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Introduction

The War on Sex

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I

The world is waging a war on sex.

It is a quiet war. It is often an undercover war. It has gone unnoticed, for the most part, except by those who have been affected by it, directly or indirectly.

And yet it is hardly an unpopular war. Many people, when asked to endorse it, do so enthusiastically. It has aroused little indignation, opposition, or resistance. It is painfully difficult to contest. It relies on a mainstream consensus — if not exactly in its favor, at least in support of the general principles in whose name it is fought.

It is also a terribly destructive war. It has devastated civil liberties. It has had grave consequences for the autonomy and agency of women, young people, the disadvantaged, and the vulnerable. It has ruined many, many lives. It has had a particularly violent impact on those who are socially marginalized, socially stigmatized, or racially marked, or who cherish nonstandard sexual practices. Sexual freedom has lost significant ground to it — ground that will take a very long time to recover.

Costly for some, the war on sex has turned out to be immensely profitable and useful for others — not only for politicians and academics, therapists and police officers, journalists and moralists, but also for a multitude of interested parties. It is not about to end any time soon. And, as in most wars, fog and shadows, propaganda and disinformation conceal the contours of events. So we need to understand what is going on in order to confront it and to challenge it. And we need to do that now.

"We have heard a great deal of overblown rhetoric during the sixties in which the word 'war' has perhaps too often been used — the war on poverty, the

war on misery, the war on disease, the war on hunger." So Richard Nixon remarked on January 22, 1970, in his first Annual Message to the Congress on the State of the Union, no doubt with a backward glance at his predecessor, President Lyndon Johnson. "But if there is one area where the word 'war' is appropriate," Nixon continued, "it is in the fight against crime. We must declare and win the war against the criminal elements which increasingly threaten our cities, our homes, and our lives."[1] In addition to launching what became known as the War on Crime, Nixon reportedly called for a War on Drugs when, a year and a half later, on June 17, 1971, he issued a "Special Message to the Congress on Drug Abuse Prevention and Control." In fact, that White House statement spoke only of a "war against heroin addiction" and the "threat of narcotics"; it proposed "a full-scale attack on the problem of drug abuse in America." It did not employ the phrase "war on drugs," but Nixon's earlier declaration of a "war against crime" provided a model for the formula by which his drug policy, and its successors, became known.[2]

Is the word "war" actually appropriate to designate the sharp rise in the limitations placed on sexual freedom in the United States and elsewhere since the 1970s? Some readers may greet these opening paragraphs — and the title of this book itself — with a measure of Nixon's skepticism about overblown rhetoric. The war on sex is not, admittedly, a single, integrated phenomenon, nor does it appear to be a deliberate strategic plan coordinated at some high level of centralized authority: it is rather the cumulative effect of many independent, though interrelated, initiatives. No one in power in the U.S. government has formally declared a war on sex as a matter of public policy. On the contrary, the last fifty years are conventionally understood to have witnessed an inexorable expansion of sexual liberties in the United States — if not exactly a sexual revolution, then at least a slow extension into law, policy, and social practice of the revolutionary changes in sexual life associated with the upheavals and counterculture of the 1960s.

The essays collected in this volume tell a very different story, a story quite unlike that conventional tale of progress — though thoroughly cognizant of the standard progress narrative they challenge. It is a story that runs counter to many received ideas about recent history and sexual politics. It focuses on the United States but it also glances elsewhere — at the Caribbean, at Asia, and at Europe (which is particularly affected). The war on sex is a global phenomenon, and the work assembled here offers a narrow glimpse of its global dimensions. But the war on sex is also an American export, and the contributors to this collection pay particular attention to the United States because its

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influence, both through government programs and policies and through U.S. funding of international nongovernmental organizations (NGOs), has had a worldwide impact.

It may not in fact be a gross exaggeration to call the current rollback of sexual freedom a war. Although it is not a conventional armed conflict, the state is deeply involved in waging it, and it does so to the full extent of its might. In the United States, for example, no fewer than two federal agencies, the Department of Justice (DOJ) and the Department of Homeland Security, and one municipal agency, the New York Police Department (NYPD), combined on August 25, 2015, to launch a massive raid on the Manhattan offices of Rentboy.com, an entirely aboveground, two-decades-old online clearinghouse for advertisements by gay male escorts. At the same time, officers armed with guns and vests appeared without warning at the homes of the organization's staffers and arrested them, though six months later the feds quietly dropped all charges against everyone but the CEO. What made this organization so dangerous, so deserving of an armed response, and its employees such a threat to national security? The most serious crime of which the latter stood accused was "conspiring to violate the Travel Act by promoting prostitution"; there were no allegations of trafficking, pimping, exploiting minors, creating a public nuisance, using force or coercion, or victimizing anyone (the 1961 Travel Act merely forbids interstate commerce that promotes illegal activities).[3] Sex itself was the enemy — nonstandard forms of it in particular, such as gay sex and commercial sex. Many government agencies, including the police, the FBI, and the Immigration and Customs Enforcement (ICE, a branch of the Department of Homeland Security), are routinely engaged in sexual surveillance, and they do not hesitate to pursue even noncontact crimes of a sexual nature with disproportionate deployments of militarized force.[4]

As this example shows, the war on sex should not be confused with a heightened awareness of sexual violence, rape, and the sexual abuse of children along with a greater determination to do something about them by means of law and social policy. There is nothing wrong with using legal and moral pressure to reduce the incidence of sexual assault, forced prostitution, and child pornography featuring real children subjected to sexual mistreatment: those are all instances of grievous personal harm, which must be prevented, if possible, and, if not, must be met with a firm, appropriate response.

The war on sex, however, cannot be reduced to an enlightened effort to prevent and punish sexual harm, though it often camouflages itself as such. It is rather a war against sex itself — in many cases, against sex that does no

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harm but that arouses disapproval on moral, aesthetic, political, or religious grounds. Those grounds provide an acceptable and politically palatable cover for a war on the kinds of sex that are disreputable or that many people already happen to dislike.

Let me be very clear on this point. There is no denying that sex can be a vehicle for harm, sometimes very serious harm. It is not only legitimate but indeed imperative to stop people from using sex to harm one another. Sexual freedom is not a license to abuse others for one's own pleasure. But preventing sexual abuse should not furnish a pretext for an all-out war on sex that permanently identifies sex itself with danger and with potential or actual harm. Nor should it provide a justification for dispensing with all measure and proportion in deterrence and punishment.

The view that sex *in itself* is bad or harmful is rarely articulated or argued. But it is powerfully if wordlessly expressed in the tendency to punish sexual crimes much more harshly than other serious crimes, even the most destructive and violent crimes. It is also present in hyperbolic condemnations of the kinds of sex that are admittedly unsavory, disgusting, or selfish: those judgments easily slide into portraying disapproved sex as inappropriate or undesirable sex, then as objectifying or exploitative sex, and finally as genuinely abusive, violent, or harmful sex.

Under that cover, and in the guise of a campaign against sexual violence or abuse, the war on sex offers a noble cause and an effective rallying point for people located on every part of the political spectrum. It unites feminists and evangelicals, liberals and radicals, politicians and activists, intellectuals and populists, Left and Right. That is what makes it so hard to critique and to challenge. But that is also what makes it so important to address.

The purpose of this book is to document, to describe, and to oppose the war on sex.

In the United States today, it is common to believe that we live in an era of sexual emancipation. And there are good reasons for thinking so. Within the span of a single lifetime, within the memory of many people who are alive today, sexual attitudes in the United States have undergone major transformations. A series of judicial and legislative decisions have permitted certain sexual freedoms that, just a short time before, would have seemed unthinkable. The U.S. Supreme Court has enshrined many sexual freedoms in constitutional law. Let us recall a few of the major legal milestones.

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For most of U.S. history, it was constitutionally permissible for individual states to criminalize the distribution and use of contraception. Only in 1965 did the Supreme Court guarantee a right of access to contraception — for husbands and wives only, not for unmarried partners or anyone else. The Court went further in 1972, when it struck down laws that restricted the availability of contraceptives to married couples. In 1977, it went further still, prohibiting states from limiting the sale or distribution of contraceptives to people sixteen and older, thereby permitting adolescents to purchase condoms and other contraceptive products.[5] To be sure, the battle over contraception is not yet over. There are ongoing social conflicts today over a series of policy questions relating to contraception: whether the U.S. military should provide it to service members, whether private insurance companies can be required by the federal government to cover its costs, whether employers can be required to offer such coverage, whether certain kinds of pharmaceutical contraceptives should be available without a doctor's prescription, and whether there should be age restrictions on obtaining them over the counter. But the legality of contraception itself and its availability for general sale are no longer contested.

Abortion has been legal since 1973, though it is often unobtainable in practice, especially by poor women, in many parts of the United States. Obscenity, whether verbal or pictorial, is rarely prosecuted, except in reference to child pornography: books with four-letter words in them cannot be banned from publication (though they may be removed from libraries and schools). Since 1969, it has been legal to possess pornography and to view it in one's home (as long as the individuals who figure in it and who view it are at least eighteen years of age: pornography depicting minors, which was once illegal only to produce, is now also illegal to possess). It took the Supreme Court longer to legalize non-heterosexual and non-genital sex, but in 2003 it vacated state laws that criminalized anal, oral, and manual sex between consenting adults performed in private for noncommercial purposes.[6] Women can no longer be prohibited by the states from serving on juries; other restrictions, both formal and informal, on the access of women to employment, education, athletics, and care for their young children have been lifted, thereby guaranteeing women a degree of social autonomy without which real sexual autonomy is not possible. Marriage has finally ceased to be a license to rape: spousal rape has been illegal in all fifty states since the early 1990s. In at least twenty-two states homosexuality is no longer a legally permissible ground for denial of access to employment, housing, and public accommodation, and marriage between two people of the same sex is now legal nationwide. The rights of transgender people are slowly gaining official recognition.

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How is it possible, in the context of such broad and far-reaching progressive reforms, to speak of a war on sex?

This volume does not ignore or attempt to play down these historical changes. The work collected here acknowledges that in many respects the last fifty years have witnessed a significant expansion of sexual freedoms — at least, of certain sexual freedoms. That expansion represents an important historical development. It also represents a positive development, since sexual freedom is a good in itself. The contributors to this volume seek neither to minimize nor to deny these striking changes.

But the progressive liberalization of sex in the United States over the last fifty years is not the whole story. Outside the privileged domain of certain approved, legally permitted, and constitutionally protected sexual practices, sexual freedom has come under sustained attack. There has been a war, in short, on the kinds of sex that are morally disapproved, or that are stigmatized, or that simply fall outside the range of practices currently sanctified by legal guarantees.

New restrictions, both formal and informal, are being placed on commercial sex and sexual services, public sexual expression and publicly visible sexual representation, sex in publicly accessible venues, nonmarital sex and sex outside the context of the couple, sex online, sex in the workplace, HIV-positive sex, pornography, gay sex, sex in schools and prisons, sex between adults and minors, and sex among minors.

It would be impossible to produce an exhaustive list of the complex ways in which sexual freedom is currently under siege in the United States. But the last fifty years, especially the last two and a half decades, have witnessed a series of ominous developments that can be enumerated easily enough. There have been, for example:

- a gradual restriction of public access to contraception and abortion, including a nationwide campaign against Planned Parenthood;
- a widening and diversifying opposition to sex education in public schools;
- a multiplication of attacks on sex research and sex-related scholarship;
- a series of panics over sex crimes and sexual predators that have eventuated in new waves of repressive legislation;
- an expansion of sex offender registries and of the categories of sex crimes for which registration is mandatory;

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- an accelerating drive to protect children and adolescents from dangers of all kinds, including sexual danger, which has had the effect of curtailing the sexual agency of minors and young adults;
- the emergence of a new consensus and political infrastructure opposed to human trafficking, which has often targeted all forms of commercial sex instead of focusing on forced prostitution, labor exploitation, coerced work, and other nonsexual forms of trafficking;
- an attack on online advertising for sexual services, as part of the campaign against trafficking;
- new restrictions on access to pornography, which the state of Utah, in a piece of non-binding legislation passed in 2016, went so far as to declare a "public health crisis";[7]
- a growing concern for the rights of victims at the expense of the civil liberties of the accused and due process for the accused;
- a continuing crackdown on sex in publicly accessible venues;
- a mounting tendency to treat sex itself as a danger or threat;
- an intensifying urgency to protect people from sex;
- an increasing regulation and criminalization of sex;
- an imposition of ever-narrowing legal and administrative definitions of who is entitled to engage in sex;
- an expansion of the populations whose sexual behavior falls under state or bureaucratic control;
- a striking upsurge in the severity of the punishments meted out to those who commit sex offenses, even those convicted of relatively minor infractions: for example, the proportion of sex offenders subject to federal mandatory minimum sentences has skyrocketed (from 5 percent in 2001 to 51 percent in 2010);[8] and
- an explosion in the number of registered sex offenders, with a 35 percent increase from 2005 to 2013, by a conservative measure.[9]

In comparing rates of sex offender registration against general trends in American correctional supervision, Trevor Hoppe, one of the editors of this volume,

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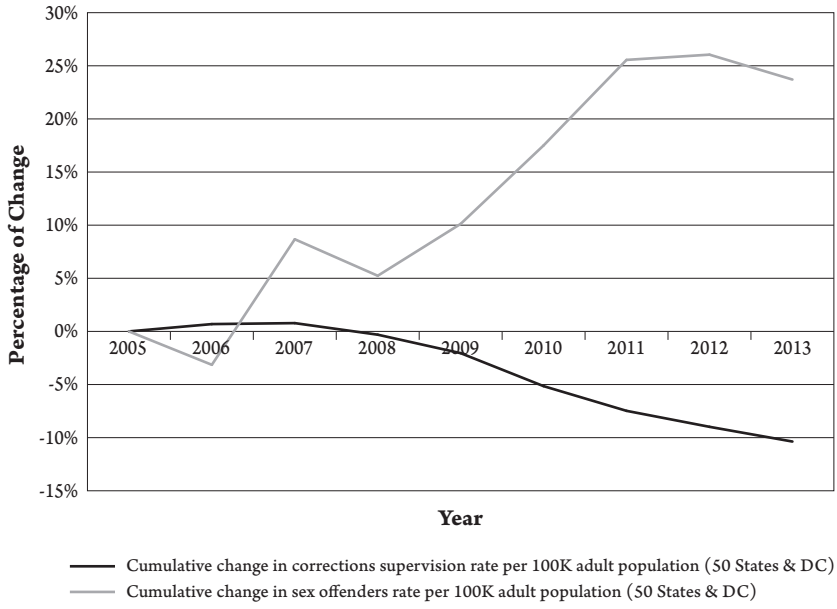
has found that sex offender registration rates have spiked in recent years, even as trends in corrections have plateaued (see figure Intro1).[10]

In the light of these developments, there is reason to temper the optimism that has greeted the dramatic success of the lesbian/gay/bisexual/transgender (LGBT) rights movement in decriminalizing private, consensual, noncommercial adult sex and in legalizing gay marriage. Recent victories for LGBT rights at the U.S. Supreme Court and in federal policy have induced a false sense of complacency among many people on the progressive end of the political spectrum. The resulting faith in the ongoing enlargement of sexual freedom has blocked an awareness of what the essays assembled in this collection show: that sex has increasingly become a distinct target of contemporary policing, punishment, and bureaucratic management. In fact, during the same period that has witnessed the progress of LGBT rights, a complex array of both governmental and nongovernmental institutions — such as sex offender registries and the anti-prostitution industry — has emerged and expanded. Sexual and racial minorities, along with immigrants and the poor, are often

FIGURE INTRO1. Change in rates of sex offender registration vs. corrections, 2005–2013



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vulnerable to their effects, but White heterosexual couples and children do not escape them either. And "outside of the global north," as Maurice Tomlinson reminds us in his contribution to this collection, "the ongoing struggle for securing basic legal protections for LGBTI [lesbian, gay, bisexual, Trans*, and intersex] people . . . remains a pressing issue."

In short, the familiar stories we have been telling ourselves about the sexual revolution, the rise of sexual permissiveness, the collapse of old-fashioned sexual morality, the change in sexual attitudes, the progress of women's rights and gay rights, the decriminalization of sodomy, and the legalization of gay marriage have all diverted attention from a less familiar but equally important story about the new war on sex, a war that in recent years has intensified in scope and cruelty. One aim of this volume, then, is to tell at least some parts of that neglected story — and to document the increasing restriction and regulation of sex in an era otherwise characterized by sexual liberalization.

The proliferating restrictions placed on sex in recent decades should not be seen as mere bumps on the road to greater sexual tolerance or the last gasps of Victorian prohibitions — residual formations or dwindling pockets of reaction, destined to be swept away by the rising tide of progress and enlightenment. On the contrary, many of these phenomena represent emergent formations: new developments that point to urgent problems of justice. They demand to be addressed. They call in particular for a reconsideration not just of specific tactics but also of broad political strategies on the part of feminist, LGBT, and other progressive forces. *They require new mobilizations of political resistance in the name of sexual freedom itself.* For sexual freedom, as Amber Hollibaugh writes in her contribution to this volume, "is a fundamental, an essential, freedom, and, oddly enough, the ultimate protector of human privacy, vulnerability, autonomy." Moreover, since the war on sex is entwined with racism, sexism, social inequality, and homophobia — though, as I shall argue, it is also distinct and independent from them — it demands a coalitional response that can bring together a range of social movements.

Recently, a number of mainstream political and civil stakeholders have contested some of the extreme consequences of the ominous developments just mentioned. So there are real and significant opportunities for new alliances along the front lines of certain battles in the intensifying war on sex. All of these developments point to the need for a fresh historical vision of how we got into our present situation and for an enhanced understanding of the embattled terrain on which we now find ourselves.

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That, in sum, is what this volume aims to provide. The essays collected here document what some of the authors (and others) do not scruple to call "The War on Sex" — the manifold ways in which sexual freedom and sexual expression have in recent decades come under attack from both government and civil society. The contributors trace the history of how progressive political movements came to abandon the cause of human rights pertaining to sex. They also examine how kinds of sexual conduct as well as kinds of sexually defined individuals are currently being hemmed in by new sorts of formal regulation, social disqualification, policing, hypercriminalization, and administrative management in a period of otherwise expanding sexual liberties.

The recent decades have been marked in both Europe and the United States by an expansion of what legal scholar Bernard Harcourt calls "neoliberal penality." Harcourt understands something quite precise by this term. He uses it to refer to "a form of rationality in which the penal sphere is pushed outside political economy and serves the function of a boundary: the penal sanction is marked off from the dominant logic of classical economics as the only space where order is legitimately enforced by the State." As the state retreats from regulation of the market, it vastly expands into other realms of regulation, control, and punishment, "passing new criminal statutes and wielding the penal sanction more liberally *because that is where administration is necessary, that is where the State can legitimately act, that is the proper sphere of governing*."[11] In the case of sex, neoliberal penality has conduced to an intensification of criminal and regulatory social-control programs affecting ever-widening spheres of human behavior.

Particularly in the last fifty years, as Roger Lancaster explains in his contribution to this volume, "the redistributive welfare state, which once governed through ideals of health, well-being, and discipline, has given way to a punitive neoliberal regime, which takes the crime scene as the basic paradigm of governance and conditions assistance on varied forms of *victimization* (or otherwise subjects benefits to means-testing as opposed to universal entitlement). . . . Mass incarceration is only one of the punitive state's techniques, and what goes unexamined is the role of sexual fear and loathing in promoting expansive new extra-carceral modes of securitization."

The carceral state itself has been the object of growing critical attention. Activists, scholars, and the media have highlighted the expansion of the prison population in the United States. And as the economic fallout from

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the 2008 financial crisis has continued to devastate state budgets, even some conservative state governments have been forced to reconsider their tough-on-crime policies, which swell the prison population and drain scarce resources needed for other urgent purposes. In this context, activists and progressive organizations have had some success in rallying broad-based support for campaigns against punitive drug policies and minimum sentencing requirements.

As a result, opposition to the prison-industrial complex, once limited to academic and activist critics of structural racism, has gone mainstream. Speaking at Columbia University on April 29, 2015, Hillary Clinton declared, in one of her first presidential campaign appearances, "It's time to end the era of mass incarceration." President Barack Obama chimed in on July 14, 2015, calling for an end to mandatory minimum sentencing and for congressional action to fix "a broken system." Strong bipartisan support for that objective has in fact emerged in the U.S. Congress as well as across the entire political spectrum; Koch Industries and the MacArthur Foundation, FreedomWorks and the Center for American Progress, along with a number of right-wing and left-wing political leaders and groups, have all come together to form the Coalition for Public Safety in order to lobby for criminal justice reform.[12] Of course, it remains to be seen how substantial or significant any actual reforms prove to be, and in any case the effects of overhauling the federal criminal justice system alone will be felt by only about 10 percent of the entire U.S. prison population. Whatever the outcome, the anti-incarceration movement has made undeniable progress, but it has been less unified, less vigorous, less interested, and less successful in countering the war on sex.

Nonetheless, the war on sex has not gone entirely unchallenged by activists, critics, scholars, lawyers, political commentators, and journalists.[13] Anyone who reads the writings assembled in this volume, who takes the trouble to look into the political mobilizations of resistance and critique that they describe, or who pursues the scholarly leads provided by their citations will recognize how many individuals, organizations, and political coalitions have identified, and contested, the various ways that sex is currently being targeted for regulation and control. A long list of activist groups fighting against the war on sex can be found in the afterword to this volume. Efforts to oppose the war on sex have often been strikingly courageous, astute, and forward-looking, and they have achieved some important victories. But they have had to struggle for broad acceptance. And, in terms of actual progress, this movement is still at its very beginning.

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It is perhaps symptomatic of the current state of sexual politics that the war on sex has yet to receive, even from feminists and queer theorists, the urgent attention it deserves. Those who have been defending sexual freedom all along would benefit from a wider political, critical, and scholarly consensus in their favor as well as from more vigorous and principled support. One purpose of this volume, accordingly, is to underwrite their efforts — if only by highlighting the existence of the war on sex and by bringing it to the attention of those who might well challenge it if they actually recognized its extent or the magnitude of the threat it poses to sexual freedom and civil liberties. The writings assembled here should provide renewed inspiration for a broad and powerful response to the war on sex from progressive forces both inside and outside the academy.

Another purpose of this volume is to call for renewed critical analysis of the politics of sex itself.

The politics of sex cannot be reduced to a politics of identity. On the contrary, as the evidence collected here shows, it is a politics that cuts across identity — across differences of race, class, gender, sexuality, and other social categories. That is both a *challenge* and an *opportunity*. It is a challenge because it calls into question some of the dominant, recent, identity-based ways of organizing both knowledge and political movements around sex and sexuality. It is an opportunity because it offers to bring together, across differences of identity, many distinct constituencies affected by the politics of sex.

As a number of essays in this volume make clear, racial and sexual minorities, as well as women, transgender people, and the poor, are sometimes exposed to the harshest kinds of sexual policing. Young transgender people of color are at particular risk of discrimination and mistreatment. Black communities are disproportionately affected: sex offender registration rates for Black men in the United States are roughly twice those for Whites.[14] In other words, the inequalities produced by sexual politics are often stratified according to the same axes of social difference as many other kinds of social inequality.

Often — but not always.

As the contributors to this volume demonstrate, sex as a target of state power is more than just a vehicle for the consolidation of existing social hierarchies. Rather, sex — understood as a continuum of practices ranging from the acceptable and approved to the disreputable and disapproved, along with the regulatory categories of persons those practices generate — has its own

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politics. It should be seen as an axis of social difference in its own right. Sex gives rise to specific kinds of regulation and control, and it is subject to its own forms of oppression and demonization.[15]

More than thirty years ago, Gayle Rubin argued in her foundational essay, "Thinking Sex," that the politics of sex was not entirely reducible to the politics of gender; it constituted its own axis of inequality and required analysis in its own right.[16] The work collected in this volume dramatizes that point, extends it further, and demands a new engagement with it. As the evidence gathered here argues with particular force and eloquence, sexual politics cuts across the identity politics of gender, race, class, and sexuality.

Take, for example, Louisiana's 200-year-old Crime Against Nature law, which was expanded in 1982 to include "Solicitation" (offering to engage in oral or anal sex for money). The Louisiana state legislature massively reaffirmed its commitment to the law as recently as 2014, when it voted 66–27 against its repeal. Alexis Agathocleous, in his contribution to this volume, highlights the real-world consequences of this law: he shows "how a statute, passed in the context of virulent homophobia in the early 1980s, came to be predominantly wielded against African American women. . . . [The law] was adopted and then enforced in ways that involve sometimes overlapping and sometimes distinct discriminatory purposes." Sexual politics, in other words, is often a solvent of identity. It can override the divisions among different social groups that define themselves by reference to specific identity markers. Sexual politics requires its own analysis.

Why sex? What is it about sex itself that makes it such a ready site for social control? And how do we mobilize politically around it? If the essays in this volume do not offer a single answer to that question, they provide a number of salient clues, and they increase the pressure on all of us to find both theoretical and practical solutions.

II

As of December 7, 2015, there were 843,680 persons registered in the United States as sex offenders.[17] (That is more people than the entire population of states like North Dakota, Wyoming, or Alaska.) The names, photographs, addresses, workplaces, criminal histories, and personal information of these sex offenders are recorded in public, searchable databases, accessible via government websites to anyone with an Internet connection or a smartphone (the specific details posted online vary somewhat by state). Sex offenders must

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register with the local police in all the jurisdictions where they live, work, and attend school; in many jurisdictions, they must comply with strict residency restrictions as well as restrictions on places where they may be present, and they must regularly update their information (including whenever they move to a new address), on pain of incurring additional penalties, such as prison time. In Louisiana, they must personally notify their neighbors of their presence, for example by distributing handbills with their photos or by taking out advertisements in local newspapers at their own expense. In Texas, the Department of Public Safety must provide written notice to the immediate neighbors of certain sex offenders. In Oklahoma and Louisiana, the words "sex offender" appear in large orange-red letters on their drivers' licenses. In 2003, the U.S. Supreme Court upheld the constitutionality of Alaska's Sex Offender Registration Act, finding that it could be applied to convicted criminals retroactively *because its complex provisions were merely regulatory and not punitive* — a precedent-setting decision.[18]

Very few registered sex offenders — a mere 1 percent in some states — fall into the category of violent sexual predators.[19] Many of those on the sex offender registries were found guilty of crimes that did not involve any contact with another person. Others were convicted of misdemeanors (rather than felonies) of a sexual nature or of crimes involving consensual sexual activity that elicited no complaint from the alleged victims or from bystanders. Among the offenses subject to registration in a number of states in 2007, according to Human Rights Watch, were paying for sex, urinating in public, flashing or streaking, and sexual relations between underage teenagers.[20] In Britain, a man was placed on a sex offender registry in 2007 because he was caught having sex with a bicycle in the privacy of his home.[21] The vast majority (72.4 percent) of the 2,317 sex offenders convicted under *federal* statutes in the United States in 2010 (the most recent year for which the statistics have been analyzed) were charged with "the possession, receipt, transportation, or distribution of sexually oriented images of children": that is, they were found guilty of noncontact crimes — specifically, child pornography offenses that involved no actual physical relations with or direct abuse of a minor on their part.[22]

Judith Levine notes in her chapter that "a quarter of convicted sex offenders are [themselves] minors, eleven to seventeen years old; 16 percent are under twelve." Of all sex offenses against minors "known to the police," according to a comprehensive U.S. Department of Justice report from December 2009, more than a third (35.6 percent) are committed by other minors, many of them quite young: "The number of youth coming to the attention

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of police for sex offenses increases sharply at age 12 and plateaus after age 14." Even more troubling is the fact that the juvenile sex offenders identified by the police, and recorded in the DOJ's National Incident-Based Reporting System, include "a small number of children younger than 6 years of age." The authors of the 2009 DOJ report decided to exclude that group from its statistics.[23]

Children can of course cause serious sexual harm to other children. Some of them may simply be engaging in routine sexual exploration and experimentation and may therefore require relatively little in the way of intervention. Some of them, however, commit forcible sexual assault, rape, or other acts of sexual violence: such conduct calls for more elaborate intervention and thoughtful, humane punishment. Since children often have unimpeded access to younger children, they can inflict sexual harm unobserved. So it is important to be aware of the risk of sexual abuse among minors and to prevent it as well as to punish it appropriately. If efforts to identify and to discipline juvenile perpetrators of sexual abuse have multiplied of late, that is in part because communities and law enforcement are trying quite properly to make up for a long history of ignoring and of underreporting the sexual abuse of minors by other minors. But the sheer numbers of very young children currently being accused of sex offenses, and the draconian ways in which they are being punished, also raise the possibility that sex offenses are being defined far too broadly and treated out of all proportion to the real danger they present — the possibility, in other words, that sex, not harm, is the actual target of regulation. The DOJ report just cited estimates that in 2004 alone the police in the United States would have identified about 89,000 juveniles as sex offenders.[24]

Those figures may surprise, but what is really surprising is that they aren't higher. As Owen Daniel McCarter, Erica R. Meiners, and R. Noll point out in their contribution to this volume, transgender youth, especially transgender women of color, are often treated as sexual deviants by their schools and accused of sexual offenses. And starting in 2009, when the news media fastened on an epidemic of "sexting" among students at Tunkhannock Area High School in rural Pennsylvania, there has been an avalanche of reports about teenagers taking, and often sending one other via their smartphones, sexually explicit photographs of themselves. Such photos qualify under federal law as child pornography if the subject is under the age of eighteen. Child pornography is illegal to possess (to say nothing of distributing) *even when it consists of images of yourself*. No wonder, then, that high school students all around the United

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States have fallen into the clutches of the law and have been subject to a wide variety of disciplinary and punitive measures.[25]

In November 2014, the parents of all children enrolled in the School District of Rhinelander, Wisconsin, received a prerecorded telephone message from the school administration in coordination with the Oneida County Sheriff's Department. The robocall announced the conclusion of an investigation into "numerous students who were sharing inappropriate photos via personal cell phones." The message, as quoted in the Rhinelander *Star Journal*, pointed out that, although no criminal charges had been filed against any of the students involved, "Wisconsin law does consider incidents such as this as *felony offenses*, and it does not have disciplinary alternatives for such offense."[26] Law enforcement officials in many school districts across the country have been obliged in recent years to explain to astonished assemblies of high school students that taking (and, worse, exchanging) explicit photos of themselves makes them felons, who if convicted risk lifelong registration on public, searchable databases as sex offenders, with potentially devastating consequences for their subsequent abilities to find housing, employment, and schooling. As Hanna Rosin summed up the situation in the November 2014 issue of the *Atlantic*, "in most states it is perfectly legal for two 16-year-olds to have sex. But if they take pictures, it's a matter for the police."[27]

Rosin's point is illustrated by the case of Brianna Denson and Cormega Zyon Copening, two African American sixteen-year-olds in Fayetteville, North Carolina. State law permits them to have sex but not to sext: that is a felony, which in North Carolina means that they can be charged as adults — and that journalists can publish their names. Accordingly, on September 2, 2015, a reporter for the *Fayetteville Observer* mentioned the case and described Denson's situation as follows:

> After a 16-year-old Fayetteville girl made a sexually explicit nude photo of herself for her boyfriend last fall, the Cumberland County Sheriff's Office concluded that she committed two felony sex crimes against herself and arrested her in February. The girl was listed on a warrant as both the adult perpetrator and the minor victim of two counts of sexual exploitation of [a] minor — second-degree exploitation for making her photo and third-degree exploitation for having her photo in her possession. A conviction could have put the girl in prison and would have required her to register as a sex offender for the rest of her life. A plea

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> bargain arranged for her in July [2015] should clear her record next summer.[28]

Of what did that plea bargain consist?

> This is how Denson is settling her case. In court on July 21, Denson told District Court Judge Stephen Stokes that she was responsible for the crime of disseminating harmful material to minors. This is a misdemeanor and does not have the life-ruining requirement that she register as a sex offender. One of [the Cumberland County district attorney's] assistants dropped the felony sexual exploitation charges. Stokes put Denson on probation for a year. He ordered her to pay $200 in court costs, stay in school, take a class on how to make good decisions, refrain from using illegal drugs or alcohol, not possess a cellular phone for the duration of her probation and to do 30 hours of community service. If Denson stays out of trouble, [the district attorney] next July will drop the misdemeanor charge. She will be able to move on with her life with a clean criminal record.[29]

Her boyfriend was not so fortunate, even though he did not disseminate the photos. In fact, neither teen was accused of sharing their photos with anyone besides each other. The sheriff's office still "hit Copening with five sexual exploitation of a minor charges — four for making and possessing two sexually explicit pictures of himself and the last for possessing a copy of the picture that Denson made for him. Copening, who was 16 at the time and is now 17, also faces possible prison time and the requirement to register as a sex offender if convicted. The charges have already forced him off the football team at Jack Britt High School. He had been the quarterback."[30] Copening eventually avoided prison time with a plea bargain similar to Denson's, including a year of probation, during which he will be subject to warrantless searches.[31]

Denson and Copening narrowly escaped lifelong restrictions on their movements. On February 1, 2016, the U.S. Congress unanimously passed H.R. 515: International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes through Advanced Notification of Traveling Sex Offenders. The law forbids the secretary of state to issue passports to any individuals who have ever been convicted of a sex offense with someone below the age of eighteen

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unless those passports display a "unique identifier," defined as "any visual designation affixed to a conspicuous location on the passport indicating that the individual is a covered sex offender" (by "covered," the text means "covered by that description": i.e., guilty of a sex offense with a minor). Travel documents issued to covered sex offenders before the passage of the law are subject to revocation. No other category of criminal — indeed, no other category of *person* — has until now been identified as such on a U.S. passport, let alone by a visibly conspicuous scarlet letter. Unlike some other countries, the United States has never demanded that its citizens carry papers indicating their religious affiliation or ethnicity, or anything having to do with their medical, criminal, or sexual histories. Never, that is, before now.[32]

The new federal statute also establishes a special center within the ICE "to send and receive notifications to or from foreign countries regarding international travel by registered sex offenders" and to monitor foreign travel by American "child-sex offenders," who must now provide "information relating to [their] intended travel . . . outside the United States, including any anticipated dates and places of departure, arrival, or return, carrier and flight numbers for air travel, destination country and address or . . . any other itinerary or other travel-related information required by the Attorney General." Sponsored by Republican Representative Chris Smith of New Jersey, citing a 2010 Government Accountability Office (GAO) report that found 4,500 passports were being issued annually to sex offenders, the legislation was intended, in Smith's words, to hinder U.S. citizens from abusing "little children" overseas; the State Department, however, had rebutted the implications of the GAO's finding in an appendix to the report, indicating that it "already has the authority to deny passports to people convicted of sex tourism involving minors and those whose probation or parole terms forbid them from traveling." The new law, then, will impose an additional burden on the lives of former sex offenders, long after they have completed their sentences and been released from supervision, and will put them at the mercy of foreign governments whenever they are abroad. And it will do all this without producing any real gains in terms of effective crime prevention. President Barack Obama signed the new legislation into law on February 8, 2016.[33]

At least six other countries in the world (Australia, Canada, France, Ireland, South Africa, and the United Kingdom) require the registration of sex offenders, according to Human Rights Watch. But the United States "is alone in the scope of the registries, in particular the public and easily accessible nature of the information on the registries, the onerous conditions imposed on

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registrants, the imposition of residency restrictions, and the broad application of many of these aspects to youth sex offenders."[34]

The practice of listing the names and whereabouts of convicted criminals on public registries for many years after they have completed serving their sentences has been largely restricted, so far, to those who have committed crimes that are specifically sex-related. Most other criminals — even those who have been convicted of violent crimes, such as murder, robbery, or assault with a deadly weapon — do not have to register publicly once they have done their time and been released from correctional supervision. (Nor should they: one of the oldest tenets of formal, reasoned law is the idea that every punishment is specific and finite, with fixed limits, including a set period of time, clear sanctions, explicitly stated deprivations, and nothing more.) The treatment of sex offenders, then, cannot be explained by their sheer dangerousness. Rather, the danger that they represent qualifies as extreme *because* it involves sex.

A few states are starting to institute public registries to incorporate other classes of criminals besides sex offenders. In this way, the treatment of sex offenders risks becoming generalized and providing a model for the management of all ex-convicts. As Judith Levine points out in her contribution to this volume, "What happens to sex offenders can eventually happen to all offenders. For instance, states have instituted registries for offenses from drunk driving to methamphetamine manufacture. Florida lists all prisoners released from custody." Roger Lancaster agrees: "If we want to see what social control could look like over the course of the twenty-first century, we should look to the sex offender."

Lancaster goes on to expand on this point. The treatment of sex offenders, he argues,

> should worry us more than it apparently does, in part because the techniques used for marking, shaming, and controlling sex offenders have come to serve as models for laws and practices in other domains. Electronic ankle bracelets and techniques of house arrest are being applied to an expanding list of offenders and defendants — including undocumented immigrants who have been released from custody to await processing (on civil, not criminal, charges). It is estimated that a quarter of a million people are currently manacled to some form of electronic monitoring. Public registries, which make visible any stain on a person's record, have proved especially popular with government agencies, civic

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organizations, and private vigilante groups. A victims' rights clearinghouse in New Mexico posts an online database of everyone convicted in the state of driving while intoxicated. Several states publish online listings of methamphetamine offenders, while lawmakers in Texas, Nevada, and California have introduced initiatives to create public registries of those convicted of domestic violence.

Gregory Tomso, another contributor to this volume, sees a troubling convergence between the increased governmental regulation of sex and popular movements to contain sexual danger. Noting how "the state's new, aggressive interest in HIV dovetails with an extremist and increasingly popular view of HIV-infected persons as dangerous disease carriers who pose a threat to local communities," Tomso remarks how easy it is for HIV-positive people to be assimilated by the public to the category of sex offenders: "In some cases, people with HIV and violent sex offenders appear to be completely fungible in popular discourse, one standing in for the other amid calls to deprive those with HIV of their civil rights, including their right to privacy. Extremists are using the Internet to promote a form of crowdsourced, vigilante justice targeting sex offenders and so-called HIV predators. The website STDcarriers.com, for example, publishes the names and photographs of thousands of people worldwide who have tested positive for sexually transmitted infections or who have been prosecuted for criminal HIV transmission."

Despite these incipient moves to institute public registries for other types of criminals, only those who have been found guilty of certain sex-related offenses by a court of law are required at this time to register in all fifty of the United States. In that sense, sex remains exceptional in U.S. jurisprudence.

The age at which one may be liable to disciplinary punishment as a sex offender is rapidly decreasing. The age at which it is permissible to exercise sexual agency and freedom is on the rise.

In April 2014, five-year-old Eric Lopez was spotted by a teacher on the playground of the Ashton Ranch Elementary School in Surprise, Arizona. According to Eric's mother, who recounted the story to a local radio station, a somewhat older student had told Eric to pull down his pants or else he would do it for him. Eric complied, pulling down his pants and underwear in front of other students. The teacher took Eric to the office of the principal, who discussed the incident with Eric and got him to sign a form (Eric signed only

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his first name, that being as much as he knew how to do at his young age), acknowledging that he had been disciplined for "sexual misconduct." To be sure, school officials did not present Eric's behavior to him in that light, since they did not consider such a term "age appropriate," and Eric, for his part, didn't know how to read. The form was placed in his file as part of his permanent scholastic record. Eric's mother was not informed at the time; she discovered the incident a couple of months later and tried to have the incriminating document removed from her son's file. The school refused her request on the grounds that, according to the policy of the Dysart Unified School District, indecent exposure qualifies as a form of sexual misconduct and the school is not obliged to summon a parent to a disciplinary hearing unless the student explicitly invokes his right to have her there. The Las Vegas affiliate of CBS News reported that the assistant superintendent defended the school's actions in a written statement to the local radio station; he said, "Our school district uses consistent language for disciplinary infractions in order to provide clarity and track discipline data accurately," explaining that the district must follow state and federal guidelines and definitions set to define a sexual offense.[35]

Less than a year later, on January 13, 2015, the Faculty of Arts and Sciences (FAS) at Harvard University promulgated a new policy banning all sexual or romantic relations between professors and undergraduate students. It states, "No FAS Faculty member shall request or accept sexual favors from, or initiate or engage in a romantic or sexual relationship with, any undergraduate student at Harvard College."[36] This prohibition is not limited to professors and students who have some professional association: it does not take into account, for example, whether the professor is the instructor or supervisor of the student. Rather, it forbids relationships between all professors and all undergraduates, even if they have no institutional affiliation with each other and know each other only from a chance meeting off campus or online. The purpose of the categorical prohibition, as Harvard freely acknowledged, was not only to prevent abuse but also to "reflect the faculty's expectations of what constituted an appropriate relationship between undergraduate students and faculty members."[37] The faculty simply happened to disapprove of sex between undergraduates and professors, whether or not it involved any misconduct. Here, once again, the target of regulation is not confined to actual harm; it extends to sex itself. The new policy also does not take into account the age of either the student or the professor, only their official status at Harvard. No matter how old you may be, if you are an undergraduate at Harvard,

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you remain a statutory minor for sexual purposes insofar as you cannot freely consent to have sexual relations with another adult, of any age, if the latter happens to be a member of the Harvard faculty.

In short, while you are never too young to be guilty of sexual misconduct, you may never be old enough to make certain kinds of sexual decisions for yourself.

III

Let us turn now to the disproportionate sentences often handed out for sexual crimes. Take the case of Daniel Enrique Guevara-Vilca. A stockroom worker in East Naples, Florida, with no previous criminal record, Guevara-Vilca was twenty-four years old when police raided the home he shared with his mother and brother and found a laptop computer that contained 300 sexually explicit pictures of children and 38 hours of taped child pornography. Guevara-Vilca claimed he did not know the images were there: he often downloaded a quantity of pornography from various sites late at night without watching it first. He was found guilty by a six-person jury in 2011 and sentenced by a Collier County Circuit Court judge to serve 454 concurrent life terms, one for each count of possessing an illicit image, amounting to life in prison without the possibility of parole. "Had Mr. Vilca actually molested a child," the *New York Times* pointed out, "he might well have received a lighter sentence." Life without the possibility of parole is a sentence typically given for crimes like first-degree murder, but not for crimes of lesser violence.

In Florida, however, as the *Times* explained, "possession of child pornography is a third-degree felony, punishable by up to five years in prison."[38] In fact, under Guevara-Vilca's sentencing scoresheet, "the minimum permissible sentence was 152.88 years in prison." So remarked Appellate Judge Stevan T. Northcutt of Florida's Second District Court of Appeal on April 10, 2015, when he reversed Guevara-Vilca's conviction on a technicality and remanded the case for a new trial. Judge Northcutt also observed that "if Guevara-Vilca had been charged with possession of child pornography with intent to promote [illegal sex acts involving a minor], he could have been convicted and sentenced for only one second-degree felony count rather than 454 third-degree felony counts."[39]

In this respect, the case of Guevara-Vilca resembles that of Morton R. Berger, an Arizona man who received a 200-year prison sentence, which the U.S. Supreme Court let stand in 2007, for possessing twenty pornographic

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images of children. This sentence amounted to twenty consecutive sentences of ten years each, since "Arizona law imposes a mandatory minimum sentence of 10 years for 'sexual exploitation of a minor,' and it requires that sentences for multiple convictions [for a range of "dangerous crimes against children"] be served consecutively," as Linda Greenhouse of the *New York Times* explained.[40]

It is reasonable to argue that purchasers of photographic images of the sexual abuse of children drive the market for them and contribute financially to the production of them, thereby indirectly causing real and grievous harm to minors. It is legitimate to criminalize commercial forms of child pornography on that basis and to prosecute and punish those who produce them as well as those who purchase them. When the same images are downloaded repeatedly for free from online sites, however, it is not clear (despite occasional assertions to this effect) that actual, additional harm is being inflicted on minors by Internet users — let alone harm comparable to first-degree murder.

Let us consider the harsh punishments meted out for another category of sexual crime. Twenty-four U.S. states currently make it illegal for HIV-positive people to have sex without first disclosing their infection to their sexual partners. Less than 5 percent of those prosecuted for breaking such laws are accused of infecting their partners; the others, evidently, are accused of failing to inform their sexual partners of their HIV infection before engaging in sexual activity that did not result in the transmission of HIV. Sean Strub, in his contribution to our volume, mentions the well-known case of Nick Rhoades in Iowa, who in 2009 was sentenced to twenty-five years in prison for having failed to disclose his HIV-positive status to another man, whom he did not infect with HIV during sexual intercourse, no doubt because the sexual contact in question actually carried little or no risk of transmitting HIV (Rhoades was under antiretroviral treatment at the time and used a condom for anal sex; the only unprotected sexual contact he had was oral and did not involve ejaculation).[41] He was later released on probation and placed on a sex offender registry; then, in 2014, the Iowa Supreme Court overturned Rhoades's conviction.

Even more remarkable is the case of Willy Campbell, an HIV-positive man currently serving a thirty-five-year prison term in Texas for spitting at a police officer — who, of course, was not infected, since spitting is not a means of HIV transmission: according to the U.S. Centers for Disease Control and

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Prevention (CDC), "HIV cannot be spread through saliva, and there is no documented case of transmission from an HIV-infected person spitting on another person."[42] Nonetheless, in 2008, a Dallas jury found that Campbell's saliva was "a deadly weapon," which means that Campbell has to serve half of his sentence before being eligible for parole.[43] These lengthy prison terms for behavior that occasioned no harm to others, but that is associated with socially stigmatized sex, far exceed criminal sentences normally handed out for manslaughter.

Thirty years of research into the sexual dimensions of the HIV/AIDS epidemic have quantified the risky sexual practices of seemingly every conceivable population, at an annual cost of many millions of dollars. But only a small handful of studies have examined the impact of criminalizing HIV on the epidemic itself and on human rights more broadly. The fact that it is still not possible to determine with any degree of exactitude the number of HIV-positive people who have been incarcerated under HIV disclosure laws (a thousand? several thousand?) is a telling indication of how little is known about the expanding regulation of sex.

Excessively harsh or lengthy punishments for sex crimes — even, in some cases, for behavior that caused no injury — are not the most terrifying consequences of the war on sex. Indefinite detention without trial by jury is even more disturbing. In her contribution to this volume, Laura Mansnerus describes how civil commitment policies enacted as part of wide-ranging sex offender legislation have allowed twenty states, the District of Columbia, and the U.S. federal government to keep certain sex offenders locked up for life in high-security treatment facilities, sometimes without a second jury trial, even though those detained did not receive life sentences when they were originally tried in a court of law. In *Kansas v. Hendricks* (1997), the Supreme Court ruled that such detention extending far beyond actual court-ordered sentences is permissible: it does not qualify for inclusion among the "cruel and unusual punishments" prohibited by the Eighth Amendment to the U.S. Constitution because it is not a punishment at all. It is, in theory at least, treatment.[44] Never mind that the treatment facilities where such sex offenders are held bear a striking resemblance to prisons. Or that in some states almost no one ever completes the so-called treatment and ends up getting released.

Regina Kunzel reminds us in her contribution to this volume that civil commitment has a long history, stretching back to the late 1930s and the

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1940s, when a widespread panic over sexual deviance resulted in many new innovative and draconian state laws. Those laws provided for the indefinite psychiatric confinement, without any criminal charges, of individuals identified as "sexual psychopaths." In the majority of cases, this term really meant homosexuals, since the legislation "was used most extensively" in order to suppress and to punish "consensual sex between adults of the same sex."

When the chapters by Mansnerus and Kunzel are placed side by side, they make an important political point. As Kunzel argues, the midcentury historical developments that she chronicles provide "a preview and genealogy of the seemingly ever-expanding regime of sex offender surveillance and punishment that we live with today." In particular, by showing how "the discourse of medicine — the language of illness, treatment, and cure — masked a midcentury expansion of the carceral state," Kunzel "offers some clues to understanding the ambivalent and often muted response of early gay rights activists to sexual psychopath legislation, and perhaps even the silence on the part of contemporary LGBT politics in response to the more recent and sweeping national wave of laws criminalizing sexual offenders since 1990." Kunzel suggests that the determination of some LGBT groups to distance themselves and their constituents from the imputations of pathology and criminality with which they had long been stigmatized, and thereby to "dislodge homosexuality from its classification as a mental illness," led them to approve of "sexual psychopath legislation [in general] while seeking to remove homosexuals from its criminalizing purview."

As Kunzel shows, LGBT political organizations have not always known what position to take in the war on sex, especially since they have had to worry that by defending the wrong people they would discredit themselves and their constituencies. That political point about gay activists' fears of reinforcing negative stereotypes in the minds of the heterosexual majority is confirmed by Scott De Orio, in another historical study included in this volume. De Orio describes an almost identical political scenario in California in the 1970s, when "gay activists, liberal state officials, and law-and-order conservatives redefined what it meant to be a 'sex offender' by transforming California's sex offender registry to focus less on gay sex and more on rape and sex with minors." In this case, the issue was not sexual psychopath laws but a vaguely worded section of the state penal code criminalizing "lewd or dissolute conduct," which was used primarily against "gay men who sought intimacy in bars, parks, and other public places." Those convicted under that statute were required to register with the local police as sex offenders.

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"Gay activists challenged that regime," De Orio continues, "by forming an alliance with liberals who supported the reform of laws punishing victimless crimes." As a result, "the gay-liberal coalition" was able to end "the police enforcement of the lewd conduct law in semiprivate spaces like gay bars and to remove those convicted under the law from the sex offender registry." But that victory entailed a certain cost. For conservatives — with the endorsement of "liberals and some gay activists," De Orio observes — successfully "spearheaded a campaign to make the registry entail much harsher punishments than it did before." Furthermore, "the broad consensus that registration was appropriate for the 'real' sex offenders completely overshadowed the minority of gay activists, feminists, and civil libertarians who argued that the registry should be abolished entirely. Through these battles, gay activists, liberals, and conservatives produced a new raison d'être for sex offender registration that the federal government would later adopt when it started requiring all states to maintain a registry in the 1990s."[45]

All this historical background is highly significant because it helps to explain our current situation. In particular, it allows us to understand how a sinister legal mechanism like civil commitment, invented in the late 1930s and the 1940s before temporarily falling into disuse in the late 1960s and the 1970s, could be successfully revived in the 1990s and maintain its legitimacy today. As a result, it has become acceptable to treat sex offenders, like sexual psychopaths and homosexuals before them, as dangerous predators who may be held in high-security treatment facilities without limit and without trial, unable to appeal their detention by the usual legal methods.

In some cases, those treatment facilities provide very little effective treatment. For example, the Associated Press reports that only three of the offenders involuntarily confined by the State of Kansas in Larned State Hospital have been released since the program began operating in 1994. Meanwhile, the number of sex offenders being held without any term limit has grown to 258, according to the state's own Department for Aging and Disability Services, which administers the program.[46] In Missouri, 206 offenders have been designated sexually violent predators and have been civilly committed against their will to the maximum-security Sex Offender Rehabilitation and Treatment Services at facilities in Farmington and at Fulton State Hospital, supposedly for the purpose of mental health care, following the end of their criminal sentences. Not a single one of them "has successfully completed treatment and been released into the community" since the program was created by statute in 1999.[47]

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The record holder among the states is Minnesota. As of June 2015, it held 715 sex offenders without term limits in maximum-security treatment centers in Moose Lake and St. Peter (including 67 whose only crimes were committed while they were juveniles). At the current rate of civil commitment, the number of such detainees will rise by the year 2022 — according to the state's own projections — to a total of 1,215. The Minnesota Sex Offender Program was once used to detain dangerous sex offenders, but it was extended in 2003 to include any sex offender who met expanded legal qualifications for civil commitment. No offender has ever been fully discharged since the program's inception in 1994. As U.S. District Court Judge Donovan Frank concluded on June 17, 2015, "no one has any realistic hope of ever getting out of this 'civil' detention."[48]

As Mansnerus reports, there are "about 5,000 sex offenders, [confined] involuntarily and indefinitely, who [because they are not serving prison sentences] are not in the criminal justice system at all." Since they are considered to present a threat to society if released, their incarceration can be challenged only by a motion from the public defender's office claiming that the detainee "is not as dangerous as the state says he is." Mansnerus adds, "The argument rarely succeeds."

This is preventive detention, a human rights issue, which should raise obvious constitutional questions, as it is starting to do both in Missouri (where U.S. District Judge Audrey G. Fleissig ruled on September 11, 2015, that the application of the state's civil commitment program was unconstitutional) and in Minnesota. While neither Judge Frank nor Judge Fleissig challenged civil commitment itself — they could not very well do so, since the Supreme Court signed off on it in *Kansas v. Hendricks* — Judge Frank did appeal for authority to Justice Anthony Kennedy's concurring opinion in that case, which cautioned against using civil commitment as an alternate form of punishment. Accordingly, he found that "*the Minnesota statutes governing civil commitment and treatment of sex offenders are unconstitutional as written and as applied*. . . . The overwhelming evidence at trial established that Minnesota's civil commitment scheme is a punitive system that segregates and indefinitely detains a class of potentially dangerous individuals without the safeguards of the criminal justice system."[49] Judge Fleissig reached a similar conclusion about civil commitment in Missouri, finding that "the Constitution does not allow [Missouri officials] to impose lifetime detention on individuals who have completed their prison sentences and who no longer pose a danger to the public, no matter how heinous their past conduct."[50]

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These recent cases confirm that certain sex offenders now have "their own place in constitutional jurisprudence," as Mansnerus says: they are "different not just from other citizens but also from other criminals." Nothing accounts for this difference but sex itself — that is, the sexual nature of the offense. Sex changes the nature of crime and of criminal jurisprudence alike. As Mansnerus succinctly puts it, "All kinds of criminals have personality disorders and failures of self-control," which could in theory justify detaining them indefinitely after the end of their criminal sentences, but such indefinite detention is normally considered unconstitutional. "As to why sex offenders are different from the others," Mansnerus remarks, "the best apparent answer is that their crimes involved sex."

Mansnerus adds, "Indeed, some men in indefinite confinement would be better off if they had simply killed their victims. It is not the magnitude but the nature of the threat that has brought on fear and revulsion — and punishment beyond what the courts sanction for other criminal behavior. Sex *is* different, even if the Constitution does not say so."

IV

We have few analytic tools for understanding the urgent political and theoretical questions raised by the continued expansion of punitive policies aimed at regulating and controlling sex. The war on sex calls for new ways of thinking about sexual politics. The frameworks available to those of us in the academy — psychology, criminology, public health, jurisprudence, and scholarship on sexual orientation, class, gender, race, and mass incarceration — may help to reveal particular facets of the socio-legal regulation of sex, but they do not account for all the limitations currently being placed on sexual expression across a wide range of regulatory contexts. They do not explain how it is that sexual prohibitions, once consolidated into law, invariably outrun the purposes for which they were devised and get extended to encompass others; how sex crime laws constantly morph and branch out and trickle down, infiltrating and shaping all sorts of administrative procedures; why such laws tend to expand, including new categories of acts, both sexual and nonsexual, and new categories of persons; why the ages of those targeted by such laws keep falling while the ages of those accountable under them keep rising — in short, why sex constitutes such an important, independent vector of social control.

Nor can the available analytic tools bring out the links between, say, the prosecution of sex work and HIV criminalization, or similar combinations

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of issues, because different aspects of the criminalization and social control of sex are often treated independently. This silo effect, as Amber Hollibaugh and Mary Anne Case both point out in their contributions to this volume, extends beyond the academy and into social movements. As a result, the criminalization of sex is glaringly absent from the agendas of a number of existing progressive political projects, which often cannot resist the temptation, as Hollibaugh puts it, "[to move] as far away from sex as possible." Mary Anne Case similarly laments the fact that the various constituencies affected by the war on sex "too rarely make common cause or even seem to see the connections between the issues to which they are committed." Accordingly, Case warns students of sexual politics about the perils of "silo-ization": that is, the tendency to enclose "a set of issues and constituencies far from fruitful interaction with others." Let's review some unfortunate effects of these political and theoretical tendencies to silo-ization.

Although the burden of criminal law falls most severely on the poor, and in particular on poor Black men, civil rights organizations no longer take much of a specific interest in the war on sex or in the forms of sexual politics that contribute to the mass incarceration of Black men — such as the wrongful conviction rate of Black men for sexual misconduct with White women. Earlier generations of Black civil rights activists did protest the disproportionate use of rape charges against Black men as well as the high conviction rate for them; as far back as the end of the nineteenth century, Black clubwomen and suffragists refused to join the campaign by White purity reformers to raise the age of sexual consent or to impose criminal penalties on male sex offenders, fearing that such measures would simply compound the mistreatment of Black men by the criminal justice system.[51] But with the decline of lynching, the political impetus behind this resistance faded, disappearing by the late 1960s.

The LGBT political movement took shape in the late 1940s and early 1950s as a coordinated resistance to the police harassment of gay men and other minorities, but it has not consistently opposed the rise of the carceral state. In recent years, most large LGBT organizations have actually supported the carceral state, insofar as they have lobbied for state and federal hate crime statutes that impose harsher penalties for certain offenses and have advocated for the rights of LGBT crime victims while paying relatively little attention to the plight of LGBT persons caught in the net of the criminal justice system.[52] Meanwhile, the movement has tended to abandon the struggle for sexual freedom in favor of fighting for same-sex marriage and an end to discrimination against lesbians,

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gay men, and (sometimes) transgender people in housing, employment, and public accommodation.[53] When Rentboy.com was dismantled and its staffers arrested by the U.S. federal government and the NYPD, criticisms of the prosecutors and the police appeared on the websites of such organizations as the ACLU, Human Rights Watch, Lambda Legal, the National LGBTQ Task Force, the National Center for Lesbian Rights, and the Transgender Law Center, but the Human Rights Campaign — the most important, Washington-based gay lobby group — remained silent.

And yet, as Laura Mansnerus shows, there is good reason to believe that "gay men are overrepresented among those chosen for lifetime detention" and incarcerated by means of civil commitment. In fact, if you are a male between the ages of eighteen and twenty-five, and if you have sex with another male under eighteen who was not related to you or whom you just met, and if you have never "lived with [a] lover for at least two years," *you belong in the moderate- to high-risk category* according to the tabulation devised by Static-99, "an instrument designed to assist in the prediction of sexual and violent recidivism for sexual offenders," which is widely used in North Atlantic countries in sentencing scoresheets: in other words, you qualify as a "sexually violent predator" for the purposes of civil commitment.[54]

Hans Tao-Ming Huang, in his contribution to this volume, wonders about the relation between the cause of gay marriage and the abandonment of other struggles against sexual oppression: "It is curious that efforts to control and punish deviant HIV-positive subjects [in Taiwan] coincide with efforts to mobilize the AIDS surveillance industry to support the cause of gay marriage. Campaigns to secure same-sex marriage rights have reached new heights in the past two years. Is the current advocacy of HIV rights and LGBT rights in Taiwan premised upon the foreclosure of the deviant HIV subject? Must the 'community' be cleaned up before it can seek legal recognition?"

Some feminists have an ambivalent relationship to laws relating to sex crimes, while others firmly take positions for or against. Many find themselves torn between the need to protect women from sexual violence and the goal of underwriting female sexual self-determination. A number of our contributors single out for critique what one of them, Elizabeth Bernstein, calls "the rise of carceral feminism." Bernstein explores "the significance of feminism's own widening embrace of the neoliberal carceral state," along with "the rise of a carceral feminist framework." She correlates these developments with "a neoliberal *gender* strategy that securitizes the family and lends moral primacy to marriage" rather than to sexual autonomy and sexual freedom for women.

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"Criminal justice," Bernstein concludes, "has often been the most effective vehicle for binding feminists and evangelicals together around historically and socially specific ideals of sex, gender, and the family."

Judith Levine and Roger N. Lancaster agree with Bernstein when she writes that "cross-ideological alignments . . . have occurred around both sex and crime. . . . In the present historical moment, sex is often the vehicle that joins 'left' and 'right' together around an agenda of criminal justice." In short, the war on sex cannot be blamed on right-wing extremists or religious radicals alone but also needs to be understood as the result of a long-standing collaboration between the Left and the Right. As Lancaster insists, "we misunderstand the stark future that has already crept up on us if we see in it only a reflection of conservative agendas, defunct authoritarianisms, and intolerant puritanisms of times past. Not a single element of the punitive turn is exempt from the democratic longings of liberal subjects, in some permutation or other, for liberation, freedom, and empowerment. The constituencies for continuous control lie as much on the liberal Left as on the conservative Right."

V

The contributors to this collection cannot confront all the dimensions of the war on sex in all their specificity. The subject is too vast to be encompassed by a single volume. The work assembled here tends to cluster around three main themes: the criminalization of HIV, both in the United States and overseas; the criminalization of commercial sex and sex work; and the history and operation of sex offender registries, along with the punishment of sex offenders in general. I have already touched on sex offender registries and the criminalization of HIV, and I will say more about the criminalization of sex work in a moment, so let me glance now at some relevant topics that this collection does not take up in sufficient detail. Since its omissions do not result from any specific preferences or intentions on the part of the editors, but simply from an inability to deal with all the urgent issues, it may be useful to list some of those issues here. For if they cannot all be covered in a single volume, a number of them can at least be mentioned. The purpose of this section, then, is to highlight and to indicate the importance of some topics of major concern that this collection as a whole does not adequately address.

First, it will already be evident that the contents of this volume bear mostly on criminal law. Further analysis of the war on sex will need to deal in detail

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with three additional areas: administrative regulation, civil law, and federal policy. Recent developments in all three of those areas are responsible for the production and multiplication of new and highly repressive mechanisms for controlling sex.

I have already noted some disquieting examples of administrative regulation. There is the increasing surveillance of student behavior in primary and secondary schools, along with the introduction of new, stringent, and overly broad sexual misconduct codes in higher education and the workplace. In these administrative contexts, enforcement procedures usually do not replicate judicial procedures in use by the state that conform to established requirements of the criminal justice system; rather, employers and educational institutions tend to apply their own, less systematic and less stringent definitional and evidentiary criteria for what is and is not punishable. Although they do so in an effort to respond to the changing legal and political environment, their administrative regulations often represent an alternative, for better or for worse, to legal prohibitions against sexual misconduct.[55]

Antioch College's notorious Sexual Offense Prevention Policy, which required students to request and to receive explicit affirmative verbal consent before initiating each step in sexual relations,[56] was widely ridiculed when it was introduced in 1991. But in retrospect it would seem to have been prophetic, for versions of it have recently become law in California (2014) and in New York (2015).[57] (Whoopi Goldberg and Lady Gaga actively lobbied for the New York statute.) State legislators elsewhere have proposed similar measures, and many colleges and universities are already implementing them by adding them to their administrative regulations.

Under these regulations, college disciplinary boards must use an "affirmative consent standard" in adjudicating complaints of sexual assault. The California law defines that standard as imposing on individuals the obligation to make an "affirmative, conscious, and voluntary agreement to engage in sexual activity" before proceeding to engage in it (the standard is informally dubbed "yes means yes"), with the further proviso that "affirmative consent must be ongoing throughout a sexual activity." As a result, sexual partners have to be able to document both initial and continuing consent, at least in cases where they are accused of sexual assault, if they ever hope to clear themselves of sexual misconduct charges.

"How might a student demonstrate that he repeatedly obtained consent?" asks attorney Wendy Kaminer; she cites the response of Bonnie Lowenthal, the California assemblywoman "who coauthored that state's law": "Your

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guess is as good as mine."[58] Under these circumstances, it should come as no surprise that software companies have started to market apps that enable sexual partners to register their consent at each stage of their relations, in case one of them happens to accuse the other of sexual assault at some point in the future.[59]

This may have the welcome result of reducing sexual assault on campus, which is perceived to be widespread, but it could also result in a trivialization of the meaning of sexual assault and in a sexually repressive blurring of its very definition. As Matt Kaiser, an attorney quoted by *Time*, puts it, "Assault can [now] mean touching somebody's butt when making out and they didn't want you too [*sic*] and didn't say you could."[60] Feminist legal scholar Janet Halley makes a more ambitious argument:

> Affirmative consent requirements — in part because of their origin in a carceral project that is overcommitted to social control through punishment in a way that seems to me to be social-conservative, not emancipatory — will do a lot more than distribute bargaining power to women operating in contexts of male domination and male privilege. They will foster a new, randomly applied moral order that will often be intensely repressive and sex-negative. They will enable people who enthusiastically participated in sex to deny it later and punish their partners. They will function as protective legislation that encourages weakness among those they protect. They will install traditional social norms of male responsibility and female helplessness. All of these will be the costs we pay for the benefits affirmative consent requirements deliver.

In some circumstances, Halley argues, "even 'yes' is not enough" to mean yes or to eliminate the possibility of coercion: according to some feminist understandings of affirmative consent and some rules of evidence, ultimate epistemic authority over the question of whether the accuser truly gave her consent rests with her, residing in her own subjective knowledge of her feelings and her intent, irrespective of any outward affirmation she might have provided at the time she engaged in sexual activity.[61]

There are further, potentially troubling consequences. Like Halley, Judith Shulevitz points out that the affirmative consent standard "shifts the burden of proof from the accuser to the accused" — something that "represents a real departure from the traditions of criminal law in the United States" (in fact, the war on sex has been shifting that burden from accusers to accused for some time now, effectively requiring defendants to prove their innocence).[62]

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Worse, affirmative consent is now migrating from college handbooks to state penal codes, where it is starting to define the boundary between consensual sex and criminal assault. "Most people think of 'yes means yes' as strictly for college students," Shulevitz remarks, but "it is actually poised to become the law of the land. About a quarter of all states, and the District of Columbia, now say sex isn't legal without positive agreement, although some states undercut that standard by requiring proof of force or resistance as well." A model statute, intended to redefine the legal meaning of "sexual assault and related offenses," and designed for consideration and eventual adoption by the federal government and the states, is in the process of being formulated and discussed by the American Law Institute: an early draft not only featured the affirmative consent standard but also extended "contact" to include any touching of any body part (clothed or unclothed) with the aim of sexual gratification (reaching out on a date to take another person's hand without that person's express prior permission would qualify). That provision was not retained, but the point remains: campus policy risks becoming U.S. law.[63]

Meanwhile, more and more students are in effect coming under protective custody, with Title IX of the Education Amendments Act of 1972 being used to justify disciplinary action against students or teachers who have the kinds of sex that decision-makers don't like. As Laura Kipnis writes, "with the extension of Title IX from gender discrimination into sexual misconduct has come a broadening of not just its mandate but even what constitutes sexual assault and rape." In fact, Kipnis herself was the target of a Title IX complaint merely for *publishing an article* in the *Chronicle of Higher Education* that criticized how current sexual harassment codes had shaped "the narratives and emotional climate of professor-student interactions" at U.S. universities, including on her own campus: a graduate student at her school, who was otherwise unknown to Kipnis, complained that the article "had a 'chilling effect' on students' ability to report sexual misconduct."[64] No wonder that college professors are hastily removing sexual content from the courses they teach, in order to avoid being accused by students of making their classrooms "hostile environments" or "unsafe spaces" for those who may be easily susceptible to feelings of sexual discomfort.[65]

Turning now from administrative regulation to civil law, I should indicate that further research is needed to examine the sexually repressive effects of current developments, including the use of domestic violence restraining orders, the

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rise of sexual fault grounds in divorce hearings, and the expansion of emotional harm torts. In family courts in the United States today, it is becoming easy to turn divorce into an endless and insoluble conflict by making an unprovable accusation of sexual abuse or domestic violence against a former spouse, and courts are beginning to institutionalize their practices to deal with this move.

Fathers now face social expectations to participate in child care, but they are prosecuted and punished under child molestation laws for engaging in the kinds of physical contact with their children (such as bathing naked with them) that, when performed by mothers, do not provoke concern from prosecutors. As one feminist legal scholar comments, "We want men to share responsibility for children and are critical of them when they do not do so. At the same time, we do not seem to trust men with children in the same way we do mothers."[66] Recent prosecutions dramatize that point.

Many of these regulatory or punitive measures arise from laudable impulses to identify and eliminate sexual abuse and to protect victims or potential victims from harm. But a certain number of them miss their mark and end up hurting the very individuals they are intended to help. They also end up having the effect of constraining intimacy and punishing sex itself.

Federal policy offers the following instructive example of such unintended consequences. In 2003, George W. Bush asked Congress to approve a measure he called the President's Emergency Plan for AIDS Relief (PEPFAR). This initiative would go on to become the largest global development program funding HIV treatment and prevention in Africa. But as the legislation was making its way through the various congressional committees, Republican Representative Chris Smith from New Jersey (sponsor of the recent International Megan's Law discussed earlier) added an amendment to it that requires any group or organization receiving U.S. government funds not "to promote or advocate the . . . practice of prostitution" and to have "a policy explicitly opposing prostitution or sex trafficking." The U.S. Supreme Court struck down the second of those two provisions ten years later, in 2013, but only as it applies to organizations based in the United States: the restriction continues to govern all foreign governments and all NGOs outside the United States that receive funds from PEPFAR. Meanwhile, the first provision remains in force.[67]

The two clauses, collectively known as the Anti-Prostitution Loyalty Oath (APLO) or Pledge, were ostensibly designed to prevent taxpayer dollars allocated

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to the global fight against HIV/AIDS from contributing in any way to human trafficking or the sexual enslavement of women. Accordingly, the APLO mandates that NGOs receiving U.S. government funds adopt an organization-wide policy opposing prostitution and declare their opposition to it in their materials. The evidence, however, suggests that victims of sex trafficking have been hurt, rather than helped, by this measure. The APLO has been widely criticized by members of the public health community, not only because it compounds the stigma associated with sex work, but also because it prohibits U.S.-funded NGOs from partnering with sex workers to devise practices that reduce the transmission of HIV; furthermore, it impedes those NGOs from determining the most effective HIV/AIDS prevention strategies to adopt in specific social contexts. For example, the APLO makes it difficult for public health organizations to establish trust with sex workers, brothel owners, and other commercial sex businesses; to set up drop-in centers for sex workers and victims of sex trafficking; and to offer sex workers various kinds of practical advice about how to deal with clients while protecting themselves from HIV infection. Such advice is now financially risky because it could be construed as promoting prostitution.

"In the field," according to the Center for Health and Gender Equity, "the policy has not resulted in a single documented positive result. To the contrary, advocates have documented numerous examples of the harmful effects of the pledge, which can endanger the lives of sex workers, their clients, and their families." In 2005, accordingly, Brazil refused $40 million in U.S. global HIV/AIDS funding so that it could retain the possibility of continuing to sponsor programs that had been found to be successful in reducing the spread of HIV.[68]

Recent research has shown that "HIV prevention has been less successful since the inclusion of the pledge," which can be correlated with a corresponding rise in infections "particularly among sex workers and people presumed to be sex workers, including some gay men and transgender people." As funding restrictions have kicked in, drop-in centers have had to close: "in some instances sex workers no longer have access to places to bathe and use a toilet. Sex workers have been denied clinic services. Sex workers have less access to condoms and personal lubricant," necessary for preventing HIV transmission. Another effect has been to stifle information sharing among NGOs about what programs are effective in stopping the spread of HIV among sex workers and their clients.[69] In January 2015, *The Lancet* published a series of articles showing that "sex workers face substantial barriers in accessing prevention,

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treatment, and care services," not all of them legal, "and remain underserved by the global HIV response"; until the specific needs of sex workers are met, not only by decriminalization but also by the elimination of social and economic factors interfering with their ability to protect their health, it will be difficult to combat the worldwide HIV/AIDS epidemic.[70]

In short, any study of the regulation of sex in the world today will need to look beyond the sphere of criminal law. The dimensions and consequences of the war on sex far exceed the sorts of activities that are subject to criminalization and the sorts of disciplinary measures that are designed to prohibit and punish sexual offenses.

While civil law, administrative regulation, and public policy are not the primary focus of this volume, the work contained in it does afford a few perspectives on sexual regulation that look beyond issues of criminalization. A vivid glimpse into the intensifying bureaucratic and administrative management of sex is offered, for example, by Hans Tao-Ming Huang's study of the blending of social welfare with policing in Taiwan's HIV services. Like South Korea and China, Taiwan uses household registration techniques for the purposes of HIV surveillance. In that context, Huang reveals a particularly sinister development whereby HIV case managers — including nurses, buddies, and other hospital-based personnel — monitor patients' compliance with treatment regimes and report disapproved but not necessarily harmful behavior to state agencies. In some cases, the result may be criminal prosecution, but in many instances greater bureaucratic surveillance and practices of self-care are prescribed: punishment is reserved for those who do not cooperate. "As HIV testing and treatment have been scaled up," Huang remarks, "militarized social control comes to be reactivated under the current regime of HIV surveillance." The administrative regulation of sex, then, can have repressive effects without resorting to criminal prosecution.

Public employment can be denied for purely moral reasons related to sex. Melissa Petro was never prosecuted for a crime. She did lose her job as a teacher for reasons entirely unrelated to her job performance, which was apparently stellar. As Petro recounts in her contribution to this volume, what got her into trouble was not sex but writing about it. She published an op-ed on the website of the *Huffington Post*, in which she "criticized the recent censoring of the adult services section of Craigslist." In the course of that column, she mentioned that she had once worked as a stripper and a prostitute. "Because

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I was arguing that sex workers shouldn't be ashamed to speak for themselves, I signed my name to it." Her column caught the attention of the *New York Post*, which put the story on the cover of its September 27, 2010, issue. Petro was removed from her job as a teaching fellow in a New York City public school, reassigned to the Department of Education administrative offices, and charged with conduct unbecoming a professional. No one questioned her competence as a teacher. A year later, she still could not find a job, despite "two master's degrees, five years' experience in the nonprofit sector, and three years' experience teaching."

Petro's case recalls that of Julie Gagnon, an administrative assistant at Etchemins Secondary School (a public high school in Lévis, on the south shore of Quebec City in Canada), who was fired in 2011 when a fourteen-year-old student recognized her from a pornographic film he had seen online and then created a Facebook profile for her under her stage name. The school board chair, Leopold Castonguay, unblinkingly justified her dismissal to reporters as follows: "We considered the facts and actions that led to this incident were inappropriate, unacceptable and incompatible not only with our mission but also with our values that we wish to teach our young students."[71] The students appear to have had other ideas.

A few weeks later, the *San Francisco Chronicle* reported that a state appeals court had "upheld the dismissal of a San Diego schoolteacher who was fired [in November 2008] for posting a sexually explicit ad and photos in the 'men seeking men' section of Craigslist." Frank Lampedusa did not identify himself by name in the ad, but he was apparently recognized by a user of the website (restricted to persons eighteen years of age and older), who made an anonymous tip to a police dispatcher, describing himself as the father of a student at Farb Middle School, where Lampedusa had taught since 2004 and served as dean of students. According to the *Chronicle*, "Lampedusa's firing had [earlier] been overruled by a state commission that said the ad was unrelated to his ability to teach middle-school students. But the appeals court disagreed, saying Lampedusa's conduct showed he was unfit to teach and 'serve as a role model' for his students. A teacher's private life can constitute grounds for dismissal if it demonstrates 'indecency and moral indifference,' said the Fourth District Court of Appeal in San Diego," which intended its 3–0 ruling to serve "as a statewide precedent for future cases." In the words of Justice Gilbert Nares, "Lampedusa's public posting of his pornographic ad is inconsistent with teaching middle-school students and serving as an administrator." Jose Gonzales, a lawyer for the district, explained the decision as follows: "Like

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judges and police officers," teachers "are held to a higher standard of off-duty conduct . . . because of their critical function in our government."[72]

In all three of the cases just mentioned, it seems likely that the stigmatized character of the sex at issue — commercial, pornographic, homosexual — played some role in the decision to dismiss the employee from the school. The inference to be drawn from these cases, then, is that what is often at stake in sexual regulation cannot be captured by the politics of identity (the female or gay identity of the employee). It has to do, rather, with *the kinds of sex* that are subject to social disapproval. Because they are already disliked, those kinds of sex turn out to be easy or plausible targets of both state and civil regulation. Sex has its own politics.

VI

Even when it comes to criminal law, we have not been able to take stock of all the new forms of intensified interdiction or the full range of legal measures with sexually repressive effects. In the context of the war on sex, even progressive reforms in criminal law can have unintended repressive consequences. Take, for example, the federal Prison Rape Elimination Act. Passed by the unanimous consent of Congress in 2003, the Prison Rape Elimination Act (PREA) was designed to address the epidemic of sexual violence in U.S. prisons. It required the U.S. Attorney General to devise national standards for detecting, preventing, reducing, and punishing rape and other forms of sexual abuse, whether by prisoners or by prison staff. Those standards came into effect on August 20, 2012; they apply to all federal, state, and local confinement facilities (the Department of Homeland Security belatedly issued its own regulations for immigration detention facilities in March 2014). Whereas the PREA standards came into force immediately in the Federal Bureau of Prisons, few states fully comply with them as yet. Most states, however, have assured the Department of Justice of their intention to do so — since they risk losing 5 percent of certain federal funds if they don't.

Despite the slow pace of its implementation, PREA has already had a significant impact. It offers numerous protections against sexual assault and provides important measures of safety for lesbian, gay, bisexual, and — crucially — transgender detainees. But it remains unclear how much practical benefit PREA has actually provided prisoners. Some of its consequences have turned out to be undeniably harmful, insofar as they have licensed prison officials to punish not only sexual violence, assault, and abuse but also many nonviolent forms of sex

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and gender expression that those officials consider inappropriate.[73] As Dean Spade has written, "It is unclear whether the new rules have reduced sexual violence, but it is clear they have increased punishment."[74]

According to a May 2014 report by Columbia Law School's Center for Gender and Sexuality Law, "LGBT prisoners have . . . experienced unanticipated negative impacts from the Prison Rape Elimination Act (PREA), including being punished through new policies purportedly created to comply with PREA that forbid gender non-conforming behavior and punish consensual physical contact."[75] The act provides prison officials with a new pretext, in other words, to punish gay prisoners for having consensual sex with each other and to discipline transgender prisoners.

For example, Idaho has invoked PREA and the need to prevent sexual assault in order to clamp down on gender expression among prisoners, forbidding inmates in women's prisons from having masculine haircuts and inmates in men's prisons from having feminine haircuts; its regulation states, "To foster an environment safe from sexual misconduct, offenders are prohibited from dressing or displaying the appearance of the opposite gender."[76] Prison officials in Massachusetts cited PREA to justify denying a transgender woman medically necessary hormone treatment on the grounds that it would make her vulnerable to sexual assault, though the U.S. Court of Appeals for the First Circuit rejected their claim as a patent expression of bad faith.[77]

Meanwhile, in Arkansas, a prisoner was placed in administrative segregation because he was found guilty of engaging in consensual sex. "Administrative segregation" is the technical term for solitary confinement, which is sometimes considered torture by human rights groups and was the target of a vehement critique by U.S. Supreme Court Justice Anthony Kennedy in 2015.[78] As of late 2014, between 80,000 and 100,000 prisoners in the United States were held in solitary confinement, though on January 25, 2016, President Obama imposed a ban on the solitary confinement of juveniles in federal prisons and eliminated its use for minor infractions, which may have the effect of reducing the number of federal prisoners in solitary confinement by 10,000.[79] Under PREA, administrative segregation (typically used to isolate prisoners who are judged to be threats to others) has been extended to isolate prisoners deemed likely to commit a sexual assault. But one consequence has been that solitary confinement is now used quite often to punish anyone who expresses same-sex desire. In Kansas, a prisoner who had written a note inviting a fellow inmate to engage in a consensual sexual relationship was put in PREA segregation. "Because segregation and solitary confinement, as well

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as labeling someone as a sexual predator, can actually create greater vulnerability to sexual abuse," legal scholar Gabriel Arkles points out, "these actions may undercut the purported goal of preventing sexual abuse."[80]

In his contribution to this volume, Jay Borchert documents the extent to which prison officials continue to prohibit and punish consensual sex among prisoners: he uncovers a number of cases from Michigan in which prisoners who were accused not of sexual assault but merely of "consensual touching of each other," were sentenced to lengthy terms of administrative segregation, as if they represented a threat to the general prison population. The Supreme Court's decriminalization of gay sex in private and sanctification of it in marriage, Borchert shows, have yet to extend to the two million Americans who are incarcerated. Chase Strangio, an attorney with the ACLU, agrees: "All corrections agencies continue to prohibit consensual sexual contact or touching of any kind. Consensual contact is often punished as harshly as rape. . . . The West Virginia Supreme Court upheld a disciplinary infraction against a prisoner for kissing another prisoner on the cheek. He served 60 days in solitary. Unfortunately, PREA is becoming another mechanism of punishment used by corrections officials, often especially targeting LGBT prisoners."[81]

Accordingly, the authors of the May 2014 report from Columbia Law School's Center for Gender and Sexuality Law called on the Department of Justice to "amend the PREA regulations to require prisons to eliminate bans on consensual sex among incarcerated people . . . with the purpose of creating a policy that allows for appropriate, consensual sexual contact among prisoners but does not undermine the purposes of PREA or authorize relationships between a prisoner and a prison staff member." The DOJ, they argue, "should convene a working group of relevant agency personnel and outside experts, including people who have been incarcerated and survivors of sexual assault," in order to "investigate and address instances of prison staff using PREA as a pretext for punishing non-sexual displays of affection, [instances] which tend to be based on homophobia and transphobia."[82]

Similar kinds of criticisms have been leveled against New York's new statewide Human Trafficking Intervention Initiative, which has the unfortunate potential to perpetuate the criminalization of sex workers under the guise of eliminating sex trafficking and, especially, the sexual exploitation and victimization of minors. Many anti-trafficking measures, in fact, either conflate

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trafficking with mere sex work or ignore the differences between them. As Carole Vance points out, both the understandable outrage and the sometimes elaborately marshaled panic over sex trafficking (based on wildly inflated estimates of the numbers of victims, which no amount of debunking ever succeeds in discrediting) can lead to this category confusion: "the distinction between the 'exploitation of prostitution' and 'prostitution' is often lost, along with the distinction between prostitution and trafficking."[83] And while the language of the law is often clear enough, its implementation on the ground can produce, as Vance says, "another reality altogether."[84]

Let us then consider in this light New York's Human Trafficking Intervention Initiative. This measure created a statewide system of eleven Human Trafficking Intervention Courts (HTICs), the first such system in the nation, "designed to intervene in the lives of trafficked human beings and to help them to break the cycle of exploitation and arrest," according to New York State Chief Judge Jonathan Lippman (now retired), who announced the launch of this reform by the New York judiciary on September 25, 2013. The new courts, Lippman continued, are expected to cover "close to 95 percent of those charged with prostitution and trafficking related offenses" in the state of New York.[85] Similar programs have emerged in cities across the country, from Baltimore to Columbus, Ohio, from Phoenix to West Palm Beach, Florida; in addition, Texas and Connecticut have special courts and programs to deal with prostitution.[86]

These initiatives reflect a laudable determination, modeled on the reform of the treatment of drug offenders, to replace interdiction with harm reduction and to avoid compounding the abuse of victims of sex trafficking, especially minors, who are all too often prosecuted and punished as criminals, instead of simply being freed from their captors and restored to their communities. If one wishes to oppose sex trafficking in the name of human rights, and if one wishes to protect the human rights of those who are victims of trafficking, it makes no sense to use the criminal law to prosecute victims as if they were offenders. Adopting this enlightened and progressive logic, New York's HTICs are supposed to make it possible to refer the majority of those arrested for prostitution-related misdemeanors to treatment programs and social services instead of to the criminal justice system. "Defendants who [cooperate and] complete a mandated program obtain an adjournment [in] contemplation of dismissal (ACD), and if they are not rearrested for any offense for six months, the charge is dismissed and sealed."[87]

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While New York's Human Trafficking Intervention Initiative was at first hailed by sex worker groups and by progressives for providing an alternative to harsh and unfair punishments, its implementation has since been criticized. Here, for example, is the finding of Truthout, a progressive Internet news website, published on October 26, 2014: "A Truthout review of state and other data shows that, despite the increased focus on trafficking, the vast majority of prostitution-related arrests in New York City are for low-level charges like loitering and simple prostitution, not human trafficking. Sex workers and even trafficking victims are far more likely to end up in handcuffs than the sex traffickers allegedly lurking in the shadows." Truthout found that 917 defendants had participated in the Brooklyn HTIC since the court was established, with 211 more cases pending, but that no major sex trafficking cases or convictions had been listed on the Brooklyn district attorney's website in 2014. "The Queens HTIC has heard more than 2,400 cases since its pilot program began keeping track in February 2010 . . . but a review of the office's press releases shows seven people have been charged with sex trafficking in four major cases since the HTIC program expanded in September 2013." Instead of sex traffickers, the HTICs seem to be processing hundreds of people engaged in ordinary prostitution, whether buying or selling.[88]

It is perhaps no surprise that the unintended consequences of New York's policies are not evenly felt across the community. The Red Umbrella Project (RUP), a largely queer Brooklyn-based organization of sex workers and their advocates, found that "in Brooklyn, Black people are present in the HTIC and face prostitution-related charges at a disproportionately high rate. Black defendants in the Brooklyn HTIC faced 69% of all charges, 94% of loitering for the purpose of engaging in a prostitution offense charges, and were 88% of the defendants who faced three or more charges." The RUP also pointed out that police are not informed of which defendants have been granted ACDs or had their charges dismissed and sealed. "Therefore, receiving an ACD does not protect someone who is no longer doing sex work from being rearrested for a loitering for the purposes of prostitution charge if they spend time in public space in a neighborhood where they have previously been arrested, or near an area that the police have identified as a stroll where people trade sex."[89]

Although being sent to therapy or yoga classes is more humane than being sent to prison, it is not an entirely appropriate way of treating adults who have simply decided to sell sex in order to earn money, as various commentators have noted. Nor does it address the social and economic factors that

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motivate some people to engage in prostitution. At the same time, the redefinition of *all* sex work as human trafficking does serve to justify the continuing criminalization of sex work and to perpetuate police sweeps of sex workers, without apparently providing effective means for fighting human trafficking and punishing traffickers, who still seem to slip through the net of the law.

As for sex workers themselves, it is not clear that being arrested by the police is the best way to gain access to social services. Nor can law enforcement address the conditions that impel disadvantaged youth to resort to sex work. Lisa Duggan reports in *The Nation* that the Urban Institute, in partnership with Streetwise and Safe, has published a series of studies

> outlining the reasons young LGBTQ New Yorkers engage in what they call "survival sex" or sex in exchange for housing, food, or cash. As Audacia Ray, director of RUP, explained to me, the language of "trafficking" covers over the intertwined conditions of migration, domestic violence, and poverty — which only sometimes come together with the kind of organized force and coercion conjured by the term. When used as an umbrella term for nearly all sex work, as it is in the HTICS, "trafficking" effectively erases the systemic conditions that shape the experience of sex work, substituting individual criminal "traffickers" for the traps of poverty and homelessness. The trafficking framework also erases the agency of women. Sex work becomes a kind of statutory crime, with women as legal children, with issues of coercion assumed and questions of consent rendered irrelevant for the court.[90]

Legal definitions of trafficking also sometimes fail to make a rigorous distinction between the family and friends of sex workers and their "pimps," criminalizing the former as if they were necessarily the latter. That is not to deny that the two categories often coincide, but they do not do so in every case.

The fact that the burden of the punishments meted out under anti-trafficking programs, such as New York's Human Trafficking Intervention Initiative, seems to fall squarely on sex workers and not, as it turns out, on sex traffickers, should raise red flags. So should the tendency of interdiction efforts to focus on sex work instead of on other kinds of human trafficking involving coerced labor. Once again, everything here points less to a program to eradicate abuse than to a determination to regulate and constrain sex itself. In her contribution to this volume, Elizabeth Bernstein notes that " 'trafficking' as defined in international protocols and in current federal law could conceivably encom-

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pass sweatshop labor, agricultural work, or unscrupulous labor practices on [U.S.] military bases in Iraq," but that is not how those regulations are usually applied. Instead, they are often used to constrain and to punish sex work in particular, along with sex workers and their families.[91]

Bernstein goes on to discuss the international versions of these anti-trafficking initiatives: "With 'women's human rights' understood as pertaining exclusively to questions of sexual violence and to bodily integrity (but not to the gendered dimensions of broader social, economic, and cultural issues), the human rights model in its global manifestation has become a highly effective means of disseminating feminist carceral politics on a global scale." She continues, "Within the context of campaigns to combat the global 'traffic in women,' this efficacy has been manifest in the United States' tier ranking and economic sanctioning of countries that fail to pass sufficiently punitive anti-prostitution laws, in the transnational activist push to criminalize male clients' demand for sexual services, in the tightening of international borders as a means to 'protect' potential trafficking victims, and in the implementation of new restrictions upon female migrants' capacity to travel." Such restrictions sometimes have the further effect of forcing female migrants to rely on smugglers to transport them across borders, which makes these women less autonomous and therefore *more* vulnerable to sex trafficking.[92]

Bernstein's critique converges with the analysis of California's Proposition 35 that Carol Queen and Penelope Saunders contribute to this volume. Overwhelmingly approved by popular referendum in November 2012, with 81 percent of voters casting ballots in its favor, Prop 35, known as the CASE Act (Californians Against Sexual Exploitation), claimed to criminalize human trafficking. Queen and Saunders argue, however, that the new law will actually do the following instead:

> "expand the definition of trafficking well beyond that currently recognized by global experts;
>
> expand prison sentences and sex offender registration, including in some cases for the people the law claimed to protect;
>
> further criminalize sex workers' associates, including their partners and families;
>
> erode affected persons' online privacy through requirements to register their Internet accounts with law enforcement;

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> channel fines to police agencies, sex work abolition agencies, and non-profits associated with Homeland Security — limiting or eradicating entirely funds that would, under earlier anti-trafficking strategies, be available to support victims directly."

One effect of the Prop 35, in other words, is further to elide "the differences between sex trafficking and sex *work* (e.g., prostitution, exotic dancing, and other forms of eroticized labor)," thereby blocking efforts to protect sex workers from harm and make sexual labor safer for those who freely choose to engage in it. In response to developments such as Prop 35, which punish rather than protect sex workers, Amnesty International adopted on August 11, 2015, a new policy defending the rights of sex workers and calling for "the full decriminalization of all aspects of consensual sex work." Other human rights organizations, such as Human Rights Watch, UNAIDS, the World Health Organization, the Global Commission on HIV and the Law, and the Open Society Foundations, now also support the decriminalization of sex work.[93]

VII

Although the transnational dimensions of the war on sex largely escape our purview, this volume does include articles on Taiwan by Hans Tao-Ming Huang, on the Netherlands by Gregory Tomso, and on the Caribbean by Maurice Tomlinson. Analysis of transnational issues is hampered by a paucity of adequate tools to address the delicate political issues raised by the war on sex outside the context of the established industrialized democracies. Recent critiques of "homonationalism" within queer theory, for example, whatever their other uses, are singularly ill-equipped to respond to the challenges posed by new state persecutions of homosexuals in Russia and Uganda. Particularly in countries that used to belong to the Soviet bloc, or that fall within the current sphere of Russian influence, there has been an uncanny echoing of queer theory's critique of LGBT rights as an alien, inapt, Westernizing imposition of a liberal model on local sexual cultures and norms (similar arguments for the inapplicability of LGBT rights to Asian countries were once advanced by the autocratic government of Singapore).[94] Liberals have had a loud and forceful response to the neo-orthodox reaction in these post-Soviet countries, and the prospect of EU admission was enough to force Moldova to retreat from its Putinesque laws, but queer theorists seem to be paralyzed in the face of these developments, apparently worried that academics who advocate for gay

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rights will be seen as homonationalist or merely liberal. The current geopolitical climate for sexual justice therefore gives rise to a number of extremely thorny questions.

In conclusion, to say that the developments described in this essay and in this volume constitute a war on sex is not to imply that all those developments are the same. Is the war on sex to be understood as a redirected expression of social hostility, an oblique attack on already stigmatized but otherwise innocent groups, such as racial minorities and sexual dissidents? Or do current sexual regulations actually target the right people but end up going too far? Do they err in being overly inclusive and in criminalizing the innocent along with the guilty? Or is it that the expanding restrictions on sex, which bypass *persons* and identify harmful, injurious *activities* (e.g., the production of sexually explicit images of children), define those targets too broadly (so as to include teenagers taking nude selfies)? Or is the problem that the right practices (rape, sex trafficking) are being correctly opposed but in ways that produce bad and unintended consequences along with counterproductive effects? Or is it simply the case that the guilty, who deserve to be punished, are being punished out of all proportion to the seriousness of their crimes?

It should be clear at this point that *all of these factors* are involved in the war on sex. But it should also be clear that *all of these factors are different from one another* and bring different dynamics or logics of practice into play. They should not be conflated; rather, they should each be described in all their specificity, then analyzed and confronted on an issue-by-issue basis — even if they are all driven, to varying degrees, by a single underlying animus against sex itself.

To denounce the war on sex is not to call for the decriminalization or liberation of all sexual practices. It is certainly not to condone sexual violence; the sexual exploitation and victimization of women, children, the poor, and the vulnerable; or to express indifference to the reality and gravity of various kinds of sexual harm. It is not even to indicate approval of prostitution, pornography, or risky sexual practices in an age of epidemic disease. It is to suggest, rather, that moral disapproval should not be translated automatically into prohibition or repression, much less criminalization. Personal feelings about good and bad sex, even considered views about right and wrong sex, should acquire the force of law or social policy only after much careful, critical, collective reflection.

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There are many aspects of contemporary sexual life and contemporary sexual culture that are deeply troubling. It should be possible, accordingly, to critique on feminist grounds the increasing sexualization of images of women in the mass media or the routine pornographization of women's and men's bodies in mainstream advertising without engaging in puritanical overkill — without, for example, demonizing recreational or nonreproductive sex and without promoting familialism or imposing conjugal domesticity on the unwilling or the recalcitrant. It is certainly not appropriate or desirable to suppress the free expression of opinions about the differences between good and bad sex. People have a right to object to sex that they regard as wrong or immoral. But in passing laws, framing regulations, and formulating policy, they should place the emphasis on reducing harm rather than inculcating virtue — or someone's idea of it. It ought to be possible to detect, deter, prevent, and punish sexual misconduct while maximizing sexual freedom and the sexual agency of individuals.

Many of the contributors to this volume focus on the damage done to sexual civil liberties by the recent convergence between certain elements in the women's movement and certain elements in the conservative movement, which agree on using the power of the state and other institutions to police sex, to restrict sexual choices, and to punish sexual infractions. The resulting consensus among some feminists and some conservatives has persuaded many people today that rape, abuse, domestic violence, and sexual exploitation should be combated by increased penalties — by stricter, harsher, and continually more expansive forms of repression, restriction, surveillance, prohibition, criminalization, and punishment. Nonetheless, feminism is not the enemy: the authors whose work is collected here see no fundamental, substantive, irreconcilable opposition between feminism and sexual freedom. It is women, after all, who often have suffered the most from the carceral turn in sexual politics. As Judith Levine argues in her own contribution, "if we are to end sexual violence by cracking down on sexual freedom, we are trading one oppression for another."

Here, as so often in the context of political struggles, it is a question of identifying the principal enemy. For example, readers of this volume will have to ask themselves which is worse: rare, horrific crimes committed by deranged individuals or a systematic, increasing, massive, generalized encroachment on civil liberties by the state? At the moment, the balance between sexual freedom and the need for protection from sexual danger has shifted to the advantage of the latter. Can we redress the balance in a responsible way? Is it pos-

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sible to confront structural violence, systematic injustice, and the persistent forms of social inequality (between men and women, adults and children) without bearing down unfairly on already disempowered individuals and groups or depriving them of agency? And is it possible to re-equilibrate the criminal justice system by devising appropriate penalties for crimes of sexual harm that do not over-criminalize and over-punish those who are guilty of them?

These are not easy questions to answer. But we must try. How well we succeed in answering them is likely to determine the positions we take in the war on sex.

NOTES

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No. 15-MJ-780; Lisa Duggan, "What the Pathetic Case against Rentboy.com Says about Sex Work," *The Nation*, January 7, 2016, http://www.thenation.com/article/what-the-pathetic-case-against-rentboy-com-says-about-sex-work/. The federal indictment of Jeffrey Hurant, founder and CEO of Rentboy.com, which was filed on January 27, 2016, in the U.S. District Court for the Eastern District of New York, does actually attempt to associate the website with sex trafficking and underage sex, but it tellingly omits to include such charges in the three counts on which Hurant is indicted: they comprise one count of promoting prostitution and two counts of money laundering. See Scott Shackford, "The Official Indictment of Rentboy.com's Founder Will Infuriate You: Human Trafficking Issues Are Raised to Make Site Operators Look Bad, but the Charges Don't Match," Reason.com, January 28, 2016, http://reason.com/blog/2016/01/28/the-official-indictment-of-rentboycoms-f.

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8. U.S. Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (October 2011), p. 300.

9. See Trevor Hoppe, "Punishing Sex: Sex Offenders and the Missing Punitive Turn in Sexuality Studies," *Law & Social Inquiry* 41, no. 3 (2016): 573–594.

10. Hoppe, "Punishing Sex."

11. Bernard E. Harcourt, "Neoliberal Penality: A Brief Genealogy," *Theoretical Criminology* 14, no. 1 (2010): 1–19 (quotation on p. 4; italics in original). See, further,

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Bernard E. Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (Cambridge, MA: Harvard University Press, 2012).

12. See Bill Keller, "Where Right Meets Left: The Odd-Couple Alliance on Justice Reform Is Not as Odd as It Seems," Marshall Project, February 20, 2015, https://www.themarshallproject.org/2015/02/20/where-right-meets-left, who comments, "Nobody wants to grapple with the draconian treatment of sex offenders."

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14. See Hoppe, "Punishing Sex."

15. For a particularly eloquent statement to this effect, see Andrew Extain, "Beyond the Headlines: How We See Sex Offenders," Center for Sexual Justice, July 27, 2015, http://www.centerforsexualjustice.org/2015/07/27/beyond-the-headlines-how-we-see-sex-offenders/.

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17. According to statistics compiled from state registries by the National Center for Missing and Exploited Children, http://www.missingkids.org/en_US/documents/Sex_Offenders_Map2015.pdf (accessed February 8, 2016).

18. Smith v. Doe, 538 U.S. 84 (2003). The Supreme Court decision invoked an unfounded and, it now seems, false statistic about the high recidivism rate among sex offenders to justify the practice of putting the names of convicted sex offenders on public registries, a statistic that thereby gained undeserved authority in subsequent jurisprudence: see Ira Mark Ellman and Tara Ellman, " 'Frightening and High': The Supreme Court's Crucial Mistake about Sex Crime Statistics," *Constitutional Commentary* 30, no. 3 (fall 2015): 495–508.

19. "More than 20,000 sex offenders are registered in Georgia. . . . Of that 20,000, only 244 offenders are considered violent sexual predators required to wear a monitor for life, GBI [Georgia Bureau of Investigation] statistics show": Joy Lukachick

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Smith, "Georgia Drops Hundreds from Sex Offender Registry," *Chattanooga Times Free Press*, November 13, 2011, http://www.timesfreepress.com/news/news/story/2011/nov/13/georgia-drops-hundreds-from-sex-registry/63812/. Similar figures have been quoted for Vermont, which as of 2007 had 24,000 registered sex offenders, of whom 282 were classified by the state as "sexual predators" or were convicted of sexually violent crimes, according to Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* 19, no. 4(G) (September 2007): 62.

20. Human Rights Watch, *No Easy Answers*, 39–40; Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US* (2013), 21n.

21. BBC News, "Bike Sex Man Placed on Probation," November 14, 2007, http://news.bbc.co.uk/2/hi/uk_news/scotland/glasgow_and_west/7095134.stm; BBC News, "Bike Sex Case Sparks Legal Debate," November 16, 2007, http://news.bbc.co.uk/2/hi/uk_news/scotland/glasgow_and_west/7098116.stm.

22. U.S. Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 295, 300. Sex offenders convicted under federal statutes represent a small fraction of the total number of convicted sex offenders in the United States, but the detailed statistical information about them that is available makes it possible to characterize them with some precision.

23. David Finkelhor, Richard Ormrod, and Mark Chaffin, "Juveniles Who Commit Sex Offenses against Minors," Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice, *Juvenile Justice Bulletin* (December 2009), 1–4, http://www.ojp.usdoj.gov. The statistics provided by the report are based on very spotty and incomplete data from the National Incident-Based Reporting System, which (though more informative than any previous collection of crime data in the United States) "is not yet nationally representative, nor do its data represent national trends or national statistics" (2). The authors also caution that "very few of the youth described [as sex offenders in this report] are convicted as adults would be. Many were only alleged to have engaged in illegal behavior, and, if subject to justice system action, were adjudicated delinquent rather than convicted of a crime" (1n). An additional clarification: "It is also important to note that the offender ages recorded in NIBRS reflect the ages of the youth at the time the incidents are reported, not the ages at the time the incidents occurred, which are different in 19 percent of cases" (3).

24. Finkelhor, Ormrod, and Chaffin, "Juveniles Who Commit Sex Offenses against Minors," 4.

25. In one 2004 Pennsylvania case, "a 15-year-old girl was charged with manufacturing and disseminating child pornography for having taken nude photos of herself and posted them on the Internet. She was charged as an adult, and as of 2012 was

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facing registration for life" as a sex offender (Human Rights Watch, *Raised on the Registry*, 35). In another instance, police in Manassas City, Virginia, not only charged a seventeen-year-old boy with two counts of child pornography for sending his fifteen-year-old girlfriend a photo of his own penis, but they attempted to pin the rap on him by inducing him to have an erection so they could photograph it themselves in order to complete a positive identification of the culprit. The teenager received a year's probation, and the detective in the case later killed himself when he was about to be arrested on charges of making sexual advances to two thirteen-year-old boys whom he had been coaching in hockey. See Julie Carey, David Culver, and the NEWS4 [NBC Washington] Team, "Va. Teen Could Be Jailed for 'Sexting' Girlfriend," July 3, 2014, http://www.nbcwashington.com/news/local/Va-Teen-Could-be-Jailed-for-Sexting-Girlfriend-265770831.html; Tom Jackman, "In 'Sexting' Case Manassas City Police Want to Photograph Teen in Sexually Explicit Manner, Lawyers Say," *Washington Post*, July 9, 2014, http://www.washingtonpost.com/blogs/local/wp/2014/07/09/in-sexting-case-manassas-city-police-want-to-photograph-teen-in-sexually-explicit-manner-lawyers-say/?tid=sm_fb; Michael McLaughlin, "Police Abandon Plans to Photograph Teen's Penis in Virginia Sexting Case," *Huffington Post*, July 10, 2014, http://www.huffingtonpost.com/2014/07/10/manassas-city-teen-sexting_n_5572316.html; Tom Jackman, "Manassas City Teen Placed on Probation in 'Sexting' Case Where Police Sought Photos," *Washington Post*, August 1, 2014, https://www.washingtonpost.com/local/manassas-city-teen-placed-on-probation-in-sexting-case-where-police-sought-photos/2014/08/01/c4d6ff62-19ad-11e4-85b6-c1451e622637_story.html; Tom Jackman, "Manassas City Police Detective in Teen 'Sexting' Case Commits Suicide," *Washington Post*, December 15, 2015, https://www.washingtonpost.com/local/public-safety/manassas-city-police-detective-in-teen-sexting-case-commits-suicide/2015/12/15/de88f7c4-a356-11e5-9c4e-be37f66848bb_story.html.

26. http://starjournalnow.com/Content/News/Local-News/Article/School-District-of-Rhinelander-concludes-sexting-investigation/7/46/8906 (accessed April 26, 2015). Emphasis added.

27. Hanna Rosin, "Why Kids Sext," *The Atlantic*, November 2014, http://www.theatlantic.com/magazine/archive/2014/11/why-kids-sext/380798/#sthash.lC73Bowv.dpuf. Cf. Samantha Allen, "Colorado's Sexting Nightmare," *The Daily Beast*, November 9, 2015, http://www.thedailybeast.com/articles/2015/11/09/colorado-s-sexting-nightmare.html: "a 16-year-old in Colorado can legally consent to sex with a 26-year-old but a 17-year-old cannot send a nude photo to another 17-year old." For a general survey of this issue, see Amy Adele Hasinoff, *Sexting Panic: Rethinking Criminalization, Privacy, and Consent* (Urbana: University of Illinois Press, 2015).

28. Paul Woolverton, "NC Law: Teens Who Take Nude Selfie Photos Face Adult Sex Charges," fayobserver.com, September 2, 2015, http://www.fayobserver.com/news

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/local/nc-law-teens-who-take-nude-selfie-photos-face-adult/article_ce750e51-d9ae-54ac-8141-8bc29571697a.html.

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exclude them — a successful effort. They mounted no other objection to the law." See Timothy Stewart-Winter, "Queer Law and Order: Sex, Criminality, and Policing in the Late Twentieth-Century United States," *Journal of American History* 102, no. 1 (June 2015): 61–72 (quotation on p. 72).

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