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## The Criminal Justice System and the LGBTQ Community: An Anti-Queer Regime

### Abstract

The LGBTQ community in the US, while experiencing great strides in social equality, continues to suffer disproportionately in the criminal justice system. Historical precedents of criminalizing the LGBTQ community are rife within the criminal justice system; the establishment of anti-sodomy laws, belief of inherent criminality, and a heteronormative perspective have all fostered a greater anti-queer regime. The criminalization and incarceration of the LGBTQ community remain steadfastly in place, with little to no reprieve. Establishing a new narrative in the criminalization and imprisonment of the LGBTQ community may assist in efforts to achieve real change within the criminal justice system. Moving towards a new analysis rooted in the queer experience may also be useful in dismantling the criminal justice system that continues to criminalize and incarcerate the LGBTQ community.

### Keywords

LGBTQ community, criminal justice system, carceral state, queer criminology

The Criminal Justice System and the LGBTQ  
Community: An Anti-Queer Regime

*Steven Peck*

**Abstract**

The LGBTQ community in the US, while experiencing great strides in social equality, continues to suffer disproportionately in the criminal justice system. Historical precedents of criminalizing the LGBTQ community are rife within the criminal justice system; the establishment of anti-sodomy laws, belief of inherent criminality, and a heteronormative perspective have all fostered a greater anti-queer regime. The criminalization and incarceration of the LGBTQ community remain steadfastly in place, with little to no reprieve. Establishing a new narrative in the criminalization and imprisonment of the LGBTQ community may assist in efforts to achieve real change within the criminal justice system. Moving towards a new analysis rooted in the queer experience may also be useful in dismantling the criminal justice system that continues to criminalize and incarcerate the LGBTQ community.

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## Introduction

After decades of trials and tribulations, the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community in the United States has been able to gain significant legal and social recognition. LGBTQ people are no longer explicitly targeted in the ways they once were. However, the legacies of their criminalization have left an indelible stain on the criminal justice system. Despite the gains of activists and reformers, there are severe deficiencies in how the criminal justice system interacts with the LGBTQ community today. Most recently, in 2019, LGBTQ prisoners in San Bernardino County were sequestered away from the rest of the jail population, abused verbally and physically, and received notably less educational and work resources (Gilna, 2019). This is only a glimpse into the litany of institutional and socialized oppression that LGBTQ individuals face in prison and the rest of the criminal justice system. Incidents like that of San Bernardino are not anomalous or unheard of in the US. The practice of policing behavior and corralling and containing LGBTQ individuals is the most frequent policy taken by prison authorities. The criminalization, punishment, and incarceration of LGBTQ individuals in the US have been a long historical development that continues even to this day. While it is no longer illegal “to be” LGBTQ, there remain significant vestiges—and new manifestations—of the criminalization and incarceration of LGBTQ individuals by the criminal justice system in the US.

This paper will attempt to document the historical processes that have criminalized and imprisoned those in the LGBTQ community and uncover what makes prison so hostile to LGBTQ bodies. Criminalization and incarceration have become greatly defined in the US by the targeting of racial and ethnic

minorities. For the LGBTQ community, criminal status has been developed quite distinctly using perceived moral deviance and immorality. Discussion of the criminal justice system within the context of LGBTQ issues has certainly increased as a result of wider societal acceptance and understanding but has not materialized into any sufficient or tangible change for LGBTQ prisoners. The variance in sexuality and gender identity makes it critical that all experiences are documented and analyzed—a discrepancy that only seems to become more and more visible in recent years. While more research has been put into the background of LGBTQ criminality and its causes today, there is a definite absence in the advancement of LGBTQ rights within the prison. Connecting the issues of today with the experiences of the past can provide more insight into the matter.

Literature on the history of the criminalization of the LGBTQ community in the US tends to lean towards experiences in the 20th century. Stewart-Winter (2015) sticks to more recent developments in LGBTQ criminalization and incarceration, while Kunzel (2010), Mogul et al. (2011), and Meyer & Sikk (2016) provide some of the more extensive and exhaustive investigations into the history and creation of a hostile criminal and penal environment for the LGBTQ community. Learning about more recent events is needed, but it is critical to have a thorough and established history to understand the emergence of LGBTQ criminality.

When it comes to observations of the treatment and condition of LGBTQ individuals in prison, there seem to be some disparities between cisgender (cis) and transgender (trans) prisoners. Smith & Yarussi (2015) and Jones (2017) apply a broad analysis of LGBTQ prisoners, whereas Vitulli (2020), Roseberg & Oswin (2015), and Smith (2012) pay close attention to the

condition and treatment of transgender bodies in the prison and the forms in which they are abused and mistreated. Keeping in mind the experiences of identities is necessary when attempting to uncover the unique issues LGBTQ prisoners face. In any case, an analysis of the treatment of gay men and trans women in prison must go hand in hand.

Despite the work accomplished outside the prison, the incarceration of LGBTQ individuals—particularly trans women of color—is dangerously unabated. Hereth & Bouris (2020), Robinson (2020), and Woods (2017) all describe the continuous mistreatment of LGBTQ individuals and how the many supposed reforms pushed into the mainstream have failed to trickle down to prisons and their LGBTQ prisoners. Hereth & Bouris (2020), unlike others, seek a radical reevaluation of the prison system based on the experiences of LGBTQ youth, who are disproportionately represented in the prison population. Introducing new perspectives and considering critical responses to the problems LGBTQ prisoners face is essential; questioning the narrative of LGBTQ criminalization today is desperately needed in the study of the LGBTQ community and the prison.

### **Setting the Narrative for Criminalization**

To understand the history of the LGBTQ community, one must acknowledge that the construction of the ‘LGBTQ’ identity has been one of several centuries—contextualizing how it was viewed must be recognized. The use of distinguishing identifiers for both sexuality and gender were not heavily used initially in the US (Meyer & Sikk, 2016), which is why when looking at the ways homosexuality was criminalized in the past, transgender and gender-variant individuals were not yet recognized. Homosexuality was an encompassing term for sexuality and

gender, so it is important to distinguish the breadth of its usage and meaning.

To begin, the criminalization and incarceration of the LGBTQ community in the US was not a sudden development or exclusively a product of longstanding persecution. Instead, it has been a series of successive and overlapping developments, often intersecting with class, race, and nationality. In early colonial America, issues surrounding sexuality and gender had become more than an issue of religion. The discovery of indigenous expressions of sexuality and gender perplexed both missionaries and colonists alike, which encouraged its extensive persecution and policing (Mogul et al., 2011). Not only did this devastate the organization of indigenous communities, but it also planted the seed for a new Western conception of ‘deviant’ sexuality and gender forms. This is not to say that homosexuality was not seen as aberrant in Europe at the time; rather, the basis for criminalization was a multi-pronged effort in establishing a sexually pure world in conjunction with a non-indigenous one in the US.

With the advent of the prison institution in the US during the 19th century, there was confusion about the perceived increase in sexual deviation. Before the later gay panic of the 1960s, there was an uproar about the notable presence of homosexuality in the prison. Prison architects found themselves unable to explain how their "...new philosophy and architecture of incarceration that they endowed with so many redemptive virtues seemed to be uniquely adapted to, and even encouraging of, vice" (Kunzel, 2008). Penologists—in a sort of criminogenic sense—started to believe that homosexuality was born of its criminal proclivities, not of blasphemy. No longer were differences in sexuality and gender viewed purely as moral violations. Now, homosexuality

was conflated with criminality and inherent delinquency. These developments would go on to shape the treatment of LGBTQ individuals in prison and later, create a greater cultural disdain for the LGBTQ community.

The late 19th century was a period of great legal ramifications for the treatment of the soon-to-be LGBTQ community, possibly the most foundational in deliberate criminalization and incarceration of the LGBTQ community in the US. As prison reformers grappled with the presence of homosexuality, there was a surfacing of extensive "...institutional efforts were undertaken during this period to bifurcate identity into 'black' or 'white,' 'heterosexual' or 'homosexual,' and thus to simplify socially constructed boundaries of race and sexual orientation" (Somerville, 2000). The convergence of racial and sexual hierarchies both had great ramifications on the recognition and treatment of gay and black prisoners. Now in the prison, sexuality, and race were policed. As Somerville later explains, *Plessy v. Ferguson* (1896) was the most instrumental legal event that precipitated a growing classification of sexuality and gender. Cultural perceptions of deviant and criminal sexuality and gender were legitimized into a simultaneous codification of race and sexuality into binary systems that required enforcement. It was a formative event for race and sexuality identity formation in the US. McWhorter (2009) corroborates Somerville's claim, finding that:

Sexuality was crucial to the establishment of national identity and the progress of the nation-state... sexuality as a set of administrative mechanisms and concerns was thoroughly interpenetrated with racial discourses and practices in the United States. Race and sexuality had both become conceptually and practically inseparable. (p. 202)

The connection between race and sexuality should not be ignored; the basis for inherent criminality was contingent on the classification of individuals centered on identity, which in this case, were racial and sexual ones. Going back to its colonial form, the fixation on creating deviant sexuality was needed for nation-building in the US; without distinguishing the “other,” there was little to unify over. After the genesis of the so-called homosexual, the state, acting through the criminal justice system, demanded a mechanism to ensure the purity of the nation. Ultimately, moral fears were weaponized against those who violated sexual and gender norms for the sake of nation-building.

At the same time old sodomy laws, which had been present since English rule, would soon be used in new and twisted ways. Their use as regulatory tools for moral purposes was fully utilized against the LGBTQ community in the early 20th century. Prosecutions based on sodomy laws increased dramatically, as “...sodomy laws sought to protect ‘public morals and decency’; sodomy was listed along with bigamy, adultery, the creation, and dissemination of obscene literature, incest, and public indecency” (Weinmeyer, 2014). While sodomy laws were historically used in the 19th century, this new era ushered in the most extensive form of punitive measures taken against the LGBTQ community. Sodomy was treated as an action; homosexuality, however, was treated as a status. With sodomy laws being widely available, “...the decency-promoting state could not ignore homosexuality, it [needed to] distinguish among different levels of abomination... there was both explicit articulation of what constituted the crime against nature, and open-ended authorization for police to target related activities” (Eskridge, 2008). The convergence of sodomy and homosexuality set forth the formation of a new moral enforcement regime. It was arguably the greatest escalation in

criminalization (and by extension incarceration) of the nascent LGBTQ community at the time. With the state being obliged to criminalize any suspected homosexual conduct, many were churned violently through the criminal justice system.

As legal precedent for the prosecution of homosexuality grew, influential swaths of society in the US began to consider the issue of sexual deviancy and its related ills. This resulted in the collective efforts of the "...scientific, medical, legal, religious, and political institutions [to demarcate] the categories of sexual 'deviance' while simultaneously creating the range of behaviors attributed to normative sexualities" (Meyer & Sikk, 2016). The supposed criminal nature of homosexuality was becoming seriously and empirically pathologized. Homosexuality was no longer just a representation of sin or savagery—it was a security threat that needed to be dissected, controlled, and remedied.

Owing to its newfound attention in American society, the issue of homosexuality had seeped into immigration law. Prosecutions that were based on homosexual suspicions were becoming more widespread and utilized, as they became "...the most commonly used exclusionary provision in immigration law overall... the state wielded this charge against aliens it considered perverse because it confirms that the state had no special legal tool for vetting aliens 'afflicted with homosexuality'" (Canaday, 2009). The tainted image of homosexuality offered the state new qualities to oversee and manage. Immigrants only represented the external threat of sexual and gender deviance. However, these fears about national purity would soon be redirected inwards.

By the middle to the late 20th century, the practice of filtering homosexuality through the criminal justice system would be brought to even greater heights. Rising insecurity over the invisible threat of homosexuality would go on to explode into the

cultural realm, launching a period of hysteria, entrapment, and virulent policing of the LGBTQ community (Dennis, 2014). The mobilization of public forces against gay establishments and the widespread publication of anti-gay materials made existence as an LGBTQ person grueling on social and legal terms. Notions of being gay or frequenting a gay establishment were seen as enabling or embodying unabashed criminal vagrancy. In line with similar thoughts about urban renewal and crime in the 1960s and 70s, "...Americans perceived the issue of gay visibility as part and parcel of a breakdown of law and order" (Stewart-Winter, 2015). The vein of homosexual criminality seeped through the social consciousness once again, but this time as an existential threat to all in American society. The later LGBTQ rights movement would go on to push for an end to raids on gay establishments and communities, but the levels of criminalization and incarceration did not simply fall off. Behind the closed doors of the prison and the broader criminal justice system, the LGBTQ community continues to be criminalized and more importantly, villainized.

### **Confining the LGBTQ Community in the Criminal Justice System**

The criminal justice system, though it has become more aware of the needs and issues of the LGBTQ community, persists as the most substantial collection of institutions that continue to harm the LGBTQ community—all in relative obscurity. Whether one considers the demoralizing imposition of masculine archetypes or the violent organization of transgender and gender-nonconforming bodies, the prison in particular harbors some of the worst the criminal justice system has to offer. It is worth noting that the study of LGBTQ prisoners and their conditions tends to focus more on male prisons; more literature on the experiences of LGBTQ prisoners in female prisons is something that must be

developed in the future. This section will focus primarily on the conditions that LGBTQ prisoners face in prison and the criminal justice system and how it impacts their criminalization and incarceration.

One of the most defining actions the prison has taken against LGBTQ prisoners is the practice of segregation. For example, the practice of segregating LGBTQ individuals in the Los Angeles County Prison K6G unit, while operating under the auspices of inmate safety, did not alter the overall prison environment and in many ways reinforced discriminatory stances (Dolovich, 2011). The complexities of cultural hostility towards LGBTQ individuals make segregation understandable in the sense of safety, but its ultimate efficacy seems to be ambiguous. Segregation cannot perform as a safety mechanism for LGBTQ prisoners precisely because they are placed "...in the context of a stratification order that situates them at or near the bottom of the prison hierarchy and as objects of derision, often expressed through language, sex, and violence" (Brown & Jenness, 2020). LGBTQ prisoners, when segregated, are meant to be objectified—forced to be identified and ostracized for prison organization and stability. With such adverse effects, it becomes difficult to easily justify the practice of segregation as an innocent safety procedure for LGBTQ prisoners. In a national review of segregation practices, Smith & Yarussi (2015) established the grim status of segregating LGBTQ prisoners:

Administrative segregation, and the ensuing isolation from the general population for purposes of 'safety,' often exacerbate mental health conditions such as depression or gender dysphoria. In addition, isolation from the general population often means limited or no access to

programming, regular visitation, or health care, all of which are necessary for LGBTI populations. (p. 12)

Prison administrations may very well believe they are acting in the best interests of their LGBTQ population when segregating them, but this does not mean safety is being prioritized. If anything, segregation performs the subliminal reinforcement of heterosexual ideals and objectifies the existence of LGBTQ prisoners and their identities.

Segregation is considerably meshed within the gendering forces of the prison, offering itself as a prop for reinforcement of heterosexual norms. Segregation is utilized by prison administrators to single out that deemed feminine or otherwise violating traditional norms of gender or sexuality (Robinson, 2011). Efforts to isolate LGBTQ prisoners cannot be viewed simply through the lens of safety and security; there are significant cultural and structural restraints on expression and identity that shape their treatment and organization. Moreover, the use of segregation in prisons "...enables and contributes to the production of masculinity and femininity because men's and women's prisons employ different rules and different norms of conduct" (Pemberton, 2013). LGBTQ prisoners are perceived as a deviation in need of correction. Segregation allows for the complete and utter submission to gendered norms: the physical manifestation of an anti-queer system.

The creation of a gendered system within the prison is rooted in various areas, both institutional and social. Early penologists in the study of sexuality and gender in the prison, such as Johnson (1971), believed that homosexuality fulfilled the role of women in men's prison and that would not have otherwise been performed in society. In this sense, the belief is that the homosexual (and other sexual and gender identities) served a

complementary role for heterosexual men, who would otherwise be discontent at the lack of a feminine presence. Though this represents somewhat of an archaic perspective by today's standards, it provides insight into the role of LGBTQ individuals in prison.

In the context of policing sexuality and gender within the prison system, the assignment of masculinity and femininity to prisoners does not seem entirely farfetched. This appears to surface quite evidently socially and institutionally, where "...heterosexuality is maintained as superior within correctional institutions... the hegemonic environment of male prisons often cultivates a type of emphasized homosexuality" (Hefner, 2018). The belief and instruction in a masculinizing prison environment do not ignore the presence of female prisons. Sociologists in the 1960s sought to explain the rejection of gendered norms in female prisons "...as a reassuring mirror of gender normativity and an assertion of dominant gender norms under difficult conditions" (Kunzel, 2008). Though the mirroring of gender roles in the female prison does not explicitly mean that the prison itself is influencing the performance of gender roles, it does give confidence in the idea of the projection of masculinity and femininity as organizational tools for the prison.

Heteronormative ideals are undoubtedly forced onto LGBTQ prisoners by correctional officers and the prison environment. This does not mean the prison as an institution is alone responsible. Despite the indications of a heteronormative convention within the prison, it would be remiss to say that prisons are completely static environments devoid of external influence. Hensley (2000) gives credence to the idea that there is a measure of the permeability of prison attitudes towards homosexuality, noting that "...socialized ideas, beliefs, and values are often

brought into the prison and shape the subculture” (p. 440). The synthesis of outside attitudes and institutional support for discrimination and violence are the essential motivators for the stratification and ostracization that LGBTQ prisoners experience. On an otherwise positive note,

Carr et al. (2020) express that the prison offers a realm of identity formation for closeted or otherwise unknowingly LGBTQ prisoners, citing the development of personal relationships and affirming intimacies. By utilizing Lambropoulou’s (1999) interpretation of the autopoietic theory and the prison, these seemingly contradictory influences can be better understood. The prison, in the context of the LGBTQ community, adapts to both the culture of the more LGBTQ-friendly incoming prisoners and the institutionally LGBTQ-hostile prison authorities. Just as an organism adapts to its environment to maintain its existence, the prison adapts to preserve its anti-queer foundations. In practice, this allows the prison to constantly reproduce homophobic and transphobic elements all while adapting to a prison culture that is more accepting of the LGBTQ community. Irrespective of external influence, the prison has been made to replicate and expand upon its homophobic and transphobic architecture.

The use of race has also played a role in the rampant homophobia and transphobia in the prison system. Drawing from its historical interactions with homophobia and transphobia, racism has had a symbiotic role with the view. Indeed, even sociologists began to vest confidence in racializing the status of being LGBTQ, as “...prison literature racialized both lesbianism and butch/femme roles, implicitly blaming Black women for sexual aggression and, indeed, homosexuality, by associating them with a male role... [these] official interpretations reinforced long-standing associations among race, sexuality, and gender

roles” (Freedman, 1996). This is not the cause of prison literature alone; the pervasive influence of the prison extends its perceptions beyond its walls. Moreover, the intertwining of race, sexuality, and gender complicates the safety and health of LGBTQ prisoners (Turpin et al., 2021) especially gay black men and black trans women with HIV/AIDS. Once again, the intersection of race becomes an essential part of institutionalized homophobia and transphobia. There is a level of codependency between the two that contributes to the greater anti-queer regime.

In the case of transgender and gender-nonconforming individuals, the prison enforces its strictest ideas of gender. Its disciplinary actions involve the use of segregation, discrimination, and disenfranchisement to enshrine its conception of the gender binary. Isolating and categorizing transgender prisoners is not only used for administrative ease, but also as a form of discrimination (Smith, 2012). By using segregation under the pretext of safety (as is typically done), correctional officers can discipline and humiliate transgender inmates without any repercussions. Moreover, “...trans women [and] Two-Spirit people... are put into solitary confinement against their will at the highest rates” (Lydon et al., 2015, p. 37). This alarming statistic is just a piece of the broader violence against transgender and gender nonconforming prisoners. In many cases, this confuses “...prison administrators [who] explicitly understood gender nonconformity as homosexuality. They argued that gender nonconforming prisoners incited sexual desire and violence from other prisoners” (Vitulli, 2020). A basic misunderstanding—or outright denial—of gender identities broadens the violence transgender and gender nonconforming prisoners experience. The threat of violence, especially when meted by the very prison authorities who argue they work for the safety of LGBTQ prisoners, becomes driven by

the need to erase the presence of those deemed to be violating the gender binary.

Beyond punitive administrative measures, the very structure of the prison has adverse effects on transgender and gender-nonconforming individuals. Jones (2017) establishes that repressive prison policies contribute to an overwhelming climate of sexual violence and submission, with transgender and gender-nonconforming individuals facing the brunt of it. While not necessarily explicit, the reinforcement of regulation based on the gender binary and comparable efforts in solidifying gender distinctions denigrate the very existence of transgender prisoners. In a similar sense, Rosenberg & Oswin (2015) remark on the incredible carceral geographies in effect on transgender prisoners, finding that “[attempts] to quell trans feminine embodiment pull invisibilized bodies back into the prison walls, where they undergo the pull and push between seen and unseen” (p. 20). The attempts by the prison to bind and control the identities of transgender and gender-nonconforming prisoners is as much physical as it is social. This is precisely a reflection of the prison architecture; gender identity is regulated and organized by the prison environment, punishing those who attempt to defy its instruction. Transgender and gender-nonconforming prisoners who attempt to resist this enforced binary are met with such institutional opposition—it becomes difficult for them to exist.

The prison system in the US is blatantly geared against the LGBTQ community—but do the courts fare any better? In most cases, the court system upholds and legitimizes the criminalization and incarceration of the LGBTQ community. Maschi et al. (2016) describe a legal system endemic with elements of homophobia and transphobia, stating that “[t]he legal system itself may have imposed discrimination before being

sentenced and entering prison. Individuals may be exposed to the personal feelings or biases of the police, lawyer, or judge who impacts their treatment and sentencing” (p. 246). The entire judicial process—from the point of contact with law enforcement to the courtroom itself—is plagued by its historical roots of homophobia and transphobia. These influences affect both the sentencing and the testimony of LGBTQ individuals. Braunstein (2017) similarly laments the persistence of homophobic and transphobic elements in the legal system, finding that LGBTQ individuals are consistently either mistreated and antagonized or outright prosecuted for crimes of dubious nature despite the lack of legal basis. Systemic issues of discrimination contribute to the broader developments in the incarceration of LGBTQ youth and LGBTQ people of color.

Another criminalizing (and dehumanizing) legal practice is the so-called “panic defense.” At first glance, the justification of the gay and trans panic defense implies only widespread prejudice. However, the panic defense represents the entrenched homophobia and transphobia embedded in the criminal justice system. The panic defense comprises three main premises: insanity and diminished capacity, which states that the defendant could not control their violent impulses in light of the victim being outed as gay or transgender and have become unstable or insane; provocation by a suspect LGBTQ individual, usually in the instance of physical or sexual contact; and self-defense (Patel, 2019). For many instances of the panic defense, LGBTQ is portrayed as provocateurs and assailants who were rightfully or at the very least justifiably killed by the defendant(s). Justifications like these assist the perception of inherent criminality of the LGBTQ community, along with their deprivation of civil rights.

For trans women, in particular, the panic defense is greatly invalidating and dehumanizing. These arguments hinge upon the assumed deceit of trans women, violation of gender norms, and the defendant's crisis of sexual identity (Lee, 2020). Not only do these arguments justify violence against trans women for their "wrongdoings," they go as far as establishing that trans women are not true women and should be held in contempt for their offenses against gender norms. Moreover, the panic defense represents the actualization of transphobic elements in the legal system. In the eyes of the law, trans women signify a threat to long-instilled notions of gender. It is only conclusions like these that give credence to greater hostility and violence against trans women and the LGBTQ community in the criminal justice system.

To be clear, this is not only an issue of legal maneuvering by defense lawyers or judges with discriminatory stances. Jurors themselves contribute to the greater discriminatory forces within the court system. To expand upon this, Tomei et al. (2020) created a statistical study of juror perceptions, coming to an astounding conclusion that the panic defense allows for a "...a context [to be] created in which prejudice can be openly expressed via leniency in verdicts and sentencing. Jurors can rationalize their expressions of prejudice... [in which] legalized discrimination can occur without societal repercussions" (p. 4255). Impartiality, while typically valued in a court setting, is virtually disavowed when considering a case involving an LGBTQ victim. These attitudes cannot be viewed solely as cultural byproducts of jurors—the court has painstakingly validated the panic defense and maintained its use. One cannot view this simply as a transactional relationship between society and the courts; conscious and unconscious forces of criminalizing LGBTQ individuals are in effect. The association between criminality and being LGBTQ has

not been lost in the eyes of the legal system. These forces, both carceral and judicial, fuel the criminalization and incarceration of the LGBTQ community.

### **Lessons from Today & Looking Towards the Future**

Despite all the progress being made in legitimizing and recognizing the existence of the LGBTQ community, the legacies, and more importantly the strategies of criminalization and incarceration remain in place. Most shockingly, the focus on LGBTQ victims and the decline in the perception of inherent criminality in the LGBTQ community have not reduced incarceration rates in the community (Woods, 2017). Although the social forces that instilled the idea of inherent criminality are gone, their legacies persist. Moreover, the conditions within the prison have not improved either, as "...sexual minority inmates are, in many of the measured characteristics, distinct from their heterosexual counterparts and that they experience higher rates of mistreatment, harsh punishment, and victimization" (Meyer et al., 2017). Knowing that society has become more accepting of the LGBTQ community, observing almost no change within the prison has dire implications. A report by the Center for American Progress & Movement Advancement Project (2016) largely confirms the severe overrepresentation of the LGBTQ community in the criminal justice system:

LGBT youth and adults face unique challenges that disproportionately increase their likelihood of run-ins with law enforcement and having their lives criminalized. They also are overrepresented in correctional and detention facilities, they often are treated violently and unfairly while in detention, and they face unique challenges rebuilding their lives after serving time. (p. 136).

The interactions the LGBTQ community has with the criminal justice system have not dramatically improved since the rise of the modern LGBTQ rights movement. LGBTQ youth, instead of reaping the benefits of a more “tolerant” society, are experiencing the same—if not worse—the brutality of the criminal justice system. Nothing short of systemic discrimination and criminalization can accurately explain these discrepancies.

Why does the LGBTQ community continue to suffer indignities at the hands of the criminal justice system? Much of it has to do with the failure to accurately address the real discrepancies in the system in the first place. Lambie (2013) argues that LGBTQ organizations are gradually reinforcing the same strategies of disenfranchisement that they fought against during the advent of gay liberation in the 1970s. This has grave implications for the efficacy of the various punitive and redistributive policies many in the LGBTQ community have fought for. While there is certainly no consensus on this matter, critics bring forth legitimate concerns about the inability to translate general social change for the criminal justice system.

Although there is some change in behaviors, most times the criminal justice system continues to “...[regulate] LGBTQ youth’s identities and uphold heteronormativity and the gender binary. As research has shown, police mishandle and often ignore crimes committed against transgender people, furthering negative interactions between transgender people and police” (Robinson, 2020). Whether this means police need more training or that law enforcement, in general, is predisposed to demonize the LGBTQ community remains yet to be known. Meyer (2015) ultimately concludes that despite the legal advancements made, heteronormative social pressures have continued to proliferate in the criminal justice system, which is why transgender people of

color continue to face disproportionate violence from individuals and the state. Meyer (2015) and Robinson (2020) both present narratives of unexplained violence and criminalization, which signify the lack of attention scholars have paid to the LGBTQ community and the criminal justice system.

With the criminalization and incarceration of the LGBTQ community ostensibly being unaffected by the broader cultural and legal movements in favor of LGBTQ rights, there is a need for a reexamination of the queer approach to the criminal justice system. Hereth & Bouris (2020) consider the realities of reducing the incarceration of LGBTQ youth, concluding that centering the dismantling of the prison is a necessity in achieving the decarceration of the LGBTQ community. Though this is a rather critical stance to hold, disregarding the deep historical context of homophobia and transphobia in the US and its criminal justice system would be a mistake. There must be an awareness that “[q]ueer experiences are mediated in part through deep-seated archetypal narratives... they drive racialized, often violent, policing and punishment of sexual and gender nonconformity by law enforcement agents, judges, juries, and prisons” (Mogul et al., 2011). The LGBTQ community does not have the option of ignoring or moving past the ideological stance of the criminal justice system. While laws can be amended or repealed, this does not take away any of the institutional bases of homophobia and transphobia in the criminal justice system.

The need for an intersectional analysis is a rather salient point critics have also made; LGBTQ people of color, whether a victim or an offender, receive treatment based on their racial, sexual, and gender identity. Continuing to treat LGBTQ issues as separate from racial and immigration ones only serves to exacerbate inequalities within the LGBTQ community, with no

reproach for real change (Bassichis et al., 2011). Treating LGBTQ issues with the criminal justice system as standalone or wholly detached from the broader struggles of liberation may prolong or intensify current problems. Green (2017) supports these findings, arguing that only a pedagogy centered on dismantling colonial and neoliberal thought can tangibly reduce the criminalization and incarceration of LGBTQ people from all sorts of racial, ethnic, and national backgrounds. When taking in the fullest extent of the historical intersections of colonialism, racism, and xenophobia with the transgressions against the LGBTQ community, it is unsurprising that this is a conclusion many have come to. Dismantling the institutional oppression of the LGBTQ community demands a reckoning of the historical processes that made it so, not to mention how it continues to affect the community.

With all the various angles to approach the unabated crisis of violence and incarceration that the LGBTQ community faces today, one thing is clear: the current actions have not done enough. A new critical stance is necessary to fully dismantle the oppression the LGBTQ experiences in the criminal justice system. The invocation of a ‘queer criminology’ is something that would be indispensable in rectifying these invisible inequalities. This call cannot be overstated enough; the abandonment of comprehensive investigations of the criminalization and incarceration the LGBTQ community experiences makes it only clearer that “...the projects we thought were crucial at one time in the very recent past are likely still crucial and should not be shelved, and research looking broadly at deeply ingrained societal power structures is still necessary” (Panfil, 2018). Furthermore, only looking at the LGBTQ community as victims in the criminal justice system obscures the causes and fates of LGBTQ offenders. This

redirection of study and “...criminological neglect of LGBTQ offenders insulates any of their behaviors allegedly rooted in homophobia or transphobia from the investigation, and therefore, inhibits developing criminological interventions for addressing them” (Woods, 2013). Scholars, sociologists, and most of all allies of the LGBTQ community must grapple with the reality that the violence and oppression the community has historically faced has not vanished over time. If anything, it has become deeply entangled with the criminal justice system and hidden from view. Additionally, scholars must avoid characterizing the LGBTQ rights movement as finished; the mere presence of an anti-queer criminal justice system shows that the fight for equality is all but completed. Understanding that the LGBTQ community—specifically transgender people of color—faces an inordinate amount of resistance and oppression from the criminal justice system, new and critical examinations are desperately needed.

The criminalization and incarceration of the LGBTQ community have been a process—one unmitigated even to this day. Being that the LGBTQ community continues to face inequities and violence at the hands of the criminal justice system, advancements be made. Without the proper tools to examine the homophobic and transphobic qualities proliferating within prisons and courtrooms, the status quo will unfortunately remain. Many in the LGBTQ community continue to be arrested on the grounds of sodomy after the decriminalization of anti-sodomy laws at the national level means there is much to be learned about how the criminal justice system punishes those deemed deviant.

This paper has sought to elucidate the historical processes of a homophobic and transphobic criminal justice system in the US, examine in what ways the criminal justice system institutes a hostile environment for the LGBTQ community, and investigate

the critical responses to these systemic issues. When considering the arrays of criminalization employed against the LGBTQ community, one must pay special attention to its nuanced development. Religious bigotry is the progenitor of such practices, but by no means a dominating influence. Colonialism, racism, and the development of moral panics are all essential elements of the anti-LGBTQ regimen that has been left relatively untouched in the criminal justice system. Resorting to antiquated ideas of inherent criminality or dismissing the discrepancies the LGBTQ community experiences within the criminal justice system does a disservice to the many who continue to suffer solely due to their sexuality and/or gender identity. Furthermore, discounting the deliberate efforts in punishing and constricting the LGBTQ community within the carceral state and the judicial system denies the homophobic and transphobic forces in play. Moving towards an intersectional and LGBTQ-specific analysis may deliver the needed tools to dismantle the anti-queer regime in the criminal justice system.

## References

- Bassichis, M., Lee, A., & Spade, D. (2011). *Building an abolitionist trans and queer movement with everything we've got*. AK Press.
- Braunstein, M. D. (2017). The five stages of LGBTQ discrimination and its effects on mass incarceration. *University of Miami Race & Social Justice Law Review*, 7(1).  
<http://repository.law.miami.edu/umrsjlr/vol7/iss1/3>
- Brown, J. A., & Jenness, V. (2020). LGBT people in prison: Management strategies, human rights violations, and political mobilization. *Oxford Research Encyclopedia of Criminology*.  
<https://doi.org/10.1093/acrefore/9780190264079.013.647>
- Canaday, M. (2009). *The straight state: Sexuality and citizenship in twentieth-century America*. Princeton University Press.
- Carr, N., Serisier, T., & McAlister, S. (2020). Sexual deviance in prison: Queering identity and intimacy in prison research. *Criminology & Criminal Justice*, 20(5), 551-563.  
<https://doi.org/10.1177%2F1748895820937401>
- Center for American Progress and Movement Advancement Project. (2016). *Unjust: How the broken criminal justice system fails LGBT people of color*.  
<https://www.lgbtmap.org/policy-and-issue-analysis/criminal-justice-poc>
- Dennis, J. P. (2014). The LGBT offender. In D. Peterson & V. R. Panfil (eds.), *Handbook of LGBT Communities, Crime, and Justice*, 87-101. Springer.

- [https://doi.org/10.1007/978-1-4614-9188-0\\_5](https://doi.org/10.1007/978-1-4614-9188-0_5)
- Dolovich, S. (2011). Strategic segregation in the modern prison. *American Criminal Law Review*, 48(1).  
<https://ssrn.com/abstract=1894819>
- Eskridge, William N. (2008). *Dishonorable passions: sodomy laws in America, 1861-2003*. Viking.
- Freedman, E. B. (1996). The prison lesbian: Race, class, and the construction of the aggressive female homosexual, 1915-1965. *Feminist Studies*, 22(2), 397-423.  
<https://doi.org/10.2307/3178421>
- Gilna, D. (2019). Two-year investigation, litigation and settlement ends segregation, mistreatment of LGBTQ prisoners at California jail. *Prison Legal News*, 30(5), 59.
- Green, M. (2017). LGBTQ youth of color in the school-to-prison pipeline: Freedom, liberation, and resistance. *Aleph, UCLA Undergraduate Research Journal for the Humanities and Social Sciences*, 14.  
<https://doi.org/10.5070/L6141039027>
- Hefner, M. K. (2018). Queering prison masculinity: Exploring the organization of gender and sexuality within men's prison. *Men and Masculinities*, 21(2), 230-253.  
<https://doi.org/10.1177/1097184X17695037>
- Hensley, C. (2000). Attitudes toward homosexuality in a male and female prison: An exploratory study. *The Prison Journal*, 80(4), 434-441.  
<https://doi.org/10.1177%2F0032885500080004008>
- Hereth, J., & Bouris, A. (2020). Queering smart decarceration: Centering the experiences of LGBTQ+ young people to imagine a world without prisons. *Affilia*, 35(3), 358-375.  
<https://doi.org/10.1177%2F0886109919871268>

- Johnson, E. (1971). The homosexual in prison. *Social Theory and Practice*, 1(4), 83-95.  
<http://www.jstor.org/stable/23556660J>
- Jones, B. (2017). LGBTQ prison policy, queer visibility, and prison violence. ProQuest Dissertations Publishing.
- Kunzel, R. G. (2010). *Criminal intimacy: Prison and the uneven history of modern American sexuality*. University of Chicago Press.
- Lamble, S. (2013). Queer necropolitics and the expanding carceral state: Interrogating sexual investments in punishment. *Law and Critique*, 24(3), 229-253.  
<https://doi.org/10.1007/s10978-013-9125-1>
- Lambropoulou, E. (1999). The sociology of prison and the self-referential approach to prison organization and to correctional reforms. *Systems Research and Behavioral Science*, 16(3), 239. <https://link-gale-com.libaccess.sjlibrary.org/apps/doc/A54901722/AONE?u=csusj&sid=AONE&xid=61d9b6c7>
- Lee, C. (2020). The trans panic defense revisited. *The American Criminal Law Review*, 57(4), 1411-1497. <https://www.law.georgetown.edu/american-criminal-law-review/in-print/volume-57-number-4-fall-2020/the-trans-panic-revisited/>
- Lydon, J., Carrington, K., Low, H., Miller, R., & Yazdy, M. (2015). *Coming out of concrete closets: a report on Black & Pink's national LGBTQ prisoner survey*. <https://www.blackandpink.org/wp-content/uploads/Coming-Out-of-Concrete-Closets.-Black-and-Pink.-October-21-2015..pdf>
- Maschi, T., Rees, J., Klein, E., & Levine, R. (2016). LGBT

- elders and the criminal justice system. In D. A. Harley, & P. B. Teaster (Eds.), *Handbook of LGBT elders: An Interdisciplinary Approach to Principles, Practices, and Policies*, 239-259. Springer International Publishing. [https://doi.org/10.1007/978-3-319-03623-6\\_12](https://doi.org/10.1007/978-3-319-03623-6_12)
- McWhorter, L. (2009). *Racism and Sexual Oppression in Anglo-America: A Genealogy*. Indiana University Press.
- Meyer, D. (2015). *Violence against Queer People: Race, Class, Gender, and the Persistence of Anti-LGBT Discrimination*. Rutgers University Press.
- Meyer, I. H., Flores, A. R., Stemple, L., Romero, A. P., Wilson, B. D. M., & Herman, J. L. (2017). Incarceration rates and traits of sexual minorities in the United States: National inmate survey, 2011-2012. *American Journal of Public Health*, 107(2), 267-273. <https://doi.org/10.2105/AJPH.2016.303576>
- Meyer, L., & Sikk, H. (2016). Introduction to lesbian, gay, bisexual, transgender, and queer (LGBTQ) history in the United States. In M. E. Springate (Ed.), *LGBTQ America: A Theme Study of Lesbian, Gay, Bisexual, Transgender, and Queer History*. National Parks Foundation and the National Park Service.
- Mogul, J. L., Ritchie, A. J., & Whitlock, K. (2011). *Queer (In)Justice: The criminalization of LGBT people in the United States*. Beacon Press.
- Panfil, V. R. (2018). Young and unafraid: Queer criminology's unbounded potential. *Palgrave Communications*, 4(1). <https://doi.org/10.1057/s41599-018-0165-x>
- Patel, D. N. (2019). The indefensible "Gay Panic Defense". *Journal of Legislation*, 46(1). <https://scholarship.law.nd.edu/jleg/vol46/iss1/6/>

- Pemberton, S. (2013). Enforcing gender: The constitution of sex and gender in prison regimes. *Signs: Journal of Women in Culture & Society*, 39(1), 151–175.  
<https://doi-org.libaccess.sjlibrary.org/10.1086/670828>
- Robinson, B. A. (2020). The lavender scare in homonormative times: Policing, hyper-incarceration, and LGBTQ youth homelessness. *Gender & Society*, 34(2), 210-232. <https://doi.org/10.1177/0891243220906172>
- Robinson, R. K. (2011). Masculinity as prison: Sexual identity, race, and incarceration. *California Law Review*, 99(5), 1309-1408. <https://www.jstor.org/stable/41345385>
- Rosenberg, R., & Oswin, N. (2015). Trans embodiment in carceral space: Hypermasculinity and the US prison industrial complex. *Gender, Place and Culture: A Journal of Feminist Geography*, 22(9), 1269-1286. <https://doi.org/10.1080/0966369X.2014.969685>
- Smith, B. V., & Yarussi, J. M. (2015). Policy Review and Development Guide: Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Custodial Settings, 3rd edition.  
[https://digitalcommons.wcl.american.edu/fasch\\_rpt/59](https://digitalcommons.wcl.american.edu/fasch_rpt/59)
- Smith, W. E. (2012). In the footsteps of *Johnson V. California*: Why classification and segregation of transgender inmates warrants heightened scrutiny. *The Journal of Gender, Race and Justice*, 15, 689.
- Somerville, S. B. (2000). *Queering the Color Line: Race and the Invention of Homosexuality in American Culture*. Duke University Press.  
<https://hdl.handle.net/2027/uva.x004393421>
- Stewart-Winter, T. (2015). Queer law and order: Sex,

- criminality, and policing in the late twentieth-century United States. *The Journal of American History*, 102(1), 61-72. <https://doi.org/10.1093/jahist/jav283>
- Tomei, J., Cramer, R. J., Boccaccini, M. T., & Panza, N. R. (2020). The gay panic defense: Legal defense strategy or reinforcement of homophobia in court? *Journal of Interpersonal Violence*, 35(21-22), 4239-4261. <https://doi.org/10.1177%2F0886260517713713>
- Turpin, R., Khan, M., Scheidell, J., Feelemyer, J., Hucks-Ortiz, C., Abrams, J., & Dyer, T. (2021). Estimating the roles of racism and homophobia in HIV testing among black sexual minority men and transgender women with a history of incarceration in the HPTN 061 cohort. *AIDS Education and Prevention: Official Publication of the International Society for AIDS Education*, 33(2), 143-157. <https://doi.org/10.1521/aeap.2021.33.2.143>
- Vitulli, E. W. (2020). A means of assuring the safe and efficient operation of a prison: Segregation, security, and gender nonconformity. *GLQ: A Journal of Lesbian and Gay Studies*, 26(1), 174-182. <https://doi.org/10.1215/10642684-7929213>
- Weinmeyer, R. (2014). The decriminalization of sodomy in the united states. *American Medical Association Journal of Ethics, The Virtual Mentor*, 16(11), 916-922. <https://doi.org/10.1001/virtualmentor.2014.16.11.hlaw1-1411>
- Woods, J. B. (2014). Queer contestations and the future of a critical “queer” criminology. *Critical Criminology*, 22(1), 5-19. <https://doi.org/10.1007/s10612-013-9222-3>
- Woods, J. B. (2017). LGBT identity and crime. *California Law*

*Review, 105(3), 667-733.*

<https://www.californialawreview.org/print/2-lgbt-identity-and-crime/>