and nothing to do with the fight for gay marriage. Queer people are reluctant to pay more attention to the treatment of sexually violent offenders because we do not want to admit how much history our identity categories share. We cannot truly get to the bottom of these identities, these actions, to the moral boundaries that are put around sexual behavior, until we accept that they are interconnected both in representation, in rhetoric, and in the discourse of scientific inquiry. I cannot say all sexuality is fluid except the really horrible types of sexuality, and cannot say all desire is liberated, except the types of desire I do not want related to my desire. Saying this does not actually create new ways of investigating sexuality; it simply makes it harder to see how theories about homosexuality continue to be used to describe pedophilia, and vice versa.[515] Yet this is the pattern of libratory queer theory.

The concept of sexuality is *so* wide and *so* fluid that it links the moral judgments of queerness, absolutely, to the treatment of sexually violent offenders. We must face this head on and acknowledge that the end results of sexuality, the variety of acts and positions and preferences, are complex. The category we call sexuality includes acts and identities that are fluid and also acts and identities that are fixed. They are joined together by a theory of motive and drive, and by a concept of physical response. And then, only

after we have acknowledged this, can we start to argue that it does not necessarily follow from this that the mechanisms that produce them are the same. My future project begins here, and will work to argue for the necessity of a critical feminist theoretical intervention into the fields of criminology and cultural studies of law and crime.

Criminal sexual identity functions as a positive explanatory theory assumed by the rules of evidence, by media coverage, and by populist outrage, but it is actually a remnant, formed by the acts and actors left behind as more and more sexual acts are decriminalized and more sexual desires are depathologized.[516] The forensic psychiatric treatment of sexually violent offenders is not the sole source of criminal sexual identity. This identity can be found in the unspoken of queer and feminist theory as a negative space, formed by the sexualities untouched or unaffected by theories of sexual fluidity, and attributed, by default, to those criminal sexual actors who are either forgotten or excluded.

Despite the efforts to separate homosexuality from sex offending and sexual deviancy, these systems remain linked. This is not only because the sexual acts which remain crimes are still subject to problematic assumptions about the connections between acts and identity which scholars of sexuality have been critiquing for decades, but also because fears about compulsive criminal sexuality shape arguments about civil rights for LGBT citizens. The historical connection between LGBT identity and deviant sexuality within the psychological classification of paraphilias contributes to this connection, and, correspondingly, the criminal sexual identity of specific criminals is always linked explicitly or implicitly to specific paraphilias. For example, Chapter Three showed how sexually violent offenders are linked to pedophilia regardless of whether they suffer from

it or if their crimes involved underage victims.[517] Similarly, homosexuality and lesbianism were once considered paraphilias and were forms of legislated sexual deviancy. Because of this categorical link, it is common within psychological research for discoveries about the origins or causes of homosexuality to be transposed on to other paraphilias. This is problematic because criminal sexual identity is always implicated in discussions of sexual identity. Despite the significant work done to separate out the more morally acceptable forms of identity and practice from the unacceptable and criminal ones, their association within scientific research has not wavered.

The idea that different kinds of sexualities may have entirely different origins and mechanisms has not entered the public or scientific discourse in a significant way. In order to make an ethical intervention into the use of sexual identity categories in forensics, we must first consider the possibility that the mechanism by which, for example, pre-pubescent children become a person's primary sexual object choice may be entirely different from the mechanism creating attraction to adult men or women. At the current moment, public discourse about sexuality is that it is all the same, and, even though many queer theorists and LGBT activists have gone to great lengths to disassociate themselves from criminally violent pedophiles (and for good reason), they have done so largely on ethical and moral grounds, not with a fundamental ideological shift.

It is my hope that by pointing out how these sorts of assumptions function that we may open a space for further investigation into just such a shift. Queer theorists' reluctance to extend theories of sexuality to the treatment of sex offenders can be read as an unfortunate oversight that has allowed the continued proliferation of problematic

assumptions about gender, sex, and sexuality within the discussion of sex offender classification and treatment. Moving forward from this project, I want to take this reluctance and leverage it into a split in ideas of how sexuality, sexual identity, and sex acts work. It is possible, especially since theories about sexuality are bifurcating so rapidly, that the sexual desire of sex offenders is categorically different from that of LGBT people. This is the foundation of criminal sexual identity: indebted to the pervert and the morally insane, legislated in the exceptionality of the sexually violent offender, and embodied as the pedophilic predator, but utilized in search of a more holistic and accurate theory of human sexual practices.

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[509] Isaac Asimov, *Foundation* (New York,: Gnome Press, 1951); ———, *Foundation and Empire*, (New York,: Gnome Press, 1952); ———, *Second Foundation* (New York: Gnome Press, 1953).
[510] Duncan, *Female Sexual Predators*.
[511] A 1995 Montana bill and a 1996 Kansas bill calling to expand the definition of sex crimes to include consensual adult sodomy were defeated after public outcry. Similarly, several states have removed people convicted of misdemeanor adult sodomy and consensual underage sex—so-called Romeo and Juliet convictions—from public sex offender registries.
[512] Hannah Arendt, *Eichmann in Jerusalem; a Report on the Banality of Evil* (New York: Viking Press, 1963).
[513] Susan Neiman, *Evil in Modern Thought: An Alternative History of Philosophy* (Princeton: Princeton University Press, 2002).
[514] Technically, light is trapped by the gravity of the black hole, not destroyed. I am grateful to Silas Mérez for keeping my physics honest.
[515] Chenier, "The Natural Order of Disorder: Pedophilia, Stranger Danger and the Normalising Family."
[516] There was even some speculation in the 1970s that once homosexuality was removed from the DSM, the other paraphilias would soon follow. Charles Moser and Peggy J. Kleinplatz, "DSV-IV-TR and the Paraphilias: An Argument for Removal," *Journal of Psychology and Human Sexuality* 17, no. 3/4 (2005).
[517] Some criminal sexual identities are studied only through an attendant paraphilia, at least in name. In fact, the majority of studies about pedophilia are also about criminal sexual identity, because the subjects are those who have been charged or convicted. See Chapter Three of this work.

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