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The LGBT Piece of the Underenforcement- Overenforcement Puzzle

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Jordan Blair Woods, *LGBT Identity and Crime*, 105 **Calif. L. Rev.** (forthcoming 2017), available at [SSRN](#).

I have always been fascinated by the underenforcement-overenforcement puzzle. I was thus immediately drawn to Jordan Blair Woods's fantastic article, which analyzes this complex problem through the lens of LGBT identity. Let me explain the underenforcement-overenforcement issue: Individuals who belong to marginalized groups, such as racial and sexual minorities, disproportionately bear the brunt of crime *and* law enforcement. When minorities are victims of violence, especially violence motivated by bigotry, liberal advocates tend to support policies and practices that are tough on such crime. When minorities suffer police harassment, revolving door criminal justice, and mandatory sentences, liberal advocates call for police restraint, decarceration, and discretionary leniency. Is this just abject inconsistency? Not necessarily. Let's say on block A, a white man beats up a black man, while on block B, a black man beats up a white man. The prosecutor charges the white defendant with a misdemeanor and releases him with time served, but charges the black defendant with aggravated assault, resulting in a mandatory ten-year sentence. Everyone should rightly scream foul because similar actors were treated differently on account of race, the racially privileged person received leniency, and the minority was treated harshly.

Difficulties arise when such notions of formal equality and substantive fairness translate into a legal reform agenda. One of the clear drivers of inequity in the above scenario is prosecutorial discretion, so one might propose that prosecutors always bring the most serious charge supported by the evidence. This would surely address the underpunishment of whites, but it might compound the problems of African American overpolicing. Indeed, in response to evidence showing that prosecutors disproportionately seek the death penalty in white-victim cases, race scholar [Randall Kennedy](#) once suggested that prosecutors be required to pursue capital punishment in black-victim cases, recognizing the "cost" of executing more black defendants. In my hypo, the crimes are interracial, but most violence is intraracial. Alternatively, we might be concerned with the mandatory ten-year sentence and believe that judicial discretion in sentencing would have produced justice for the black defendant. But such discretion risks disproportionately benefitting whites who harm blacks.

To complicate matters further, the categories of victim and defendant are fluid, and those who experience social and economic marginalization flow in and out of them. A singular focus on minorities as violence victims can lead to myopia about the ways that pro-prosecution reform affects minorities when they, or their loved ones, inhabit the criminal defendant category. This focus can also eschew intra-group differences, including intersections with other identities and individuals' differing reactions to victimization. Scholars like [Kennedy](#) and [Alexandra Natapoff](#) have discussed African Americans' complex relationship with under- and overpolicing. Feminist commentators, including [Leigh Goodmark](#), [Jamie Abrams](#), and [myself](#), have analyzed female identity and criminal law, seeking to find a satisfactory path between concern for women's widespread subordination and skepticism of the penal state. Discussion of how LGBT identity fits into this puzzle, however, has been noticeably absent from the conversation. That is, until now.

In an article that in my opinion revolutionizes LGBT and criminal law theorizing, Woods sounds a cautionary note about how past fights against homosexuality's construction as psychopathy and newer anti-violence activism have "left us with flat understandings of LGBT offenders as sexual offenders and flat understandings of LGBT victims as hate crime victims." Woods builds on the nascent critique of "carceral" LGBT activism set forth by [Dean Spade](#) and others (here, I draw a parallel to "[carceral feminism](#)," a concept developed by sociologist Elizabeth Bernstein), and asserts that, after successfully challenging the decades-long regime linking LGBT identity and sexual deviance, activists focused singularly on LGBT people as victims of discriminatory violence. While this focus is understandable and laudable on

many levels, it led to an impoverished account of the larger relationship between LGBT identity and criminal law.

Woods provides a genealogy of the current victim-based scholarly view through an “intellectual history” of how LGBT identity (understood historically as gay male identity) and criminal law “travelled together over time.” This history is divided into two time frames, one over a century long (1860s-1970s) and the other only a few decades (1980s-today), perhaps reflecting the rapid evolution of thought on the issue. The hundred-year story is one of sexual deviance. LGBT individuals were invisible in the U.S. criminal law for much of its history, Woods notes, except to the extent that certain same-sex “abominable” acts were criminalized. The psychologizing of homosexuality in the late nineteenth century, the scientific treatment paradigm of crime control in the early twentieth century, the development of theories of immutable psychopathy in the 1940s, and post-World War II moral panic over child sex offenses paved the way for the infamous “sexual psychopath” laws of the mid-century. Facing the choice of psychiatric treatment or criminal punishment, LGBT individuals, Woods observes, had little option but to accept the narrative of homosexuality as psychological deviance. At the same time, well-meaning criminologists supporting non-penal interventions offered sympathetic accounts of homosexuality as a product of “micro-level” problems, such as damaged family and social group dynamics, but they ignored any connections between LGBT persons’ crimes and “macro-level” social inequities like poverty and neighborhood conditions—connections that social structure theorists frequently made for other identity groups. What emerged by the 1970s, according to Woods, was a picture of a group defined by internal sexual deviance, whether such difference was benign or malign.

The second period of the intellectual history is a rapid retreat from the sexual deviance paradigm of the preceding century. LGBT activism, sexual liberationist sentiments, and the progressive 1962 revision of the Model Penal Code undermined the vitality of sodomy laws. The early part of the period also saw the abandonment of sexual psychopathy laws, removal of homosexuality from the DSM, and general move away from defining LGBT identity in terms of mental disease. Woods explains that these conditions “opened space to conceive of LGBT people in the criminal justice system in ways other than as deviant sexual offenders.” What ultimately occupied this space was a conception of LGBT identity defined, not by deviance, but by discrimination. In the 1980s and 90s, progressive criminal law theorists and anti-discrimination activists on the left and prosecutors and victims’ rights supporters on the right turned their attention to the issue of hate crimes, and violence against gays and lesbians was a “key aspect” of this growing movement. The movement proved jurisgenerative, with states widely adopting punitive hate crime legislation, and academically fecund, producing a wealth of empirical information on homophobic violence. Woods stresses that the program adopted an anti-discrimination paradigm, “namely, that a perpetrator’s discriminatory selection of a victim on the basis of the victim’s LGBT identity resulted in unique problems.” Within the criminal law, LGBT identity was again singularly meaningful, but this time its meaning was one of individual victimhood at the hands of violent hate-mongers, now conceived of as the psychological deviants. Woods fascinatingly reveals that in the [Lawrence v. Texas](#) litigation, psychological experts filed an amicus brief stressing that anti-sodomy laws reinforce the pathological anti-gay prejudice underlying hate crime.

In Woods’s telling, the frame flipped from overpolicing to underpolicing. One might ask if there is anything wrong with that. One could argue that having won the overpolicing battle against sodomy and psychopathy laws, activists were right to concentrate on battling hate crimes. The problem with that argument, according to Woods, is that it conceptualizes the world of LGBT issues in criminal law as sodomy and hate crime, when in fact there are many other—perhaps more pressing—battles to fight. The sodomy-hate crime binary has stunted the development of data on and theorizing about LGBT individuals as perpetrators of non-sex crimes and victims of non-bias crimes, and Woods devotes substantial energy to calling for more academic capital to be expended on those efforts. He envisions a critical school of LGBT criminology similar to feminist criminology. Woods also draws upon the available evidence to persuasively hypothesize that non-sodomy/hate crime issues abound: LGBT individuals disproportionately suffer from structural conditions—inequality, poverty, lack of social support—that dispose people to be perpetrators and victims of “ordinary” crimes. Moreover, one has ground to reason that, like other marginalized groups, LGBT groups are disproportionately subjected to police discrimination, harassment, and brutality.

By calling for greater breadth and introspection on the relationship between LGBT identity and criminal law and

revealing that it is much “murkier” (to borrow [Elizabeth Schneider's](#) word) than the sodomy-hate crime binary allows, Woods has contributed substantially to the scholarly discussion. But I want more. Is there more to the critique of the carceral hate crime project than saying that the project is too narrowly focused and creates an information vacuum? What does Woods surmise these new LGBT criminologists and criminal law theorists will conclude about the hate crime movement and its larger relation to LGBT justice? Should the reader take Woods’s analysis as a critique of the individualist anti-discrimination frame, a critique currently being made by left scholars in the [labor context](#)? Do his arguments resound in the feminist rejection of the victim label or progressive criminal law scholars’ objection to the victims’ rights movement? Could there be a burgeoning analysis of “governance” LGBT theory here, akin to Janet Halley’s examination of “[governance feminism](#)”? I am excited to hear what Woods and others taking up his call to action have to say about all these issues. For now, it is enough that this article exists. I believe it will be remembered for years to come as the start of something big.

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