

2012

## Queer (In)Justice: Mapping New Gay (Scholarly) Agendas

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### Recommended Citation

Queer (In)Justice: Mapping New Gay (Scholarly) Agendas, 102 J. CRIM. L. & CRIMINOLOGY 171 (2012) (reviewing JOEY L. MOGUL et al., QUEER (IN)JUSTICE (2011)).

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## BOOK REVIEW

### ***QUEER (IN)JUSTICE: MAPPING NEW GAY (SCHOLARLY) AGENDAS***

**GIOVANNA SHAY\* & J. KELLY STRADER\*\***

JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* (Beacon Press 2011). 216 pp.

*The 2011 book Queer (In)Justice surveys involvement of sexual minorities in all phases of the what the authors term the “criminal legal system.” It examines the treatment of LGBTQ people as criminal defendants, victims, and prisoners. Queer (In)Justice moves beyond the typical focus of gay rights activists and scholars in the criminal law area to address the everyday treatment of LGBTQ people by police, prosecutors, courts, and corrections authorities. Relying heavily on prison abolitionist movement thinking, the book calls into question reliance on criminal punishment as a means of combating violence against LGBTQ people. Although largely anecdotal, and sometimes over-heated in its rhetoric, Queer (In)Justice succeeds in constructing a compelling narrative and mapping out largely uncharted territory. This Review provides an overview and critique of Queer (In)Justice, situating the book within current legal scholarship. The Review then suggests topics for further research in this developing area, taking account of recent developments in the LGBTQ rights movement.*

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## I. INTRODUCTION

Recently, the LGBTQ<sup>1</sup> rights movement has had high-profile victories, such as the passage of same-sex marriage legislation in New York and the repeal of Don't Ask, Don't Tell. There is some truth to the observation that these well-financed<sup>2</sup> campaigns reflect the priorities of economically advantaged, predominantly white gays to gain mainstream status and acceptance.<sup>3</sup> This is not the whole story, however. When New Yorkers celebrated marriage equality, they did so at the Stonewall Inn,<sup>4</sup> recognized as a birthplace of the gay rights movement and the site of the 1969 uprising against police harassment by relatively powerless and stigmatized gay and transgender people, some of them young people of color.<sup>5</sup>

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<sup>1</sup> We use the term "LGBTQ" to include the categories lesbian, gay, bisexual, transgender, queer, and questioning. The term "queer" broadly defines those who do not fit within majority groups of sexual orientation, sexual expression, and gender identity. We occasionally use the terms "LGBTQ" and "queer" interchangeably.

<sup>2</sup> See Michael Barbaro, *Behind Gay Marriage, an Unlikely Mix of Forces*, N.Y. TIMES, June 26, 2011, at A1 (describing the Wall Street financing of extremely well-organized lobbying efforts in support of the same-sex marriage bill); see also Elisabeth Bumiller, *Out and Proud to Serve*, N.Y. TIMES, Sept. 20, 2011, at A12 (describing the repeal of Don't Ask, Don't Tell on September 20, 2011, and the new policy that allows gay and lesbian service members to serve openly).

<sup>3</sup> JOEY L. MOGUL ET AL., *QUEER (IN)JUSTICE*, at xviii (2011) ("[LGBTQ rights groups] have been dominated by white, middle-class leadership and membership, and have also relied heavily on financial support of affluent, white gays. As a result, their agendas tend to favor assimilation . . . over challenges to the systemic violence and oppressions it produces."); see also WILLIAM N. ESKRIDGE, JR., *GAYLAW 5* (1999) ("[G]aylegal struggles have been dominated by white middle-class male perspectives."); Courtney Megan Cahill, *Disgust and the Problematic Politics of Similarity*, 109 MICH. L. REV. 943, 956 (2011) ("[T]he more that gays look like straights, the more likely it is that those straights who are unsympathetic to the idea of same-sex marriage might be able to empathize . . ."); Nancy Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 544 (2009) ("The couples chosen as plaintiffs in marriage litigation, and others who are spokespersons for marriage equality, emphasize how much they resemble married heterosexual couples."); Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1375, 1389 (2005) (identifying Massachusetts marriage equality opinion's "like-straight" reasoning and its "assimilation of homosexuality to a heterosexualized marriage norm").

<sup>4</sup> Elizabeth A. Harris & Adriane Quinlan, *Where the Fight Began, Cries of Joy and Talk of Weddings*, N.Y. TIMES, June 25, 2011, at A3 ("Crowds gathered, screamed and embraced in Sheridan Square near the Stonewall Inn, where the gay-rights movement began more than 40 years ago.").

<sup>5</sup> See Shannon Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 N.Y.L. SCH. J. HUM. RTS. 589, 592 (2001) (asserting that transgender people were "the most likely to fight back at Stonewall," and describing the gay rights movement as "a movement that was launched by bull daddies, drag queens, and transsexuals in 1969"); see also Morgan Bassichis, Alexander Lee & Dean Spade, *Building an Abolitionist Trans & Queer Movement with Everything We've Got, in CAPTIVE GENDERS 15* (Eric A. Stanley & Nat Smith eds., 2011) (describing the Stonewall Rebellion as "a fight against racist, anti-poor, and anti-queer violence").

Many of the recent LGBTQ movement's goals turn on weighty constitutional law questions, perhaps partly because of what Justice Scalia has termed the "law-profession culture"<sup>6</sup> in which the issues are debated and litigated. At times, however, these debates do not capture the full complexity of the challenges facing LGBTQ people, some of whom are more concerned with meeting basic economic needs than with gaining the ability to marry. And many LGBTQ people of color, as members of multiple minority groups, grapple with the "synergistic" forms of such multi-level discrimination.<sup>7</sup>

In the criminal justice arena, the LGBTQ rights movement has had particularly narrow goals. The movement has principally focused its energy on undoing unfavorable legislation—sodomy laws—and on enacting legislation viewed as favorable—hate crimes, sentencing enhancement statutes, and, more recently, anti-bullying statutes. Many thus viewed the Supreme Court's 2003 invalidation of sodomy laws in *Lawrence v. Texas*<sup>8</sup> as an overarching gay rights victory<sup>9</sup> and states' enactment of hate crimes statutes as evidence of society's move towards protecting sexual minorities as it protects racial, ethnic, and religious minorities.

These achievements have had limited effects on the day-to-day

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<sup>6</sup> *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."). Justice Scalia used the term "law-profession culture" disparagingly, in order to group the *Lawrence* majority with "law-profession" elites. We employ his term to make a different point—that LGBTQ rights advocates often focus their efforts on constitutional rights litigation, reflecting the underlying interests of those advocates, many of whom hail from academia.

<sup>7</sup> Darren Leonard Hutchinson, "Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse, 85 CORNELL L. REV. 1358, 1384 (2000) (arguing that "gay rights activists pursue white and upper-class political agendas"); see also Kristine E. Newhall & Erin E. Buzuvis, (*e*)Racing Jennifer Harris: Sexuality and Race, Law and Discourse in *Harris v. Portland*, 32 J. SPORT & SOC. ISSUES 345 (2008) (using "intersectional analysis" to describe how both homophobia and racism played a role in discrimination against a Penn State basketball player).

<sup>8</sup> 539 U.S. at 578. Although sodomy prosecutions for private, non-commercial consensual sexual activities were relatively rare, sodomy laws did have a wide impact on LGBTQ rights in other areas, such as family law. See *infra* text accompanying notes 13–14.

<sup>9</sup> See William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1040 (2004) ("Lawrence represent[s] a regime shift for gay people analogous to the regime shift that *Brown* and *Loving* represented for people of color and that *Roe* and *Craig* represented for women."); Sarah Kershaw, *Adversaries on Gay Rights Vow State-by-State Fight*, N.Y. TIMES, July 6, 2003, at N8 ("[Lawrence was] a revolutionary moment akin to the aftermath of the decisions in *Brown v. the Board of Education*, which banned school segregation, and *Roe v. Wade*, which legalized abortion.").

functioning of the criminal justice system, however. *Lawrence* was surely a watershed victory,<sup>10</sup> and its elimination of criminal stigma has real practical importance for LGBTQ people in areas such as family law.<sup>11</sup> However, the decision has had relatively limited effect as criminal law precedent.<sup>12</sup> Similarly, hate crimes statutes may send an important message, but have done little to deter violence against LGBTQ people.<sup>13</sup> Indeed, the most recent data show a substantial increase in hate crimes against LGBTQ people, including horrific examples of hate-inspired homicides.<sup>14</sup>

It is perhaps time, then, for the LGBTQ rights movement to expand its principal criminal justice goals to the issues that continue to confront LGBTQ people on the street and in the home every day. In terms of crime enforcement, LGBTQ people face discrimination by police and prosecutors on an ongoing basis. And as victims of crime, LGBTQ people face police indifference, even hostility, when confronted with crimes such as domestic abuse.

Refocusing the LGBTQ-rights movement in the criminal justice context would therefore mean moving beyond broad constitutional and legislative goals towards ground-level issues such as discriminatory prison policy and practice, police targeting of LGBTQ people, police indifference

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<sup>10</sup> MOGUL ET AL., *supra* note 3, at 10 (“Enforced or not, sodomy laws have accumulated a cultural force that extends beyond their now technically defunct legal reach.”); *see id.* at 72–73 (discussing the collateral consequences of sodomy statutes).

<sup>11</sup> *See* Matt Larsen, Note, *Lawrence v. Texas and Family Law: Gay Parents’ Constitutional Rights in Child Custody Proceedings*, 60 N.Y.U. ANN. SURV. AM. L. 53 (2004) (arguing that after *Lawrence*, it is unconstitutional to consider gay parents’ sexual orientations in custody disputes).

<sup>12</sup> M. Blake Huffman, *North Carolina Courts: Legislating Compulsory Heterosexuality by Creating New Crimes Under the Crime Against Nature Statute Post-Lawrence v. Texas*, 20 LAW & SEXUALITY 1 (2011) (describing how North Carolina courts have continued to enforce the “crime against nature” statute post-*Lawrence* by judicially narrowing it, while countenancing discriminatory enforcement against LGBT defendants); J. Kelly Strader, *Resurrecting Lawrence v. Texas as a Basis for Challenging Criminal Prosecutions*, 25 CRIM. JUST. 30, 31 (Summer 2010) (surveying post-*Lawrence* precedent and concluding that “the *Lawrence* decision has had surprisingly little impact on lower federal courts and state courts” in criminal cases).

<sup>13</sup> MOGUL ET AL., *supra* note 3, at 126 (noting statistics documenting a jump in anti-gay bias crimes in California during the Proposition 8 campaign).

<sup>14</sup> *See* Lee Romney, *Hate Crimes Against Gays, Others Rise, Report Says*, L.A. TIMES, July 13, 2011, at A12 (reporting that data collected by the National Coalition of Anti-Violence Programs show a 13% increase from 2009 to 2010 in violent crimes against LGBTQ people or those perceived to fall within that group). The data reveal some chilling recent examples: “An 18-year-old gay man from Texas allegedly slain by a classmate who feared a sexual advance. A 31-year-old transgender woman from Pennsylvania found dead with a pillowcase around her head. A 24-year-old lesbian from Florida purportedly killed by her girlfriend’s father, who disapproved of the relationship.” *Id.*

to violence against LGBTQ people, and the discriminatory treatment of LGBTQ people in the courts. In some respects, this shift would mark a return to the core issues that touched off the modern gay rights movement.

As scholars of criminal law who examine issues of gender and sexuality, we were therefore heartened to see the release of a book devoted to LGBTQ issues in criminal justice. *Queer (In)Justice: The Criminalization of LGBT People in the United States*, by Joey Mogul, Andrea Ritchie, and Kay Whitlock, synthesizes many themes emerging from research and activism regarding queer folk in various aspects of the criminal justice system—including violence against LGBTQ people, use of homophobic tropes in prosecutions of LGBTQ people, and custodial sexual abuse of prisoners with non-heterosexual orientations.<sup>15</sup>

The book is a welcome contribution, given that many leading works about “gays and the law” discuss criminal issues primarily within the context of sodomy laws and other criminal prohibitions used to stigmatize sexual minorities.<sup>16</sup> Because the book’s narrative is often based in anecdote, *Queer (In)Justice* does not always provide a comprehensive overview of the issues it addresses. Nonetheless, the book effectively widens the lens to encompass more aspects of LGBTQ interaction with the criminal justice system than are typically the focus of criminal justice reform efforts. The book follows themes of subordination of LGBTQ people through various phases of the process (arrest, charging, trial, incarceration) and across roles within that process (defendant, victim, prisoner).

Most interesting to us, and potentially to other scholars, the book suggests many areas for further study. In this Review, we identify openings for scholarship that would build upon the themes and issues that *Queer (In)Justice* raises. The potential topics are numerous and include traditional legal scholarship, cross-disciplinary scholarship, and qualitative and quantitative research.

In Part II, this Review provides an overview of *Queer (In)Justice*. Part III focuses on some particular narratives that the authors discuss and that illustrate the daily injustices faced by LGBTQ people. Part IV discusses the shortcomings of recent criminal justice reform efforts, and Part V introduces topics for further research and reform.

## II. BROADENING THE DEBATE

*Queer (In)Justice* seeks to substantially broaden the focus of the

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<sup>15</sup> MOGUL ET AL., *supra* note 3.

<sup>16</sup> *See, e.g.*, ESKRIDGE, *supra* note 3, at 327–83 (describing and compiling laws and regulations targeting gay people throughout American history).

criminal justice reform movement on behalf of LGBTQ people. The book situates the problem of violence against gays within the framework of “mass incarceration.”<sup>17</sup> It draws on the work of critics of the “prison-industrial complex,” including Angela Y. Davis<sup>18</sup> and progressive activist groups such as Critical Resistance and the Sylvia Rivera Law Project.<sup>19</sup> At times, the rhetoric of the prison abolition movement can be a bit overheated, and *Queer (In)Justice* shares this flaw. The book does effectively elucidate, however, the ways in which the “criminal legal system”—as the authors term it<sup>20</sup> and as others have noted—is “regressive.”<sup>21</sup> That is, the system ensnares poor people of color, with a special burden on poor people of color who are gay or transgender.

The work is organized in part chronologically and in part thematically. It begins with a chapter on “Colonial Legacies,” tracing the origins and enforcement of colonial sodomy laws.<sup>22</sup> The second chapter, “Gleeful Gay Killers, Lethal Lesbians, and Deceptive Gender Benders,” focuses on “queer criminal archetypes,” from demonized killers Leopold & Loeb to executed Florida prostitute-turned-alleged-serial-killer Aileen Wuornos.<sup>23</sup> The third chapter, “The Ghosts of Stonewall,” describes the policing of gay social spaces, sex work, and public sex.<sup>24</sup> In the fourth chapter, “Objection! Treatment of Queers in Criminal Courts,” the authors describe homophobia and transphobia in the judicial system.<sup>25</sup> The fifth chapter, “Caging Deviance: Prisons as Queer Spaces,” is one of the most detailed and

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<sup>17</sup> MOGUL ET AL., *supra* note 3, at xii; see Loic Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DAEDALUS, Summer 2010, at 74 (crediting David Garland with introducing the term “mass incarceration” into the popular and scholarly discourse).

<sup>18</sup> MOGUL ET AL., *supra* note 3, at xvi.

<sup>19</sup> *Id.* at 146–49. See DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 19–42 (2011) (describing the political philosophy of the critical, prison-abolitionist trans movement).

<sup>20</sup> MOGUL ET AL., *supra* note 3, at xix–xx.

<sup>21</sup> Cf. David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97, 98–99 (2007) (arguing that “the ‘politics of crime,’ which encourages elected officials to expand the reach and the sanctions of criminal law, leads to regressive and racially biased practices across the system”). The *Queer (In)Justice* authors sometimes employ especially fiery rhetoric to make their point. See, e.g., MOGUL ET AL., *supra* note 3, at xx (describing the “historically pervasive, consistent, and persistent systemic violence that characterizes the criminal legal system” and concluding that the system is “rotten—that is to say, foundationally and systematically violent and unjust”).

<sup>22</sup> MOGUL ET AL., *supra* note 3, at 1–19.

<sup>23</sup> *Id.* at 20–44.

<sup>24</sup> *Id.* at 45–68.

<sup>25</sup> *Id.* at 69–91.

substantive chapters in the book.<sup>26</sup> In this chapter, the authors describe the myriad ways in which LGBTQ prisoners suffer discrimination and abuse. The sixth chapter, “False Promises: Criminal Legal Responses to Violence Against LGBT People,” examines the ways in which criminal justice reform has failed to alleviate the wrongs described in the earlier chapters.<sup>27</sup> In the final chapter, “Over the Rainbow: Where Do We Go from Here?,” the authors suggest approaches for correcting these wrongs, with particular attention paid to economically disadvantaged persons, trans persons, and people of color.<sup>28</sup>

*Queer (In)Justice* attempts an ambitious survey. The work’s scope is itself useful, given that scholars have yet to examine many aspects of how the criminal legal system treats LGBT people. However, the book’s effectiveness is at times undercut by its largely anecdotal approach, which strings together a series of high-profile incidents and cases. The book often reads like a collection of stories that made the news, many of them (such as the Leopold and Loeb case) well-known and often told. The book also largely fails to provide comprehensive data or evidence of discrimination. This emphasis on storytelling over quantitative research may be understandable, given that the three co-authors are primarily civil rights advocates. Despite these shortcomings, there is an undeniable power in the narrative that the book tells. The next section provides a brief overview of that narrative.

### III. THE POWER OF THE NARRATIVE

The collective power of the stories that the authors present cannot be denied. *Queer (In)Justice* puts a human face on the issues by recounting numerous disturbing, and sometimes horrific, instances of abuse and discrimination. The authors chronicle the discriminatory treatment of LGBTQ people, citing studies done by bar associations and judicial commissions: queer defendants are more likely to be arrested and prosecuted for certain offenses than straight defendants; queer youth are more likely to be detained pretrial than straight youth; and queer defendants convicted of sex offenses receive harsher sentences than their straight counterparts.<sup>29</sup>

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<sup>26</sup> *Id.* at 92–117.

<sup>27</sup> *Id.* at 118–40.

<sup>28</sup> *Id.* at 141–58.

<sup>29</sup> *Id.* at 77–78; see also Caitlyn Silhan, *The Present Case Does Involve Minors: An Overview of the Discriminatory Effects of Romeo and Juliet Provisions and Sentencing Practices on Lesbian, Gay, Bisexual, and Transgender Youth*, 20 *LAW & SEXUALITY* 97 (2011) (describing how “Romeo and Juliet” exceptions to statutory rape provisions often apply only to opposite-sex couples, resulting in long prison sentences and sex offender



The authors also recount numerous examples of homophobic rhetoric used by courts and prosecutors. In one homicide case, for example, a prosecutor described the defendant as a “hard-core” lesbian.<sup>30</sup> In a death penalty case in which the defendant was convicted of killing his lover, the prosecutor argued for the death penalty on the grounds that “sending a homosexual to the penitentiary certainly isn’t a very bad punishment.”<sup>31</sup> In a case in which a transgender man was prosecuted for sexual assault on the theory that consensual sex acts were rendered involuntary because the complainants did not know the defendant was trans, the judge said at sentencing, “What this case is about is deceit.” The judge thus viewed the defendant’s gender identity as a lie rather than as a genuine expression of the defendant’s self.<sup>32</sup>

One of the best-developed chapters elaborates upon the theme of “prisons as queer spaces.”<sup>33</sup> It begins with a well-publicized account, the Roderick Johnson case, one of the best-known examples of prison sexual violence. While incarcerated in the Texas Department of Criminal Justice, Johnson was subjected to numerous, brutal sexual assaults. When he sought help, prison officials made repeated remarks suggesting that Johnson should not mind the abuse because he was gay.<sup>34</sup>

While this chapter discusses how prison sexual violence disproportionately affects LGBTQ prisoners, it does not offer much sustained analysis of the efforts to eliminate prison sexual violence.<sup>35</sup> It cites the first Bureau of Justice Statistics national survey on the issue in 2003<sup>36</sup> and mentions the Prison Rape Elimination Act (PREA),<sup>37</sup> but it does not evaluate the PREA reforms or describe the countervailing restrictions on prisoners’ access to courts under the Prison Litigation Reform Act (PLRA).<sup>38</sup>

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registration for LGBTQ youth who participate in the same conduct as their straight counterparts).

<sup>30</sup> MOGUL ET AL., *supra* note 3, at 83.

<sup>31</sup> *Id.* at 89.

<sup>32</sup> *Id.* at 77; *see also* Aeyal Gross, *Gender Outlaws Before the Law: The Courts of the Borderland*, 32 HARV. J.L. & GENDER 165 (2009) (discussing a similar case in Israel).

<sup>33</sup> MOGUL ET AL., *supra* note 3, at 95; *see* Daniel R. Schaffer, *Queer (In)Justice: The Criminalization of LGBT People in the United States*, PRISON LEGAL NEWS, July 2011, at 48 (reviewing MOGUL ET AL., *supra* note 3 in the leading publication directed at incarcerated people).

<sup>34</sup> MOGUL ET AL., *supra* note 3, at 93.

<sup>35</sup> *Id.* at 98–103.

<sup>36</sup> *Id.* at 99.

<sup>37</sup> *Id.* at 105–06; *see* PREA, 42 U.S.C. §§ 15601–15609 (2006).

<sup>38</sup> *See* PLRA, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (1996) (codified at 18 U.S.C. § 3623; 28 U.S.C. § 1932 (2006)); Margo Schlanger & Giovanna

*Queer (In)Justice* goes beyond the problem of prison rape, outlining other issues affecting LGBTQ prisoners. It describes how correctional facilities penalize consensual sex between inmates and punish prisoners who are perceived to be gay or gender non-conforming for non-sexual behavior.<sup>39</sup> It mentions the “butch wing” in Fluvanna Women’s Correctional Center in Virginia, in which gender-nonconforming women were segregated and taunted.<sup>40</sup> It also deals at length with the problems of transgender prisoners, including a heightened risk of sexual assault and limited access to gender-affirming medical care.<sup>41</sup>

The authors demonstrate the influence of prison abolition movement thinking,<sup>42</sup> arguing that prisons are “mythmaking institutions” that reinforce gendered roles and stereotypes, as well as racial tropes.<sup>43</sup> In a recent article, law professor Kim Shayo Buchanan presented a particularly rich and nuanced exposition of similar themes (though not necessarily tied to the abolitionist movement). Professor Buchanan’s piece refutes racialized myths about prison rape while seeking to expose how [non]responses to prison sexual violence can reinforce conventional masculinities.<sup>44</sup>

Although *Queer (In)Justice* criticizes administrative segregation of gay prisoners, it does not examine the controversy surrounding the K6G unit of the Los Angeles County Detention Center.<sup>45</sup> This segregated LGBTQ unit has been the subject of varied assessments by legal scholars including Russell K. Robinson and Sharon Dolovich.<sup>46</sup> In provocative pieces,

Shay, *Preserving the Rule of Law in America’s Jails & Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139 (2008) (describing restrictions on prison litigation under the PLRA).

<sup>39</sup> MOGUL ET AL., *supra* note 3, at 97.

<sup>40</sup> *Id.* at 109.

<sup>41</sup> *Id.* at 110–17.

<sup>42</sup> See Bassichis, Lee & Spade, *supra* note 5, at 16, 34 (questioning how the mainstream gay rights movement became “pro-police, pro-prisons, and pro-war,” and advocating “strategies that will reduce and ultimately eliminate the number of people and dollars going into prison” (emphasis omitted)).

<sup>43</sup> MOGUL ET AL., *supra* note 3, at 92–106; see Cassandra Shaylor, *Neither Kind Nor Gentle: The Perils of ‘Gender Responsive Justice,’* in *THE VIOLENCE OF INCARCERATION* 145, 154 (Phil Scranton & Judge McMulloch eds., 2009) (advocating prison abolition as a response to a correctional system that perpetuates racialized stereotypes of violent masculinities).

<sup>44</sup> Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender & the Rule of Law*, *YALE L. & POL’Y REV.* 1 (2010); see also Kim Shayo Buchanan, *E-Race-ing Gender: The Racial Construction of Prison Rape*, in *MULTIDIMENSIONAL MASCULINITIES AND LAW: FEMINIST AND CRITICAL RACE APPROACHES* (Frank R. Cooper & Ann C. McGinley eds., forthcoming 2012).

<sup>45</sup> MOGUL ET AL., *supra* note 3, at 108–09.

<sup>46</sup> See Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 *AM. CRIM. L. REV.* 1 (2011) [hereinafter Dolovich, *Strategic Segregation*]; Sharon Dolovich, *Two Models*

Professors Robinson and Dolovich take different views of the K6G unit. While Robinson criticizes it for relying on stereotypes about gay men and for being culturally insensitive to the realities of men of color,<sup>47</sup> Dolovich defends the K6G unit as a necessary measure, given the violent atmosphere of the L.A. County Jail.<sup>48</sup>

With respect to everyday criminal law enforcement, *Queer (In)Justice* illustrates the ways in which police nationwide continue to target LGBTQ people for certain crimes, especially “vice” crimes such as prostitution, lewd conduct, and indecent exposure. The popular “broken windows” theory of law enforcement assumes that such “quality of life” crimes can lead to the deterioration of neighborhoods and to an increase in more serious offenses. These types of crimes, however, provide police and prosecutors with enormous discretion in deciding whether and when to arrest and prosecute.<sup>49</sup> The authors effectively describe how such vague crimes as solicitation to commit prostitution can, for example, lead to arrests for “walking while trans.”<sup>50</sup> Such discriminatory practices seem to fall under the radar of most groups focused on criminal justice reform and LGBTQ rights.

As to the treatment of victims of crimes, the authors also effectively describe the relative lack of attention paid to economically underprivileged and trans victims, and to victims who are people of color. The authors, for example, contrast the outraged response to Matthew Shepard’s murder with the relative indifference that followed the killing in Memphis of an African-American transgender woman, Duanna Johnson.<sup>51</sup>

Although the authors do not address the bullying issue in detail, we note that the recent spate of bullying-induced suicides of young LGBTQ people raises many of the same themes that the authors address. It is significant, for example, that the most publicized of these cases have

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*of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY (forthcoming 2012); Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race and Incarceration*, 99 CALIF. L. REV. 1309 (2011); see also Jeannie Suk, *Redistributing Rape*, 48 AM. CRIM. L. REV. 111 (2011) (criticizing Dolovich’s defense of the K6G unit as protecting only gay men and transgender women from prison rape).

<sup>47</sup> Robinson, *supra* note 46, at 1335, 1376.

<sup>48</sup> Dolovich, *Strategic Segregation*, *supra* note 46, at 5–6.

<sup>49</sup> MOGUL ET AL., *supra* note 3, at 48–49, 53; see Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006) (describing the “broken windows” theory and providing a critical assessment of that theory).

<sup>50</sup> MOGUL ET AL., *supra* note 3, at 61.

<sup>51</sup> *Id.* at 143–45.

involved victims who have been privileged and white.<sup>52</sup>

One of the book's most important contributions is to describe the violence inflicted by the system itself. The authors note that "state-sponsored violence is seldom named and prosecuted as criminal, though it may involve killing large numbers of people, torture, massive theft, and use of sexual violence."<sup>53</sup> As the book recounts, recent statistics show that "law enforcement officers were the third largest category of perpetrators of anti-LGBT violence"<sup>54</sup> and the "problem of police misconduct is both systemic and commonplace."<sup>55</sup> Yet such violence has seldom been addressed by mainstream LGBTQ rights organizations.<sup>56</sup>

Discriminatory police practices in arrests and prosecutions are themselves a form of violence against LGBTQ people. Police targeting of LGBTQ people is an ongoing miscarriage of justice, whether the offense is "walking while trans" (prosecuted as soliciting prostitution) or soliciting "lewd conduct" in places (such as remote parts of public parks) where the harm from such conduct is hard to fathom.<sup>57</sup> As the authors note, "[g]ay men and transgender women are among the most visible targets of sex policing."<sup>58</sup>

Despite a popular perception that anti-gay policing is a bygone

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<sup>52</sup> Compare, for example, the amount of attention paid to the suicides of Tyler Clementi and Carl Walker-Hoover. See Richard Pérez-Peña & Nate Schweber, *Roommate Is Arraigned in Rutgers Suicide Case*, N.Y. TIMES, May 24, 2011, at A22 (describing the highly-publicized suicide of Rutgers University student Tyler Clementi that resulted from the taping and public posting of Clementi's sexual encounter with another man); Chris Rohmann, *Stage Struck: Pesticide for Bullies*, VALLEY ADVOC. (May 20, 2010), <http://www.valleyadvocate.com/article.cfm?aid=11785> (describing the suicide of eleven-year-old African-American Springfield student Carl Walker-Hoover, who was bullied because he was perceived to be gay, and whose tragic death "provoked far less media attention and community soul-searching than" the highly-publicized suicide of Phoebe Prince, who was taunted because of an opposite-sex love triangle).

<sup>53</sup> MOGUL ET AL., *supra* note 3, at xvi.

<sup>54</sup> *Id.* at 47.

<sup>55</sup> *Id.* at 51.

<sup>56</sup> *Id.* at 47.

<sup>57</sup> There is substantial scholarship concerning the legal, cultural, and expressive aspects of public sex. See, e.g., Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUM. J. GENDER & L. 1, 12–31 (2008); Bernard E. Harcourt, *Foreword: "You Are Entering a Gay and Lesbian Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-)Queers*, 94 J. CRIM. L. & CRIMINOLOGY 503, 509–10 (2004); Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1658–59 (2004); see generally MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY* 167–203 (2010) (describing how the use of disgust as a reaction to same-sex sexual activities leads to increased enforcement of statutes that criminalize public sex).

<sup>58</sup> MOGUL ET AL., *supra* note 3, at 53.

problem of the pre-Stonewall era,<sup>59</sup> discriminatory police conduct continues to occur every day all over the country. For just one highly publicized example, which the authors do not mention, take the recent sting operation conducted in Palm Springs, California—described as “the gayest city in America.”<sup>60</sup> The Palm Springs police chief recently provoked outrage when directing an operation targeting a neighborhood known for gay cruising.<sup>61</sup> The police chief told the arresting officers, “What a bunch of filthy mother-fuckers. You guys should get paid extra for this.”<sup>62</sup> After the remarks became public, the police chief resigned in 2011.

As the authors of *Queer (In)Justice* point out, such attitudes exist throughout police departments in America, and LGBTQ people suffer as a result.<sup>63</sup> Enforcement of lewd conduct statutes is rarely focused on straight people.<sup>64</sup> And though the queer rights movement may be squeamish about confronting discriminatory prosecutions of public sex, these are cases that regularly ruin people’s lives. One need not be a fan of former United States Senator Larry Craig to question the wisdom of sending police officers into bathroom stalls to effectively entrap closeted people who seek anonymous sexual partners in public spaces.<sup>65</sup> One man arrested in North Carolina, post-*Lawrence*, for private conduct with another adult stated that although the prosecutor ultimately dropped the charges, the arrest itself constituted punishment: “as long as [the crime against nature] remains on the books, it is a crime punishable by an arrest, a stay in jail, media attention and a fine of \$450.”<sup>66</sup>

These tactics can have far-reaching repercussions. For example, the effects of lewd conduct targeting can and do turn tragic, leading to suicides

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<sup>59</sup> Cf. David Alan Sklansky, “*One Train May Hide Another*”: Katz, *Stonewall*, and the *Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 880, 932 (2008) (making a fascinating argument that modern criminal procedure privacy protections were shaped by 1960s “anxieties” about “homosexuality and its policing,” such as “peepholes and undercover decoys in public lavatories,” and concluding that “[g]ay men and lesbians can still face police harassment, but far less than they used to face”).

<sup>60</sup> Phil Willon, *Chief Quits Over Gay Sex Sting*, L.A. TIMES, Jan. 11, 2011, at AA1.

<sup>61</sup> *Id.*

<sup>62</sup> *Palm Springs Police Chief Apologizes for Calling Gays ‘Filthy Mother F---,’* LGBTQ NATION (Dec. 29, 2010), <http://www.lgbtqnation.com/2010/12/palm-springs-police-chief-apologizes-for-calling-gays-filthy-mother-f/>.

<sup>63</sup> MOGUL ET AL., *supra* note 3, at 45–68.

<sup>64</sup> *Id.* at 53.

<sup>65</sup> Entrapment as a formal defense is hard to prove, but entrapment is effectively what occurs in many of these cases. For a comprehensive analysis of the entrapment defense in the context of gay sting operations, see Jordan Blair Woods, *Don’t Tap, Don’t Stare, and Keep Your Hands to Yourself! Critiquing the Legality of Gay Sting Operations*, 12 J. GENDER RACE & JUST. 545 (2009).

<sup>66</sup> Huffman, *supra* note 12, at 4 (internal quotation marks omitted).

when the names of the arrestees become public.<sup>67</sup> Also, defendants arrested for crimes such as lewd conduct may be too afraid of public exposure to even present a defense to the charges.<sup>68</sup> Conviction of even a minor sex offense can mandate registration as a sex offender and produce dire employment consequences.<sup>69</sup> And, not surprisingly, given the over-policing of racial and ethnic minorities,<sup>70</sup> the people targeted for these crimes are often people of color.<sup>71</sup> Even LGBTQ juveniles may face a disproportionate risk of criminal sanction for alleged sex offenses such as statutory rape.<sup>72</sup>

In addition, LGBTQ people face discrimination within the courts themselves.<sup>73</sup> Studies have shown that queer people commonly face derogatory comments in the courts and even discrimination by the attorneys who represent them.<sup>74</sup> One respondent to a California survey on LGBTQ people in the courts stated that, “jury members suggested that a witness was gay and therefore his testimony could not be trusted.”<sup>75</sup>

It is difficult to read these stories without empathizing with the many victims of the injustices that the authors describe. The book’s narratives put a human face on problems that many readers may know only in the abstract. At the same time, the sheer number of stories, many of them familiar, undercuts the authors’ goals. A more in-depth telling of fewer cases may have more effectively inspired the advocacy that the authors support.

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<sup>67</sup> MOGUL ET AL., *supra* note 3, at 58–59.

<sup>68</sup> *Id.* at 77.

<sup>69</sup> See Robert L. Jacobson, Note, “Megan’s Laws” Reinforcing Old Patterns of Anti-Gay Police Harassment, 87 GEO. L.J. 2431 (1999) (describing how the wide adoption of sex offender registry statutes in the 1990s ensnared a new generation of gay men targeted for minor “sex offenses” such as solicitation, for which straights were rarely arrested).

<sup>70</sup> See Marc Mauer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, HUM. RTS., Fall 2010, at 14.

<sup>71</sup> MOGUL ET AL., *supra* note 3, at 59.

<sup>72</sup> See Michael H. Meidinger, *Peeking Under the Covers: Taking a Closer Look at Prosecutorial Decision-Making Involving Queer Youth and Statutory Rape*, 32 B.C. THIRD WORLD L.J. (forthcoming Spring 2012).

<sup>73</sup> See 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) (describing studies of gays’ experiences in the courts of New Jersey, California, and the United Kingdom); Todd Brower, *Obstacle Courts: Results of Two Studies on Sexual Orientation Fairness in California Courts*, 11 AM. U. J. GENDER SOC. POL’Y & L. 39 (2002).

<sup>74</sup> MOGUL ET AL., *supra* note 3, at 74–75; cf. Sarah Valentine, *When Your Attorney Is Your Enemy: Preliminary Thoughts on Ensuring Effective Representation for Queer Youth*, 19 COLUM. J. GENDER & L. 773 (2010).

<sup>75</sup> MOGUL ET AL., *supra* note 3, at 75.

## IV. DEFECTS IN CURRENT REFORM EFFORTS

One of *Queer (In)Justice*'s most important achievements is its illumination of the ways in which recent criminal justice reform efforts have fallen short. In some instances, though, the analysis fails to recognize important issues or to delve into certain issues in an in-depth way.

For example, the penultimate chapter, "False Promises," deals with violence against LGBTQ people. This chapter covers both hate crimes against gay people and the police response to violence within same-sex intimate relationships—a combination that is at times dissonant. The authors' decision to merge these two topics probably reflects a shift in the focus of anti-violence advocacy groups from bias crimes to domestic violence.<sup>76</sup> Each of these topics, however, is complex and important and therefore probably merits its own chapter, if not its own book.

A notable oversight here is the police and judicial [non]response to same-sex rape. Law professor I. Bennett Capers provides an excellent analysis of this subject in the article "Real Rape Too" in the *California Law Review*.<sup>77</sup> Lara Stemple also has written about male rape survivors, using an international human rights framework.<sup>78</sup>

True to their theme of taming mass incarceration, the authors of *Queer (In)Justice* advocate solutions to the problem of homophobic violence and domestic violence that do not rely so heavily on criminal punishment, specifically prison. For example, they reject additional hate crime penalties as a solution.<sup>79</sup> This position brings to the surface questions that are among the most interesting in the book: How can LGBTQ movements get law enforcement to take violence against gays seriously when the criminal legal system has historically criminalized, abused, and stigmatized queer folk? Is appealing to criminal penalties an appropriate response, when gay sex has

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<sup>76</sup> Adele M. Morrison, *Queering Domestic Violence to "Straighten Out" Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law's Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN'S STUD. 81, 89–90 (2003) ("[Some] anti-violence programs . . . originally founded to focus on issues of violence against LGBT individuals and communities, such as hate crimes and police brutality, . . . have since expanded to address the issue of violence within LGBT communities, including domestic violence.").

<sup>77</sup> Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259 (2011). In a significant development, the FBI recently announced that it is expanding its definition of rape to include same-sex rape. See Charlie Savage, *U.S. to Expand Its Definition of Rape in Statistics*, N.Y. TIMES, Jan. 7, 2012, at A11; see also Roni Caryn Rabin, *Men Struggle for Rape Awareness*, N.Y. TIMES, Jan. 23, 2012, at D1.

<sup>78</sup> Lara Stemple, *Male Rape and Human Rights*, 60 HASTINGS L.J. 605 (2009) (discussing the problem of male rape and how current female-focused approaches to combating sexual violence reinforce gender stereotypes).

<sup>79</sup> MOGUL ET AL., *supra* note 3, at 123–29.

been criminally stigmatized for so long in the United States?<sup>80</sup> And is it simply dangerous to vest yet more power in a criminal legal system that seems to incarcerate poor people and people of color disproportionately whenever it is entrusted with greater authority?

These debates are familiar to those who have followed the debate about domestic violence policy in the opposite-sex context. Domestic violence advocates also have asked whether a movement founded on anti-subordination values can or should rely on state power.<sup>81</sup> Queer activists and commentators might want to consider what lessons can be learned from the feminist domestic violence law reform movements of the 1980s and 1990s.<sup>82</sup>

The authors also correctly point out that the focus on legislative reform has severe limits. But on occasion, they fail to make their case as effectively as they might. For example, the decades-long effort to overturn sodomy laws culminated in the Supreme Court's six-to-three decision in *Lawrence* holding those laws unconstitutional.<sup>83</sup> In its decision, the Court plainly announced that "the fact that the governing majority in a State has traditionally viewed a particular practice as *immoral* is not a sufficient reason for upholding a law prohibiting the practice."<sup>84</sup> Scholars have

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<sup>80</sup> See Spindelman, *supra* note 3, at 1402–05 (raising many provocative questions, such as whether the gay rights movement has shied away from airing "dirty laundry" about same-sex abuse, and whether it is too complicated for victims of same-sex rape to conceive of what happened to them as a sexual violation, in part because "[gay] identities were formed in outlawry"); cf. Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 651 (2009) (arguing that "[f]eminists should disengage from rape reforms that strengthen the penal state," in part because the criminal justice system does not share the values of the feminist movement).

<sup>81</sup> See LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* (2012) (making the case for a "non-essentialist," more autonomy-based approach to domestic violence intervention); Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 96–97 (2008); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1865–68 (1996); Holly Maguigan, *Wading into Professor Schneider's "Murky Middle Ground" Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 427, 429–34 (2003); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1676–85 (2004).

<sup>82</sup> See RYIAH LILITH, *Reconsidering the Abuse That Dare Not Speak Its Name: A Criticism of Recent Legal Scholarship Regarding Same-Gender Domestic Violence*, 7 MICH. J. GENDER & L. 181, 211–18 (2001) (questioning whether LGBTQ advocates want to adopt the solution of mandatory arrest laws); Morrison, *supra* note 76, at 149–56 (2003) (advocating the development of "[m]ore nuanced approaches" to domestic violence in queer relationships).

<sup>83</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>84</sup> *Id.* at 577–78 (emphasis added) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); see J. Kelly Strader, *Lawrence's Criminal Law*, 16



debated whether *Lawrence* truly rejected a morality-based criminalization scheme,<sup>85</sup> but the decision's language is clear on this score.<sup>86</sup>

Nevertheless, sodomy laws are still enforced in states around the country.<sup>87</sup> For example, *Lawrence* included language that some courts have interpreted to mean that the decision does not apply to minors.<sup>88</sup> These courts have therefore upheld sodomy prosecutions where a party was under the age of eighteen. In the most extreme case, one state supreme court upheld the state's law criminalizing oral and anal sex among teenagers on the grounds that the statute properly promotes "the goal of promoting proper notions of morality among our State's youth."<sup>89</sup> Heteronormative views of "morality" thus continue to govern the enforcement of criminal laws around the country, even after *Lawrence* held that the morality of the majority should not form the basis for a criminal law.<sup>90</sup>

Finally, the authors of *Queer (In)Justice* point out a dilemma for the reform agenda. On the one hand, activists seek a broader law enforcement role in protecting LGBTQ people against gay bashing, bullying, and domestic violence. The authors present compelling examples of the limitations on effective law enforcement in these areas. For example, they write of Los Angeles Police Department officers who, responding to the

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BERKELEY J. CRIM. L. 41 (2011) (describing lower courts' resistance to the underlying philosophy of the *Lawrence* decision); see also Justin Reinheimer, Comment, *What Lawrence Should Have Said: Reconstructing an Equality Approach*, 96 CALIF. L. REV. 505, 505 (2008) (concluding that *Lawrence* "has had remarkably little impact on" gay rights litigation).

<sup>85</sup> Compare, e.g., Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2004) (arguing that *Lawrence* was the culmination of the Court's movement towards rejecting morality-based rationales for criminal laws), with Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1313 (2004) (concluding that *Lawrence* does not hold that the Constitution prohibits criminal laws rooted in the morality of the majority).

<sup>86</sup> See Strader, *supra* note 84 (analyzing the *Lawrence* decision and concluding that it unquestionably rejects morals-based criminal laws).

<sup>87</sup> See Huffman, *supra* note 12.

<sup>88</sup> 539 U.S. at 578 ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution."); see Strader, *supra* note 84, at 59–60 (arguing that *Lawrence* does not hold that the decision is inapplicable to minors).

<sup>89</sup> *In re R.L.C.*, 643 S.E.2d 920, 925 (N.C. 2007). Similar discriminatory statutes continue to be enforced in a number of states. See Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195 (2008) (describing how "Romeo and Juliet" exceptions to statutory rape laws exclude LGBTQ teens).

<sup>90</sup> *Lawrence*, 539 U.S. at 582; see Strader, *supra* note 84.

assault of a Latina transgender woman, reportedly asked paramedics to examine her genitals; 911 dispatchers in Minnesota who were said to have “mocked” LGBT callers seeking help; and North Carolina police who failed to respond to violence against a lesbian couple that included threats against their child and the killing of the family dog.<sup>91</sup>

On the other hand, the authors accurately describe the horrors attendant to the over-incarceration crisis in this country and, in particular, to the burdens faced by LGBTQ people and people of color in our prisons.<sup>92</sup> The authors note that the number of prisoners has skyrocketed and that more than 60% of all prisoners and more than two-thirds of those serving life sentences are people of color.<sup>93</sup> Sending more people to jail in the effort to protect LGBTQ people feeds an incarceration system that is bloated, dysfunctional, and discriminatory. As the authors note: “Queer engagement with law enforcement cannot be accurately described, much less analyzed, as a stand-alone, generic ‘gay’ experience because race, class, and gender are crucial factors in determining how and which queers will bear the brunt of violence at the hands of the criminal justice system.”<sup>94</sup> In addition, given their treatment in the courts, LGBTQ victims might rightly hesitate to turn to the criminal justice system for protection. The authors note the difficulty in “placing primary responsibility for preventing violence in the hands of a criminal legal system that is itself responsible for much of the LGBT violence.”<sup>95</sup> Instead, the authors of *Queer (In)Justice* turn to suggestions for reform that include alternatives to an expanded role for law enforcement.

#### V. THE ROAD TO EFFECTIVE REFORMS

*Queer (In)Justice* faults mainstream gay rights movements with seeking to separate themselves from queer people perceived as criminals.<sup>96</sup> The authors suggest that a “truly progressive queer movement” must include “multi-issue, nationally-linked, community-based organizing,”<sup>97</sup> and that queer activists must stand against the death penalty and in solidarity with prisoners.<sup>98</sup> The authors do not provide a roadmap for attaining specific reforms. Instead, they offer a queer agenda that is nothing less than a complete social reconstruction: “diverting resources from war,

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<sup>91</sup> MOGUL ET AL., *supra* note 3, at 130–31.

<sup>92</sup> *Id.* at xi–xii.

<sup>93</sup> *Id.* at xii.

<sup>94</sup> *Id.* at xviii.

<sup>95</sup> *Id.* at 129.

<sup>96</sup> *Id.* at 145.

<sup>97</sup> *Id.* at 155, 158.

<sup>98</sup> *Id.* at 151–55.

prison construction, the revolving door criminal legal system, and increasingly militarized police forces, toward education, drug treatment, employment programs, community centers, and other initiatives that will strengthen communities and produce safety for all.”<sup>99</sup> Although perhaps admirable, attaining these goals is a tall order, to say the least.

We share the authors’ goal of reducing the nation’s reliance on our massive criminal legal system, even while extending evenhanded justice to previously overlooked categories of crime victims. We are also aware that the best-intentioned criminal law reforms can backfire when grafted onto a criminal legal system that all too often targets poor communities of color.<sup>100</sup>

Our aim in this review is somewhat less ambitious. We seek principally to highlight potential areas for additional research suggested by *Queer (In)Justice*. In particular, we identify potential openings in the law review literature. These issues are suitable for further exploration by more traditional legal scholars, by scholars using interdisciplinary approaches, and by social scientists. The issues raised by the authors of *Queer (In)Justice* suggest many such topics of inquiry, and we identify additional topics as well.

For example, how are family ties addressed in sentencing LGBTQ defendants? Some theorists have suggested that it is problematic to give sentencing “discounts” for family ties when some families are not recognized by the state.<sup>101</sup> There is empirical work that could be done to get a handle on how queer families are described in the criminal courts.<sup>102</sup> Research might examine how presentence investigations describe queer defendants’ relationships and families. Similarly, it might examine how queer defendants describe their lives at allocution, when the defendant has an opportunity to make a statement before the sentence is imposed. The same questions might be examined in the context of judges’ statements at sentencing. It would be interesting to know how these parts of the process are changing, if at all. We suspect such changes could be occurring regionally in response to the evolving views of the “family,” but research is needed to confirm this conclusion.

A related project would be to examine how “family” is defined in

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<sup>99</sup> *Id.* at 157.

<sup>100</sup> See Mauer, *supra* note 70.

<sup>101</sup> See, e.g., Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1184 (2007) (“[I]n making any benefits available solely on the basis of family ties, the state necessarily is making express normative judgments regarding who counts as family and who does not.”).

<sup>102</sup> Admittedly, privacy protections for some court documents, such as presentence investigation reports, may create challenges to this type of research.

correctional regulations for purposes such as visitation.<sup>103</sup> A few months before same-sex marriage passed in New York, the state Department of Corrections proposed a regulation including same-sex spouses in civil unions and marriages in a furlough program.<sup>104</sup> California already permits family visitation for registered domestic partners.<sup>105</sup> Other corrections systems define marriage and family more restrictively.<sup>106</sup> In *Overton v. Bazzetta*, the Supreme Court approved Michigan regulations that defined family, in that case familial relationships to children, in more traditional terms.<sup>107</sup> There is a need for a comprehensive survey of all family-related corrections regulations, updated periodically,<sup>108</sup> to ascertain if other states are following New York's example.

Another possible area of research relates to voir dire questions designed to root out homophobia or other juror biases. Cynthia Lee has suggested that voir dire is an important tool both for identifying bias and for juror education.<sup>109</sup> A recent empirical study suggests a need for further research on juror attitudes towards queer defendants, witnesses, and complainants.<sup>110</sup> It would be useful to hear more from both researchers and leading attorneys regarding whether any best practices have been identified.

Yet another area for further inquiry, both descriptive and prescriptive, is police response to violence within the context of LGBTQ relationships. A number of advocacy groups work in this area, such as the National

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<sup>103</sup> Cf. Zachary Wolfe, *Gay & Lesbian Prisoners: Recent Developments and a Call For More Research*, 10 PRISON LEGAL NEWS 1 (2008) (calling for more research relating to gay prisoners in three areas: visitation, access to LGBT publications, and use of protective custody).

<sup>104</sup> 33 N.Y. Reg. 1–2 (Apr. 20, 2011) (proposing amendments to N.Y. COMP. CODES R. & REGS. tit. 7, §§ 1900.3(a)(1), 1901.1(a), 1901.1(c)(2)(i)(a) (1993)). Glenn Blain, *Paint the Clinks Pink. Conjugal Visits Allowed for Gay Inmates and Partners*, N.Y. DAILY NEWS, Apr. 23, 2011, at 4.

<sup>105</sup> Kacy Elizabeth Wiggum, *Defining Family in American Prisons*, 30 WOMEN'S RTS. L. REP. 357 (2009) (surveying how same-sex partners are treated under family visitation (conjugal visit) programs).

<sup>106</sup> *Id.* at 374–75 (discussing the example of Mississippi); see also Giovanna Shay, *Ad Law Incarcerated*, 14 BERKLEY J. CRIM. L. 329, 357–58 (2009) (describing how corrections regulations can define prisoners' families).

<sup>107</sup> 539 U.S. 126, 133 (2003).

<sup>108</sup> See Wiggum, *supra* note 105, at 368–81 (describing restrictions on extended family visiting programs for unmarried same-sex couples in New Mexico, New York, and Washington state).

<sup>109</sup> Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 559–64 (2008).

<sup>110</sup> Shane W. Kraus & Laurie L. Ragatz, *Gender, Jury Instructions and Homophobia: What Influence Do These Factors Have on Legal Decision Making in a Homicide Case Where the Defendant Utilized the Homosexual Panic Defense?*, 47 CRIM. L. BULL. 237 (2011) (calling for additional research on juror attitudes towards homosexuality and suggesting possible voir dire questions).

Coalition of Anti-Violence Programs.<sup>111</sup> Beginning in the 1990s, scholars have debated the prevalence of abuse in gay and lesbian relationships,<sup>112</sup> suggested reforms to domestic violence statutes to protect same-sex partners,<sup>113</sup> and pointed out unresponsiveness (or worse) from the battered women's movement, the gay community, law enforcement, and the courts.<sup>114</sup> It would be interesting to hear more about what jurisdictions have implemented training or other reforms, and how they have fared. It also will be interesting to see how the response to LGBTQ domestic violence changes in jurisdictions in which same-sex couples attain more formal levels of relationship recognition.<sup>115</sup>

Although the work of the National Prison Rape Elimination Commission under PREA has made clear that LGBTQ prisoners are at heightened risk of custodial sexual abuse, there are many empirical and theoretical issues of interest regarding the experiences of gay and trans folk who are incarcerated.<sup>116</sup> For example, the Commission noted that there is limited research on factors indicating that a prisoner is at a heightened risk for sexual abuse while incarcerated.<sup>117</sup> In addition, some commentators

<sup>111</sup> See ANTI-VIOLENCE PROJECT, <http://www.avp.org> (last visited Nov. 1, 2011).

<sup>112</sup> Compare Sandra E. Lundy, *Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts*, 28 NEW ENG. L. REV. 273, 277 (1993) ("Most researchers agree that the incidence of battering in lesbian and gay couples is about the same as it is for heterosexual couples . . ."), with Lilith, *supra* note 82, at 184 ("[M]ost studies of same-gender domestic violence examine the dynamics of abuse rather than the prevalence, providing no support for assertions of parity.").

<sup>113</sup> See Shannon Little, *Challenging Changing Legal Definitions of Family in Same-Sex Domestic Violence*, 19 HASTINGS WOMEN'S L.J. 259 (2008); Nancy E. Murphy, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335 (1995) (suggesting a model gender-neutral domestic violence statute that would include same-sex couples).

<sup>114</sup> Lundy, *supra* note 112, at 285–92.

<sup>115</sup> Cf. Morrison, *supra* note 76, at 95, 134 (describing how domestic violence laws can be phrased in gendered terms that exclude same-sex victims, and writing in 2003 that, "[t]o date . . . the inclusion of same-sex couples . . . in domestic violence law has occurred only through the back door . . . . [I]n practice, prosecutors and judges can exclude same-sex couples . . . through statutory interpretation . . ."); Sharon Stapel, *Falling to Pieces: New York State Civil Legal Remedies Available to Lesbian Gay, Bisexual, and Transgender Survivors of Domestic Violence*, 52 N.Y.L. SCH. L. REV. 247, 249 (2007) (describing gaps in coverage created by New York domestic relations law prior to the recent passage of marriage equality, and arguing that "domestic violence in the LGBT communities is not adequately addressed by current laws").

<sup>116</sup> NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 7–8 (2009).

<sup>117</sup> *Id.* at 7 ("Research to date has focused on vulnerability to abuse by other prisoners, rather than by staff, and on the risks for men and boys rather than for women and girls."); see also M. Dyan McGuire, *The Empirical and Legal Realities Surrounding Staff Perpetrated Sexual Abuse of Inmates*, 46 CRIM. L. BULL. 428, 435, 441 (2010) (arguing that although "almost all of the protective efforts to date have been predicated on the assumption that only

have criticized PREA itself,<sup>118</sup> called for its amendment,<sup>119</sup> or emphasized next steps to implementation.<sup>120</sup> These critiques should be further debated.

Issues regarding cross-gender supervision also are implicated. Some have asked whether proposed limitations on cross-gender supervision (currently debated as the Department of Justice prepares regulations under PREA)<sup>121</sup> are heteronormative.<sup>122</sup> Others counter that such limits simply reflect realities about male power over women in custody.<sup>123</sup> There is room for more research about the realities of same-sex custodial sexual abuse (guard-on-prisoner)<sup>124</sup> and about how policies regarding prisoner privacy should be crafted.

Finally, while male-to-female transgender prisoners have been the

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opposite sex guards are a threat,” it is reasonable to conclude that same-sex assaults of prisoners by guards also occur “on an on-going basis”).

<sup>118</sup> See Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 175 (2006) (describing PREA as “mostly hortatory”); see also Spade, *supra* note 19 at 91 & n.31 (arguing that “[w]hile passed in the name of preventing sexual assault, the NPREA has been used to further enforce and increase penalties against prisoners for consensual sexual activity”).

<sup>119</sup> James E. Robertson, *The “Turning-Out” of Boys in a Man’s Prison: Why and How We Need to Amend the Prison Rape Elimination Act*, 44 IND. L. REV. 819 (2011) (calling for an amendment to PREA to protect male juveniles sentenced to adult prisons).

<sup>120</sup> See Terry A. Kupers, *The Role of Misogyny and Homophobia in Prison Sexual Abuse*, 18 UCLA WOMEN’S L.J. 107, 130 (2010) (describing the role of “prison culture” in sexual abuse and the need for meaningful implementation of PREA).

<sup>121</sup> See Letter from Thomas M. Susman, Dir., Gov’t Affairs Office, Am. Bar Ass’n, to Robert Hinchman, Senior Counsel, U.S. Dep’t of Justice, (Apr. 4, 2011), available at [http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011apr04\\_dojcomments\\_o.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011apr04_dojcomments_o.authcheckdam.pdf) (urging the DOJ to adopt the National Prison Rape Elimination Commission (NPREC) proposal to limit non-emergency cross-gender pat searches and non-emergency cross-gender viewing of prisoners who are nude or performing bodily functions); see also Valerie Jenness & Michael Smyth, *The Passage and Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road from Symbolic Law to Instrumental Effects*, 22 STAN. L. & POL’Y REV. 489 (2011) (providing an account of the movement to stop prisoner rape).

<sup>122</sup> See, e.g., Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1291 (2003); see also Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751, 755–56 (2005) (criticizing Kapczynski and other “modesty critics” who espouse a “gender-neutral interpretation of privacy,” which Buchanan warns could “expose women prisoners to custodial sexual abuse”).

<sup>123</sup> Ashlie E. Case, *Conflicting Feminisms and the Rights of Women Prisoners*, 17 YALE J.L. & FEMINISM 309, 324–25 (2005).

<sup>124</sup> More data is becoming available from the Bureau of Justice statistics following PREA. See U.S. DEP’T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008–2009, at 24 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf> (reporting that the majority of reported staff-on-inmate incidents are opposite-sex incidents).

subject of high-profile cases, such as *Farmer v. Brennan*,<sup>125</sup> and have been examined in scholarship<sup>126</sup> and in film,<sup>127</sup> there is still more to learn.<sup>128</sup> And we know less about the experiences of female-to-male transgender prisoners.<sup>129</sup> *Queer (In)Justice* briefly mentions issues raised by the presence of transgender men in prisons designated for women.<sup>130</sup> Like many areas touched on in the book, there is much room here for further study.

In all of these areas, more work needs to be done on the ground. Quantitative research into, for example, the targeting of gay men for lewd conduct, of trans people for prostitution, and of LGBTQ people of color for everything is as needed as research into the long-studied phenomenon of racial profiling.<sup>131</sup> Discrimination against LGBTQ people in jury selection is another issue that merits attention.<sup>132</sup>

It may be time to create a data clearinghouse of information about criminal cases involving LGBTQ issues.<sup>133</sup> Such a clearinghouse could include relevant court filings and judicial opinions, as well as academic

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<sup>125</sup> 511 U.S. 825 (1994).

<sup>126</sup> See, e.g., Lori Sexton, Valerie Jenness & Jennifer Macy Sumner, *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons*, 27 JUST. Q. 835 (Dec. 2010) (describing a comprehensive study of transgender inmates in facilities designated for men in California); see also Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515 (2009) (describing the harm of segregation of transgender prisoners); Sydney Tarzwell, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167 (2007) (discussing the problem of ensuring safe housing and appropriate medical care for transgender prisoners).

<sup>127</sup> CRUEL AND UNUSUAL: TRANSGENDER WOMEN IN PRISON (Reid Productions 2006).

<sup>128</sup> E.g., Sexton, Jenness & Sumner, *supra* note 126, at 837 (noting that “systematic social science work that examines the demographic patterns and lived experiences of [the incarcerated transgender] population is, at best, in a nascent state”).

<sup>129</sup> But see Lori Girshick, *Out of Compliance: Masculine-Identified People in Women's Prisons*, in CAPTIVE GENDERS, *supra* note 5, at 189, 190 (discussing “the less known concerns of masculine-identified people in two women's prisons in California”).

<sup>130</sup> MOGUL ET AL., *supra* note 3, at 110–11.

<sup>131</sup> See SENT'G PROJECT, <http://www.sentencingproject.org/clearinghouse/> (last visited Nov. 1, 2011), for a collection of research on racial profiling.

<sup>132</sup> In one 2011 case pending before the Ninth Circuit, the defendant was convicted of assaulting a prison guard. The defendant was gay, and the prosecution struck a lesbian from the jury. On appeal, the defendant argued that the Equal Protection Clause's protection against discrimination in jury selection based on race, *Batson v. Kentucky*, 476 U.S. 79 (1986), should be extended to sexual minorities. See Carol J. Williams, *Protect Gay Jurors from Dismissal, Court is Urged*, L.A. TIMES, Aug. 5, 2011, at AA1.

<sup>133</sup> See, e.g., *Securities Class Action Clearinghouse*, STAN. L. SCH., <http://securities.stanford.edu> (last visited Nov. 1, 2011); *The Civil Rights Litigation Clearinghouse*, U. MICH. L. SCH., <http://www.clearinghouse.net/> (last visited Nov. 1, 2011).

studies on these topics and recommendations of best practices.

Qualitative research would also be extremely helpful. What are the articulated reasons for such practices? Why do the police arrest whom they arrest for vague and expansive “vice” crimes that are so open to discriminatory enforcement? Why do prosecutors choose to pursue some queer defendants while not pursuing straight defendants in similar circumstances? How can we educate prosecutors and judges in best practices to ensure fair trials and counter private homophobia? How can we best protect prisoners with non-heterosexual orientations from abuse while incarcerated? These are conversations that we need to engage if we are ever to get at the root of the problems outlined in *Queer (In)Justice*.

## VI. CONCLUSION

*Queer (In)Justice* is a fascinating read and a useful contribution to our understanding of the role of LGBTQ people in the criminal justice system. Although somewhat anecdotal, it sketches a narrative about queer people in the criminal legal system that has not yet been given full expression. In his groundbreaking 1999 work *Gaylaw*, William Eskridge acknowledged white, middle-class command of the gay rights movement up to that point, and wondered where the movement would go when it was guided by the voices of people of color and working-class gays.<sup>134</sup> *Queer (In)Justice* is one response to this question. Given the far reach of mass incarceration, it is not surprising that some of the stories of less-privileged queer folk play out in the criminal legal system. Our hope is that scholars will fill the interstices outlined by *Queer (In)Justice* and point the way to further progress.

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<sup>134</sup> Eskridge, *supra* note 9, at 5.



