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## THE PERTINENCE OF *PERRY* TO CHALLENGING THE CONTINUING CRIMINALIZATION OF LGBT PEOPLE

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The landmark nature of the Ninth Circuit’s opinion in *Perry v. Brown*,<sup>1</sup> and of legislated and litigated marriage equality around the country and the world, cannot be denied. On a personal level, the advent of marriage equality in Canada—as distinct from domestic partnership—had a profound, although incomplete, impact on my own family’s acceptance of my sexuality. Conversely, while on a recent vacation in North Carolina, I noticed the subtle effect the recent statewide ban on same-sex marriage had on the choices my butch lesbian partner and I—who don’t believe in the institution of marriage—made in how we conducted ourselves in public, compared to when we are at home in New York. Many of the LGBTQ youth of color I work with at Streetwise and Safe (SAS)<sup>2</sup> hailed the 2011 passage of legislation officially bringing marriage equality to New York as a benchmark of society’s acceptance—even as many of them remain among the one in four LGBTQ youth who experience a negative reaction when they disclose their sexuality to their families, and are among the hundreds of thousands who experience violence and homelessness as a result.<sup>3</sup> And unfortunately, despite the enactment of local and state anti-discrimination ordinances, many LGBTQ youth continue to be pushed out of schools, shelters, services, and ultimately, the streets by homophobia and transphobia on the part of peers, administrators, and law enforcement agents.<sup>4</sup> As a result of this systemic rejection and criminalization, all too many LGBTQ youth end up in foster care and the juvenile justice system, only to face continuing homophobia

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1. *Perry v. Brown*, 671 F.3d 1052 (9th Cir.) (holding that classification created by statute amending the California Constitution to deny same sex couples the designation of “marriage” while leaving intact the domestic partnership statute granting same sex partners all the rights and privileges of marriage violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution), *cert. granted sub nom.* *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

2. For more information on Streetwise and Safe (SAS), see [www.streetwiseandsafe.org](http://www.streetwiseandsafe.org) (last visited Jan. 20, 2013).

3. Nicholas Ray, *Lesbian, Gay, Bisexual, and Transgender Youth: An Epidemic of Homelessness*, NATIONAL GAY AND LESBIAN TASK FORCE AND THE NATIONAL COALITION FOR THE HOMELESS 24 (2006), <http://www.thetaskforce.org/downloads/HomelessYouth.pdf>.

4. *Id.* at 18, 66.

and violence within those institutions.<sup>5</sup>

The promise of the *Perry* court's recognition of a dignity interest in the designation of a relationship as "marriage," even where no classification exists in terms of the material benefits flowing from different forms of state relationship recognition, suggests that no distinction based on sexual orientation, however intangible, shall be tolerated by law.<sup>6</sup> Unfortunately, this principle remains far from reality for criminalized LGBTQ youth and adults—the criminal legal system continues to be one of the primary, yet often unacknowledged, sites of ongoing, widespread, and pervasive discrimination against LGBTQ people.

Indeed, in the realm of policing and enforcement of criminal law, the end of *de jure* discrimination brought about by the United States Supreme Court's 2003 decision in *Lawrence v. Texas*<sup>7</sup> has had little effect on the widespread and continuing *de facto* discrimination against LGBTQ people—particularly LGBTQ people of color and homeless and low-income LGBTQ people—that pervades every aspect of the criminal legal system. As my co-authors Joey Mogul and Kay Whitlock and I argue in *Queer (In)Justice: The Criminalization of LGBT People in the United States*,<sup>8</sup> the invidious—and often unconscious—classifications that govern the treatment of LGBTQ people on a daily basis in the criminal legal system are both invisible and impervious to the *Perry* holding, even as they deeply offend the dignity of those they affect and have severe material consequences absent in *Perry*.

Classifications based on sexual orientation and gender identity that are made not by law, but by police officers, court officials, prosecutors, judges, juries, and penal authorities, are rarely subject to rational basis review or constitutional scrutiny of any kind. These classifications often operate in conjunction with, in service of, and are reinforced by other impermissible classifications based on race, age, income, housing, and immigration status, among others. They are hidden within routine and mundane determinations of what constitutes "reasonable suspicion" to justify a police stop, what constitutes "probable cause" to arrest, who is a victim of violence and who is more likely to have committed violence, who is suspect and who is credible, who belongs and who doesn't, whose presence signals "disorder" and whose does not. These classifications, rooted in racialized, gendered, transphobic, and heteronormative understandings of acceptable behavior and gender presentation and expression, continue to operate in daily interactions between law enforcement agents and LGBTQ

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5. *Id.* at 5, 16–21, 66–83; Katayoon Majd, Jody Marksamer & Carolyn Reyes, *Hidden Injustice: Lesbian, Gay, Bisexual and Transgender Youth in Juvenile Courts*, THE EQUITY PROJECT (2009), [http://www.equityproject.org/pdfs/hidden\\_injustice.pdf](http://www.equityproject.org/pdfs/hidden_injustice.pdf).

6. *Perry v. Brown*, 671 F.3d at 1063–64 ("Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California . . . . The Constitution simply does not allow for 'laws of this sort.'").

7. *Lawrence v. Texas*, 539 U.S. 558 (2003).

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

people, in the shadows of efforts to achieve legal equality through impact litigation.

In rare instances, we are able to bring them to light, albeit indirectly. In a significant victory in a case I had the privilege of litigating along with the Center for Constitutional Rights and the Loyola University Civil Justice Clinic, a federal court declared unconstitutional on equal protection grounds a requirement that individuals convicted of soliciting oral or anal sex for compensation under Louisiana's centuries-old "crime against nature by solicitation" ("CANS") statute register as sex offenders. In so doing, Judge Martin C. Feldman held that there was no rational basis for imposing such a classification where individuals convicted of solicitation under the state's prostitution statute, which criminalizes identical conduct and requires proof of identical elements, are not subjected to a sex offender registration requirement under any circumstances.<sup>9</sup>

Police and prosecutors exercise unfettered discretion when determining who and when to charge under the CANS statute. Until 2010, the charge was a felony on a first offense, carrying a maximum sentence of 5 years, and, until 2011, it required that an individual pay hundreds of dollars a year to register as a sex offender and carry a driver's license branding them as a "sex offender" in bright orange capital letters, among a host of rules and restrictions on every aspect of everyday behavior.<sup>10</sup> Predictably, a significant number of individuals charged with CANS rather than solicitation of prostitution—which was a misdemeanor on a first offense and carried significantly lower penalties on a second or subsequent offense, and never required registration as a sex offender—were transgender women and gay men of color. Also disproportionately represented were low income and homeless women of color whose sexuality and perceived criminality are "queered" by the historic and present day legacy of gendered racial discrimination, which frames women of color as inherently sexually deviant.<sup>11</sup> As detailed in our complaint and our arguments pointing to the complete absence of any rational basis whatsoever for the distinction in consequences of convictions under the two statutes, as well as in the submission of *amici curiae* Juvenile Justice Project of Louisiana, Lambda Legal, the National Center on Lesbian Rights, and the Sylvia Rivera Law Project, this statutory scheme operated within and against the backdrop of a long history of legal discrimination against LGBTQ people and sex acts associated with

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9. Doe v. Jindal, 851 F. Supp. 2d 995, 1007 (E.D. La. 2012).

10. Registration of Sex Offenders and Child Predators, LA. REV. STAT. ANN. § 15:542 *et seq.* (2011).

11. See Cathy Cohen, *Punks, Bulldaggers and Welfare Queens: The Radical Potential of Queer Politics?*, 3(4) GLQ: A J. OF LESBIAN AND GAY STUD. 437, 456 (1997). See also PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (2nd ed. 2000); Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African American Woman and Battered Women's Syndrome*, 1995 WIS. L. REV. 1003 (1995).

homosexuality, and served as a powerful tool of continuing discrimination against LGBTQ youth and adults.

The court concluded that, where the proscribed conduct was chargeable under both statutes, the “statutory classification drawn between individuals convicted of CANS and those convicted of prostitution is not rationally related to achieving any legitimate state interest,” thus violating the Equal Protection Clause.<sup>12</sup> The court’s opinion, however, explicitly sidestepped the question of whether the statute was deployed to enact continuing discrimination based on sexual orientation and gender identity (which can be broadly conceived to include the “deviant” gender identity imposed on Black women).<sup>13</sup> Instead, the court hewed closely to a strict construction of the Equal Protection Clause to prohibit a classification for which the state could offer and the court could conceive of no rational basis whatsoever.<sup>14</sup>

In so doing, it did not rely on *Lawrence v. Texas*, which explicitly excluded from its reach contexts such as public sex, sex for compensation, and sex among minors, contexts in which continuing discrimination against LGBTQ people in the enforcement of criminal law operates with impunity.<sup>15</sup> Nor was *Perry* relevant to its analysis because the laws at issue did not discriminate on their face against people of a particular sexual orientation.<sup>16</sup> Interestingly, the only relevance of marriage to the court was the United States Supreme Court’s holding in *Eisenstadt v. Baird*,<sup>17</sup> which held that criminalization of birth control when distributed to unmarried, but not married couples, could not withstand rational basis review.

*De facto* discrimination—the ways in which sexual orientation and gender identity combined with race, gender, and poverty to produce discrimination in the statute’s application—was invisible in the *Jindal* court’s legal analysis. And the indignity of being labeled a sex offender simply based on police and prosecutors’ exercise of unlimited discretion with respect to which statute to use

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12. *Jindal*, 851 F. Supp. 2d at 1006.

13. *Id.* at 1000 n.10. The Court also rejected the argument that it was bound by the Louisiana State Supreme Court’s decision in *State v. Baxley*, 656 So.2d 973 (La. 1995), which found that the CANS statute did not facially discriminate between “homosexuals” and “heterosexuals,” on the grounds that the classification at issue in *Doe v. Jindal*—between individuals convicted under CANS and individuals convicted under the solicitation provision of the prostitution statute—was not considered in *Baxley*, which was decided under the state, not federal, constitution. *Id.* at 1008.

14. *See supra* note 13 and accompanying text.

15. *Jindal*, 851 F. Supp. 2d at 1000 n.11 (“*Lawrence* does not speak to the solicitation of sex for money and has little precedential force here.”). The court did rely, in part, on the decision in *People v. Hofsheier*, in which the California Supreme Court struck down a criminal statute that imposed harsher penalties on individuals convicted of engaging in oral or anal sex with a minor than on those convicted of engaging in other sexual activity with a minor. *See People v. Hofsheier*, 129 P.3d 29 (2006) (cited in *Doe v. Jindal*, No. 11-338, 2011 WL 3925042, at \*7 n.14 (E.D. La. Sept. 7, 2011)).

16. Rather, CANS had a discriminatory impact on those soliciting oral or anal sex, and a disproportionate impact on LGBTQ people.

17. *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

when charging an individual accused of offering oral or anal sex for compensation—a discretion clearly informed by historic and present-day homophobia and transphobia, in addition to gendered racism—is not one contemplated by the *Perry* opinion.

The context presented by *Doe v. Jindal* was unique. A situation in which the use of a particular criminal statute to target LGBTQ people for discriminatory and disproportionate punishment can be isolated and challenged, in the absence of always elusive evidence of discriminatory enforcement, is rare. More commonly, discriminatory and disparate enforcement of facially neutral criminal statutes such as “disorderly conduct,” “lewd conduct,” and “loitering for the purposes of prostitution” escapes even rational basis review. How, then, can the holding of *Perry* be applied to challenge the classifications which lead police to routinely profile a transgender woman of color walking down the street as being engaged in a prostitution-related offense where a white, non-transgender woman walking down the same street under the same circumstances—at the same time of day, even wearing the same clothing—would not be subject to the same presumptions? How can it be leveraged to challenge the presumption that gay men in a park must be there for the purpose of engaging in lewd conduct where identically-situated heterosexual individuals would not be subject to the same presumption? How can it be used to address the reality that violence against LGBTQ people often results in their arrest under the theories of “mutual combat” or profiling based on race, gender identity or expression, immigration status, and other markers of perceived “criminality”? The indignity of not being able to stand outside a bodega or walk down the street without being labeled as having the “intent to prostitute,” sit with a lover in a public place without facing the humiliation of a “lewd conduct” charge, or seek protection from the police without being perceived as a likely perpetrator of violence is not contemplated by the *Perry* opinion.

In other words, ongoing discrimination against LGBTQ people cannot be abated solely through a single-minded charge toward marriage equality and other formal markers of legal equality. Indeed, landmark decisions such as *Perry*, unfortunately, do not even bring jurisprudential benefits to struggles against the countless overt and subtle forms of discrimination experienced by LGBTQ people in the criminal legal system because of the ways discrimination is structured and embedded in everyday decisions by system players.

Generally speaking, the classifications affecting LGBTQ people caught in the maw of the criminal legal system—from discriminatory policing of the presence of racially gendered bodies in public spaces, to denial of medically-necessary hormone treatment in prison where similarly-situated individuals requiring medical treatment not associated with gender identity do not face the same barriers to access to medication—are not subject to the same constitutional or judicial scrutiny as the *de jure* discrimination at issue in *Perry*. Even the

Obama administration's pronouncement that discrimination based on sexual orientation should be subject to heightened scrutiny<sup>18</sup> offers little relief given that, in the absence of a facial classification based on sexual orientation, an individual must surmount the nearly impossible hurdle—which is functionally even higher for an individual accused of criminal conduct—of proving intent to discriminate to obtain relief. Yet the classifications at issue here are no less profound and widespread in their impact than that at issue in *Perry*—both in material terms, but also in terms of the dignity afforded to the existence of LGBTQ people—particularly given the legal and social margins to which people with criminal convictions are relegated in the United States.<sup>19</sup>

Interestingly, marriage equality can further highlight and sharpen LGBTQ people's experience of discrimination in the criminal legal system. In one illustrative instance, a transgender woman of color who recently came to see me to talk about a strip search she had been subjected to by NYPD officers repeatedly pointed out to me that she had been with her husband—her “for real,” “legal” husband—at the time of the arrest which preceded the search, and even pulled out her marriage license to show me during the consultation. Her frustration at the disjuncture between the recognition of her relationship by the state and the absence of dignity in her treatment by the criminal legal system was both palpable and poignant.

Given the current limitations of equal protection challenges to *de facto* discrimination, what legal strategies can we deploy to address the ongoing and pervasive discrimination against LGBTQ people in the criminal legal system—which, in any other form or context, would produce widespread outrage among those committed to full equality for LGBTQ people?

The Community Safety Act, currently under consideration by the New York City Council, offers one potential remedy. Its broad anti-profiling provisions would create a private right of action to challenge law enforcement practices that have a disproportionate impact on individuals and communities based on sexual orientation and gender identity, along with race, ethnicity, color, religion, age, sex, housing status, disability (including HIV status), immigration status, and occupation.<sup>20</sup> This landmark bill could serve as a model for national and local legislation, which would create real opportunities to obtain legal remedies for acts of individual and systemic discrimination by law enforcement agents against LGBTQ people.

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18. Memorandum from Eric Holder, U.S. Attorney General, to John Boehner, Speaker of the House of Representatives 5 (Feb. 23, 2011) (“[T]he President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.”), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

19. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); JOEY L. MOGUL, ANDREA J. RITCHIE, & KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* (2011).

20. N.Y.C., N.Y., Community Safety Act, Intro. Nos. 799, 800, 801, and 881 (Feb. 29, 2012).

The Department of Justice's recent consent decree with the New Orleans Police Department,<sup>21</sup> following an investigation that documented the discriminatory enforcement of the statute at issue in *Doe v. Jindal*, offers another model approach to combating discrimination against LGBTQ people by law enforcement agencies. The decree's provisions, which are unprecedented in the breadth and depth of coverage of discriminatory policing of LGBTQ people, clearly prohibit consideration of sexual orientation and gender identity as a basis for stops, searches, or arrests, along with other discriminatory practices, and set a gold standard for local law enforcement agencies across the country.

Remedies such as these, in combination with diligent litigation and both advocacy and organizing efforts aimed at challenging the ongoing institutional and structural discrimination faced by LGBTQ people of color and low-income LGBTQ people in virtually all institutions and aspects of life, and particularly the criminal legal system,<sup>22</sup> require the resources and attention of LGBTQ movements. Otherwise, the promise of *Perry* will remain an empty one for the significant numbers of LGBTQ people who will continue to face devastating discrimination in the criminal legal system long after the wedding bells have rung.

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21. Consent Decree Regarding the New Orleans Police Department, *United States v. City of New Orleans*, No. 12-1924 (E.D. La. July 24, 2012).

22. See DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS AND THE LIMITS OF LAW* (2011); MOGUL, RITCHIE, WHITLOCK, *supra* note 19.