



## MEMORANDUM

**From:** Williams Institute

**Date:** September 2009

**RE:** Louisiana – Sexual Orientation and Gender Identity Law and Documentation of Discrimination

### I. OVERVIEW

While, in 1998, New Orleans became one of the earliest cities in the United States to pass a local ordinance protecting LGBT people from discrimination,<sup>1</sup> repeated attempts to pass state legislation that would prohibit discrimination on the basis of sexual orientation or gender identity/expression have all failed. For example, in 2008, the most recent attempt to protect LGBT rights in the employment context failed to make it out of its first committee in the state House of Representatives and the effort to pass the legislation was subsequently abandoned. In 2008, a bill was also introduced that would have just protected state employees from sexual orientation discrimination. That bill too failed to make it out of its first committee.<sup>2</sup>

Although two former Louisiana governors issued executive orders prohibiting employment discrimination against state employees on the basis of sexual orientation,<sup>3</sup> both orders were allowed to lapse – taking LGBT state employees first in and then out of the law’s protection. The first executive order was issued in 1992 and then allowed to lapse in 1996 when the next governor took office.<sup>4</sup> Similarly, a 2004 executive order<sup>5</sup> was allowed to lapse in 2008 when newly-elected Governor Jindal took office. As a result, LGBT people currently have no protection against public or private employment discrimination in Louisiana.

Other state laws and officials have been hostile to LGBT people in Louisiana. For example, prior to the U.S. Supreme Court’s decision in *Lawrence v. Texas*,<sup>6</sup> Louisiana had long had one of the broadest state sodomy laws of any state. The law was unsuccessfully challenged on the basis of its disparate impact on LGBT individuals. In addition, the Louisiana Commission on Marriage and Family, recently reorganized by Governor Jindal, has several appointees who have a well-documented history of saying inflammatory, anti-LGBT rhetoric. For example, one member is Gene Mills, executive

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<sup>1</sup> SCOPE OF EXPLICITLY TRANSGENDER-INCLUSIVE NON-DISCRIMINATION LAW (Transgender L. & Policy Inst. & Nat’l Gay & Lesbian Task Force 2006) available at <http://bit.ly/6DDBp> (last visited Sept. 13, 2009).

<sup>2</sup> H.B. 981 (La. 2008).

<sup>3</sup> In 1992, former Governor Edwin Edwards issued executive orders prohibiting employment discrimination on the basis of sexual orientation and, in 2004, former Governor Kathleen Blanco issued a similar executive order.

<sup>4</sup> La. Exec. Order No. EWE 92-7 (1992).

<sup>5</sup> La. Exec. Order No. KBB 2004-54 (2004).

<sup>6</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

director of the conservative Louisiana Family Forum. While heterosexual relationships can result in children, Mills has said, “you don’t get the equivalent in a homosexual relationship . . . you get disease.”<sup>7</sup> In 2000, Baton Rouge City Council members Mike Tassin and Jim Benham walked out of a council meeting during which a gay and lesbian group gave a presentation on discrimination. Tassin tried to block the presentation but was overruled by his fellow council members. Tassin said he objected to having the group’s literature placed at his desk, calling the pamphlets “crap.”<sup>8</sup>

Documented examples of employment discrimination by state and local governments in Louisiana on the basis of sexual orientation and gender identity include:

- In 2006, a gay man was hired as a faculty member and coordinator of the 4-H Program at Louisiana State University. He implemented successful youth programs in his position, was promoted in 2007, and received a Distinguished Service Award. At the meeting during a camp event supervised by the faculty member, the Human Resources Manager told him that the school had received an anonymous letter saying that the faculty member had a personal ad on a gay dating website. The faculty member was immediately put on administrative leave without even the opportunity to collect his belongings from the campsite—because he “could not interact with the youth anymore.” He refused to quit so he was demoted from his supervisory position and all youth programs were taken away from him. His contract was not renewed for the 2009-2010 school year.<sup>9</sup>
- In 2004, a lesbian bus driver for the Monroe School District reported that she had faced harassment for gender non-conformity and sexual orientation. She complained about the adverse treatment, but her grievance was deemed invalid.<sup>10</sup>
- A tenured teacher and coach for women's sports at Oak Hill High School who was fired on suspicion of being a lesbian. The teacher was suspected of having an inappropriate relationship with a student, who was actually family of a friend with whom she had a close familial relationship. After being discharged on a 5-4 vote, the teacher filed suit and the trial judge found in her favor. The appeals court affirmed the trial court's decision, finding that the charges against her "are replete with insinuations and innuendos" and “ the Board's case is seriously lacking in evidence, much less the `substantial evidence' required to support the Board's actions. The court concluded that the School Board's decision "was arbitrary and an abuse of discretion," and assessed the School Board the full costs of the

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<sup>7</sup> Scott Gold, *Louisiana Judge Throws Out State Ban on Gay and Lesbian Marriages*, L.A.TIMES, Oct. 6, 2004, available at <http://bit.ly/1FEdNI>.

<sup>8</sup> Allison Kilkenny, *Bobby Jindal Stocks Marriage Commission With Anti-Gay Crusaders*, DAILY NEWS & OPINION, Jan. 6, 2009, <http://allisonkilkenny.wordpress.com/2009/01/06/bobby-jindal-stocks-marriage-commission-with-anti-gay-crusaders>.

<sup>9</sup> Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

<sup>10</sup> E-mail from Ming Wong, Nat’l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

appeal.<sup>11</sup> Holt v. Rapides Parish Sch. Bd., 1996 WL 709720 (La. Ct. App. Dec. 11 1996).

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

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<sup>11</sup> *Holt v. Rapides Parish Sch. Bd.*, 1996 WL 709720 (La. Ct. App. Dec. 11, 1996).

## II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

### A. State-Wide Employment Statutes

Currently the state of Louisiana has not enacted laws to prohibit sexual orientation and gender identity employment discrimination.<sup>12</sup> The state's employment non-discrimination laws do prohibit discrimination on the basis of race, sex, disability, age, religion, national origin, pregnancy or childbirth, sickle cell trait, handicap and smoking.

The provisions of the Louisiana Employment Discrimination Law (the "LEDL") apply to employers of 20 or more employees (and in the case of pregnancy and related medical conditions, more than 25 employees), labor organizations, joint labor management committees, employment and apprenticeship and training programs, and all agencies of state and local governments.<sup>13</sup> The LEDL prohibits discrimination in hiring, compensation, terms, conditions, or privileges of employment.<sup>14</sup> The LEDL also prohibits limiting, segregating, or classifying an employee or applicant in a manner that would deprive, or tend to deprive, an individual of employment opportunities or otherwise adversely affect the status of an employee.<sup>15</sup> In addition, the LEDL makes it unlawful for a labor organization to exclude, expel from membership, or otherwise discriminate against a member or applicant for membership, to limit, segregate, or classify membership or an application for membership, or to fail or to refuse to refer an individual for employment, or to cause an employee to violate any provision of the LEDL.<sup>16</sup>

The Louisiana Commission on Human Rights was established in 1988 by Act 866 in the 1988 Regular Session of the Louisiana Legislature and was mandated to process charges of discrimination on the bases described above, to investigate alleged discriminatory acts, to mediate disputes, and to provide education and training related to discriminatory practices.<sup>17</sup> To make determinations as to whether discrimination has occurred, Commissioners may consider one of two basic theories of discrimination: 1) disparate treatment (based on discriminatory motive or intent); and 2) disparate impact (based on evidence establishing that an employer has a policy or practice that is neutral on its face, but which policy or practice has a substantially greater negative impact on members of a protected group).<sup>18</sup> Because sexual orientation and gender identity/expression are not considered to be improper bases for discriminatory practices

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<sup>12</sup> In 1997, the Louisiana Legislature passed the Louisiana Employment Discrimination Law, LA. REV. STAT. ANN. §23:301, *et seq.* ("LEDL"). Prior to 1997, Louisiana's various discrimination statutes were non-uniform and scattered throughout the revised statutes. The LEDL repealed and reenacted many of Louisiana's employment discrimination statutes as part of a single, comprehensive piece of legislation found in one Title of the Revised Statutes. LA REV. STAT. ANN. §23:301 *et seq.*, as amended.

<sup>13</sup> LA. REV. STAT. ANN. §23:302.

<sup>14</sup> *See, e.g.*, LA. REV. STAT. ANN. §23:312.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> "Filing a Complain of Discrimination," Louisiana Commission on Human Rights, *available at* <http://www.gov.state.la.us/HumanRights/filingacomplaintofdiscrim.htm> (last visited Sept. 13, 2009).

<sup>18</sup> Louisiana Commission on Human Rights, How the Commission Does Its Work, <http://gov.louisiana.gov/HumanRights/howthecommissionworks.htm> (last visited Sept. 13, 2009).

under the LEDL, LGBT individuals are not afforded any protection under these complaint mechanisms.

## **B. Attempts to Enact State Legislation**

There have been numerous attempts in both the Louisiana House of Representatives and the Louisiana State Senate to enact legislation prohibiting employment discrimination on the basis of sexual orientation or gender identity/expression but these attempts have ultimately failed.

In 2001, State Senators Don Cravins and Paulette Irons introduced Senate Bill 862, which would have provided protection for gays and lesbians in the employment context. The proposed law provided that employers of more than 25 people could not discriminate against an employee simply because of his or her actual or perceived sexual orientation.<sup>19</sup> While the bill made it out of committee, it was killed on the Senate floor before it could be put to a vote. This effort marked the furthest that a bill of that kind had ever progressed in the Louisiana legislature. Since that failed attempt, Louisiana lawmakers have proposed similar legislation in one form or another, with each attempt similarly ending in failure. Most recently, on March 31, 2008, State Representative LaFonta introduced Louisiana House Bill 443, which would have prohibited employment discrimination based on actual or perceived sexual orientation or gender identity or expression.<sup>20</sup> However, after the bill was sent to committee in late May 2008, Rep. LaFonta decided to pull the bill from consideration, effectively tabling the issue indefinitely.

At the same time, Rep. LaFonta also introduced House Bill 981, which would have established a separate law specifically prohibiting the state and its agencies, including “officers” of such agencies, from engaging in discrimination or harassment based on race, color, religion, sex, sexual orientation, national origin, political affiliation, or disability. Proposed HB 981 defined “sexual orientation” to include heterosexuality, homosexuality, and bisexuality. The law also would have expressly recognized such employers’ right to establish appropriate dress and appearance requirements for its employees.<sup>21</sup> HB 981 never made it out of the Committee on House and Governmental Affairs.

In 2000, Baton Rouge City Council members Mike Tassin and Jim Benham walked out of a council meeting during which a gay and lesbian group gave a presentation on discrimination. Lambda Group Inc. gave the council postcards from 300 people supporting a state law to prohibit anti-gay discrimination in employment. Tassin tried to block the presentation but was overruled by his fellow council members. Tassin said he objected to having the group’s literature placed at his desk, calling the pamphlets ‘crap.’ He left saying he disagreed with the group’s message. Carrie Evans, a member of

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<sup>19</sup> S.B. 862 (La. 2001).

<sup>20</sup> H.B. 443 (La. 2008).

<sup>21</sup> H.B. 981 (La. 2008).

the group, noted that more constituents from Benham’s district had signed the cards than from anywhere else.

### **C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions**

#### **1. Executive Orders**

In 1992, then-Governor Edwin Edwards became the first Southern governor to issue an executive order protecting lesbian, gay, bisexual, and transgendered persons from discrimination in state governmental services, employment, and contracts.<sup>22</sup> This executive order, which provided protection only to public employees, expired in August of 1996 and was not renewed when the next governor, Mike Foster, took office.

On December 6, 2004, then-Governor Kathleen Blanco issued a similar executive order barring state agencies and contractors from various sorts of harassment and discrimination by race, religion, gender, sexual orientation, national origin, political affiliation, or disability.<sup>23</sup> The executive order banned discrimination in providing government services, in dealing with government employees and in government dealings with private companies. It also required businesses contracting with the state to pledge not to discriminate on the basis of race, religion, gender, sexual orientation, national origin, political affiliation, or disability in any way related to employment.

Gov. Blanco’s successor, Gov. Jindal, did not renew the executive order and it therefore expired in August 2008.<sup>24</sup> Explaining his rationale for declining to renew the executive order, Gov. Jindal said that it was “not necessary to create additional special categories or special rights” because these forms of discrimination are prohibited under existing state and federal laws.<sup>25</sup> Jindal also expressed concern that renewing the executive order could create problems with faith-based organizations’ ability to contract with the state, a concern he had raised at the time Gov. Blanco issued the order. When the executive order was issued in 2004, Gov. Blanco’s office admitted that much of the language included in the executive order already was covered under existing state and federal law and that the primary objective of the order was to clearly state a policy that everyone should be treated fairly in the workplace. Each of the areas covered by the executive order is covered by existing state and federal laws -- except for sexual orientation.

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<sup>22</sup> La. Exec. Order No. EWE 92-7.

<sup>23</sup> La. Exec. Order No. KBB 2004-54.

<sup>24</sup> Chris Johnson, *A Step Backwards for Equality in Louisiana*, HRC BACKSTORY, Aug.21, 2008, <http://bit.ly/6JX8B> (explaining that Gov. Jindal’s position is not correct as Louisiana remains one of thirty states that does not prohibit discrimination based on sexual orientation and one of thirty eight states that does not prohibit discrimination based on gender identity).

<sup>25</sup> *Id.*

D. **Local Legislation**

1. **City of New Orleans**

A 1984 attempt to enact an ordinance to ban discrimination against homosexuals in public accommodations, employment, and housing was narrowly defeated by the New Orleans City Council.<sup>26</sup> However, in 1995, New Orleans enacted a “Bill of Rights” that made it unlawful to discriminate in commercial spaces, employment, housing accommodations, private clubs, and public accommodations on the basis of age, color, creed, gender or sex, marital status, national origin/ancestry, physical condition/disability, race, religion, or sexual orientation.<sup>27</sup> The New Orleans City Council added gender identification to the city’s non-discrimination ordinances in 1998.<sup>28</sup>

New Orleans established the Human Relations Commission to investigate discrimination claims and individuals who believe that they have experienced discrimination are encouraged to contact the Commission. The Commission employs a staff of three and maintains two offices in New Orleans. Upon being contacted with a complaint, the Commission staff will advise an individual of his/her rights under New Orleans’ non-discrimination laws and when appropriate, will assist an individual in filing a confidential complaint with the office.<sup>29</sup> Those who are found to have violated the non-discrimination laws face fines of up to \$500 or up to six months in jail.**III.**

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<sup>26</sup> *New Orleans Rejects Homosexual Rights Bill*, N.Y. TIMES, Apr. 15, 1984, available at <http://bit.ly/198pRw>.

<sup>27</sup> The City of New Orleans Human Relations Commission, available at <https://secure.cityofno.com/portal.aspx?portal=58> (last visited Sept. 6, 2009).

<sup>28</sup> NEW ORLEANS ORD. 22021 (June 18, 1998).

<sup>29</sup> *Id.*

### III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE & LOCAL GOVERNMENTS

#### A. Case Law

##### 1. State & Local Government Employees

Holt v. Rapides Parish Sch. Bd., 1996 WL 709720 (La. Ct. App. Dec. 11 1996).

Gwendolyn Holt was a tenured teacher and coach for women's sports at Oak Hill High School. One of her students was Lori Robinson, the daughter of Holt's cousin Mike Robinson. Holt and the Robinsons had a close, familial relationship, and that carried over into Holt's relationship with Lori at school. Rumors ran throughout the community that Holt was a lesbian. Seizing on these rumors and a number of unsubstantiated "incidents" involving Holt and Lori, the Superintendent of Schools, Allen Nichols, went to the Board of Education seeking Holt's dismissal on grounds of "willful neglect of duty" based on an "improper relationship" with a student. The Board held a hearing, after which it voted 5-4 that several of the incidents were proven, found Holt guilty of "willful neglect of duty" by a vote of 6-3, and then voted to discharge her by a vote of 5-4.

In the ensuing lawsuit, the trial judge found in favor of Holt. The appeals court affirmed the trial court's decision, finding that the charges against Holt "are replete with insinuations and innuendos, but the Board's case is seriously lacking in evidence, much less the 'substantial evidence' required to support the Board's actions".<sup>30</sup> The trial judge stated: "The events did happen, but except for some vague inference, they do not substantiate a charge of an unprofessional relationship. Furthermore, the other facts and circumstances of these events make them completely innocuous. We agree with the trial judge and, thus, find no error in the district court's finding . . . ." <sup>31</sup> The court concluded that the School Board's decision "was arbitrary and an abuse of discretion,"<sup>32</sup> and assessed the School Board the full costs of the appeal.<sup>33</sup>

##### 2. Private Employees

Oiler v. Winn-Dixie, 2002 U.S. Dist. LEXIS 17417 (E.D. La. 2002).

In *Oiler*,<sup>34</sup> a New Orleans truck driver, filed suit against his former employer, Winn-Dixie, under federal sex discrimination laws.<sup>35</sup> The driver, Peter Oiler, had worked for Winn-Dixie for 23 years. While attempting to resolve workplace rumors that he was gay, he told his supervisor that he sometimes wore women's clothing away from the job.<sup>36</sup> This information was provided to Michael Istre, president of Winn-Dixie

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<sup>30</sup> *Holt v. Rapides Parish Sch. Bd.*, 1996 WL 709720, 2 (La. Ct. App. Dec. 11, 1996).

<sup>31</sup> *Id.* at 3.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 4.

<sup>34</sup> *Oiler v. Winn-Dixie*, 2002 U.S. Dist. LEXIS 17417 (E.D. La. 2002).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 6.

Louisiana, who requested that Oiler resign.<sup>37</sup> Oiler, who had been promoted regularly and who had had excellent performance evaluations, repeatedly refused to resign and was subsequently fired.<sup>38</sup> In court testimony, Istre admitted that Oiler was fired for the simple reason that, “I think if my customers recognized him . . . I’d lose business.”<sup>39</sup> In September 2002, the U.S. District Court for the Eastern District of Louisiana granted Winn-Dixie’s motion for summary judgment, ruling that Oiler’s claims did not fall under federal statutes outlawing sex discrimination and were not consistent with the law set forth in *Price Waterhouse*, a Supreme Court case banning sex stereotyping in the workplace.<sup>40</sup> In so holding, Judge Lance Affrick reasoned that “the repeated failure of Congress to amend Title VII supports the argument that Congress did not intend Title VII to prohibit discrimination on the basis of a gender identity disorder. In reaching this decision, this Court defers to Congress who, as the author of Title VII, has defined the scope of its protection. Neither Title VII nor the United States Supreme Court’s decision in *Price Waterhouse* affords plaintiff the protection that he seeks.”<sup>41</sup>

The judgment notwithstanding, Judge Affrick recognized the injustice that Oiler had suffered, writing: “Defendant’s rationale for plaintiff’s discharge may strike many as morally wrong. However, the function of this court is not to raise the social conscience of defendant’s upper level management, but to construe the law in accordance with proper statutory construction and judicial precedent. The Court is constrained by the framework of the remedial statute enacted by Congress and it cannot, therefore, afford the luxury of making a moral judgment.”<sup>42</sup>

## B. Other Documented Examples of Discrimination

### Louisiana State University

In 2006, a gay man was hired as a faculty member and coordinator of the 4-H Program at Louisiana State University. He implemented successful youth programs in his position, was promoted in 2007, and received a Distinguished Service Award. At the meeting during a camp event supervised by the faculty member, the Human Resources Manager told him that the school had received an anonymous letter saying that the faculty member had a personal ad on a gay dating website. The faculty member was immediately put on administrative leave without even the opportunity to collect his belongings from the campsite—because he “could not interact with the youth anymore.” He refused to quit so he was demoted from his supervisory position and all youth programs were taken away from him. His contract was not renewed for the 2009-2010 school year.<sup>43</sup>

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<sup>37</sup> *Id.* at 9.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 12.

<sup>40</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>41</sup> *Oiler*, 2002 U.S. Dist. LEXIS 17417 at 32.

<sup>42</sup> *Id.* at 30-31.

<sup>43</sup> Email from Ken Choe, Senior Staff Attorney, American Civil Liberties Union, to Brad Sears, Executive Director, the Williams Institute (Sept. 11, 2009, 14:10:00 PST) (on file with the Williams Institute).

Monroe Public School

In 2004, a lesbian bus driver reported that she had faced harassment for gender non-conformity and sexual orientation. She complained about the adverse treatment, but her grievance was deemed invalid.<sup>44</sup>

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<sup>44</sup> E-mail from Ming Wong, Nat'l Center for Lesbian Rts., to Christy Mallory, the Williams Institute (May 7, 2009, 11:15:00 PST) (on file with the Williams Institute).

#### IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

##### A. Criminalization of Same-Sex Sexual Behavior

Prior to the U.S. Supreme Court's decision in *Lawrence v. Texas*,<sup>45</sup> Louisiana had one of the oldest and most restrictive sodomy laws in the U.S..<sup>46</sup> Any "unnatural carnal copulation" by a human being with another of the same sex, among other behavior, was considered a "crime against nature" and was punishable by up to five years in prison and/or a \$2,000 fine.<sup>47</sup> In addition, Louisiana enacted a sex offender registration law in 1992 that included both violent sex offenses and consensual sodomy - also included within the scope of the sodomy law.<sup>48</sup> The sex offender registration law required not only registration and notice of change of address of each offender, but also a photograph and fingerprints to be provided to the sheriff, with failure to register punishable by one year in prison and/or a one thousand-dollar fine.<sup>49</sup> Subsequent violations of the law would lead to a maximum of three years in prison without parole, probation, or suspension of sentence. As a result of the interaction of these two laws, an individual found guilty of engaging in consensual oral sex with an individual of the same sex could be forced to register as a sex offender under Louisiana law.

Prior to *Lawrence*, Louisiana courts had consistently denied privacy challenges to the sodomy law. In *State v. Smith*, Mitchell Smith, a heterosexual man, was convicted of a "simple" crime against nature after he admitted to engaging in oral sex with a woman.<sup>50</sup> Smith appealed the criminal conviction on the grounds that the sodomy law criminalized private, non-commercial sexual activity between consenting adults in violation of the right to privacy guaranteed by Article I, Section 5 of the Louisiana Constitution. The Louisiana Fourth Circuit Court of Appeal heard the appeal and concluded that the sodomy law is unconstitutional on its face as it infringes upon the right to privacy to the

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<sup>45</sup> *Lawrence*, 539 U.S. at 558.

<sup>46</sup> LA. REV. ANN. STAT. §14:89 (defining a "crime against nature" as

"the unnatural carnal copulation by a human being with another of the same or opposite sex or with an animal. Emission is not necessary, and when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime. Whoever commits the crime against nature shall be fined not more than two thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both.")

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

<sup>48</sup> *Acts of the State of Louisiana 1992*, Act 388 (June 18, 1992).

<sup>49</sup> *Id.*

<sup>50</sup> *State v. Smith*, 766 So. 2d 501 (La. 2000).

extent that it criminalizes private, consensual, non-commercial sex acts.<sup>51</sup> The court did not rule on Smith's claim that the law was applied in a discriminatory manner. On appeal to the Louisiana Supreme Court, the court concluded that "no reasonable Louisiana citizen would consider that the result of voting to ratify a general constitutional guarantee of 'liberty' or 'privacy' would be to divest that citizen's elected legislators of the right to continue the specific statutory proscription against sodomy or any other criminal act. To the contrary, any reasonable citizen would believe that he or she thereby was retaining the liberty to make such determinations through elected legislators. There is no evidence that the people adopting the Louisiana Constitution at referendum intended to create a constitutional right to engage in oral or anal sex."<sup>52</sup>

In 1994, the Louisiana Electorate of Gays and Lesbians, Inc. ("LEGAL"), a non-profit gay rights organization, in conjunction with a number of citizens, filed a class action seeking to have the sodomy law deemed unconstitutional on several grounds, including Equal Protection, arbitrary application and enforcement against gays and lesbians, and cruel and unusual punishment, in addition to raising privacy concerns.<sup>53</sup> In 1999, Orleans Parish Civil District Court Judge Carolyn Gill Jefferson ruled that the sodomy law was unconstitutional on privacy grounds "only insofar as it prohibits non-commercial, consensual, private sexual behavior by adult human beings," and issued an injunction against its enforcement in such instances.<sup>54</sup> The ruling, however, did not address LEGAL's other constitutional claims and LEGAL filed a motion for a new trial. At the same time, LEGAL appealed the case to the Louisiana Fourth Circuit Court of Appeal with respect to the portions of the statute that the trial court had not declared unconstitutional. LEGAL's appeal was stayed by the Louisiana Supreme Court pending resolution of the *Smith* case (described above). In the interim, the ruling by the Louisiana Supreme Court in *Smith* that the sodomy law does not violate the state constitutional right to privacy squarely contradicted the trial court's ruling on the privacy issue and the case was remanded to the trial court for reconsideration on that issue. Judge Jefferson reaffirmed her earlier ruling in March 2001, again ruling solely on privacy grounds. LEGAL again appealed. On March 28, 2002, relying on *Smith*, the Louisiana Supreme Court issued a decision vacating the trial courts ruling and transferred the case to the Louisiana Fourth Circuit Court of Appeal for consideration of the remaining constitutional claims. The Court of Appeal concluded that the plaintiffs had brought no evidence that the "crime against nature" statute discriminates against gays and lesbians. The court reasoned that the sodomy law is facially neutral as it "applies equally to all individuals - male, female, heterosexual and homosexual."<sup>55</sup> The court also reasoned that the sodomy law was not unconstitutional as the result of the legislature's discriminatory purpose. According to the court, "the record is devoid of any evidence that the crime

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<sup>51</sup> *State v. Smith*, 729 So. 2d 648 (La. Ct. App. 1999).

<sup>52</sup> *Smith*, 766 So. 2d at 508.

<sup>53</sup> *La. Electorate of Gays & Lesbians, Inc. v. State 94-1679*, 640 So. 2d 1319 (La. 1994)

<sup>54</sup> *La. Electorate of Gays & Lesbians, Inc. v. State*, 2002 La. App. LEXIS 3689 (La. Ct. App. Nov. 20, 2002).

<sup>55</sup> *Id.* at 13.

against nature statute was enacted for the purpose of discriminating against gay men and lesbians.”<sup>56</sup> Further efforts at appeal by LEGAL were denied.<sup>57</sup>

In 2001, it appeared as if the state legislature was prepared to overturn the sodomy law without the involvement of the courts.<sup>58</sup> In June 2001, State Senator Charles Jones moved to introduce a sodomy amendment to House Bill 2047 (proposed by State Representative Daniel Martiny), which would have toughened the state’s mandatory sex-offender registration laws. The amendment proposed by Sen. Jones would have decriminalized private, noncommercial sex acts between consenting adults.<sup>59</sup> Lawmakers in the Louisiana House of Representatives had narrowly failed to pass a similar bill in May 2001 (the vote was, in fact, a 46-46 tie).<sup>60</sup> The effort in the House was stunted in part by a letter from State Parks Superintendent Gene Young, who complained that overturning the law would make it harder for him to stop gay sex in state parks.<sup>61</sup> The proposed bill suffered a similar fate in the Senate and was never enacted.

## B. HIV/AIDS Discrimination

### In re Cecil Little

In July 2003, Cecil Little Jr.’s family filed a complaint in the U.S. District Court for the Eastern District of Louisiana and complaints with the Department of Health and Human Services Office for Civil Rights against six nursing homes, claiming that all had violated a law prohibiting care facilities receiving federal funds - in this case, Medicare and Medicaid - from discriminating against patients with disabilities.<sup>62</sup> Little claimed that he was denied care because of his HIV-positive status and suffered unlawful discrimination under the Federal Rehabilitation Act among other state and federal laws. Eventually, one of the six facilities named in that complaint - Kentwood Manor in Kentwood, Louisiana - accepted Little. Until Kentwood Manor accepted Little, he was forced to stay at another facility 160 miles away from his family, where his health rapidly deteriorated. He now lives within 20 miles of his sister.<sup>63</sup>

## C. Hate Crimes

Louisiana hate crime laws include “actual or perceived” gender and sexual orientation as protected classes.<sup>64</sup> The Louisiana Commission on Human Rights has been charged with collecting, studying, and reporting statewide data for such hate crimes,

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<sup>56</sup> *Id.* at 15.

<sup>57</sup> See, e.g., *La. Electorate of Gays & Lesbians, Inc. v. Connick*, 902 So. 2d 1090 (La. 2005).

<sup>58</sup> George Painter, *Louisiana Sodomy Law Survives Repeal Effort*, SODOMY LAWS, June 21, 2001, <http://bit.ly/imrCo>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> George Painter, *Louisiana Upholds Sodomy Law, Rejects Employment Non-Discrimination Bill*, SODOMY LAWS, May 24, 2001, <http://bit.ly/oQcf0>.

<sup>62</sup> *[Five] rest homes accused of discrimination involving HIV*, DOLAN MEDIA NEWS, June 21, 2004.

<sup>63</sup> *Id.*

<sup>64</sup> LA. REV. STAT. ANN. § 14:107.2 (2002).

which data is reported annually to the governor and members of the Legislature. However, as yet, Louisiana has not addressed gender identity-based violence under these provisions of the hate crimes laws.<sup>65</sup>

#### D. Education

In March 2008, House Bill 674 - a bill that would have required city, parish, and local school boards to adopt policies prohibiting bullying, harassment, and intimidation based on various characteristics, including sexual orientation but not gender identity or expression - was introduced in the state House of Representatives by State Representative Walt Leger.<sup>66</sup> The bill passed a House committee by an 11-4 vote.<sup>67</sup> However, on April 29, 2008, the bill was defeated by a 28-63 vote in the House.

#### E. Health Care

Louisiana law does not allow for a partner to make decisions on behalf of his or her incapacitated same-sex partner in the absence of an express advance directive.<sup>68</sup>

#### F. Gender Identity

Louisiana passed a birth certificate statute in 1968, which reads: “Any person born in Louisiana, who has sustained sex reassignment or corrective surgery which has changed the anatomical structure of the sex of the individual to that of a sex other than that which appears on the original birth certificate of the individual, may petition a court of competent jurisdiction as provided in this Section to obtain a new certificate of birth.”<sup>69</sup> This statute is still in effect. On December 23, 2008, the U.S. District Court for the Eastern District of Louisiana granted summary judgment in favor of plaintiffs Oren Adar and Mickey Ray Smith, two gay men who are adoptive parents of a child born in Louisiana but adopted in New York, in their suit against the Louisiana State Registrar seeking injunctive relief and a declaratory judgment that the registrar's refusal to enforce a New York adoption decree and to issue an amended birth certificate including both parents' names violated the Full Faith and Credit Clause of the U.S. Constitution.<sup>70</sup> The Louisiana State Registrar had initially refused the request that both the men's names be added to the birth certificate because gay adoption and same-sex marriage are illegal in Louisiana. Adar and Smith then filed a lawsuit in federal court, taking the position that leaving their names off the birth certificate “singles out unmarried same-sex couples and their adoptive children for the improper use of making them unequal to everyone else.”<sup>71</sup> U.S. District Court Judge Jay Zainey granted the plaintiffs' summary judgment motion and ordered the Louisiana State Registrar to recognize the adoption on constitutional grounds, ruling that doing otherwise would violate the Full Faith and Credit Clause,

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<sup>65</sup> *Id.*

<sup>66</sup> Notice of Committee Meeting, Louisiana House of Representatives (Apr. 23, 2008).

<sup>67</sup> *Anti-Bullying Bill Clears House Committee*, ADVOCATE, Apr. 24, 2008.

<sup>68</sup> LA. REV. STAT. ANN. § 40:1299.53.

<sup>69</sup> LA. REV. ANN. STAT. § 40:62 (A)(2004).

<sup>70</sup> *Adar v. Smith*, 2008 WL 5378130 (E.D. La. 2008).

<sup>71</sup> *Id.*

which mandates that court-ordered events that take place in other states remain legally binding across state lines. Per this ruling, both Adar and Smith will be recognized as their son's legal parents under Louisiana law. The state has confirmed that it plans to appeal the ruling.<sup>72</sup>

#### H. Recognition of Same-Sex Couples

In 1999, the Louisiana legislature unanimously enacted a statute prohibiting the state from recognizing marriage for same-sex couples.<sup>73</sup> And, in 2004, Louisiana became one of the first states in the country to approve a constitutional amendment banning same-sex marriage as well as civil unions and domestic partnerships. The amendment reads as follows:

Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.<sup>74</sup>

In August 2004, the Forum for Equality, a statewide civil rights organization, filed suit against the state seeking to have the amendment removed from the ballot.<sup>75</sup> The amendment was initially struck down by Judge William Morvant, who ruled that the amendment was not narrowly tailored as is required under state law. According to state law, constitutional amendments are valid only if they have a single legal purpose and the court ruled that the amendment in fact had two purposes: the first was to ban gay marriage and the second was to ban civil unions and domestic partnerships. An appeal of the trial court decision was heard by the state's five-judge First Circuit Court of Appeal, but the Court of Appeal sent the case to the state's Supreme Court without ruling on the issue.<sup>76</sup> The Louisiana Supreme Court followed the trial court in focusing on the issue of

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<sup>72</sup>*Louisiana Will Appeal Birth Certificate Order*, SHREVEPORT TIMES, Jan. 1, 2009, available at <http://bit.ly/VuRKj>.

<sup>73</sup> Louisiana House Bill 1450 passed by a margin of 95-0 in the House and 37-0 in the Senate. The bill enacted Louisiana Civil Code Annotated, Article 96, which states that

“[a] purported marriage between parties of the same sex does not produce any civil effects” and Article 3520(B), which states “A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.”

<sup>74</sup> La. Const. art. XII, §15.

<sup>75</sup> *Forum for Equality v. McKeithen*, No. 2004-11324 (La. D., Orleans Parish, Div. J-13 Aug. 6, 2004).

<sup>76</sup> See generally *Forum for Equality PAC v. McKeithen*, 2004 La. App. LEXIS 2407 (La. Ct. App. Oct. 13, 2004)

whether the amendment in fact had more than one purpose. The Louisiana Supreme Court concluded that each part of the amendment was “germane to the object of ‘defense of marriage’” and, hence, that the amendment was legally valid.<sup>77</sup>

In contrast, the New Orleans City Council unanimously enacted a Domestic Partnership ordinance in July 1993, and then amended and readopted it in 1999. The Domestic Partnership ordinance establishes a registry in which an adult, cohabiting couple who are not married and who are either different-sex or same-sex, can register their relationship with the city. After the ordinance was enacted, the city’s Chief Administrative Officer made access to health insurance available to registered domestic partners of city employees.

In 2002, the Alliance Defense Fund filed suit on behalf of a group of New Orleans taxpayers to challenge the Council’s authority to enact the ordinance.<sup>78</sup> The plaintiffs argued that under the home rule charter and the state constitution, the City of New Orleans was precluded from establishing new legal forms of family relationships. They relied primarily on Article VI, Section 9 of the Louisiana Constitution, which states that “no local governmental subdivision shall . . . enact an ordinance governing private or civil relationships.” On January 15, 2009, a unanimous three-judge panel of the Louisiana Fourth Circuit Court of Appeal rejected the Alliance Defense Fund’s appeal. The court’s opinion in *Ralph v. City of New Orleans* affirmed the lower court’s ruling that the City of New Orleans had the legislative authority to adopt the measure and intimated that the challenged ordinance did not violate the state’s “Defense of Marriage Amendment,” passed by the voters in 2004 (as discussed above).<sup>79</sup> Writing for the panel, Judge Joan Bernard Armstrong explained, “[t]he ordinance does not control the making and administration of domestic partnerships, it merely provides a mechanism whereby persons may register these partnerships with the City.”<sup>80</sup>

#### **J. Other Non-Employment Sexual Orientation & Gender Identity Related Laws**

In October 2008, Gov. Jindal announced that he would revive the Louisiana Commission on Marriage and Family, billed as “an entity within the executive department that serves to propose programs, policies, incentives and curriculum regarding marriage and family by collecting and analyzing data on the social and personal effects of marriage and child-bearing within the state of Louisiana.”<sup>81</sup> The Commission will be considering and making recommendations regarding marriage and family issues within the state. According to the statute, the commission is comprised of a maximum of twenty-nine members including the governor, the secretary of the Department of Social Services, the secretary of the Department of Health and Hospitals, the director of the Louisiana Workforce Commission, the commissioner of higher

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<sup>77</sup> *Forum for Equality v McKeithen*, 893 So. 2d 715, 2004-2477 (La. 2005)

<sup>78</sup> *Ralph v. City of New Orleans*, 2009 WL 103895 (La. Ct. App. Jan. 15, 2009).

<sup>79</sup> *Id.* at 12.

<sup>80</sup> *Id.*

<sup>81</sup> Press Release, Office of the Gov. of the State of La., Governor Bobby Jindal Announces Appointments to the Louisiana Commission on Marriage and Family (2008), available at <http://bit.ly/CispX>.

education, the superintendent of the Department of Education, the executive director of the Children’s Cabinet, the executive director of the Office of Women’s Policy, and the director of Temporary Assistance for Needy Families, or their designees. Observers have expressed concerns that many of those appointed by Gov. Jindal to serve on the panel will promote an extreme, anti-gay agenda that sets back, blocks, and battles any attempts to recognize or respect Louisiana’s LGBT people or families headed by same-sex couples.<sup>82</sup>

Among those who have been appointed by Gov. Jindal to serve on the Commission are Tony Perkins, the president of the anti-gay advocacy group known as The Family Research Council, Gene Mills, executive director of the conservative Louisiana Family Forum and Michael Johnson, senior legal counsel for the Alliance Defense Fund, a nonprofit group that opposes gay marriage, and the lead lawyer for the organization in its challenge of the New Orleans Domestic Partnership ordinance.<sup>83</sup> Each of these individuals has a long history of anti-LGBT rhetoric. According to reports, Perkins and Mills, especially, are anti-gay advocates, and have been the driving forces behind attempts to ban legal protections for same-sex couples.<sup>84</sup> While heterosexual relationships can result in children, Mills has said, “you don’t get the equivalent in a homosexual relationship . . . you get disease.”<sup>85</sup>

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<sup>82</sup> Bill Barrow, *Advocates Fear Attack on Gay Adoption by Louisiana Lawmaker*, TIMES-PICAYUNE, Dec. 30, 2008.

<sup>83</sup> *See supra* Section IV.A(1).

<sup>84</sup> *Id.*

<sup>85</sup> Scott Gold, *Louisiana Judge Throws Out State Ban on Gay and Lesbian Marriages*, L.A.TIMES, Oct. 6, 2004, available at <http://bit.ly/1FEdNI>.