Taking the 'Hate' Out of Hate Crimes: Applying Unfair Advantage Theory to Justify the Enhanced Punishment of Opportunistic Bias Crimes

Jordan Woods, University of Arkansas, Fayetteville
LGBT Identity and Crime

Jordan Blair Woods*

Recent studies report that LGBT adults and youth disproportionately face hardships that are risk factors for criminal offending and victimization. Some of these factors include higher rates of poverty, overrepresentation in the youth homeless population, and overrepresentation in the foster care system. Despite these risk factors, there is a lack of study and available data on LGBT people who come into contact with the criminal justice system as offenders or as victims.

Through an original intellectual history of the treatment of LGBT identity and crime, this Article provides insight into how this problem in LGBT criminal justice developed and examines directions to move beyond it. The history shows that until the mid-1970s, the criminalization of homosexuality left little room to think of LGBT people in the criminal justice system as anything other than deviant sexual offenders. The trend to decriminalize sodomy in the mid-1970s opened a narrow space for scholars, advocates, and policymakers to use antidiscrimination principles to redefine LGBT people in the criminal justice system as innocent and nondeviant hate crime victims, as opposed to deviant sexual offenders.
Although this paradigm shift has contributed to some important gains for LGBT people, this Article argues that it cannot be celebrated as an unequivocal triumph. This shift has left us with flat understandings of LGBT offenders as sexual offenders and flat understandings of LGBT victims as hate crime victims. These one-dimensional narratives miss many criminal justice problems that especially fall on LGBT people who bear the brunt of inequality in the criminal justice system—including LGBT people of color, transgender people, undocumented LGBT people, LGBT people living with HIV, and low-income and homeless LGBT people. This Article concludes by showing how ideas and methods in criminology offer promise to enhance accounts of LGBT offending and LGBT victimization. In turn, these enhanced accounts can inform law, policy, and the design of criminal justice institutions to better respond to the needs and experiences of LGBT offenders and LGBT victims.

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INTRODUCTION

After decades of mobilization and litigation, the U.S. Supreme Court held in *Obergefell v. Hodges* that the U.S. Constitution guarantees same-sex couples the right to marry.1 Now that marriage equality is here, there are looming questions about the next battlegrounds in the fight for formal equality for LGBT people. Possibilities include “religious freedom laws”;2 discrimination against LGBT people in the workplace, housing, and public accommodations;3 and discrimination against LGBT families living inside and outside of marriage.4

The post-marriage era has also opened space to move beyond formal equality concerns to address the substantive inequalities that LGBT people commonly face. Scholars have criticized race-, gender-, and class-based substantive inequalities in the U.S. criminal justice system. Addressing LGBT-based substantive inequality, however, is difficult because we know very little about LGBT people who come into contact with the criminal justice system as either offenders or as victims.

With respect to criminal offending, there are currently little study and available data on LGBT offenders at several points of the criminal process, including arrest and detention, charging, conviction, sentencing, and probation and parole. This makes it difficult to identify LGBT inequalities at these different points and to develop legal and policy interventions to address those inequalities. With respect to victimization, most studies and available data on LGBT victims involve hate crimes, an undoubtedly important area of LGBT

and should not be the end of innovation and experimentation around the issue of relationship recognition); Nancy D. Polikoff, What Marriage Equality Arguments Portend for Domestic Partner Employee Benefits, 57 N.Y.U. REV. L. & SOC. CHANGE 49 (2013) (discussing how protections for unmarried couples and families are threatened in light of marriage equality).


7. This point is discussed in more detail in infra Part III.A.1.

8. See infra Parts II.B, III.B. There are two recent exceptions. The first is data involving the sexual victimization of LGBT inmates under the PREA. See infra notes 291–301. The second is sexual orientation data on intimate partner violence from the National Intimate Partner and Sexual Violence Survey, which the Centers for Disease Control and Prevention (CDC)’s National Center for Injury Prevention and Control conducted in 2010. As discussed further in infra Part III.B, the data revealed that bisexual women had significantly higher lifetime prevalence of rape, physical assault, and stalking by an intimate partner when compared to both lesbian and heterosexual women. Moreover, lesbian women and gay men reported levels of intimate partner violence and sexual violence equal to or higher than those of heterosexuals. MIKEL L. WALTERS, JIERU CHEN & MATTHEW J. BREIDING, NAT’L CTR. FOR INJURY PREVENTION & CONTROL, NAT’L CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 FINDINGS ON VICTIMIZATION BY SEXUAL
victimization. There is little study and available data, however, on the potentially broader set of non-hate-motivated circumstances under which LGBT people become victims of crime. Accordingly, left in the shadows are the more nuanced ways in which LGBT discrimination in the domains of family, society, economy, and politics can leave LGBT people vulnerable to a host of harmful personal and property crimes.

These gaps in knowledge are troubling in light of recent discoveries indicating that LGBT individuals disproportionately face hardships that scholars have found increase the risk of criminal offending and victimization. Consider three recent developments.

First, recent studies report that as many as 20 to 40 percent of homeless youth identify as LGBT. Many of these youth wind up on the streets after suffering family rejection and abuse for being LGBT. To date, the connection between LGBT youth homelessness and crime (both during adolescence and later during adulthood) remains underexplored. Existing studies, however, support the notion that homeless youth are at greater risk than nonhomeless youth for committing a range of crimes from petty theft to violence in order to
Homeless youth are also at greater risk for sexual, physical, and verbal victimization. Second, in the first study of its kind, researchers in 2014 discovered that 19 percent of Los Angeles County foster youth identified as LGBT—double the estimated percentage of LGBT youth in Los Angeles. Notably, almost 86 percent of those LGBT foster youth also identified as Latino, Black, or Asian Pacific Islander. The relationship between being in foster care as an LGBT youth and crime (both during adolescence and later during adulthood) is an underexplored topic. However, existing studies do indicate that foster youth are overrepresented in the juvenile justice system. Foster youth are also at greater risk for being arrested and incarcerated as adults after aging out of the foster care system.

Third, contrary to stereotypes that gay men and lesbians are affluent with high disposable income, recent studies report that LGBT people experience higher rates of poverty than non-LGBT people, and that lesbians, bisexual women, transgender people, LGBT people of color, and LGBT youth are

13. See, e.g., Stephen W. Baron, General Strain, Street Youth and Crime: A Test of Agnew's Revised Theory, 42 CRIMINOLOGY 457, 459 (2004); Kristin M. Ferguson, Kimberly Bender & Sanna J. Thompson, Predicting Illegal Income Generation Among Homeless Male and Female Young Adults: Understanding Strains and Responses to Strains, 63 CHILDREN & YOUTH SERVS. REV. 101, 101 (2016) ("Homeless youth are reportedly more likely than their housed peers to be involved in illegal activities to generate income, such as theft, prostitution, and drug possession, use, and sales.").


16. Id. at 8 tbl.2.


especially vulnerable. In 2016, 27 percent of LGBT adults experienced a time in the past year when they did not have enough money to feed themselves or their families—1.6 times higher than non-LGBT adults. Scholars have yet to explore the connections between LGBT poverty and LGBT offending or victimization. A long line of research, however, shows that poverty is a risk factor for a range of criminal offending and victimization.

Thus, on one hand, there is a dearth of information about LGBT offenders and LGBT victims. On the other hand, several indicators suggest that LGBT people are at greater risk than non-LGBT people for a range of offending and victimization. Drawing on ideas in criminology, this Article provides an original intellectual history of LGBT identity and crime to explain how this disjoint in LGBT criminal justice emerged. It then uses the intellectual history as a springboard to examine directions to move beyond these knowledge gaps.

Some scholars and advocates have criticized the mainstream LGBT social movement for neglecting criminal justice issues beyond sodomy criminalization and hate crime victimization. They have also used litigation to address some of these neglected problems, including the police profiling of LGBT people and the


23. In examining what insight ideas (and more specifically theories) in criminology have to offer about LGBT identity and crime, this Article primarily takes a critical historical approach. John Tosh and Seán Lang claimed that “[h]istory reminds us that there is usually more than one way of interpreting a predicament or responding to a situation.” JOHN TOSH & SEÁN LANG, THE PURSUIT OF HISTORY 32 (4th ed. 2006). Thus, a historical approach has promise to offer alternative explanations for how the disjoint mentioned above emerged, beyond the surface explanation that it is an inadvertent oversight. At the same time, Tosh and Lang underscored that “[h]ow the past is known and how it is applied to the present need are open to widely varying approaches.” Id. at 2. Given this diversity, this Article is primarily guided by the principle of “process” in historicism. Simply put, through fresh evaluations of criminological texts, this Article situates this disjoint in a broader trajectory that “is still unfolding” to “give[ ] us some purchase on the future and allow[ ] a measure of forward planning.” Id. at 40.

selective enforcement of criminal laws against LGBT communities.\textsuperscript{25} This Article broadens existing conversations about LGBT identity and crime beyond social mobilization and litigation to consider ideas and methods in criminology.\textsuperscript{26} Specifically, it argues that historical ideas in criminology help to diagnose the current problem of why there is so little understanding of LGBT offenders and LGBT victims. Moreover, criminology offers unique conceptual and empirical tools to enhance accounts of LGBT offending and LGBT victimization, which can in turn help law, policy, and the design of criminal justice institutions (for example, police agencies, prosecutor’s offices, and courts) to better respond to the needs and experiences of LGBT offenders and LGBT victims.\textsuperscript{27}

My central claims are twofold. First, I show that until the mid-1970s—before which almost every U.S. state criminalized same-sex sodomy\textsuperscript{28}—there was little space to view LGBT people in the criminal justice system other than as deviant sexual offenders. A wave of sodomy decriminalization in the mid-1970s,\textsuperscript{29} however, opened a narrow space for scholars, advocates, and policymakers in the 1980s and 1990s to use antidiscrimination principles to move discussions about LGBT identity and crime away from viewing LGBT people as deviant sexual offenders toward viewing them as innocent and nondeviant hate crime victims.\textsuperscript{30}

Although this paradigm shift is often celebrated and has contributed to some important gains for LGBT people, I argue that it has fallen short on both the offending and the victimization sides of LGBT criminal justice.\textsuperscript{31} Specifically, the limited deployment of antidiscrimination principles during this shift has resulted in flat narratives of LGBT offenders as deviant sexual offenders and of LGBT victims as hate crime victims.\textsuperscript{32} This shift has also overlooked many criminal justice problems that LGBT people have faced—and continue to face—that do not involve sodomy criminalization or hate crime victimization. These problems especially affect marginalized segments of the LGBT population that bear the brunt of LGBT inequality in the criminal justice system, including low-income and homeless LGBT people, LGBT people of color,
transgender people, undocumented LGBT people, and LGBT people living with HIV. 33

My second claim is that with the exception of hate crime, most of the scholarly attention to LGBT identity and crime has focused on whether homosexuality should be considered a form of criminal sexual deviance in and of itself. Scholars, however, have treated other demographic differences (for example, race, ethnicity, gender, class, and age) as nondeviant differences, and then examined how hardships (for example, family instability, poverty, and societal discrimination) shape offending and victimization within and across those differences. 34 Because LGBT people disproportionately face many of these hardships, I argue that conceptualizing LGBT identity in similar terms would (1) prompt new questions about LGBT identity and crime; (2) open doors to identify connections and trends between LGBT identity and other identity differences with respect to both offending and victimization; and (3) inform law, policy, and the design of criminal justice institutions, thus enabling them to better understand and respond to LGBT offenders and LGBT victims.

Because so little information exists on LGBT offenders and victims, it is impossible to conclude what we will find once LGBT identity is conceptualized in this way. However, we can speculate that discoveries might roughly fall into two camps. First, hardships attached to LGBT identity might be the primary driver of certain forms of LGBT offending and victimization. For instance, the high proportion of LGBT homeless youth suggests that family conflict over LGBT identity is a distinct pathway to youth homelessness, which then puts LGBT youth at greater risk for offending and victimization. 35 Findings in this camp could highlight LGBT-specific criminal justice problems that law, policy, and criminal justice institutions should be aware of and address.

Second, non-LGBT differences (including race, ethnicity, gender, and age) might be stronger drivers than LGBT identity—or coequal drivers with LGBT identity—of certain hardships that put segments of the LGBT population at greater risk for offending and victimization. For instance, people of color face poverty at higher rates than white people, 36 white LGBT people face poverty at

33. Although we have little aggregate data, advocates and LGBT organizations have dug beneath the surface to identify key drivers of LGBT incarceration, which include drug policy, collateral consequences of criminalization and immigration, criminalization of poverty and homelessness, lack of access to identification and social services for transgender people, and criminalization of sex work and responses to trafficking in persons. CATHERINE HANSSENS ET AL., A ROADMAP FOR CHANGE: FEDERAL POLICY RECOMMENDATIONS FOR ADDRESSING THE CRIMINALIZATION OF LGBT PEOPLE AND PEOPLE LIVING WITH HIV 54–65 (2014), http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap_for_change_full_report.pdf [https://perma.cc/T7YL-U5H2].

34. See infra Part IV.

35. See supra notes 10–14.

higher rates than white non-LGBT people, and LGBT people of color experience poverty at higher rates than both white non-LGBT and white LGBT people. Although findings in this camp might show that LGBT identity is not a unique source of vulnerability for certain hardships, these findings are still meaningful because they illustrate how considering LGBT identity can offer more nuanced intersectional accounts of the different ways that poverty is connected to offending and victimization. In addition, common experiences of inequality across both non-LGBT and LGBT differences could open opportunities for coalition-building between LGBT social movements and other social movements to address criminal justice problems. As an example, one major critique of the mainstream LGBT social movement has been that it is centered on the problems of middle- to upper-class white gay men.

Before developing both of my claims, three caveats are in order. First, the intellectual history looks to the treatment of LGBT identity and crime in three main sources: criminological literature, criminal laws, and LGBT social movements. Its purpose is to show how ideas about LGBT identity and crime have traveled together over time in each of these sources. Its purpose is not to make causal arguments about the connections between these sources (for instance, whether ideas in criminology influenced LGBT social movements), and I do not view these causal arguments as necessary to establish my claims. It is difficult to create a directional story about how ideas involving LGBT identity and crime came about, and all three sources have had important roles in shaping those ideas over time.

Although I look to all three sources, my primary focus is on the criminological literature. This literature is an untapped wealth of knowledge that offers unique insight into the past, present, and future states of LGBT criminal justice. Criminological theories and research reflect historical, political, and cultural assumptions about crime and criminal justice populations. Criminology is also a multidisciplinary field, and criminologists have advanced diverse conceptual and empirical models to study crime. Accordingly, tracking

37. See supra note 20.
38. Id.
39. Russell K. Robinson, Marriage Equality and Postracialism, 61 UCLA L. REV. 1010, 1038 (2014) (“Wealthy white males dominate the gay rights agenda, which prioritizes rights that are most meaningful for people who are middle or upper class and neglects the discrimination faced by poorer LGBT people . . . .”).
40. To be more precise, I sometimes use the term “lesbian and gay” when discussing prior social movements that centered on the concerns of lesbians and gay men.
42. David Garland, Of Crimes and Criminals: The Development of Criminology in Britain, in THE OXFORD HANDBOOK OF CRIMINOLOGY 11, 19 (M. Maguire et al. eds., 1997). It is important to note that the interdisciplinary nature of criminology as a field has invited some criticism that the field lacks a disciplinary “core.” See Joachim J. Savelberg & Robert J. Sampson, Introduction: Mutual Engagement: Criminology and Sociology?, 37 CRIME L. & SOC. CHANGE 99, 99 (2002).
the treatment of LGBT identity in this literature over time exposes the types of questions that have been asked about LGBT identity and crime, and prompts the questions that remain to be studied. Further, criminologists are professional experts and their theories and research have influenced—and continue to influence—criminal laws and criminal justice policies.\textsuperscript{43}

As a second caveat, although intellectual histories are useful to track the development of an idea over time,\textsuperscript{44} no single intellectual history can offer a fully comprehensive account.\textsuperscript{45} There are inevitable gaps in coverage, different ways to divide the literature, and alternative explanations for the development of an idea. Recognizing these limitations, I designed the intellectual history to offer as systematic an account as possible.\textsuperscript{46} The intellectual history is expansive in time.

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\textsuperscript{43} Deborah W. Denno, \textit{Criminologists as Expert Witnesses in Criminal Law Cases: The Growing Intersection Between Criminology and Criminal Law, in The Criminology of Criminal Law} 83, 85–86 (William S. Laufer & Freda Adler eds., 2012) (discussing areas of criminology that have influenced criminal law); Jean Hine, \textit{Applied Criminology: Research, Policy and Practice, in Applied Criminology} 18 (Brian Stout et al. eds., 2008).


\textsuperscript{45} For this reason, it is important to provide a brief explanatory note about methodology. The critical historical analysis that shaped the intellectual history focused on “mainstream” criminological theories—those that arguably had the greatest potential to set a tone for the treatment of LGBT populations in criminology and beyond the discipline by inspiring new paradigms to conceptualize crime and rigorous empirical testing. I divided the research into two phases. The aim of the first phase was to develop an organized scheme of the criminological literature to form the basis of the intellectual history. Specifically, I conducted research to identify the major schools of criminological thought, the major subfields in those schools, and the major authors and works in each of those subfields. I categorized theories as “mainstream” if they were discussed in criminological treatises, handbooks, popular collections of essays, or prior systematic critiques of criminological theory. In total, I analyzed over a hundred sources to identify how the criminological literature was divided, and analyzed the most popular works of authors in subfields.

The second phase of research involved the collection and analysis of individual primary texts. As a starting point, I collected the major works of each author identified in the first phase. I then read each of those works completely. I paid special attention to three themes. First, I documented the major scientific and theoretical assumptions driving the author’s perspective. Second, I documented where and how the author discussed sexual orientation and gender identity in the text. I also documented when the author omitted sexual orientation and gender identity from a work entirely. Oftentimes, homosexuality (which was often the focus of discussions of LGBT identity when they appeared) was only mentioned briefly. Third, I documented whether the author discussed any other authors or texts that were not captured during the first phase of the research. I then collected and documented when and how those texts discussed sexual orientation and gender identity. In addition, it is important to note that this Article focuses entirely on theories of crime from North America and Europe (especially from the United States and the United Kingdom). The reality that criminology is a “weak” discipline in many areas of the world mostly motivated this focus. See \textit{What Is Criminology? I} (Mary Bosworth & Carolyn Hoyle eds., 2011). At the same time, it is important to underscore that the intellectual history would look very different if it were not limited to Western perspectives or philosophies given the continuing enforcement of sodomy laws against LGBT people in many non-Western countries. See Map: Countries Where Homosexuality Is a Crime, CBC News (Feb. 25, 2014), http://www.cbc.ca/news2/interactives/map-same-sex-criminalization [https://perma.cc/3F4U-4D22].

\textsuperscript{46} Beyond the methodology discussed \textit{supra} note 45, the data analysis process made this systematic account possible. I divided data analysis into multiple levels. In the first level of analysis, I identified major themes in the treatment (or lack thereof) of sexual orientation and gender identity in the
It tracks the treatment of LGBT identity and crime from the 1860s—when criminologists developed the first scientific theories of crime—\(^47\)—to today. It is also expansive in terms of the evaluated criminological perspectives. It examines a range of theories and research in several major schools of criminology, including biology, psychology, and sociology.

Third, in this Article I often use the term “LGBT,” which is a contemporary term commonly used to describe lesbian, gay, bisexual, and transgender sexual orientations and gender identities.\(^48\) In using this term, I want to clarify that most discussions of LGBT identity in criminology (and criminal justice contexts more broadly) primarily apply to male homosexuality.\(^49\) In the criminological literature, there is little attention to lesbians, bisexuals, and transgender people, and even less attention to intersectional issues involving LGBT identity and race, ethnicity, class, and gender.\(^50\)

For this reason, one might raise questions about my use of the term “LGBT” to evaluate these prior discourses. My primary motivation for using this term is to indict prior and current reductionist accounts of LGBT identity and crime. In using this term, I intend to push the idea that it is essential to bring the criminal justice hardships and experiences of people along the entire LGBT spectrum out of the shadows,\(^51\) and that intersectional approaches are necessary to achieve this goal.

This Article proceeds as follows. Part I presents the first of two sections of the intellectual history, which focuses on ideas about LGBT identity and crime from the 1860s to the mid-1970s. I call this period the “former criminal status individual texts. In the second level, I compared those themes to identify broader themes involving the treatment of sexual orientation and gender identity over time within a criminological subfield. In the third level, I conducted a similar analysis comparing themes across subfields to identify broader themes involving the treatment of sexual orientation or gender identity over time in a specific school of criminology. In the last level of analysis, I compared those themes across major schools of criminology to identify organized concepts or principles to explain the treatment of sexual orientation or gender identity across schools of criminology over time. Through this process, the major themes from the intellectual history took form.

\(^47.\) SeeinfraPartI.A.


\(^49.\) In some of the evaluated discourses before the 1950s, however, scholars used the term “homosexuality” to encompass gender nonconformity. The idea that “gender identity” was distinct from biological sex assigned at birth did not emerge until researchers advanced this idea in the 1950s. See Noa Ben-Asher, The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties, 29 HARV. J.L. & GENDER 51, 82 (2006).


\(^51.\) Here, I do not intend to exclude the experiences of people who reject LGBT identity labels and engage in same-sex sexual conduct or gender nonconforming behaviors (for example, men who have sex with men). I am mindful that racism, sexism, and other forms of marginalization in mainstream LGBT circles can motivate people to reject LGBT identity labels. See Russell K. Robinson, Racing the Closet, 61 STAN. L. REV. 1463, 1467 (2009).
because sodomy laws existed in almost every U.S. state and were widely enforced against LGBT people (especially gay men).

I show that during this period, there was little discursive space to think of LGBT people in the criminal justice system other than as deviant sexual offenders.

Part II presents the second section of the intellectual history, which focuses on ideas about LGBT identity and crime after the decline of sodomy laws in the mid-1970s. It explains how this decline opened a narrow space for scholars, advocates, and policymakers in the 1980s and 1990s to draw on antidiscrimination principles to move ideas about LGBT identity and crime away from treating LGBT people as deviant sexual offenders toward treating them as innocent and nondeviant hate crime victims. I label this growing attention to anti-LGBT hate crime victimization as "the new visibility."

Part III discusses three problems with the rush to portray LGBT people as innocent and nondeviant hate crime victims under the new visibility. First, this rush has obscured the relationship between criminal offending and LGBT identity, leaving little space to understand LGBT offenders.

Second, it has left little space to understand the non-hate-motivated circumstances under which LGBT people become victims of crime, despite signals that LGBT people are at greater risk than non-LGBT people for a wide range of victimization beyond hate crimes.

Third, it has neglected the multiple dimensions of LGBT victimization and ignored their interactions with LGBT offending. Understanding these interactions is essential to improving the state of LGBT criminal justice given that many LGBT offenders have likely been victimized at several points of their lives—whether from family rejection or abuse, peer violence, or social discrimination.

Finally, Part IV discusses what these shortcomings tell us about the types of questions that we should be asking about LGBT offending and LGBT victimization. It also explains how ideas in criminology are useful to engage with those questions. These enhanced accounts can then inform law, policy, and the design of criminal justice institutions to better address the needs and experiences of LGBT offenders and LGBT victims.

I.


This Part presents the first portion of the intellectual history, which focuses on ideas about LGBT identity and crime from the 1860s—when scholars began to advance the earliest criminological theories—to the mid-1970s—when states

52. Eskridge, supra note 28, at 662.
53. See infra Part III.A.
54. See infra Part III.B.
55. See infra Part III.C.
56. See infra Part III.C.
began to repeal sodomy laws that applied to same-sex sexual activity. I evaluate three major areas of literature during this period: (1) Cesare Lombroso’s early biological theory of crime, (2) psychological theories of crime, and (3) sociological theories of crime. Across all three areas, the discourse on LGBT identity and crime was limited to whether homosexuality should be viewed as a form of sexual deviance in and of itself. The limited parameters of this discourse reflect that there was little room under the former criminal status quo to conceive of LGBT people who came into contact with the criminal justice system as other than deviant sexual offenders.

A. Lombroso’s Early Biological Theory of Crime: The Emerging Class of Biologically Inferior Homosexual Offenders

Sexual deviance concepts were so deeply entrenched in discussions of LGBT criminal justice that they shaped the earliest conceptual and empirical understandings of LGBT identity and crime. The birth of criminology is often traced to a group of Italian physicians who first applied the scientific method to study the causes of crime in the 1860s.57 Cesare Lombroso’s early biological theory of crime58 was the most influential of these perspectives, and shaped theories and research on crime for decades after its development.59

57. This group consisted of Cesare Lombroso, Raffaele Garofalo, and Enrico Ferri. REECE WALTERS, DEVIN'T KNOWLEDGE: CRIMINOLOGY, POLITICS AND POLICY 15 (2003). Some scholars disagree that modern criminology began in the late nineteenth century with the Italian physicians. See generally, e.g., Alfred Lindesmith & Yale Levin, The Lombrosian Myth in Criminology, 42 AM. J. SOC. 653 (1937). These scholars date its birth to the mid-eighteenth century, when Cesare Beccaria released his influential treatise on penal reform. See generally CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (1764). Although legal thinkers of the eighteenth and early nineteenth centuries, including Beccaria, made influential contributions to penal reform, they were not concerned with applying the scientific method to study the causes of crime. WALTERS, supra, at 16. Since criminology is typically defined as the scientific study of crime, most criminologists do not date the birth of modern criminology to the late eighteenth and early nineteenth centuries. Id.

58. Here it is important to discuss a caveat concerning the available English translations of Lombroso’s scholarship. In 1876, Lombroso released the first edition of Criminal Man, which he revised in four subsequent editions. Despite Criminal Man being considered a foundational text, no complete English translation of any edition of Criminal Man has been published. Mary Gibson & Nicole Hahn Rafter, Editors’ Foreword, in CESARE LOMBROSO, CRIMINAL MAN 3 (Mary Gibson & Nicole Hahn Rafter trans., 2006) (1876). Two incomplete and distorted English translations of the text, both released in 1911, shaped twentieth-century interpretations of Lombroso’s positions. Lombroso’s daughter produced the first translation shortly after Lombroso’s death, the content of which scholars now interpret as being mostly written by Lombroso’s daughter and not Lombroso himself. Horton released the second translation, which was only based on the third volume of the fifth edition of the text. Id. In 2006, historians Gibson and Rafter released the first abridged English translation of all five editions. This Article draws on excerpts from Gibson and Rafter’s translation because it is the most accurate and comprehensive translation to date.

59. MARK M. LANIER, STUART HENRY & DESIRE J.M. ANASTASIA, ESSENTIAL CRIMINOLOGY 75 (4th ed. 2015). Focusing on Lombroso’s work warrants explanation given that he was not the only Italian physician of the late nineteenth century to apply principles of biological determinism to explain crime. See supra note 57. I focus on Lombroso’s theory for three reasons. First, Lombroso’s theory of crime became influential in the field and inspired the development of future criminological theories in Europe and the United States. Id. Second, the evolving treatment of sexuality and gender nonconformity
For context, it is useful to explain a few developments that predated Lombroso’s theory of how homosexuality was conceptualized in Western societies. Until the mid-nineteenth century, homosexuality was viewed as a series of abominable acts, as opposed to a feature of individual identity. As historian Jonathan Katz has explained, the words “heterosexual” and “homosexual” did not even exist in the United States until 1892.

The view that homosexuality was a feature of individual identity gained force during the second half of the nineteenth century. As Michel Foucault described, the homosexual “became a personage, a past, a case history, and a childhood.” During this period, many Western societies (including the United States) became increasingly mobile as a result of rapid industrialization and urbanization. Historians have explained that the growth of a capitalist consumer economy promoted a new social ethos that motivated people to view the human body as a source of sexual gratification, not merely a source of reproduction. In this environment, a greater diversity of sexual preferences and behaviors, including homosexuality, became more publicly visible.

Sodomy laws were rarely enforced in the United States before 1880. Scholars have interpreted this lack of enforcement as a product of the State’s
limited role in regulating the private sphere at the time. For instance, rules of
evidence shielded adults who engaged in private consensual sodomy from
prosecution by excluding the testimony of a willing sexual partner. Because
the State had this limited role, middle-class society turned to medical
professionals to regulate private sexual morality in this time of great change.

In this environment, a science of sexology emerged and homosexuality
became the subject of medical inquiry. In 1869, Carl Westphal—a professor of
psychiatry in Berlin—became the first medical practitioner to study
homosexuality from a clinical perspective. Following Westphal, several
renowned physicians advanced the idea that homosexuality was a natural form
of human sexuality. Other prominent physicians, however, relied on new
scientific theories—especially degeneracy theory—to define homosexuality as
an unnatural sexual inversion. This reliance deflected social responsibility for
sexual vices, including homosexuality, by rooting their causes in individual
pathology.

In 1886, German Austrian psychiatrist Richard von Krafft-Ebing advanced
the most influential of these positions in his work Psychopathia Sexualis. Krafft-Ebing described homosexuality as a feature of individual personality, consistent with newly emerging conceptions of homosexual identity. He defined heterosexuality as the biological norm and classified sexual behaviors that did
not further procreation, including homosexuality, as manifestations of

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68. Ronald Hamowy, Medicine and the Criminalization of Sin: “Self-Abuse” in 19th Century America, 1 J. Libertarian Stud. 229, 231 (1977) (describing that the State’s role in regulating sexuality focused on protecting the sanctity of the public realm from “the public flaunting of sexual activities,” not on regulating socially disapproved sexual behaviors within the privacy of the home).
69. Eskridge, supra note 67, at 20. This testimony was admissible to support a sodomy conviction only if the partner was coerced or a minor. Id. Evidence of the government’s limited role in regulating private sexual morality is further substantiated by the ways in which courts interpreted and applied other statutes involving sexual conduct. In many states, courts required an act of adultery or fornication to be “open and habitual” in nature to qualify as a crime. Hamowy, supra note 68, at 230–31.
70. See supra notes 68–69.
73. Id.
74. Karoly Maria Benkert, Havelock Ellis, Edward Carpenter, and Magnus Hirschfeld were prominent physicians who advanced these views. Greenberg, supra note 71, at 410–11.
75. Benedict-Augustin Morel formulated degeneracy theory in 1857, which argued that “many medical, psychiatric, and social problems were due to the deterioration of the human body … under the impact of an unhealthy environment.” Id. at 412.
76. Id. at 411–15.
77. Id. at 413.
79. Id. at 357–58 (describing that in advanced cases of homosexuality, “feeling, thought, will, and the whole character . . . correspond with the peculiar sexual instinct”).
pathological disorders. Important, based on his view that homosexuality was a biological abnormality, Krafft-Ebing argued that punishment was neither an effective nor an appropriate response. Rather, he recommended several nonpunitive interventions to address homosexuality, including masturbation, the promotion of good sexual mores and hygiene, and hypnosis.

Krafft-Ebing’s view that homosexuality was a pathological disorder directly shaped the treatment of homosexuality in Lombroso’s early biological theory of crime. Lombroso’s theory argued that external physical features reflected a person’s internal morality, and that therefore the causes of crime were connected to a person’s physical features. Using methods of phrenology and anthropometry, he distinguished different types of offenders from law-abiding citizens based on measurements of skulls, brains, facial features, and other body parts. Influenced by Darwin’s theory of evolution, Lombroso contended that most criminal offenders were “born criminals” (delinquente nato) and that they possessed certain physical anomalies that made them resemble more “primitive” humans.

Critically, Lombroso’s theory shifted the discourse on crime away from philosophical debates about proportional punishments for specific acts toward the scientific investigation of criminal offenders. Emerging conceptions of homosexual identity fit neatly into this paradigm shift. Lombroso initially

80. GREENBERG, supra note 71, at 414. Specifically, Krafft-Ebing described sadism, masochism, assorted fetishes, and “antipathic sexual instinct”—his term for homosexuality—as pathological. Id.

81. KRAFFT-EBING, supra note 78, at 383; see also LESLIE J. MORAN, THE HOMOSEXUALITY OF LAW 7 (1996) (elaborating that Krafft-Ebing did not consider the “homosexual” as an appropriate subject for legal regulation, but viewed “homosexual” as “a term by means of which this male genital body might become a new object within a different field of regulation”).


83. Scholars have explained that Lombroso’s adoption of Krafft-Ebing’s theories of sexual psychopathy was by no means inevitable, and that its causes are not entirely clear. See, e.g., Mariana Valverde, Lombroso’s Criminal Woman and the Uneven Development of the Modern Lesbian Identity, in THE CESARE LOMBROSO HANDBOOK 201, 203 (Paul Knepper & P.J. Ystehede eds., 2013) (noting that there “is no real answer to this question”). This is especially noteworthy given that alternative and less stigmatizing conceptions of homosexuality were circulating among medical professionals at the time. See supra note 74 and accompanying text.

84. Gibson & Rafter, supra note 58, at 9.


86. Gibson & Rafter, supra note 58, at 9.

87. Id. at 1.

88. WALTERS supra note 57, at 16.

89. Gibson & Rafter, supra note 58, at 8. Lombroso used Darwin’s concept of “atavism” to describe criminals as biological throwbacks to a lesser-evolved, more primitive human. Id. at 1. He used the term “atavism” to refer to human “regression to an earlier stage of evolution.” Id. at 39.
described homosexual men ("pederasts") as feminine in appearance based on hair, clothing, and mannerisms; promiscuous; having an affinity for the arts; and likely to associate with one another. As he developed and honed his theory, he came to describe homosexual men as a distinct class of insane offenders whose psychology was defined by biological inferiority and perversion. He explicitly relied on Krafft-Ebing’s pathological view of homosexuality to create this classification. This conceptual move illustrates how at the time when criminologists advanced our earliest scientific and empirical theories of crime, homosexuality was not simply viewed as a series of deviant acts; rather, homosexuals were a distinct class of offenders defined by their perceived deviant sexual pathology.

At the same time, it is important to underscore that the use of biological positivism in Lombroso’s theory to rationalize the denigration of specific groups was by no means specific to sexual and gender minorities at the time. Rather, this use of biological positivism emerged against the backdrop of growing awareness of racial, cultural, economic, political, and social differences between the North and South of Italy after the unification of Italy in 1861. Italian Southerners mostly consisted of villagers from isolated agricultural areas, who had visible racial differences from Italian Northerners because of South Italy’s closer proximity to Africa and the Middle East than to Northern Europe.

Historians have documented that economic and demographic changes due to migration and industrialization fueled concerns about the stability of the new unified state. In this fragile context, biological positivism emerged as an instrument of nationalism to identify, control, and “civilize” certain groups that were perceived as dangerous and threatening to social order, including racial and

90. LOMBROSO, supra note 58, at 73.
92. Lombroso stated:
   The crimes of rape and pederasty may be caused by sexual inversion (Conträre Sexualempfindung, to use Krafft-Ebing’s term). When the erotic impulses of an individual do not correspond to his physical constitution, he seeks sexual satisfaction among his own kind. Sexual inversion leads not only to perverted lust (pederasty and lesbianism) but also to a morbid propensity for platonic love and idealization of individuals of the same sex. This strange anomaly often shapes the person’s entire psychology.
   LOMBROSO, supra note 58, at 58.
93. See FOUCAULT, supra note 63, at 43.
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ethnic (as well as sexual and gender) minorities.98 For instance, Lombroso’s writings described whites as “civilized” and nonwhite groups as “primitive” or “savage.”99 Therefore, the denigration of sexual and gender minorities in early biological theories of crime was part of a broader pattern of using biological principles to rationalize the subordination and control of minority groups.

B. Psychological Theories of Crime: Homosexuality as Criminal Sexual Deviance Caused by Psychological Dysfunction

During the first half of the twentieth century, criminologists began to favor theories and methods of psychology over those of phrenology and anthropometry.100 This Section evaluates the treatment of LGBT identity in two major strands of psychological theories of crime that gained popularity after this shift: (1) psychoanalytic theories and (2) psychopathological theories. Both strands include disagreements over whether homosexuality should be criminalized, viewed as a mental illness, or both. Regardless of which side criminologists fell on, the scope of the debates was limited to whether homosexuality should be viewed as a form of sexual deviance in and of itself. There was little to no consideration of how psychological hardships that LGBT people experienced could have shaped LGBT offending or LGBT victimization in situations that did not involve sodomy.

1. Psychoanalytic Theories of Crime: Homosexuality as a Natural Variant of Human Sexuality and Contestations Over Criminalization

Psychoanalytic theories of crime were especially popular between the 1920s and the 1940s.101 In this literature, criminologists relied on Sigmund Freud’s theory of psychoanalysis to explain crime in terms of unconscious

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98. Id. at 8.
101. The arguments in this Section are based on my close readings of five cornerstone texts on psychoanalysis and crime during this period: August Aichhorn, Wayward Youth (Viking Press 1935) (1925); Franz Alexander & William Healy, Roots of Crime: Psychoanalytic Studies (1935); Franz Alexander & Hugo Staub, The Criminal, The Judge, and The Public: A Psychological Analysis (Gregory Zilboorg trans., 1931) (1929); Kate Friedlander, A Psychoanalytical Approach to Juvenile Delinquency (1947); William Healy & Augusta F. Bronner, New Light on Delinquency and Its Treatment (1936).
motives.  

Freudian theory had significant implications for how criminologists addressed culpability and punishment. Specifically, psychoanalysis drew attention to the unconscious desires that motivated behavior over which people had no control. Many psychoanalysts believed that criminal punishment was ineffective to reform individual actors because their offenses were not products of choice or free will.  

These ideas about culpability and punishment contributed to significant changes in how criminologists discussed homosexuality in this area of literature. For context, however, it is useful first to summarize Freud’s views on homosexuality, which also shaped these changes. Freud viewed homosexuality as a harmless aberration of sexual development that could not be changed during adulthood. He argued that all children were innately bisexual and experienced a homosexual phase during early psychosexual development, but that most children grew out of this phase before adulthood. In his view, homosexual desires remained as unconscious drives during psychosexual development and were deflected to serve other ends in overt behavior.

Several criminologists who relied on Freudian theory adopted the position that homosexuality was a harmless aberration of sexual development that could not be changed during adulthood. In advancing this less stigmatizing view, these thinkers criticized the criminalization of adult homosexuality. Some even went so far as to characterize criminal laws against homosexuality as illegitimate.

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105. Id.
107. Bayer, supra note 72, at 22 (observing that “all children experienced a homosexual phase in their psychosexual development, passing through it on their route to heterosexuality”).
108. Id.
109. Id.
110. See, e.g., Alexander & Staub, supra note 101, at 138–39 (describing that “as a matter of fact, every living being, is bisexual in its biological development” and stressing Freud’s writings on homosexuality as “of particular importance”); Friedlander, supra note 101, at 132 (arguing, based on Freud’s views, that homosexual tendencies are part of everyone’s biology and that it is so common for boys and girls to go through homosexual phases after puberty that it should be considered a “normal phase of sexual development”).
intrusions into private life, foreshadowing the reasoning in Lawrence v. Texas decades ahead of its time.

This tolerance, however, extended only so far. Many of these criminologists also adopted Freud’s position on the malleability of child sexual development to recommend using psychotherapy to “correct” homosexuality in children. Therefore, although these criminologists disagreed with criminalizing adult homosexuality, they viewed homosexuality during adulthood as worthy of avoiding. This lends further support to my claim that a stigma of sexual deviance attached to LGBT identity under the former criminal status quo—in this case, even when criminologists advanced more tolerant views of homosexuality.

2. Psychopathological Theories of Crime: Homosexuality as Mental Disease and Contestations Over Criminalization

In 1941, Hervey Cleckley released groundbreaking research that offered the first clinical profile of the “psychopath.” Criminologists applied and honed...
this profile to study the connection between psychopathy and crime. Three points about sexual deviance and LGBT identity emerge from this literature. First, criminologists who studied psychopathy and crime disagreed over whether homosexuality should be criminalized, but unlike the psychotherapists discussed above, they viewed homosexuality in adults as a mental disease that was “curable” and warranted psychiatric intervention. Second, stereotypes of homosexuals as sexual psychopaths and pedophiles are common in this literature. Third, criminologists in this literature provided professional expertise on government-organized committees that were created to address sex crimes, many of which proposed new “sexual psychopath” laws. As explained below, these laws worked in conjunction with existing criminal laws against sodomy to coerce LGBT people to undergo psychiatric treatment.

To provide greater context for the treatment of LGBT identity in this literature, it is helpful to discuss a few developments in psychiatry and criminal law that occurred from the 1940s to the early 1970s. Emerging ideas about psychopathy coincided with a growing consensus in the U.S. psychiatric profession that homosexuality was a mental disease. The writings of Sandor Rado, Edmund Bergler, Irving Bieber, and Charles Socarides were especially

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117. See, e.g., J. PAUL DE RIVER, CRIME AND THE SEXUAL PSYCHOPATH 83 (1956) (describing a homosexual who refused psychiatric treatment as a “criminal in the true sense”); cf. Edwin H. Sutherland, The Sexual Psychopath Laws, 40 J. CRIM. L. & CRIMINOLOGY 543, 554 (1950) (“Certain psychiatrists have stated that they are interested in the sexual psychopath laws principally as a precedent; they believe that all or practically all criminals are psychopathic . . . .”). But see Benjamin Karpman, The Sexual Psychopath, 42 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 184, 197 (1951) (“The proper treatment of the sexual psychopath is not confinement but psychotherapy, or, better yet, proper sexual education in childhood.”).

118. The stigma attached to this stereotype is demonstrated through the statement from Eugene D. Williams, former chief deputy district attorney of Los Angeles County, in his introduction to the book The Sexual Criminal, written by prominent forensic psychiatrist Dr. J. Paul De River. Williams described the “homosexual” as an “inveterate seducer of young children of both sexes.” J. PAUL DE RIVER, supra note 117, at xii.


121. BAYER, supra note 72, at 28; Clifford J. Rosky, Fear of the Queer Child, 61 BUFF. L. REV. 607, 633 (2013).

122. See, e.g., EDMUND BERGLER, HOMOSEXUALITY: DISEASE OR WAY OF LIFE? 7 (1956) (characterizing homosexuality as a “curable illness” that stemmed from unconscious masochism); CHARLES W. SOCARIDES, THE OVERT HOMOSEXUAL 35 (1968) (describing homosexuality as a neurotic disorder in which the libidinal instinct had “undergone excessive transformation and disguise in order to be gratified in the perverse act”).
influential in motivating this consensus. Reflecting this influence, homosexuality was listed as a mental disorder in the 1952 edition of the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM).

Emerging ideas about psychopathy and the growing psychiatric consensus that homosexuality was a mental disease contributed to important changes in how LGBT people were treated under the law. The most vivid example was a wave of sexual psychopath legislation that swept across the United States from the late 1930s to the early 1970s. Between 1946 and 1959 specifically, twenty-nine states enacted sexual psychopath laws.

A wave of moral panic about sexual predators targeting children during and immediately after World War II contributed to these new laws. The war not only displaced millions of men from their homes, but also drove the proportion of women in the workforce to an all-time high. Images of the “sex criminal” in popular culture started to include storylines about women being alone during wartime. Once the war concluded, Americans faced the challenge of returning to normalcy both inside and outside of the home. Strengthening traditional family values was one means by which people attempted to return to normalcy. The prioritization of traditional family values fed anxieties about populations that were perceived to threaten those values, including gay men.

Sexual psychopath laws emerged in this environment of moral panic, and primarily took two forms. The first was directly connected to the criminal domain. Any person who was charged with a crime and found by a jury to be a sexual psychopath could be handed over to the state’s department of public health, perhaps indefinitely, until that person was fully “cured.” The second was a variation of civil insanity laws that provided for the psychiatric commitment of sexual psychopaths, perhaps indefinitely, regardless of whether they were charged with a crime. As written, sexual psychopath laws applied to a variety of crimes (for example, rape, prostitution, child molestation, and

123. BAYER, supra note 72, at 28.
124. Id. at 39.
125. JOHN D’EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 18 (2d ed. 1998). For a more detailed discussion of the connection between psychopathy and sexuality in the mid-twentieth century, see generally Schmeiser, supra note 106.
126. ESKRIDGE, supra note 67, at 95; George, supra note 119, at 226.
127. See, e.g., Freedman, supra note 120, at 121–23; George, supra note 119, at 229–31.
129. Id. at 72.
131. Id.
132. See, e.g., Freedman, supra note 120, at 132.
133. Id.
134. Id.
sodomy) and noncriminal sexual disorders. These laws were enforced so heavily against gay men, however, that the term “sexual psychopath” became culturally synonymous with “homosexual.”

This convergence between the psychiatric sphere and the criminal justice system put LGBT people in a bind: either accept the label of being mentally ill or accept the label of being a criminal. For instance, prominent forensic psychiatrist J. Paul De River argued that “any homosexual act” could be “eradicated through psychotherapy and education, providing the individual involved desires to really do something about it.” He further stressed that any homosexual who refused psychiatric treatment was “a criminal in the true sense as he has no regard or respect for existing laws, made and enforced by the majority of our society.” To avoid criminal prosecution, many LGBT people reluctantly chose the mentally ill label and underwent psychiatric treatment directed to change their sexual orientations and gender identities. The use of psychopathy concepts to construct homosexuality as a mental disease offered scientific justification for this bind that LGBT people faced.

Having illustrated how sexual deviance concepts shaped discussions of LGBT identity in these two major strains of psychological theories of crime, my analysis now turns to evaluate the treatment of LGBT identity under the sociological theories of crime that gained popularity during the same period.

C. Sociological Theories of Crime: Homosexuality as Criminal Sexual Deviance Caused by Environmental Factors

As these ideas about the relationship between LGBT identity and crime emerged in psychoanalytic and psychopathological theories of crime, a different set of ideas appeared in sociological theories of crime. These sociologically based ideas were important because they framed the discourse on how social and environmental factors, as opposed to individual psychology, shape the relationship between LGBT identity and crime.

Generally, sociological theories of crime can be divided into two camps, each of which I will discuss in turn. First, social structure theories study the macrolevel causes of crime (for instance, poverty, unemployment, racism, and

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135. Id.; Margot Canaday, Heterosexuality as a Legal Regime, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 442, 460 (Michael Grossberg & Christopher Tomlins eds., 2008).
136. Id.; Bayer, supra note 72, at 28.
137. De River, supra note 117, at 83.
138. Id.
139. Id. at 28.
141. To be clear, here I am not arguing that this is the only way to divide the sociological literature. Paul Rock, Sociological Theories of Crime, in THE OXFORD HANDBOOK OF CRIMINOLOGY, supra note 42, at 233, 234 (noting that “[t]here is no one, royal way to lay out the sociology of crime”).
poor education). Discussions of LGBT identity in this literature are scarce, showing that the former criminal status quo left little room to consider how LGBT-related social hardships (for instance, losing a job or family rejection for being LGBT) influence LGBT offending or LGBT victimization. Second, social process theories explain crime through microlevel interactions between individuals and peer groups, families, schools, social institutions, and society. Discussions of LGBT identity in this literature are more common, but characterize homosexuality as a form of sexual deviance rooted in environmental causes—namely, improper socialization.

1. Social Structure Theories: Neglect of LGBT Identity as a Demographic Difference and Anti-LGBT Discrimination as a Social-Structural Determinant of Crime

At the turn of the twentieth century, Chicago experienced a rapid increase in industrialization and urbanization as millions of migrant workers settled into poor neighborhoods with widespread crime to find work. These dramatic changes in the city influenced sociologists at the University of Chicago (collectively known as the “Chicago School”) to examine connections between neighborhood conditions and crime.

Two points about the treatment of identity emerged from the Chicago School. First, the Chicago sociologists conceptualized racial or ethnic heterogeneity and poverty as structural determinants of crime. Accordingly, their theories reflect the idea that certain social conditions influence crime (for listed references and footnotes).
example, weakened family ties or weakened community bonds), and that it is impossible to understand those connections without considering demographic differences—namely, race, ethnicity, and class. Second, these theories offered empirical models to measure the uneven distribution of crime in neighborhoods with different racial, ethnic, and class compositions without labeling people as deviants or criminals strictly on the basis of race, ethnicity, or class. In fact, Robert Ezra Park used his early theory of social disorganization to challenge the stigmatizing idea that the uneven racial distribution of crime was caused by purportedly inherent biological differences between individuals of different races.

Importantly, there is little to no consideration of LGBT identity in this literature. Though it is impossible to reach definite conclusions, there are at least two possible explanations for this omission, both of which lend support to my claim that there was little room under the former criminal status quo to view LGBT people in ways other than as deviant sexual offenders. One possible formalist explanation is that the Chicago sociologists did not consider LGBT hardships as nondeviant structural determinants of crime because—unlike race, ethnicity, or class—they viewed LGBT identity as an inherent manifestation of crime given existing sodomy laws.

An alternative and more sound possibility is that the Chicago sociologists were open to viewing LGBT identity along the same terms as other demographic differences in their research, but existing political pressures motivated them to avoid doing so. Recently, historians have called attention to an underground research agenda of the Chicago sociologists that documented a diversity of sexual practices in urban spaces, including homosexuality, prostitution, and interracial sexual relationships. This research was largely unpublished and never reached the public. Historians have argued that the Chicago sociologists likely hid their research on homosexuality from the public because it was too controversial for its time and might have compromised support for their other areas of research.

Although it is impossible to know for sure why LGBT identity was not considered, the focus on demographic differences in this literature reflects a missed opportunity to examine macrolevel connections between LGBT identity,
neighborhood conditions, and crime beyond sodomy. Later in this Article, I will return to this point and discuss in more detail the types of questions that social structure theories prompt for LGBT offending and LGBT victimization.155

2. Social Process Theories: Homosexuality as Sexual Deviance Caused and Sustained by an Individual’s Interactions with the Environment

Discussions of LGBT identity (and homosexuality in particular) are more common in social process theories, which explain crime in terms of microlevel interactions between individuals and peer groups, families, schools, and social institutions.156 These theories became especially popular during the 1950s, when “symbolic interactionism”157 emerged as a dominant sociological framework to study deviance.158 At four different levels, social process theories described homosexuality as a form of sexual deviance rooted in environmental causes: (1) society, (2) families, (3) peer groups, and (4) social movements.159

At the first level—society—some social process theorists160 described homosexuals as sexual deviants merely because society labeled them that way via the criminal law.161 Generally, these scholars were concerned with the process by which societies come to define certain acts and people as deviant.162 Although they did not embrace laws criminalizing homosexuality, their analysis centered on the validity of those laws and the social problems that those laws created for LGBT people.163 Their discussions did not go the additional step to

155. See infra Part IV.C.

156. In this Section, I am drawing from literature in three areas of social process theory: (1) labeling and societal reaction theories, (2) social control theories, and (3) social learning theories. Labeling and societal reaction theories view crime as a social construction and examine the process by which societies come to define certain acts and people as deviant. Frank P. Williams III & Marilyn D. McShane, Criminological Theory: Selected Classic Readings 181–82 (2d ed. 1998). Social control theories examine why people refrain from committing crime. Matt DeLisi, Self-Control Pathology: The Elephant in the Living Room, in Control Theories of Crime and Delinquency 21, 30 (Chester L. Britt & Michael R. Gottfredson eds., 2003). Social learning theories view crime as a learned behavior. Vito & Maaahs, supra note 102, at 177.


159. To be clear, some social process theorists focused on more than one level of environmental causes. As will be explained, Howard Becker is an example of a social process theorist who focused on society and peer groups in his analysis of homosexuality and deviance.

160. With respect to this first level, I am primarily drawing on labeling and societal reaction theories.

161. See, e.g., Howard S. Becker, Outsiders 30 (1963) (describing that the homosexual “makes of deviance [his] way of life” and “organizes his identity around a pattern of deviant behavior”).

162. Williams & McShane, supra note 156, at 181–82 (explaining that “labelling theorists developed a perspective that emphasized the importance of society’s role in defining a person as a criminal or delinquent”).

163. For example, Howard Becker stressed that being “known as a homosexual in an office may make it impossible to continue working there.” Becker, supra note 161, at 34. He further stressed that
examine the social hardships that contributed to LGBT offending and LGBT victimization beyond sodomy criminalization.164

At the second level—families—some social process theorists165 viewed homosexuality as a form of sexual deviance that “improper” socialization within families caused and sustained. These arguments appeared after scholars started to draw on B.F. Skinner’s “operant conditioning theory”166 in the 1960s to explain the mental processes—including sexual deviance—through which individuals learned how to commit crime. For instance, in early iterations of his social learning theory of crime, Ronald Akers167 hypothesized that a person’s sex drive had biological origins, but that its strength and direction were guided by social regulations and institutions, including gender roles, marriage, and family.168 From this point of view, he argued that parents and others who socialize children might encourage homosexuality.169

At the third level—peer groups—some social process theorists described homosexuality as a form of sexual deviance that peer groups encouraged and sustained. For instance, in articulating his influential labeling theory, Howard Becker argued that norms within peer groups could facilitate deviancy. Using homosexuality as an example, he explained that membership in a deviant subculture “solidifie[d] a deviant identity” and encouraged “a set of perspectives and understandings about what the world is like and how to deal with it, and a set of routine activities based on those perspectives.”170

At the fourth and final level—social movements—some social process theorists described homosexuality as a form of sexual deviance and discussed the role of early lesbian and gay social movements in justifying homosexual “deviance” for people who engaged in same-sex sex. For context, it is helpful to explain that the rise of lesbian and gay mobilization is commonly traced to the

164. This conclusion is based on my close readings of the major texts from this area of criminological literature.

165. With respect to this second level, I am primarily drawing on social learning theories.

166. Operant conditioning theory argues that learning is shaped by the consequences that flow from behavior (for instance, punishment or reinforcement). B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR 62–66 (3d ed. 1957).

167. In the following discussion, I am drawing on sources that are based on Akers’s early articulation of his social learning theory in the 1970s. Akers dedicated an entire chapter in the first and second editions of Deviant Behavior: A Social Learning Approach, a key work in which he explicated and applied his social learning theory, to the topic of homosexuality. RONALD L. AKERS, DEVIANT BEHAVIOR: A SOCIAL LEARNING APPROACH (1973). In later articulations of his theory after sodomy laws lost force, he no longer included this chapter on homosexuality. See, e.g., RONALD L. AKERS, SOCIAL LEARNING AND SOCIAL STRUCTURE: A GENERAL THEORY OF CRIME AND DEVIANCE (2009).

168. Id. at 147.

169. Id. at 150. Akers identified two ways that this could occur. First, parents might socialize children in ways that provide direct reinforcement for homosexuality. Second, parents might socialize children in ways that render them “unprepared” to engage in heterosexual conduct. Id.

birth of the “homophile” movement in the 1950s. Groups affiliated with this movement advocated for the full inclusion of lesbians and gay men in society, and for homosexuals to be afforded the same rights and protections as heterosexuals.

To understand the influence of early lesbian and gay mobilization on discussions in the criminological literature, revisit Becker’s labeling theory discussed above. Becker argued that the homosexual community developed its own historical, legal, and psychological justifications for their members’ deviant activities, and described the emerging body of literature from the homophile movement as providing a working philosophy for the homosexual. This working philosophy purportedly functioned to justify homosexual behaviors from the perspective of people who engaged in them.

Social process theorists who discussed homosexuality at one or more of these levels did not necessarily embrace criminalizing homosexuality, and some even held opposite intentions: to humanize and normalize specific groups of “deviants” by showing that they were no different than the rest of the population. At the same time, their discussions assumed the legitimacy of the status quo under which sodomy laws existed and were enforced against LGBT people. Consistent with my claim, this literature paid little attention to how social hardships that stemmed from microlevel interactions between LGBT people and their environment (such as family rejection for being LGBT) contributed to LGBT offending or LGBT victimization beyond sodomy.

To recap, this first section of the intellectual history illustrated that ideas about LGBT identity and crime under the former criminal status quo (which lasted from the 1860s through the early 1970s) centered on whether homosexuality should be viewed as a form of criminal sexual deviance in and of itself. These ideas were largely shaped by thinkers engaging with LGBT identity and crime through the lens of sodomy laws. They paid little attention to how the psychological and social hardships that LGBT people faced might shape LGBT offending and LGBT victimization beyond sodomy. This illustrates the lack of space under the former criminal status quo to think of LGBT people in the criminal justice system other than as deviant sexual offenders.

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171. In the 1950s, the “homophile” movement emerged with the creation of the Mattachine Society, which was comprised of gay men and is viewed today as the first modern gay rights organization. Soon after in 1955, a parallel society for lesbians called the Daughters of Bilitis formed. D’EMILIO, supra note 125, at 2.
172. Id.
173. Id.
174. BECKER, supra note 161, at 38.
175. Id. at 38–39.
II.
THE NEW VISIBILITY (MID-1970S–TODAY): LGBT PEOPLE AS INNOCENT AND NONDEVIAN'T HATE CRIME VICTIMS

This Part presents the second section of the intellectual history, which focuses on the paradigm shift between the mid-1970s and 1990s to redefine LGBT people in the criminal justice system as innocent and nondeviant hate crime victims, as opposed to deviant sexual offenders. I label this heightened focus on anti-LGBT hate crime victimization as “the new visibility.” For context, Part II.A discusses some important changes in substantive criminal law and in lesbian and gay social movements that preceded this shift. Part II.B then examines the move to redefine LGBT people in the criminal justice system as innocent and nondeviant hate crime victims. I explain that the new visibility embodied a broad trend among scholars, advocates, and policymakers to reframe LGBT identity as a source of unjust victimization as opposed to a source of sexual offending.

A. The Decline of the Former Criminal Status Quo

The decline of the former criminal status quo did not occur in one complete sweep. Rather, at least two phenomena contributed to its decline. First, state legislatures began to decriminalize private consensual sodomy in the 1970s, which was largely a consequence of states incorporating the Model Penal Code.177 Second, challenges from professional experts and lesbian and gay social movements encouraged the psychiatric profession to shift away from its dominant view that homosexuality was a mental disease.178 Each of these phenomena did different work to diminish the stigma of sexual deviance attached to homosexuality. The former phenomenon diminished the criminal stigma, whereas the latter phenomenon diminished the mental illness stigma. As explained later, these changes opened space to conceive of LGBT people in the criminal justice system in ways other than as deviant sexual offenders.

1. The Model Penal Code and Sodomy Decriminalization

Every state criminalized private consensual sodomy between adults until Illinois repealed its sodomy law in 1961.179 This repeal occurred after Illinois adopted the American Law Institute (ALI)’s Model Penal Code (MPC), which did not criminalize private consensual sodomy between adults.180 During the 1970s, a number of states decriminalized private consensual sodomy, mostly as

177. See infra Part II.A.1.
178. See infra Part II.A.2.
179. Eskridge, supra note 28, at 662.
a consequence of twenty-two states adopting the MPC between 1971 and 1983.\footnote{Id. at 63.}

One might argue that this decriminalization trend was the inadvertent outcome of states incorporating the MPC, as opposed to mobilization on the issue. But as scholars have documented, the omission of private consensual sodomy from the MPC was part of a broader historical moment involving the right to privacy.\footnote{See Melissa Murray, Griswold’s Criminal Law, 47 CONN. L. REV. 1045, 1047 (2015) (noting that Griswold v. Connecticut was part of a historical moment that “sought to reimagine the state’s authority in the intimate lives of citizens and limit the use of criminal law as a means of enforcing moral conformity”); Reva B. Siegel, How Conflict Entrenched the Constitutional Right to Privacy, YALE L.J. F. 316, 317–18 (2015) (placing the debate over whether it was appropriate to criminalize sex into broader contestations over the meaning of a constitutional right to privacy).} In this moment, professional experts, legislators, courts, and advocates questioned the role of the criminal law in regulating morality, and private intimate life in particular.\footnote{See Siegel, supra note 182, at 317–18.}

One could trace the beginning of this moment to the late 1940s, when Alfred Kinsey released groundbreaking research showing that it was not uncommon for men and women to engage in illegal sex acts at some point of their lives, including adultery, fornication, sodomy, and homosexuality.\footnote{See Alfred C. Kinsey, Wardell B. Pomeroy & Clyde E. Martin, Sexual Behavior in the Human Female (1953) [hereinafter HUMAN FEMALE]; Alfred C. Kinsey, Wardell B. Pomeroy & Clyde E. Martin, Sexual Behavior in the Human Male (1948) [hereinafter HUMAN MALE].} Kinsey’s specific revelation that it was not uncommon for people to engage in homosexual acts within their lifetime challenged the growing psychiatric consensus that framed homosexuality as a mental disease.\footnote{Bayer, supra note 72, at 42. Kinsey began his comprehensive study on sexual behavior in 1938, and over the course of a decade he and his staff interviewed over 5,300 white men and 5,940 white women about their sexual histories. HUMAN FEMALE, supra note 184, at 3, 4. Although the sample was racially homogenous, it was intended to represent a cross section of Americans based on geographic location, education, occupation, socioeconomic level, age, and religion. Id. at 31–37. Kinsey placed sexuality on a 7-point scale from 0 (exclusively heterosexual) to 6 (exclusively homosexual). Id. at 471–72. He found that about 37 percent of the male subjects and 13 percent of the female subjects had engaged in at least one homosexual act to the point of orgasm between adolescence and late adulthood. Id. at 474–75. Moreover, only 10 percent of the male subjects were more or less exclusively homosexual (a rating of 5 or 6) for at least three years between the ages of sixteen and fifty-five. HUMAN MALE, supra note 184, at 650. Only 2 to 6 percent of unmarried women between the ages of sixteen and fifty-five, and 1 percent of married women in the same age range, identified as more or less exclusively homosexual. HUMAN FEMALE, supra note 184, at 473.} Based on his findings, Kinsey called for legislators to lift criminal laws against homosexual acts (as well as other sexual acts) that, contrary to popular belief, were quite common behind closed doors.\footnote{Murray, supra note 182, at 1050 (noting that “Kinsey began advocating for legal reform”).}

In 1951, the ALI began its project of creating a model uniform code to simplify the inconsistent web of common law and statutes that comprised
different states’ criminal laws. The drafters were especially concerned about criminal law intruding into private life. Referencing Kinsey’s research, a commission consisting of prominent legal experts released an early draft of the MPC in 1955 that omitted private consensual sodomy from its list of crimes—a landmark reform given that every state criminalized private consensual sodomy at the time. This omission remained in the final version of the MPC that the ALI adopted in 1962. To morally and philosophically justify this reform, the drafters drew on J.S. Mill’s harm principle to conclude that “no harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners.”

While the MPC drafters discussed and formulated these reforms, similar debates about privacy and the criminal regulation of sexual morality emerged in England and Wales. In 1957, the Department Committee on Homosexual Offenses and Prostitution released a report (the “Wolfenden Report”) concluding that criminalization was an inappropriate response to private consensual homosexual conduct and prostitution. Using arguments similar to the privacy justifications of the MPC reforms, the Wolfenden Report stressed a domain of private morality that the criminal law may not encroach upon.

Soon after the Wolfenden Report’s release, Lord Patrick Devlin and H.L.A. Hart engaged in extensive written debates about the moral and philosophical underpinnings of its recommendations. Hart argued in favor of protecting a sphere of privacy from criminal intervention, whereas Devlin defended the use of the criminal law to enforce public morality. The opposing ideas represented in the Hart-Devlin debates would later shape the U.S. Supreme Court’s 1965 decision in *Griswold v. Connecticut*, which established a federal constitutional right to privacy and initiated privacy jurisprudence in areas involving reproductive rights, sex, and marriage.

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187. *Id.* at 1051.
188. *Id.*
194. The Wolfenden Report stressed that “[u]nless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.” *Id.* ¶ 61.
197. 381 U.S. 479 (1965).
Before moving on, I want to be clear: I am not arguing that this sodomy decriminalization trend resulted in sodomy laws having no relevance to the criminal justice problems that LGBT people faced after the 1970s. For instance, the Court’s 1986 decision in *Bowers v. Hardwick* provided a federal constitutional justification for the twenty-five states that had sodomy laws on the books at that time. Even after the Court overturned *Bowers* in its 2003 decision in *Lawrence v. Texas*, some states continued to have criminal laws on the books prohibiting private consensual sodomy, and police officers have recently applied these laws against LGBT people in constitutionally suspect ways. Rather, this discussion is intended to set the stage for my argument to follow that this sodomy decriminalization trend was associated with a drastic shift in scholarly and popular conceptions of LGBT people in the criminal justice system after the mid-1970s.

2. Challenges to the Psychiatric Profession and the Repeal of Sexual Psychopath Laws

As criminal sodomy laws lost popularity, so did the prevailing view in the psychiatric profession that homosexuality was a mental illness. Homosexuality was removed from the DSM in 1973. Many states also began to repeal their sexual psychopath laws in the early 1970s. The declining popularity of the orthodox view in the psychiatric field that homosexuality was a mental illness was a key precursor to the decline of the dominant image of the deviant LGBT sexual offender under the former status quo.

Two interconnected factors help to explain these changes. First, a growing body of empirical research provided a scientific basis to reject the view that homosexuality was a mental disease. Alfred Kinsey and Evelyn Hooker’s research was especially influential in discounting this prevailing view. In one study, Hooker recruited gay subjects with the help of the Mattachine Society, illustrating the connection between these experts and early lesbian and gay social

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199. 478 U.S. 186, 196 (1986) (upholding against constitutional challenge Georgia’s sodomy law insofar as it criminalized acts between people of the same sex).


201. Ian Millhiser, 10 Years After They Were Declared Unconstitutional, 14 States Still Have ‘Sodomy’ Laws, *ThinkProgress* (Apr. 9, 2013), http://thinkprogress.org/justice/2013/04/09/1835221/10-years-after-they-were-declared-unconstitutional-14-states-still-have-sodomy-laws [https://perma.cc/AAS7-DG2M].


203. BAYER, supra note 72, at 40.

204. Id.; NATHAN JAMES, KENNETH R. THOMAS & CASSANDRA FOLEY, CIVIL COMMITMENT OF SEXUALLY DANGEROUS PERSONS 6 (2008).

205. BAYER, supra note 72, at 41–66 (summarizing major research challenging the prevailing view that homosexuality was a mental illness).
movements. Based on her findings, Hooker advocated for changing societal conditions that denigrated homosexuality, and against subjecting homosexuals to psychiatric treatment.

Second, lesbian and gay social movements prioritized eliminating the stigma of disease attached to homosexuality. During the homophile movement, organizations provided public forums for professional experts to present research challenging this stigmatizing view. For instance, in 1955, the Mattachine Society released the first issue of its magazine, *Mattachine Review*. The issue featured a summary of Hooker’s research, which, as noted above, refuted the idea that homosexuality was a mental disease.

Challenges to the psychiatric profession continued with the birth of more radical lesbian and gay mobilization during the 1960s. The growth of lesbian and gay neighborhoods and establishments in major cities, as well as the increased public presence of lesbian and gay social movements, was associated with heightened police crackdowns on lesbian and gay communities and social spaces during the 1960s. Energized by radical counterculture movements of the 1960s, many LGBT people pursued a more radical agenda of protest against LGBT oppression. The Stonewall Riots of 1969 and the development of the Gay Liberation Front symbolized the growth of this more radical turn within lesbian and gay social movements.

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207. *Id.*
208. BAYER, *supra* note 72, at 67–100 (discussing challenges to the psychiatric profession in lesbian and gay social movements from the 1950s to the 1970s).
209. See *supra* note 171 (briefly describing the homophile movement).
210. *Id.* at 73–75 (describing that the *Mattachine Review* and the *Ladder*—the two official publications of the Mattachine Society and the Daughters of Bilitis—included psychiatric research contesting the idea that homosexuality was a mental illness).
211. *Id.* at 73.
212. *Id.*
213. BÉRUBÉ, *supra* note 130, at 245.
Members of these more radical groups joined feminists to protest at the American Psychiatric Association (APA)’s annual conventions in 1970 and 1971. Demonstrators disrupted presentations and grabbed microphones to denounce psychiatrists who advocated using aversion therapy to treat homosexuality. In part to avoid disruption at future conventions, the APA allowed “homosexuals” to present at the 1971 convention—something homosexuals had been consistently denied in the past. Protest organizers and prominent gay activists also discussed their demands to remove homosexuality from the DSM with APA officials. This mobilization triggered more critical conversations at the 1972 APA convention about the psychiatric discipline’s stance toward homosexuality. In 1973, the APA’s board of trustees voted to remove homosexuality from the DSM.

* * *

In sum, two related but separate movements contributed to the decline of the image of the deviant LGBT sexual offender. The first was the decriminalization of private consensual sodomy in the 1970s, which was largely a consequence of states incorporating the MPC. The second was the declining popularity of the view in the psychiatric profession that homosexuality was a mental disease. My analysis now shifts gears to discuss how the decline of the former criminal status quo opened space for new narratives about the relationship between LGBT identity and crime.

B. Anti-LGBT Hate Crime Victimization: The Move to Antidiscrimination Principles to Reframe LGBT Identity and Crime

The decline of both sodomy laws and the dominant view that homosexuality was a mental illness paved the way for a new scholarly and policy agenda that reframed LGBT identity as a source of unjust hate-motivated victimization. Importantly, this emerging agenda on anti-LGBT hate crime victimization was part of a wider movement consisting of different racial, ethnic,
religious, and sexual minority groups that pushed “hate crime” to the fore of public discussion starting in the 1980s.223 Many scholars view the social movements of the 1960s and 1970s—including the Civil Rights Movement, the women’s movement, the lesbian and gay rights movement, and the crime victim’s movement—as having provided the structural and discursive foundations necessary to redefine violence against minorities as “hate crimes” in the 1980s.224 During the 1980s and 1990s, civil rights organizations and other advocacy groups increasingly monitored and called attention to the problem of hate-motivated violence.225 In addition, legislatures and municipalities enacted hate crime laws and ordinances at the local, state, and federal levels.226

Greater attention to hate-motivated violence against lesbians and gays specifically was a key aspect of this growing hate crime movement.227 In 1989, Gregory Herek—a psychologist and prominent LGBT hate crime scholar—published an article that criticized the lack of scientific attention paid to anti-lesbian and gay hate crime, especially among psychologists.228 Herek advanced several arguments why psychologists should be concerned about anti-lesbian and gay hate crime, illustrating a lack of awareness in the field at that time that this topic was worthy of study.229

Answering this call for greater research, in 1989 the National Institute of Mental Health convened a two-day workshop that brought together clinicians,

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223. VALERIE JENNESS & RYKEN GRATET, MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT I (2001) (“During the 1980s and 1990s, multiple social movements began to identify and address the problem of discriminatory violence directed at minorities.”).


225. Grattet et al., supra note 224, at 286.

226. JENNESS & GRATET, supra note 223, at 20. It is important to note that states are not in agreement regarding the meaning of “hate” under hate crime laws. While some states require hate crimes to be motivated by actual group animus, others only require that the perpetrators intentionally select the victims on the basis of protected group characteristics, regardless of whether that selection was motivated by animus. See Jordan Blair Woods, Comment, Taking the “Hate” Out of Hate Crimes: Applying Unfair Advantage Theory to Justify the Enhanced Punishment of Opportunistic Bias Crimes, 56 UCLA L. REV. 489, 495–501 (2008).

227. Valerie Jenness, Social Movement Growth, Domain Expansion, and Framing Processes: The Gay/Lesbian Movement and Violence Against Gays and Lesbians as a Social Problem, 42 SOC. PROBS. 145, 149 (1995) (describing that “[h]ate-motivated violence against gays and lesbians has attracted considerable attention from a variety of constituencies and numerous forums, including editorials in many prestigious newspapers, official hearings before both houses of Congress, and sustained educational efforts on many university campuses”).


229. Id. at 948.
community workers, and researchers from a variety of disciplines to develop a research agenda for anti-lesbian and gay hate crime. The workshop provided the impetus for the first special collection of published essays on anti-lesbian and gay hate crime. The essays touched on three key areas: (1) existing data and methodological issues involving the study of anti-lesbian and gay hate crime; (2) the circumstances under which this violence occurred; and (3) the psychological harms of this violence and the available services to assist victims with those harms.

In the 1990s and 2000s, studies of anti-lesbian and gay hate crime victimization surged, which enhanced knowledge in each of these three areas. As the literature grew, it paid greater attention to anti-transgender hate crime. In addition, there was greater discussion of the underreporting of anti-LGBT hate crime to the police. Reporting obstacles included fear of secondary victimization by the police, fear of retaliation by the perpetrator(s), general distrust of the police, and feelings of shame from being criminally targeted for being LGBT. These studies substantiated the idea that crimes motivated by anti-LGBT prejudice were a special case—whether because they were more frequent or caused more serious harm to both immediate LGBT victims and LGBT communities than nonhate crimes did. Critically, this idea rested on antidiscrimination principles—namely, that a perpetrator’s discriminatory selection of a victim on the basis of the victim’s LGBT identity resulted in unique problems that warranted special scholarly, policy, and legal attention.

Antidiscrimination concerns not only shaped this body of literature, but also influenced wider developments in social movements, criminal law, and constitutional doctrine. Beginning with social movements, during the 1980s and

232. These areas are set out in the table of contents of the special issue.
236. Id.
237. Gregory M. Herek, J. Roy Gillis & Jeannine C. Cogan, Psychological Sequelae of Hate-Crime Victimization Among Lesbian, Gay, and Bisexual Adults, 67 J. CONSULTING CLINICAL PSYCHOL. 945, 945–46 (1999) (noting that much of the “heightened concern” about hate crimes during the 1990s “reflected an assumption that whereas all crimes have negative consequences for the victim, hate crimes represent a special case because of their more serious impact on both the crime victim and the larger group to which she or he belongs”).
238. Although here I am focusing on anti-LGBT hate crime, the analysis to follow illustrates that reliance on anti-discrimination principles applied to other categories of hate crime as well.
1990s there was an unprecedented level of mobilization against violence within lesbian and gay communities, in part due to perceptions that this violence was increasing.\textsuperscript{239} Many lesbian and gay advocacy groups coordinated with lesbian and gay community centers to establish antiviolence projects to address the problem.\textsuperscript{240} Antiviolence projects served many functions, including documenting anti-lesbian and gay violence within communities; distributing reports of this violence to law enforcement agencies, government officials, and lesbian and gay communities; and offering victim assistance to lesbian and gay victims of hate crime.\textsuperscript{241} Over time, antiviolence projects paid more attention to hate crime affecting a broader spectrum of the LGBT population, including bisexual and transgender people.\textsuperscript{242}

With regard to criminal law reforms, many state legislatures adopted hate crime laws that included sexual orientation, which imprinted the image of the innocent and nondeviant LGBT hate crime victim into legislation. For instance, sixteen states and the District of Columbia adopted hate crime laws that included sexual orientation between 1978 and 1995.\textsuperscript{243} Within this same period, only Minnesota and the District of Columbia included gender identity in their hate crime laws, illustrating that there was much less attention paid to anti-transgender violence during these reforms.\textsuperscript{244}

Generally, hate crime laws (both in the LGBT and non-LGBT context) fell into two camps. First, some laws provided for the enhanced punishment of anti-LGBT hate crime (as well as other forms of hate crime).\textsuperscript{245} These laws rested on antidiscrimination principles because they embodied the idea that the criminal law should not tolerate violence directly motivated by anti-LGBT prejudice (or other forms of prejudice), especially when the prejudicial nature of this violence resulted in greater harm to targeted victims and communities than non-hate-motivated crimes did.\textsuperscript{246} Second, some laws shaped the gathering of hate crime

\textsuperscript{239} Jenness, \textit{supra} note 227, at 150. For a critical perspective on this wave of hate-crime activism in mainstream gay mobilization see generally Spade & Willse, \textit{supra} note 24.

\textsuperscript{240} Jenness, \textit{supra} note 227, at 150.

\textsuperscript{241} \textit{Id.} at 154–62 (discussing the multiple functions of antiviolence projects).


\textsuperscript{243} Jenness, \textit{supra} note 227, at 149. California passed the first state hate-crime law in 1978. \textit{Id}.

\textsuperscript{244} For a comprehensive list of current hate-crime laws that include sexual orientation and gender identity protections, see \textit{Hate Crime Laws}, MOVEMENT ADVANCEMENT PROJECT, \url{http://www.lgbtmap.org/equality-maps/hate_crime_laws} [https://perma.cc/XNY9-6PSJ] (last visited Mar. 12, 2017).


\textsuperscript{246} Wisconsin advanced, and the Court accepted, this argument to uphold the constitutionality of the State’s hate crime penalty-enhancement law in \textit{Wisconsin v. Mitchell}, 508 U.S. 476 (1993). \textit{See infra} note 251.
statistics. It is also possible to view these laws as resting on antidiscrimination principles because they reflected the idea that crimes motivated by anti-LGBT prejudice warranted special government monitoring in light of their distinct harms to immediate LGBT victims and wider LGBT communities. That LGBT identity was and still is largely omitted from official crime statistics involving other crimes—a point I will discuss further—lends support to this idea.

Constitutional doctrine also reflects the paradigm shift away from the deviant LGBT sexual offender to the innocent LGBT hate crime victim. Two U.S. Supreme Court cases are instructive on this point. The first is the Court’s 1993 decision in Wisconsin v. Mitchell, which upheld the constitutionality of Wisconsin’s hate crime penalty-enhancement statute. Although the facts of the case involved a racially motivated crime, the Wisconsin statute more broadly applied to crimes in which a perpetrator “intentionally select[ed]” a victim because of bias toward a victim’s sexual orientation, race, religion, color, disability, national origin, or ancestry. The State’s petition for certiorari specifically discussed the problem of gay bashing and its reply brief in support of its petition included a study indicating that anti-gay hate crime was on the rise.

Before the Court, the defendant argued that the Wisconsin statute violated the First Amendment because it impermissibly punished offensive thought. In response, the State argued that the statute punished conduct—namely, the perpetrator’s intentional selection of a victim because of that victim’s personal characteristic. In upholding the law, the Court relied on antidiscrimination

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248. On this point involving antidiscrimination principles, there are important parallels with the government collection of racial data under the 1964 Civil Rights Act. Although organizations in the Civil Rights Movement were initially skeptical that this data would further entrench segregation, attitudes within these organizations shifted to view racial data collection as an integral part of the enforcement of civil rights legislation. See Jack M. Balkin & Reva B. Siegel, Principles, Practices, and Social Movements, 154 U. Pa. L. Rev. 927, 928, 938 (2006).

249. I discuss this point in more detail infra Part III.A.1.


251. In Wisconsin v. Mitchell, the respondent, Mitchell, was part of a young group of black men that brutally beat a white man. Id. at 479–80. Immediately before the assault, the group watched and discussed a scene from the movie Mississippi Burning, in which a white man beats a young black boy while he is praying. Id. at 480. After the scene ended, the group asked Mitchell, “[D]o you all feel hyped up to move on some white people?” Id. The group then moved outside and assaulted the white victim. Id. The jury concluded that Mitchell selected his victim because he was white, and enhanced his maximum sentence from two to seven years of imprisonment. Id.

252. Id. at 480.


255. Id. at 484.
principles, stressing that “motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge.”\textsuperscript{256} The Court further stressed that the Wisconsin statute targeted hate-motivated conduct that the State and its amici curiae perceived to inflict greater individual and societal harm, and concluded that the State’s desire to redress those harms was adequate justification for the law.\textsuperscript{257}

The second case is the Court’s 2003 decision in \textit{Lawrence v. Texas}, which overruled \textit{Bowers v. Hardwick}\textsuperscript{258} and invalidated remaining sodomy laws as they applied to private consensual sodomy between two adults.\textsuperscript{259} On one hand, the differences between Justice Anthony Kennedy’s majority and Justice Antonin Scalia’s dissenting opinions reflect the opposing ideas about privacy and the criminal regulation of morality surrounding the MPC, the Wolfenden Report, and the Hart-Devlin debates discussed previously.\textsuperscript{260} In fact, Kennedy’s opinion discusses the decriminalization reforms that the MPC and the Wolfenden Report inspired.\textsuperscript{261}

On the other hand, a closer reading of the decision reveals that antidiscrimination principles played an important role in the case. Psychological experts who served as amici for Lawrence characterized the Texas homosexual sodomy statute as a source of reinforcement for anti-lesbian and gay prejudice and hate-motivated violence.\textsuperscript{262} Legal experts who served as amici further stressed that sodomy laws resulted in states excluding lesbians and gays from hate crime laws and antidiscrimination protections in the civil realm.\textsuperscript{263} This positioning of hate crime laws in the \textit{Lawrence} litigation illustrates how the case played an important role in discrediting images of the LGBT deviant sexual offender.

Antidiscrimination principles also appear to have factored into Justice Kennedy’s opinion deciding the case on due process, as opposed to equal protection, grounds. He stressed that “[w]hen homosexual conduct is made criminal by the law of the States, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”\textsuperscript{264} He further stressed the stigma that the Texas law placed on

\begin{itemize}
\item \textsuperscript{256} Id. at 487.
\item \textsuperscript{257} Id.
\item \textsuperscript{258} 478 U.S. 186, 196 (1986).
\item \textsuperscript{259} 539 U.S. 558, 566–78 (2003).
\item \textsuperscript{260} Nan D. Hunter, \textit{Living with Lawrence}, 88 MINN. L. REV. 1103, 1123 (2004).
\item \textsuperscript{261} \textit{Lawrence}, 539 U.S. at 572–74.
\item \textsuperscript{263} Brief of the Cato Institute as Amicus Curiae in Support of Petitioners at 20, \textit{Lawrence v. Texas}, 539 U.S. 558 (2003) (No. 02-102).
\item \textsuperscript{264} \textit{Lawrence}, 539 U.S. at 575.
\end{itemize}
Justice Sandra Day O’Connor’s concurrence invalidating the Texas law on equal protection grounds also rested on antidiscrimination principles. She explained that the “Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction.”266 She emphasized the consequences of being convicted under the Texas statute, including disqualification from working in a variety of professions (for instance, medicine, athletic training, and interior design).267 Similar to Justice Kennedy’s majority opinion, her concurrence stressed the risk of being forced to register as a sex offender for the same crime in other states.268 Notably, Justice O’Connor also stressed the collateral consequences of the Texas law in the civil domain, including “employment, family issues, and housing.”269

Accordingly, both Justice Kennedy’s majority and Justice O’Connor’s concurrence in Lawrence stressed the collateral consequences of criminal sodomy laws. Their discussions reflect how the move away from images of the deviant LGBT sexual offender has contributed to the substantive criminal law being framed as primarily harmful to LGBT people in the civil, as opposed to the criminal, domain. Underlying this framing is the misguided idea that eliminating sodomy laws corrects the main injustice that LGBT people experience in the criminal realm. As I will argue in the next Part, this narrow framing overlooks a range of criminal justice problems that LGBT people have faced—and continue to face.

III.
PROBLEMATIZING THE NEW VISIBILITY

Scrutinizing the limited ways in which scholars, advocates, and policymakers have relied on antidiscrimination principles under the new visibility brings to the surface the LGBT criminal justice problems that have been overlooked. This Part discusses three ways in which the rush to view LGBT people as innocent and nondeviant hate crime victims has fallen short. First, it has obscured the relationship between LGBT identity and criminal offending. Second, it has fostered incomplete accounts of LGBT victimization. Third, it has neglected the dynamic interactions between LGBT victimization and LGBT

265. Id. at 576.
266. Id. at 581 (O’Connor, J., concurring).
267. Id.
268. Id.
269. Id. at 582. For a more detailed discussion of the collateral consequences of sodomy laws for lesbians and gays, see Christopher R. Leslie, Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws, 35 HARV. C.R.-C.L. L. REV. 103 (2000).
offending. These problems illustrate a need to broaden existing accounts of the relationship between LGBT identity and crime.

A. Obscured Relationships Between LGBT Identity and Offending

The rush to view LGBT people (and in particular, lesbians and gays) in the criminal justice system as innocent and nondeviant hate crime victims has left little space to understand LGBT people as offenders. There are at least three overlapping layers to how we have lost sight of LGBT criminal offenders under the new visibility, which I will discuss in turn: (1) a scarcity of data on how many LGBT offenders there are and the types of personal or property crimes for which they are arrested or have committed, (2) a lack of theoretical insight into how LGBT identity might relate to the causes of offending for both personal and property crimes, and (3) a lack of LGBT-offender narratives to replace the antiquated deviant sexual-offender narrative.

1. Scarcity of Data on LGBT Offenders

Recently available data suggests that the incarceration rate for self-identified lesbian, gay, and bisexual adults is three times that of the U.S. adult population. Nonetheless, there is a scarcity of publicly available data involving LGBT offenders at several points of the criminal process including detention and arrest, charging, conviction, sentencing, and probation and parole. These statistical gaps make it difficult to identify and to address LGBT-based inequality at these different points of the criminal process.

The connection between the move to embrace images of the innocent and nondeviant hate crime victim and the lack of available data on LGBT offenders is apparent in official government crime statistics. Consider the Federal Bureau of Investigation (FBI)’s Uniform Crime Reporting (UCR) Program, which began in 1930 and is the most popular source of official crime data in the United States. Published annually, the UCR today is based on data from over 18,400 law enforcement agencies across the United States. The UCR report contains data on four categories of violent crime (murder, forcible rape, robbery, and aggravated assault) and four categories of property crime (burglary, larceny-

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270. Meyer et al., supra note 6, at 267.
271. As explained infra pp. 146–47, there is some data involving the sexual victimization of LGBT inmates from data collection efforts under the Prison Reform and Elimination Act (PREA).
theft, motor vehicle theft, and arson) that are reported to the police. In expanded data, the UCR breaks down some of these reported offenses and arrests based on the race, sex, and age of the victims and the offenders.

Scholars have used this data to study how crime is distributed within and across these demographic differences and have built theoretical models to explain those distributions. Sexual orientation and gender identity, however, are omitted from this data. Rather, the only point at which sexual orientation and gender identity appear in the UCR data is in a separate report on hate crime statistics that breaks down the number of hate crime incidents, offenses, victims, and known offenders based on sexual orientation and gender identity bias.

Undoubtedly, there are several potential explanations for why LGBT identity is excluded from more general offending data in official crime sources. For instance, these statistics may be more difficult to collect in cases that do not involve anti-LGBT hate crime victimization. There are also other demographic characteristics, such as religion, that these data sources exclude. Moreover, calling for greater inclusion of, and attention to, sexual orientation and gender identity in official and unofficial crime data raises challenging and controversial concerns about the monitoring and classification of LGBT people. Scholars have also warned that the inclusion of rigid definitional categories of sexual identity is excluded from more general offending data in official crime sources.


276. See, for example, Michael Gottfredson and Travis Hirschi’s “self-control theory” discussed infra Part IV.D.


278. Scholars have raised these points about LGBT identity and statistics in general. See, e.g., Kath Browne, *Queer Quantification or Queer(y)ing Quantification: Creating Lesbian, Gay, Bisexual, or Heterosexual Citizens Through Government Social Research, in Queer Methods and Methodologies: Intersecting Queer Theories and Social Science Research* 231 (Kath Browne & Catherine J. Nash eds., 2010). In the specific context of crime statistics and LGBT identity, Matthew Ball has stressed that “it remains important to consider the ways in which such knowledge is produced, the ends to which that knowledge is put, and the assumptions made about the potential of such knowledge to transform the experiences of queer communities in the context of criminal justice.” MATTHEW BALL, CRIMINOLOGY AND QUEER THEORY: DANGEROUS BEDFELLOWS? 85 (2016).
orientation and gender identity in official crime statistics perpetuates narrow and oversimplified ideas of what it means to be LGBT.\textsuperscript{279}

At the same time, scholars have argued that the availability of LGBT-inclusive statistics assists in allocating resources and developing policies in the interest of equality.\textsuperscript{280} With regard to crime data specifically, there are persuasive reasons why there should be greater attention paid to LGBT identity in aggregate offending data at different points of the criminal process. To begin with, the lack of data on the number of LGBT people who are arrested and for what crimes makes it difficult to quantify how many LGBT people are affected by police profiling. This lack of data also makes it difficult to determine whether particular segments of the LGBT population (for instance, LGBT people of color, transgender people, or homeless LGBT people) are especially vulnerable to police profiling.\textsuperscript{281}

Illustrating the promise of such data—especially along the lines of intersectionality—recent studies on homeless LGBT youth have reported that homeless LGBT youth (and in particular, homeless LGBT youth of color) commonly experience illegitimate practices of police profiling, indiscriminate stops and searches, and arrests for “quality of life” offenses.\textsuperscript{282} History tells us that these statistics can make a difference in raising social awareness and designing laws and doctrine to combat police profiling. For instance, data showing racial disparities in stops, searches, and arrests has been vital to recent

\textsuperscript{279} For an insightful analysis on the connection between identity categories, essentialism, and LGBT identity in criminology, see Matthew Ball, \textit{Queer Criminology, Critique, and the “Art of Not Being Governed,”} \textit{22 CRITICAL CRIMINOLOGY} 21 (2014).


pushbacks in both courts and legislatures against racial profiling involving stop-and-frisks and the aggressive enforcement of quality of life offenses.\textsuperscript{283}

Moreover, LGBT statistics involving the pretrial phase of a criminal case would help to answer several questions, including whether LGBT suspects are more likely to be detained before trial, whether prosecutors are more likely to dismiss or reduce charges in cases involving non-LGBT suspects, and whether non-LGBT suspects are more likely to be offered plea bargains that reduce charges or do not include prison sentences. These questions touch on several possible LGBT-based injustices and disparities that occur pretrial. For instance, in 2014, researchers released a report finding that each of these questions implicated significant racial disparities.\textsuperscript{284} The report relied on a dataset of diverse cases from the New York County District Attorney’s Office that included demographic information about the race and ethnicity of suspects, and tracked outcomes at these different points of the prosecution.\textsuperscript{285} Because this dataset omitted sexual orientation and gender identity information, it is impossible to identify parallel LGBT-based disparities.\textsuperscript{286}

In addition, LGBT-inclusive statistics involving sentencing would assist in identifying LGBT-based sentencing inequalities. Available statistics have made it possible to identify sentencing disparities based on race, gender, education, and socioeconomic status.\textsuperscript{287} One study, for instance, reported that black offenders, male offenders, offenders with low levels of education, and low-income offenders receive substantially longer sentences.\textsuperscript{288} It is difficult to explore how LGBT identity fits into these patterns of sentencing disparities. This knowledge gap is especially troubling given that scholars have stressed different ways that anti-LGBT biases permeate courts and shape the perception of LGBT litigants and witnesses, jury selection, and judicial outcomes.\textsuperscript{289}

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Floyd v. City of New York, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (relaying on racial disparities in obtained data to hold that the NYPD’s stop-question-and-frisk policy is unconstitutional under both the Fourth and Fourteenth Amendments). To provide another example, shortly before legalizing marijuana for personal use, the District of Columbia decriminalized simple marijuana possession in 2014. See Jordan Blair Woods, Decriminalization, Police Authority, and Routine Traffic Stops, 62 UCLA L. REV. 672, 695 (2015). The sponsor of the bill stressed evidence of racial disparity in arrest data for simple marijuana possession. Id.
\item Id. at 75.
\item It is important to note, however, that the dataset provided some data on the gender of prosecutors and defendants. See id. at 26, 62.
\item See generally Bosso, supra note 19 (discussing how bias against sexual minorities in cultural narratives affects LGBT discourse in the legal system); Todd Brower, Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts, 27 PACE L. REV. 141 (2007) (exploring the influence of LGBT visibility on court outcomes); Cynthia Lee, The Gay
\end{enumerate}
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Finally, the lack of data on how many LGBT people are on parole, how many LGBT people complete parole, and how many (and the circumstances under which) LGBT people violate parole, makes it difficult to identify LGBT recidivism rates and trends. These statistics can inform policies that serve to assist ex-offenders’ successful reentry into society. For instance, with the goal of reducing recidivism, the California Department of Corrections and Rehabilitation releases an annual report that includes recidivism rates based on gender, age at time of release, race or ethnicity, and county of parole. This report omits sexual orientation and gender identity information, which hinders the evaluation of the extent to which LGBT offenders are being successfully reintegrated into society after their release from jail or prison.

Although there are knowledge gaps involving LGBT offending at many points of the criminal process, in the past several years there have been significant advances in data involving LGBT inmates under the Prison Rape Elimination Act (PREA). Enacted in 2003, PREA requires the Bureau of Justice Statistics (BJS) to gather data on the prevalence and incidence of sexual assault in prisons and jails, as reported by inmates. This data has provided a useful snapshot of the proportion of adult and juvenile inmates who self-identify as LGBT and their higher rates of sexual victimization.
Moreover, this data has contributed to significant policy changes that address LGBT sexual victimization behind bars, illustrating the key point that paying greater attention to LGBT identity in crime data can inform changes in how criminal justice institutions respond to and treat LGBT populations. For instance, PREA created the National Prison Rape Elimination Commission (NPREC) to study prison rape and recommend national standards to the DOJ to address the problem. In May 2012, after nine years of investigation, the DOJ promulgated a set of regulations implementing PREA. The DOJ’s summary of the final regulations stressed that LGBT inmates were particularly vulnerable to sexual abuse in prisons. The regulations included protections against the assault, harassment, and prolonged isolation that many LGBT inmates suffered while incarcerated. After the DOJ promulgated these regulations, the federal government was immediately required to implement PREA in federal prisons. States had until August 2013 to certify compliance with PREA regulations or lose federal funds. Since the DOJ’s promulgation, several states have passed their own PREA laws.

Of course, it is possible that LGBT-inclusive data might not reveal LGBT inequality at one or more points of the criminal process. But to the extent that this data could, this absence frustrates efforts to identify and to address those inequalities, which likely fall on segments of the LGBT community most vulnerable to inequality within the criminal justice system (for instance, low-income and homeless LGBT people, LGBT people of color, transgender people, LGBT people living with HIV, and undocumented LGBT people). Either way, the shift under the new visibility toward images of the innocent and nondeviant LGBT hate crime victim completely misses these issues involving LGBT offenders.

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296. Id.
298. ACLU, supra note 295; see also, e.g., NPREC, supra note 297, at 215 (articulating a national standard that “medical practitioners conduct examinations of transgender individuals to determine their genital status only in private settings and only when an individual’s genital status is unknown”).
299. ACLU, supra note 295.
300. Id.
301. Id. at 2.
2. Lack of Theoretical Attention to LGBT Identity and Offending

The rush to redefine LGBT people in the criminal justice system as innocent and nondeviant hate crime victims has hindered the advancement of theorizing about criminal offending, both in the LGBT context and more generally.

In the LGBT context, the obscured relationship between LGBT identity and offending has driven underground the diverse ways that hardships attached to LGBT identity (for instance, family rejection for being LGBT or LGBT-based social discrimination) can contribute to offending, particularly in contexts that do not involve sodomy. As the next Section will explain in more detail, scholars have recognized that hardships within and across demographic groups defined by race, ethnicity, class, gender, and age can shape experiences of criminal offending. LGBT identity, however, has yet to be comprehensively viewed in these same terms.

It is unclear what we will find when LGBT identity is considered in these broader terms. This expanded approach, however, might bring pathways to crime involving specific LGBT hardships out of the shadows. It might also strengthen our knowledge of issues surrounding intersectionality by uncovering how hardships associated with non-LGBT differences (for instance, race, ethnicity, class, and age) work in tandem with sexual orientation or gender identity to shape experiences and uneven distributions of offending in different segments of the LGBT population.

Thinking beyond the LGBT context, greater attention to LGBT identity holds promise to challenge heterosexist assumptions that shape more generally applicable theories of offending that apply to both non-LGBT and LGBT populations. This attention might also offer more sophisticated qualitative and quantitative models of criminal offending. On these points, there are important parallels with the contributions of feminist criminologists.

Before the 1960s, women's involvement in crime was not a major focus of the criminological discipline.302 Most existing perspectives on the issue advanced depictions of women as inherently passive and docile based on gender-role stereotypes.303 Inspired by the emergence of second-wave feminism, feminist criminologists in the 1960s began to criticize the historical neglect and mistreatment of women in crime theories and research.304 Liberal feminists advocated for the full inclusion of women in existing theories of crime to fill

302. See generally Kathleen Daly & Mead Chesney-Lind, Feminism and Criminology, 5 JUST. Q. 497, 507–08 (1988) (describing an “awakening” in the field of criminology during the 1960s that called attention to the omission of women from general theories of crime).


knowledge gaps about female offending and victimization.\(^\text{305}\) In the 1970s, radical feminist criminologists critiqued the move to include women in existing theories of crime without interrogating how those theories reinforced patriarchy.\(^\text{306}\) Radical feminists depicted the historical evolution of social relations in terms of masculine power and privilege, and developed new theories to conceptualize crime in terms of patriarchy.\(^\text{307}\)

Although LGBT people’s specific experiences of crime have not been a strong focus of feminist criminology,\(^\text{308}\) what we learn from these perspectives is that theoretical understandings of crime can improve when they take different identities into account.

This logic extends to LGBT identity. Consider D. Kelly Weisberg’s 1985 ethnographic study of seventy-nine male youth sex workers in New York and San Francisco.\(^\text{309}\) Less than 20 percent of the youth identified as heterosexual and most left home before the age of seventeen.\(^\text{310}\) Twenty-two percent of the youth (all of whom identified as homosexual or bisexual) cited family conflict over their sexuality as a reason for leaving home.\(^\text{311}\) The stigma attached to homosexuality and the lack of opportunities for same-sex intimacy without the threat of rejection motivated many of them to use sex work as a means to explore and define their sexual identities.\(^\text{312}\) Thus, in considering LGBT identity, the study problematized oversimplified models and theories of crime that assumed that financial gain was the sole motive driving youth to engage in sex work.\(^\text{313}\)

Another example of how paying greater attention to LGBT identity can enhance general understandings of crime involves studies examining the connection between marriage and offending. Many studies of crime emphasize marriage as a critical life event that dissuades prior offenders from committing crimes in the future.\(^\text{314}\) Given that same-sex couples have only recently gained

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305. Daly & Chesney-Lind, supra note 302, at 512.
306. Id. at 537–38.
307. Id.
309. D. KELLY WEISBERG, CHILDREN OF THE NIGHT: A STUDY OF ADOLESCENT PROSTITUTION 70 (1985). 85 percent of the youth were age twelve to eighteen, and the rest were over eighteen. Id. at xii.
310. Id. at xiii, 70.
311. Id. at 71.
312. Id. at 22 (stressing that “prostitution became a vehicle for the enjoyment of their sexuality, for sociability with other gay men, and for a declaration of their own homosexuality”).
313. See id. at 56. Subjects reported many reasons for engaging in prostitution, including financial gain (87 percent), sexual gratification (27 percent), fun and adventure (19 percent) and sociability (11 percent). Id. at 56.
access to the institution of marriage, it is unclear how this presumption has applied to prior offenders in committed same-sex relationships.

On one hand, considering same-sex relationships might problematize the presumption that marriage itself, as opposed to forming similar long-term commitments, motivates desistance from crime. Given their historical exclusion from marriage, same-sex couples are an interesting case to examine whether love, companionship, and a sense of obligation to one’s partner or children, are underlying forces that motivate desistance from crime independent of marriage. On the other hand, in the fight for marriage equality, advocates emphasized that marriage provides unique social, cultural, financial, and legal benefits. Although the unique benefits of marriage over other forms of state-recognized relationships have varied across jurisdictions and time, marriage could have fostered distinct mechanisms of security that same-sex couples were denied and that motivated desistance from crime. For instance, a study that was published prior to Obergefell reported that married lesbians, gays, and bisexuals were significantly less psychologically distressed than lesbians, gays, and bisexuals who were not in a legally recognized relationship.

Although which point of view is correct remains an open question, the key point is that both possibilities show how considerations of LGBT identity can problematize and enhance prevailing models and understandings of criminal offending.

3. Flat Narratives and Stereotypes of LGBT Offenders

Obscuring the relationship between LGBT identity and offending has also left us with a one-dimensional image of LGBT offenders as deviant sexual offenders. Studies reporting the overrepresentation of LGBT youth in the youth homeless and foster youth populations suggest that this image is far underinclusive.

In fairness, there are reasons to be cautious about expanding crime studies to generate new narratives about LGBT offending. Under the former criminal status quo, LGBT people were commonly stereotyped as “predators,” “criminals,” “sinners,” and “psychopaths.” Crime research that calls attention

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317. See supra notes 10–18.

to the overrepresentation of LGBT people in the criminal justice system could fuel existing LGBT stereotypes or create new ones. The troublesome history between the 1940s and 1960s of using crime research to support the enactment of sexual psychopath laws substantiates these risks. These dangers show a need to be cautious and careful when considering LGBT identity in future research on offending.

At the same time, broadening how we think about LGBT identity and criminal offending can provide a greater diversity of narratives that more accurately capture the experiences of LGBT offenders today. Those narratives can do important work to defeat stereotypes of LGBT people. Vanessa Panfil’s recent ethnographic study of gay gang members—the first study of its kind—exemplifies this point. Panfil’s study included fifty-three gay gang- and crime-involved men who were mostly men of color in their late teens or early twenties and were involved in either majority gay-identified or majority heterosexual-identified gangs. The very act of calling attention to the fact that there are openly gay gang members, and that gay-majority gangs exist, shatters certain stereotypes of both LGBT people and gang members. A consistent finding of Panfil’s study was that participants both responded to, and actively resisted, societal stereotypes about gay men through violence, gang membership, and crime. One stereotype that they often wanted to dispel was the notion that gay men were weak, passive, and would not defend themselves if threatened or harassed. Another stereotype they actively resisted was that gay men were “deadbeats”—a term used to describe gay male cocaine users, escorts, or “crafters” (people who commit various forms of economic fraud).

The knowledge gap involving LGBT offending enables these stereotypes to persist. This is especially the case when violating the criminal law is part of a broader effort of LGBT offenders to challenge demeaning stereotypes of LGBT people that rest on homophobia, transphobia, and sexism.

ORIENTATION AND THE MILITARY, supra, at 177, 179–82 (discussing common historical stereotypes of homosexuality).

319. See supra Part I.B.2.
322. As Panfil explained, “Being regarded as passive, effeminate, middle-class, and white essentially removes gay men from consideration as violent offenders and gang members.” Id. at 103.
323. Id. at 104–05.
324. Id. at 105.
325. Id.
326. Id.
B. Incomplete Accounts of LGBT Victimization

The rush to move away from the deviant LGBT sexual offender to the innocent and nondeviant LGBT hate crime victim has also resulted in an incomplete picture of LGBT victimization. With the exception of recent data involving intimate partner violence and the sexual victimization of LGBT inmates, hate crime continues to dominate the available data on LGBT victimization. Accordingly, there is very little information about the non-hate-motivated circumstances under which LGBT people become victims of crime.

Consider the National Crime Victimization Survey (NCVS). Conducted by the U.S. Census Bureau for the BJS, the NCVS is the largest ongoing victim survey in the United States. The NCVS was created to capture crimes that victims did not report to the police. For the reasons discussed previously, underreporting is a particular concern in the context of anti-LGBT hate crime victimization.

The NCVS asks participants about several demographic characteristics, including age, marital status, sex, race, and income. These questions help to assess the distribution of victimization within and across these characteristics. Critically, these demographic questions omit sexual orientation and gender identity information; this information only appears in a series of questions involving hate crime. In those questions, participants can answer whether they believed that they were victims of a hate crime, whether they perceived the crime to be motivated by their gender or sexual orientation, and whether the incident took place near a gay bar or at a Gay Pride March.

Recent studies, however, suggest that LGBT people disproportionately face hardships (for instance, poverty and homelessness) that likely put them at greater

327. See supra notes 8 and 294.
328. The NCVS is based on a nationally representative sample of about 90,000 households (approximately 160,000 people). The households are included in the sample for three years, and the participants are interviewed twice a year about their victimization experiences of violent and property crimes. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DATA COLLECTION: NATIONAL CRIME VICTIMIZATION SURVEY (NCVS): METHODOLOGY, http://www.bjs.gov/index.cfm?ty=dcdetail&iid=245#Methodology [https://perma.cc/KN53-C7D2] (last visited Mar. 11, 2017).
risk for a much wider range of victimization than hate crime. These signals suggest that the available data on LGBT victimization is far underinclusive. In addition, the limited attention to LGBT identity in the data inhibits intersectional explorations of whether different segments of the LGBT population experience dissimilar rates of victimization for particular crimes.

To illustrate the significance of these intersectional explorations, consider recently released victimization data involving sexual and intimate partner violence. Until 2010, national survey data on sexual and intimate partner violence omitted sexual orientation. In 2013, the first snapshot of LGB-inclusive data revealed that bisexual women had an especially high lifetime prevalence of both sexual and intimate partner violence. Specifically, bisexual women had a much higher lifetime prevalence of rape by any perpetrator (46.1 percent) when compared to both lesbians (13.1 percent) and heterosexual women (17.4 percent). Bisexual women also had a much higher lifetime prevalence of sexual violence other than rape by any perpetrator (74.9 percent) compared to both lesbians (46.4 percent) and heterosexual women (43.3 percent)—as well as gay (40.2 percent), bisexual (47.4 percent), and heterosexual men (20.8 percent). Moreover, bisexual women experienced a much higher lifetime prevalence of rape, physical violence, and stalking by an intimate partner (61.1 percent) compared to both lesbians (43.8 percent) and heterosexual women (35.0 percent)—as well as gay (26.0 percent), bisexual (37.3 percent), and heterosexual (29.0 percent) men. Although future research and theorization is necessary to explore why bisexual women appear to have such high lifetime prevalence of sexual and intimate partner violence, the key point is that the need for such examination at the intersection of gender and sexual orientation would not be apparent without this LGB-inclusive data. These intersectional explorations are especially meaningful in the bisexual context given the historical erasure of bisexual identity from the legal and political domains.

Victimization data from the National Transgender Discrimination Survey (NTDS) offers another example of the multifaceted victimization narratives that

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333. See supra notes 10–22.
334. This national survey data is gathered from the National Intimate Partner and Sexual Violence Survey, conducted by the CDC’s National Center for Injury Prevention and Control. WALTERS ET AL., supra note 8, at 1.
335. Id. The numbers were too small to estimate the lifetime prevalence of rape by any perpetrator for gay and bisexual men, although the lifetime prevalence for heterosexual men was 0.7 percent. Id.
336. Id.
337. Id. at 2.
emerge from intersectional and LGBT-inclusive crime data. In 2011, the National Center for Transgender Equality and the National Gay and Lesbian Task Force released the NTDS, which is the most comprehensive survey to date on transgender discrimination in the United States. The NTDS revealed that race had a large impact on transgender respondents’ interactions with the police. Specifically, white transgender respondents experienced respectful treatment from the police at much higher levels than transgender respondents of color. Overall, 22 percent of all transgender respondents who interacted with the police experienced harassment by officers, which was much lower than the 38 percent of black, 36 percent of multiracial, and 29 percent of Asian transgender respondents who experienced harassment during interactions with the police. Moreover, black transgender respondents who interacted with the police reported being physically assaulted by officers at much higher levels than transgender respondents overall (15 percent versus 6 percent) as well as being sexually assaulted by officers (7 percent versus 2 percent). These intersectional connections involving gender identity and race that emerged from the NTDS data lend support to the idea that although victimization by police officers is a problem for transgender people in general, such victimization is especially acute for transgender people of color.

Shedding new light on criminal victimization disparities within the LGBT population could influence LGBT organizations and social service providers to think differently about how they allocate resources and offer services to LGBT crime victims. Further, a more complete picture of LGBT victimization might assist criminal justice institutions (for instance, law enforcement agencies, prosecutor’s offices, and courts) to think more broadly about who LGBT victims are and how to interact with them sensitively. Consider the following example involving LGBT homeless youth who are trafficked into the sex trade.

Currently, there is a growing movement across states to treat youth who are trafficked into the sex trade as victims, as opposed to offenders. Over a dozen states have enacted safe harbor exceptions to laws criminalizing prostitution for


340. Id. at 2. The NTDS included 6,450 transgender respondents across the United States. Id.

341. Id. at 159.

342. Id.

343. Id.

344. Id. at 160.

345. COVENANT HOUSE, HOMELESSNESS, SURVIVAL SEX AND HUMAN TRAFFICKING: AS EXPERIENCED BY THE YOUTH OF COVENANT HOUSE NEW YORK 19 (2013); Michelle Madden Dempsey, Decriminalizing Victims of Sex Trafficking, 52 AM. CRIM. L. REV. 207, 209 (2015) (“While this situation is beginning to change in some states and localities in the United States, the vast majority of jurisdictions continue to criminalize victims of sex trafficking.”).
minors who are trafficked into the sex trade. Despite these legislative changes, scholars and commentators have documented that there are inadequate systems in place to offer these youth victims the institutional support that they need to escape the trade.

Homeless youth are particularly vulnerable to sex trafficking. Not having a place to sleep is a key factor that contributes to homeless youth entering the sex trade. Many sex traffickers pressure homeless youth into the industry by alerting them to the fact that shelters are at full capacity, and then offering them a place to sleep for the night. Given that empirical data on LGBT victimization centers on hate crime (and to a lesser extent, intimate partner violence), it is unknown whether LGBT youth are more vulnerable to sex trafficking in light of their overrepresentation in the youth homeless population. In terms of the design of criminal justice institutions, such a discovery would suggest that prosecutors and police should have the cultural competency to interact with LGBT victims beyond hate crime.

The key point is that the rush to construct LGBT crime victims as hate crime victims has overlooked the wider range of circumstances under which LGBT people become victims of crime.

C. Obscured Interactions Between LGBT Victimization and Offending

Scholars have stressed that victimization patterns cannot be understood separately from offending patterns, and that victimization is a key risk factor for offending. For instance, studies have reported that youth who are victims of violent crime are more likely to be perpetrators of violence as adults. At the same time, youth offenders are more likely to be victims of a range of crimes, including assault, robbery, larceny, and vandalism.

Under the new visibility, the paradigm shift away from the deviant LGBT sexual offender to the innocent and nondeviant LGBT hate crime victim has
neglected and obscured these possible interactions between LGBT victimization and offending. Nonetheless, one might surmise that many LGBT offenders have been victims at multiple points of their lives.\textsuperscript{355} Victimization could stem from harassment, social discrimination, violence, or family rejection and abuse—common hardships that LGBT adults and youth experience, whether they offend or not.\textsuperscript{356}

To understand how these interactions could unfold in the LGBT context, revisit the high representation of LGBT homeless youth.\textsuperscript{357} Many LGBT youth wind up on the streets after suffering family rejection and abuse.\textsuperscript{358} Although the relationship between LGBT youth homelessness and crime is underexplored, existing studies on homeless youth more generally have reported that homeless youth are at greater risk for being physically and sexually victimized on the streets.\textsuperscript{359} With respect to offending, the crimes that homeless youth commit to survive can range from minor crimes (for example, petty theft and shoplifting) to serious crimes (for example, violence as a means of self-protection).\textsuperscript{360} As John Hagan and Bill McCarthy described, “[H]unger causes theft of food; problems of hunger and shelter lead to serious theft; and problems of shelter and unemployment produce prostitution.”\textsuperscript{361}

LGBT homeless youth might face problems that non-LGBT homeless youth experience to a lesser degree or not at all.\textsuperscript{362} For instance, anti-LGBT

\textsuperscript{355}. To explain this point in more detail, the discussion to follow will draw on studies involving LGBT homeless youth and LGBT adults who are incarcerated.

\textsuperscript{356}. DUROSO & GATES, supra note 10, at 4 (discussing family rejection, being kicked out of the home, and physical, emotional, or sexual abuse at home as the top three reasons why LGBT youth are homeless or at risk of becoming homeless); JOSEPH G. KOSC IW ET AL., GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE 2013 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS (2014) (documenting anti-LGBT harassment and bullying in schools); Pizer et al., supra note 3 (discussing workplace discrimination against LGBT people); Stotzer, supra note 234 (reviewing U.S. data on violence against transgender people).

\textsuperscript{357}. See QUINTANA ET AL., supra note 10.

\textsuperscript{358}. Id. at 9.

\textsuperscript{359}. See generally Edidin, supra note 14, at 359–60; Les B. Whitbeck, Dan R. Hoyt & Kevin A. Ackley, Abusive Family Backgrounds and Later Victimization Among Runaway and Homeless Adolescents, 4 J. RES. ADOLESCENCE 375 (1997) (discussing the effect of abusive family backgrounds on victimization of adolescents on the street).


\textsuperscript{361}. JOHN HAGAN & BILL MCCARTHY, MEAN STREETS: YOUTH CRIME AND HOMELESSNESS 104 (1997).

\textsuperscript{362}. In a future article Unaccompanied Youth and Private-Public Order Failures, 103 IOWA L. REV. (forthcoming 2018) (draft on file with author), I analyze this point and the examples to follow in this paragraph in further detail.
discrimination might make it more difficult for LGBT youth to find support networks or support services to get off the streets. In many localities, lack of public funding causes private community organizations and religious institutions to provide the bulk of services to unaccompanied youth. LGBTQ youth may feel unwelcome, be turned away, or face discrimination when the missions of those entities are hostile toward LGBTQ people. Another possibility is that family rejection for being LGBT might make it less likely that LGBT homeless youth will go back, or be welcomed back, to their families. With these youth having nowhere to go, their rejection might in turn shape future criminal involvement.

Consider the story of Brian Dixon, a gay youth who found himself homeless at the age of eighteen. After enduring years of mental and physical abuse from his family, Brian left home at the age of fourteen to live with his grandparents in Georgia. Within a year, his grandparents placed him into Georgia’s foster care system. From there, Brian bounced from group home to group home. One of those group homes, touted as a “Christian group home,” made him sign a form agreeing to never disclose his sexual orientation. Brian tried to hide that he was gay, but he was unsuccessful and the group home kicked him out.

Eventually, Brian quit high school and earned a GED before officially “aging out” of the foster care system. He asked for an extension to stay in foster care so that he could work on his nursing degree. His new caseworker, whom Brian described as a “devout Christian,” did not support him and convinced her superiors that Brian was not a “good candidate” for an extension. Brian was dropped off with his belongings at a homeless shelter. The strict rules and curfew at the facility did not mesh with his school and work schedule. Eventually, Brian wound up living on the streets in Atlanta, which capitulated into a year-long streak of illegal drug use and prostitution to make ends meet.

These dynamic interactions between LGBT offending and victimization also unfold in the adult context. On this point, Sharon Dolovich’s ethnographic study of the K6G unit in the Los Angeles County Men’s Central Jail is instructive. The K6G unit is a small unit in the jail that holds approximately 350–400 residents who are gay men or transgender women. Although Dolovich’s study focused primarily on the experiences and conditions in K6G compared to the general population units, the findings raise important questions about the connection between LGBT victimization and LGBT offending.

363. QuinTana et al., supra note 10, at 27.
365. Dolovich, Two Models of the Prison, supra note 6, at 965.
366. Id. at 969, 980.
In particular, several K6G residents in Dolovich’s study reported that they felt safer being incarcerated in K6G than they felt “on the outside.” These findings raise questions about what is happening to these LGBT offenders on the outside that they feel safer in a jail—especially a jail known for being incredibly dangerous—than wherever they live when they are not incarcerated. The study revealed multiple adverse living conditions for many K6G residents on the outside. Many residents were homeless, poor, hungry, or unemployed; lacked access to health care and medication; engaged in sex work for money; and lacked family support. As these findings highlight, in constructing LGBT crime victims primarily as hate crime victims, we have neglected the multiple dimensions of LGBT victimization and their relation to LGBT offending.

IV.
RECLAIMING LGBT IDENTITY AND CRIME: LOOKING BACK TO MOVE FORWARD

In the previous Part, I identified the shortcomings of the new visibility; this Part now discusses the types of questions that we should be asking about LGBT offending and LGBT victimization. It also shows how ideas in criminology offer promising first steps to engage with those questions. Specifically, it examines four areas of criminological theory that focus on a much broader set of crimes than hate crime. Critically, scholars have yet to apply these theories to LGBT identity in a meaningful way. Scholars have applied these theories, however, outside of the LGBT context to examine how psychological and social hardships shape distributions and experiences of crime within and across demographic groups defined by race, ethnicity, gender, class, and age. Accordingly, bridging the gap between these theories and LGBT identity can open possibilities to engage in intersectional research and develop more sophisticated accounts of LGBT offending and victimization.

367. Id. at 985, 1048–49 & n.340. Here, it is important to recognize that legal scholars have offered alternative evaluations of the K6G unit. As discussed above, Professor Sharon Dolovich has offered a relatively positive account of the K6G unit as a protective measure for gay and transgender inmates. Professor Russell Robinson, however, has offered a more critical take that challenges the view that gay and transgender inmates feel safer in segregated housing. He argues that such segregation relies on and perpetuates stereotypes of gay men that are inconsistent with the experiences of gay men of color. See generally Robinson, supra note 6.

368. Dolovich, Two Models of the Prison, supra note 6, at 967.

369. Id. at 1094–99.

370. It is important to note that these theories focus more on offending than on victimization. This treatment is a product of victimology only being included in mainstream criminology in the 1970s. LANIER ET AL., supra note 59, at 10. Therefore, these theories are merely a sample and not the complete universe of options to engage with LGBT identity in ways that capture a broader range of criminal justice problems than sodomy and hate crime.

371. The lack of attention to LGBT identity in these theories lends further support to my central claim that there is little to no criminological theory or research that conceptualizes LGBT identity as a nondeviant difference. In fact, more recent criminological theories often use homosexuality, when
A. Life Course and Crime

The first area of criminological theory that holds promise to enhance understandings of LGBT identity and crime is life course theories. In the family law domain, longitudinal studies have played a critical role in dispelling the notion that children in families with same-sex parents are worse off than children in families with heterosexual parents. For instance, since the 1980s, the National Longitudinal Lesbian Family Study (NLLFS) has followed a cohort of families headed by lesbian parents to examine the social, psychological, and emotional development of children, and the dynamics within those families. The findings revealed that children of lesbian parents score similarly to children of heterosexual parents on many development and social measures, and even score higher on some psychological measures, including self-esteem, academic performance, and desistance from rule breaking and aggression.

Demonstrating the NLLFS’s influence, several amicus briefs and expert reports discussed or cited the NLLFS in the marriage equality litigation.

In criminology, Developmental and Life Course (DLC) theories became a major approach to studying crime in the 1990s, when several longitudinal studies on criminal offending were published. DLC theories focus on the development of criminal and antisocial behavior during an individual’s life span from childhood to adulthood. These theories attempt to identify the risk factors, protective factors, and life events that make people more or less likely to behave in criminal or antisocial ways during their lifetimes.

Eight major DLC theories have emerged from the longitudinal studies published in the 1990s. Broadly speaking, these theories have identified several categories of factors that put people at greater risk for criminal offending before the age of twenty: (1) individual factors (for example, low school discussed, as an example to show how the definition of crime can change over time—a point that still places LGBT identity in relation to sexual offending and sexual deviance concepts, even after the decline of criminal sodomy laws. See, e.g., Peter B. Ainsworth, Psychology and Crime 4 (2000) (using homosexuality as an example to show “what are and what are not criminal acts, changes constantly”).


375. David P. Farrington, Life-Course and Developmental Theories in Criminology, in THE SAGE HANDBOOK OF CRIMINOLOGICAL THEORY 249, 250 (Eugene McLaughlin & Tim Newburn eds., 2010).

376. Id. at 249.

377. Id.

378. For a summary of these eight theories, see David P. Farrington, Conclusions About Developmental and Life-Course Theories, in INTEGRATED DEVELOPMENTAL & LIFE-COURSE THEORIES OF OFFENDING 247 (David P. Farrington ed., 2005).
achievement, low intelligence, hyperactivity-impulsiveness, and aggression); (2) family factors (for example, parental neglect, harsh discipline and child abuse, broken families, criminal parents, and delinquent siblings); (3) socioeconomic factors (for example, low family income and large family size); (4) peer factors (for example, delinquent peers, low popularity, and peer rejection); (5) school factors (for example, a high delinquency rate at an attended school); and (6) neighborhood factors (for example, a high crime neighborhood). DLC theories have also provided insight into the life events during adulthood that influence people to desist from crime, including getting married, getting a satisfying job, and joining the military.

Longitudinal crime studies might hold special promise to fill knowledge gaps involving LGBT offending and victimization in light of research suggesting that LGBT youth are coming out in greater numbers and at earlier ages. Moreover, at least two categories of risk factors that DLC theories focus on (family factors and peer factors) directly touch on hardships that many LGBT youth face today. Studies indicate that LGBT youth are vulnerable to experiencing family rejection and bullying at school for being LGBT. In addition, many of the adult life events that DLC researchers have found are associated with desistance from crime involve social institutions that have historically excluded LGBT people (for instance, marriage and the military) or involve domains where LGBT people are vulnerable to discrimination (for instance, the workplace).

Part of the problem is that several of the longitudinal studies that DLC researchers relied on began decades ago when consensual same-sex sex was


380. Farrington, supra note 375, at 251.

381. See, e.g., Christian Grov et al., Race, Ethnicity, Gender, and Generational Factors Associated with the Coming-Out Process Among Gay, Lesbian, and Bisexual Individuals, 43 J. SEX RES. 115 (2006) (studying younger cohorts of subjects who reported significantly earlier ages for sexual debut with same-gendered partners as compared to older cohorts).

382. See generally, e.g., Roberto Baiocco et al., Negative Parental Responses to Coming Out and Family Functioning in a Sample of Lesbian and Gay Young Adults, 24 J. CHILD. FAM. STUD. 1490, 1491 (2015) (describing how stress over coming out can include family rejection).


384. See Pizer et al., supra note 3 (discussing workplace discrimination and patterns of discrimination against LGBT people in court decisions, including marriage and military).
either criminalized or when there was still a heavy societal stigma attached to LGBT identity.385 Consider the Cambridge Study in Delinquent Development (CSDD), which is a globally influential longitudinal survey involving 411 boys who reported low socioeconomic status in South London.386 The CSDD began in 1961,387 when same-sex sex between adults was still criminalized in England.388 Some of the study variables addressed the sexuality of the subjects, but only captured the boys’ attraction to girls. These variables included the boys’ interests in girls; parental attitudes toward the boys going out with girls; how the boys felt about bringing girls home; and the frequency of the boys’ sexual activity in terms of the number of girls with whom they had had intercourse.389

Because same-sex sex was criminalized when the CSDD began, it is arguably unreasonable to expect that CSDD researchers at the time would have viewed sexual orientation and gender identity as nondeviant, demographic differences. This point, however, raises a problem that applies not only to the CSDD, but also to other longitudinal studies that have shaped DLC theories since then: the stigma of outdated sexual deviance concepts continues to thrive in hidden ways today when scholars rely on longitudinal studies that implicitly accept those stigmatizing concepts. This problem shows a potential need to develop new longitudinal studies involving crime that more accurately and sensitively capture LGBT identity.

Putting this need aside, the key point is that DLC theories prompt underexplored questions about the risk factors and life events that shape LGBT people’s involvement and desistance from crime over the course of their lives.

B. Neighborhood Conditions and Crime

The second area of criminological theory that holds promise to enhance understandings of LGBT identity and crime is social disorganization theories. The social disorganization theories of the Chicago sociologists390 lost popularity in the 1950s,391 until Robert Sampson and Byron Groves offered their strongest

385. This is not to suggest that there is not a large social stigma that still attaches to being LGBT in many regions of the United States today.


387. Id.

388. These laws were not lifted until 1967, when the British Parliament decriminalized private consensual sexual conduct between men over the age of twenty-one. JEFFREY WEEKS, COMING OUT: HOMOSEXUAL POLITICS IN BRITAIN, FROM THE NINETEENTH CENTURY TO THE PRESENT 176 (1977).


390. These theories were evaluated in supra Part I.C.1.

empirical support in the late 1980s.\footnote{392}{See Robert J. Sampson & W. Byron Groves, Community Structure and Crime: Testing Social-Disorganization Theory, 94 AM. J. SOC. 774 (1989).} Using data from over two hundred neighborhoods in the 1982 British Crime Survey, Sampson and Groves discovered a connection between community structural variables and social disorganization.\footnote{393}{Id. at 777, 782.} Specifically, they discovered that crime rates were highest in neighborhoods characterized by low friendship networks, low organizational participation, and high frequency of unsupervised teenage groups.\footnote{394}{Id. at 786–94 (presenting the study findings).} Importantly, Sampson and Groves’s social disorganization model included racial or ethnic heterogeneity and socioeconomic status as variables to explain the distribution of crime.\footnote{395}{Id. at 788.} Therefore, their model illustrates that considerations of demographic differences can enhance knowledge about distributions of crime, and that it is possible to study those distributions without stigmatizing people as deviants or criminals on the basis of those differences alone.

Although criminologists have yet to apply social disorganization concepts to study LGBT offending or victimization in a systematic way, some public health scholars have examined the connection between neighborhood-level factors and two public health issues affecting gay men. First, public health scholars have studied whether social networking patterns in neighborhoods with very high representations of gay people\footnote{396}{Some scholars have used the term “gay ghettos” to describe these neighborhoods. See Martin P. Levine Gay Ghetto, in 3 SEXUALITIES: CRITICAL CONCEPTS IN SOCIOLOGY, DIFFERENCE AND THE DIVERSITY OF SEXUALITIES 166 (Kenneth Plummer ed., 2002) (describing “gay ghettos” as “neighborhoods housing large numbers of gays as well as homosexual gathering places, and in which homosexual behavior is generally accepted, designated as such in [some metropolitan communities]”).} facilitate illicit drug use among gay men.\footnote{397}{See, e.g., Mance E. Buttram & Steven P. Kurtz, Risk and Protective Factors Associated with Gay Neighborhood Residence, 7 AM. J. MEN’S HEALTH 110 (2012); Richard M. Carpiano et al., Community and Drug Use Among Gay Men: The Role of Neighborhoods and Networks, 52 J. HEALTH & SOC. BEHAV. 74 (2011).} Second, public health scholars have examined whether social networking patterns in primarily gay neighborhoods increases the likelihood of gay men engaging in risky sexual behaviors.\footnote{398}{See, e.g., Brian C. Kelly et al., Sex and the Community: The Implications of Neighborhoods and Social Networks for Sexual Risk Behaviours Among Urban Gay Men, 34 SOC. HEALTH & ILLNESS 1085 (2012). Researchers have also looked at these issues in the context of men who have sex with men. See, e.g., Gregory Phillips II et al., Neighborhood-Level Associations with HIV Infection Among Young Men Who Have Sex with Men in Chicago, 44 ARCHIVES SEX BEHAV. 1773 (2015).} These examples illustrate the ways in which neighborhood- and community-level factors offer insight into problems that affect LGBT communities.

In the criminal justice context, social disorganization theories prompt meaningful questions about LGBT identity and crime. For instance, scholars might explore associations between sexual orientation or gender identity heterogeneity in a neighborhood and LGBT offending and victimization.
Scholars might also explore the relationship between different neighborhood conditions (such as networking patterns or levels of social isolation) in neighborhoods with very high representations of LGBT people and crime beyond illicit drug use. Perhaps the strength of local friendship networks in those neighborhoods is associated with lesser or higher rates of specific types of crime and crime in the aggregate.

C. Individual Strain and Crime

The third area of criminological theory that holds promise to enhance understandings of LGBT identity and crime is individual strain theories. Strain theories of crime examine how sociostructural pressures motivate people to commit crime. For instance, Robert Agnew’s “general strain theory” (GST) argues that people commonly experience negative emotions when they encounter “strain,” which refers “to negative or adverse relations with others.” Strains can have economic, social, or cultural origins and take many forms (for example, poverty, parental rejection, erratic supervision or discipline, child abuse and neglect, negative secondary school experiences, marital problems, failure to achieve selected goals, criminal victimization, residing in poor communities, homelessness, and discrimination based on race or ethnicity, gender, and religion). The core policy recommendations of GST are to reduce exposure, and to help people respond to strain in noncriminal ways.

One of the major advantages of GST is that it can be applied to study group differences in crime. For instance, criminologists have applied GST to examine differences in crime rates within and across groups based on age.
sex. To date, there are no published studies that apply GST to explore connections between LGBT identity and crime.

In the public health literature, however, the concept of strain has had a key role in explaining connections between anti-LGBT discrimination and adverse mental health outcomes for LGBT individuals. Generally, studies have reported that LGBT people suffer higher occurrences of mental health problems—including substance abuse, affective disorders, and suicide—than non-LGBT people. Ilan Meyer’s “minority stress” theory has explained these negative outcomes as consequences of the strain that stems from sexual orientation discrimination, and researchers have expanded the theory to include gender identity discrimination. Critically, minority stress theory illuminated that the strain from anti-LGBT discrimination is multifaceted, and occurs along a continuum from distal processes (objective events and conditions) to proximal personal processes (subjective perceptions and appraisals). In addition, the theory identified different levels of coping with minority stress, including the individual level (for example, personality factors) and the group level (for example, services by LGBT-affiliated or friendly social institutions or organizations).

These discussions of minority stress in the public health literature are useful to consider how criminologists might apply GST to explore connections between


407. See generally Deeanna M. Button, Understanding the Effects of Victimization: Applying General Strain Theory to the Experiences of LGBQ Youth, 37 DEVIAN'T BEHAV. 537 (2016) (applying GST to explore connections between LGBQ youths’ experiences with victimization and negative life outcomes); Susan M. Snyder, et al., Homeless Youth, Strain, and Juvenile Justice Involvement: An Application of General Strain Theory, 62 CHILD. & YOUTH SERVS. REV. 90, 92–93 (2016) (applying GST to explore connections between experiences of discrimination and violent victimization that result from LGBT identity and involvement in the juvenile justice system).


410. Ilan H. Meyer, Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence, 129 PSYCHOLOGICAL BULL. 674, 676 (2003). Meyer identified four processes of minority stress: (1) external objective stressful events and conditions (chronic and acute), (2) expectations of such events and the vigilance this expectation requires, (3) concealment of one’s sexual orientation, and (4) the internalization of negative social attitudes. Id.

411. Id. at 677.
LGBT identity, strain, and crime. For instance, GST identified discrimination based on race or ethnicity, gender, and religion as crime-facilitating strains. Homophobia and transphobia fit into this list. In addition, GST identified parental rejection, negative school experiences, criminal victimization, and homelessness as crime-facilitating strains. Given that LGBT youth and adults commonly experience these strains, GST may offer insight into how these strains relate to when and why LGBT people offend or desist from crime.

D. Social Controls and Crime

The fourth area of criminological theory that holds promise to enhance understandings of LGBT identity and crime is social control theories. Social control theories examine the factors that motivate people not to commit crime and view socialization as the key process through which social controls prevent individuals from committing crime. Two popular social control theories prompt different questions about family dynamics and crime. These theories have yet to be applied to LGBT identity, but they may provide insight into whether and why LGBT youth and children in same-sex headed families desist from crime.

The first theory is Michael Gottfredson and Travis Hirschi’s “self-control theory.” Self-control theory views individual self-control as the primary mechanism of criminal restraint. It argues that people develop their sense of self-control during early childhood, and that once acquired, self-control remains relatively stable throughout life. The theory identifies ineffective socialization during early childhood as the primary source of low self-control. Schools and other social institutions contribute to socialization, but the theory views parents as most important in the socialization process. Accordingly, the theory argues that children from households with ineffective and neglectful parents “tend to be impulsive, insensitive, physical (as opposed to mental), risk-taking, short-sighted, and nonverbal,” and therefore, more likely to engage in crime.

Self-control theory attempts to explain group differences in crime rates based on age, sex, and race. Gottfredson and Hirschi discovered that these characteristics were not strong correlates of criminal offending, and thus argued that differences in self-control provided a better explanation. It is unclear whether this proposition applies to LGBT identity. The omission of sexual

412. See supra Part I.C.2.
413. See supra Part I.C.2.
415. Id. at 91.
416. Id. at 97, 144.
417. Id. at 97.
418. Id. at 106.
419. Id. at 90.
420. Id. at 123–53 (applying self-control theory to race, sex, and age).
orientation and gender identity from popular crime surveys that are used to calculate crime rates inhibits these applications.

There are some clues, however, from the findings of the NLLFS. Those findings revealed that children who reported experiences of homophobia showed higher levels of rule-breaking and aggressive behavior. Children who reported experiencing homophobia and attended schools with LGBT curricula showed lower levels of aggressive problems than children who had experienced homophobia and did not attend such schools. Moreover, compared to a heterosexual family comparison group, children of lesbian parents reported lower levels of aggression and rule-breaking behavior.

The second theory is John Hagan’s “power-control” theory. This theory raises different questions about the relationship between juvenile delinquency and family dynamics. In its current form, the theory largely assumes a traditional family model headed by one man and one woman. The key question for power-control theory is cast in these traditional terms—namely, “What differences do the relative positions of husbands and wives in the workplace make for gender variations in the parental control, risk preferences, and delinquent behaviour [sic] of adolescents?” To date, the theory has not been applied to households that are headed by LGBT parents or by a single LGBT parent.

But given its emphasis on families, power-control theory provides a platform to explore the relationship between the distribution of power within LGBT-headed families, child socialization, and juvenile delinquency. For instance, perhaps inequitable power divisions based on gender roles are less common in LGBT-headed households. Higher egalitarianism between LGBT couples might then shape child socialization in ways that discourage juvenile delinquency. Although more research is necessary, this is one potential hypothesis for why children of lesbian parents in the NLLFS reported lower levels of aggression and rule-breaking behavior.

CONCLUSION

In providing an intellectual history of LGBT identity and crime, this Article has shown that the rush to portray LGBT people who come into contact with the
criminal justice system as innocent and nondeviant hate crime victims has resulted in flat understandings of LGBT offenders as sexual offenders and flat understandings of LGBT victims as hate crime victims. These one-dimensional narratives overlook a range of problems that especially fall on LGBT people who bear the brunt of inequality in the criminal justice system—including LGBT people of color, transgender people, undocumented LGBT people, LGBT people living with HIV, and low-income and homeless LGBT people. Addressing LGBT inequality in the criminal justice system requires more engagement with the hardships that likely put LGBT people at greater risk for both offending and victimization, including poverty, homelessness, and family rejection. This Article has illustrated how ideas and methods in criminology offer new directions to engage with these issues, and to identify meaningful connections and trends about LGBT identity and crime. These enhanced accounts can then inform law, policy, and the design of criminal justice institutions to better respond to the needs and experiences of LGBT offenders and LGBT victims.