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ARTICLE

RESIDENTIAL REAL ESTATE TRANSACTIONS: THE AIDS INFLUENCE

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INTRODUCTION

Since 1981,[1] Acquired Immune Deficiency Syndrome ("AIDS")[2] has claimed the lives of approximately 171,890 people.[3]

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1. 1981 represents the approximate date when the medical community started documenting AIDS cases. At least four cases were identified and documented in California. *See* Michael S. Gottlieb et al., *Pneumocystis Carinii; Pneumonia and Mucosal Candidiasis in Previously Healthy Homosexual Men: Evidence of a New Acquired Cellular Immunodeficiency*, 305 NEW ENG. J. MED. 1425 (1981); *see also* Henry Masur et al., *An Outbreak of Community-Acquired Pneumocystis Carinii Pneumonia: Initial Manifestation of Cellular Immune Dysfunction*, 305 NEW ENG. J. MED. 1431 (1981) (identifying eleven cases that arose in New York City between 1979 and 1981).

2. AIDS is the term reserved for those individuals who have contracted the human immunodeficiency virus ("HIV") and "have developed at least one well-defined, life-threatening clinical condition that is clearly linked to HIV-induced immunosuppression." DONALD H.J. HERMANN & WILLIAM P. SCHURGIN, LEGAL ASPECTS OF AIDS § 1:06, at 8 (1991). As the authors stated:

> [HIV] [sic] is an RNA virus that was originally designated human T-lymphotrophic virus (HTLV-III). It is part of a family of retroviruses whose existence in human beings was just recently established. These viruses, which are widespread among many animals, are characterized by their integration into host cells. The importance, both biologically and clinically, is the specificity of the interaction between the virus and certain host cells which require the presence of a specific protein receptor to enable the process of viral infection to occur. The hallmark of HIV infection in AIDS is a selective depletion of certain helper/inducer T-lymphocytes or T-helper cells. These T-helper white blood cells are a primary part of the body's im-

This world renowned,[4] incurable[5] disease attacks and ultimately paralyzes its victims' immune systems. Despite the fact that the medical community believes that AIDS cannot be contracted through casual contact,[6] skeptics remain.[7] Indeed, the public's preoccupation with AIDS has fueled a debate: whether, and under what circumstances,

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mune system. In essence they are specialized white blood cells that help fight infection. The destruction of these important white blood cells eventually leads to a decline in the body's immune system. As a result of this so-called immunodeficiency, the body becomes susceptible to a number of secondary infections associated with Acquired Immune Deficiency Syndrome or AIDS.

Id. § 1:05, at 7-8.

3. *See* CENTER FOR DISEASE CONTROL (CDC), HIV/AIDS SURVEILLANCE REPORT 17 (1992). Specifically, since 1981, 2,267 children under thirteen and 169,623 adults, which includes adolescents over thirteen, have died from AIDS-related causes. In 1992, 235 children and 23,176 adults died from AIDS. *Id.*

4. Since AIDS cases were first documented in 1981, they have been reported in approximately 136 countries and territories. Center for Disease Control, *Update: Acquired Immune Deficiency Syndrome (AIDS) Worldwide*, 37 MORBIDITY AND MORTALITY WKLY. REP. 286-88 (1988); *see* Robert M. Jarvis, *Advocacy for AIDS Victims: An International American Law Approach*, 20 U. MIAMI INTER-AM. L. REV. 1 (1988) (describing the rights of AIDS victims under international law and the use of such laws in both national and international courts).

5. *See* Kathryn Render, *Tuberculosis Chapters: A Model for Future AIDS Legislation*, 32 ST. LOUIS U. L.J. 1145 (1987).

6. *See* Gerald H. Friedland & Robert S. Klein, *Transmission of the Human Immunodeficiency Virus*, 317 NEW ENG. J. MED. 1125 (1987). The authors concluded as follows:

> The accumulated data strongly support the conclusion that transmission of HIV occurs only through blood, sexual activity, and perinatal events. Nevertheless, the fear of transmission by other routes may continue to increase with the anticipated increase in the number of cases of AIDS over the next few years. An unrealistic requirement for absolute certainty about the lack of transmission by other routes persists, despite the knowledge that it is not scientifically possible to prove that an event cannot occur. It remains difficult to believe that a virus that is spreading rapidly and may cause a cruel, frightening, and fatal disease is not highly contagious and easily transmitted. The available data indicate that HIV transmission is not highly efficient in a single or a few exposures, unless one receives a very large inoculum. The widespread dissemination of HIV is more likely the result of multiple, repeated exposures over time by routes of transmission that are strongly related to personal and cultural patterns of behavior—particularly, sexual activity and the use of drugs. Isolated transmission events should be placed in full perspective by examining the results of population-based studies that provide rates of risk.

Id. at 1133; *see also* Center for Disease Control, *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 MORBIDITY AND MORTALITY WKLY. REP. 509 (1987) (HIV is spread by sexual contact, parenteral exposure to blood through needle-sharing, via infected mothers to their fetuses, and infrequently by occupational exposure through needle-stick injury or mucous membrane exposure).

7. *See* David M. Freedman, *Wrong Without Remedy*, 72 A.B.A. J., June 1, 1986, at 36 (acknowledging that there will be people who have made up their minds that AIDS may be contracted through casual contact and will not be dissuaded no matter what evidence is produced).

a person with AIDS ("PWA")[8] should be required to disclose that he is afflicted with the virus?[9]

The same issue has arisen within the real estate[10] context: Should the vendor of residential property[11] have an obligation to tell a prospective purchaser that a recent occupant of the premises had AIDS? Consider the following hypothetical:

> John and Mary Abele were married for thirty years and had three children. One year ago, John started losing his appetite. He also had recurring flu-like symptoms. Concerned about John's constant problems, Mary proposed that they retire, sell their house and move to Florida. John liked Mary's idea and posted a "for sale by owners" sign on their front lawn. Six months ago, Jerry and Margaret Mays submitted a purchase agreement to the Abeles with an offer that the Abeles could not reject. One month before the Abeles received the purchase agreement, John's physician told him that he had AIDS. Last week, the day after Jerry and Margaret moved into their new house, John died. The Mays' new neighbors greeted them with open arms and John's obituary. The obituary states that John died from complications associated with AIDS. The Mays family has decided to sue Mary Abele for failing to disclose her husband's condition.

In an attempt to discourage purchasers from filing such lawsuits, states have attempted to resolve the disclosure issue through legislation.[12] Nevertheless, the states' response to the debate has not been

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8. According to the National Association of People With AIDS, "[t]he PWA descriptor is the preferred name selected by people who have AIDS. . . ." Rhonda R. Rivera, *Lawyers, Clients, and AIDS: Some Notes from the Trenches*, 49 OHIO ST. L.J. 883, 883 n.1 (1989).

9. *See, e.g.*, State v. Stark, 832 P.2d 109 (Wash. Ct. App. 1992) (regarding obligation to disclose and not intentionally expose sexual partners to HIV).

10. As defined, real estate includes "[l]and and anything permanently affixed to the land, such as buildings, fences, and those things attached to the buildings, such as light fixtures, plumbing and heating fixtures, or other such items which would be personal property if not attached. The term is generally synonymous with real property." BLACK'S LAW DICTIONARY 1263 (6th ed. 1990). Throughout the text, the term real estate will be used interchangeably with real property and realty (a "brief term for real property or real estate"). *Id.* at 1264.

11. This article deals primarily with a discussion of the vendor's disclosure obligation with respect to residential property. For a recent discussion of the general duty of disclosure in a commercial context, see Frona M. Powell, *The Seller's Duty to Disclose in Sales of Commercial Property*, 28 AM. BUS. L.J. 245 (1990). The real estate broker's or agent's disclosure obligation, while relevant, since they are often involved in residential transactions, will not be discussed. *See infra* note 22. For a general discussion of the broker's disclosure obligation, see Paula C. Murray, *AIDS, Ghosts, Murder: Must Real Estate Brokers and Sellers Disclose?*, 27 WAKE FOREST L. REV. 689 (1992).

12. *See* CAL. CIV. CODE § 1710.2 (West 1985 & Supp. 1993); COLO. REV. STAT. ANN.

uniform. Existing disclosure statutes can be divided into four types.[13] Type I statutes generally provide that information regarding an occupant within a household who has AIDS is immaterial, and preclude a claim against the vendor for nondisclosure.[14] Type II statutes also preclude a claim against the vendor for nondisclosure, unless the purchaser makes a specific inquiry.[15]

The third category of statutes combines certain aspects of the preceding two types of legislation. Like Type I statutes, Type III statutes[16] provide that the information is immaterial,[17] and preclude a claim against the vendor.[18] Additionally, Type III statutes give a purchaser the opportunity to make specific inquiries of the vendor regarding an occupant's medical status.[19] However, unlike Type II statutes, Type III statutes do not require the vendor to answer,[20] thus, enabling a vendor to refuse to respond to the purchaser's direct request.

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§ 38-35.5-101 (West Supp. 1992); CONN. GEN STAT. ANN. §§ 20-329cc to 20-329ff (West Supp. 1992); D.C. CODE ANN. § 45-1936(f)(1) (Michie Supp. 1992); FLA. STAT. ANN. § 689.25 (West Supp. 1992); GA. CODE ANN. § 44-1-16 (Michie 1991); HAW. REV. STAT. § 467-14(18) (1992); ILL. COMP. STAT. ch. 225, § 455/31.1 (Smith-Hurd 1993); KY. REV. STAT. ANN. § 207.250 (Michie/Bobbs-Merrill 1991); LA. REV. STAT. ANN. § 37:1468 (West Supp. 1993); MD. CODE ANN., BUS. OCC. & PROF. § 16-322.1 (1992); MD. CODE ANN., REAL PROP. § 2-120 (1992); NEV. REV. STAT. ANN. § 40.565 (Michie Supp. 1991); N.C. GEN. STAT. §§ 39-50, 42-14.2 (Michie Supp. 1992); OKLA. STAT. ANN. tit. 59, § 858-513 (West Supp. 1993); OR. REV. STAT. § 93.275 (1991); S.C. CODE ANN. § 40-57-270 (Law. Co-op. Supp. 1992); TENN CODE ANN. § 66-5-110 (Supp. 1992); TEX. REV. CIV. STAT. ANN. art. 6573a, § 15(c) (West Supp. 1993); UTAH CODE ANN. §§ 57-1-1(4), 57-1-37 (Supp. 1992); S.B. No. 138, 1st Reg. Sess. § 10 (1991) (to be codified at MO. REV. STAT. § 516.030.10). Most of the statutes deal with owner/seller and broker/salesperson liability.

13. The existing statutes were broken down into four categories. Statutes were organized by looking at (1) the individuals affected by the statute (*i.e.* vendor, agent, or both), and (2) the disclosure requirement, if any, placed upon those individuals.

14. *See* D.C. CODE ANN. § 45-1936(f); FLA. STAT. ANN. § 689.25; KY. REV. STAT. ANN. § 207.250; LA. REV. STAT. ANN. § 37:1468; MD. CODE ANN. REAL PROP. § 2-120; NEV. REV. STAT. ANN. § 40.565; OR. REV. STAT. § 93.275; TENN. CODE ANN. § 66-5-110; UTAH CODE ANN. §§ 57-1-1(4)(b), 57-1-37. All of these statutes, except for the Tennessee statute, provide that the information is immaterial.

15. *See* CAL. CIV. CODE § 1710.2(d); GA. CODE ANN. § 44-1-16(2); N.C. GEN. STAT. § 39-50; S.C. CODE ANN. § 40-57-270(D). These statutes are not uniform in stating that information regarding an occupant's affliction with HIV or AIDS is immaterial. *Compare* CAL. CIV. CODE § 1710.2(d) *with* N.C. GEN. STAT. § 39-50.

16. *See* CONN. GEN. STAT. ANN §§ 20-329cc to 20-329ff; OKLA. STAT. ANN. tit. 59, § 858-513.

17. *See* CONN. GEN. STAT. ANN. §§ 20-329cc, 20-329dd(a); OKLA. STAT. ANN. tit. 59, § 858-513A.

18. *See* CONN. GEN. STAT. ANN. § 20-329dd(b); OKLA. STAT. ANN. tit. 59, § 858-513B.

19. *See* CONN. GEN. STAT. ANN. § 20-329ee; OKLA. STAT. ANN. tit. 59, § 858-513C.

20. *See* CONN. GEN. STAT. ANN. § 20-329ee; OKLA. STAT. ANN. tit. 59, § 858-513C.

The Type IV statutes only apply to a real estate "licensee" and preclude a claim against a broker or salesperson who fails to disclose an occupant's medical status.[21] Thus, Type IV statutes do not provide protection for the vendor.

None of the states has adequately resolved the debate concerning the vendor's disclosure obligation. Effective legislation in this area must reflect a balance of the following three competing interests: (1) the typical prospective purchaser's interest in gaining access to any information that might affect the realty's value, including knowledge that the vendor had AIDS; (2) the vendor's privacy interest in withholding the fact that he has AIDS from public scrutiny; and (3) the state's interests in upholding anti-discrimination laws and controlling the AIDS epidemic.[22]

None of the existing statutes balances all of the relevant concerns. Type I statutes are comprehensive and balance the three competing interests most effectively.[23] Conversely, Type IV statutes are the most deficient because, unlike the other statutes, they do not preclude the purchaser from stating a cause of action against the vendor.[24] Thus, Type IV statutes neglect to include one of the significant participants in a real estate transaction.

Although none of the statutes balances all of the competing interests, the statutes have varying degrees of effectiveness. From the purchaser's perspective, the Type I statutes are the worst. These statutes preclude the purchaser from forcing the seller to reveal AIDS-specific information.[25] Type I statutes also resolve the ambivalent purchaser's dilemma of trying to gain access to this type of knowledge by removing it from the pool of available information.

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21. *See, e.g.*, COLO. REV. STAT. ANN. § 38-35.5-101 (includes information regarding the occupant's medical status as well as whether the property was the site of a homicide, other felony, or a suicide); HAW. REV. STAT. § 467-14(18) (includes information regarding the fact that an occupant has AIDS); ILL. COMP. STAT. ch. 225, § 455/31.1 (includes information regarding the occupant's medical status or any act or occurrence that did not affect the property's physical condition).

22. Most importantly, the identified interests reflect an attempt to isolate the individuals who would be most affected by the legislation (i.e. the vendor and the purchaser). The interests also reflect a recognition of the fact that a disclosure law concerning AIDS cannot be examined in isolation. Instead, the law must encompass preexisting laws concerning privacy rights and anti-discrimination, as well as the state's interests.

23. *See supra* note 14.

24. Unlike the other statutes, Type IV statutes fail to protect the vendor as well as the agent. Providing exclusive protection to the agent is insufficient in our litigious society. *See supra* note 22 and accompanying text.

25. However, Type I statutes fail to provide the vendor with guidance about how he should proceed if the purchaser makes an inquiry. *See supra* note 14.

Types II and III statutes give a purchaser the opportunity to acquire AIDS-specific information about a seller.[26] Thus, a purchaser would prefer these statutes over Type I statutes. However, between Types II and III, a purchaser would prefer Type II statutes because they require a vendor to give a truthful answer if asked whether he has AIDS.[27] A purchaser would dislike Type III statutes relative to the Type II statutes because Type III statutes allow a vendor to refuse to respond to a purchaser's inquiry. A purchaser who acquired the realty without a broker would also like the Type IV statutes because they do not preclude a purchaser from stating a cause of action against the vendor.

From the vendor's perspective, the Type I statutes are the best because they provide the most protection. They make AIDS-specific information immaterial and effectively allow the vendor to refuse to address the inquiry.[28] Types II and IV statutes are the worst for the vendor, although for different reasons. The Type II statutes require the vendor to respond to a direct inquiry, thereby taking away the vendor's ability to control the publication of his confidential information. The Type IV statutes are also problematic for the vendor since they only provide protection for the vendor's agents.[29]

From the vendor's perspective, the most effective legislation must preclude the prospective purchaser from successfully suing the vendor for nondisclosure, like the Type I statutes.[30] The legislation must also enable the vendor to seek punitive damages against any person who obtains AIDS-specific information from the vendor and uses it to the vendor's detriment. Types II and III fail in both respects to adequately consider the vendor's position.[31]

From the state's perspective, the Type I statutes are the best because they support the state's dual interests in upholding anti-discrimination laws and controlling the AIDS epidemic.[32] These stat-

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26. *See supra* notes 15-16.

27. *See* CAL. CIV. CODE § 1710.2(d); GA. CODE ANN. § 44-1-16(2); N.C. GEN. STAT. ANN. § 39-50; S.C. CODE ANN. § 40-57-270(D).

28. The Type I statutes preclude a cause of action from being stated against the vendor, but do not provide the vendor with guidance about how he should proceed. *See supra* note 25. Presumably, the vendor can simply assert that, given the statute, any response is unnecessary. The Type V statute attempts to provide the vendor with guidance by absolutely prohibiting a disclosure. *See infra* note 250 and accompanying text.

29. *See supra* note 24 and accompanying text.

30. *See supra* note 14.

31. *See supra* note 26.

32. *See infra* notes 176-215 and accompanying text. However, to promote the state's interests, imposing a penalty upon violators may be necessary. *See infra* note 251 and accom-

utes help the state fulfill its first obligation by withdrawing such information from the pool of material information available to the prospective purchaser. If not disclosed, or at risk of being disclosed, it cannot have a discriminatory effect.

Type I disclosure legislation, which deems AIDS-related information immaterial and makes it inaccessible to the public, also furthers a state's public health obligation. Assuming that the state is interested in educating the public and providing incentives to encourage PWAs to seek treatment, it must enact laws which are consistent with those goals. Only the Type I statutes promote such goals by not unnecessarily requiring disclosure. Types II and III have the opposite effect. They undermine a state's attempts to accomplish its public health goals since the AIDS-specific information can be placed into the public domain. Thus, a PWA may feel even more vulnerable and less inclined to participate in the state's detection and treatment services.[33]

Effective disclosure legislation is needed because this debate is raging, particularly in the real estate context.[34] Accordingly, this article seeks to propose ways to enhance existing disclosure legislation. Part I identifies and examines the competing interests and related issues underlying the debate.[35] Part II examines the problems with existing legislation and identifies attributes for model disclosure legislation.[36] Part III proposes a prototype, a Type V statute,[37] which will enhance the Type I statute.

PART I: ANALYSIS OF COMPETING INTERESTS

A. *Purchaser's Interest in Realty's Components of Value: Vendor's Disclosure Obligation*[38]

A typical prospective purchaser, like the hypothetical Mays

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panying text.

33. *See* Gary James Wood & Alice Philipson, *AIDS Testing and Privacy: An Analysis of Case Histories*, 2 AIDS AND PUB. POLICY J. 21, 22 (1987) (stating that "confidential testing encourages citizens to participate in epidemiological studies. . . . "). Thus, requiring disclosure when information will not be held in confidence, *see infra* note 56, makes the PWA feel more vulnerable.

34. The disclosure legislation was discussed at the August, 1992 annual meeting of the American Bar Association.

35. *See infra* notes 38-215 and accompanying text.

36. *See infra* notes 216-47 and accompanying text.

37. *See infra* notes 248-52 and accompanying text.

38. The law regarding this issue is quite broad. This article addresses this issue from only one perspective: the duty of a vendor, like the Abele family, to disclose material facts that they might otherwise withhold. *See supra* note 11.

family, is interested in making the best bargain with the vendor. In common parlance, the purchaser wants to get a good deal by paying the least amount of money for the real estate. Accomplishing that goal depends upon the purchaser's ability to identify the realty's weaknesses[39] so that the vendor will lower the purchase price.

To bargain effectively and accomplish this ultimate goal, the prospective purchaser must discern the realty's components of value. Components of value comprise the intrinsic or extrinsic factors[40] that either directly concern the realty, thereby affecting its habitability, or indirectly impact upon the realty, thereby affecting its suitability. Two types of components can be formulated. The positive components of value, like a newly finished kitchen or neighborhood amenities, enhance the realty and make it attractive to the prospective purchaser. The vendor has an incentive to disclose these components because they add value to the realty.

Negative components of value, however, make the realty less desirable to the prospective purchaser. These components include physical defects, like defective wiring, a leaky roof, or an encumbrance, as well as other "defects"[41] that offend the purchaser be-

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39. The vendor is one of the prospective purchaser's main information sources. The prospective purchaser can also use an inspector or experienced builder to help to identify the realty's structural defects. Duncan v. Schuster-Graham Homes, Inc., 578 P.2d 637, 638-39 (Colo. 1978) (experienced builder is in the best position to help buyer detect structural defects).

40. The distinction between intrinsic and extrinsic facts is as follows:

> And there is often a material distinction between circumstances, which are intrinsic, and form the very ingredients of the contract, and circumstances which are extrinsic, and form no part of it, although they create inducements to enter into it, or affect the value or price of the thing sold. Intrinsic circumstances are properly those which belong to the nature, character, title, safety, use or enjoyment of the subject-matter of the contract; such as natural or artificial defects in the subject-matter. Extrinsic circumstances are properly those which are accidentally connected with it, rather bear upon it, at the time of the contract, and may enhance or diminish its value or price, or operate as a motive to make or decline the contract; such as facts respecting . . . the character of the neighborhood . . . or like circumstances.

W. Page Keeton, *Fraud-Concealment and Non-Disclosure*, 15 TEX. L. REV. 1, 20-21 & n.48 (1936) (citing STORY, EQUITY JURISPRUDENCE § 210 (5th ed. 1849)).

41. Historically, defects discussed in connection with realty concerned concrete or physical defects like those referenced earlier in the text. *See infra* notes 63, 74 and accompanying text. Under modern analysis, if they are deemed "material" defects, the vendor must disclose them. *See infra* notes 67-108 and accompanying text. Given modern thought, however, such a limited definition of defects is inaccurate. Defects must also include the realty's other potential problems, which problems will only arise on an individual basis because their existence depends upon the purchaser's perception. *See infra* notes 98-108, 170 and accompanying text. Thus, while it may be difficult to endorse this expanded definition of defects, it is more accurate.

cause of his idiosyncracies or practical concerns about the value of his bargain.[42] Concern about the AIDS virus, and the extent to which one risks being exposed to the AIDS virus if a former occupant had the ailment, falls within the latter category. The vendor lacks an incentive to disclose either type of defect because they devalue the realty, although the purchaser may be extremely interested in ascertaining such information.[43]

A schism exists between information that would reveal all of the components of value and material information that the vendor is legally obligated to disclose. The current state of the law makes it difficult to predict that portion of the pool of information concerning the realty that the vendor must reveal. Since AIDS-specific information indirectly concerns the realty, it is particularly difficult to assess its discoverability. However, doctrine provides a starting point. Accordingly, determining whether the Abele family must disclose depends upon which theory of disclosure is being applied. Three theories of a vendor's disclosure obligation have evolved:[44] 1) the classical model, based upon the common law rule of *caveat emptor*;[45] 2) the modern model, based upon the principles of good faith and fair deal-

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42. Prospective home buyers in California regarded certain homes as being defective because their former occupants had AIDS. Wood & Philipson, *supra* note 33, at 24 (information compiled from attorneys working on the AIDS Legal Referral Panel of Bay Area Lawyers for Individual Freedom in San Francisco, Calif.; case histories arose out of lawsuits which had not settled). In early 1985, a number of homes once occupied by gay men entered the real estate market in San Francisco. *Id.* "Some of the homes were owned by gay men still living on the premises; others were held by the estates of men who had died from AIDS." *Id.* A few prospective buyers made it clear to their real estate agents and brokers that they would not purchase homes that were once occupied by men who had AIDS. *Id.* As a result, most of the major brokerage houses required HIV disclosures. *Id.* In addition, during this period, numerous homes sold for less than fair market value and numerous estates were held in probate pending the almost impossible sale of real property. *Id.*

43. *See infra* notes 166-70, 220 and accompanying text.

44. It is more appropriate to talk about the evolutionary process of the vendor's disclosure duty because there is no jurisdictional consensus. Comments made some years ago still apply:

> Countless cases deal with the nondisclosure by a vendor of realty of defects in the property itself. The courts seem to be anything but unanimous in their decisions, some adhering to the harsh rule of "no duty", others apparently willing to make an exception in the case of severe defects, especially if they are latent and not readily discoverable even by a diligent purchaser. It is not really possible to reconcile the decisions.

William B. Goldfarb, *Fraud and Nondisclosure in the Vendor-Purchaser Relation*, 8 W. RES. L. REV. 5, 14 (1956); *see* Leon Rittenberg III, Comment, *Louisiana's Tenfold Approach to the Duty to Inform*, 66 TUL. L. REV. 151, 156 (1991) (models of "duty to inform have evolved from conceptual models of individual responsibility").

45. *See infra* notes 48-66 and accompanying text.

ing;[46] and 3) the economic model, based upon the premise that disclosures should be made by the cheapest mistake preventer.[47]

1. Classical Duty to Disclose

The classical model reflects the common law rule of *caveat emptor*.[48] Under this model, the law is premised on the freedom of contract theory[49] and shaped by an individualistic philosophy.[50] The deed represents the parties' total agreement.[51] Upon its transfer to the purchaser, the purchaser assumes all of the risks.[52] No implied warranties remain.[53] Thus, after the transfer of the deed, the vendor cannot be held liable,[54] unless one of the exceptions to the common

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46. *See infra* notes 67-108 and accompanying text.

47. *See infra* notes 109-26 and accompanying text.

48. *Caveat emptor* means "let the buyer beware." BLACK'S LAW DICTIONARY 202 (5th ed. 1979). The maxim summarizes the rule that a purchaser must examine, judge, and test for himself. *Id.* Proceeding on the assumption that the parties were involved in an arm's length transaction, the buyer was left to his own devices to make the best bargain. Purchasers could not prevail even if the vendor failed to make material disclosures regarding the realty's defects. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, 644-45 (1941).

49. Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1183 (1931).

50. *Id.* at 1186; *see* Keeton, *supra* note 40, at 5.

51. The merger doctrine underlies the doctrine of *caveat emptor*. Under the doctrine "a contract merges into the deed, and once the deed is accepted, the deed is deemed the final act of the parties expressing the terms of their agreement." JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 580 (2d ed. 1988); *see* Bennett v. Behring Corp., 466 F. Supp. 689, 701 (S.D. Fla. 1979); Knudson v. Weeks, 394 F. Supp. 963, 976 (W.D. Okla. 1975); Pybus v. Grasso, 59 N.E.2d 289, 291 (Mass. 1945); Smith v. Vehrs, 242 P.2d 586, 591 (Or. 1952); Miles v. Mackle Bros., 242 N.W.2d 247, 249-50 (Wis. 1976). The goal is "to resolve all real property problems by looking to only one recorded document and to make that document carry all of the limitations of the transaction so that the whole world can know the complete contours of the deal." DAVID WHALEY, WARRANTIES AND THE PRACTITIONER 229 (1981).

52. In Palmore v. Morris, Tasker & Co., 37 A. 995 (Pa. 1897) the Supreme Court of Pennsylvania stated:

> Before he purchased the real estate the law presume[d] [that] the grantee [had] examined the property, and was cognizant of its situation, surroundings, the character of the structures upon it, and their condition of repair. Without an express covenant by the grantors, as between them and the grantee, there was no duty on the grantors to repair. The purchaser thereafter assumed that duty because he then became the owner and occupant.

Id. at 998-99.

53. *Id.*

54. Swinton v. Whitinsville Savings Bank, 42 N.E.2d 808 (Mass. 1942). In *Swinton*, the purchaser asserted that the vendor had failed to disclose damage caused by termite infestations. Even though the court found that the vendor was aware of the damage and knew it was not readily apparent to the purchaser, the court refused to hold the vendor liable for the nondisclosure. Although the court acknowledged the case's moral appeal, the court believed that "[t]he law ha[d] not yet . . . reached the point of imposing upon the frailties of human nature a standard so idealistic. . . ." *Id.* at 809. *Swinton* is often cited because of the court's strict

law rule applies.[55] Specifically, the vendor can be held liable if he is a fiduciary,[56] engages in deceit,[57] delivers an express warranty,[58] or withholds information about a concealed unreasonably dangerous condition.[59]

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adherence to the common law rule. *See* Sanders v. White, 476 So. 2d 84 (Ala. 1985) (no duty to disclose defective roof); Ray v. Montgomery, 399 So. 2d 230 (Ala. 1980) (no duty to disclose termite infestation); Gegeas v. Sherril, 147 A.2d 223 (Md. 1958) (no duty to disclose termite infestation); Solomon v. Birger, 477 N.E.2d 137 (Mass. 1985) (no duty to disclose cracks in house); Kuczmanksi v. Gill, 302 S.E.2d 48 (Va. 1983) (vendor not liable for nondisclosure of defective gutter and rotten bathroom floors).

55. "To the general rule that a seller has no duty to disclose material facts to the purchaser, the common law [has] recognized certain exceptions and, throughout the Twentieth Century, courts continued to develop various mitigating qualifications." Richard M. Jones, *Risk Allocation and the Sale of Defective Used Housing in Ohio—Should Silence Be Golden?*, 20 CAP. U. L. REV. 215, 218 (1991); *see* Serena Kafker, *Sell and Tell: The Fall and Revival of The Rule on Nondisclosure in Sales of Used Real Property*, 12 U. DAYTON L. REV. 57, 59 (1986); Renee D. Braeunig, Note, Johnson v. Davis: *New Liability for Fraudulent Nondisclosure in Real Property Transactions*, 11 NOVA L. REV. 145, 148 (1986); Ronald Basso, Note, Reed v. King: *Fraudulent Nondisclosure of a Multiple Murder in a Real Estate Transaction*, 45 U. PITT. L. REV. 877, 882 (1984); Aaron P. Morris, Note, *Vendors of Real Estate: When Does Liability for Dangerous Conditions End?*, 17 SW. U. L. REV. 23, 27 (1987). One author prefers to call them "qualifications" as opposed to exceptions. *See* Goldfarb, *supra* note 44, at 10.

56. Keeton, *supra* note 40, at 11; *see also* Leo Bearman, Jr., *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541, 561 (1961). According to Keeton, "[i]t is frequently stated in the decisions that the law imposes no duty on the party to a transaction to disclose information in the absence of a confidential or fiduciary relationship: such as principal and agent, trustee and cestui, parent and child, guardian and ward, and attorney and client." Keeton, *supra* note 40, at 11. The typical vendor-purchaser relationship is not a fiduciary relationship. *See id.* at 12; *see also* Goldfarb, *supra* note 44, at 40.

57. Hamilton, *supra* note 49, at 1174. This suggests that the purchaser "is induced to buy through some false statement of fact about the quality or fitness for use of the realty or building, spoken by the vendor with knowledge that it was false and with intent to deceive the purchaser. . . ." Bearman, *supra* note 56, at 561.

58. Keeton, *supra* note 40, at 39.

59. RESTATEMENT (SECOND) OF TORTS § 353 (1965). Section 353 provides as follows:

> (1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if
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> (a) the vendee does not know or have reason to know of the condition or the risk involved, and
>
> (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.
>
> (2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise, the liability continues only until the vendee has had reasonable opportunity to discover the condition and take such precautions.

Applying the doctrine of *caveat emptor* to the Abele/Mays hypothetical, the Abele family would not have a duty to reveal John's virus to the Mays family. A disclosure would neither be required under the common law rule, nor under one of the classic exceptions. Because the Abeles are not fiduciaries,[60] they cannot be compelled to disclose under the fiduciary exception to the common law rule.[61] Likewise, because there is no evidence of conscious deceit or of an express warranty, since the Abeles did not make any statements regarding John's health, these exceptions[62] are inapplicable.

The Mays' last resort is to assert that John Abele's condition infected the realty and made it unreasonably dangerous.[63] Under this exception, a vendor can be subject to tort liability if the purchaser can establish that the defect existed at the time of sale, that the vendor knew or had reason to know of its existence,[64] and that the concealed condition involved an unreasonable danger.[65] However, this exception is also inapplicable because scientific evidence does not support the conclusion that a residence formerly occupied by a PWA is unreasonably dangerous.[66] Thus, the classic exceptions to the doctrine of *caveat emptor* are inapplicable.

See also Christy v. Prestige Builders, Inc., 329 N.W.2d 748, 752 n.7 (Mich. 1982); Jones, *supra* note 55, at 219.

60. Historically, the vendor-purchaser relationship has not been regarded as a fiduciary one. *See supra* note 56 and accompanying text.

61. Since disclosure cannot be compelled where there is no fiduciary relationship between the parties, this assertion is limited. However, even if a fiduciary relationship existed, there is no certainty that the present circumstances would trigger a duty to disclose.

62. *See supra* notes 57-58 and accompanying text.

63. *See supra* note 59 and accompanying text. Numerous cases have held vendors liable for failure to disclose an unreasonably dangerous condition which threatens the purchaser's health. *See, e.g.*, Shane v. Hoffmann, 324 A.2d 532 (Pa. 1974) (sewer problems inundated a home's basement with human excrement and other waste material and was held to have threatened the purchasers' health).

64. RESTATEMENT (SECOND) OF TORTS, *supra* note 59, § 353(1).

> "[R]eason to know" [means] that [the vendor] has information from which a person of reasonable intelligence, or of his own superior intelligence, would infer that the condition exists, or would govern his conduct on the assumption that it does exist, and would realize that its existence will involve an unreasonable risk of physical harm to persons on the land.

Id. at 236, cmt. b.

65. One court recently stated that the degree of danger depends on many factors, including the likely use of the property. Niecko v. Emro Mktg. Co., 769 F. Supp. 973, 978 (E.D. Mich. 1991).

66. Such an assertion would have to be premised on scientific evidence that the retroviruses that cause HIV linger within the realty and can be contracted by subsequent inhabitants. No support exists for such an argument. *See supra* note 6.

2. Modern Duty to Disclose

The modern model of disclosure has not displaced the classical model, but has expanded it in two respects. First, the modern model broadens the vendor's obligation towards the purchaser.[67] It replaces the focus on shrewd individualism[68] with a focus on equity, fairness, good faith, and fair dealing.[69] The vendor is increasingly perceived as having an ethical obligation to the purchaser to make disclosures that will help the latter get the benefit of his bargain.[70] Nondisclosure and the suppression of material facts are synonymous with a fraudulent misrepresentation.[71]

The modern model also reflects an expansion of the classic *ca-*

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67. This new view departs from the classical model. As the court noted in Johnson v. Davis, 480 So. 2d 625 (Fla. 1985):

> In determining whether a seller of a home has a duty to disclose latent material defects to a buyer, the earlier common law consistently imposed an ability upon the commission of affirmative acts of harms, but shrank from converting the courts into an institution for forcing men to help one another. This distinction [between malfeasance and nonfeasance] is deeply rooted in our case law. . . . Where failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative representations is tenuous. Both proceed from the same motives and are attended with the same consequences; both are violative of the principles of fair dealing and good faith; both are calculated to produce the same result; and, in fact, both essentially have the same effect.

Id. at 627-28. However, although the vendor's duty reflects an expansion of American common law, its theoretical basis is not novel. As early as the nineteenth century, Pothier envisioned such a disclosure obligation for the vendor because of the principle of good faith. *See infra* note 76 and accompanying text.

68. *See* Keeton, *supra* note 40, at 5; *see also* PROSSER, *supra* note 48, at 722.

69. *See Johnson*, 480 So. 2d at 628.

70. The "freedom of contract principle has eroded somewhat as a consequence of both the regulatory impact of public law on real estate transactions and the emerging trend toward striking down bargains that are either unconscionable or offensive to public policy." MICHAEL T. MADISON & ROBERT M. ZINMAN, MODERN REAL ESTATE FINANCE: A TRANSACTIONAL APPROACH 3 (1991).

71. *See, e.g.*, Correa v. Maggiore, 482 A.2d 192, 196 (N.J. 1984); *cf.* Goldfarb, *supra* note 44, at 6-7. Goldfarb stated that:

> The courts and commentators treat actionable silence or, as it is more often denominated, "actionable nondisclosure" as a variety of misrepresentation. It is one of the implied theses of the present inquiry that it is not logical, or even helpful, to do so. True, under some circumstances, a failure to speak may amount to the equivalent of an actual, verbal representation of fact. Silence is, after all, a type of conduct, or at least of forbearance. If the representation thus implied is, in fact, false, and if the other elements of fraud are present, the plaintiff ought to be entitled to a remedy. But, under many circumstances, silence is merely silence. It says nothing. The silent party may fail to deny or assert a given fact. But it may be unfair and unreasonable to label his behavior as a representation, much less a *mis*representation. And yet, even under such circumstances, the silence may be tortious.

Id.

veat emptor exceptions to conform to modern standards.[72] Under this model, in addition to dangerous latent defects,[73] latent defects which affect the property's market value or desirability must be disclosed.[74] Thus, effectively, a pool of material information that the

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72. In Wilhite v. Mays, 232 S.E.2d 141 (Ga. App. Ct. 1976), *aff'd*, 235 S.E.2d 532 (Ga. 1977), the court justified disregarding *caveat emptor*.

> The rule of *caveat emptor* . . . is a statement of the mores of medieval through nineteenth-century England (and America) and apparently worked well in agricultural societies. . . . However, the sale of farm acreage . . . —the type of transaction to which *caveat emptor* originally addressed itself—is very different from the sale of a modern home, with complex plumbing, heating, air conditioning, and electrical systems. . . .

Id. at 142-43 (emphasis added); *see also Johnson*, 480 So. 2d at 628, where in its comparison of philosophies used to decide cases under the classical model as compared to the modern model, the Supreme Court of Florida stated:

> These unappetizing cases are not in tune with the times and do not conform with current notions of justice, equity and fair dealing. One should not be able to stand behind the impervious shield of caveat emptor and take advantage of another's ignorance. Our courts have taken great strides since the days when judicial emphasis was on rigid rules and ancient precedents. Modern concepts of justice and fair dealing have given our courts the opportunity and latitude to change legal precepts in order to conform to society's needs. Thus, the tendency of the more recent cases has been to restrict rather than extend the doctrine of caveat emptor. The law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it.

73. *See supra* note 59 and accompanying text.

74. A line of cases hold that a seller's failure to disclose a defect known to him and not to the purchaser entitles the latter to damages or rescission. *See* MILTON R. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY 49 (5th ed. 1991). These cases,

> . . . bas[e] [the] purchaser's claim on negligent or reckless nondisclosure rather than caveat emptor. Seller is not excused by purchaser's agreement to take the property "as is." These cases generally involve material conditions not discoverable by purchaser by ordinary care and diligence. . . . Under this rule the risk of latent defects that are unknown to either party falls on the purchaser. But mutual mistake by seller and buyer of the existence of a building defect permitted rescission of a contract of sale. A moderate amount of "puffing" is deemed neither material nor actionable. On the other hand a purchaser is under no duty to tell seller facts known to purchaser and not to seller. . . .

Id. at 52-54 (citations omitted). Friedman defines this line of cases to include cases involving dangerous latent defects. *Id.* at 49.

This article differentiates this line of cases from the earlier ones, particularly those involving dangerous latent defects, because cases under the modern model reflect a change in the judiciary's views. Failing to disclose dangerous latent defects has been condemned for some time. *See* Cutter v. Hamlen, 18 N.E. 397 (Mass. 1888) (lessor's failure to disclose that the house was infected with diphtheria). Yet, under the modern model, courts have decided in favor of the purchasers under the explicit or implicit premise that fair dealing and justice require disclosure. *See, e.g.*, Clauser v. Taylor, 112 P.2d 661 (Cal. 1941) (seller failed to disclose that two residential lots had been filled with debris and that, in that condition, the cost of the building on them was materially increased); Weintraub v. Krobatsch, 317 A.2d 68 (N.J. 1974) (seller failed to disclose a serious cockroach infestation, which could only have been discovered when the lights were out because cockroaches are nocturnal creatures); Gilbey v.

vendor must disclose has been created in the interest of upholding the principles of good faith and fair dealing.

The principles of good faith and fair dealing are used to promote equitable standards of behavior for parties involved in contracts of sale.[75] One view of the principle of good faith was stated by Pothier early in the nineteenth century:

> [G]ood faith not only forbids the assertion of falsehood, but also all reservation concerning that which the person with whom we contract has an interest in knowing, touching the thing which is the object of the contract.
>
> The reason is that equity and justice, in these contracts, consists in equality. It is evident that any reservation, by one of the contracting parties, concerning any circumstance which the other has an interest in knowing, touching the object of the contract, is fatal to this equality: for the moment the one acquires a knowledge of this object superior to the other, he has an advantage over the other in contracting; he knows better what he is doing than the other; and consequently, equality is no longer found in the contract.
>
> In applying these principles to the contract of sale, it follows that the vendor is obliged to disclose every circumstance within his knowledge touching the thing which the vendee has an interest in knowing and that he sins against that good faith which ought to reign in this contract, if he conceals any such circumstance from him.[76]

According to Pothier, a vendor must disclose material information to guarantee equality in the bargaining process. Therefore, if the vendor fails to act in good faith, and withholds valuable information from the purchaser about the object of the contract, the parties cannot bargain on an equal basis.

Professor Keeton also embraces the moralistic philosophy underlying the modern model. Keeton's position is that the duty to dis-

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Cooper, 310 N.E.2d 268 (Ohio Ct. of C.P. 1973) (sellers and broker failed to disclose that certain permanent and temporary easements encumbered the property).

Scholars have attempted to identify those factors that influence the courts, recognizing that materiality is a principal element of any action based upon a fraudulent misrepresentation. W. Page Keeton, *Actionable Misrepresentation: Legal Fault as a Requirement, II. Rescission*, 2 OKLA. L. REV. 56, 59 (1936). The factors have been outlined in a variety of ways. *See, e.g.*, Braeunig, *supra* note 55, at 155; Kafker, *supra* note 55, at 60; Morris, *supra* note 55, at 27.

75. These principles have been endorsed by the American Law Institute. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 161 (1979).

76. Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178, 185-86 n.c (1817) (quoting POTHIER, DE VENTE No. 233).

close should be required "whenever justice, equity and fair dealing demand it."[77] He asserts that the disclosure obligation should apply to all circumstances where "unfair conduct"[78] will result if one of the parties to the transaction does not speak.

Thus, the modern model is a composite of a myriad of philosophies. Although not all courts have advocated a philosophy as broad as Professor Keeton's,[79] some courts have endorsed and promoted the underlying principles of good faith and fair dealing.[80] For example, in *Lingsch v. Savage*,[81] the purchasers brought an action in fraud against the sellers and the sellers' broker for failing to disclose that the realty was in a state of disrepair, contained illegal units, and had been set for condemnation by the city.[82] Although the case was remanded, the *Lingsch* court articulated the elements of the cause of action. The court stated:

> The elements of a cause of action for damages for fraud based on mere nondisclosure and involving no confidential relationship would therefore appear to be the following: (1) Nondisclosure by the defendant of facts materially affecting the value or desirability of the property; (2) Defendant's knowledge of such facts and of their being unknown to or beyond the reach of the plaintiff; (3) Defendant's intention to induce action by the plaintiff; (4) Inducement of the plaintiff to act by reason of the nondisclosure; and (5) Resulting damages.[83]

The first two elements[84] of the claim for nondisclosure reflect the court's commitment to the principles of good faith and fair dealing. The first two elements require the plaintiff to establish three factors: (1) facts materially affecting the real property's value or desirability; (2) the vendor's exclusive knowledge of such facts;[85] and (3) nondisclosure of those facts by the vendor.[86] Fundamentally, if

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77. Keeton, *supra* note 40, at 31.

78. *Id.*

79. PROSSER, *supra* note 48, at 725 n.39 (citing Keeton, *Fraud-Concealment and Non-Disclosure*, 15 TEX. L. REV. 1, 31-40 (1936)).

80. Some courts have explicitly endorsed Professor Keeton's position. *See Weintraub*, 317 A.2d at 72; Obde v. Schlemeyer, 353 P.2d 672 (Wash. 1960) (vendors were obligated to disclose termite infestation to purchasers).

81. 29 Cal. Rptr. 201 (Ct. App. 1963).

82. *Id.* at 203.

83. *Id.* at 206.

84. The other elements are standard in establishing a fraud claim. *See, e.g.*, Globe Int'l, Inc. v. Superior Ct., 12 Cal. Rptr. 2d 109, 112 (Ct. App. 1992).

85. *See supra* note 74 and accompanying text.

86. *See supra* note 74 and accompanying text.

the vendor withholds material information about the property which is otherwise unavailable to the purchaser, the purchaser is placed in an unequal bargaining position. The purchaser cannot make reasonable bids on the property because he has not been fully informed.[87] This outcome benefits the vendor, but is unfair to the buyer. By withholding information, the vendor fails to act in good faith. It follows that there cannot be any fair dealing, since all of the relevant information has not been disclosed.[88]

Other courts, like the Supreme Court of Florida in *Johnson v. Davis*,[89] have endorsed *Lingsch*.[90] The *Lingsch*[91] case and its progeny[92] have established a more onerous burden for the vendor. Although these courts do not impose implied warranties upon a vendor, the disclosure requirement, nonetheless, reflects a "policy rather similar in its purpose to that which imposes implied warranties of quality. . . ."[93] These courts require a vendor to make disclosures if the purchaser lacks access to material information. To the extent that the vendor fails to make disclosures, courts hold the vendor accountable.[94]

The courts' opinions are consistent with Pothier's position. Each court is effectively taking the position that the real property's material components of value[95] are significant. To the extent that a vendor has exclusive knowledge and withholds information regarding one of the negative components of value, thereby placing the purchaser in an inferior bargaining position,[96] the court must intercede.[97]

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87. *See supra* note 76 and accompanying text.

88. *See supra* note 76 and accompanying text.

89. 480 So. 2d 625 (Fla. 1986).

90. The *Johnson* court endorsed the philosophy underlying *Lingsch*. The Supreme Court of Florida concluded that the seller has a duty to disclose all known facts "materially affecting the value of the property. . . ." The court did not include those facts that affect the property's "desirability." *See id.* at 629.

91. *See supra* notes 81-88 and accompanying text.

92. *See* Posner v. Davis, 395 N.E.2d 133 (Ill. App. Ct. 1979) (basement flood, rotten basement stairs and other water damage); *Weintraub*, 317 A.2d 68 (roach infestation); Thacker v. Tyree, 297 S.E.2d 885 (W. Va. 1982) (cracked foundation and walls); *see also Johnson*, 480 So. 2d 625.

93. PROSSER, *supra* note 48, at 724-25.

94. *See supra* notes 81-93 and accompanying text.

95. *See supra* notes 38-44 and accompanying text.

96. *See supra* note 76 and accompanying text.

97. This approach is unlike the one used by courts utilizing the classical model. *See Swinton*, 42 N.E.2d at 809. As stated by the Supreme Court of Florida, if the courts did not assume such a position, parties would be charged with the responsibility of making their own

The problem with the vendor's new disclosure duty, however, is that it inhibits the vendor from determining, with any consistency, what he must disclose. Accordingly, in some respects the *Lingsch* opinion makes it unnecessary to differentiate between what the purchaser wants to know—namely, all of the components of value—and what the vendor must disclose—namely, all the *material* components of value. Under the modern model, the pool of available information is quite large. Courts are struggling to determine the scope of the materiality element[98] by continuing to ask which facts must be disclosed to the purchaser.

The *Lingsch* court stated that the vendor is obligated to disclose facts which are of sufficient materiality to "[affect] the value or desirability of the property. . . ."[99] Implicit in this statement is a conclusion that the California materiality standard is both objective and subjective. If the property's *value* is used as a barometer, an objective materiality standard is applied. The value of an omitted fact and its impact upon the realty can be determined by looking at objective criteria; specifically, the cost of repairing the defect and the extent to which it devalues the realty.

Alternatively, if "desirability"[100] is the gauge, a more subjective standard is being applied. In that case, the purchaser's own tastes or needs are used as a barometer. Since tastes vary, however, it is difficult to predict or quantify the value of those tastes.[101]

The California materiality standard was applied in *Reed v. King*.[102] In *Reed*, the purchaser of a home brought an action against the vendors and their agent for rescission and damages.[103] The complaint alleged that the vendors had a duty to disclose that a woman and her four children had been murdered in the home ten years ear-

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bargains. *See Johnson*, 480 So. 2d at 628.

98. It is futile to attempt to dispose of the materiality issue. Two lines of thought exist. First, the objective view, as illustrated by RESTATEMENT (SECOND) OF TORTS § 538(2)(a) (1977), provides that a fact is "material" if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction. . . ." This reasonable person analysis does not allow the individual's idiosyncrasies to affect the court's final assessment. In contrast, see discussion of Lingsch v. Savage, *supra* notes 81-83 and accompanying text.

99. 29 Cal. Rptr. at 209.

100. *Id.*

101. Authors have been critical of the use of a subjective standard. *See, e.g.*, Braeunig, *supra* note 55, at 161.

102. 193 Cal. Rptr. 130 (Ct. App. 1983); *see also* Sambovsky v. Ackley, 572 N.Y.S.2d 672 (App. Div. 1991) (reinstatement of plaintiff's complaint seeking rescission of a contract to purchase property which plaintiff discovered was possessed by poltergeists).

103. 193 Cal. Rptr. at 130.

lier.[104] The complaint further stated that such a disclosure was necessary because the information was material and may have affected the value of the house.[105] The court held that the complaint stated a cause of action because the information was of sufficient materiality to impose a duty of disclosure.[106]

Using the rationale of *Lingsch*,[107] the *Reed* court found that the murders were potentially material information that may have affected the realty's value. In response, the California legislature clarified the breadth of the court's holding through its disclosure legislation.[108]

Courts applying the modern model, particularly the California standard, have a broader vision of the vendor's disclosure obligation. The vendor's duty arises whenever the information has the potential of affecting the value of the bargain. Accordingly, since the materiality threshold is difficult to identify, it is likely that a court would deem material the fact that John Abele had AIDS while he lived in the house. Thus, under the modern model, John would be obliged to reveal his ailment.

This conclusion, however, is anomalous. Since the modern model is more progressive than the classical model, one would expect a different outcome. Yet, despite the modern model's attributes, including its promotion of the principles of good faith and fair dealing, the AIDS-stricken vendor loses.

3. Economic Duty to Disclose

The economic model[109] requires disclosure from the "cheapest

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104. *See id.* at 131.

105. *Id.* at 133.

106. *Id.*

107. *See supra Lingsch*, 29 Cal. Rptr. at 209 (stating that where the "seller fails to disclose the true facts of [the property's] condition not within the buyer's reach and affecting the value or desirability of the property, an 'as is' provision is ineffective to relieve the seller of . . . his . . . fraud.").

108. The legislature stated as follows:

> (e) The applicability of cases such as *Reed v. King* . . . which deals with the obligation of a seller of real property to disclose facts materially affecting the value or desirability of the property, is not clear as to situations where previous owners or inhabitants of real property have been afflicted with AIDS. The Legislature intends to clarify this situation by the enactment of this act.

1986 CAL. STAT. 498 (codified at CAL. CIV. CODE § 1710.2(e) (West Supp. 1991)).

109. Professor Anthony Kronman's discussion of disclosure obligations from an economic perspective provides the foundation for this third disclosure model. Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUDIES 1 (1978). *But cf.* Christopher T. Wonnell, *The Structure of a General Theory of Nondisclo-*

mistake preventer"[110] or the person with "superior access to the relevant information."[111] Premised on the view that information is a valuable commodity,[112] this model recognizes that "adequate information is a prerequisite to the rational and efficient exchange of other commodities."[113] If either party has inadequate information, a unilateral or mutual mistake can result.[114] According to Professor Kronman, the risk of having either type of mistake is too great. The effect of mistake is to impose costs upon "the contracting parties themselves and [on] society as a whole since the actual occurrence of a mistake always (potentially) increases the resources which must be devoted to the process of allocating goods to [the] highest-valuing users."[115]

While the economic model acknowledges the need to exchange information, it also recognizes that requiring disclosure is not always efficient. To make this point, Kronman distinguishes the party who has "deliberately acquired information"[116] from the one who has "casually acquired information."[117] The party who deliberately acquires information invests resources and should not be required to disclose because such a requirement discourages the acquisition and

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sure, 41 CASE W. RES. L. REV. 329, 342 (1991). A discussion of additional economic theories is beyond the scope of this section. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992).

110. Kronman, *supra* note 109, at 25.

111. *Id.* at 25 n.70.

112. *See id.* at 14-15.

113. Wonnell, *supra* note 109, at 341.

114. Kronman, *supra* note 109, at 4 ("[i]nformation is the anecdote to mistake").

115. *Id.* at 2-3.

116. Kronman states:

> As it is used here, the term "deliberately acquired information" means information whose acquisition entails costs which would not have been incurred but for the likelihood, however great, that the information in question would actually be produced. These costs may include, of course, not only direct search costs . . . but the costs of developing an initial expertise as well. . . . If the costs incurred in acquiring the information . . . would have been incurred in any case—that is, whether or not the information was forthcoming—the information may be said to have been casually acquired. The distinction between deliberately and casually acquired information is a shorthand way of expressing this economic difference. Although in reality it may be difficult to determine whether any particular item of information has been acquired in one way or the other, the distinction between these two types of information has—as I hope to show—considerable analytical usefulness.

Id. at 13. According to Professor Kronman, such information is the result of a "deliberate investment (either in the development of expertise or in actual searching)." *Id.* at 18.

117. *Id.* at 14-15 ("[A person] who casually acquires information makes no investment in its acquisition . . . .").

production of socially useful information.[118] Alternatively, the party who casually acquires information should be required to disclose because this person is "likely to be a better (cheaper) mistake-preventer. . . ."[119]

Kronman illustrates his point as follows:

> However one feels about Professor Keeton's moral claim, requiring the disclosure of latent defects makes good sense from the more limited perspective offered here. In the first place, it is likely to be expensive for the buyer to discover such defects; the discovery of a latent defect will almost always require something more than an ordinary search. Even where neither party has knowledge of the defect, it may be efficient to allocate to the seller the risk of a mistaken belief that no defect exists, on the grounds that of the two parties he is likely to be the cheapest mistake-preventer.[120]

In the Abele/Mays hypothetical, who is the "cheapest mistake preventer?"[121] If a court applied the economic model, and concluded that John's condition was like a "latent defect" because it devalued the realty, the Abele family would be required to disclose John's

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118. *Id.* at 16-17. Underlying Kronman's argument is the idea that when the parties to a contract have failed to

> allocate th[e] risk [of a mistake] by including an appropriate disclaimer in the terms of their agreement . . . the object of the law of contracts should be (as it is elsewhere) to reduce transaction costs by providing a legal rule which approximates the arrangement the parties would have chosen for themselves if they had deliberately addressed the problem.

Id. (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW, 73-74 (2d ed. 1977)).

119. *Id.* at 16. Professor Kronman's explanation is as follows:

> If we assume that courts can easily discriminate between those who have acquired information casually and those who have acquired it deliberately, plausible economic considerations might well justify imposing a duty to disclose on a case-by case basis. . . . A party who has casually acquired information is, at the time of the transaction, likely to be a better (cheaper) mistake-preventer than the mistaken party with whom he deals-regardless of the fact that both parties initially had equal access to the information in question. One who has deliberately acquired information is also in a position to prevent the other party's error. But in determining the cost to the knowledgeable party of preventing the mistake (by disclosure), we must include whatever investment he has made in acquiring the information in the first place. This investment will represent a loss to him if the other party can avoid the contract on the grounds that the party with the information owes him a duty of disclosure.
>
> If we take this cost into account, it is no longer clear that the party with knowledge is the cheaper mistake-preventer when his knowledge has been deliberately acquired. Indeed, the opposite conclusion seems more plausible.

Id.

120. *Id.* at 25 (citation omitted).

121. *Id.*

condition to the Mays family. Under this analysis, the Abeles should assume the risk because they have exclusive access[122] to the confidential medical information at issue.[123] Alternatively, a court could conclude that this strain of economic analysis is irrelevant. Although Professor Kronman's discussion revolves around disclosure obligations, his analysis is premised on the existence of a latent material defect. A court might conclude that John Abele's condition cannot be compared to the same. Since, unlike a latent defect, John Abele's condition will not diminish the realty's habitability, information concerning his medical status is immaterial. Thus, if the information lacked value, it would not matter how the information was acquired.

In order to analyze the Abeles' disclosure obligation and predict the outcome under the three different models, certain assumptions must be made. First, John's condition could not be contracted by a later occupant of the house. Second, the disclosure could, nonetheless, be regarded as a negative component of value because it might temporarily affect the realty's market value.

Under the classical model, the common law rule of *caveat emptor* restricts the seller's disclosure obligation and only requires disclosures if certain exceptions exist.[124] Since none of the exceptions applies, the Abeles would not have to make the disclosure to the Mays family.

Application of the modern model, however, yields a different result. Under this model, the vendor's disclosure obligation is much broader because of the view that the vendor has a responsibility to disclose latent defects to the purchaser in order to avoid an inequitable result.[125] For example, this would include telling the purchaser about a defect that might devalue the realty's market value. Thus, the Abeles would be required to make the disclosure. A similar outcome would be required under the economic model, but for a different reason. There, the Abeles would be forced to make the disclosure

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122. It would be illegal for the Mays family to discover the AIDS-specific information. *See, e.g.*, CAL. CIV. CODE § 56 (West 1992) (no medical information can be released by anyone, including medical care providers, without either a detailed statutory authorization from the patient, proper subpoena, legal search warrant, or other appropriate legal authority); *id.* at §§ 56.10, 56.11; ILL. COMP. STAT. ch. 410, 305/6 (Smith-Hurd 1993) (identity of any person upon whom a test has been performed and test results are confidential); WASH. REV. CODE ANN. § 70.24.105(2) (West 1992) (prevents disclosure of the identity of a person upon whom an HIV test is performed or the disclosure of the results of that test to persons without statutory authorization).

123. *See infra* notes 129-35 and accompanying text.

124. *See supra* notes 55-59 and accompanying text.

125. *See supra* notes 67-78 and accompanying text.

because they could be regarded as the cheapest mistake-preventers.[126]

B. *Vendor's Interest in Withholding Information Regarding His Medical Status: Right to Privacy in Medical Information*

The second competing interest concerns the Abeles. As vendors, with one individual having the dual status of being a PWA, they would not want John's medical status revealed to the public. The Abeles' interest in withholding such information extends beyond John's desire to avoid the discomfort of having his illness revealed to the Mays family. From the PWA's perspective, the repercussions of making a public statement that one has AIDS can be serious.[127] If such a disclosure is made within the course of a business relationship, the PWA's problem is compounded. Despite the fact that such a disclosure is an unnecessary communication, given the non-existent risk of contracting the disease, it can be used against the PWA to his financial detriment. Thus, given the nature of the information and current public attitudes toward AIDS, a PWA has legitimate reasons, that extend beyond pure embarrassment, for not wanting to

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126. *See supra* notes 110-16 and accompanying text.

127. PWAs' experiences range from social stigmatism to ostracism to unemployment to denial of access to health care. *See* Chalk v. United States District Court, 840 F.2d 701, 703 (9th Cir. 1988) (teacher with AIDS was removed from teaching duties); Poff v. Caro, 549 A.2d 900, 901 (N.J. 1987) (landlord refused to rent to three gay men for fear of AIDS); *AIDS Spreads to the Courts*, NEWSWEEK, July 1, 1985, at 61 (gay men who came to work with rashes or chest colds were getting fired because of AIDS phobia); *Doctors Fear AIDS, Too*, NEWSWEEK, Aug. 3, 1987 (doctors refused to treat people with or suspected of having AIDS); Myra MacPherson, *The Children & the Flames of Fear; In Florida, a Family at the AIDS Flash Point*, WASHINGTON POST, Sept. 11, 1987, at B1 (Florida family whose hemophiliac children tested positive for HIV had their house fire-bombed); Redway v. Los Angeles County, 1 AIDS POL'Y & L.(BNA) 6 (Aug. 13, 1986) (action based on similar grounds); Reginald Stuart, *Haitians, Seeking Freedom and Jobs, Find Heartaches Instead in America*, N.Y. TIMES, June 28, 1983, at A18 (Haitians were denied employment because of AIDS fear); Amy Tarr, *The Legal Issues Widen*, NAT'L L.J., Nov. 25, 1985, at 1 (children with AIDS had been denied access to schools in Denver, Colorado, New Haven, Connecticut, Troy, Georgia and Kokomo, Indiana); *Undertakers Unit Warns of AIDS*, N.Y. TIMES, June 18, 1983, at 27 (funeral directors urged not to embalm bodies of PWAs); Urbaniak v. Newton, 2 AIDS POL'Y & L. (BNA) 8 (Feb. 25, 1987) (PWA's disclosure of his medical status to an insurance company was widely disseminated to his employer and resulted in termination of his employment).

Moreover, a disclosure made during the PWA's lifetime could be detrimental for the PWA's survivors. *See, e.g.*, Doe v. Borough of Barrington, 729 F. Supp. 376 (D. N.J. 1990). In *Doe*, police officers revealed the PWA's medical status to the PWA's neighbors who then contacted the media. *Id.* The PWA's wife and children successfully claimed that their constitutional rights to privacy had been violated as a result of the disclosure of their loved one's confidential information. *Id.* at 382. The court concluded that those sharing a household with an infected person also suffer from a disclosure. *Id.* at 385.

make an unnecessary disclosure.

Given a PWA's concerns, and despite any disclosure duty that might arise applying property doctrine, is John Abele entitled to keep his medical status out of the public domain? If John Abele had any control over the dissemination of information regarding his medical status, a right to keep the information out of the public domain would arise because of his right to privacy in that information.[128] Federal[129] and state[130] courts have uniformly held that information

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128. Privacy has its roots in the latin word *privatus* meaning the quality or state of being private or apart from the state. VINCENT J. SAMAR, THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION 19 (1991); *see* also Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Two distinct branches of the right to privacy exist. The first branch encompasses those rights which exist against the Government. *See* Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (recognizing two types of privacy interests: "the individual interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions").

The second branch of the right to privacy concerns those general privacy rights which exist against other individuals. Prosser has identified four categories of claims: 1) intrusion upon plaintiff's seclusion, solitude, or private affairs; 2) public disclosure of private facts which would be highly offensive to a person of reasonable sensibilities; 3) publicity which places the plaintiff in a false light in the public eye; and 4) appropriation, for the defendant's advantage, of plaintiff's name or likeness. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 814 (4th ed. 1971). This second branch is the focus of this article; however, a detailed discussion of the actual claims that the PWA could assert in the event of a privacy violation is beyond the scope of this article. *See* SAMAR, *supra*, at 28-32; *see also* Dale A. Whitman, *Secrecy and Real Property*, 27 AM. U. L. REV. 251, 260-70 (1978) (civil actions may be pursued for appropriation, intrusion, public disclosure of private facts, and holding a plaintiff out to the public in a false light).

This article asks the preliminary question: Is information about one's body and state of health within the ambit of matter entitled to privacy protection?

129. The federal courts have held that "[i]nformation about one's body and state of health is matter which the individual is ordinarily entitled to retain within the 'private enclave where he may lead a private life.' " United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) (citing United States v. Grunewald, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting) (footnote omitted), *rev'd*, 353 U.S. 391 (1957), *quoted in* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (in connection with the Fifth Amendment)).

In accord with the view that this information "stand[s] on a different plane than other relevant material," *Westinghouse Elec. Corp.*, 638 F.2d at 577, the courts have imposed a higher burden of discovery on reports concerning a party's physical and mental condition. *Compare* FED. R. CIV. P. 35, *with* FED. R. CIV. P. 26(b); *see also* 8 CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2237-38 (1970). The burden is particularly onerous if the request results in the disclosure of a PWA's identity. See, for example, cases where the moving party sought discovery of alleged AIDS-infected blood donors: Mason v. Regional Medical Ctr. of Hopkins County, 121 F.R.D. 300, 303 (W.D. Ky. 1988) (donor's identity was to only be revealed to a limited number of persons); Belle Bonfils Memorial Blood Ctr. v. District Ct., 763 P.2d 1003, 1013 (Colo. 1988) (court protected donor's identity and ordered deposition of donor via written questions); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675 (Tex. Ct. App. 1987), *cert. denied*, 484 U.S. 1065 (1988) (donors' identities only revealed to parties).

130. *See infra* notes 131-32 and accompanying text.

about one's medical condition is private. As a California state court noted:

> To determine whether . . . a right of privacy [exists] . . . to protect the medical records here in dispute, we must examine . . . the nature of the information sought. A person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected.[131]

This type of information is kept out of the public domain not only to protect the individual, but also to promote effective diagnosis and treatment. As the same court stated:

> The patient-physician privilege . . . creates a zone of privacy whose purposes are (1) "to preclude the humiliation of the patient that might follow disclosure of his ailments" . . . and (2) to encourage the patient's full disclosure to the physician of all information necessary for effective diagnosis and treatment of the patient. . . .
>
> The patient should be able to rest assured with the knowledge that "the law recognizes the [physician-patient] communications as confidential, and guards against the possibility of his feelings being shocked or his reputation tarnished by their subsequent disclosure . . . ." The matters disclosed to the physician arise in most sensitive areas often difficult to reveal even to the doctor. Their unauthorized disclosure can provoke more than just simple humiliation in a fragile personality. . . . The individual's right to privacy encompasses not only the state of his mind, but also his viscera, detailed complaints of physical ills, and their emotional overtones.[132]

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131. Division of Medical Quality v. Gherardini, 156 Cal. Rptr. 55, 60 (Ct. App. 1979) (citations omitted). In *Gherardini*, patients' privacy rights were at issue because the state medical board requested their medical files in connection with an investigation of a San Diego doctor's competence in treating patients. *Id.* at 57. In remanding the case, the court required the medical board to demonstrate the medical records' relevance and materiality to the investigation. *Id.* at 62. Additionally, the medical board was required to show that the patient's constitutional rights were not infringed. *Id.* The court stated that "[i]f disclosure is to be compelled after the requisite balancing of the juxtaposed rights, and the finding of a compelling state interest, then it should be accomplished only by an order drawn with narrow specificity." *Id.*

See also Westinghouse Elec. Corp., 638 F.2d at 577. In *Westinghouse*, the court stated as follows:

> Information about one's body and state of health is matter which the individual is ordinarily entitled to retain within the "private enclave where he may lead a private life." It has been recognized in various contexts that medical records and information stand on a different plane than other relevant material.

Id. (citations omitted).

132. *Gherardini*, 156 Cal. Rptr. at 60 (citations omitted).

Federal and state statutes are consistent with court decisions. Federal legislation acknowledges the individual's privacy interest in personal information such as medical records.[133] Most of the current state confidentiality laws are in accord with federal legislation. State legislation consists of laws which (1) regard medical records as confidential documents[134] and (2) forbid the unauthorized disclosure of information regarding a person who has undergone AIDS testing.[135]

Certain disclosure statutes[136] require a property owner to answer truthfully to the best of his knowledge any inquiries regarding his medical status.[137] An argument can be made that such a requirement is tantamount to forcing a vendor to place his medical profile into the public domain. Through the disclosure, the PWA reveals his medical status to a purchaser who may or may not share the information with other members of the public. The truthful disclosure requirement takes away the PWA's ability to control dissemination of his personal diagnosis.[138] Thus, the requirement constitutes an intrusion into his zone of privacy, which is forbidden under existing federal and state laws.[139] Essentially, legislation that lacks a justifiable basis for its disclosure requirement[140] is wholly inconsistent with

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133. To avoid governmental intrusion into citizens' privacy rights, Congress passed the Privacy Act of 1974. 5 U.S.C. §§ 552a(a)-(q) (1976). The Act requires departments and agencies of the executive branch and their employees to observe certain rules regarding the disclosure of personal information about individuals. *Id.* Regulations governing access to personal information have also been issued in an effort to minimize intrusions into an individual's records. 45 C.F.R. §§ 5b.1-5b.11, 99.1-99.67 (1979) (concerns, among other things, medical records under control of the Department of Health, Education, and Welfare); *see also* Freedom of Information Act, 5 U.S.C. § 552(b)(6) (1976) (medical files are the subject of a specific exemption).

134. *See, e.g.*, GA. EVID. CODE ANN. § 38-718 (Michie 1991).

135. *See, e.g.*, ARK. CODE ANN. § 20-15-904(c) (Michie 1991); CAL. HEALTH & SAFETY CODE §§ 199.25, 199.42 (West 1990). Legislation involving AIDS testing attempts to carefully monitor the disclosure of the subject's identity and to whom test results may be given.

136. *See supra* note 27 and accompanying text.

137. *See, e.g.*, GA. CODE ANN. § 44-1-16(2).

138. State confidentiality laws also take away part of the PWA's right to control the dissemination of information. *See, e.g.*, State v. Stark, 832 P.2d 109 (Wash. Ct. App. 1992) (a PWA must disclose medical status to sexual partners). They do not mandate a disclosure to the public at large, but only to those individuals who are at risk of contracting the disease from the PWA or who are in the business of monitoring the virus to protect public health. Thus, the AIDS disclosure legislation that requires a truthful disclosure is too intrusive. *See infra* notes 227-32 and accompanying text.

139. *See supra* notes 129-31.

140. Stated more precisely, "to survive a constitutional challenge, a statute compelling disclosure must be rationally related to a legitimate governmental goal." Murray, *supra* note 11, at 707.

state confidentiality statutes.[141]

Although medical information is confidential, a disclosure can be mandated if it promotes a legitimate public interest. For example, in *United States v. Westinghouse Electric Corp.*,[142] the court held that employee medical records could be given to the National Institute for Occupational Safety and Health (NIOSH), a federal governmental agency that was conducting a health hazard evaluation of the corporation's facility.[143] After concluding that the employees' medical records were entitled to privacy protection,[144] the court stated the following with respect to how it needed to reconcile competing rights:

> Thus, as in most other areas of the law, we must engage in the delicate task of weighing competing interests. The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, . . . the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articu-

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141. The disclosure of medical information to a physician as opposed to a purchaser should be differentiated because the former disclosure is privileged. *See, e.g.*, CAL. EVID. CODE, §§ 990-1007 (West 1992). Since the vendor-purchaser relationship is not privileged, the same guarantee does not exist. *See supra* note 56. Although the vendor-purchaser relationship does not trigger the privilege, the information is entitled to be given the same legal significance. A PWA's medical profile remains private regardless of the context.

142. 638 F.2d 570 (3d Cir. 1980).

143. In *Westinghouse Elec. Corp.*, 638 F.2d 570, two interests were involved: the employees, whose individual rights of privacy were at stake if the medical reports were disclosed, and NIOSH, an agency attempting to acquire those records to complete its authorized investigations. *Id.* at 572. NIOSH initiated a health hazard evaluation of the employer's facility because workers were experiencing allergic reactions from exposure to certain chemicals. *Id.* After making a preliminary assessment, NIOSH sought medical records to determine if there was a correlation between the environment and the employees' complaints. *Id.*

The case is instructive even though the competing parties were the government and the employer, as opposed to private parties. The court relied upon precedent to conclude that the employees had a privacy interest to protect. The court stated that "[t]he privacy interest asserted in this case falls within the . . . right not to have an individual's private affairs made public by the government." *Id.* at 577 (citing Paul v. Davis, 424 U.S. 693, 713 (1976) (referring to Whalen v. Roe, 429 U.S. 589, 599-600 (1977))). In this context, although private parties are involved, the same type of information is being sought; namely, information concerning an individual's medical profile. However, since the privacy right in this information is not absolute, the interests must be balanced, to determine if disclosure is warranted irrespective of the litigant's legal status. Thus, the *Westinghouse Elec. Corp.* case is helpful in identifying the relevant factors that should be examined.

144. *Id.* at 577.

> lated public policy, or other recognizable public interest militating toward access.[145]

Applying the factors to the Abele/Mays hypothetical yields a favorable result for John Abele. With respect to the first two factors (the type of record requested and the information contained therein), presumably the court's intention was to assess the type of information that was being requested to determine the severity of the intrusion.[146] In *Westinghouse*, the employer "ha[d] not produced any evidence to show that the information which the medical records contain[ed] [was] of such a high degree of sensitivity that the intrusion could be considered severe. . . ."[147] The court found that "[m]ost, if not all, of the information in the files [would] be results [from] routine testing, such as X-rays, blood tests, pulmonary function tests, hearing and visual tests. This material, although private, was not generally regarded as sensitive."[148]

John's situation is different. Material regarding AIDS is sensitive information. Thus, a disclosure of John's medical status would constitute a severe intrusion because of the stigma attached to the disease,[149] as well as the resulting problems that John and his family might experience.[150] Moreover, it is impossible to limit the severity of such an intrusion. Once the PWA states his medical status, an irreversible intrusion has occurred.

The third factor concerns "the potential for harm in any subsequent nonconsensual disclosure."[151] This factor is even more useful if it is expanded to identify the potential harm, as well as the general consequences, of such a disclosure. As expanded, it looks at the total effect of a disclosure to third parties.

As applied to the hypothetical, the consequences vary. If John

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145. *Id.* at 578.

146. Although the employer asserted that NIOSH had not met its burden of proof with respect to showing why it needed to see the entire employee medical files, as opposed to excerpts, the court disagreed and thought that NIOSH's request was justifiable. The court believed that "Westinghouse's proposal that NIOSH be allowed to examine only excerpted data from the medical records would unduly hamper the NIOSH investigation. The entire file must be made available. . . ." *Id.* at 576.

147. *Id.* at 579.

148. *Id.* However, the court also recognized that some employees might have information in their files that they consider highly sensitive. *Id.* at 580. Thus, the court required NIOSH to give prior notice to employees so that they could raise a personal claim of privacy. *Id.* at 581.

149. *See* Murray, *supra* note 11; *see also supra* note 127.

150. *See supra* note 127.

151. *See supra* note 145 and accompanying text.

had told the Mays family about his illness before the sale, the consequences could have been dire.[152] Aside from the personal problems that they may have experienced,[153] the Abeles could have also suffered economically. Specifically, the Mays family could have spread the word about the Abeles' "AIDS house" and caused its fair market value[154] to decline.

From the Mays' perspective, a disclosure to third parties would have been beneficial. Once disclosed, the house would have been stigmatized, and it is likely that fewer purchase offers would have been made.[155] As a result, if the Abeles acted like reasonable vendors in such a situation, they would have been more inclined to accept a lower bid from the Mays family to expedite the sale of their house. Thus, through the lower bid, the Mays family would benefit economically. They would receive a house that, but for its former occupant, would have sold at a higher fair market value.

It is difficult to determine whether the realty's stigmatized status would inhibit the Mays' family from getting fair market value when they later attempted to resell the property.[156] Nonetheless, with respect to the original transaction between the Abele and Mays families, the potential for harm caused by a subsequent nonconsensual disclosure would be greater for the Abeles.

Analysis of the next factor is less speculative. This factor looks at "the adequacy of safeguards to prevent unauthorized disclosure."[157] Simply stated, there are no safeguards in the hypothetical

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152. *See supra* note 127.

153. *Id.*

154. Fair market value is defined as follows:

> The amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. By fair market value is meant the price in cash, or its equivalent, that the property would have brought at the time of taking, considering its highest and most profitable use, if then offered for sale in the open market, in competition with other similar properties at or near the location of the property taken, with a reasonable time allowed to find a purchaser.

BLACK'S LAW DICTIONARY 597 (5th ed. 1983).

155. *See supra* note 42.

156. Case histories reflect the effect of an AIDS disclosure on the PWA's ability to make a conveyance. *See supra* note 42. It is unclear whether the stigma on the property would affect the second buyer's ability to sell the property. Since the stigma arises in the first instance because the PWA is in the house, it would seem that the stigma would follow the individual, particularly since it does not physically remain in the house after the PWA's departure. *See supra* note 6. Thus, arguably, unless the subsequent purchaser was also a PWA, he would not suffer the same potential economic loss. Rather, he would gain by selling the house and making more of a profit since he acquired the house below fair market value.

157. *See supra* note 145 and accompanying text.

situation because communication between the vendor and purchaser is not privileged.[158] Thus, if John Abele told the Mays family about his illness, secrecy would not be required or expected.[159]

The sixth factor concerns "the degree of need for access."[160] This factor requires the party seeking disclosure to justify his need for the information.[161] Since information about one's medical profile contains intimate, personal facts, the party seeking the information should be given as little information as possible.[162] Moreover, he should justify the intrusion into the individual's zone of privacy by articulating a "reasonable need."[163] Need in this context is difficult to evaluate, particularly because the party seeking the information is not the government, but a private individual. When the government is involved, as in the *Westinghouse* case, need for the data can be more easily identified once the public benefit is ascertained.[164] However, when private interests are at stake, it is more difficult to predict or judge the reasonableness of the need.[165]

The Mays family could raise two potential arguments to support their assertion that the information was needed. First, the information may be needed for objective reasons. The Mays family may need to know about John's condition to fully assess the realty's fair

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158. *See supra* note 56.

159. Indeed, this situation is at the other end of the spectrum when compared to *Westinghouse Elec. Corp.*, 638 F.2d 570. There, the court relied on the lower court's determination that NIOSH's procedures represented "sufficiently adequate assurance of non-disclosure by the petitioner [NIOSH]." *Id.* at 580. Westinghouse had argued that NIOSH's procedures were inadequate because outside contractors, employed to conduct data processing and analysis, had access to the information. *Id.* The company questioned the procedures even though NIOSH deleted individual identifiers, such as names and addresses, before disclosures were communicated. *Id.* In this context, prospective buyers would have full access to the vendor's information.

160. *See supra* note 145 and accompanying text.

161. *Westinghouse Elec. Corp.*, 638 F.2d at 581.

162. *Id.* at 577-79.

163. *Id.* In *Westinghouse Elec. Corp.*, the court found that NIOSH had established such a need for the employees' entire, as opposed to partial, medical file. NIOSH needed the records in order to be able to compare its findings before and while the employees were exposed to certain substances. *Id.* at 579.

164. *Id.* at 579. The public interest used by the court to substantiate the intrusion was "the interest in occupational safety and health to the employees in the particular plant, employees in other plants, future employees and the public at large is substantial. It ranks with the other public interests which have been found to justify intrusion into records and information normally considered private." *Id.*

165. It is obvious that John's disclosure cannot be revealed in degrees; that is, he cannot partially disclose his condition like a medical file can be partially disclosed. Thus, since the Mays family will ultimately receive highly sensitive information about John Abele, the remaining question concerns the reasonableness of the Mays' request.

market value.[166] This argument is supported by the fact that a house's fair market value can fluctuate depending upon its inhabitants.[167] To use such an argument suggests that the Mays family recognizes that such extrinsic information is relevant.[168]

However, if the identified defect does not devalue the realty in an absolute sense,[169] it seems unethical to conclude that such an argument justifies the purchaser's "reasonable need" for the information. Since John's medical condition could not contaminate the realty, the realty would not actually be affected by his medical status. Therefore, the objective reason is understandable, yet objectionable because it promotes discrimination against the vendor.

The Mays family could also assert a "reasonable need" to get the information for more subjective reasons; namely, because of their AIDS-phobia or basic concern about living in a house formerly occupied by a PWA. This reason cannot be judged. Since real property investments are the largest and most significant investments that most people will make,[170] people have a right to feel comfortable with their decision.

The last factor examines existing laws or public policy which may militate toward access to the information.[171] In this scenario, public policy in favor of access would exist if it were possible to contract AIDS by moving into a residence formerly occupied by a PWA. In that case, the disclosure would be justified because of the potential threat to the new owner and, arguably, public health.[172] However, in light of current medical knowledge, such a public health threat does not exist.[173] Moreover, if federal housing laws are ever

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166. *See supra* notes 41-43.

167. National housing studies have examined the effect of race and class on real property values. *See generally* James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049 (1989).

168. *See supra* note 40.

169. An occupant's AIDS diagnosis is unlike a concrete or physical defect that devalues the realty. *See supra* note 74. A physical defect tends to diminish the new purchaser's actual use and enjoyment of the realty. *See supra* note 74. The AIDS diagnosis also constitutes a defect (*supra* note 41) that can potentially devalue the realty. *See* supra notes 41-42. However, unlike the typical physical defect, the extent to which this new species of defect interferes with the purchaser's use and enjoyment depends upon the purchaser's subjective assessment of its significance. *See supra* note 43. Although it may not directly impact the purchaser's use and enjoyment of the property, it may nonetheless concern the purchaser. *See infra* note 220.

170. *See* Quintin Johnstone, *Major Issues in Real Property Law*, 55 MO. L. REV. 1, 5 (1990).

171. *See supra* note 145 and accompanying text.

172. *See infra* notes 176-215 and accompanying text.

173. *See supra* note 6.

used to ameliorate all forms of discrimination, requiring a disclosure may ultimately be deemed illegal.[174]

In earlier analysis, applying the modern and economic disclosure models, the Abeles would have to make a disclosure regarding John's medical status. Applying privacy standards yields a different result. Forcing John Abele to reveal that he has AIDS to a prospective purchaser is tantamount to forcing him to publish a portion of his medical status. However, since federal and state laws acknowledge and protect a person's privacy interest in medical information, any mandatory disclosure is questionable, unless required to promote a legitimate public interest.[175]

C. *State's Interests*

1. Upholding Federal Anti-discrimination Law

Historically, people with diseases have been regarded as outcasts. During the earlier part of the twentieth century, public authorities prosecuted and quarantined those with typhoid,[176] leprosy,[177] and smallpox,[178] allegedly for public health reasons. Yet, in some of the quarantine cases, the use of such an extreme measure was questionable because it was uncertain whether the person being quarantined had actually contracted the disease[179] or would infect others.[180]

These earlier decisions reflect public disdain for people with diseases. This attitude,[181] as well as the ability to quarantine individu-

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174. *See infra* notes 194-208 and accompanying text.

175. *See supra* note 140 and accompanying text.

176. People *ex rel.* Barmore v. Robertson, 134 N.E. 815 (Ill. 1922) (sustaining indefinite confinement of a typhoid carrier).

177. Kirk v. Wyman, 65 S.E. 387, 390 (S.C. 1909) (quarantine of a woman suffering from "anaesthetic" leprosy, even though the disease was only "slightly contagious").

178. Crayton v. Larabee, 116 N.E. 355, 358 (N.Y. 1917) (isolation of a healthy woman in a house adjoining another house in which smallpox had been diagnosed); *see also* Highland v. Schulte, 82 N.W. 62 (Mich. 1900) (residents of both sides of a duplex were quarantined even though the disease was only identified on one side).

179. *Robertson*, 134 N.E. at 819 (stating that "[i]t is not necessary that one be actually sick in order that the health authorities have the right to restrain [one's] liberty by quarantine regulation"); *see also Larabee*, 116 N.E. at 358.

180. *See, e.g.*, Varholy v. Sweat, 15 So. 2d 267, 268 (Fla. 1943) (upholding internment in a venereal disease camp of a married woman who argued that her risk of spreading the disease was low because her husband was stationed in another state and she lacked immoral habits).

181. Like many other minorities, people with diseases are outside of the norm, not part of the majority, and are often subject to various forms of criticism. *See supra* note 127.

als, remains.[182] Current developments in federal[183] and local anti-discrimination legislation,[184] and in constitutional law,[185] however, have had a significant impact on how people with diseases may be treated.

The evolution of anti-discrimination legislation to protect the PWA occurred in three phases. The first phase began in the early twentieth century, most notably when Congress enacted the Rehabilitation Act[186] to protect the handicapped. As initially construed within the Rehabilitation Act, the handicapped did not include people with contagious diseases.[187] The Rehabilitation Act's scope was expanded during the second phase when the Supreme Court decided *School Board of Nassau County v. Arline*.[188] In *Arline*, an elementary school teacher with tuberculosis was dismissed from her position because of the periodic recurrence of her disease.[189] The Court held that Arline was handicapped within the meaning of Section 504 of the Rehabilitation Act.[190] Through its decision, the Court expanded the handicapped class to include people with contagious diseases. However, the Court never reached the issue of whether a PWA

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182. *See generally*, Rosanne Pagano, *Quarantine Considered for AIDS Victims*, 4 CAL. L. REV 17 (1984); *see also* Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274 (1986).

183. *See, e.g.*, Rehabilitation Act of 1973, 29 U.S.C. § 794 (1992) (proscribing recipients of federal funds from discriminating against other qualified handicapped individuals). This statute has also been used as a model for other legislation like the Federal Fair Housing Amendments Act of 1988. *See infra* note 199; *see also* Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. II 1990) (omnibus federal act prohibiting discrimination against disabled individuals).

184. *See, e.g.*, SAN FRANCISCO, CAL., ORDINANCE 49,985 (Dec. 20, 1985), 3 EMPL. PRAC. GUIDE (CCH) ¶ 20,950B (Dec. 1985) (prohibiting discrimination based on the fact or perception that a person has AIDS; extends to employment, housing, public accommodations, educational institutions, and city facilities); LOS ANGELES, CAL., MUN. CODE ch. 4, art 5.8 (1985), DAILY LAB. REP. (BNA) No. 48, at A-7 (March 12, 1986). These ordinances were enacted to protect a PWA from discrimination.

185. *See generally*, Deborah J. Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739 (1986) (analysis of the constitutionality of three controversial proposals for controlling the AIDS epidemic by the use of exclusion from public schools and certain occupations, and through quarantine within homes or public institutions).

186. 29 U.S.C. § 794 (1973); *see also* Robert Lipshutz, *Arline: Real Protection Against Discrimination for Society's New Outcasts?* 17 STETSON L. REV. 517, 522 (1988) (discussing in detail the Rehabilitation Act and its amendments. Lipshutz also states that the Rehabilitation Act has been called the "Bill of Rights for Handicapped Persons"). *Id.* at 521.

187. *See* Lipshutz, *supra* note 186, at 519.

188. 480 U.S. 273 (1987).

189. *Id.* at 276.

190. *Id.* at 286, n.15.

could be considered handicapped.[191]

The third phase of the evolutionary process, however, culminated in the inclusion of PWAs into the handicapped class. Since *Arline*, federal[192] and state[193] anti-discrimination laws have consistently included PWAs and, effectively, expanded the protective anti-discrimination umbrella.

Among existing anti-discrimination laws,[194] federal housing laws are particularly significant because of their relevance to the underlying question of whether the vendor's handicap should be disclosed.[195] Congress drafted the housing laws[196] to eliminate the badges and incidents of slavery that continue to manifest themselves through housing discrimination and neighborhood segregation.[197] Fundamentally, the Fair Housing Act of 1968[198] and the Fair Housing Amendments Act of 1988[199] reflect Congress' intent to establish remedial laws to provide fair housing throughout the United States. As suggested by one court, the premise underlying the original Fair Housing Act was that certain factors like race, color, religion, sex, and national origin had to be identified as impermissible characteristics so that housing discrimination could be thwarted for a prospective purchaser or tenant.

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191. *Id.* at 282, n.7.

192. *See Chalk*, 840 F.2d at 703 (reversing denial of preliminary injunction seeking reinstatement of teacher with AIDS to classroom duties under Rehabilitation Act); Martinez v. School Bd., 861 F.2d 1502, 1506 (11th Cir. 1988) (holding AIDS is a handicap under Rehabilitation Act); Baxter v. City of Belleville, Ill., 720 F. Supp. 720, 730 (S.D. Ill. 1989) (concluding HIV carriers are handicapped under Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1976)); Robertson v. Granite City Comm. Unit Sch. Dist., 684 F. Supp. 1002, 1007 (S.D. Ill. 1988) (holding that student with AIDS-related complex is handicapped under Rehabilitation Act).

193. *See, e.g.*, Raytheon Co. v. Fair Employment Hous. Comm'n, 261 Cal. Rptr. 197 (Ct. App. 1989); M.A.E. v. Doe & Roe, 566 A.2d 285, 287 (Pa. Super. Ct. 1989).

194. *See supra* note 183.

195. *See supra* notes 9-12.

196. *See infra* notes 198-99.

197. Kushner, *supra* note 167, at 1051.

198. 42 U.S.C. §§ 3601-31 (1982) [hereinafter "1968 Act"].

199. 42 U.S.C. §§ 3601-19 (Supp. 1993) expands the 1968 Act, *supra* note 198, and provides the following:

> It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, *handicap*, familial status, or national origin.

Id. § 3605(a) (emphasis added).

> *Like Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.*, the Fair Housing Act was enacted to ensure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics. . . . Congress designed it to prohibit "all forms of discrimination, sophisticated as well as simple-minded. . . ." The Act, therefore, is to be construed generously to ensure the prompt and effective elimination of all traces of discrimination within the housing field.[200]

The Fair Housing Amendments Act of 1988 furthers Congress' attempt to ameliorate discrimination by adding a person's handicap to the original list of impermissible factors.[201] Within the amended Act, the use of a person's handicap is prohibited at two significant stages of the real estate transaction: the appraisal period and the bargaining period.

The "Appraisal Exemption" provides that an appraiser cannot consider a person's handicap: "Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors *other than* race, color, religion, national origin, sex, *handicap* or familial status."[202] The Fair Housing Amendments Act also prohibits a person's handicap from being used to entice or discourage a person from seeking property to purchase:

> [It is unlawful] [t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.[203]

The former provisions could be interpreted to suggest that Congress acknowledges the discrimination that transpires when a person's handicap is improperly considered. This is a reasonable interpretation, particularly given the "Appraisal Exemption." It forbids an ap-

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200. United States v. City of Parma, Ohio, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980) (citations omitted), *rev'd in part on other grounds*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982). Typically, vendors have not been plaintiffs. *See infra* note 204.

201. Under the Fair Housing Amendments Act of 1988, familial status and handicap were added to the original factors which included race, color, religion, sex, and national origin. 42 U.S.C. § 3605(c).

202. 42 U.S.C. § 3605(c) (emphasis added).

203. 42 U.S.C. § 3604(c).

praiser from considering a person's handicap when the appraiser is evaluating the realty. If the handicap was considered, at least one result might be diminution of the property's value. Effectively, through this provision, Congress is acknowledging the Abeles' plight. A handicap is an impermissible factor that should not be considered because it may negatively influence the transaction.

Assuming that Congress acknowledges the discriminatory effect of improperly considering a person's handicap, it is possible to conceive of an expansion of the fair housing laws to protect handicapped vendors like the Abeles. Historically, the courts have not used the fair housing laws to protect vendors, although the courts have liberally construed such laws.[204] Earlier decisions which analyzed the original factors[205] concluded that the factors could not be used to any degree to affect the real estate transaction.[206] Thus, they could neither be used as a basis upon which a housing decision is made[207] nor as a condition precedent upon which a housing arrangement is based.[208]

Given Congress' decision to include the handicapped within the Fair Housing Amendments Act, each state has an additional mandate. Each state must acknowledge and protect a new potential victim of discrimination, the PWA. Relative to other victims of housing discrimination, the discrimination that could be experienced by the PWA is as troublesome, although distinguishable. The PWA faces the potential problem of being restricted from fully profiting from the sale of his realty because once the handicap is disclosed, it be-

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204. *See generally* Kushner, *supra* note 167; F. Willis Caruso & William H. Jones, *Fair Housing in the 1990's: An Overview of Recent Developments and Prognosis of Their Impact*, 22 JOHN MARSHALL L. REV. 421 (1989).

Historically, plaintiffs have included a prospective buyer or tenant, not a seller. *See id.* at 435. However, if the fair housing laws are going to eliminate all traces of discrimination, they must ultimately give standing to "all injured persons. . . ." *Id.* at 432. Thus, like any other plaintiff, the vendor should be given the opportunity to establish a *prima facie* case if the disclosure of his handicap has a discriminatory effect.

205. The original factors excluded "familial status" and a "handicap." *See supra* note 202.

206. *See, e.g.*, Smith v. Adler Realty Co., 436 F.2d 344, 349-50 (7th Cir. 1970); United States v. L & H Land Corp., 407 F. Supp. 576, 580 (S.D. Fla. 1976).

207. *See, e.g.*, Smith v. Adler Realty Co., 436 F.2d at 349-50 ("[R]ace is an impermissible factor in an apartment rental decision and . . . it cannot be brushed aside because it was neither the *sole* reason for discrimination nor the total factor of discrimination. We find no acceptable place in the law for partial racial discrimination.") (emphasis added).

208. United States v. L & H Land Corp., 407 F. Supp. at 580 (verbal statements made to white tenants indicating that they were not permitted to have black guests violated 42 U.S.C. § 3604(c)).

comes a negative component of value.[209]

2. Protecting Public Health: Monitoring Epidemics

Each state has an obligation to maintain public health.[210] The incidence of AIDS has reached epidemic proportions[211] and threatens public health within the United States more than any other existing malady, particularly because it is currently incurable. Since AIDS is a recognized problem, any AIDS law must also be consistent with and further public health goals.

In combating public health problems, a state engages in a balancing test to compare the individual's and state's respective interests.[212] Private rights often yield to public interests.[213] If the circumstances suggest that the likelihood of contracting the disease is minimal, however, why implement unnecessary disclosure requirements?[214] The state's public health goals are not furthered by disclosure if there is no possibility of contracting the virus.

In this section, the disclosure's propriety is challenged. The Fair Housing Amendments Act if broadly applied could prohibit the disclosure of a PWA's handicap because its disclosure could influence the outcome of the real estate transaction. Thus, with this interpretation of federal housing law, the Abeles could assert that they could not disclose John's handicap without violating the law.[215] Furthermore, a state's interest in protecting public health is not promoted by requiring a disclosure. If anything, it will discourage a PWA from

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209. *See supra* notes 41-43 and accompanying text.

210. *See* Wendy A. Weber, *AIDS: Legal Issues in Search of a Cure*, 14 WM. MITCHELL L. REV. 575, 602-11 (1988) (extensive discussion of the constitutional basis of public health law).

211. *See generally* Larry Gostin, *A Decade of Maturing Epidemic: An Assessment and Directions for Future Public Policy*, 16 AM. J.L. & MED. 1 (1990).

212. Weber, *supra* note 210, at 611.

213. *See* Edward A. Fallone, *Preserving the Public Health: A Proposal to Quarantine Recalcitrant AIDS Carriers*, 68 B.U. L. REV. 441, 463 (1988) ("[p]rotection of public health is 'one of the first duties of the state,' . . . private rights may have to yield to [the interests] of the general public").

214. For the Abeles, a mandatory disclosure may be unnecessary; however, it is necessary in other contexts. Simply, the greater the likelihood of contracting the disease from the PWA, the greater the PWA's disclosure duty to the individual at risk. *See* State v. Stark, 832 P.2d 109, 116 (Wash. Ct. App. 1992).

215. The Fair Housing Amendments Act preempts state law that purports to permit a discriminatory housing practice. *See* 42 U.S.C. § 3615; *accord* Op. Att'y Gen. Tex. No. JM-1093, 5725 (Sept. 5, 1989). Thus, if the Fair Housing Amendments Act is broadly interpreted, disclosure legislation that forces a PWA to disclose his handicap could be in violation of federal law.

seeking help if he thinks that his privacy rights can be so easily invaded.

Part I of this article weighed the competing interests involved in the hypothetical real estate transaction. The initial section was devoid of any reference to the existing disclosure legislation so that the basic problem facing the parties could be examined from each perspective. Having resolved that the Abeles' plight justifies the conclusion that an AIDS-specific disclosure is unnecessary, the next section critiques the existing disclosure statutes.

PART II: CRITIQUE OF EXISTING LEGISLATION

A. *Disclosure Legislation Should Have Its Own Identity*

Some of the disclosure legislation is AIDS-specific.[216] However, other statutes have broader application. They affect disclosures regarding AIDS, as well as other incidents that may have occurred within the realty. Utah's statute is representative of broad disclosure statutes.[217] Section 57-1-37(2) of the act provides that neither an owner nor his agent is liable for failing to disclose that the property is stigmatized.[218] "Stigmatized" is defined as follows:

> (a) the site or suspected site of a homicide, other felony, or suicide; or
> (b) the dwelling place of a person infected, or suspected of being infected, with the Human Immunodeficiency Virus, or any other infectious disease that the Utah Department of Health determines cannot be transferred by occupancy of a dwelling place.[219]

At a glance, the Utah-type statutes are not problematic. The fact that the property was the dwelling place of a person infected with AIDS may, like the other factors, stigmatize the property.[220]

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216. Kentucky's statute is representative of AIDS specific legislation. It states in part: "The fact that an occupant of real property is infected or has been infected with human immunodeficiency virus or diagnosed with acquired immunodeficiency syndrome is not a material fact that shall be disclosed in a real estate transaction." KY. REV. STAT. ANN. § 207.250(1); *see also* TEX. REV. CIV. STAT. ANN. art. 6573a, § 15(c).

217. UTAH CODE ANN. § 57-1-1(4).

218. *Id.* § 57-1-37(2).

219. *Id.* § 57-1-1(4). Other statutes treat these factors similarly because they have "psychologically impacted" the property. *See, e.g.*, OKLA. STAT. ANN. tit. 59, § 858-513.

220. Purchasers, like other consumers, act rationally and irrationally. The fact that a former occupant committed suicide or died from an illness complicated by the AIDS virus while in the realty might disturb some prospective purchasers more than others. However, it is difficult to predict how many purchasers would be disturbed, and unfair to decide whether such a feeling is rational or irrational. It is possible to predict that most purchasers would be

Indeed, the AIDS factor is similar to the other factors[221] because, although AIDS does not have any effect on the suitability of the property for occupancy by subsequent homeowners, it constitutes a negative component of value.[222]

All factors, however, are not created equal. Even though the factors can have the same effect on a purchaser, the resulting stigma from the AIDS disclosure is more severe because of the nature of the disease. Given the many dimensions of the AIDS factor and its inherent complexity, it should not be equated with the other factors. The competing interests of the parties involved reflect its many dimensions. The parties with interests involved may be the following: (1) the vendor, who risks humiliation because of his affliction (or because of his association with someone who had the virus); (2) the purchaser, who is simply trying to get a good bargain; and (3) the state, that is trying to avoid hysteria about an epidemic and, at the same time, protect its citizens from discrimination.[223] To adequately

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concerned that the property was considered defective, tainted or stigmatized. With such a fear, most purchasers would want to acquire the realty for less than the vendor offered to justify the risk that the property might not sell or might sell for less than its market value at a later time. *See infra* note 222. Thus, irrespective of the purchaser's subjective assessment of the property, he would be hesitant because of the risk inherent in acquiring stigmatized property. The realty's market value could decline because of market forces and the purchaser's own efforts. The realty's market value reduction could occur as a result of the decline in demand for the realty. If fewer people were interested in the property, the vendor would be more inclined to lower the price so that the defective property could be sold. In addition, the market value could potentially decline even further if the purchaser used the existence of the negative component of value as a bargaining tool. The purchaser could try to convince the vendor that the property's value was worth even less because of the stigma.

221. An additional factor that has "stigmatized" property has been the existence of poltergeists or ghosts or goblins within the realty. *See* Sambovsky v. Ackley, 572 N.Y.S.2d 672 (App. Div. 1991). The analysis regarding the other factors (suicide and homicide) applies to the above referenced factor as well. *See* Murray, *supra* note 11, at 689.

222. *See supra* notes 40-43. It is difficult to predict how long any of the factors might stigmatize the realty and affect its market value. Eventually, in the long run, the stigma should become less significant, unless it becomes permanently associated with the realty. This permanent association could take place if the realty's market value, as affected by the stigma, was dropped substantially below that of comparable houses in the area and stayed well below the other houses despite the passage of time. A permanent association could be easily accomplished if the house were conveyed numerous times within a short span of time.

223. In addition, more than the other two factors, the AIDS factor is linked to a person's identity, an individual whom the public fears or criticizes because he has AIDS. These sentiments were expressed by residents who did not want a special use permit to be issued so that an AIDS hospice could be opened in their community:

> Among the reasons expressed by Residents' Committee members for opposing the hospice are the possibility that mosquitoes might transmit the AIDS virus to the community; the undesirability of having former drug users and homosexuals living in Sabana Ward; the belief that the hospice site is flood prone, thus giving rise to a

accommodate all of these interests, the disclosure legislation must differentiate the AIDS factor from the other factors. Disclosure legislation concerning the AIDS factor must not only inhibit the disclosure of immaterial information, but also reflect the public policy objective of forcing people to acknowledge PWAs' privacy rights. Inclusion of the other factors in the same statute with the AIDS factor makes an extremely complex problem trivial.

B. *Disclosure Legislation Should Not Undermine Its Objective*

Types II and III[224] of the existing statutes undermine the disclosure legislation's ideal objective in varying degrees. Disclosure legislation should convey the uncompromising position that information regarding the vendor's health status need not be disclosed, unless medical evidence establishes that a subsequent occupant is at risk of contracting the virus. Since there is no known risk of contracting the virus by moving into a residence once occupied by a PWA, there is no threat. Thus, for now, a disclosure is unnecessary. However, since Types II and III allow the prospective purchaser to acquire the information, they fail to meet the ideal objective.

The Type II statutes are two dimensional. Typically, the first section of these statutes precludes a cause of action against an owner or the owner's agent for failing to disclose that an occupant is infected with a contagious disease.[225] The Georgia statute is typical and provides as follows:

> No cause of action shall arise against an owner of real property or the agent of such owner for the failure to disclose in any real estate transaction the fact or suspicion that such property:
>
> (1) Is or was occupied by a person who was infected with a virus or any other disease which has been determined by medical evidence as being highly unlikely to be transmitted through the occupancy of a dwelling place presently or previously occupied by such an infected person. . . .[226]

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risk of contamination through inundation; the risk of transmitting AIDS-related infections such as pneumonia; the risk that the hospice might decrease the value of surrounding property; the risk that hospice residents might pose a danger to students attending a nearby school.

Association of Relatives and Friends of Aids Patients v. Regulations and Permits Admin., 740 F. Supp. 95, 99 (D. P.R. 1990).

224. *See supra* notes 15-20 and accompanying text.

225. *See, e.g.*, S.C. CODE ANN. § 40-57-270(B).

226. GA. CODE ANN. § 44-1-16(1).

The second section of the Type II statutes, either explicitly[227] or implicitly,[228] provides that an owner and the owner's agent[229] must respond truthfully to direct inquiries regarding the occupant's health status. The Georgia statute provides: "[A]n owner or the agent of such owner shall answer truthfully to the best of such owner's or agent's knowledge, any question concerning the [aforementioned provisions]."[230]

As drafted, the two sections in the Type II statutes are contradictory. In the first section, purchasers lose their ability to sue vendors who fail to disclose the information. However, in the second section, the purchaser is given a loophole. Essentially, the purchaser is able to ascertain the very information that the vendor in the first section is not obligated to disclose.

The Type II statutes are also deficient because they hinder that which they should be attempting to further. Arguably, such legislation has the potential to be dispositive in lawsuits involving disclosure conflicts between PWAs and purchasers. However, as drafted each one fails to facilitate a resolution of the conflict. Instead, the statutes open a Pandora's box. By shifting the burden to the vendor to make a truthful disclosure of the same information that each statute also makes unavailable to the purchaser in the first instance, the statutes provide a fertile setting for litigation. Purchasers are always in a position to assert that such inquiries were made, yet never addressed. Thus, ultimately, the purchaser's loophole not only destroys the statutes' effectiveness but creates a breeding ground for litigation.

The Type III statutes are less deficient than the Type II statutes, but also problematic. As noted earlier, the Type III statutes are a hybrid of Types I and II. As with those statutes, each one states that a cause of action cannot be maintained against owners for failure to disclose whether the real estate was occupied by a PWA.[231]

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227. *See* S.C. CODE ANN. § 40-57-270(D) (owner or agent is not protected against intentional misrepresentation); N.C. GEN. STAT. § 39-50 (seller may not knowingly make a false statement); CAL. CIV. CODE § 1710.2(d) (owner or agent may not make an intentional misrepresentation).

228. TEX. REV. CIV. STAT. ANN. art. 6573a, § 15(c) (agent shall "provide the information to a potential purchaser or lessee of the real property on receiving a specific request for the information from the potential purchaser or lessee").

229. In certain states, the prohibition against making a misrepresentation of fact, or false statement only applies to the agent. *Id.*

230. GA. CODE ANN. § 44-1-16(2).

231. *See, e.g.*, OKLA. STAT. ANN. tit. 59, § 858-513B (1989).

The Type III statutes also share one of the Type II statutes' negative traits. Like those statutes, the Type III statutes provide the purchaser with an opportunity to obtain information from the vendor regarding the occupant's health status.[232] Unlike the Type II statutes, however, an inquiry does not obligate a disclosure from the vendor.[233] Rather, the purchaser must satisfy two requirements before the vendor considers making the disclosure. First, the purchaser must be in the process of making a bona fide offer on the property.[234] Second, the purchaser must prepare a written request for the information and indicate that knowledge of such information is important to her decision to acquire the property.[235] Thereafter, the owner is given the option to refuse to make a disclosure.[236] However, in the event that a disclosure is made to the purchaser, it must be consistent with privacy laws.[237]

The Type III statutes also undermine the disclosure legislation's objective. Like the Type II statutes, they fail to convey the unequivocal policy that the information cannot and should not be disclosed. The only difference between the two types is that the Type III statutes do not require disclosure in response to a direct inquiry.

The Type III statutes' lack of a mandatory disclosure obligation is commendable. However, the Type III statutes are still ineffective. They send a mixed message to the purchaser by establishing requirements or conditions precedent for the prospective buyer to satisfy before the vendor considers revealing the information. On one level, the message conveyed is that the information is personal to the owner. Accordingly, before it will be revealed, the buyer must intend to acquire the property and establish that such information will affect his ability to make a final decision regarding the acquisition. On another level, the message conveyed is that such information is not absolutely protected because the purchaser is still given the option of requesting it from the vendor. Thus, while the Type III statutes seem to regard the disclosure as the vendor's invaluable, confidential commodity, by acknowledging the vendor's privacy rights in the information, the vendor is, nonetheless, placed in a "no win" situation. If the vendor fails to disclose, a presumption will arise that the realty

232. *See supra* note 19 and accompanying text.
233. *See supra* note 20 and accompanying text.
234. OKLA. STAT. ANN. tit. 59, § 858-513C.
235. *Id.*
236. *Id.*
237. *Id.*

was inhabited by a PWA. Thus, the vendor's option is meaningless.

C. *Disclosure Legislation Should Shield All Potential Litigants From Liability*

As noted, most of the disclosure legislation states that a cause of action cannot be stated if information concerning an occupant's health status is not disclosed to the buyer.[238] However, the statutes vary with respect to who is shielded from liability. Four groups of statutes exist. Certain statutes only protect the broker-licensee from liability;[239] other statutes protect the owner and the owner's agent.[240] A third group of statutes shield the owner, the owner's agent and the transferee's agent from liability.[241] The fourth group of statutes is silent with respect to who is shielded from liability.[242]

The disclosure legislation should shield all of the parties who might be sued for failing to disclose. The third group of statutes is the only one that can pass such a test.[243] Obviously, in the case of property that is sold or leased by the vendor, the potential for litigation exists. Furthermore, litigation could also arise against the vendor's agent if the agent handled the transaction. The less obvious, yet potential litigant, is the transferee's agent. He could also be subjected to a lawsuit despite his alliance with the purchaser. Thus, all three individuals should be shielded. In so doing, the disclosure legislation is drafted broadly enough to accommodate potential lawsuits.

D. *Disclosure Legislation Should Promote the Vendor's Right to Privacy*

Most of the statutes provide, without any restriction, that a cause of action cannot be stated against the owner or owner's agent. However, the California statute is ambiguous and appears to depart from the norm.[244] Section 1710.2(a) provides in part:

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238. *See, e.g.*, GA. CODE ANN. § 44-1-16(1).

239. ILL. COMP. STAT. ch. 225, § 455/31.1; *see also* TEX. REV. CIV. STAT. ANN. art. 6573a, § 15(c).

240. CONN. GEN. STAT. ANN. § 20-329dd; NEV. REV. STAT. ANN. § 40.565.2; S.C. CODE ANN. § 40-57-270(B); UTAH CODE ANN. § 57-1-37(2).

241. *See* CAL. CIV. CODE § 1710.2(a); FLA. STAT. ANN. § 689.25(2); KY. REV. STAT. ANN. § 207.250(2); OKLA. STAT. ANN. tit. 59, § 858-513B; OR. REV. STAT. § 93.275(1).

242. *See, e.g.*, N.C. GEN. STAT. § 39-50.

243. *See supra* note 241. The fourth group of statutes might also pass the test. The failure to specifically list the statute's beneficiaries suggests that everyone benefits. *See supra* note 242.

244. *See supra* note 226. The California statute is ambiguous and could be interpreted in two ways. One interpretation suggests that all deaths occurring upon the property within the

> No cause of action arises against an owner of real property or his or her agent, or any agent of a transferee of real property, for the failure to disclose to the transferee the occurrence of an occupant's death upon the realty property or the manner of death where the death has occurred more than three years prior to the date the transferee offers to purchase, lease, or rent the property, or that an occupant of that property was afflicted with, or died from, [HIV].[245]

This section has two inconsistent parts. If the death occurred more than three years before the transferee submits an offer to engage in the transaction, the first portion shields the transferor, his agent, and the transferee's agent ("transferor") from having a cause of action stated against them if any of them fails to disclose the occurrence or manner of an occupant's death.[246] Within the same paragraph, another portion of the section provides that a cause of action does not arise against the transferor if the same fails to disclose an occupant's affliction with, or death as a result of, HIV. Thus, unlike the first portion of the section, the latter portion appears[247] to provide the transferor with a blanket of protection. Irrespective of when an occupant with HIV lived or died within the realty, a transferee is precluded from stating a cause of action against the transferor for failure to disclose.

The reason for the inconsistency between the two portions of the section is unclear. Obviously, if the transferor is provided with unlimited protection if he fails to disclose that an occupant had or died

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last three years may have to be disclosed since a failure to disclose would enable a transferee to state a cause of action against the transferor. This is the more logical interpretation. If this is how the statute is applied, this is ineffective because a time limitation only serves to limit the transferor's privacy right. The transferee should be precluded from stating a cause of action irrespective of when the death occurred.

Another interpretation is also possible. This alternative suggests that the former interpretation does not apply to a disclosure concerning an occupant's HIV-related death. Rather, the transferor could avoid liability even if he fails to disclose that an occupant has died from HIV within the last three years. *See infra* notes 246-47 and accompanying text.

245. CAL. CIV. CODE § 1710.2(a).

246. *Id.*

247. As drafted, the three year limitation only appears to apply to deaths unrelated to HIV. The three year limitation appears immediately before the comma that separates those two portions of the statute. *Id.* Moreover, if the section was not differentiating an HIV-related death from a death caused by other causes, it would have been unnecessary to mention death again in connection with the HIV disclosure. Thus, the statute could have read, for example, that no cause of arises against an owner of real property . . . for the failure to disclose to the transferee . . . that an occupant of the property was afflicted with HIV. If "or died from [sic] HIV" is deleted, the suggestion is that the time limitation applies to deaths irrespective of the cause.

from HIV, the statute is as effective as other existing disclosure statutes—at least insofar as it protects the vendor's privacy right by making the disclosure immaterial. However, the first portion of the section that establishes the three year time limit undermines the section's effectiveness. If a transferor cannot avoid claims when he fails to make disclosures about recent deaths, yet can avoid claims for recent deaths when the occupant died from HIV, a potential problem could arise. If a transferee determines that someone has died within the realty within the last three years, but does not know the cause of death, he might file a lawsuit. As a result, once the court determines that the occupant's death was HIV-related, it would dismiss the action. The problem, however, is that as a result of having to determine the cause of death, the transferor's ability to control the disclosure of the information is taken away. Thus, the time limitation can potentially undermine the statute's effectiveness. Accordingly, to protect the transferor's right to privacy, the statute should not have a time limitation placed upon the protection given to the transferor, even if the limitation only concerns deaths from causes unrelated to HIV.

PART III: CONCLUSION

In a real estate transaction, the vendor's disclosure obligation, and a court's interpretation of the same, is unpredictable. Indeed, the fact that certain states have enacted disclosure legislation suggests that they are in accord with this conclusion. The modern quest to impose a higher standard of good faith and fair dealing has effectively created a more onerous burden for the vendor, but muddled the meaning of materiality. As a result, the vendor cannot always predict what must be disclosed, particularly if the applicable standard is subjective as opposed to objective. Alternatively, the purchaser has been given more ammunition to request information because the pool of available information is expanding.

Existing disclosure legislation seeks to clarify the vendor's disclosure obligation—at least with respect to the disclosure of information about one's medical status. Because of the nature of the information subject to be disclosed, however, disclosure legislation must do more. It must also seek to serve an "educative function"[248] by

248. Education can be used to contain the AIDS epidemic. *See, e.g.*, Robert Roden, *Educating Through the Law: The Los Angeles AIDS Discrimination Ordinance*, 33 UCLA L. REV. 1410, 1423 (1986). Roden states as follows:

[E]ducation is currently the best defense against the AIDS epidemic. Until the pub-

promoting a public policy of non-discrimination against PWAs. Such a policy is consistent with the ever expanding umbrella of federal and state anti-discrimination laws.

Accordingly, the Type V statute should reflect an attempt to clarify the vendor's disclosure obligation and advance an anti-discrimination policy. The first goal can be accomplished by using the Type I statute as a base. In addition to avoiding the problems inherent with existing disclosure statutes,[249] the Type V statute must also provide that the information is outside of the pool of available information, thereby making it impossible for the vendor to voluntarily disclose it[250] or for the prospective purchaser to discover it.

The Type V statute must also go beyond the Type I model to accomplish its second goal. To promote an anti-discrimination policy, the statute must also penalize[251] individuals who discover information about the vendor's AIDS diagnosis. Such a drastic measure may guarantee compliance with the law.

Thus, in a jurisdiction with a Type V statute, the Mays family would be unable to sue Mary Abele. Moreover, if the Mays family had asked whether John Abele had AIDS, the Abeles would not have had an obligation to make a disclosure. Alternatively, if the Abeles had revealed John's medical status to the Mays family, and if

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> lic understands how to avoid exposure to the virus, the disease will not be contained. Until the public believes that casual contact with AIDS victims poses little or no risk, discrimination based on fear will not be eliminated.

Id. at 1423 (citations omitted). Roden also asserts that the law is "an educational medium." *Id.* at 1424. Thus, "[t]he law as educator [can] see[k] 'to change ideas by influencing behavior' " through the enactment of "educative legislation." *Id.* at 1425.

249. *See supra* notes 216-47 and accompanying text.

250. This proposal raises First Amendment issues which are beyond the scope of this article. However, in the interest of protecting the frightened vendor who is unaware of his right to decline to volunteer such information (*see supra* notes 129-42 and accompanying text), denying a vendor such a First Amendment right may be in his best interest. Moreover, by completely withdrawing the information from the pool of available information, it is easier to avoid a potential discriminatory effect.

251. The availability of actual and punitive damages, plus costs and attorney's fees, gives "incentives" to PWAs (who have experienced discrimination) to pursue their claims. The awards also "stand as deterrents against discriminatory behavior." Roden, *supra* note 248, at 1437; *see also* 42 U.S.C. § 3613(c) (West Supp. 1993) (in a civil lawsuit, if a discriminatory housing practice has occurred or is about to occur, the court may award the same damages).

Scholars are critical of punitive damages. *See, e.g.*, John Dwight Ingram, *Punitive Damages Should Be Abolished*, 17 CAP. L. REV. 205 (1988) (punitive damages should not flourish, but should be abolished because they are outdated); Kurt M. Zitzer, *Punitive Damages: A Cat's Clavicle in Modern Civil Law*, 22 JOHN MARSHALL L. REV. 657 (1989) (use of punitive damages should be abandoned to maintain the distinction between civil and criminal laws). However, if they deter objectionable behavior, they may be necessary.

the Mays family had used that information to the Abeles' detriment, the Abeles would have been in a position to file a civil suit against the Mays family. Actual damages could have been computed by determining the difference between the house's market value and what the Mays family actually paid for the realty. Punitive damages would have also been available against the Mays family if their behavior had evinced a "flagrant" disregard[252] for the Abeles' rights.

The Type V disclosure legislation reflects an attempt to acknowledge the rights and responsibilities of all of the parties involved in a residential real estate transaction. Such legislation is consistent with our nation's democratic spirit.

252. *See* Ingram, *supra* note 251, at 218.