Introduction

Californians have a tremendous opportunity to make our communities safer by voting Yes on Proposition 83, Jessica’s Law. It is a comprehensive initiative that would strengthen California’s laws against child molesters and sexual predators.

Both major political parties and every major law enforcement and crime victims group in California support the proposition. As district attorney, I know firsthand the importance of passing Proposition 83. I see how sexual predators exploit the loopholes and weak laws to repeat their crime over and over again.

—Jan Scully, Sacramento County District Attorney, October 6, 2006

American media and politics are saturated with stories about sex crime. As the prosecutor describes above, there is a widely shared conception of what the problem is and how to address it: sexual offending is carried out by predators who repeat their crimes and must be stopped through new, tough laws. As a result, since the 1990s, scores of new laws have increased prison sentences and attached extra penalties and restrictions on released sex offenders.\(^1\) Because these laws are often tied to states’ criminal justice funding, they directly influence the functioning of police, court, and correctional personnel, as well as the makeup of prisons and parole systems. The particulars focus on “managing” sex offenders through notification laws and various forms of biological and psychological monitoring. While the public may support the idea of treatment for some offenders, risk assessment and control are far more characteristic of the contemporary approach to sex crime, and prevention is rarely addressed.

Popular tough-on-crime legislation such as Proposition 83, the ballot initiative referenced above, often capitalizes on fears of the violent recidivist who is beyond the reach of any approach except incapacitation (that is, sterilization or castration or even execution). The spirit of California’s “three strikes and you’re out” approach has informed sentencing reform in states
across the country, with most states shifting from indeterminate to determinate sentencing structures in whole or in part. Interestingly, violent crime rates have consistently fallen during the period of panic over recidivists. But the efficacy of “governing through crime” outweighs the facts. Today, policymakers continue to seek ever-better ways of signaling their concern with crime and their solidarity with victims and their families. For example, Proposition 83, known as “Jessica’s Law,” won approval by a large margin of voters in California’s November 2006 election. Jessica’s Law tried to solve the crime problem by increasing criminal justice oversight of known offenders. Jessica’s Law in its California iteration increased sentences for existing sex crimes, added lifetime GPS monitoring of sex offenders, dramatically expanded eligibility for the state’s civil commitment, and restricted where released sex offenders may live.

In the current climate, many people interested in questioning some aspects of our approach to sex offender punishment believe it is too politically dangerous, even when hundreds of millions of dollars are at stake. As Ray McNally, a Republican consultant, said about Jessica’s Law, “Pity the poor politician who decides to stand up against this initiative. They’ll be roadkill by morning.” Unlike other measures on the same ballot, there was very little debate among commentators and no “war of commercials” on radio or television about this proposition (the only commercial that mentioned Jessica’s Law condemned a gubernatorial candidate who had expressed limited concerns about an earlier version of the bill). The experts who were featured in the public arena were a strange group. Aside from a convicted sex offender who supported most aspects of the law, critics got little airtime. Not even the victims’ rights group California Coalition Against Sexual Assault (CalCASA), which circulated press releases about the risks of forcing offenders to move out of well-supervised areas, received attention. Other critics did not even try to reach the public. At a training meeting for a coalition of therapists and correctional officers who work with sex offenders, everyone agreed not to voice practical concerns over the implementation of Jessica’s Law—these low-status experts are rarely heard under the best of circumstances, and protests would only waste capital on a losing cause. As I will show, the public support, and even the policies themselves, resemble past efforts dating back to the 1930s. Unique to the present, however, are the dominant orthodoxy and the silencing of critics.

This state of affairs is not good for debate in a healthy civic society, and it is not good for policy making, regardless of the law’s content. In order to understand the current dynamics surrounding social and political responses
to sex crime, I put contemporary sex offender punishment in historical context. My findings challenge previous attempts to theorize law made in response to sex crime, and I add empirical grounding to contemporary explanations of penal expansion.

**Data and Methodology**

Increasingly, conclusions drawn from social research are viewed with most confidence if they are the product of triangulation. Borrowed from navigation, “triangulation” in social research means the use of multiple methods in order to guard against the effects of error in one method. This type of multifaceted approach should be familiar to criminologists and to other interdisciplinary scholars, who know better than most that the question or problem, rather than the pet approaches of a particular discipline or profession, should dictate which strategy is used.

My approach is one of multiple methods, including descriptive statistics, archival research, and participant observation. Specifically, I present numerical data that describe criminal justice patterns, combined with a social policy analysis of both the legal changes since 1980 and the institutional changes affecting criminal justice policy in California based on archival and ethnographic research.

Throughout the book, I will track the ways law, media, and psychiatric and criminological scholarship imagined sex offenders in the United States during the twentieth century. In the next paragraphs and in appendix A, I discuss the various measurement techniques I used to achieve something as close to representativeness as I think is possible in examining how discourse, policy, and implementation interact. In short, I tried to identify all the predominant ways of talking about the problem of sexual offending in each realm, and to pay attention to which seemed to recur the most or to hold the most influence, while also pointing out less common perspectives and why they held less weight. Although I am interested in which discursive strains dominated and why, I try to avoid making causal claims about discourse and action. While sensitive to debates about how and whether “culture” can be operationalized, Mary Douglas’s definition—“culture, in the sense of the public, standardized values of community, mediates the understanding of individuals. It provides in advance some basic categories”—frames much of my approach. Relationships among punishment policy, public perceptions, and expert opinions vary meaningfully over time. Although the roots of current sex offender policies extend much further, I begin with the sexual
psychopath era, from about 1930 to 1950, continue into the era of rehabilitative debate, from about 1950 to 1980, and then go to the containment era, 1980 to the present. I describe the sex offender–related media coverage from two major newspapers; social guidance media; state-of-the-art scholarship in criminology, psychiatry, and psychology; and state legislative activity in California. Together, these measures reveal the discursive field surrounding sex offenders—the toolkit of ideas, beliefs, and strategies available to those who made, supported, and implemented policies. Nicole Hahn Rafter, a criminologist, advocates for this kind of mixed-data approach, which takes seriously popular as well as scientific forms of knowing. In her recent work on sex crimes in film, she explains the connection between the cultural turn in sociology and the need to tell stories in popular media:

While much of this work is speculative, it seems that the fragments of cultural information in our minds form themselves first into frames and then into schemata or templates—bigger and more solid frames—that we draw on in the form of assumptions, social norms, principles, and so on, using them as handy guides to behavior so we are not obliged to think through every action or reaction from the start. Schemata then aggregate into even larger mental structures—ideologies (including assumptions about the nature of heroes and villains), paradigms, logics, and narratives of the self (perhaps including the self as a victim or perpetrator of a sex crime).11

The sex offender discursive field, therefore, provides ways of knowing, which will shape future actions as “guides to behavior” as well as “narratives of the self.” To capture this field, I systematically reviewed the sex offender coverage in published articles in flagship American scholarly journals and in two prominent U.S. newspapers since 1930, and by seeking out all archived social guidance media related to sexual deviance.12 For correctional policy and implementation, I address national trends and provide snapshots from multiple states, as well as an extended case analysis of the state of California across the eras. While California cannot represent patterns in other states or at the national level, it has been at the forefront of innovation in correctional policy. As a populous state, it has driven the national correctional numbers. As a model for other states, California pioneered therapeutic sterilization laws in 1909 and led the push for sexual psychopath laws in the 1930s. It later shone during the golden age of rehabilitation. Today, California suffers from some of the worst symptoms of the actuarial approach to punishment, including prison overcrowding and a shameful record of parolee recidivism.13
California has also been a model for sex offender treatment and management: legislators invested in a state-of-the-art research and treatment facility for sex offenders in the early 1950s in response to a series of publicized sex crimes; and in the 1960s and 1970s, California’s Mentally Disordered Sex Offender Program was the standard-bearer for sex offender treatment practitioners across the country. More recently, the Sex Offender Treatment and Evaluation Project helped pioneer the relapse prevention approach to sexual offending and the state opened a new facility for sexually violent predators at Coalinga State Hospital that has received sustained national and international attention. Yet despite this commitment to noncarceral treatment and research, California has also increasingly filled its prisons with sex offenders.

Due to its sheer size and scope, California’s experiments with sex offender control have provided the grist for much of the existing scholarship in the area. As a result, both the knowledge base and the implementation of sex offender policies often relied on data and interpretation of California samples. For all of these reasons, California is a particularly meaningful site for investigating the genesis and evolution of contemporary modes of sex offender punishment. In some ways it may be more unusual than typical; for example, its correctional and civil commitment populations are larger than those of most other nations. But as California goes, the world often follows. Policies made in California tend to spread, just as sensational stories that originate there tend to dominate the news. As my conclusion will suggest, California may also offer a model for modulating some of the most extravagant policies for sex offender management.

The combined approach to the study of punishment over a more than eighty-year span allows me to discuss broad changes, while grounding my conclusions in a detailed study of local forces. I also use sex offender punishment as a case for studying formal social control as a larger phenomenon. Specifically, my work contributes to the history and sociology of punishment in the United States, the sociology of professions, the study of the gap between law on the books and law in action, and discussions of professional discretion in political and judicial decision making.

David Garland’s Culture of Control describes the “structured field of crime control and criminal justice” and how it came to be. He admonishes, “Do not mistake short-term movements for structural change. . . . Do not mistake talk for action. . . . Do not assume talk is inconsequential. . . . Do not confuse means with ends. . . . Do not conflate separate issues. . . . Do not lose sight of the long-term.” I apply Garland’s insights to a particular subset of issues and examine them with a long view: the framing of sexual offending and its
responses from 1930 to the present. This provides an empirically grounded historical comparison of one crime control problem, which is often seen as emblematic of the general field.

The Scholarly Context

There is near unanimity among those who study punishment trends that we are now in the midst of a peculiarly punitive era, with approaches to crime and punishment that are unique to late modernity. For example, Garland’s work on the contemporary “culture of control” is one of several influential explanations of our penal present that each, in varying ways, offers causal models. Many of these considerations descend from Michel Foucault and his efforts to identify the mentalities and rationalities that underlie governmental institutions and policies.17

Almost all of this contemporary theorizing has normative motivations and implications: the penal apparatus is out of control, so to change course we must understand it.18 Many of these accounts also blame a vengeful public: As Garland explains, “There is now a distinctly populist current in penal politics that denigrates expert and professional elites and claims the authority of ‘the people’, of common sense, of ‘getting back to basics.’”19

There is also a distinct Marxist strain in contemporary critiques. For many, the special punishments imposed on sex offenders highlight the uniqueness of the current regime. For example, Loïc Wacquant emphasizes the connections between changes in the organization of labor, social welfare, and punishment, elaborating on Marxian theorists like Rusche and Kirchheimer.20 As Wacquant writes,

The logic of punitive panopticism and segregative imprisonment that has informed the management of dispossessed, deviant, and dangerous categories in America following the renunciation of the Keynesian social contract is now applied with all the more force to sex offenders, since their misdeeds are more scandalous and touch more directly the foundations of the familial order at the very moment that the family has to compensate for the disappearance of state protections against the risks of working life.21

Wacquant thus joins other scholars in pointing out that sex offender crackdowns coincide with the state’s retreat from its past responsibilities to its citizens in the areas of welfare and work, suggesting an attempt to substitute public safety for other kinds of security.22 But these may be coincidental and not causal.
In recent years, scholars, policy makers, and the public have reconsidered certain aspects of general punishment trends since the 1980s. For example, Krisberg and Marchionna found that “by almost an 8 to 1 margin (87% to 11%), the U.S. voting public is in favor of rehabilitative services for prisoners as opposed to a punishment-only system. Of those polled, 70% favored services both during incarceration and after release from prison.” Nevertheless, new and improved sex offender punishments are constantly suggested and often enacted. Thus it is unclear whether sex offender punishment reflects the intensification of general penal trends or whether it has a unique trajectory. While I avoid strong causal claims, I have marshaled a wide variety of data to question available theorizing and suggest new, contextualized explanations of sex offender punishment.

**Social Construction and Social History**

The influence of social theorist Emile Durkheim is nearly universally evident among writers who address the relationships among society, crime, and punishment. Durkheim’s insight that the act of punishing strengthens social bonds remains integral to understanding who and how societies punish. His related description of crime as a social fact is similarly fundamental. Rather than existing as a natural or God-given truth, the definition of crime is produced by people and will vary across time and place. For example, the offense of adultery is no longer part of the criminal codes in most U.S. states, but had once resulted in numerous executions in the early American colonies. Adultery has been transformed from a capital crime to a private misdeed.

Social constructionists and social historians have long understood that the framing of threats to children requires deep contextual analysis. In particular, Philip Jenkins’s seminal work on changing conceptions of the child molester and Katherine Beckett’s account of changes in the media’s framing of child sexual abuse provide the groundwork for the present research.

Scholars have also studied the tendency to view the sex offender as a monster and as a scapegoat at the intersection of public fears and reactionary policy. Focused on exaggerated responses and hyperbolic claims, scholars, including Richard Ofshe on the satanic abuse panic, Jonathan Simon on Megan’s law, Franklin Zimring on adolescent sexual offenders, and Eric Janus on preventive detention, have all described the often unfounded assumptions and generalizations that have led to ill-advised public policy. Much of this policy making appears to be Durkheimian in nature—a way of drawing boundaries that demonstrate social values and create solidarity.
A great deal of the scholarship that delves into social beliefs and reactions to sex crime builds on Stanley Cohen’s concept of “moral panic”:

A condition, episode, person or group emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right thinking people; socially accredited experts pronounce their diagnosis and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes visible.27

Moral panic scholarship on this topic has focused on the social construction of the “monster” and has shown how the reaction to what is often an overblown threat takes on a life of its own.

The historians Philip Jenkins and Estelle Freedman, in particular, draw our attention to important complexities in the framing of sex crime as a problem. Jenkins and Freedman explain shifts in public interest in sexual offending using many of the same kinds of archival sources I reference. Jenkins’s book, Moral Panic: Changing Concepts of the Child Molester in Modern America, provides a rich account of three eras, which formed the basis of my own periodization.28 One of his early chapters focuses on “the age of the sexual psychopath”—this period also forms the basis for Freedman’s work, which highlights the ways in which discourse about sexual abnormality allowed the re-drawing of moral boundaries put into crisis by the world wars and postwar social changes.29 Both scholars contributed not only wonderful leads for archival material but also provocative interpretations of the causes and meanings of preoccupations with sex offenders.

Freedman identifies two eras of “sex crime panic,” from 1937 to 1940 and from 1949 to 1955, which she sees as illustrative of a new public discourse on nonmarital, nonprocreative sexuality. Freedman identifies in these sex panics a newly focused punitive attention to homosexual deviants (the inadequately masculine) and violent sex criminals (the hypermasculine) as well as the stigmatization of victims of sexual assault. Freedman explains the sex panics by focusing on shifts in professional and social arrangements, which she describes as three convergent trends. First, as courts and prisons became important arenas into which American psychiatry expanded beyond its earlier base in state mental hospitals, the recently established specialization of foren-
sic psychiatry sought new explanations for criminal behavior. Second, the social stresses of the depression drew attention to the problems of male deviance. Third, the social scientific study of sexuality became respectable, and the influence of psychoanalytic theories on American psychiatry during the 1930s provided an intellectual base for a sexual theory of crime.

Jenkins similarly views interest in sex crime as a window into other social phenomena. He focuses on child molesters and covers a longer historical period, extending the critique of the sexual psychopath era to the early end of the contemporary focus on sexual predators.

Freedman’s article came out in 1989, while Jenkins’s book was published in 1998. Given the exponential increase in sex offender policies since their works and those of other scholars, including Lynch and Beckett who also have examined these trends, not only is there more to analyze but my longer historical view allows for the realization of different patterns. In particular, where each of these works emphasize distinct periods, I see a long progression from multiple ways of talking about sex offenders to a simplified, totalizing narrative. Most important, I also offer a different interpretation of what Jenkins calls “the liberal era” and what all view as a lull in the governance of sex crime. The longer historical view combined with a focus on how different components of the discursive field present conflicting narratives allows me to see the same period of time as signifying not a break from the periods before and after, but as a test of rehabilitative rhetoric that laid the groundwork for contemporary policies.

**From Construction to Practice**

In addition, while owing much to the historical and sociological perspective that Freedman and others have brought to public debates about sexual offending, I focus on the relationship between criminology and forensic psychology and the importance of sex offenders as subjects for both disciplines. Other scholars of this topic have ignored variations among discourse, legal changes, and changes in formal social control, instead assuming that talk equals action, and that action leads to expected changes in practice.

While it is clear that public attitudes and changes in the construction of threats play a role in policy change, their causal role is not so clear. Major shifts have taken place since 1930 at the policy level and as further measured by criminal justice trends. These shifts are related in part to changes in the politics and structures of criminal justice, and especially to the kinds of
expertise considered relevant to crime control. In the following chapters I will examine these shifts as they apply to sex offender and general punishment trends in the United States. The correctional numbers show a phenomenal increase in sex offender incarceration over time.

The best information available for showing longitudinal punishment patterns for particular offenses is from yearly reports of prison admissions to state institutions (long-term historical data cannot be reliably compiled into national figures, but the California numbers shown in figure 1.1 generally track national trends in sex offender punishment since the 1960s). Figure 1.1 shows sex offender admissions, as rates per 100,000 Californians in order to correct for population growth.

The timing reflected in this figure is surprising, given the insistence by both moral panic scholars and those who examine larger punishment trends that the present is peculiar. Prison admissions for felony sex offenses remained flat until the 1960s despite extensive media attention to sensational sex cases, punitive public attitudes, and frequent passage of new laws aimed at sex crime, each of which I describe in the next chapter. These contradict what we might have expected from accounts about “panics” surrounding sex fiends and psychopaths in the postwar period. It also contradicts penal theorists who consider sex offender punishment as exemplary as well: from 1940 to 1971, there was a 48% decrease in sex offender prison admissions, while the big period of expansion occurred from 1971 to 1984, when there was a 486% increase. After 1984, there were some fluctuations, but nothing comparable to the pre-1984 increase.

If we could create a line graph that would track public concern about sex offenders, it would bear a very different shape, with some peaks and valleys, but with neither the flat period from the 1930s to the 1970s nor the dips in the 1990s—of course, such a graph is impossible because “public concern” is not something we can easily measure over time. However, proxies for public concern include media coverage (however imprecise, given the major structural changes in news reporting over the twentieth century) and the more easily quantified passage of state and federal laws. Sex offender–related law making over this period showed spurts of activity that broadly correspond to the periods of moral panic that Estelle Freedman and other historians of twentieth-century sex law have identified, but with massive growth in the 1990s, more than ten years after sex offender prison admissions began to grow exponentially. I dissect the particulars of these trends in later chapters; for now this proves that public anxiety alone cannot drive sex offender punishment or the larger imprisonment boom. If public anxiety could do
All California incarceration data in this and subsequent figures (admissions, institutional population, and time served) are from the California Prisoners series published in various forms by the California Department of Corrections, first through the Bureau of Criminal Statistics, and later by the Offender Information Services Branch Data Analysis Unit. Rates are calculated using the annual state population as published in California Legislature 2004, Table B-1.

this, the law-making boom of the 1990s would have come before the prison expansion, not after.

Notwithstanding the unexpected relationship between public concern and punishment numbers over the long term, we might argue that the policymaking trend since the 1980s shows a long-overdue recognition of the seriousness of sexual offending and that criminal justice reflects our toughened attitude. Public opinion and policy changes nationwide have shifted to take sexual offending in general more seriously. While media and politics have paid attention to sex crime as a problem since at least the early twentieth century, there has been a marked shift in the severity of responses that are called for, and there have been some changes in how sex crimes are actually handled. For example, a 2008 report on sexual offenders in Delaware specifically claimed, “Criminal sexual behavior that in the past might have been handled as a mis-

**Figure I.1. Admissions to California Prisons for All Felony Sex Offenses, 1932–2007, per 100,000 Residents**
demeanor, addressed privately, or even considered a mental health issue, is now more likely to be prosecuted as a felony. Available criminal penalties for a variety of sex offenses have certainly increased since the early 1990s. In addition, over the past few decades, the Bureau of Justice Statistics reports that the rate of prisoners sentenced for violent sexual assault has increased at a higher rate than the general prisoner population. But these policy changes, and rate increases, belie the stagnation that has generally occurred for the prosecution and sentencing of rape. As will be discussed in later chapters and is well known to sexual violence scholars, neither clearance rates nor median time served for forcible rape have changed much in the last forty years—despite changes not only in public attitudes but in law enforcement training and techniques (e.g., sensitivity training as well as the use of DNA collection and analysis). Victim-ization rates also do not uniformly reflect the expected decline as a result of all the new laws aimed at preventing recidivism.

Thus there are two “problems” in the current scholarship: the seemingly overblown response to a particular category of monstrous sex offenders that moral panic scholars emphasize, and the contrasting lack of measurable successes in using the law to address real patterns of sexual violence. I believe this stems from a refusal to acknowledge the multiple and contradictory goals that currently motivate various punishment policies. In subsequent chapters I will lay out the various policies and the stakeholders who are involved in their promotion and application to sex offenders. I have linked stories about sex crime with the way the punishment laws work and have used this linkage to show that the United States has gone off track in several pursuits of justice and social change.

**Plan of the Book**

In general, I move from discourse analysis to implementation analysis, although some of each can be found in each chapter. Chapter 1 briefly introduces the discursive categories that appear throughout: the images of the offender and the common fallacies that underlie many strategies for responding to sex crime.

The next several chapters describe three eras in the history of sex offender punishment, combining accounts of public anxiety about sex crime with the strategies promoted by experts in psychology and psychiatry and in government (construed broadly to include elected officials as well as criminal justice and correctional authorities). Chapter 2 describes the sexual psychopath era, roughly 1930–1955, in which the media construct and the law refers to a
monstrous sex fiend who is plagued by uncontrollable desires and must be captured. In the era of rehabilitative debate, 1950–1980, described in chapters 3 and 4, public interest in new concepts from the psychiatric fields provided a limited testing ground of rehabilitative techniques. But their apparent failure helped pave the way for the current dichotomous approach to sexual offending—punish the offenders and treat the victim. In the containment era, 1980 through the present, described in chapter 5, a peculiar mix of ideologies and strategies are applied to convicted sexual offenders—treatment, incapacitation, and retribution are all featured in a wide range of approaches, although incapacitation dominates.

Chapters 6 and 7 focus on the major discursive shift that has taken place since the 1950s: the displacement of alternative explanations for sexual offending by that of the bogeyman. The ascendance of the undifferentiated image of the monster sex offender appears to have usurped the alternative versions in the policy field. Thus policies typically require the justice systems to react to all sexual offending with the same penal severity. These chapters explain the major shifts and missteps by psych experts that led to their sidelong except as correctional workhorses. Chapter 7 examines the increasing synchronicity of prosecutorial statements about sex offenders and those of hard-line victim advocates and the explicit alliances between police, prosecutors, and victim advocates that characterize the containment era. Chapter 8 moves solidly into implementation analysis by interpreting trends in sex offender criminal justice data across the eras. These data suggest that the most important influence on sex offender punishment may have little to do with ideas or practices unique to sex offenders.

In chapter 9, the conclusion, I explain the implications of each strand developed in the book. The historical perspective suggests that future penological theory and scholarship must examine multiple dimensions in order to draw strong conclusions. Focusing on ruptures and shifts in one dimension has led to overstating the significance of penal change and moral panic. Finally, I consider the possibilities for policy reform, noting several recent state-level successes. Given the sheer numbers of sex offenders currently under correctional control and the staggering costs associated with the numerous special conditions imposed upon them, sex offender policies will have to change.