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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*



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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.

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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

1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

2. See generally Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169 (2012) (discussing religious exemptions in the same-sex marriage context); Douglas NeJaime & Reva Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2558–66 (2015) (discussing religious exemptions in the same-sex marriage and LGBT equality context).

3. See generally Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715 (2012) (describing research and other evidence documenting employment discrimination against LGBT employees and calling for federal legislation prohibiting anti-LGBT employment discrimination).

4. See generally Courtney G. Joslin, *Marital Status Discrimination 2.0*, 95 B.U. L. REV. 805 (2015) (describing concerns about discrimination against both same-sex and different-sex unmarried couples after marriage equality); Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1514–25 (2016) (discussing the uncertain future of nonmarital statuses after *Obergefell v. Hodges*); Melissa Murray, *Paradigms Lost: How Domestic Partnership Went From Innovation to Injury*, 37 N.Y.U. L. REV. & SOC. CHANGE 291, 305 (2013) (noting that “[m]arriage equality need not

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.⁵ 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.⁶ This makes it difficult to identify LGBT inequalities at these different points and to develop legal and policy interventions to address those inequalities.⁷ With respect to victimization, most studies and available data on LGBT victims involve hate crimes,⁸ 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*, 37 N.Y.U. REV. L. & SOC. CHANGE 49 (2013) (discussing how protections for unmarried couples and families are threatened in light of marriage equality).

5. See, e.g., DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 113–15 (1999) (discussing color blindness and substantive inequality in the criminal justice system).

6. See *infra* Part III.A.1. An exception is studies and data involving LGBT inmates. For instance, a very recent study analyzing data from the 2011–2012 National Inmate Survey conducted by the Bureau of Justice Statistics found that the incarceration rate for self-identified lesbian, gay, and bisexual individuals was three times that of the U.S. adult population. Ilan H. Meyer et al., *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011–2012*, 107 AM. J. PUB. HEALTH 267, 267 (2017). Moreover, Sharon Dolovich and Russell Robinson have conducted studies of the K6G unit in the Los Angeles County Jail, which houses gay men and transgender women. See Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965 (2012) [hereinafter Dolovich, *Two Models of the Prison*]; Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1 (2011) [hereinafter Dolovich, *Strategic Segregation*]; Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309 (2011). Scholars have also studied the experiences of transgender inmates in California. See, e.g., Valerie Jenness & Sarah Fenstermaker, *Agnes Goes to Prison: Gender Authenticity, Transgender Inmates in Prisons for Men, and Pursuit of “The Real Deal,”* 28 GENDER & SOC’Y 5 (2014). In addition, there is recent data on the proportion of adult LGBT inmates in jails and prisons, and LGBT youth in juvenile detention facilities under the Prison Reform Elimination Act (PREA). See *infra* notes 291–301.

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, 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.⁹ 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.¹⁰ Many of these youth wind up on the streets after suffering family rejection and abuse for being LGBT.¹¹ To date, the connection between LGBT youth homelessness and crime (both during adolescence and later during adulthood) remains underexplored.¹² 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

ORIENTATION 1 (2013), http://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf [<https://perma.cc/2UBU-PHXK>].

9. See *infra* Part III.B.

10. NICO SIFRA QUINTANA, JOSH ROSENTHAL & JEFF KREHELY, CTR. FOR AM. PROGRESS, ON THE STREETS: THE FEDERAL RESPONSE TO GAY AND TRANSGENDER HOMELESS YOUTH 6 tbl.1 (2010), <https://cdn.americanprogress.org/wp-content/uploads/issues/2010/06/pdf/lgbtyouthhomelessness.pdf> [<https://perma.cc/VNB3-PTV5>]

(summarizing studies reporting that between 20 to 40 percent of homeless youth in major U.S. cities identify as LGBT). Moreover, in a nationwide study of over three hundred agencies that serve homeless youth, 94 percent reported working with LGBT homeless youth in the past year and LGBT homeless youth comprised almost 40 percent of their clientele. LAURA E. DURSO & GARY J. GATES, WILLIAMS INST., SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICE PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS 3 (2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf> [<https://perma.cc/Z6SX-H97V>].

11. QUINTANA ET AL., *supra* note 10, at 9.

12. In a future article titled *Unaccompanied Youth and Private-Public Order Failures*, 103 IOWA L. REV. (forthcoming 2018) (draft on file with author), I analyze the connections between LGBT youth homelessness and involvement in the juvenile justice system in greater detail. The limited available data, however, lends support to the connection between LGBT youth homelessness and involvement in the juvenile justice system. For instance, Angela Irvine conducted a survey of 2,100 youths in six juvenile justice institutions across the country. The study found that 15 percent of the youths were LGB, either questioning their sexual orientation or transgender, or expressing their gender in nonconforming ways. Moreover, LGB and gender non-conforming youths were more likely than heterosexual youths to enter the juvenile justice system because they ran away from home or an out-of-home child welfare placement. Angela Irvine, “We’ve Had Three of Them”: Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System, 19 COLUM. J. GENDER & L. 675, 676–77 (2010).

survive on the streets.¹³ Homeless youth are also at greater risk for sexual, physical, and verbal victimization.¹⁴

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.¹⁵ Notably, almost 86 percent of those LGBT foster youth also identified as Latino, Black, or Asian Pacific Islander.¹⁶ 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.¹⁷ Foster youth are also at greater risk for being arrested and incarcerated as adults after aging out of the foster care system.¹⁸

Third, contrary to stereotypes that gay men and lesbians are affluent with high disposable income,¹⁹ 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.”).

14. See generally, e.g., Jennifer P. Edidin, et al., *The Mental and Physical Health of Homeless Youth: A Literature Review*, 43 CHILD PSYCHIATRY & HUM. DEV. 354, 359–60 (2012) (discussing research indicating that homeless youth are at greater risk for victimization).

15. BIANCA WILSON ET AL., WILLIAMS INST., SEXUAL AND GENDER MINORITY YOUTH IN FOSTER CARE: ASSESSING DISPROPORTIONALITY AND DISPARITIES IN LOS ANGELES 6 (2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf [<https://perma.cc/YY97-DM7A>].

16. *Id.* at 8 tbl.2.

17. Joseph J. Doyle Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. POL. ECON. 746, 747 (2008) (summarizing studies involving higher rates of juvenile delinquency among foster youth); Rosemary C. Sarri, Elizabeth Stoffregen & Joseph P. Ryan, *Running Away from Child Welfare Placements: Justice System Entry Risk*, 67 CHILD. YOUTH SERVS. REV. 191, 191 (2016) (concluding that running away from foster care is a high-risk factor for entry into both the juvenile and adult justice systems).

18. Mark E. Courtney et al., *Foster Youth Transitions to Adulthood: A Longitudinal View of Youth Leaving Care*, 80 CHILD WELFARE 685, 708–09 (2001) (reporting high rates of adult criminal involvement and run-ins with law enforcement based on a study of former foster youth in Wisconsin).

19. For instance, in his dissent in *Romer v. Evans*, Justice Antonin Scalia described that “those who engage in homosexual conduct tend to . . . have high disposable income.” 517 U.S. 620, 645 (1996) (Scalia, J., dissenting); see also Luke A. Boso, *Urban Bias, Rural Sexual Minorities, and the Courts*, 60 UCLA L. REV. 562, 606 (2013) (discussing the “common misperception that LGB people are overwhelmingly affluent, geographically connected, and engaged in dominant depictions of gay culture”); Courtney Megan Cahill, *The Oedipus Hex: Regulating Family After Marriage Equality*, 49 U.C. DAVIS L. REV. 183, 227 (2015) (noting the “common anti-gay stereotype of the affluent gay man”); Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589, 1593 (2013) (noting the “affluent gay stereotype”).

especially vulnerable.²⁰ 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.²¹ 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.²²

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,²³ 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.²⁴ They have also used litigation to address some of these neglected problems, including the police profiling of LGBT people and the

20. M.V. LEE BADGETT, LAURA E. DURSO & ALYSSA SCHNEEBAUM, WILLIAMS INST., NEW PATTERNS OF POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf> [<https://perma.cc/4K29-VLZ3>]. Transgender people are four times more likely to live in poverty than nontransgender people. CTR. FOR AM. PROGRESS ET AL., PAYING AN UNFAIR PRICE: THE FINANCIAL PENALTY FOR BEING TRANSGENDER IN AMERICA (2015), <http://www.lgbtmap.org/file/paying-an-unfair-price-transgender.pdf> [<https://perma.cc/V92C-4YLB>]. In addition, 2014 data from the latest Gallup-Healthways Well-Being Index survey found that LGBT Americans report lower financial well-being than non-LGBT people. Gary J. Gates, *LGBT Americans Report Lower Well-Being*, GALLUP (Aug. 25, 2014), <http://www.gallup.com/poll/175418/lgbt-americans-report-lower.aspx> [<https://perma.cc/AZG2-2SXR>].

21. GARY J. GATES, WILLIAMS INST., FOOD INSECURITY AND SNAP PARTICIPATION IN LGBT COMMUNITIES 2 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Food-Insecurity-and-SNAP-Participation-in-the-LGBT-Community.pdf> [<https://perma.cc/VJK2-SR28>].

22. See, e.g., ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT 31–52 (2012).

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.

24. See, e.g., JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES xii (2011); Dean Spade & Craig Willse, *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique*, 21 CHICANO-LATINO L. REV. 38 (2000).

selective enforcement of criminal laws against LGBT communities.²⁵ This Article broadens existing conversations about LGBT identity and crime beyond social mobilization and litigation to consider ideas and methods in criminology.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.²⁷

My central claims are twofold. First, I show that until the mid-1970s—before which almost every U.S. state criminalized same-sex sodomy²⁸—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,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*.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.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.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,

25. See, e.g., *Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012) (challenging Louisiana's Crime Against Nature by Solicitation statute that was disproportionately applied against transgender women).

26. Criminology is the study of criminal lawmaking, criminal lawbreaking, and societal reactions toward criminal lawbreaking. EDWIN H. SUTHERLAND, DONALD R. CRESSEY & DAVID F. LUCKENBILL, *PRINCIPLES OF CRIMINOLOGY* 3 (11th ed. 1992).

27. See *infra* Part IV.

28. William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 662–63 (1999).

29. See *infra* Part II.A.

30. See *infra* Part II.B.

31. See *infra* Part III.

32. To be clear, I am not arguing that antidiscrimination principles should have no role in addressing LGBT criminal justice issues. Rather, my point is that the limited ways in which antidiscrimination principles have been used during this trend overlooks a wide range of LGBT criminal justice hardships and inequality.

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 HANSSSENS 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.

36. See generally RUSSELL SAGE FOUND., THE COLORS OF POVERTY; WHY RACIAL AND ETHNIC DISPARITIES PERSIST (Ann Chih Lin & David R. Harris eds., 2008) (offering a collection of perspectives on why racial and ethnic disparities surrounding poverty persist today).

higher rates than white non-LGBT people,³⁷ and LGBT people of color experience poverty at higher rates than both white non-LGBT and white LGBT people.³⁸ 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.³⁹

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.⁴⁰ 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.⁴¹ Criminology is also a multidisciplinary field, and criminologists have advanced diverse conceptual and empirical models to study crime.⁴² 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.

41. WERNER J. EINSTADTER & STUART HENRY, *CRIMINOLOGICAL THEORY: AN ANALYSIS OF ITS UNDERLYING ASSUMPTIONS* 12 (2d ed. 2006).

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. Savelsberg & 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.⁴³

As a second caveat, although intellectual histories are useful to track the development of an idea over time,⁴⁴ no single intellectual history can offer a fully comprehensive account.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.⁴⁶ The intellectual history is expansive in time.

43. Deborah W. Denno, *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, *Applied Criminology: Research, Policy and Practice*, in *APPLIED CRIMINOLOGY* 18 (Brian Stout et al. eds., 2008).

44. See PIERS BEIRNE, *INVENTING CRIMINOLOGY: ESSAYS ON THE RISE OF HOMO CRIMINALIS* 9 (1993); David Garland, *Criminological Knowledge and Its Relation to Power*, 32 *BRIT. J. CRIMINOLOGY* 403, 412 (1992).

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 *WHAT IS CRIMINOLOGY?* 1 (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].

46. Beyond the methodology discussed *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 crime⁴⁷—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 and gender identity across schools of criminology over time. Through this process, the major themes from the intellectual history took form.

47. See *infra* Part I.A.

48. Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 89 n.1 (2014).

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).

50. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (developing “intersectionality” to evaluate the race and gender dimensions of violence against women of color).

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).

quo” because sodomy laws existed in almost every U.S. state and were widely enforced against LGBT people (especially gay men).⁵² 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.⁵³ 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.⁵⁴ Third, it has neglected the multiple dimensions of LGBT victimization and ignored their interactions with LGBT offending.⁵⁵ 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.⁵⁶

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.

THE FORMER CRIMINAL STATUS QUO (1860S–EARLY 1970S): LGBT PEOPLE AS DEVIANT SEXUAL OFFENDERS

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, *DEVIANT 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.⁶⁰ As historian Jonathan Katz has explained, the words "heterosexual" and "homosexual" did not even exist in the United States until 1892.⁶¹

The view that homosexuality was a feature of individual identity gained force during the second half of the nineteenth century.⁶² As Michel Foucault described, the homosexual "became a personage, a past, a case history, and a childhood."⁶³ During this period, many Western societies (including the United States) became increasingly mobile as a result of rapid industrialization and urbanization.⁶⁴ 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.⁶⁵ In this environment, a greater diversity of sexual preferences and behaviors, including homosexuality, became more publicly visible.⁶⁶

Sodomy laws were rarely enforced in the United States before 1880.⁶⁷ Scholars have interpreted this lack of enforcement as a product of the State's

in Lombroso's writings offers insight into the broader intellectual currents of his time. See Nicole Hahn Rafter & Mary Gibson, *Editors' Introduction*, in CESARE LOMBROSO & GUGLIELMO FERRERO, *CRIMINAL WOMAN, THE PROSTITUTE & THE NORMAL WOMAN* 3, 21 (Nicole Hahn Rafter & Mary Gibson trans., 2004) ("Lombroso should be recognized as a transitional figure between Victorian prudery and the celebrations of sexual freedom characterizing sexology from its foundation in the early twentieth century on."). Third, Lombroso's name appears in the titles of works that made the first calls to "queer" criminology. See Nic Groombridge, *Perverse Criminologies: The Closet of Doctor Lombroso*, 8 *SOC. & LEGAL STUD.* 531 (1999); Stephen Tomsen, *Was Lombroso a Queer? Criminology, Criminal Justice, and the Heterosexual Imaginary*, in *HOMOPHOBIC VIOLENCE* 33 (Steven Tomsen & Gail Mason eds., 1997). These scholars viewed Lombroso as a major figure in part because his early theories included discussions of sexuality.

60. JEFFREY WEEKS, *SEXUALITY* 33 (1986).

61. JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* 33 (1995).

62. WEEKS, *supra* note 60, at 33 ("From the mid-nineteenth century . . . 'the homosexual' . . . was increasingly seen as belonging to a particular species of being, characterized by feelings, latency and a psychosexual condition.").

63. 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 43 (Robert Hurley trans., Vintage Books 1980) (1976).

64. Anita Clair Fellman & Michael Fellman, *The Rule of Moderation in Late Nineteenth-Century American Sexual Ideology*, 17 *J. SEXUAL RES.* 238, 239 (1981).

65. *Id.*

66. See VERN L. BULLOUGH, *HOMOSEXUALITY: A HISTORY* 5 (1979) (noting that in the nineteenth century, "urbanism brought with it greater diversity in sexual preferences" in European and U.S. cities); see also GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE UNDERWORLD 1890-1940*, at 1 (1994) (explaining that "[i]n the half-century between 1890 and the beginning of the Second World War, a highly visible, remarkably complex, and continually changing gay male world took shape in New York City").

67. WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003*, at 21 (2008).

limited role in regulating the private sphere at the time.⁶⁸ For instance, rules of evidence shielded adults who engaged in private consensual sodomy from prosecution by excluding the testimony of a willing sexual partner.⁶⁹ Because the State had this limited role,⁷⁰ middle-class society turned to medical professionals to regulate private sexual morality in this time of great change.⁷¹

In this environment, a science of sexology emerged and homosexuality became the subject of medical inquiry.⁷² In 1869, Carl Westphal—a professor of psychiatry in Berlin—became the first medical practitioner to study homosexuality from a clinical perspective.⁷³ Following Westphal, several renowned physicians advanced the idea that homosexuality was a natural form of human sexuality.⁷⁴ Other prominent physicians, however, relied on new scientific theories—especially degeneracy theory⁷⁵—to define homosexuality as an unnatural sexual inversion.⁷⁶ This reliance deflected social responsibility for sexual vices, including homosexuality, by rooting their causes in individual pathology.⁷⁷

In 1886, German Austrian psychiatrist Richard von Krafft-Ebing advanced the most influential of these positions in his work *Psychopathia Sexualis*.⁷⁸ Krafft-Ebing described homosexuality as a feature of individual personality,⁷⁹ 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

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.

71. DAVID F. GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* 403 (1988).

72. RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 19 (1981).

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.

78. RICHARD VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS* (Rebman Co. 1906) (1886).

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.⁸⁰ Importantly, based on his view that homosexuality was a biological abnormality, Krafft-Ebing argued that punishment was neither an effective nor an appropriate response.⁸¹ Rather, he recommended several nonpunitive interventions to address homosexuality, including masturbation, the promotion of good sexual mores and hygiene, and hypnosis.⁸²

Krafft-Ebing's view that homosexuality was a pathological disorder directly shaped the treatment of homosexuality in Lombroso's early biological theory of crime.⁸³ Lombroso's theory argued that external physical features reflected a person's internal morality,⁸⁴ and that therefore the causes of crime were connected to a person's physical features. Using methods of phrenology and anthropometry,⁸⁵ he distinguished different types of offenders from law-abiding citizens based on measurements of skulls, brains, facial features, and other body parts.⁸⁶ 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.⁸⁷

Critically, Lombroso's theory shifted the discourse on crime away from philosophical debates about proportional punishments for specific *acts*⁸⁸ toward the scientific investigation of criminal *offenders*.⁸⁹ 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 fetishisms, 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 HOMOSEXUAL(ITY) 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").

82. KRAFFT-EBING, *supra* note 78, at 299–300 (summarizing lines of treatment for "antipathic sexual instincts"); MAGNUS HIRSCHFELD, *THE HOMOSEXUALITY OF MEN AND WOMEN* 463 (Michael A. Lombardi-Nash trans., 2000) (summarizing these recommendations).

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.

85. Phrenology is "the study of the shape of the skull and its relation to character traits." Cooper Ellenberg, *Lie Detection: A Changing of the Guard in the Quest for Truth in Court?*, 33 *LAW & PSYCHOL. REV.* 139, 140 (2009). Anthropometry is "the measurement of body parts for the purpose of understanding human variation." Cary Federman, *A "Morphological Sphinx": On the Silence of the Assassin Leon Czolgosz*, 2 *J. THEORETICAL & PHIL. CRIMINOLOGY* 100, 125 (2010).

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.⁹⁰ 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.⁹¹ He explicitly relied on Krafft-Ebing’s pathological view of homosexuality to create this classification.⁹² 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.⁹³

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 1861.⁹⁴ 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.⁹⁵

Historians have documented that economic and demographic changes due to migration and industrialization fueled concerns about the stability of the new unified state.⁹⁶ In this fragile context,⁹⁷ 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.

91. For a more comprehensive discussion of Cesare Lombroso’s treatment of homosexuality in men and women, see generally Jordan Blair Woods, *The Birth of Modern Criminology and Gendered Constructions of Homosexual Criminal Identity*, 62 J. HOMOSEXUALITY 131 (2015).

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 273.

93. See FOUCAULT, *supra* note 63, at 43.

94. DINO CINEL, *THE NATIONAL INTEGRATION OF ITALIAN RETURN MIGRATION, 1870–1929*, at 177–200 (1991).

95. See LUCY RIALI, *SICILY AND THE UNIFICATION OF ITALY: LIBERAL POLICY AND LOCAL POWER 1859–1866*, at 4 (1998).

96. ALIZA S. WONG, *RACE AND THE NATION IN LIBERAL ITALY, 1861–1911: MERIDIONALISM, EMPIRE, AND DIASPORA* 8 (2006).

97. SUZANNE STEWART-STEINBERG, *THE PINOCCHIO EFFECT: ON MAKING ITALIANS, 1860–1920*, at 2 (2007) (noting that “anxiety does in fact describe the post-1860s moment” in Italy).

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

98. *Id.* at 8.

99. Gibson & Rafter, *supra* note 58, at 17–19.

100. At least two factors contributed to this shift. First, criminologists criticized phrenology and anthropometry as flawed science. *See, e.g.*, CHARLES GORING, *THE ENGLISH CONVICT: A STATISTICAL STUDY* (1913). Second, new developments in psychology—especially Sigmund Freud's theory of psychoanalysis and Hervey Cleckley's clinical research on psychopathy—offered novel approaches to studying the causes of crime. *See* HERVEY M. CLECKLEY, *THE MASK OF SANITY: AN ATTEMPT TO REINTERPRET THE SO-CALLED PSYCHOPATHIC PERSONALITY* 238–55 (1941) (introducing and describing a clinical profile of the psychopath); Sigmund Freud, *Three Essays on Sexuality* (1905), *reprinted in* *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 125 (James Strachey ed. & trans., 1953).

101. The arguments in this Section are based on my close readings of five cornerstone texts on psychoanalysis and crime during this period: AUGUST AICHORN, *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.¹⁰² Freudian theory had significant implications for how criminologists addressed culpability and punishment.¹⁰³ Specifically, psychoanalysis drew attention to the unconscious desires that motivated behavior over which people had no control.¹⁰⁴ Many psychoanalysts believed that criminal punishment was ineffective to reform individual actors because their offenses were not products of choice or free will.¹⁰⁵

These ideas about culpability and punishment contributed to significant changes in how criminologists discussed homosexuality in this area of literature.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ In his view, homosexual desires remained as unconscious drives during psychosexual development and were deflected to serve other ends in overt behavior.¹⁰⁹

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.¹¹⁰ 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

102. GENNARO F. VITO & JEFFREY R. MAAHS, *CRIMINOLOGY: THEORY, RESEARCH, AND POLICY* 112, 114 (2012).

103. Gabriel N. Finder, *Criminals and Their Analysts: Psychoanalytic Criminology in Weimar Germany and the First Austrian Republic*, in *CRIMINALS AND THEIR SCIENTISTS: THE HISTORY OF CRIMINOLOGY IN INTERNATIONAL PERSPECTIVE* 447, 454 (Peter Becker & Richard F. Wetzell eds., 2006).

104. Helen Silving, *Psychoanalysis and the Criminal Law*, 51 *J. CRIM. L. CRIMINOLOGY & POLICE SCI.* 19, 23 (1960).

105. *Id.*

106. Susan R. Schmeiser, *The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning*, 20 *YALE J.L. & HUMAN.* 163 (2008) (discussing criminologists' role in emerging and intersecting medical and legal reasoning concerning psychopathy and sexuality).

107. BAYER, *supra* note 72, at 22 (observing that “[a]ll 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,¹¹¹ foreshadowing the reasoning in *Lawrence v. Texas*¹¹² 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.¹¹³ Therefore, although these criminologists disagreed with criminalizing adult homosexuality, they viewed homosexuality during adulthood as worthy of avoiding.¹¹⁴ 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."¹¹⁵ Criminologists applied and honed

111. See, e.g., ALEXANDER & STAUB, *supra* note 101, at 134 (describing punishments for homosexual sodomy as "unwarranted intrusions into the private life of citizens" that are "devoid of any far-reaching, imperative, sociological foundation, and are nothing more than a meaningless and superfluous offense to the general sense of justice").

112. 539 U.S. 558 (2003). In *Lawrence v. Texas*, the U.S. Supreme Court invalidated a Texas law that made it a crime for two persons of the same sex to engage in certain sexual conduct. *Id.* at 578. *Lawrence* will be discussed in more detail in *infra* Part II.B.

113. See, e.g., AICHHORN, *supra* note 101, at 156–57 (describing the case of a seventeen-year-old gay teenager who was put to work in a tailor shop to sublimate his homosexual tendencies); ALEXANDER & STAUB, *supra* note 101, at 143, 144 (describing homosexuality as a problem of child education and stressing that society "must attempt to institute preventive measures by means of rational, psychologically correct education of children" to prevent homosexuality). These interventions often harmed children psychologically. Terry S. Stein, *Theoretical Considerations in Psychotherapy with Gay Men and Lesbians*, 15 J. HOMOSEXUALITY 75, 80 (1988) (stressing that the effects of psychotherapeutic interventions directed to change homosexuality were "frequently extremely negative, serving to reinforce a sense of low self-esteem and rarely affecting any significant change in sexual identity").

114. These recommendations were consistent with wider social currents that stressed improving the conditions of childhood development to promote nondeviant behavior during adulthood. With the growth of the mental hygiene movement in the late nineteenth century, scholars and advocates increasingly explained mental illness in terms of childhood maladjustment that could be addressed through improving family and social conditions. AMANDA BARUSCH, FOUNDATIONS OF SOCIAL POLICY: SOCIAL JUSTICE IN HUMAN PERSPECTIVE 241 (2009). In focusing on childhood development, psychoanalysis provided scientific justifications for interventions that stressed supervised education in schools and the home. THERESA R. RICHARDSON, THE CENTURY OF THE CHILD: THE MENTAL HYGIENE MOVEMENT AND SOCIAL POLICY IN THE UNITED STATES AND CANADA 87 (1989) (describing that during the mental hygiene movement, "[t]he concept of the prevention of delinquency spiraled outward and away from the juvenile courts toward the school, family, and community").

115. CLECKLEY, *supra* note 100, at 258–72 (discussing and defining sixteen personality traits of the psychopath). "Psychopathology" is the study of mental illness. Paul Thagard, *Introduction to the Philosophy and Psychology of Cognitive Science*, in PHILOSOPHY OF PSYCHOLOGY AND COGNITIVE SCIENCE ix, xvii (Paul Thagard ed., 2007).

this profile to study the connection between psychopathy and crime.¹¹⁶ 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.¹¹⁷ Second, stereotypes of homosexuals as sexual psychopaths and pedophiles are common in this literature.¹¹⁸ 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.¹¹⁹ As explained below, these laws worked in conjunction with existing criminal laws against sodomy to coerce LGBT people to undergo psychiatric treatment.¹²⁰

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.¹²¹ The writings of Sandor Rado, Edmund Bergler, Irving Bieber, and Charles Socarides¹²² were especially

116. See, e.g., ROBERT D. HARE, THE PSYCHOPATHY CHECKLIST-REVISED (PCL-R) (1991); Robert D. Hare, *A Research Scale for the Assessment of Psychopathy in Criminal Population*, 1 PERSONALITY & INDIVIDUAL DIFFERENCES 111 (1980).

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.

119. Edwin H. Sutherland, *The Diffusion of Sexual Psychopath Laws*, 56 AM. J. SOC. 142, 145 (1950). For a comprehensive analysis of the state commissions created to study sex offenses and sexual psychopath legislation, see Marie-Amelie George, *The Harmless Psychopath: Legal Debates Promoting the Decriminalization of Sodomy in the United States*, 24 J. HIST. SEXUALITY 225, 233–50 (2015).

120. Estelle B. Freedman, *Uncontrolled Desires: The Response to the Sexual Psychopath, 1920–1960*, in FEMINISM, SEXUALITY, AND POLITICS: ESSAYS BY ESTELLE B. FREEDMAN 121, 132 (2006).

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.¹²³ 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).¹²⁴

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.¹²⁵ Between 1946 and 1959 specifically, twenty-nine states enacted sexual psychopath laws.¹²⁶

A wave of moral panic about sexual predators targeting children during and immediately after World War II contributed to these new laws.¹²⁷ 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.¹²⁸ Images of the "sex criminal" in popular culture started to include storylines about women being alone during wartime.¹²⁹ 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.¹³⁰ The prioritization of traditional family values fed anxieties about populations that were perceived to threaten those values, including gay men.¹³¹

Sexual psychopath laws emerged in this environment of moral panic, and primarily took two forms. The first was directly connected to the criminal domain.¹³² 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."¹³³ 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.¹³⁴ 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.

128. PHILLIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* 71–72 (1998).

129. *Id.* at 72.

130. ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* 258 (1990).

131. *Id.*

132. See, e.g., Freedman, *supra* note 120, at 132.

133. *Id.*

134. *Id.*

sodomy) and noncriminal sexual disorders.¹³⁵ These laws were enforced so heavily against gay men, however, that the term “sexual psychopath” became culturally synonymous with “homosexual.”¹³⁶

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.¹³⁷ 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.”¹³⁸ 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.”¹³⁹ 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.¹⁴⁰ 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.¹⁴¹

Generally, sociological theories of crime can be divided into two camps, each of which I will discuss in turn.¹⁴² First, social structure theories study the *macrolevel* causes of crime (for instance, poverty, unemployment, racism, and

135. *Id.*

136. *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).

137. BAYER, *supra* note 72, at 28.

138. DE RIVER, *supra* note 117, at 83.

139. *Id.*

140. *Id.* at 28.

141. Frank E. Hagan & Peter J. Benekos, *The Nacirema Revisited: A Pedagogical Tool for Teaching Criminological Theory*, 13 J. CRIM. JUST. EDUC. 25, 30 (2002).

142. 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).¹⁴³ Discussions of LGBT identity in this literature are scarce,¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷

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.¹⁴⁸ Accordingly, their theories reflect the idea that certain social conditions influence crime (for

143. STEPHEN E. BROWN, FINN-AAGE ESBENSEN, GIBERT GEIS, *CRIMINOLOGY: EXPLAINING CRIME AND ITS CONTEXT* 265–66 (2013).

144. This conclusion is based on my reading of the major works in this area, including ROBERT E. PARK & ERNEST BURGESS, *INTRODUCTION TO THE SCIENCE OF SOCIOLOGY* (2d ed. 1924); ROBERT E. PARK, ERNEST W. BURGESS & RODERICK D. MCKENZIE, *THE CITY* (1925); CLIFFORD SHAW & HENRY D. MCKAY, *JUVENILE DELINQUENCY AND URBAN AREAS* (1942). My discussion of social structure theories in this Section is limited to social disorganization theories of crime. For space consideration, I omit discussions of Merton’s anomie theory that became popular during the former criminal status quo. However, I conducted close readings of Merton’s major works, which also do not consider LGBT identity in a meaningful way. *E.g.* ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* (1949); Robert Merton, *Social Structure and Anomie*, 3 *AM. SOC. REV.* 672 (1938). Although I do not discuss Merton’s strain theory here, I discuss how anomie and strain theories prompt new questions about LGBT identity and crime *infra* Part IV.C.

145. BROWN ET. AL., *supra* note 143, at 326–27.

146. MARTIN BULMER, *THE CHICAGO SCHOOL OF SOCIOLOGY: INSTITUTIONALIZATION, DIVERSITY, AND THE RISE OF SOCIOLOGICAL RESEARCH* 12–13 (1984).

147. ROBERT M. BOHM, *A PRIMER ON CRIME AND DELINQUENCY THEORY* 67 (2d ed. 2001).

148. *See, e.g.*, SHAW & MCKAY, *supra* note 144, 44, 435–41. Robert Ezra Park and Ernest Burgess, who led Chicago’s Department of Sociology, were the first in the Chicago School to apply principles of biological ecology to study crime. They argued that the city grew from the inside out through a process of invasion, dominance, and succession. They asserted that this process was characterized by a cultural or a racial or ethnic group moving into a territory that was occupied by another group, and battling the occupying group until the invading group dominated the area, after which another group invaded and the cycle repeated itself. *See* PARK & BURGESS, *supra* note 144, 47–62.

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.¹⁴⁹ 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.¹⁵⁰

Importantly, there is little to no consideration of LGBT identity in this literature.¹⁵¹ 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.¹⁵² This research was largely unpublished and never reached the public.¹⁵³ 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.¹⁵⁴

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,

149. I will return to this point *infra* Part IV.B, which discusses how more recent social disorganization theories prompt questions about LGBT identity, neighborhood conditions, and crime.

150. ROBIN F. BACHIN, *BUILDING THE SOUTH SIDE: URBAN SPACE AND CIVIC CULTURE IN CHICAGO 1890–1919*, at 299 (2004).

151. *See supra* note 144.

152. *See* Chad Heap, *The City as a Sexual Laboratory: The Queer Heritage of the Chicago School*, 26 *QUALITATIVE SOC.* 457, 467 (2003). Most of the Chicago School's underground research on homosexuality is in the form of graduate student dissertations and other documents in the archival files of the Ernest W. Burgess Papers in the Special Collections Research Center of the Regenstein Library at the University of Chicago. *Id.* at 458 n.5.

153. *Id.* at 467.

154. *Id.* at 479.

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 & MAAHS, *supra* note 102, at 177.

157. Symbolic interactionism focuses on how a person's interactions with the environment shape that person's self-perception and perception of society. HERBERT BLUMER, *SYMBOLIC INTERACTIONISM: PERSPECTIVE AND METHOD* 2–3 (1969).

158. Jock Young, *Left Realist Criminology: Radical in its Analysis, Realist in its Policy*, in 4 *CRIME: CRITICAL CONCEPTS IN SOCIOLOGY* 286, 296 (Philip Bean ed., 2003).

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

in “such cases, the individual finds it difficult to conform to other rules which he had no intention or desire to break, and perforce finds himself deviant in these other areas as well.” *Id.*

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.*

170. BECKER, *supra* note 161, at 38.

birth of the “homophile” movement in the 1950s.¹⁷¹ 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.¹⁷²

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 movement¹⁷³ as providing a working philosophy for the homosexual.¹⁷⁴ This working philosophy purportedly functioned to justify homosexual behaviors from the perspective of people who engaged in them.¹⁷⁵

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.¹⁷⁶ 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.

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.

176. Alexander Liazos, *The Poverty of the Sociology of Deviance: Nuts, Sluts, and Preverts*, 20 SOC. PROBS. 103, 104 (1972) (discussing how labeling and societal reaction theorists held this intention).

II.

THE NEW VISIBILITY (MID-1970S–TODAY): LGBT PEOPLE AS INNOCENT AND NONDEVIANT 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.

180. ELLEN ANN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 62–63 (2006).

a consequence of twenty-two states adopting the MPC between 1971 and 1983.¹⁸¹

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.¹⁸² 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.¹⁸³

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.¹⁸⁴ 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.¹⁸⁵ 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.¹⁸⁶

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

181. *Id.* at 63.

182. 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).

183. See Siegel, *supra* note 182, at 317–18.

184. 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*].

185. 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.

186. Murray, *supra* note 182, at 1050 (noting that "Kinsey began advocating for legal reform").

different states' criminal laws.¹⁸⁷ The drafters were especially concerned about criminal law intruding into private life.¹⁸⁸ 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 crimes¹⁸⁹—a landmark reform given that every state criminalized private consensual sodomy at the time.¹⁹⁰ This omission remained in the final version of the MPC that the ALI adopted in 1962.¹⁹¹ 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.”¹⁹²

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.¹⁹³ 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.¹⁹⁴

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.¹⁹⁵ 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.¹⁹⁶ The opposing ideas represented in the Hart-Devlin debates would later shape the U.S. Supreme Court's 1965 decision in *Griswold v. Connecticut*,¹⁹⁷ which established a federal constitutional right to privacy and initiated privacy jurisprudence in areas involving reproductive rights, sex, and marriage.¹⁹⁸

187. *Id.* at 1051.

188. *Id.*

189. PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 136–37 (2000).

190. Eskridge, *supra* note 28, at 662.

191. CAIN, *supra* note 189, at 137.

192. MODEL PENAL CODE § 207.5 cmts. (AM. LAW INST., Tentative Draft No. 4 1955); *see also* Darryl Brown, *History's Challenge to Criminal Law Theory*, 3 CRIM. L. & PHIL. 271, 280 (2009) (discussing the role of the harm principle in sodomy reform under the Model Penal Code).

193. REPORT OF THE DEPARTMENTAL COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (1957) [hereinafter “The Wolfenden Report”].

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.

195. PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965); H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963).

196. Siegel, *supra* note 182, at 318.

197. 381 U.S. 479 (1965).

198. Siegel, *supra* note 182, at 318–19.

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.¹⁹⁹ Even after the Court overturned *Bowers* in its 2003 decision in *Lawrence v. Texas*,²⁰⁰ some states continued to have criminal laws on the books prohibiting private consensual sodomy,²⁰¹ and police officers have recently applied these laws against LGBT people in constitutionally suspect ways.²⁰² 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 1973.²⁰³ Many states also began to repeal their sexual psychopath laws in the early 1970s.²⁰⁴ 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.²⁰⁵ 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

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).

200. 539 U.S. 558, 573 (2003) (invalidating on substantive due process grounds Texas's "deviate sexual intercourse" law that criminalized same-sex oral and anal 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].

202. See, e.g., Keith Wagstaff, *Gay Men Are Still Being Arrested for Being Gay in Louisiana*, WEEK (July 30, 2013), <http://theweek.com/articles/461626/gay-men-are-still-being-arrested-being-gay-louisiana> [https://perma.cc/NUT6-TF4Q].

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.²⁰⁶ Based on her findings, Hooker advocated for changing societal conditions that denigrated homosexuality, and against subjecting homosexuals to psychiatric treatment.²⁰⁷

Second, lesbian and gay social movements prioritized eliminating the stigma of disease attached to homosexuality.²⁰⁸ During the homophile movement,²⁰⁹ organizations provided public forums for professional experts to present research challenging this stigmatizing view.²¹⁰ For instance, in 1955, the Mattachine Society released the first issue of its magazine, *Mattachine Review*.²¹¹ The issue featured a summary of Hooker's research,²¹² 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,²¹³ 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.²¹⁴ Energized by radical counterculture movements of the 1960s, many LGBT people pursued a more radical agenda of protest against LGBT oppression.²¹⁵ 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.²¹⁶

206. Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. PROJECTIVE TECH. 18, 19 (1957).

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.

214. ROBERT W. BAILEY, GAY POLITICS, URBAN POLITICS: IDENTITY AND ECONOMICS IN THE URBAN SETTING 287 (1999) (describing crackdowns in San Francisco bars during the 1960s); David Alan Sklansky, *One Train May Hide Another: Katz, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 878 (2008) (“There is widespread awareness that the police systematically harassed gay men and lesbians in the 1950s and 1960s.”).

215. D’EMILIO, *supra* note 125, at 224; Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement’s Agenda*, 47 U.C. DAVIS L. REV. 1667, 1678 (2014) (discussing the emergence of lesbian and gay “liberationist” organizations in the 1970s that were influenced “by the larger progressive political climate of the 1970s”). The Gay Liberation Front described itself as “‘a militant coalition of radical and revolutionary homosexual men and women’ that ‘exist[ed] to fight the oppression of the homosexual as a minority group, and to demand the right to the self-determination of [their] own bodies.’” Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1, 11 (2015) (quoting 10 GLF NEWS (Gay Liberation Front, N.Y.) (Feb. 1970)).

216. D’EMILIO, *supra* note 125, at 233. The Stonewall Riots were only one of many gay liberationist uprisings that occurred during the late 1960s. Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J.L. & GENDER 269, 281 (2015).

Members of these more radical groups joined feminists to protest at the American Psychiatric Association (APA)'s annual conventions in 1970 and 1971.²¹⁷ Demonstrators disrupted presentations and grabbed microphones to denounce psychiatrists who advocated using aversion therapy to treat homosexuality.²¹⁸ 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.²¹⁹ Protest organizers and prominent gay activists also discussed their demands to remove homosexuality from the DSM with APA officials.²²⁰ This mobilization triggered more critical conversations at the 1972 APA convention about the psychiatric discipline's stance toward homosexuality.²²¹ In 1973, the APA's board of trustees voted to remove homosexuality from the DSM.²²²

* * *

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,

217. BAYER, *supra* note 72, at 102, 105.

218. *Id.* at 103, 105.

219. *Id.* at 104.

220. *Id.* at 107.

221. *Id.* at 112.

222. *Id.* at 40. Here, I want to acknowledge that these changes did not eliminate the stigma against transgender people in the profession. In 1980, the APA included "gender identity disorders" in the DSM. GORDENE OLGA MACKENZIE, *TRANSGENDER NATION* 69 (1994). Those labels remained in the DSM until 2013, when the APA changed "gender identity disorders" to appear as "gender dysphoria." AM. PSYCHOL. ASSOC., *REPORT OF THE APA TASK FORCE ON GENDER IDENTITY AND GENDER VARIANCE* (2008), <http://www.apa.org/pi/lgbt/resources/policy/gender-identity-report.pdf> [https://perma.cc/2GAZ-6CZL]. This change reflected the APA's intent to avoid stigmatizing transgender people who sought gender reaffirming medical care and to "better characterize the experiences of affected children, adolescents, and adults." AM. PSYCHIATRIC ASSOC., *GENDER DYSPHORIA* (2013), https://www.psychiatry.org/File_Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf [https://perma.cc/T2LH-8245].

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,

223. VALERIE JENNESS & RYKEN GRATTET, MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT 1 (2001) (“During the 1980s and 1990s, multiple social movements began to identify and address the problem of discriminatory violence directed at minorities.”).

224. Ryken Grattet, Valerie Jenness & Theodore R. Curry, *The Homogenization and Differentiation of Hate Crime Law in the United States, 1978–1995: Innovation and Diffusion in the Criminalization of Bigotry*, 63 AM. SOC. REV. 286, 286 (1998). Generally, these laws prohibited three kinds of hate-motivated crime: physical attacks, destruction of property, and conduct intended to intimidate. *Id.* at 296; see also James B. Jacobs, *The Emergence and Implications of American Hate Crime Jurisprudence*, in HATE CRIME: THE GLOBAL POLITICS OF POLARIZATION 152 (Robert J. Kelly & Jess Maghan eds., 1998) (noting that The Civil Rights Movement was the “long-term impetus” for the wave of hate crime legislation in the 1980s).

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

226. JENNESS & GRATTET, *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”).

228. See, e.g., Gregory M. Herek, *Hate Crimes Against Lesbians and Gay Men: Issues for Research and Policy*, 44 AM. PSYCHOL. 948 (1989).

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.²³⁰ The workshop provided the impetus for the first special collection of published essays on anti-lesbian and gay hate crime.²³¹ 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.²³²

In the 1990s and 2000s, studies of anti-lesbian and gay hate crime victimization surged, which enhanced knowledge in each of these three areas.²³³ As the literature grew, it paid greater attention to anti-transgender hate crime.²³⁴ In addition, there was greater discussion of the underreporting of anti-LGBT hate crime to the police.²³⁵ 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.²³⁶ 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.²³⁷ 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.²³⁸

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

230. Kevin T. Berrill & Gregory M. Herek, *Violence Against Lesbians and Gay Men: An Introduction*, 5 J. INTERPERSONAL VIOLENCE 269, 272 (1990).

231. The essays were published in a 1990 issue of the *Journal of Interpersonal Violence*. See 5 J. INTERPERSONAL VIOLENCE 267–427 (1990).

232. These areas are set out in the table of contents of the special issue.

233. Doug Meyer, *Evaluating the Severity of Hate-Motivated Violence: Intersectional Differences Among LGBT Hate Crime Victims*, 44 SOC. 980, 981 (2010) (summarizing this literature).

234. See Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 AGGRESSION & VIOLENT BEHAV. 170 (2009) (discussing studies on anti-transgender violence).

235. See, e.g., William B. Rubenstein, *The Real Story of U.S. Hate Crime Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213, 1219–20, 1242–43 (2004) (discussing reasons why anti-gay hate crime might be underreported).

236. *Id.*

237. Gregory M. Herek, J. Roy Gillis & Jeanine 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.²³⁹ Many lesbian and gay advocacy groups coordinated with lesbian and gay community centers to establish antiviolence projects to address the problem.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.²⁴¹ Over time, antiviolence projects paid more attention to hate crime affecting a broader spectrum of the LGBT population, including bisexual and transgender people.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 1995.²⁴³ 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.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).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.²⁴⁶ Second, some laws shaped the gathering of hate crime

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

240. Jenness, *supra* note 227, at 150.

241. *Id.* at 154–62 (discussing the multiple functions of antiviolence projects).

242. See, e.g., N.Y.C. ANTI-VIOLENCE PROJECT, <http://www.avp.org> [<https://perma.cc/RQ29-55D4>] (last visited Mar. 12, 2017).

243. Jenness, *supra* note 227, at 149. California passed the first state hate-crime law in 1978. *Id.*

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

245. See, e.g., Hate Crime Sentencing Enhancement Act of 1994, Pub. L. No. 103-322, § 280003(a), 108 Stat. 1796 (1994) (codified in part as amended at 28 U.S.C. § 994 (2006)); WIS. STAT. § 939.645 (1989–90).

246. Wisconsin advanced, and the Court accepted, this argument to uphold the constitutionality of the State's hate crime penalty-enhancement law in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). See *infra* note 251.

statistics.²⁴⁷ 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.²⁴⁸ 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.²⁴⁹

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.²⁵⁰ Although the facts of the case²⁵¹ 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.²⁵² 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.²⁵³

Before the Court, the defendant argued that the Wisconsin statute violated the First Amendment because it impermissibly punished offensive thought.²⁵⁴ 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.²⁵⁵ In upholding the law, the Court relied on antidiscrimination

247. See, e.g., Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified at 28 U.S.C. § 534); MICH. COMP. LAWS ANN. § 28.257a (West 1992).

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.

250. *Mitchell*, 508 U.S. at 483–90.

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.

253. Brief of Petitioner on Writ of Certiorari to the Supreme Court of Wisconsin at 24, *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (No. 92-515); Reply Brief of Petitioner on Writ of Certiorari to the Supreme Court of Wisconsin at 14 n.6, *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (No. 92-515).

254. *Mitchell*, 508 U.S. at 481.

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.”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.²⁵⁷

The second case is the Court’s 2003 decision in *Lawrence v. Texas*, which overruled *Bowers v. Hardwick*²⁵⁸ and invalidated remaining sodomy laws as they applied to private consensual sodomy between two adults.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.²⁶⁰ In fact, Kennedy’s opinion discusses the decriminalization reforms that the MPC and the Wolfenden Report inspired.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.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.²⁶³ This positioning of hate crime laws in the *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.”²⁶⁴ He further stressed the stigma that the Texas law placed on

256. *Id.* at 487.

257. *Id.*

258. 478 U.S. 186, 196 (1986).

259. 539 U.S. 558, 566–78 (2003).

260. Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1123 (2004).

261. *Lawrence*, 539 U.S. at 572–74.

262. *See, e.g.*, Brief for Amici Curiae American Psychological Association, American Psychiatric Association, National Association of Social Workers, and Texas Chapter of the National Association of Social Workers in Support of Petitioners at 24–29, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

263. Brief of the Cato Institute as Amicus Curiae in Support of Petitioners at 20, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

264. *Lawrence*, 539 U.S. at 575.

its targets, including the indignity of the charge itself, the risk of being forced to register as a sex offender for the same crime in other states, and the collateral consequences following a conviction (for example, notations on job application forms).²⁶⁵

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.²⁷⁰ 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.²⁷¹ 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.²⁷² Published annually, the UCR today is based on data from over 18,400 law enforcement agencies across the United States.²⁷³ 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-

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).

272. LARRY J. SIEGEL & JOHN L. WORRALL, *ESSENTIALS OF CRIMINAL JUSTICE* 31 (8th ed. 2013).

273. FED. BUREAU OF INVESTIGATION (FBI), *UNIFORM CRIME REP.* (2013), MESSAGE FROM THE DIRECTOR, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/resource-pages/message-from-the-director/message-from-the-director_final [<https://perma.cc/V5EJ-GGX3>].

theft, motor vehicle theft, and arson) that are reported to the police.²⁷⁴ 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.²⁷⁵

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.²⁷⁶ 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.²⁷⁷

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.²⁷⁸ Scholars have also warned that the inclusion of rigid definitional categories of sexual

274. FBI, UNIFORM CRIME REP., OFFENSES KNOWN TO LAW ENFORCEMENT (2013), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/offenses-known-to-law-enforcement> [<https://perma.cc/JG34-Y57C>].

275. See, e.g., FBI, UNIFORM CRIME REP., EXPANDED OFFENSE DATA: EXPANDED HOMICIDE DATA TABLES (2013), https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-offense/expandedoffensemain_final [<https://perma.cc/3DND-TAZK>].

276. See, for example, Michael Gottfredson and Travis Hirschi's "self-control theory" discussed *infra* Part IV.D.

277. FBI, UNIFORM CRIME REP., 2013 HATE CRIME STAT.: VICTIMS (2013), https://www.fbi.gov/about-us/cjis/ucr/hate-crime/2013/topic-pages/victims/victims_final [<https://perma.cc/226L-5D9R>]. The DOJ released the first hate crime report in 1996 to comport with the mandates of the 1990 Hate Crime Statistics Act. FBI, UNIFORM CRIME REP., HATE CRIME (2013), <https://www.fbi.gov/about-us/cjis/ucr/hate-crime> [<https://perma.cc/LDX8-E74N>] (providing hate crime reports for each year since 1996). Statistics involving gender identity were only recently included in 2012, a change that the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 required. Pub. L. No. 111-84, § 4701, 123 Stat. 2835 (2009) (codified at 18 U.S.C. § 249 (2012)).

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.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.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.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.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

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

280. GARY J. GATES & JASON OST, THE GAY AND LESBIAN ATLAS 3 (2004) (noting that “a broad public policy agenda” could be influenced by new sexual-orientation-inclusive census data).

281. LGBT organizations have engaged in their own data collecting efforts in attempts to quantify the extent of the problem. See, e.g., AMNESTY INT’L, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE IN THE U.S. (2001), <https://www.amnesty.org/download/Documents/84000/amr511222005en.pdf> [<https://perma.cc/CWF2-G8GB>].

282. SHANNAN WILBER, JUV. DETENTION ALTERNATIVES INITIATIVE, LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN THE JUVENILE JUSTICE SYSTEM 11 (2015); MEREDITH DANK ET AL., URB. INST., LOCKED IN: INTERACTIONS WITH THE CRIMINAL JUSTICE AND CHILD WELFARE SYSTEMS FOR LGBTQ YOUTH, YMSM, AND YWSW WHO ENGAGE IN SURVIVAL SEX 32 (2015), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000424-Locked-In-Interactions-with-the-Criminal-Justice-and-Child-Welfare-Systems-for-LGBTQ-Youth-YMSM-and-YWSW-Who-Engage-in-Survival-Sex.pdf> [<https://perma.cc/L7UM-LZKB>]; KATAYOON MAJD, JODY MARKSAMER & CAROLYN REYES, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS 61 (2009), http://www.nclrights.org/wp-content/uploads/2014/06/hidden_injustice.pdf [<https://perma.cc/D66W-K48W>]. Examples of prohibited “quality of life” offenses include camping, sleeping, and begging in public; loitering or loafing; vagrancy; sitting or lying down in public; living in vehicles; food sharing; and storing personal belongings in public. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 7 (2014).

pushbacks in both courts and legislatures against racial profiling involving stop-and-frisks and the aggressive enforcement of quality of life offenses.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.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.²⁸⁵ Because this dataset omitted sexual orientation and gender identity information, it is impossible to identify parallel LGBT-based disparities.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.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.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.²⁸⁹

283. See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (relying 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.*

284. BESIKI LUKA KUTATELADZE & NANCY R. ANDILORO, PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY—TECHNICAL REPORT (2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf> [<https://perma.cc/Z65W-9S37>].

285. *Id.* at 75.

286. It is important to note, however, that the dataset provided some data on the gender of prosecutors and defendants. See *id.* at 26, 62.

287. Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75–76 (2015).

288. David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 285 (2001).

289. See generally Boso, *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*

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.²⁹⁰ 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).²⁹¹ 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.²⁹² This data has provided a useful snapshot²⁹³ of the proportion of adult and juvenile inmates who self-identify as LGBT and their higher rates of sexual victimization.²⁹⁴

Panic Defense, 42 U.C. DAVIS L. REV. 471 (2008) (discussing the gay panic defense); Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 HARV. J.L. & GENDER 407 (2014) (discussing anti-LGBT bias in voir dire); Kathyne M. Young, *Outing Batson: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire*, 48 WILLAMETTE L. REV. 243 (2011) (discussing anti-LGBT bias in voir dire).

290. CAL. DEP'T OF CORR. & REHAB., 2013 OUTCOME EVALUATION REP. 2, 13 (2014), http://www.cdcr.ca.gov/Adult_Research_Branch/Research_documents/Outcome_evaluation_Report_2013.pdf [https://perma.cc/6JL4-ZQSE].

291. See Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (codified at 42 U.S.C. §§ 15601 *et seq.*).

292. BUREAU OF JUSTICE STATISTICS (BJS), PRISON RAPE ELIMINATION ACT (SEXUAL VICTIMIZATION IN CORRECTIONAL FACILITIES), <http://www.bjs.gov/index.cfm?ty=tp&tid=20> [https://perma.cc/HC35-LDDX] (last visited Mar. 11, 2017). The BJS created the National Prison Rape Statistics Program (NPRSP), which includes four separate data collection efforts to measure the prevalence of sexual violence in different correctional facilities. *Id.*

293. PREA only requires a 10 percent random sample of all federal, state, and county prisons; a representative sample of municipal prisons; and that at least one prison from each state be included. *Id.*

294. For instance, 2011–2012 data from the National Inmate Survey (NIS) included 111,500 “non-heterosexual” prisoners (compared to 1,298,000 heterosexual inmates), and reported that nonheterosexual prisoners were over ten times more likely to suffer inmate-on-inmate sexual victimization (12.2 percent versus 1.2 percent) and staff sexual misconduct (5.4 percent versus 2.1 percent) than heterosexual prisoners. See ALLEN J. BECK, MARCUS BERZOFKY & CHRISTOPHER KREBS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, at 18 (2013), <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> [https://perma.cc/AD9F-GWKH]. Nonheterosexual prisoners also reported higher rates of staff sexual misconduct (5.4 percent versus 2.1 percent). In jails, the NIS reported 50,100 nonheterosexual inmates compared to 654,500 heterosexual inmates. “Non-heterosexual” included gay, lesbian, bisexual, and other sexual orientations. *Id.* The NIS is part of the NPRSP. BJS, *supra* note 292. 2012 data from the National Survey of Youth in Custody included 2,200 nonheterosexual youth in juvenile facilities (compared to 15,900 heterosexual youth),

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.²⁹⁵ In May 2012, after nine years of investigation, the DOJ promulgated a set of regulations implementing PREA.²⁹⁶ The DOJ's summary of the final regulations stressed that LGBT inmates were particularly vulnerable to sexual abuse in prisons.²⁹⁷ The regulations included protections against the assault, harassment, and prolonged isolation that many LGBT inmates suffered while incarcerated.²⁹⁸ After the DOJ promulgated these regulations, the federal government was immediately required to implement PREA in federal prisons.²⁹⁹ States had until August 2013 to certify compliance with PREA regulations or lose federal funds.³⁰⁰ Since the DOJ's promulgation, several states have passed their own PREA laws.³⁰¹

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*.

and reported that nonheterosexual youth were more likely to suffer sexual assault by another youth (10.3 percent versus 1.5 percent) than heterosexual youth. ALLEN J. BECK & DAVID CANTOR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH 20 (2012), <http://www.bjs.gov/content/pub/pdf/svjfry12.pdf> [<https://perma.cc/H2ZF-3ATP>]. Nonheterosexual youth reported nearly similar rates of sexual victimization by facility staff than heterosexual youth (7.5 percent versus 7.8 percent), but reported higher rates of sexual victimization by both youth and staff (14.3 percent versus 8.9 percent). *Id.*

295. AM. CIVIL LIBERTIES UNION (ACLU), END THE ABUSE: PROTECTING LGBTI PRISONERS FROM SEXUAL ASSAULT I (2014), <https://www.aclu.org/sites/default/files/assets/012714-prea-combined.pdf> [<https://perma.cc/H78Z-WCP4>].

296. *Id.*

297. NAT'L PRISON RAPE ELIMINATION COMM'N (NPREC), NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 7–8 (2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf> [<https://perma.cc/3927-5VTN>].

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).

303. CAROL SMART, *WOMEN, CRIME AND CRIMINOLOGY: A FEMINIST CRITIQUE* xiii-xiv (1976).

304. Daly & Chesney-Lind, *supra* note 302, at 511–12; Frances Heidensohn & Loraine Gelsthorpe, *Gender and Crime*, in THE OXFORD HANDBOOK OF CRIMINOLOGY, *supra* note 42, at 381, 383.

knowledge gaps about female offending and victimization.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.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.³⁰⁷

Although LGBT people's specific experiences of crime have not been a strong focus of feminist criminology,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.³⁰⁹ Less than 20 percent of the youth identified as heterosexual and most left home before the age of seventeen.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.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.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.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.³¹⁴ Given that same-sex couples have only recently gained

305. Daly & Chesney-Lind, *supra* note 302, at 512.

306. *Id.* at 537–38.

307. *Id.*

308. Lesbian activists criticized second-wave feminism in the 1960s for excluding queer women and perpetuating discrimination against them. JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 316 (3d ed. 2012).

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.

314. *See generally* John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, in 28 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* 1 (M.H. Tonry ed., 2001) (discussing studies on marriage and desistance from crime).

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.³¹⁵ 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.³¹⁶

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 populations³¹⁷ 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.”³¹⁸ Crime research that calls attention

315. Douglas NeJaime, *Windsor's Right to Marry*, 123 YALE L.J. ONLINE 219, 239 (2013) (discussing that same-sex marriage advocates “emphasized the unique social and cultural status associated with marriage”); Kimberly D. Richman, *By Any Other Name: The Social and Legal Stakes of Same-Sex Marriage*, 45 U.S.F. L. REV. 357, 378 (2010) (stating that “the legal and financial benefits . . . are often at the core of lawyers’ and other advocates’ arguments for same-sex marriage”).

316. Richard G. Wight, Allen J. LeBlanc & M.V. Lee Badgett, *Same-Sex Legal Marriage and Psychological Well-Being: Findings from the California Health Interview Survey*, 103 AM. J. PUB. HEALTH 339, 314 (2013) (discussing studies on marriage and desistance from crime).

317. See *supra* notes 10–18.

318. Gregory M. Herek, *Why Tell If You're Not Asked? Self-Disclosure, Intergroup Contact, and Heterosexuals' Attitudes Towards Lesbians and Gay Men*, in OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY 197, 204 (Gregory M. Herek et al. eds., 1996); Theodore R. Sarbin, *The Deconstruction of Stereotypes: Homosexuals and Military Policy*, in OUT IN FORCE: SEXUAL

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.³¹⁹ 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.³²⁰

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.³²¹ 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.³²² 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.³²³ 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.³²⁴ 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).³²⁵

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.³²⁶

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

319. *See supra* Part I.B.2.

320. Vanessa R. Panfil, *Better Left Unsaid? The Role of Agency in Queer Criminological Research*, 22 CRITICAL CRIMINOLOGY 99 (2014) [hereinafter Panfil, *Better Left Unsaid*]. For a more comprehensive discussion of Panfil's work on gay gang members, see generally VANESSA R. PANFIL, *THE GANG'S ALL QUEER: THE LIVES OF GAY GANG MEMBERS* (2017).

321. Panfil, *Better Left Unsaid*, *supra* note 320, at 104, 105.

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,³²⁷ 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.³²⁸ The NCVS was created to capture crimes that victims did not report to the police.³²⁹ For the reasons discussed previously, underreporting is a particular concern in the context of anti-LGBT hate crime victimization.³³⁰

The NCVS asks participants about several demographic characteristics, including age, marital status, sex, race, and income.³³¹ 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.³³²

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).

329. CAROLYN TURPIN-PETROSINO, UNDERSTANDING HATE CRIMES: ACTS, MOTIVES, OFFENDERS, VICTIMS, AND JUSTICE 17 (2015).

330. Rubenstein, *supra* note 235, at 1220.

331. Questions involving demographic characteristics are part of the NCVS Basic Screen Questionnaire, which is a separate document from the NCVS Crime Incident Report that asks about the criminal incidents themselves. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, QUESTIONNAIRES: NCVS BASIC SCREEN QUESTIONNAIRE, http://www.bjs.gov/content/pub/pdf/ncvs1_2012.pdf [https://perma.cc/H8CW-WLTH] (last visited Mar. 11, 2017).

332. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCVS CRIME INCIDENT REPORT 33–35, http://www.bjs.gov/content/pub/pdf/ncvs2_2012.pdf [https://perma.cc/NL2U-YUZT] (last visited Mar. 11, 2017).

risk for a much wider range of victimization than hate crime.³³³ 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.³³⁴ 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).³³⁵ 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).³³⁶ 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.³³⁷ 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.³³⁸

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

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.

338. See generally Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415 (2012) (discussing bisexual erasure in same-sex marriage litigation); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000) (discussing why the category of bisexuality has been erased in contemporary American political and legal discourse).

emerge from intersectional and LGBT-inclusive crime data.³³⁹ 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.³⁴⁰ The NTDS revealed that race had a large impact on transgender respondents' interactions with the police.³⁴¹ Specifically, white transgender respondents experienced respectful treatment from the police at much higher levels than transgender respondents of color.³⁴² 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.³⁴³ 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).³⁴⁴ 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.³⁴⁵ Over a dozen states have enacted safe harbor exceptions to laws criminalizing prostitution for

339. JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY & NAT'L GAY & LESBIAN TASKFORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011), http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf [<https://perma.cc/FN8D-GF4R>].

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.³⁴⁶ 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.³⁴⁷

Homeless youth are particularly vulnerable to sex trafficking.³⁴⁸ Not having a place to sleep is a key factor that contributes to homeless youth entering the sex trade.³⁴⁹ 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.³⁵⁰ 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,³⁵¹ and that victimization is a key risk factor for offending.³⁵² For instance, studies have reported that youth who are victims of violent crime are more likely to be perpetrators of violence as adults.³⁵³ At the same time, youth offenders are more likely to be victims of a range of crimes, including assault, robbery, larceny, and vandalism.³⁵⁴

Under the new visibility, the paradigm shift away from the deviant LGBT sexual offender to the innocent and nondeviant LGBT hate crime victim has

346. CHELSEA PARSONS ET AL., CTR. FOR AM. PROGRESS, 3 KEY CHALLENGES IN COMBATING THE SEX TRAFFICKING OF MINORS IN THE UNITED STATES 5 (2014).

347. *Id.*; COVENANT HOUSE, *supra* note 345, at 19 (discussing how youth ages eighteen and older are shut out of government and private funding allocated for sex trafficking victims).

348. COVENANT HOUSE, *supra* note 345, at 19.

349. *Id.*

350. *Id.*

351. *See, e.g.*, Janet L. Lauritsen, Robert J. Sampson & John H. Laub, *The Link Between Offending and Victimization Among Adolescents*, 29 CRIMINOLOGY 265, 265 (1991).

352. *See* JENNIFER N. SHAFFER & R. BARRY RUBACK, U.S. DEP'T JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, VIOLENT VICTIMIZATION AS A RISK FACTOR FOR VIOLENT OFFENDING AMONG JUVENILES 1 (2002), <https://www.ncjrs.gov/pdffiles1/ojjdp/195737.pdf> [<https://perma.cc/27BQ-3CGA>].

353. SCOTT MENARD, U.S. DEP'T JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, SHORT- AND LONG- TERM CONSEQUENCES OF ADOLESCENT VICTIMIZATION, YOUTH VIOLENCE RESEARCH BULLETIN 14 (2002), <https://www.ncjrs.gov/pdffiles1/ojjdp/191210.pdf> [<https://perma.cc/62P2-YUXH>].

354. *See, e.g.*, Lauritsen, Sampson & Laub, *supra* note 351, at 286.

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.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.³⁵⁶

To understand how these interactions could unfold in the LGBT context, revisit the high representation of LGBT homeless youth.³⁵⁷ Many LGBT youth wind up on the streets after suffering family rejection and abuse.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.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).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.”³⁶¹

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

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.

356. DURSO & 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. KOSCIW 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).

357. See QUINTANA ET AL., *supra* note 10.

358. *Id.* at 9.

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).

360. Jeanne G. Kaufman & Cathy Spatz Widom, *Childhood Victimization, Running Away, and Delinquency*, 4 J. RES. CRIME & DELINQ. 347, 349 (1999). Beyond survival crime, homeless youth can come into contact with law enforcement and the courts through the multitude of laws and ordinances prohibiting life-sustaining behaviors of homeless populations. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 282, at 18–25; COAL. ON HOMELESSNESS, S.F., PUNISHING THE POOREST: HOW THE CRIMINALIZATION OF HOMELESSNESS PERPETUATES POVERTY IN SAN FRANCISCO 5–9 (2015); Alexandra Natapoff, *Gideon’s Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 446 (2015).

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

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.³⁶³ 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.³⁶⁴ 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.³⁶⁵ The K6G unit is a small unit in the jail that holds approximately 350–400 residents who are gay men or transgender women.³⁶⁶ 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.

364. Brian's story is told in *The Other Side of the Rainbow: Young, Gay and Homeless in Metro Atlanta*, JUV. JUST. INFO. EXCHANGE (July 13, 2011), <http://jjie.org/2011/07/13/other-side-of-rainbow-young-gay-homeless-metro-atlanta> [https://perma.cc/XTF8-MDWM].

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."³⁶⁷ 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 dangerous³⁶⁸—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.³⁶⁹ 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.³⁷⁰

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.³⁷¹

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.³⁷² 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.³⁷³ Demonstrating the NLLFS's influence, several amicus briefs and expert reports discussed or cited the NLLFS in the marriage equality litigation.³⁷⁴

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.³⁷⁵ DLC theories focus on the development of criminal and antisocial behavior during an individual's life span from childhood to adulthood.³⁷⁶ 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.³⁷⁷

Eight major DLC theories have emerged from the longitudinal studies published in the 1990s.³⁷⁸ 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”).

372. *About—NLLFS*, NAT'L LONGITUDINAL LESBIAN FAM. STUDY, <https://www.nllfs.org/about> [<https://perma.cc/9EQM-E276>] (last visited Mar. 11, 2017).

373. Henry Bos, Nanette Gartrell & Loes van Gelderen, *Adolescents in Lesbian Families: DSM-Oriented Scale Scores and Stigmatization*, 25 *J. GAY & LESBIAN SOC. SERVS.* 121, 123 (2013).

374. *See, e.g.*, Brief of American Sociological Association as Amicus Curiae in Support of Petitioners at 9–10, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574); Brief of American Sociological Association as Amicus Curiae in Support of Respondent Kristin M. Perry and Edith Schlain Windsor at 10–13, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (Nos. 12-144, 12-307).

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).³⁷⁹ 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.³⁸⁰

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.³⁸¹ 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 rejection³⁸² and bullying at school³⁸³ 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).³⁸⁴

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

379. David P. Farrington, *Developmental and Life-Course Criminology: Theories and Policy Implications*, in CRIMINOLOGICAL THEORY: A LIFE-COURSE APPROACH 167, 170 (Matt DeLisi & Kevin M. Beaver eds., 2011); David P. Farrington, *Introduction to Integrated Developmental & Life-Course Theories of Offending*, *supra* note 378, at 6.

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).

383. HUMAN RIGHTS WATCH, "LIKE WALKING THROUGH A HAILSTORM": DISCRIMINATION AGAINST LGBT YOUTH IN US SCHOOLS 19–38 (2016), https://www.hrw.org/sites/default/files/report_pdf/uslgbt1216web_2.pdf [<https://perma.cc/ZCL2-3R9M>] (presenting the results of a study showing that bullying and harassment is a serious problem for LGBT youth today); see generally JOSEPH G. KOSCIW ET AL., GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS (2011), [http://www.glsen.org/sites/default/files/2011 National School Climate Survey Full Report.pdf](http://www.glsen.org/sites/default/files/2011%20National%20School%20Climate%20Survey%20Full%20Report.pdf) [<https://perma.cc/46YP-3XQT>] (discussing bullying statistics in schools and possible benefits of antibullying policies).

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.

386. Georgia Zara & David P. Farrington, *A Longitudinal Analysis of Early Risk Factors for Adult-Onset Offending: What Predicts a Delayed Criminal Career?*, 20 CRIM. BEHAV. & MENTAL HEALTH 257, 260 (2010).

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).

389. For a complete list of the variables in the CSDD, see DAVID P. FARRINGTON, *CAMBRIDGE STUDY IN DELINQUENT DEVELOPMENT (GREAT BRITAIN), 1961-1981* (1999), <http://halley.sju.edu/8488/8488cb.pdf> [<https://perma.cc/GC8C-B6HJ>].

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

391. *OUT OF CONTROL: ASSESSING THE GENERAL THEORY OF CRIME* 110 (Erich Goode ed., 2008).

empirical support in the late 1980s.³⁹² 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.³⁹³ 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.³⁹⁴ Importantly, Sampson and Groves's social disorganization model included racial or ethnic heterogeneity and socioeconomic status as variables to explain the distribution of crime.³⁹⁵ 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 people³⁹⁶ facilitate illicit drug use among gay men.³⁹⁷ 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.³⁹⁸ 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.

392. See Robert J. Sampson & W. Byron Groves, *Community Structure and Crime: Testing Social-Disorganization Theory*, 94 AM. J. SOC. 774 (1989).

393. *Id.* at 777, 782.

394. *Id.* at 786–94 (presenting the study findings).

395. *Id.* at 788.

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]”).

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).

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).

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.³⁹⁹ 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."⁴⁰⁰ 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).⁴⁰¹ The core policy recommendations of GST are to reduce exposure, and to help people respond to strain in noncriminal ways.⁴⁰²

One of the major advantages of GST is that it can be applied to study group differences in crime.⁴⁰³ For instance, criminologists have applied GST to examine differences in crime rates within and across groups based on age,⁴⁰⁴

399. Strain theories of crime have their origins in the work of Robert Merton, who in 1938 applied Durkheim's concept of "anomie" to study crime. See Merton, *supra* note 144, at 3.

400. For a summary of Agnew's GST, see Robert Agnew, *Foundation for a General Strain Theory of Crime and Delinquency*, 30 CRIMINOLOGY 47, 61 (1992). Anger is the focus of GST, but other negative emotions are also important. *Id.* at 49.

401. Robert Agnew, *Controlling Crime: Recommendations from General Strain Theory*, in CRIMINOLOGY AND PUBLIC POLICY: PUTTING THEORY TO WORK 25, 28 (Hugh D. Barlow & Scott H. Decker eds., 2010).

402. *Id.* at 25.

403. Nicole Leeper Piquero & Miriam D. Sealock, *Race, Crime, and General Strain Theory*, 8 YOUTH VIOLENCE & JUV. JUST. 170, 171 (2010).

404. See, e.g., Robert Agnew, *Stability and Change in Crime over the Life Course: A Strain Theory Explanation*, in 7 ADVANCES IN CRIMINOLOGICAL THEORY, DEVELOPMENTAL THEORIES OF CRIME AND DELINQUENCY 101 (Terence P. Thornberry ed., 1997).

sex,⁴⁰⁵ and race or ethnicity.⁴⁰⁶ To date, there are no published studies that apply GST to explore connections between LGBT identity and crime.⁴⁰⁷

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.⁴⁰⁸ 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.⁴⁰⁹ 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).⁴¹⁰ 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).⁴¹¹

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

405. See, e.g., Lisa M. Broidy, *A Test of General Strain Theory*, 39 CRIMINOLOGY 1 (2001); Lisa Broidy & Robert Agnew, *Gender and Crime: A General Strain Theory Perspective*, 6 J. RES. CRIME & DELINQ. 275 (1997).

406. See, e.g., David Eitle & R. Jay Turner, *Stress Exposure, Race, and Young Adult Male Crime*, 44 SOC. Q. 243 (2003); Joanne M. Kaufman et al., *A General Strain Theory of Racial Differences in Criminal Offending*, 41 AUSTL. & N.Z. J. CRIMINOLOGY 421 (2008); Ronald L. Simons et al., *Incidents of Discrimination and Risk for Delinquency: A Longitudinal Test of Strain Theory with an African American Sample*, 20 JUST. Q. 827 (2003).

407. See generally Deeanna M. Button, *Understanding the Effects of Victimization: Applying General Strain Theory to the Experiences of LGBQ Youth*, 37 DEVIANT 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).

408. Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 1 PSYCHOL. SEX ORIENTATION & GENDER DIVERSITY 1, 3 (2013).

409. Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. HEALTH & SOC. BEHAV. 38 (1995) (articulating minority stress theory); Michael L. Hendricks & Rylan J. Testa, *A Conceptual Framework for Clinical Work with Transgender and Gender Nonconforming Clients: An Adaptation of the Minority Stress Model*, 43 PROF. PSYCH. 460 (2012).

410. Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. 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,⁴¹² and view socialization as the key process through which social controls prevent individuals from committing crime.⁴¹³ 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."⁴¹⁴ Self-control theory views individual self-control as the primary mechanism of criminal restraint.⁴¹⁵ It argues that people develop their sense of self-control during early childhood, and that once acquired, self-control remains relatively stable throughout life.⁴¹⁶ The theory identifies ineffective socialization during early childhood as the primary source of low self-control.⁴¹⁷ Schools and other social institutions contribute to socialization, but the theory views parents as most important in the socialization process.⁴¹⁸ 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.⁴¹⁹

Self-control theory attempts to explain group differences in crime rates based on age, sex, and race.⁴²⁰ 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.

414. MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME (1990).

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.⁴²¹ 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.⁴²² Moreover, compared to a heterosexual family comparison group, children of lesbian parents reported lower levels of aggression and rule-breaking behavior.⁴²³

The second theory is John Hagan's "power-control" theory.⁴²⁴ 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, "[W]hat 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?"⁴²⁵ 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.⁴²⁶ 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.⁴²⁷

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

421. Henny M.W. Bos et al., *The USA National Longitudinal Lesbian Family Study (NLLFS): Homophobia, Psychological Adjustment, and Protective Factors*, 12 J. LESBIAN STUD. 455, 462 (2008).

422. *Id.* at 464.

423. See, e.g., Nanette Gartrell & Henny Bos, *US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, 126 PEDIATRICS 28, 32 (2010).

424. JOHN HAGAN, *STRUCTURAL CRIMINOLOGY* (1989).

425. *Id.* at 166.

426. Some researchers have found that same-sex parents divide family responsibilities more equitably than opposite-sex parents. See, e.g., Abbie E. Goldberg, "Doing" and "Undoing" Gender: *The Meaning and Division of Housework in Same-Sex Couples*, 5 J. FAM. THEORY & REV. 85, 95 (2013).

427. See, e.g., Gartrell & Bos, *supra* note 423, at 32.

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.

