The "Gay '90s" — Sexual Orientation and Indiana Law

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Introduction

This Article surveys current law affecting gay men and lesbians in Indiana. Federal, statutory, and administrative law is included where it affects Indiana residents. Legal issues raised by HIV/AIDS have been treated exhaustively elsewhere, and will be discussed only when they implicate sexual orientation.

The goal of this article is to assist practitioners who represent gay and lesbian clients, to determine appropriate avenues for further research, and to identify relevant issues.

I. Federal Law

A. Immigration

The Immigration Act of 1990 removes an alien's homosexuality as a bar to immigrating to the United States by eliminating the phrase "sexual deviance" from the list of permissible reasons to exclude aliens.[1] However, it is arguable that gay men may still be excluded because they constitute a high risk group for contracting HIV/AIDS,[2] which is on the list of contagious diseases for which infected aliens may be excluded.[3] The current U.S. policy of excluding HIV-positive aliens arguably provides a rational basis for the Public Health Service's examining physicians to exclude homosexuals who, although not HIV-positive, are at a high risk of becoming HIV-positive.[4]

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1. Lyn G. Shoop, *Health Based Exclusion Grounds in United States Immigration Policy: Homosexuals, HIV Infection and the Medical Examination of Aliens*, 9 J. Contemp. Health L. & Pol'y, 521, 526 (1993). *See generally* 8 U.S.C.A. §§ 1151 1182, 1224, 1226, 1251, 1252, 1254, 1427, 1440 (West Supp. 1993).

2. *See* Shoop, *supra* note 1, at 521: "The nexus between HIV and homosexuality, however, raises questions as to the immigration status of homosexuals and other persons seeking entry into the United States who, although not infected, are at a high risk of contracting HIV."

3. *Id.* at 521 (citing 42 C.F.R. § 34).

4. *Id.* at 530-44. *See also* 42 C.F.R. § 34 (1992).

B. Employment Discrimination

No federal statute specifically prohibits employment discrimination on the basis of sexual orientation. The Americans with Disabilities Act of 1990 offers gay men and lesbians no protection against job discrimination on the basis of sexual orientation.[5] The regulations promulgated pursuant to the Americans with Disabilities Act expressly provide that the "phrase physical or mental impairment does not include homosexuality . . . ."[6] Furthermore, Title VII of the Civil Rights Act of 1964 does not prohibit employment discrimination against gay and lesbian employees.[7] Section 706 of the Rehabilitation Act also excludes homosexuality from its coverage.[8]

The Employee Polygraph Protection Act of 1988 prohibits most private employers from using lie detector tests either for pre-employment screening or for testing during the course of employment.[9] Federal, state, and local government employers, however, are exempt.[10] Section 8(b) of the Act, and Department of Labor regulations, require that a polygraph examinee be informed before the exam that questions concerning sexual preference or behavior are prohibited.[11] During all phases of the polygraph testing, no questions may be asked about sexual preference or behavior.[12]

Several federal agencies now ban employment discrimination based on sexual orientation, including the Justice Department, the Department of Agriculture, the General Services Administration, and the Department of Transportation, and several regional offices of the National Park Service.[13] Because these changes are fairly recent, the scope of protection they afford is unclear at this time.

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5. 42 U.S.C.A. §§ 12101-12213 (West Supp. 1993); 47 U.S.C.A. §§ 225, 611 (West Supp. 1993).

6. 28 C.F.R. § 35.104; 28 C.F.R. § 35, App. A; 28 C.F.R. § 36.104; 28 C.F.R. § 36, App. B (1993); 29 C.F.R. § 1630.3 (1993).

7. Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978). *See also* Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. Ill. 1984), *cert. denied*, 471 U.S. 1017 (1985); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979); Polly v. Houston Lighting & Power Co., 825 F. Supp. 135 (S.D. Tex. 1993).

8. Blackwell v. United States Dept. of Treasury, 830 F.2d 1183 (D.C. Cir. 1987). *See also* 29 U.S.C.A. §§ 701-797 (West Supp. 1993); 28 C.F.R. § 35, App. A; 28 C.F.R. § 36, App. B (1993).

9. Employee Polygraph Protection Act of 1988, 29 U.S.C.A. 2001-2009 (West Supp. 1993).

10. 29 C.F.R. § 801.1 (1993).

11. 29 C.F.R. § 801, App. A (1993).

12. 29 C.F.R. § 801.22(b)(iv) (1993).

13. Gary Lee, *Secretary Pena Celebrates Gay Pride*, WASH. POST, June 16, 1993, at A19; Al Kamen, *Helms on Nominee: "She's a Damn Lesbian,"* WASH. POST, May 7, 1993, at A21; Gary Lee, *Beyond Military, Gays Seek Acceptance in Government Workplace*, WASH. POST, April 12, 1993, at A17; Joan Biskupic, *Reno Prohibits Bias Against Gays in Security Clearances*, WASH. POST, Dec. 3, 1993, at A04.

C. *Criminal Law*

Most of the legal issues in criminal law that involve the rights of gay men and lesbians arise at the state level. At the federal level, however, it should be noted that the regulations under the Bureau of Prisons of the Department of Justice state that in determining whether an inmate should be placed in a control unit, the warden may not do so on the basis that "the inmate is a protection case, e.g., a homosexual, . . . unless the inmate meets other criteria" as described in other parts of the regulation.[14]

D. *HIV/AIDS*

An individual who is HIV-positive or who has AIDS, or who simply is perceived as being HIV-positive or as having AIDS, can seek remedies under the Americans with Disabilities Act of 1990[15] and the Rehabilitation Act of 1973.[16]

II. State Law

A. *Family Law*

1. Definition of Family.—Indiana statutes generally define a "family" on the basis of biological connections or legally sanctioned exceptions to those biological connections. For example, the Indiana Code defines "member of the family" as "a spouse, parent, father-in-law, mother-in-law, child, son-in-law, daughter-in-law, grandparent, grandchild, brother, sister, brother-in-law, sister-in-law, uncle, aunt, nephew, niece, or first cousin."[17] A parent, child, sibling, or first cousin usually is related to a person by blood. A relationship of father-in-law or spouse is a relationship based not on blood but on a legally created relationship.[18] Indiana law does create a "blood" relationship between persons not related by blood, but only in the context of a traditional family. For example, an adopted child is the equivalent of a natural child.[19]

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14. 28 C.F.R. § 541.41(c)(2) (1993).

15. *See supra* note 5.

16. *See supra* note 8. *See also* Glover v. ENCOR, 867 F.2d 461 (8th Cir. 1989); Chalk v. United States Dist. Ct., 840 F.2d 701 (9th Cir. 1988); Martinez v. School Bd. of Hilborough Cty, 861 F.2d 1502 (11th Cir. 1988); Baxter v. City of Belleville, 720 F. Supp. 720 (S.D. Ill. 1989); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1987). *See also* Paul Chase, HIV/AIDS Discrimination in Indiana: Nature, Extent and Remedies for Redress (Oct. 16, 1993) (material prepared for a CLE program, "Sexual Orientation and Indiana Law," on file with the Indiana Civil Liberties Union).

17. Ind. Code § 4-31-13-5(a) (1993).

18. For other definitions of "family," see the following statutes: Ind. Code §§ 2-7-1-5, 9-13-2-43, 12-7-2-111, 14-3-3.2-18 and 30-2-8.5-9 (1993).

19. *See* Ind. Code § 31-3-1-9 (1993) (adoptive parents become the natural parents under the

Indiana statutorily encourages the formation of traditional families and discourages the formation of non-traditional families through the various definitions of "family" and the benefits extended to family members. Another example of this policy appears in the provisions regarding AIDS education. Information distributed to young adults and school children regarding AIDS prevention must encourage sexual abstinence until the school children or young adults marry.[20]

Issues which seem routine for traditional families can become quite complicated for the non-traditional families formed by gay and lesbian couples. Gay men and lesbians must therefore use legal creativity in attempting to establish rights which are statutorily granted to traditional family members. Some of the creative legal devices include, but are not limited to, the domestic partnership agreement, the power of attorney, and the living will.

2. Domestic Relations.—

a. Marriage

The Indiana Code specifically prohibits same-sex marriages.[21] By prohibiting same-sex marriages, Indiana denies to same-sex "spousal equivalents" the benefits of marriage, including the marital deduction,[22] spousal inheritance rights,[23] and employee benefits,[24] including employer-provided health insurance, pension and death benefits,[25] relocation expenses,[26] trips,[27] employee

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law). *See also* IND. CODE §§ 29-1-6-11, 6-4.1-1-3, 27-8-5-21, 29-1-2-8, 29-1-3-8, and 31-1-11.7-2 (1993).

20. IND. CODE §§ 16-41-4-1, 20-10.1-4-11, and 20-8.1-7-21 (1993).

21. IND. CODE § 31-7-1-2 (1993). The following states also statutorily prohibit same-sex marriages: Louisiana: LA. CIV. CODE ANN. art. 89, art. 94, art. 96 (West 1992); Texas: TEX. FAM. CODE ANN. § 1.01 (West 1993); Utah: UTAH CODE ANN. § 30-1-2 (1993) (amended to repeal prohibition against marriage with person infected with HIV/AIDS by 1993 Utah Laws 2nd Sp. Sess. Ch. 14 (S.B. 6)); Virginia: VA. CODE ANN. § 20-45.2 (Michie 1993).

22. *See* 26 U.S.C.A. § 2056 (West Supp. 1993).

23. *See* IND. CODE §§ 29-1-6-1 and 29-1-4-1 (1993). *See also* IND. CODE § 6-4.1-3-7 (1993) (regarding the exemption from inheritance taxes on gifts to spouses).

24. Heidi A. Sorensen, *A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination*, 81 GEO. L.J. 2105 (1993). *See* 42 U.S.C.A. § 1382 (West Supp. 1993) (social security benefits for a spouse).

25. Rovira v. AT & T, 817 F. Supp. 1062 (S.D. N.Y. 1993) (deceased employee's gay life partner could not collect under employer's death benefit plan because partner was not a spouse under ERISA). *See also* IND. CODE § 5-10-10-6 (1993) (special death benefit to surviving spouse of public safety officer who dies in the line of duty); IND. CODE § 36-8-7.5-14.1 (1993) (additional monthly benefit for surviving spouse of police officer who died in line of duty); IND. CODE § 5-10-11-5 (1993) (state employee's death benefit for surviving spouse). *See* 45 U.S.C.A. § 231a (West Supp. 1993) (surviving spouse's annuity under Railroad Retirement Act of 1974). *See* 38 U.S.C.A. § 1713 (West 1991 & Supp. 1993) (medical care for veterans' surviving spouses).

26. *See* IND. CODE § 5-10-7-5 (1993) (travel and relocation expenses for public employees

discounts, reduced tuition,[28] club memberships and similar employee perks. Gay men and lesbians must resort to other legal means to obtain some of the practical benefits of marriage. Denial of such benefits means that gay workers are receiving less total compensation than their married counterparts in the work force.

Two trends have emerged in response to this obvious inequity: legislative initiatives (almost exclusively at the municipal level) and contractual or private employer responses.

b. Domestic partnerships

(i) Legislative provisions

Municipalities in California (Berkeley, San Francisco, West Hollywood, and Santa Cruz), Washington (Seattle), New York (New York), and the District of Columbia extend certain benefits to unmarried individuals' "spousal equivalents."[29] In several of these municipalities, the partners must register as a domestic partnership to receive benefits. The benefits range from leave to care for an ill partner to health and dental benefits. In many instances, the majority of couples filing as domestic partnerships are heterosexual.[30] As of this writing, no state has extended health care coverage to domestic partners of its employees.

(ii) Private employers

As the labor market has tightened, particularly in fields where employers compete for employees with specific skills, the ability of homosexual employees to obtain parity with their heterosexual colleagues is growing.[31] As more employers examine the experience of companies which have previously extended such benefits, and find that costs are equal to or even somewhat below the costs of benefits to married persons, the trend has grown.[32] In part, the willingness

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and their immediate families). *See also* 5 U.S.C.A. § 5724, 5 U.S.C.A. § 5724b and 29 U.S.C.A. § 1662e (West Supp. 1993) (relocation allowances, credits, and reimbursement for federal employees and their families).

27. *See supra* note 26.

28. *See* IND. CODE § 20-12-19.5-1 (1993) (tuition waiver for surviving spouse of deceased firefighter or police officer).

29. For a full discussion of these ordinances, see Note, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067. *See also* Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992).

30. Bettina Boxall, *Benefits for Unmarried Partners Lauded*, LOS ANGELES TIMES, Nov. 17, 1993, at B4.

31. *Id.*

32. *Id.*

to offer benefits recognizes that benefits make up an average of 37% of an employee's compensation.[33] Thus, employees who cannot include their partners in those benefits are compensated less than those who can. Most human resources professionals expect the trend to extend benefits to domestic partners to accelerate.[34]

(iii) Private partnership agreements

Finally, in the absence of legislation or action by private employers, many couples in non-traditional relationships are choosing to formalize those relationships through the execution of partnership agreements. No case law in Indiana specifically addresses the validity of partnership agreements substituting for marriage contracts. In general, however, courts have given effect to the desires of parties to general partnership agreements in the absence of countervailing public policy concerns. In a number of jurisdictions, courts have implied domestic partnership contracts from the behavior of unmarried parties, although generally such cases have dealt with opposite-sex cohabitants.[35]

Indiana has adopted the Uniform Partnership Act (UPA).[36] It defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."[37] While a "domestic partnership" agreement may include recitation of such a business purpose, it is certainly possible that a court would find such a recitation disingenuous and thus find the partnership invalid under the UPA. Even if this were the result, however, it seems likely that a court would still give effect to the agreement under general contract principles. Assuming applicability of the UPA, parties should be thoroughly advised of the Act's effect, particularly with respect to issues of liability and taxation.

Depending upon the desires of the parties and their circumstances, partnership agreements may include provisions as diverse as responsibility for household chores, child care, division of employment benefits, and execution of further documents and agreements. Unlike a marriage contract, a partnership agreement which allows one partner to inherit property or to make health care decisions for the other will not be valid. Partnership agreements, therefore, should be part of a carefully constructed package of documents that includes, at a minimum, a durable power of attorney and a will.

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33. *Id.*

34. *See* Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 2 WIS. WOMEN'S L.J. 1 (1986); *see* David J. Jefferson, *Family Matters: Gay Employees Win Benefits for Partners at More Corporations*, WALL ST. J., March 18, 1994, at A1.

35. Beal v. Beal, 577 P.2d 507 (Or. 1977); Wilbur v. DeLapp, 850 P.2d 1151 (Or. Ct. App. 1993); Raimer v. Wheeler, 849 P.2d 1122 (Or. Ct. App. 1993); Hinkle v. McColm, 575 P.2d 711 (Wash. 1978).

36. IND. CODE § 23-4-1 (1993).

37. IND. CODE § 23-4-1-6(1) (1993).

c. Power of attorney

In the traditional power of attorney, a principal delegates powers to a person, called the attorney-in-fact, to act on his or her behalf.[38] A durable power of attorney is a specialized power of attorney because it survives the principal's incompetence.[39] An area in which the durable power of attorney is very helpful is in health care, though the usefulness of this instrument extends to many other aspects of domestic relations.

Health care may be administered to a patient only if that person consents to the care.[40] "A competent person may consent to or refuse to consent for medical treatment, including life-prolonging procedures."[41] A patient in a vegetative state would be unable to consent to a medical procedure or refuse consent to a life-prolonging procedure. If a person is incompetent and unable to consent or refuse consent, the Indiana Code provides that, in the absence of a health care representative, the incompetent person's "spouse, parent, . . . adult child, or . . . adult sibling" may provide or refuse the consent, unless disqualified.[42]

Many gay men or lesbians are involved in relationships and consider their same-sex lover a spouse. However, because gay men and lesbians may not marry, the same-sex lover is not a spouse in the eyes of the law and thus is unable to consent or refuse consent on that person's behalf. Biological families sometimes are alienated from their gay and lesbian relatives on the basis of their relatives' sexual orientation and thus might not act in the gay or lesbian individual's best interest regarding health care, especially the use of heroic measures to prolong life.

Gay men and lesbians do have the option of disqualifying their biological relatives[43] and appointing their same-sex lover, a trusted friend, or even a biological relative, as their health care representative, which is a special application of the durable power of attorney.[44] The appointment may confer upon the health care representative general authority and/or provide detailed instructions about health care decisions.[45] The health care representative may even be granted the power to refuse consent to medical treatment on the gay or lesbian person's behalf.[46]

The gay or lesbian individual may execute a power of attorney for reasons other than health care. During the period of a person's incompetency, the

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38. IND. CODE § 30-5-2-2 (1993).
39. IND. CODE § 29-3-1-5 (1993).
40. IND. CODE § 16-36-4-6 (1993).
41. IND. CODE § 16-36-4-7(a) (1993).
42. IND. CODE § 16-36-1-5 (1993).
43. IND. CODE § 16-36-1-9 (1993).
44. IND. CODE §§ 16-36-1-14, 30-5-5-17 (1993).
45. IND. CODE § 30-5-5-16 (1993).
46. IND. CODE § 30-5-5-17 (1993).

attorney-in-fact may exercise power granted by the principal to take care of general business transactions, such as paying bills or depositing checks.[47]

d. Living wills

The gay or lesbian person also has the option of executing a living will declaration to specify intent regarding the use of life-prolonging procedures.[48] The living will is "presumptive evidence of the patient's desires concerning the use, withholding, or withdrawal of life prolonging procedures" and "shall be given great weight by the physician in determining the intent of the patient who is mentally incompetent."[49] A physician relying on an individual's living will is not required to use or withdraw life-prolonging procedures, and still has discretion to direct the course of treatment.[50] An individual may also execute a "life prolonging procedures will declaration" which "does require the physician to use life-prolonging procedures as requested."[51]

It is important to note that the state's definition of "life-prolonging procedure" does not include the "provision of appropriate nutrition and hydration."[52] Hence, the execution of a living will does not automatically direct the physician to cease providing nutrition and hydration to the patient. This issue must therefore be addressed by the health care representative via the durable power of attorney. Additionally, the individual executing the living will could specify his or her intent regarding cessation of artificial nutrition and hydration.

Effective July 1, 1994, pursuant to Indiana Public Law 99-1994, a person may specify in his living will declaration the desire not to receive artificially supplied nutrition and hydration if the "effort to sustain life is futile or excessively burdensome" to the declarant.[53] This amendment expressly does not apply to living wills executed before July 1, 1994.[54]

3. Child Custody.—Following dissolution of marriage, in determining which parent should have custody of a child of the marriage, the trial or divorce court must award custody in the "best interests of the child with no presumption favoring either parent."[55] In a custody dispute between a heterosexual parent and a gay or lesbian parent, it would follow that there could be no presumption

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47. IND. CODE § 30-5-5 (1993).

48. IND. CODE § 16-36 (1993). *See also* Charles P. Sabatino, *Health Care Advance Directives: Drafting Sound Legal Documents That Reflect How Decisions Are Really Made*, 16 FAM. ADVOC. 60 (1993); Rhonda R. Rivera, *Current Legal Issues in AIDS: Lawyers, Clients and AIDS: Some Notes From the Trenches*, 49 OHIO ST. L.J. 883 (1989).

49. IND. CODE § 16-36-4-8(f) (1993).

50. IND. CODE § 16-36-4-8(f)(1) (1993).

51. IND. CODE § 16-36-4-8(g) (1993).

52. IND. CODE § 16-36-4-1(b)(1) (1993).

53. 1994 Ind. Legis. Serv. P.L. 99-1994 (H.E.A. 1037) (West).

54. *Id.*

55. IND. CODE § 31-1-11.5-21 (1993).

favoring the heterosexual parent simply because the other parent is a gay man or a lesbian. In awarding custody, the court "shall consider all relevant factors," including the following six factors:

> (1) the age and sex of the child; (2) the wishes of the child's parent or parents; (3) the wishes of the child; (4) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests; (5) the child's adjustment to his home, school, and community; and (6) the mental and physical health of all individuals involved.[56]

In *D.H. v. J.H.*, the Indiana Court of Appeals for the First District held that evidence of a parent's homosexuality is relevant to a child custody determination,[57] even though the statute does not specifically state that homosexuality is relevant.[58] The court noted that "[c]onsideration of all relevant factors is not limited to [the six factors] specifically enumerated."[59] The court held that "homosexuality standing alone without evidence of any adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child."[60] Homosexual activity in the presence of the child, or evidence that the parent's homosexuality has an adverse impact on the child, probably would preclude custody.[61]

The question becomes what acts a court would consider to be homosexual activity. An embrace between members of a heterosexual couple might be seen as inoffensive non-sexual activity, whereas a hug or kiss between members of a homosexual couple might be seen as sexual activity. Such innocuous acts might then form the basis for denying custody to the homosexual parent.

Apart from the question of whether a parent's homosexuality is a relevant factor standing alone, sexual orientation could negatively affect the court's determination under the six specific factors. Any such negative effect could result in an unreviewable denial of custody because an appellate court, recognizing the fact-sensitive nature of the determination, will not disturb a trial court's award of custody in the absence of an abuse of discretion.[62] Thus, the outcome of a court's application of sexual orientation to its consideration of the six factors could have far-reaching effects.

The first factor requires that the court consider the age and sex of the child. At first glance this factor appears unaffected by a parent's sexual orientation. However, faced with a gay or lesbian parent, the court might weigh the age and

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56. *Id.*
57. 418 N.E.2d 286, 290-94 (Ind. Ct. App. 1981).
58. IND. CODE § 31-1-11.5-21 (1993).
59. *D.H.*, 418 N.E.2d at 290-91.
60. *Id.* at 293.
61. *Id.*
62. Aylward v. Aylward, 592 N.E.2d 1247, 1250-52 (Ind. Ct. App. 1992).

sex of the child differently than if both parents were heterosexual. For example, a court might state that a very young son should not be placed with a gay father or that a very young daughter should not be placed with a lesbian mother because it is in the best interest of children to have heterosexual role models.

In considering the second factor, the wishes of either parent, the court's negative attitudes about homosexuality could operate against the gay or lesbian parent. For example, a trial court might use the heterosexual parent's negative attitudes regarding the other parent's homosexuality against the gay or lesbian parent.

Third, the court must also consider any other person who may significantly affect the child's best interests. "Any other person" is very broad. Certainly the "other person" would include the gay or lesbian parent's same-sex lover.

In considering the fourth factor, the interaction of the child with others, the trial court might also find relevant whether the same-sex lover lives with the gay or lesbian parent or frequently stays overnight in the parent's home. For example, one Indiana appellate court has held that a trial court did not abuse its discretion in ordering that during the period when the child visited the non-custodial gay father, the father's adult male lover could not be present overnight.[63] The mere existence of the same-sex lover—regardless of whether the same-sex lover visits or lives with the gay or lesbian parent—might serve as a basis for a trial court denying custody to the gay or lesbian parent.

Fifth, the court must also consider the child's adjustment to the home, the school, and the community. In applying this factor a trial court might award custody to the heterosexual parent so the child would avoid experiencing society's prejudice against homosexuality. For example, if the community knows of the sexual orientation of the gay or lesbian parent, and views it negatively, a trial court might argue that such prejudice would not be in the best interest of the child.

Finally, in considering the health of all individuals involved, HIV/AIDS issues could arise, although their effect on the determination is unclear. For example, a trial court denied a change of custody petition and furthermore terminated the visitation rights of a father with AIDS on the ground that doing so was necessary to prevent the child's being exposed to AIDS.[64] The Court of Appeals upheld the trial court's denial of change of custody, but held that the termination of visitation rights constituted an abuse of discretion.[65] The role of HIV/AIDS in child custody and visitation issues is at best unclear.

Furthermore, a gay or lesbian parent might not be HIV-positive, but instead might be perceived as HIV-positive simply because the parent is homosexual. Prejudice against HIV/AIDS has sometimes led to violence against persons living with AIDS. The court might find that this prejudice would NOT be in the

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63. Pennington v. Pennington, 596 N.E.2d 305, 307 (Ind. Ct. App. 1992).

64. Stewart v. Stewart, 521 N.E.2d 956, 959 (Ind. Ct. App. 1988).

65. *Id.* at 959, 966.

child's best interest. The taunting at school and the potential violence might endanger the child's mental or physical health. A court might use that prejudice against the gay or lesbian parent in determining custody.

The issues raised by examining homosexuality in the context of the child custody statutes need further study and eventual legislative reform. Judges should retain discretion, and the determination should remain fact-sensitive. However, the discretion must be exercised with adequate information about sexual orientation issues. Judges and attorneys must have a thorough understanding of what issues can arise and must be sensitive to the humanity of gay and lesbian persons.

4. Adoption of Children.—There are many different situations in which the issue of adoption of children can arise for gay men and lesbians in Indiana. A gay man or lesbian might wish to adopt a child. A couple consisting of two gay men or of two lesbians may wish to jointly adopt a child. The same-sex partner in a same-sex relationship might wish to adopt the other partner's natural child from a previous heterosexual relationship.

Indiana statutes are silent about the issue of gay and lesbian adoptive parents, unlike the statutes of some other states, which expressly forbid adoption of children by gay men and lesbians.[66] Indiana statutes neither forbid nor expressly authorize the adoption of children by gay men and lesbians. However, it does not follow that adoption of children by gay men and lesbians is without problems.

"Any resident of Indiana desirous of adopting any child less than eighteen (18) years of age" may petition the appropriate court to adopt a child.[67] The phrase "any resident" on its face certainly does not exclude gay men and lesbians residing in Indiana. The Indiana Code states that the petition shall specify "such additional information consistent with the purpose and provisions of this chapter as may be deemed relevant to the proceedings . . . ."[68] The Code requires that before and/or after the filing of the adoption petition, a licensed child-placing agency or a county office of family and children must provide supervision.[69] This period of supervision would probably reveal the parents' sexual orientation. The petitioner must submit a copy of the petition to any sponsoring agency involved in the adoption, and a copy to the division of family and children.[70] The county office of family and children must also receive a copy if a subsidy is requested in a petition sponsored by a private agency.[71] Sixty days after receiving the petition, the agency must submit to the court a report on whether

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66. *E.g.*, Florida: FLA. STAT. ANN. § 63.042(3) (West 1992); New Hampshire: N.H. REV. STAT. ANN. §§ 170-B:4 and 170-F:6(I) (1992).

67. IND. CODE § 31-3-1-1 (1993).

68. IND. CODE § 31-3-1-2 (1993).

69. IND. CODE § 31-3-1-3 (1993).

70. IND. CODE § 31-3-1-4(b) (1993).

71. *Id.*

the adoption is advisable.[72] Among other factors, the report must discuss the "suitability of the proposed home for the child or children."[73] The report is not binding on the court but is only advisory.[74] Hence, if an agency report recommends adoption by the gay or lesbian parent or parents, the court may reject it, or vice versa.[75] The court or the involved agencies could find the home not suitable and the adoption inadvisable solely because of the parent or parents' sexual orientation.

Although sexual orientation is not an automatic bar to adoption of children in Indiana, the negative attitudes of courts and agencies involved in the adoption process could prevent adoption of children by gay men and lesbians. Furthermore, HIV/AIDS issues could prevent an adoption or even be a basis for a biological parent to withdraw consent to an adoption.[76]

B. Employment Discrimination

1. Employment-at-Will Doctrine.—Indiana law presumes that an employee is an employee-at-will when the employment is not for a specific duration.[77] Thus, the employee may be discharged at any time and for any reason.[78] A private employer has no duty of good faith and fair dealing to an employee-at-will.[79] At-will employees have no protectable property interest in their employment.[80] Such employment is not protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[81] An employee handbook offers no exception to the employment-at-will doctrine unless the handbook somehow states that the employment is for a definite term or makes that term capable of determination.[82] Even if there were an employment contract or employee handbook which stated that the employer would not dismiss the employee because of sexual orientation, the employee still would be considered an employee-at-will in the absence of a contractual provision specifying a definite term of employment.[83] Even if the employment contract

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72. IND. CODE § 31-3-1-4(d) (1993).

73. IND. CODE § 31-3-1-4(e) (1993).

74. IND. CODE § 31-3-1-4(g) (1993).

75. *Id.*

76. Matter of Adoption of Johnson, 612 N.E.2d 569 (Ind. Ct. App. 1993).

77. Stivers v. Stevens, 581 N.E.2d 1253, 1254 (Ind. Ct. App. 1991).

78. *Id.*

79. Mehling v. Dubois County Farm Bureau Coop. Ass'n, 601 N.E.2d 5, 9 (Ind. Ct. App. 1992) (citing Hamblen v. Danners, Inc., 478 N.E.2d 926, 929 (Ind. Ct. App. 1985)).

80. Tri-City Comprehensive Community Mental Health Ctr. v. Franklin, 498 N.E.2d 1303, 1305 (Ind. Ct. App. 1986).

81. *Id.* The 14th Amendment provides in part that "[n]o State . . . shall deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV.

82. *Id.* at 1305-06.

83. *See generally* Streckfus v. Gardenside Terrace Coop., 481 N.E.2d 423 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 273 (Ind. 1987).

states that an employee will be discharged only "for cause," the employment is still terminable at the will of the employer if the contract fails to state a definite term of employment.[84]

It is reasonably certain, therefore, that a private employer in Indiana may discharge an employee because the employee is gay or lesbian or even expresses opinions about being gay or lesbian, regardless of how well the employee performs. First Amendment protection of freedom of speech, insulating an employee from discharge for expressing opinions about homosexuality, attach only if there is state action.[85] Hence, a private employer may dismiss an employee solely for expressing an opinion about homosexuality with which the employer disagrees.

2. *First Amendment Protections for Public Employees.*—A public employee may not be discharged for expressing political opinions, as long as three conditions are fulfilled.[86] The first condition is that "the employee must be speaking on a matter of public concern about which free and open debate is vital to the decisionmaking of the community."[87] The second condition is that the public employee's interest as a citizen in expressing opinions about matters of public concern must be balanced against the public employer's interest "in running an efficient operation."[88] The third and final condition is that "the employee's protected conduct must be a motivating factor" in the employer's decision to terminate the person's employment.[89]

Each of these determinations is fact-sensitive. Gay or lesbian public employees discharged for expressing opinions about sexual orientation must first prove that their statements are a matter of public concern, proof of which would depend upon the statement's context, form, and content.[90] The statement could not be one of purely personal interest to the employee[91] but instead would have to be one of public concern.[92] Speech encouraging the use of the political process to improve the legal status of gay men and lesbians certainly would be a matter of public concern, for which free and open debate is essential.[93]

The second condition, balancing the employee's and the public employer's interests, also would be fact-sensitive. Arguably, the relatively poor legal status of gay men and lesbians affects them so intimately that the gay or lesbian

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84. *Streckfus*, 481 N.E.2d at 425.

85. *See generally* Rozier v. St. Mary's Hosp., 411 N.E.2d 50 (Ill. App. 1980).

86. Indiana Dep't of Highways v. Dixon, 541 N.E.2d 877, 880-881 (Ind. 1989) (citing Pickering v. Board of Educ., 391 U.S. 563 (1968)).

87. *Dixon*, 541 N.E.2d at 881.

88. *Id.*

89. *Id.*

90. Campbell v. Porter County Bd. of Comm'r, 565 N.E.2d 1164, 1167 (Ind. Ct. App. 1991).

91. *Id.* at 1168.

92. Lach v. Lake County, 621 N.E.2d 357, 359 (Ind. Ct. App. 1993) (desire to effect political change through the political process is protected by the First Amendment).

93. *Id.*

employee's interest outweighs the public employer's interest in an efficient workplace. However, an employer might argue that the expression of opinions about such a controversial topic reduces morale to such an extent that the employer's interest outweighs the employee's interest.

Fulfillment of the third condition, that the employee's protected conduct prompted the termination, also depends upon the facts. The employee might have to prove this element through comments made by other employees and the employer, as well as memoranda and other documents.

3. The Indiana Civil Rights Commission.—The Indiana Civil Rights Commission has the power to remedy discrimination based on race, religion, national origin, familial status, and handicap. It is charged with enforcing the Indiana Civil Rights Law, the law regarding Employment Discrimination Against Disabled Persons, and the Indiana Fair Housing Act.[94] Since discrimination based on sexual orientation is not one of the discriminatory practices within the Commission's enforcement powers, a gay or lesbian employee dismissed from employment on the basis of sexual orientation may not find any remedies there.

However, sexual orientation *can* become a basis of protection because of the nexus between gay men and HIV/AIDS. The regulations promulgated by the Civil Rights Commission list HIV/AIDS as a disability.[95] An individual diagnosed with, or perceived as having, HIV disease can seek a remedy against discrimination on the basis of disability.

C. Housing Discrimination

In Indiana, it is legal to discriminate in housing against gay men and lesbians on the basis of their sexual orientation, unless they can show they suffered the discrimination because of having HIV/AIDS or being perceived as having HIV/AIDS. Hence, a landlord may refuse to rent to, or may evict, a tenant based on that individual's real or perceived sexual orientation. However, tort and contract claims might be available depending upon the facts.

Potential remedies for housing and employment discrimination against gay men and lesbians include amending the Indiana Civil Rights Law, the Indiana Fair Housing Act, and the Employment Discrimination Against Disabled Persons statute[96] to include sexual orientation as a basis for protection. Additionally, the remedies provided by the Indiana Civil Rights Commission should be strengthened.

The extent to which emotional and punitive damages may be recovered is not clear. Daniel B. Griffith, a staff attorney with the Indiana Civil Rights Commission, notes that many court decisions have reversed the Commission's

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94. IND. CODE § 22-9-1, 22-9-5, 22-9.5 (1993).
95. IND. ADMIN. CODE tit. 910, r. 2-3-2(20)(B)(xii) (1992).
96. IND. CODE §§ 22-9-1, 22-9.5, 22-9-5 (1993).

awards of emotional and punitive damages[97] by holding that "the losses referred to in this statute are pecuniary losses which can be proved with some degree of certainty, such as where a person has been denied employment, or living accommodations, or business in violation of the Civil Rights Act where the violation results in actual pecuniary loss."[98] Title 22, section 9-1-6(k)(A) of the Indiana Code states that the commission has the authority to "restore complainant's losses incurred as a result of discriminatory treatment, as the commission may deem necessary to assure justice; however, this specific provision when applied to orders pertaining to employment shall include only wages, salary, or commissions . . . ."[99]

Even if gay men and lesbians were afforded protection by the Indiana Civil Rights Commission, the denial of emotional and punitive damages for discrimination based on a person's sexual orientation is problematic. Often, only emotional and punitive damages provide sufficient motivation to change discriminatory behavior. For example, a lesbian denied an apartment because of sexual orientation arguably could find other housing. Her proof of actual pecuniary loss would be speculative, apart from compensation for the time required to find other housing. Therefore, the discriminating landlord has suffered no real loss and has no motivation to stop discriminating.

In addition, sufficient attorneys' fees should be awarded under the statutes to motivate attorneys to bring such actions on behalf of victims of sexual orientation discrimination.

Even when gay men or lesbians come within the authority of the Commission because of their real or perceived HIV-positive status, the inadequacy of remedies is still problematic. Regardless of whether the Indiana Code is amended specifically to prohibit discrimination based on sexual orientation, either the Indiana Supreme Court should hold, or a statute should provide, that emotional and punitive damages may be awarded by the Commission. Furthermore, Indiana and its municipalities should join other states in enacting legislation prohibiting sexual orientation discrimination in employment and housing.[100]

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97. Indiana Civil Rights Comm'n v. Washburn Realtors, Inc., 610 N.E.2d 293 (Ind. App. 1993); Indiana Civil Rights Comm'n v. Wellington Village Apartments, 594 N.E.2d 518 (Ind. App. 1992), *trans. denied*; Indiana Civil Rights Comm'n v. Union Township Trustee, 590 N.E.2d 1119 (Ind. App. 1992), *trans. denied*; Crutcher v. Dabis, 582 N.E.2d 449 (Ind. App. 1991), *trans. denied*.

98. Indiana Civil Rights Comm'n v. Holman, 380 N.E.2d 1281, 1285 (Ind. Ct. App. 1978) (construing IND. CODE § 22-9-1-6(k)(1) (current version at IND. CODE § 22-9-1-6(k)(A) (1993)).

99. IND. CODE § 22-9-1-6(k)(A) (1993).

100. *E.g.*, CAL. LAB. CODE § 1102.1 (West 1993) (prohibiting employment discrimination based on sexual orientation); CONN. GEN. STAT. ANN. §§ 46a-81c, -81e, -81h, -81l (West 1993) (prohibiting employment and housing discrimination based on sexual orientation); MASS. GEN. LAWS ANN. ch. 151B § 4 (West 1993) (prohibiting employment and housing discrimination based on sexual orientation); MINN. STAT. ANN. § 363.03 (West 1993) (prohibiting employment and housing discrimination based on sexual orientation); N.J. STAT. ANN. § 10:5-4, -12 (West 1993) (equal rights

D. *HIV/AIDS*[101]

In general, a person may be tested for HIV only upon obtaining that person's consent or the consent of that person's representative.[102] However, the individual's consent to testing is implied in a medical emergency where testing is necessary for medical treatment or diagnosis.[103] Furthermore, a court may order that a person be tested when there is clear and convincing evidence that the person represents a serious threat to others.[104] Another exception to obtaining consent exists when the test is done on blood collected or tested anonymously as part of an epidemiologic survey under title 16, section 41-2-3 or section 41-17-10(a)(5) of the Indiana Code.[105] The last exception to obtaining consent is that testing for HIV may be required upon conviction of certain crimes[106] or as a condition of probation.[107] HIV testing for persons applying for marriage licenses is voluntary.[108] However, the circuit court clerk must distribute AIDS information to the applicants, unless the applicants object to the information on religious grounds.[109]

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provision includes sexual orientation; employment discrimination based on sexual orientation prohibited); VT. STAT. ANN. tit. 21, § 495 (1992) (employment discrimination based on sexual orientation prohibited); WIS. STAT. ANN. §§ 101.22, 234.29 (West 1993) (equal rights provision includes sexual orientation; employment and housing discrimination based on sexual orientation prohibited).

101. IND. ADMIN. CODE tit. 760, r. 1-39-3 (1992) states that AIDS "means Acquired Immune Deficiency Syndrome and includes AIDS associated Retrovirus (ARV), Human T-Cell Lymphotropic Retrovirus Type III (HTLV-III), Lymphadenopathy Associated Virus (LAV) and Human Immunodeficiency Virus (HIV) and AIDS Related Complex (ARC)." IND. CODE § 16-18-2-171 (1993) states that HIV "refers to the human immunodeficiency virus."

102. IND. CODE § 16-41-6-1 (1993).

103. IND. CODE § 16-41-6-1(b)(1) (1993).

104. IND. CODE § 16-41-6-1(b)(2) (1993).

105. IND. CODE § 16-41-6-1(b)(3) (1993).

106. IND. CODE § 35-38-1-10.5(a) states that

> the court shall order that a person undergo a screening test for the human immunodeficiency virus (HIV) if the person is: (1) convicted of a sex crime listed in section 7.1(e) of this chapter and the crime created an epidemiologically demonstrated risk of transmission of the human immunodeficiency virus (HIV) as described in section 7.1(b)(8) of this chapter; or (2) convicted of an offense related to controlled substances listed in section 7.1(f) of this chapter and the offense involved the conditions described in section 7.1(b)(9)(A) of this chapter.

IND. CODE § 35-38-1-10.5 (1993).

107. IND. CODE § 16-41-6-1(c) (1993). IND. CODE § 35-38-2-2.3(16) states that, as a condition of probation, the court may require that a person

> undergo a laboratory test or series of tests approved by the state department of health to detect and confirm the presence of the human immunodeficiency virus (HIV) antigen or antibodies to the human immunodeficiency virus (HIV), if the person had been convicted of a sex crime or a controlled substance offense creating a risk of HIV transmission.

IND. CODE § 35-38-2-2.3 (1993).

108. IND. CODE § 31-7-3-3.5 (1993).

109. *Id.*

A state or local health official may ask a suspected carrier of HIV to give written consent to testing if the health official has "reasonable grounds" to believe that a person is a carrier.[110] If the individual refuses to consent, the health official may obtain a court order "based on clear and convincing evidence of a serious and present health threat to others" to compel testing.[111] It is not clear what evidence of a person's behavior or status constitutes "reasonable grounds" for a health official to ask a person to consent to testing. Likewise, the statutes do not define what behavior or status constitutes "clear and convincing evidence" for obtaining a court order to compel HIV testing. Arguably, a gay male's mere sexual orientation would constitute "reasonable grounds." Such discretion is problematic and could interfere with civil liberties. What evidence or behavior constitutes clear and convincing evidence needs to be clarified by the legislature.

Information about a person's HIV/AIDS status is confidential.[112] A "person may not disclose or be compelled to disclose" such information[113] concerning another individual; however, he may voluntarily disclose such information about himself.[114] The information also "may not be released or made public upon subpoena."[115] Any "person responsible for recording, reporting, or maintaining information required to be reported" who "recklessly, knowingly, or intentionally discloses or fails to protect medical or epidemiologic information classified as confidential . . . commits a Class A misdemeanor."[116] If the person violating the confidentiality requirement is a public employee, the employee is also "subject to discharge or other disciplinary action under the personnel rules of the agency that employs the employee."[117] A private tort action, such as an action for invasion of privacy[118] or intentional infliction of emotional distress might be available against an individual who discloses the information.

There are exceptions to the confidentiality requirement. First, an individual may consent in writing to release the information[119] or otherwise voluntarily disclose the information.[120] Furthermore, information about an individual's

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110. IND. CODE § 16-41-6-2(b) (1993).
111. IND. CODE § 16-41-62(c) (1993).
112. IND. CODE § 16-14-6-2(c) (1993).
113. IND. CODE § 16-41-8-1(a) (1993).
114. IND. CODE § 16-41-8-1(e) (1993).
115. IND. CODE § 16-41-8-1(a) (1993).
116. IND. CODE § 16-41-8-1(b) (1993).
117. IND. CODE § 16-41-8-1(c) (1993).
118. *See* Lee v. Calhoun, 948 F.2d 1162 (10th Cir. 1991); Urbaniak v. Newton, 277 Cal. Rptr. 354 (Cal. Ct. App. 1991); Doe v. Shady Grove Adventist Hosp., 598 A.2d 507 (Md. Ct. Spec. App. 1991); Anderson v. Strong Memorial Hosp., 531 N.Y.S.2d 735 (N.Y. App. Div. 1988); Doe v. Dyer-Goode, 566 A.2d 889 (Pa. Super. 1989).
119. IND. CODE § 16-41-8-1(d) (1993).
120. IND. CODE § 16-41-8-1(e) (1993).

HIV status may be used for a statistical purpose as long as the individual's identity is not released.[121] However, the identity of individuals in a survey may be released if each person involved consents in writing to the release of his identity as well as information about his HIV status.[122] Furthermore, confidentiality is not violated if the release of the information is necessary to protect the life or health of a named party or to enforce the public health laws.[123]

A person who tests positive for HIV or who has AIDS does have a duty to warn sexual partners or needle-sharing partners of the person's health status as well as the need to seek health care.[124] Licensed physicians who diagnose, treat, or counsel a patient who is HIV-positive or who has AIDS "shall inform the patient" of the duty to warn.[125] Furthermore, licensed physicians, licensed hospitals, and medical laboratories must report to the Indiana State Department of Health each case of HIV infection and each confirmed case of AIDS.[126] A patient's physician-patient privilege is waived[127] when a physician notifies a health officer or a person at risk about the patient's health status[128] or non-compliant behavior.[129]

Physicians[130] and non-physicians[131] have a right to report a patient's HIV-positive status or AIDS diagnosis to a health officer if the physician or non-physician has reasonable cause to believe any of three conditions has occurred. The first is where the patient poses a serious and present danger to the health of others.[132] A carrier of HIV disease is considered a "serious and present danger to others" under any of the following circumstances:

> (1) The carrier engages repeatedly in a behavior that has been demonstrated epidemiologically (as defined by rules adopted by the state department under IC 4-22-2) to transmit a dangerous communicable disease or that indicates a careless disregard for the transmission of the disease to others. (2) The carrier's past behavior or statements indicate an imminent danger that the carrier will engage in behavior that transmits a dangerous communicable disease to others. (3) The carrier

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121. IND. CODE § 16-41-8-1(a)(1) (1993).
122. IND. CODE § 16-41-8-1(a)(2) (1993).
123. IND. CODE § 16-41-8-1(a)(3) (1993).
124. IND. CODE § 16-41-7-1 (1993).
125. IND. CODE § 16-41-7-3 (1993).
126. IND. CODE § 16-41-2-3 (1993).
127. IND. CODE § 16-41-2-4.
128. IND. CODE § 16-41-7-3(e)(1) (1993).
129. IND. CODE § 16-41-7-3(e)(2) (1993).
130. IND. CODE § 16-41-7-3(b)(1) (1993).
131. IND. CODE § 16-41-7-2(b) (1993). The conditions under which physicians and non-physicians may report an individual's HIV status are the same. IND. CODE § 16-41-7-2 states the conditions for non-physicians. IND. CODE § 16-41-7-3 states the conditions for physicians.
132. IND. CODE § 16-41-7-3(b)(1)(A) (1993).

> has failed or refused to carry out the carrier's duty to warn under section 1 of this chapter.[133]

The second condition is where the patient has engaged in non-compliant behavior,[134] which means "behavior of a carrier that is not in compliance with a health directive."[135] The third condition is where the patient "is suspected of being a person at risk . . . ."[136] The statute defines "persons at risk" as "(1) past and present sexual or needle sharing partners who may have engaged in high risk activity; or (2) sexual or needle sharing partners before engaging in high risk activity" with the patient.[137] A non-physician who reports in good faith to a health officer an individual's HIV status is immune from liability in civil, administrative, disciplinary, and criminal actions.[138] However, a non-physician who "knowingly or recklessly makes a false report" is "civilly liable for actual damages suffered by a person reported on and for punitive damages."[139]

A physician may also personally inform a patient's sexual or needle-sharing partner, or a person legally responsible for the patient, when the physician

> (A) has medical verification that the patient is a carrier; (B) knows the identity of the person at risk; (C) has a reasonable belief of a significant risk of harm to the identified person at risk; (D) has reason to believe the identified person at risk has not been informed and will not be informed of the risk by the patient or another person; and (E) has made reasonable efforts to inform the carrier of the physician's intent to make or cause the state department of health to make a disclosure to the person at risk.[140]

In informing the patient's sexual or needle-sharing partner, the physician must inform the partner that the disease involved is HIV/AIDS, and about available health care, testing, and counseling.[141] A physician informing a third party at risk will not be liable in any civil, criminal, administrative, or disciplinary proceeding for the disclosure.[142]

If an individual diagnosed with AIDS presents clear and convincing evidence of a serious and present danger to the health of others, a state or local health official may obtain a court order to restrict the individual. The restriction could include isolation, provided that the "least restrictive but medically necessary

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133. IND. CODE § 16-41-7-2 (1993).
134. IND. CODE § 16-41-7-3(b)(1)(B) (1993).
135. IND. CODE § 16-18-2-250 (1993).
136. IND. CODE § 16-41-7-3(b)(1)(C) (1993).
137. IND. CODE § 16-41-7-1(c) (1993).
138. IND. CODE § 16-41-7-2(c) (1993).
139. IND. CODE §§ 16-41-7-2(d), 16-41-2-7 (1993).
140. IND. CODE § 16-41-7-3(b)(2) (1993).
141. IND. CODE § 16-41-7-3(c)(2) (1993).
142. IND. CODE § 16-41-7-3(d) (1993).

procedures to protect the public's health" are implemented.[143] In addition, if a health official "reasonably believes that a carrier presents a serious and present health threat . . . by failure or refusal to comply with a health directive," the official may take the same action.[144] If a health official believes that the person with AIDS is "mentally ill and either dangerous or gravely disabled," the official may request "immediate detention under IC 12-26-4" or "emergency detention under IC 12-26-5" in order to have the "carrier apprehended, detained, and examined."[145]

E. Health and Life Insurance

In determining whether to insure a particular individual, an insurer[146] may not in an application for health or life insurance ask any question "directed towards determining the applicant's sexual orientation."[147] Insurers simply are prohibited from using sexual orientation in the "underwriting process or in the determination of insurability."[148] "Neither the marital status, the 'living arrangements,' the occupation, the gender, the medical history, the beneficiary designation, nor the zip code or other territorial classification of an applicant may be used to establish, or aid in establishing, the applicant's sexual orientation."[149] An insurer may impose territorial rates for health and life insurance "only if the rates are based on sound actuarial principles or are related to actual or reasonably anticipated experience."[150] An insurer may not deny life or health insurance to an applicant simply because the applicant's medical records show the applicant sought AIDS testing or counseling.[151] If an insurer decides to accept a risk, the insurer may not set a maximum dollar amount of coverage which is limited solely to AIDS or an AIDS-related condition, nor may the insurer provide for an exclusion of coverage which is limited solely to AIDS or an AIDS-related condition.[152] However, this administrative provision does not prohibit an insurer from using that information in determining rates.[153] If the applicant has sought treatment for or has a diagnosis of AIDS in the medical records, the insurer may deny coverage.[154]

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143. IND. CODE § 16-41-9-1 (1993). *See also* IND. CODE § 16-41-9-11 (1993).
144. IND. CODE § 16-41-9-4 (1993).
145. IND. CODE § 16-41-9-5 (1993).
146. Insurer includes an out-of-state insurer. *See* IND. ADMIN. CODE tit. 760, r. 1-39-8 (1992).
147. IND. ADMIN. CODE tit. 760, r. 1-39-4(1) (1992).
148. IND. ADMIN. CODE tit. 760, r. 1-39-6 (1992).
149. IND. ADMIN. CODE tit. 760, r. 1-39-6(3) (1992).
150. IND. ADMIN. CODE tit. 760, r. 1-39-6(4) (1992).
151. IND. ADMIN. CODE tit. 760, r. 1-39-6(5) (1992).
152. IND. ADMIN. CODE tit. 760, r. 1-39-7 (1992). This section does not apply to those policies which provide coverage only for specified diseases.
153. IND. ADMIN. CODE tit. 760, r. 1-39-6(5) (1992).
154. *Id.*

Insurers may ask an applicant questions to determine whether the applicant has been diagnosed with or actually has AIDS or AIDS Related Complex (ARC), as long as the questions are "factual and designed to establish the existence of the condition."[155] An insurer may not ask applicants whether they *believe* they have AIDS or ARC but instead may ask applicants whether they *know* they have the condition.[156]

An insurer may require an applicant to submit to an AIDS test at the insurer's expense only after obtaining the applicant's written consent.[157] If the applicant's test reveals the applicant to be HIV-positive, the insurer must follow a test protocol before rejecting the applicant's request to be insured. This protocol includes two positive ELISA tests and a non-negative Western Blot test obtained from the same sample of blood and conducted by a qualified laboratory.[158] These tests results are confidential but may be shared with the applicant-'s physician and the insurer's underwriting department.[159] Affiliates of the insurer and underwriting departments of reinsurers may be informed of the test results and whether the application was accepted or rejected.[160] The insurer may report to the Medical Information Bureau, Inc., that "unspecified blood test results were abnormal" but may not report that "blood tests of an applicant showed the presence of the AIDS virus antibodies . . . ."[161] In reporting information to the Medical Information Bureau, Inc., the insurer's "reports must use a general code that also covers results of tests for many diseases or conditions, such as abnormal blood counts that are not related to AIDS, ARC, or similar diseases."[162]

F. Criminal Law

1. Criminal Behavior.—Homosexual activity is legal in Indiana, assuming all parties involved are at the age of consent. Strangely, the statutory definition of rape excludes the possibility of homosexual rape. The Indiana Code limits the crime of rape, a Class B felony,[163] to sexual intercourse with "a member of the opposite sex."[164] The Indiana Code defines "deviate sexual conduct" as "an act involving (1) a sex organ of one person and the mouth or anus of another

155. IND. ADMIN. CODE tit. 760, r. 1-39-4(3) (1992).
156. *Id.*
157. IND. ADMIN. CODE tit. 760, r. 1-39-5 (1992).
158. IND. ADMIN. CODE tit. 760, r. 1-39-5(2) (1992).
159. IND. ADMIN. CODE tit. 760, r. 1-39-5(3) (1992).
160. IND. ADMIN. CODE tit. 760, r. 1-39-5(3)(A) (1992).
161. IND. ADMIN. CODE tit. 760, r. 1-39-5(3)(B)(i) (1992).
162. IND. ADMIN. CODE tit. 760, r. 1-39-5(3)(B)(ii) (1992).
163. IND. CODE § 35-50-2-5 provides that "[a] person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars ($10,000)."
164. IND. CODE § 35-42-4-1 (1993).

person; or (2) the penetration of the sex organ or anus of a person by an object."[165] The Indiana Code criminalizes deviate sexual conduct as a Class B felony[166] only when it is nonconsensual. Indiana's criminal deviate sexual conduct statute is the descendent of Indiana's sodomy statute,[167] which was repealed in 1976. Sexual activity which is rape when the perpetrator and victim are of different genders is classified as criminal deviate conduct when the perpetrator and victim are of the same gender. Both rape and criminal deviate conduct become Class A felonies[168] if the conduct "is committed by using or threatening the use of deadly force, if it is committed while armed with a deadly weapon, or if it results in serious bodily injury to any person other than a defendant."[169] It is unclear why the definition of rape excludes the possibility of homosexual rape, especially in light of the same sentence for rape and criminal deviate conduct. The rape statute should be amended to allow for same-sex rape.

Other criminal law issues which could arise include the "homosexual panic defense," which is defined in other jurisdictions' case law as

> a violent emotional reaction to a homosexual situation stemming from a person's conscious or subconscious, awareness of his own homosexual tendencies and a desire to conceal them at any cost. The result...is conduct resulting in 'fright, flight or fight', and a loss of ability to distinguish between right and wrong and the suspension of premeditation or willful intent.[170]

The defense argues that a criminal defendant is insane or has reduced capacity to commit a crime, such as a murder or an assault. For example, a criminal defendant who is afraid of being homosexual murders or attacks a victim because the defendant perceives the victim's homosexuality.

It is unclear whether the homosexual panic defense constitutes a mental disease or defect under Indiana statutory provisions which would negate an element of a crime.[171] A criminal defendant who has committed murder might

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165. IND. CODE § 35-41-1-9 (1993).

166. IND. CODE § 35-42-4-2 (1993).

167. *See* Estes v. State, 195 N.E.2d 471 (Ind. 1964).

168. IND. CODE § 35-50-2-4 provides that "[a] person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars ($10,000)."

169. IND. CODE §§ 35-42-4-1, 35-42-4-2 (1993).

170. State v. Thornton, 532 S.W.2d 37, 44 (Mo. Ct. App. 1975). *See* Commonwealth v. Shelley, 373 N.E.2d 951 (Mass. 1978); Parisie v. Greer, 671 F.2d 1011, 1015 (7th Cir. 1982), *rev'd per curiam*, 705 F.2d 882 (7th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 950 (1983). *See generally Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1519-53 (1989).

171. *See* IND. CODE § 35-41-3-6 (1986) (regarding a mental disease or defect).

try to get the charge reduced to voluntary manslaughter on the ground that the homosexual panic constituted "sudden heat."[172] Arguably the defense should fail on the ground that a person's fear of homosexuality does not diminish one's capacity to distinguish between right and wrong. Furthermore, the American Psychiatric Association no longer considers homosexuality a mental illness.[173] The defense should not be permitted since it actually encourages violence against gay men and lesbians.[174]

Evidence of homosexuality has been found relevant in various criminal law cases. In one case, an Indiana court held that evidence that the defendant and his murder victim had been engaged in a homosexual relationship was admissible to provide a motive for the crime, even though the tendency of the evidence to prove the motive might be slight.[175]

Evidence of homosexuality can be problematic since it can inflame both the jury and the judge due to society's prejudice against homosexuals. The commission of the crime should be the basis for conviction and sentencing, not the defendant's homosexuality. An attorney might ask to have the evidence excluded if it is arguably irrelevant. In addition, peremptory challenges[176] can be used to exclude jurors who are obviously homophobic, though determining a juror's homophobia is at best an imprecise art. The Indiana Code states that a good cause for a peremptory challenge is if the juror is "biased or prejudiced for or against the defendant."[177] Jurors who are homophobic could be biased against a defendant solely because of a defendant's homosexual orientation.

2. *HIV/AIDS.*—Title 35, section 38-1-7.1 of the Indiana Code provides that in determining what sentence to impose for a crime, the court may consider as aggravating circumstances or for purposes of imposing consecutive sentences of imprisonment, whether the person committed a sex crime or a crime involving controlled substances which presented the risk of HIV transmission through percutaneous contact and

> (A) the crime created an epidemiologically demonstrated risk of transmission of the human immunodeficiency virus (HIV) and involved the sex organ of one (1) person and the mouth, anus, or sex organ of another person; (B) the person had knowledge that the person was a carrier of HIV; and (C) the person has received risk counseling. . . .[178]

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172. IND. CODE §§ 35-42-1-1, 35-42-1-3 (1993).

173. *See Developments in the Law—Sexual Orientation and the Law*, *supra* note 170, at 1543-46.

174. *Id.*

175. Grime v. State of Indiana, 450 N.E.2d 512, 518, 520-21 (Ind. 1983).

176. IND. CODE § 35-37-1-3 (1986) (providing that in a prosecution for murder, and Class A, B, or C felonies, the defendant has 10 peremptory challenges; for all other crimes, he has only 5).

177. IND. CODE § 35-37-1-5(11) (1993).

178. IND. CODE § 35-38-1-7.1 (1993).

3. Hate Crimes.—No survey of criminal law would be complete without a discussion of the varying proposals to criminalize so-called "hate crimes." The proposals have caused substantial controversy within minority communities, including the gay community.

In the 1993 session of the Indiana Legislature, House Bill 1716, introduced by Representatives William Crawford and Greg Porter, would have made it a Class D felony to intimidate or harass another person, or damage or destroy the property of another person, because of the other person's race, color, religion, sexual orientation, or national origin. If the result was bodily injury, the offense would become a Class C felony.[179] The proposal required law enforcement agencies to collect information documenting the extent of crimes motivated by bias. Many gay activists supported H.B. 1716 and lobbied hard to keep sexual orientation as one of the enumerated protected categories.

Legislative proposals such as H.B. 1716 suffer significant constitutional infirmities and are unlikely to survive a constitutional challenge. It is a fundamental premise of the First Amendment that conduct that cannot constitutionally be made criminal when standing alone does not become punishable simply because a person has been convicted of a separate crime.[180] First Amendment protection of opinion, expression, and association is not limited to protecting those activities from criminalization, but also prevents them from being the basis of punishment. If the First Amendment means anything, it means that society may not exact a price for holding beliefs that are at odds with those of the larger society. There is no constitutionally cognizable distinction between making hate a crime and making hate the sole factor in subjecting a criminal defendant to an additional number of years as part of a sentence. In both instances, it is the individual's bigotry that is being punished.

The United States Supreme Court has considered hate crime legislation twice in recent terms. In *R.A.V. v. City of St. Paul, Minn.*,[181] the Court struck down St. Paul City Ordinance §292.02, which provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[182]

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179. Intriguingly, the legislation also required that a person who wished to burn a cross on public or private property obtain a permit from the Office of the State Fire Marshal.

180. Wisconsin v. Mitchell, 113 S. Ct. 2193 (1993); State v. Wyant, 597 N.E.2d 450 (Ohio 1992).

181. 112 S. Ct. 2538 (1992).

182. *Id.* at 2541.

Opponents of the St. Paul ordinance argued that, had it been in effect in the South during the 1950s, it could have been used to prosecute a black family for putting a sign on their front lawn demanding integration. Justice Scalia, writing for the majority, stated "[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."[183] The Court further stated "[l]et there be no mistake about our belief that burning a cross in someone's front yard is reprehensible . . . . But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire."[184] In the 1993 term, however, the Court upheld Wisconsin's hate crimes statute, distinguishing it from the St. Paul ordinance.[185] The Wisconsin statute required enhancement of the penalty for a crime committed by a defendant who

> [i]ntentionally selects the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.[186]

The Court accepted the argument of proponents of the Wisconsin statute that, unlike the ordinance in *R.A.V.*, the Wisconsin statute was aimed at criminal behavior rather than expression. The Wisconsin statute could only be invoked if it were shown that the defendant violated an underlying and racially neutral provision of the criminal law. As even the American Civil Liberties Union argued in its Amicus Brief, "bigotry is an idea, discrimination is an act. The First Amendment protects the former, it does not protect the latter."[187]

Following *Mitchell*, it should be possible to enact a hate crimes statute that would withstand constitutional challenge. Representative Crawford has indicated his intent to submit legislation modeled on the Wisconsin law, and it is certainly possible that such legislation will be enacted by the Indiana legislature. Whether such a law can be passed which includes sexual orientation as a protected category is less certain. Furthermore, while many gay activists will support the proposed legislation, many others recognize substantial reason to be concerned lest such a law become a vehicle for the suppression of unpopular ideas and, by extension, unpopular "lifestyles."

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183. *Id.* at 2548.

184. *Id.* at 2550.

185. Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993).

186. *Id.* at 2197 (citing WIS. STAT. § 939.645). The statute was amended in 1992, but the amendments were not at issue in this case.

187. Amicus Brief at 15, *Mitchell* (No. 92-515). It should be noted that many ACLU affiliates, including Ohio and Indiana, disagreed with the national organization and opposed the Wisconsin statute on the same grounds that they had opposed the St. Paul ordinance. The Ohio affiliate submitted its own Amicus brief in the case.

III. Conclusion

This article has presented an overview of the legal status of gay men and lesbians in Indiana. HIV/AIDS issues have been presented insofar as they involve sexual orientation. Federal and state case law, statutory and administrative law are all relevant to analyzing the changing legal status of gay men and lesbians. Certainly many other issues involving gay men and lesbians have not been presented in this article, such as the current issue of homosexuals in the military. However, the article can serve as a basis for further research, as the legal position of gay men and lesbians is in a state of change. Further study and careful legislative reform are needed.