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## Your Money and Your Life! AIDS and Real Estate Disclosure Statutes

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# NOTE

## YOUR MONEY AND YOUR LIFE! AIDS AND REAL ESTATE DISCLOSURE STATUTES

### INTRODUCTION

Your child is dead. He died at home two weeks ago. His illness has left you destitute. Unpaid medical bills abound. Creditors are filing lawsuits to recover the debts that you cannot pay. Your car has been repossessed. The specter of financial ruin coupled with the unbearable memory of your child's demise make the sale of your home necessary. A prospective buyer asks your real estate agent if anyone has had or has died from Acquired Immune Deficiency Syndrome (AIDS)<sup>1</sup> in the home. Although this fact is immaterial to the quality of a home, the buyer knows that it may artificially lower the value of

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1. AIDS is the acronym that will be used throughout this Note when discussing any individual who is infected with Human Immunodeficiency Virus (HIV). AIDS encompasses a cluster of conditions that develop after a significant decline in immune function due to HIV infection. PAUL ALBERT ET AL., *AIDS PRACTICE MANUAL: A LEGAL AND EDUCATIONAL GUIDE*, at 2-5 (3rd ed., updated 1992). Public health authorities view HIV as a disease from the time of infection, rather than from the time the disease becomes symptomatic. *Id.* at 2-4 to 2-5. This is in recognition of the fact that although the disease progresses through various stages that are characterized by the onset of clusters of symptoms, many afflicted individuals are carriers or asymptomatic. *Id.* at 2-4 to 2-5. "From a public health perspective, the important event is infection rather than full-blown disease because even asymptomatic infected persons are capable of infecting others." *Id.* at 2-5 n.7 (quoting NATIONAL RESEARCH COUNCIL, *CONFRONTING AIDS: UPDATE 1988*, at 3 (1988)).

It is a common misconception that AIDS is a homosexual disease. In the United States, while men who have had sex with other men make up over sixty-four percent of the reported cases of AIDS, intravenous drug users make up twenty-nine percent, women eleven percent, and children under the age of thirteen represent 1.7 percent. *Id.* at 2-6 (citing CENTER FOR DISEASE CONTROL, *HIV/AIDS SURVEILLANCE REPORT*, at 8-9, 12 (Feb. 1992)); see also Marvin D. Appelbaum, Note, *The Application of Handicap Discrimination Laws to AIDS Patients*, 22 U.S.F. L. Rev. 317 (1988). This break-down by percentages is not reflective of the future course of the epidemic in the United States. Cases among heterosexuals are rising at a substantially faster rate than among homosexual or bisexual men. *Id.* at 2-7. The impact of this epidemic is falling even more heavily on women, the poor, and communities of color. *Id.*

the house.

Despite the foregoing, the current law in California,<sup>2</sup> and several other states,<sup>3</sup> requires a real estate agent to disclose this information through either silence<sup>4</sup> or an overt "yes." Neither option is satisfactory.

To date, the transmission of AIDS has been documented to occur by only three modes, percutaneous,<sup>5</sup> perinatal,<sup>6</sup> and sexual.<sup>7</sup> AIDS cannot be contracted through casual contact with an infected individual.<sup>8</sup> By the same standard, it is inconceivable that one could contract AIDS from a house.<sup>9</sup>

The AIDS virus is a fragile virus<sup>10</sup> which can be killed with

2. CAL. CIV. CODE § 1710.2 (West Supp. 1991).

3. See, e.g., CONN. GEN. STAT. ANN. §§ 20-329dd, 20-329ee (West Supp. 1993); FLA. STAT. ANN. § 689.25 (West Supp. 1993); GA. CODE ANN. § 44-1-16 (1991); N.C. GEN. STAT. § 42-14.2 (1992); OKLA. STAT. ANN. tit. 59, § 858-513 (West Supp. 1993); S.C. CODE ANN. §40-57-270 (Law Co-op Supp. 1992); UTAH CODE ANN. § 57-1-37 (Supp. 1992).

4. In this context, silence will signify an affirmative answer. See *infra* note 32 and accompanying text.

5. "[An entry] performed through the skin." MILLER-KEANE ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING AND ALLIED HEALTH 1127 (5th ed. 1992).

6. "[R]elating to the period shortly before and after birth; from the twentieth to twenty-ninth week of gestation to 1 to 4 weeks after birth." *Id.* at 1130. Perinatal transmission can occur in utero, during the birth process, or via breast feeding. ALBERT, *supra* note 1, at 2-11.

7. Unprotected anal or vaginal sex has been the primary form of transmitting the AIDS virus. ALBERT, *supra* note 1, at 2-10. The virus may be transmitted from a man's semen through breaks in the skin and through the mucous membranes in the vagina, rectum, and possibly the mouth. *Id.* Women may transmit the virus during intercourse through vaginal secretions or menstrual blood; however, data has suggested that transmission from a woman to her partner is relatively rare. *Id.* at 2-10 n.31.

Between 1985 and 1988, epidemiologists conducted 14 different studies which evaluated 956 individuals who shared a household with someone afflicted with AIDS. Robyn R. M. Gershon et al., *The Risk of Transmission of HIV-1 Through Non-Percutaneous, Non-Sexual Modes-A Review*, AIDS, Feb., 1990 at 645, 647. Of the 956 individuals studied, 199 were exempt due to their potential of contracting AIDS. *Id.* at 647. These individuals may have been sexual partners of someone who was HIV-positive; may have been children whose mothers were HIV-positive; or may have been hemophiliacs who received tainted transfusions. *Id.* The other 757 were identified as individuals whose only known risk was non-percutaneous and non-sexual contact. *Id.* The study "fail[ed] to identify any seropositive individuals among [the persons in this group]." *Id.* at 646.

8. See *supra* notes 5-7 accompanying text. Additionally, courts have found that persons who are "HIV-positive pose no risk of its transmission to the community at large." See, e.g., *Baxter v. City of Belleville, Ill.*, 720 F. Supp. 720, 733 (S.D. Ill. 1989); see also *Association of Relatives and Friends of AIDS Patients v. Regulations and Permits Admin.*, 740 F. Supp. 95, 101 (D. P.R. 1990) (the court held that a hospice for persons infected with AIDS poses no risk to the community).

9. See *infra* notes 10-11, 105 and accompanying text.

10. Viruses are parasites that have no life of their own. Geoffrey Cowley, *The Future of AIDS*, NEWSWEEK, Mar. 22, 1993, at 47-48. Basically, a virus integrates itself into a living

ordinary household disinfectants or with heat.<sup>11</sup> Nonetheless, unfounded fears about methods of contracting and transmitting AIDS continue to exist.<sup>12</sup> The existence of such fears has resulted in the creation of legislation similar to California's Civil Code § 1710.2.<sup>13</sup>

The California AIDS disclosure statute was enacted primarily

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cell and uses the cell's system to duplicate itself. *Id.* at 48.

11. See *Raytheon Co. v. Fair Employment and Hous. Comm'n*, 1988 WL 241125, at \*26 (Cal. Super. Ct. 1988) (citing testimony of Dr. Shirley Fannin, Associate Deputy Director of Communicable Disease Control programs for Public Health in Los Angeles County; the AIDS virus can be "inactivated by a one percent solution of clorox or household bleach, lysol disinfectant, or 3% hydrogen peroxide"), *aff'd*, 261 Cal. Rptr. 197 (Ct. App. 1989); see also Lionel Resnick, M.D. et al., *Stability and Inactivation of HTLV-III/LAV Under Clinical and Laboratory Environments*, JAMA, Apr. 11, 1986, at 1887.

[A]ll data indicate that [HIV] is extremely sensitive to heat and also to a wide range of disinfectant chemicals, at levels well within accepted sterilizing, disinfecting, and even some sanitizing regimens. This broad sensitivity to physical or chemical stress, coupled with the very low titers [the small concentration of a substance in a solution that still creates a reaction] in the blood of infected patients, are two major reasons why the virus is extremely difficult to transmit except under the most favorable conditions.

ALBERT, *supra* note 1, at 2-15 (quoting Bond, *Modes of Transmission of Infectious Diseases, in Proceedings: National Conference on Infection Control in Dentistry*, at 34-35 (1986)).

12. See Rosemary E. Mahoney, J.D. & Allan Gibofsky, M.D., J.D., *The Americans With Disabilities Act of 1990: Changes In Existing Protection and Impact On The Private Health Service Provider*, 13 J. LEGAL MED. 51, 60 n.67 (1992) (citing H.R. CONF. REP. NO. 596, 101st Cong., 2d Sess. 61, reprinted in 1990 U.S.C.C.A.N. 565, 570) (Members of the House Conference Committee expressed concern that many Americans are uneducated about AIDS and often have false perceptions about its transmission.); see also *infra* note 20.

13. See *supra* notes 2-3. The full text of § 1710.2 reads as follows:

Occupant of property afflicted with or died from AIDS; failure to disclose to transferee; no cause of action; state preemption of AIDS disclosure

(a) 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 real 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 real property, or that an occupant of that property was afflicted with, or died from, Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus. . . .

(b) It is the intention of the Legislature to occupy the field of regulation of disclosure related to deaths occurring upon real property and of AIDS in situations affecting the transfer of real property or any estate or interest in real property.

(c) This section shall not be construed to alter the law relating to disclosure pertaining to any other physical or mental condition or disease, and this section shall not relieve any owner or agent of any obligation to disclose the physical condition of the premises.

(d) Nothing in this section shall be construed to immunize an owner or his or her agent from making an intentional misrepresentation in response to a direct inquiry from a transferee or a prospective transferee of real property, concerning deaths on the real property.

CAL. CIV. CODE § 1710.2 (West Supp. 1991).

to protect the seller who is susceptible to discrimination.<sup>14</sup> However, when one considers subsections (a) and (d) of the statute, it becomes clear that the seller is faced with a serious problem when she is directly questioned about the existence and nature of any death in the home.<sup>15</sup> If the seller answers dishonestly, she may face claims of fraud or misrepresentation which, if successful, may lead to the rescission of the purchase contract by the court.<sup>16</sup> If the seller discloses, the buyer, out of ignorance and fear, might not buy the home.<sup>17</sup> Additionally, the buyer might discourage others from

14. See generally S.B. 2484, ch. 498, § 1, CAL. CIV. CODE § 1710.2 (1986).

The purpose of this bill is to clarify the legal responsibilities of sellers, landlords, and agents with regard to AIDS disclosure in real property transactions. The committee analysis notes that the California Association of Realtors (source) is concerned about the impact that the panic or hysteria regarding AIDS may have on real estate sales and rental transactions [i.e., discrimination].

*Senate Rules Comm., Senate Floor Analyses*, S.2484, Apr. 4, 1986. Other concerns noted are the impact of AIDS disclosure on the issues of privacy, confidentiality, informed consent and civil rights or whether a prior tenant's AIDS diagnosis is a material fact that requires disclosure. *Id.*

15. A seller (or a court) may misread the ambiguous language of subsection (a) to mean that a seller has a duty to disclose. California Civil Code § 1710.2(a) provides, in pertinent part that:

No cause of action arises against an owner of real property . . . for the failure to disclose to the transferee the occurrence of an occupant's death upon the real property or the manner of death where the death has occurred more than three years prior to the date the transferee offers to purchase . . . the real property, or that an occupant of that property was afflicted with, or died from, [AIDS].

CAL. CIV. CODE § 1710.2(a) (emphasis added). At first glance, the three year statute of limitations seems to modify the AIDS clause. Thus, if an occupant dies of AIDS within three years prior to the sale of the house, it would seem then that the surviving seller has a duty to disclose the death and its cause. However, a closer reading reveals that the AIDS clause is actually modified by the "no cause of action" clause. Therefore, a cause of action may not arise at *any* time for a failure to disclose the death or its cause. An accurate reading of this statute is obviously crucial if the seller is sued to rescind the contract for sale by a buyer who learns of the AIDS-related death after the contract for sale has been completed.

Furthermore, subsection (d) preserves the liability for misrepresentation if a seller untruthfully answers a buyer's request for the HIV status of previous occupants. *Id.* § 1710.2(d). The statute should either prohibit the buyer from making the inquiry, or protect the seller when she declines to answer immaterial questions. See discussion *infra* part II.

16. See, e.g., *Mellon Bank Corp. v. First Union Real Estate Equity and Mortgage Invs.*, 951 F.2d 1399 (3rd Cir. 1991) (a contract for sale of real estate that is induced by fraud may be rescinded). Although *Mellon* is a case governed by Pennsylvania law, fraud in the inducement is commonly accepted to be a ground for rescission. See generally *RESTATEMENT (SECOND) OF CONTRACTS* §§ 159, 161-162, 164, 471, 476 (1986).

17. See *Roberts v. Heramb*, No. 5943942, slip op., cited in Sharlene A. McEvoy, *Caveat Emptor Redux: "Psychologically Impacted" Property Statutes*, 18 W. ST. U. L. REV. 579, 583 n.38 (1991) [hereinafter McEvoy, *Caveat Emptor Redux*]; see also Sharlene A. McEvoy, *Stigmatized Property: What A Buyer Should Know*, 48 J. MO. B. 57, 59 (1992) [hereinafter McEvoy, *Stigmatized Property*]. In *Roberts v. Heramb*, the buyer, upon learning that one of

purchasing the home. Indeed, if the seller's medical history is disclosed, the news of the AIDS-related death may become general public knowledge. Such a disclosure could easily result in the seller being perceived as having AIDS herself, with all the attendant discrimination.<sup>18</sup>

AIDS disclosure laws create a high likelihood of discrimination against an individual whose disability,<sup>19</sup> AIDS, requires not only physical accommodations, but the right to privacy as well.<sup>20</sup> People infected with AIDS suffer discrimination in a panoply of settings ranging from employment,<sup>21</sup> to education,<sup>22</sup> to housing.<sup>23</sup> Further-

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the occupants of a home had died of hepatitis and that the other had contracted pneumonia, sued for rescission of the contract of sale and return of a \$10,000 escrow deposit. *Id.* The buyer suspected that at least one of the owners had AIDS. *Id.* The case never went to trial: the seller's illness; the seller's fear of costly time-consuming litigation; or the ambiguity of California Civil Code § 1710.2(a) (which may have caused the seller to conclude that he would be unable to successfully defend against the buyer's claim) all may be reasons why the case was settled. But for the enactment of § 1710.2, the seller would not have been in court because the buyer would not have been permitted by law to discover the seller's medical information. As indicated above, the *Roberts* case may have resulted from the ambiguity of the California statute. *See supra* note 15.

Moreover, under the statute, a buyer might use the knowledge that an occupant had AIDS to force a cheap sale. Consider how an unscrupulous buyer, upon discovering the HIV status of a previous occupant, could disclose the information, thereby causing a reduction in the property's value. The buyer could consequently purchase the property at a substantial discount.

18. *See* 42 U.S.C. § 12102(2)(C) (Supp. II 1991) ("The term 'disability' means, with respect to an individual . . . [even] being regarded as having such an impairment."); 42 U.S.C. § 3602(h)(3) (Supp. III 1991) (stating that an individual who is merely "regarded as having [AIDS]" is handicapped under the Fair Housing Amendments Act); *see also* Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 144 (1991) (to be codified at 28 C.F.R. § 35) ("A person would be covered under this test if a public entity refused to serve the person because it perceived that the person had an impairment that limited his or her enjoyment of the goods or services being offered."); *see generally* Wayne S. Hyatt, *The Fair Housing Amendment Act of 1988*, C500 A.L.I.-A.B.A. 531 (1990).

19. *See infra* notes 20-23 and accompanying text.

20. This is so because discrimination touches all people with AIDS, and those who are not afflicted with AIDS but are merely associated in some way with a high risk group. High levels of fear and ignorance have only served to spur discrimination. *See* *Barton v. N.Y.C. Comm'n on Human Rights*, 531 N.Y.S.2d 979 (Sup. Ct. 1988) (holding that a dentist violated a New York City administrative code because he refused to sublease to a fellow dentist who would be treating persons with AIDS).

21. *Cain v. Hyatt*, 734 F. Supp. 671, 678 (E.D. Pa. 1990) (construing the Pennsylvania Human Rights Act (PHRA) to be equivalent to the Fair Housing Act (FHA); predicting that the Pennsylvania Supreme Court would find that AIDS constitutes a handicap within the meaning of the PHRA; and concluding that Cain should receive back pay, an award for mental anguish and humiliation, and punitive damages for Hyatt's outrageously discriminatory behavior); *see* *Chalk v. United States*, 840 F.2d 701 (9th Cir. 1988) (reversing the denial of a preliminary injunction under the Rehabilitation Act which ordered the return of a teacher with AIDS to classroom duties).

more, it is worth noting that individuals with AIDS do not always have the luxury of time or financial resources to litigate valid discrimination claims.

When selling a home under financial, mental, and emotional distress, the seller has the added stress of having her personal affairs made public and subject to speculation or rumor (i.e., whether the survivors have AIDS). This makes an already difficult task herculean. At this point, forcing the seller to defend a civil action in fraud against the buyer seems particularly burdensome when one considers the fact that the fear of casual transmission of AIDS is medically and scientifically unfounded.<sup>24</sup>

A state's interest in the public welfare "can best be served if discriminatory actions based on irrational fears, piecemeal information and 'pernicious mythologies' are restrained."<sup>25</sup> Hence, California's disclosure statute,<sup>26</sup> by catering to discrimination, contradicts the purpose behind its enactment,<sup>27</sup> and directly violates the federal statutes that proscribe discrimination against people with AIDS.<sup>28</sup>

This Note focuses primarily on the affect that discrimination and ignorance about the methods of contracting and transmitting AIDS have on the value of property previously occupied by someone with AIDS.<sup>29</sup> Part I of this Note further discusses the currently en-

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22. See *Robertson v. Granite City Comm. Unit Sch. Dist.* No. 9, 684 F. Supp. 1002, 1006-07 (S.D. Ill. 1988) (holding that a student with AIDS-related complex is handicapped under the Rehabilitation Act); accord *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 381 (C.D. Cal. 1986) (holding that a child with AIDS is handicapped for purposes of the Rehabilitation Act).

23. See *Baxter*, 720 F. Supp. at 728 (a housing discrimination case which concludes that HIV carriers are handicapped under the FHA); *Association of Relatives and Friends of AIDS Patients*, 740 F. Supp. at 103 (holding that persons with AIDS are considered handicapped within the meaning of the FHA and may not be discriminated against on this basis in matters of housing).

24. See *supra* notes 5-11 and accompanying text.

25. *Baxter*, 720 F. Supp. at 734.

26. See *supra* note 13.

27. *Senate Rules Comm., Senate Floor Analyses*, S.2484, Apr. 8, 1986 (describing that a purpose of S.2484 is to protect the privacy of AIDS victims in light of the medical evidence that there is no risk of transmission by casual means).

28. See *infra* part II.A-B.

29. Other examples of the problems faced by persons with AIDS are social ostracization (the loss of friends and, in many cases, family); harassment by hate groups, who are now a little more aware the existence of people with AIDS (this is true regardless of whether people with AIDS are members of a normally targeted minority); and stares and whispers in the local grocery store. Interview with Victor J. Reyes, Jr., AIDS Sufferer, in West Orange, New Jersey (Apr. 15, 1991) [hereinafter Reyes interview]; see generally 42 U.S.C. § 12101(a)(2), (5) and (6) (Supp. II 1991).

acted AIDS disclosure statutes and their discriminatory effect. Part II analyzes federal legislation that militates against the current statutory scheme. Part III addresses the Equal Protection concerns and the remedies and procedures available pursuant to the Due Process Clause regarding AIDS disclosure statutes. Finally, part IV proposes several potential solutions to the AIDS disclosure dilemma in residential real estate transactions.

### I. AIDS DISCLOSURE STATUTES

California's disclosure statute<sup>30</sup> provides, in relevant part, as follows:

(d) Nothing in this section shall be construed to immunize an owner or his or her agent from making an intentional misrepresentation in response to a direct inquiry from a transferee or a prospective transferee of real property, concerning deaths on the real property.<sup>31</sup>

This law, essentially, forces sellers of a home in which someone has died of AIDS to disclose the nature of such death to any potential purchaser who may inquire.<sup>32</sup>

Several other states have enacted similar legislation.<sup>33</sup> The origin of these statutes can be traced back to the California case of *Reed v. King*.<sup>34</sup> In *Reed*, the plaintiff sued to rescind a contract for the purchase of a house when she discovered that, ten years earlier, the house was the site of several brutal murders.<sup>35</sup> The court held for

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30. CAL. CIV. CODE § 1710.2(d) (West Supp. 1991); see also *supra* note 3, listing AIDS disclosure statutes from other states. The California statute is used because it is representative of the other state statutes that deal with the issue of AIDS disclosure in real estate transactions.

31. *Id.*

32. *Id.* Although the seller may choose not to answer an inquiry about the nature of the death, the seller's silence may raise an inference that there was an AIDS-related incident on the property. In the alternative, the seller may be discriminated against if she admits or implies that there was a death related to AIDS in the household. Because the seller may not make intentional misrepresentations, the current statutory scheme creates a catch twenty-two situation for the seller. The seller must either answer truthfully and be discriminated against or remain silent and be discriminated against for the implications of her silence.

33. See *supra* note 3 and accompanying text.

34. 193 Cal. Rptr. 130 (Ct. App. 1983). The Court of Appeals reversed to allow plaintiff to prove her "allegation [that a] decade-old murder has a significant effect on market value." *Id.* at 133-34. In making a determination, the trier of fact "may rely on the opinion of experts in the field and also upon its knowledge and experience shared in common with people in general." *Id.* at 134 n.8 (quoting *South Bay Irrigation Dist. v. California-American Water Co.*, 133 Cal. Rptr. 166, 184 (Ct. App. 1976)).

35. *Id.* at 130.



the plaintiff stating that:

[i]f information known or accessible only to the seller has a significant and measurable effect on market value and . . . the seller is aware of this effect, we see no principled basis for making the duty to disclose turn upon the character of the information . . . [because] physical usefulness is not and has never been the sole criterion of valuation.<sup>36</sup>

The California legislature specifically cited *Reed v. King* when it enacted its disclosure statute.<sup>37</sup>

In addition to requiring the seller to disclose the HIV status of the decedent, upon request from the buyer, the disclosure statutes have an impact on the surviving members of the household. Buyers often make assumptions about the HIV status of the survivors.<sup>38</sup> Assumptions that the current occupants or sellers are HIV positive has lead to discrimination against them.<sup>39</sup> Although discrimination against people with AIDS is statutorily prohibited,<sup>40</sup> it, nonetheless, occurs and continues to affect people with AIDS and their surviving friends and family members.

The death of a loved one carries several burdens in its wake: emotional pain and sense of loss; loneliness; and the more tangible legal and financial issues attendant to everyday living. The survivor may be left to carry the full weight of financial responsibilities initially undertaken with a partner.<sup>41</sup> It may become necessary to liquidate assets in order to meet the demands of creditors. Very often this liquidation includes the most precious asset a person has: a home. If the survivor of an AIDS sufferer finds a buyer and this buyer in-

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36. *Id.* at 133.

37. See S.B. 2484, ch. 498, § 1(e) (enacted).

38. See McEvoy, *Caveat Emptor Redux*, *supra* note 17, at 583 (citing *Roberts v. Heramb*); McEvoy, *Stigmatized Property*, *supra* note 17, at 59 (citing *Roberts v. Heramb*).

39. See, e.g., *supra* notes 20-23.

40. See *infra* part II.A-B. (discussing the protection afforded by the Fair Housing Act and the Americans with Disabilities Act); see generally HAW. REV. STAT. § 515 (Supp. 1991) (specifically mentioning persons with AIDS as a protected group); N.Y. EXEC. LAW § 296(5)(b)(1) (McKinney 1991) (prohibiting discrimination against individuals with handicaps); N.J. STAT. ANN. § 10:5-4 (West 1991).

41. Interview with Mr. Acevedo, Surviving Family member of AIDS sufferers, in Irvington, New Jersey (Jan. 15, 1993); interview with Roberta Muller, Esq., who represents a client who has AIDS in State College, Pennsylvania. Although the client is eligible for medicaid because of his terminal illness, he is not eligible for medicare because his wife is employed. *Id.* Therefore, the client and his wife are still responsible for the remaining 20% not covered under medicaid which leaves them indebted for thousands of dollars in hospitalization, medication and other treatments. *Id.*; see also Reyes interview *supra* note 29.

quires about past deaths, the probability of selling the house at its fair market value<sup>42</sup> diminishes considerably.<sup>43</sup> For example, in *Roberts v. Heramb*,<sup>44</sup> a buyer sued the seller to rescind a purchase agreement and recover a \$10,000 escrow deposit when she learned that one of the sellers died of hepatitis and the other seller had contracted pneumonia.<sup>45</sup> The *Roberts* case should never have happened. While the California statute fails to prohibit a *Roberts*-type scenario, federal anti-discrimination legislation does create such a prohibition.

## II. FEDERAL STATUTORY ANTI-DISCRIMINATION PROVISIONS

### A. *The Fair Housing Act*<sup>46</sup>

The Fair Housing Act (FHA) prohibits discrimination in matters of housing against people with handicaps. Section 3604(c) of the FHA provides, in pertinent part, that 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 . . . *handicap* . . . or an intention to make any such preference, limitation, or discrimination."<sup>47</sup> The FHA defines the term "handicap" as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment . . . ."<sup>48</sup>

Although the language of this definition does not expressly include people with AIDS, "both the legislative history of the amendments and the rules promulgated by the Secretary of Housing and

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42. The term "fair market value" refers to the value of the house absent any diminution in price due to the artificial influence of "AIDS contamination." See *supra* notes 5-11 and accompanying text.

43. See, e.g., *Reed*, 193 Cal. Rptr. at 133-34 (recognizing that "psychologically impacted" property commands a lower than fair market price). Psychologically impacted "means the effect of certain circumstances surrounding real estate which includes . . . [t]he fact that an occupant of real property is, or was at any time expected to be, infected or has been infected with [AIDS] . . . ." CONN. GEN. STAT. ANN. § 20-329cc (West Supp. 1993).

44. No. 5943942, slip op.; see *supra* note 17 and accompanying text.

45. *Id.*

46. For purposes of simplicity, the use of "Fair Housing Act" and "FHA" will represent the Fair Housing Act and the Fair Housing Amendments Act which afforded the protections of the Fair Housing Act to individuals with handicaps. For a closer look at the affects of the FHA on people with AIDS see *Hyatt*, *supra* note 18.

47. 42 U.S.C. § 3604(c) (1989) (emphasis added).

48. *Id.* § 3602(h).

Urban Development indicate that purpose."<sup>49</sup> The report of the House Judiciary Committee expressed its intentions regarding the Fair Housing Amendments by stating that:

[g]eneralized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion . . . . people with . . . (AIDS) and people who test positive for the AIDS virus have been evicted because of an erroneous belief that they pose a health risk to others *and are therefore handicapped*.<sup>50</sup>

The Secretary of Housing and Urban Development promulgated rules which became effective on March 12, 1989 and which defined the term "handicap" to include HIV infection.<sup>51</sup> Also, the Vocational Rehabilitation Act of 1973,<sup>52</sup> from which the defining language of the FHA is derived,<sup>53</sup> repeatedly has been held to include persons with AIDS or HIV within the term "individuals with handicaps."<sup>54</sup>

The courts that have addressed the issue have unanimously interpreted the FHA definition of "handicapped" to include people with AIDS.<sup>55</sup> *Stewart B. McKinney Foundation, Inc. v. Town Plan*

49. Op. Att'y Gen. Tex. No. JM-1093 (1989), 1989 Tex. AG LEXIS 95, at \*4 (Sept. 5, 1989).

50. H.R. REP. NO. 711, 100th Cong., 2d Sess. 18, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 (emphasis added).

51. 24 C.F.R. § 100.201 (1989).

52. 29 U.S.C. § 794(a) (1988) [hereinafter Rehabilitation Act]. The relevant language of the Rehabilitation Act reads:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

*Id.* The Fair Housing Act, however, includes programs that are *not* federally funded. *See, e.g.*, 42 U.S.C. § 3604 (addressing discrimination by a private individual).

53. The Rehabilitation Act provides that, "[T]he term 'individual with handicaps' means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B) (citations omitted); *cf.* 42 U.S.C. § 3602(h)(3).

54. *See, e.g.*, *Doe v. Dolton Elementary Sch. Dist.* No. 148, 694 F. Supp. 440, 444 (N.D. Ill. 1988) (holding that, under the Rehabilitation Act, AIDS is a handicap which impairs major life activities).

55. *See, e.g.*, *Stewart B. McKinney Found., Inc. v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197, 1209-10 (D. Conn. 1992) (holding that AIDS is a handicap under the FHA); *Baxter*, 720 F. Supp. at 729, 730 ("It is clear from its legislative history that Congress intended to include among handicapped persons those who are HIV-positive . . . . The Court,

and Zoning Commission,<sup>56</sup> involved a nonprofit corporation which sued a town zoning commission for violations of the FHA.<sup>57</sup> The zoning commission insisted that the nonprofit corporation obtain a special permit to use a two family residence as a home for HIV-infected persons.<sup>58</sup> The court held that if the zoning commission considered the future residents' HIV status as a factor, *even if it was not the sole factor*, in requiring the corporation to obtain a special permit, then the zoning commission had unlawfully discriminated against the plaintiff under the FHA.<sup>59</sup>

Naturally, the FHA does not go so far as to physically endanger the public in the name of stamping out discrimination. In fact, the FHA provides that "[n]othing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."<sup>60</sup> However, "a public concern for safety [that] is based on the misperception that HIV-positive persons pose a risk of transmission to the public at large,"<sup>61</sup> "is an insufficient health concern to warrant [exclusion under § 3604(f)(9) of the FHA]."<sup>62</sup>

The FHA is not only effective against discrimination falling under federal jurisdiction, but also serves to invalidate any state law that conflicts with its purpose.<sup>63</sup> As a result, AIDS disclosure statutes like the one in California<sup>64</sup> must be deemed invalid. This legislation is especially offensive in light of the explicit purpose of the Fair Housing Amendments Act:

[T]o 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 sim-

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therefore, finds that persons who are HIV-positive are handicapped within the meaning of the FHA."); accord *Association of Relatives and Friends of AIDS Patients*, 740 F. Supp. at 95.

56. 790 F. Supp. 1197 (D. Conn. 1992).

57. *Stewart B. McKinney Found.*, 790 F. Supp. at 1197.

58. *Id.*

59. *Id.* at 1210-11.

60. 42 U.S.C. § 3604(f)(9).

61. *Baxter*, 720 F. Supp. at 734.

62. *Id.* at 733.

63. 42 U.S.C. § 3615 (1989). This section provides, in pertinent part, that "[A]ny law of a state . . . that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." *Id.*

64. See discussion *supra* part I.A (particularly pertaining to California's disclosure statute).

ple minded." The [Fair Housing] Act, therefore, is to be construed generously to ensure the prompt and effective elimination of all traces of discrimination within the housing field.<sup>65</sup>

The Texas Attorney General has interpreted this purpose to invalidate disclosure statutes similar to California's § 1710.2(d).<sup>66</sup> The Texas Attorney General issued his opinion in response to House Bill 976<sup>67</sup> which was proposed in 1989 by the Texas state legislature. The bill was designed to mandate "that a person who has actual knowledge that the previous or current occupant of real property had or has AIDS . . . shall provide that 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."<sup>68</sup>

Although the proposed Texas statute would have *required* disclosure, while the California statute merely *fails to prohibit* it, the question put to the Texas Attorney General was broad enough to elicit a helpful response to the California statute as well. As H.B. 976 was waiting to become law, the Texas House of Representatives Business and Commerce Committee put the following question to the then Texas State Attorney General, Jim Mattox: "Will a real estate licensee who discloses actual knowledge that a previous or current occupant of real property had or has AIDS . . . in response to a specific request for disclosure be in violation of the Federal Fair Housing Act of 1988 . . . and the Texas Fair Housing Act?"<sup>69</sup> After an analysis of the FHA and surrounding case law, Texas Attorney General Mattox responded in the affirmative concluding that any disclosure of actual knowledge about a seller's HIV status would vio-

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65. Op. Att'y Gen. Tex. No. JM-1093 (1989), 1989 Tex. AG Lexis 95, at \*5-6 (Sept. 5, 1989) (citing *United States v. City of Parma, Ohio*, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *aff'd*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982)); *see also infra* note 82 and accompanying text; *see generally* 42 U.S.C. § 3601 (1988).

66. "Those provisions . . . that purport to allow . . . statements regarding the fact that a current or previous occupant has or had AIDS or a related illness contravene the Federal Fair Housing Amendments Act of 1988 and are therefore invalid." Op. Att'y Gen. Tex. No. JM-1093 (1989), 1989 Tex. AG Lexis 95, at \*10 (Sept. 5, 1989).

67. H.B. 976, 71st Leg., Reg. Sess., 1989 TEX. GEN. LAWS 4802.

68. *Id.* at 4804 (emphasis added).

69. Op. Att'y Gen. Tex. No. JM-1118 (1989), 1989 Tex. AG Lexis 124, at \*1 (December 6, 1989). This question presents a direct parallel to the situation in California where not only is the legal issue identical, but California (and many of the states that followed its lead in enacting AIDS and real estate disclosure statutes, *see supra* note 3), have also incorporated the Federal Fair Housing Act into their own State law. *See, e.g., CAL. GOV'T CODE* § 12920 (West 1992 & West Supp. 1993).

late the FHA (as well as the Texas version of the FHA).<sup>70</sup> Jim Mattox stated that "[t]hose provisions of House Bill 976 . . . that purport to *allow* . . . statements regarding the fact that a current or previous occupant of real property has or had AIDS or a related illness contravene the Federal Fair Housing Amendments Act of 1988 and are therefore invalid."<sup>71</sup>

Discrimination based on HIV status is analogous to discrimination based on race or ethnicity.<sup>72</sup> In *United States v. L & H Land Corp.*,<sup>73</sup> the court held that "42 U.S.C. § 3604(c) makes it unlawful to make any statement with respect to the rental of a dwelling which indicates any discrimination . . . based on race or color."<sup>74</sup> The fact that an occupant had AIDS is as immaterial<sup>75</sup> to a real estate transaction as is the occupant's race.

However, in *Caveat Emptor Redux: Psychologically Impacted Property Statutes*,<sup>76</sup> Sharlene A. McEvoy argues the other side of the coin. Her article revolves around the premise that the purchase of a home is often the biggest purchase a person makes in a lifetime. To paraphrase her: a lot of energy goes into the purchase, decoration, and care of a home; it would be fundamentally unfair to, in essence, force a person to expend these resources on a dwelling in which the buyer will not feel comfortable—for *whatever* the reason.<sup>77</sup>

While Professor McEvoy's view is sound and certainly worthy of merit, her initial approach to the HIV-positive seller's predicament is somewhat understated. She posits that AIDS disclosure laws "are improper since any information regarding a property that may influence a purchase decision is a material fact so long as it does not

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70. Op. Att'y Gen. Tex. No. JM-1093 (1989), 1989 Tex. AG LEXIS 95, at \*10 (Sept. 5, 1989).

71. *Id.* (emphasis added). Note that Mr. Mattox did not simply address the statute that *commands* disclosure, but also the statute that *allows* disclosure.

72. This is not a very big leap since the FHA takes the same position regardless of the reason for the discrimination. *See, e.g.,* Heights Community Congress v. Hilltop Realty, Inc., 774 F.2d 135 (6th Cir. 1985) (real estate agency that engaged in racial steering found to have violated the FHA).

73. 407 F. Supp. 576 (S.D. Fla. 1976).

74. *Id.* at 580.

75. *See, e.g., Reed v. King*, 193 Cal. Rptr. at 132 n.5 (listing examples of the traditional notion of a "material fact"); *see also infra* note 127. *But see* McEvoy, *Caveat Emptor Redux*, *supra* note 17, at 579 (arguing that HIV status can be material to a real estate transaction); McEvoy, *Stigmatized Property*, *supra* note 17, at 57 (also arguing that HIV status can be material to a real estate transaction).

76. *See supra* note 17.

77. McEvoy, *Stigmatized Property*, *supra* note 17, at 62.

involve an invasion of privacy."<sup>78</sup> But the phrase "invasion of privacy" does not even begin to describe the pandemonium that enters one's life along with AIDS.<sup>79</sup>

The foregoing represents the prevailing wisdom in the area of AIDS disclosure law. The presence of the FHA's civil rights protections alone would seem sufficient to demonstrate the disturbing gap between the existing state disclosure legislation and the controlling federal anti-discrimination law, the following sections discuss alternative arguments which militate against the prevailing statutory scheme.

### B. *The Americans with Disabilities Act*<sup>80</sup>

The disclosure statutes discussed above<sup>81</sup> offend the very purpose of the Americans with Disabilities Act of 1990 (ADA) which allows the federal government to intervene in order to eliminate discrimination based on a person's disability.<sup>82</sup>

#### 1. Title II of the ADA—Public Services

Title II of the American's with Disabilities Act of 1990 prohibits discrimination by public entities against Americans with disabilities. "Public entity" is defined "as any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government. . . ."<sup>83</sup> Every aid, benefit or service provided by a public entity is governed by Title II.<sup>84</sup>

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78. *Id.* Were we to adhere to this premise, discrimination on the basis of race, gender, etc., would be permissible as well. Needless to say, it is not.

79. See Reyes interview, *supra* note 29.

80. 42 U.S.C. § 12101 (Supp. II 1991).

81. See *supra* note 3 and accompanying text.

82. The purpose of the Americans with Disability Act of 1990 is:

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b).

83. 42 U.S.C. § 12131 (Supp. II 1991).

84. See 28 C.F.R. § 35.103 (1991) (listing all the actions that are governed by Title II). The regulations promulgated pursuant to the ADA provide that:

Under Title II, "there are two major categories of programs or activities covered: those involving general public contact as part of ongoing operations of the entity and those directly administered by the entities for program beneficiaries and participants."<sup>85</sup> The first category deals with public communication and use of the entity's facilities. The *second* category involves benefits and services provided by the local or state government.<sup>86</sup>

The second category is critical to an HIV-positive vendor who resides in California or a state with a similar statutory scheme.<sup>87</sup> In this case, the "service" is the enactment of the discriminatory statute. A statute mandating that a seller must release certain information to the buyer of a home is a service that a public entity, such as the local or State government, offers to its citizens. If a statute requires disclosure of information that is not a direct threat to the health or welfare of others, and the information it requires to be disclosed is confidential, then the state discriminates against a seller whose loved one died of AIDS. Due to the discriminatory effects, such a statute violates the ADA.

The inclusion of "all public entities" in Title II is an especially significant evolution from past civil rights legislation. For example, section 504 of the Rehabilitation Act of 1973<sup>88</sup> only prohibits discrimination by state and local government activities that receive federal financial assistance.<sup>89</sup> Title II expands the scope of the federal government's intervention. Section 202, entitled "Discrimination," reads as follows: "[s]ubject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimi-

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A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that *is not as effective* in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others . . . .

28 C.F.R. § 35.130(b)(1)(iii) (1991) (emphasis added).

85. Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 8538, 8539 (1991) (codified in substance at 28 C.F.R. § 35.102 (1991)).

86. *Id.*

87. *See supra* note 13.

88. 29 U.S.C. § 794 (1988).

89. *See* Michael E. Hammond, *Civil Rights and the Disabled: The Legislative Twilight Zone*, NAT'L LEGAL CENTER FOR THE PUB. INTEREST WHITE PAPER, Vol. I, No. 5, at 11-12 (Nov. 15, 1989).



nation by any such entity.”<sup>90</sup> Section 202, unlike section 504 of the Rehabilitation Act, is not limited in its applicability to government activities which receive federal financial assistance. Therefore, a state or local government must abide by the ADA regardless of whether or not it is receiving federal financial assistance.<sup>91</sup> As such, the California Civil Code § 1710.2(d)<sup>92</sup> and statutes with similar effect<sup>93</sup> must be amended. AIDS disclosure statutes must accommodate the seller’s need for confidentiality and, therefore, present him or her with the same opportunity as other homeowners. Only then will the statutes accommodate the needs of the seller which would “afford[] [them] an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to [all sellers].”<sup>94</sup>

## 2. Title III of the ADA—Public Accommodations and Services Operated by Private Entities

This portion of the ADA further expands the federal government’s anti-discriminatory power to the portion of the private sector that provides public accommodations.<sup>95</sup> Section 302 of Title III prohibits discrimination by public accommodations: “no individual shall be discriminated against on the basis of disability in the *full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases to, or operates a place of public accommodation.*”<sup>96</sup> Thus, if two sellers advertise their home through a real estate office, the realtor must be able to accommodate the needs of the sellers in order to offer the “full and equal enjoyment of [the office’s] services”<sup>97</sup> without discrimination.<sup>98</sup>

Suppose that a realtor sends a buyer to see a home and meet the sellers. Just prior to the closing, but after the down payment has

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90. 42 U.S.C. § 12132 (Supp. II 1991).

91. *Id.*; see also *supra* note 84 and accompanying text.

92. See *supra* note 13.

93. See *supra* note 3.

94. See 42 U.S.C. § 12132.

95. “Public accommodation” is defined as: “a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment; . . . insurance office, office of an accountant or lawyer, pharmacy, professional office of a health care provider, hospital or other service establishment” provided that the operations of such entities affect commerce. 42 U.S.C. § 12181(7)(E)-(F) (Supp. II 1991) (emphasis added).

96. 42 U.S.C. § 12182(a) (Supp. II 1991) (emphasis added).

97. *Id.*

98. See *supra* note 82.

been placed in escrow,<sup>99</sup> one of the sellers dies. The realtor finds out that the seller died due to complications from AIDS. The buyer, hearing that an owner has died, asks the realtor if the owner died in the home and if the owner had AIDS. Obviously, this places the realtor and the seller in a dilemma.

If the realtor discloses that the deceased owner died of AIDS, then the seller may be discriminated against by the buyer (who might, in turn, quash the deal based on this fact).<sup>100</sup> Choosing either alternative would place the realtor in violation of the ADA.<sup>101</sup> However, silence on the part of the realtor, and the inferences attendant thereto, may lead to a similar result.<sup>102</sup> But, if the real estate agent lies about the sellers' HIV status, the realtor may be held liable for fraud and misrepresentation under the disclosure statute.<sup>103</sup> Most significantly, however, the seller may lose the opportunity to sell her home.

The realtor's disclosure of information may be "legal" under the state statute, however, it is not legal under Title III of the ADA.<sup>104</sup> The seller of the house, in this situation, does not require any physical accommodations from the government. The seller merely requires a policy change. Such a change avoids the risk of disclosing immaterial, yet confidential, information. This is especially true if it is not essential for the realtor to divulge the vendor's personal information

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99. "An escrow is a written instrument, which by its terms imports a legal obligation, deposited by a grantor, . . . or his agent, with a stranger not a party to the instrument, to be kept by the depository until the performance of a condition . . . then to be delivered over to take effect." 2 WARREN'S WEED ON THE NEW YORK LAW OF REAL PROPERTY, *Escrow*, § 1.01 (4th ed. 1993).

100. Or worse, the buyer may artificially lower the value of the home by making this information public. This would not only harm the seller financially, but it would subject her to other forms of discrimination. *See supra* part II.A.

101. *See* 42 U.S.C. § 12182(a) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodation by any person who owns, leases . . . or operates a place of public accommodation."). As a public accommodation, the real estate agency discriminates against the sellers by revealing the sellers' sensitive medical background which is immaterial to the real estate transaction.

102. *See supra* note 32.

103. *See, e.g.,* CAL. CIV. CODE § 1710.2(d) (West Supp. 1991).

104. Such an inference is based on the definition of discrimination which includes: a failure to make reasonable modification in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities, unless the entity can demonstrate that making such accommodations would fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations.

42 U.S.C. § 12182(b)(2)(A)(ii).

to the buyer because the confidential information does not pose any recognized health risk to the buyer. Specifically, because a house cannot transmit the AIDS virus, no discernable health risk exists.<sup>105</sup>

A seller contracts with a realtor in order to reach a wider market which facilitates the determination of the fair market value of a home. For the hypothetical seller, the decision of whether or not to use a realtor to help her reach a wider market may be based on whether or not she will be required to disclose her AIDS status. Thus, through the enactment of "AIDS and real estate disclosure statutes," the seller is deprived of the opportunity to enjoy the same services and advantages offered by the realtor to others who do not have that disability, namely, AIDS.<sup>106</sup>

### III. CONSTITUTIONAL CONCERNS—THE FOURTEENTH AMENDMENT

While this argument is the least likely to be adjudicated by the courts of the United States,<sup>107</sup> it is worthy of mention.

#### A. *The Equal Protection Clause*

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>108</sup> The language found at subsection (d) of California's AIDS and real estate disclosure statute<sup>109</sup>

105. *An Act Concerning Psychologically Impacted Property, Hearings on S.B. 390 Before the Joint Standing Comm.*, Feb. Sess. at 306 (1990) (quoting the former Surgeon General of the United States) [hereinafter *Hearings on S.B. 390*]. Senate Bill 390 has become Connecticut's version of California's § 1710.2, *see supra* note 13, and is codified as CONN. GEN. STAT. ANN. §§ 20-329dd, 20-329ee (West Supp. 1993).

Everyday living does not present any risk of infection. You *cannot* get AIDS from casual social contact. [N]or has AIDS been contracted from swimming in pools or bathing in hot tubs or from eating in restaurants (even if the restaurant worker has AIDS or carries the AIDS virus). AIDS is not contracted from sharing bed linens, towels, cups, straws, dishes, or any other eating utensils. You cannot get AIDS from toilets, doorknobs, telephones, office machinery, or household furniture.

*Id.* at 511 (New Jersey Real Estate Commission, Advisory Op. on S.B. 390).

106. Denial of participation is not acceptable behavior under the ADA.

it shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to *participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.*

42 U.S.C. § 12112(b)(1)(A)(i) (Supp. II 1991) (emphasis added).

107. *Singleton v. Wulff*, 428 U.S. 106, 124 (1976) (holding that courts will avoid unnecessary constitutional rulings where there are alternative bases to support a decision).

108. U.S. CONST. amend. XIV, § 1.

109. *See supra* note 13.

conceivably deprives a person with AIDS, or a survivor of an AIDS-related death in his home, of equal protection under the law. The California legislature<sup>110</sup> has effected "a hostile and discriminatory purpose" while "employ[ing] facially neutral language,"<sup>111</sup> by failing to prohibit the disclosure of a person's HIV status.

"[A] law need not require discrimination to be invalid [under the equal protection clause]; it is forbidden for the state to *encourage* it."<sup>112</sup> "Private biases may be outside the reach of the law, but the law cannot, *directly or indirectly*, give them effect."<sup>113</sup> "We cannot realistically conclude that, because the final act of discrimination is undertaken by a private party motivated only by personal economic or social considerations, we must close our eyes and ears to the events which purport to make the final act legally possible."<sup>114</sup>

The recent California case, *Citizens for Responsible Behavior v. Superior Court*,<sup>115</sup> concerned an initiative measure which proposed to make it unlawful to, *inter alia*, enact either policy or law which "classifies AIDS . . . as the basis for determining an unlawful discriminatory practice and/or establishes a penalty or civil remedy therefor."<sup>116</sup> The *Citizens* court, in upholding the injunction to keep the initiative off of the ballot, held that, if enacted, it would violate the Equal Protection Clause of the Fourteenth Amendment.<sup>117</sup> The court's line of inquiry began with the determination of whether or not a particular group "is classified as 'suspect,' as well as whether the proposed legislation would impinge upon a fundamental right."<sup>118</sup>

"If a suspect class or a fundamental right is involved, the court examines legislation under the 'strict scrutiny' standard;<sup>119</sup> other-

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110. And all legislatures that have enacted statutes with similar language or effect. See *supra* note 3.

111. *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 648, 657 (Ct. App. 1991) (citing *Parr v. Municipal Court*, 479 P.2d 353, 356 (Cal. 1971) (en banc)).

112. *Id.* at 658 (emphasis added) (citing *Mulkey v. Reitman*, 413 P.2d 825, 832 (Cal. 1966) (en banc)).

113. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (emphasis added).

114. *Citizens*, 2 Cal. Rptr. at 656 (citing *Mulkey*, 413 P.2d at 834).

115. 2 Cal. Rptr. 648.

116. *Id.* at 651.

117. *Id.* at 656. The court also discussed the Due Process clause, Freedom of Expression, and the Right to Privacy. *Id.* at 659-60.

118. *Id.* at 654.

119. See *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (promising a "more searching judicial scrutiny" where prejudice acts against "discrete and insular minorities").

wise, a 'rational basis' test is generally employed."<sup>120</sup> In *McGowan v. Maryland*,<sup>121</sup> the United States Supreme Court defined the "rational basis" test: "the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if *the classification rests on grounds wholly irrelevant to the State's objective*."<sup>122</sup> Although "[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that . . . their laws result in some inequality . . . statutory discrimination will . . . be set aside if [no] state of facts reasonably may be conceived to justify it."<sup>123</sup>

So the question becomes the following: *what state of facts could reasonably justify allowing a real estate agent to disclose the HIV status of someone who died in a seller's house?*<sup>124</sup> The medical evidence is clear and uncontradicted that HIV cannot be contracted from a house.<sup>125</sup> Therefore, the AIDS-related information should not be allowed to be disclosed. However, history demonstrates that fear and ignorance lead to discrimination, both inside and outside the context of contagious diseases.<sup>126</sup>

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120. *Citizens*, 2 Cal. Rptr. at 654 (citing *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-42 (1985)). The question of whether people with AIDS comprise a "suspect class" or whether the right to privacy is "fundamental" is rendered moot if a "rational basis" for a law is not demonstrated. See *id.* at 654 n.8. In this case, the court would not even need to address these issues.

121. 366 U.S. 420 (1961).

122. *Id.* at 425 (emphasis added).

123. *Id.* at 426.

124. Although subsection (d) of § 1710.2 of the California Civil Code does not mandate that the real estate broker or the seller herself respond to an inquiry regarding a death on the premises, it proscribes misrepresentations. Thus, the choice is between silence, which under these circumstances is likely to be read as an implicit admission, or an explicit admission. Either way, the effect is to invite discrimination, and the loss one's privacy rights. See *supra* note 32.

Not only is the decedent's privacy compromised, but the survivor's as well because the assumption may be made that the survivor is also HIV-positive. This fact is recognized in the definition of a handicapped person under the Rehabilitation Act and the Fair Housing Act which includes one who is *regarded* as having a handicap. See *supra* note 53 and accompanying text.

125. *Raytheon Co. v. Fair Employment and Hous. Comm'n*, 1988 WL 241125, \*3 (Cal. Super. Ct. 1988), *aff'd*, 261 Cal. Rptr. 197 (Ct. App. 1989) (citing the U.S. PUB. HEALTH SERV., SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME, at 13 (1986)) ("We know that family members living with individuals who have the AIDS virus do not become infected *except through sexual contact*." (emphasis added); see also *supra* note 7 and accompanying text.

126. "Shortly after Pearl Harbor was attacked, all Japanese Americans were interned. A few years later, during the polio outbreak, when the stark vision of the iron lung struck

It should be noted that as a society we have struggled with the tribulations of ethnic strife. Nevertheless, we have come far enough to enact laws prohibiting a real estate agent from disclosing the ethnic or racial makeup of a neighborhood to prospective home-buyers.<sup>127</sup>

Despite fears about the transmissibility of AIDS, the HIV status of a deceased member of a household is simply not material to the purchase of a house. Prohibiting disclosure of AIDS-specific information will not set a precedent that sellers will not have to disclose other facts that *are* material. The law clearly views material facts as defects which are material to the reasonable *objective* observer, rather than defects which are material because of the *subjective* fears of the purchaser.<sup>128</sup> Problems with the foundation of a house and other hard-to-discern defects are examples.<sup>129</sup> Perhaps the strongest argument against a slippery slope theory is that the present language of most AIDS real estate disclosure statutes already covers this potential loophole.<sup>130</sup>

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terror in the hearts of parents and children, the survival of the masses required the closure of public swimming pools." *Raytheon*, 1988 WL 241125, at \*3. In her book *Illness as a Metaphor*, Susan Sontag observed that "[a]ny disease that is treated as a mystery and acutely enough feared will be felt morally, if not literally contagious. Thus, a surprisingly large number of people with cancer find themselves being shunned by relatives and friends." SUSAN SONTAG, *ILLNESS AS A METAPHOR* 6 (1978).

127. See *supra* part II.A (discussing the Fair Housing Act, which explicitly prohibits a realtor from disclosing the ethnic or racial make-up of a neighborhood).

128. See, e.g., *Alexander v. McKnight*, 9 Cal. Rptr. 453 (Ct. App. 1992) (neighborhood noise problem is a material fact); *Karoutas v. Homefed Bank*, 283 Cal. Rptr. 809 (Ct. App. 1991) (soil conditions on property are a material fact); *Reed*, 193 Cal. Rptr. at 132 n.5 (listing defects that are commonly held to be material to the purchase of a home, including structural defects and problems with the foundation of a house); *Johnson v. Davis*, 449 So.2d 344 (Fla. Dist. Ct. App. 1984) (leaky roof is a material fact).

129. See *supra* note 128.

130. See, e.g., CAL. CIV. CODE § 1710.2(d) ("Nothing in this section shall be construed to immunize an owner or his or her agent from making an intentional misrepresentation in response to a direct inquiry from a transferee or a prospective transferee of real property, concerning deaths on the real property."). This clause would be acceptable if it followed language which made it unlawful to disclose the HIV status of an occupant or former occupant of a dwelling in a real estate transaction. See *infra* notes 210-12 and accompanying text (discussing OR. REV. STAT. § 659.033 (1991)).

Naturally, there is another side to this argument from the potential buyer's point of view. This argument, which is comprehensively addressed by Professor McEvoy in her articles on the subject, *supra* note 17, concerns itself with the buyer's right to certain expectations and the buyer's investment of what is likely to be a substantial amount of hard-earned capital.

### B. *The Due Process Clause*

"No state shall . . . deprive any person of life, liberty, or *property*, without due process of law . . . ." <sup>131</sup>

States may not deprive a person of his right to property or profits from the sale of property without providing a hearing and adequate remedies.<sup>132</sup> Unfortunately, civil litigation may not be a viable option for an individual who cannot waste time litigating the issue because he is dying of AIDS, or who cannot afford the costs of such litigation because he is in dire financial straits due to a large amount of unpaid medical bills. Thus, persons with AIDS are effectively deprived of Due Process. This concern has been addressed under the Americans with Disabilities Act and the Fair Housing Act.<sup>133</sup> These two acts offer different procedural options with different pros and cons.

The scenario to keep in mind, while reviewing the procedural options, features a seller who has AIDS and whose lover died in his home due to complications from AIDS. The seller realizes that he is starting to have difficulties caring for himself and may require individualized homecare. At the same time his private insurance premiums have increased astronomically, and he is exhausting his lifetime maximum.<sup>134</sup> He can no longer work, and his savings are diminishing quickly because he must pay his household expenses and his insurance premiums to assure the continued benefits under his medical plan. In order to ensure his uninterrupted care he must increase his cash assets. Thus, he decides to sell his home.

A buyer looks at the home, agrees on the market price, and places a ten percent deposit in escrow<sup>135</sup> until the closing. The home has no material defects.<sup>136</sup> However, prior to the closing the buyer finds out that the seller has AIDS and that his lover died of AIDS in the home. The buyer chooses not to go through with the purchase, sues to rescind the contract, and makes the HIV status of the seller's former lover a matter of public record. It is with this scenario in mind that we examine our options.

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131. U.S. CONST. amend. 14, § 1 (emphasis added).

132. See *Commissioner v. Shapiro*, 424 U.S. 614, 629 (1976).

133. See *supra* part II.A-B.

134. Life time maximum is the maximum benefit payable to a beneficiary under the terms of an insurance contract. Telephone Interview with Susan B. Duchan, Health Services Analyst (Sept. 27, 1993).

135. See *supra* note 99.

136. See *supra* notes 128-29 and accompanying text.

## 1. Procedural Due Process Under the FHA

The Fair Housing Act presents a seller with two ways to file a lawsuit. The seller may bring a civil action in federal court against the buyer for discrimination,<sup>137</sup> or he may choose to enforce the provisions of the Fair Housing Act through an administrative agency, such as the United States Department of Housing and Urban Development (HUD).<sup>138</sup>

The seller's best option is to pursue an action through HUD. If there is evidence of discrimination, HUD will file charges with an administrative law judge on behalf of the discriminated party.<sup>139</sup> In addition to free representation,<sup>140</sup> the seller is likely to gain the advantage of an expedited resolution.<sup>141</sup>

First, the seller must file a complaint with HUD.<sup>142</sup> Within 100 days of filing the complaint, HUD must either present the outcome of its investigation,<sup>143</sup> or furnish the reasons for its delay.<sup>144</sup> Next, HUD will determine whether it will handle the case itself or refer the case to a state or local agency that is certified to handle the complaint.<sup>145</sup> This decision will be based upon an investigative report examining whether there is reasonable cause to believe that discrimination has occurred.<sup>146</sup>

During the investigation, the Secretary of HUD has an obligation to do all that is feasible to resolve the problem in a manner satisfactory to both parties.<sup>147</sup> For instance, HUD may seek to get the seller and the buyer to resolve the problem through an agreement,<sup>148</sup> or through arbitration.<sup>149</sup> Breach of an agreement may result in the matter being referred to the Attorney General with a recommendation that the Justice Department bring a civil action

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137. 42 U.S.C. § 3613 (1989).

138. *Id.* § 3608.

139. *Id.* § 3612(b).

140. *See id.* § 3612(p).

141. *See id.* §§ 3610-3612.

142. The complaint must be filed within one year of the discriminatory housing practice.  
*Id.* § 3610(a)(1)(A)(i).

143. *Id.* § 3610(a)(1)(B)(iv).

144. *Id.* § 3610(a)(1)(C).

145. *Id.* § 3610(a)(1)(B)(iv).

146. *Id.* § 3610(b)(5)(A). This report may contain only factual summaries. It is not a ruling on whether discrimination actually occurred. *Id.*

147. *Id.* § 3610(b)(1).

148. *Id.* § 3610(b)(2).

149. *Id.* § 3610(b)(3).



against the breaching party to enforce the agreement.<sup>150</sup>

Once HUD determines that the buyer's reason for rescinding the contract was discriminatory, HUD will file charges in court or with an administrative law judge.<sup>151</sup> From the time he receives notice from HUD that it will file charges on his behalf, the seller has twenty days to decide which forum he wishes to use.<sup>152</sup> If the seller does not select a forum within twenty days, HUD will initiate hearings before an administrative law judge in a venue near the location where the discriminatory practice occurred.<sup>153</sup> Once an administrative law judge begins to hear the case, the seller may not subsequently initiate proceedings in civil court.<sup>154</sup>

There are strict time restraints that an administrative law judge must follow when hearing such a case. For example, an administrative law judge must begin hearings within 120 days of the charges being filed by HUD.<sup>155</sup> Once the hearing begins, the judge has another sixty days to decide the case.<sup>156</sup>

However, should the seller decide to bring the case to court without the assistance of HUD, the seller is not guaranteed a time before which his case will be heard because the same stringent time restraints do not apply to an ordinary civil action.<sup>157</sup> Without the assistance of HUD, the resolution of a discrimination case through the court system can be lengthy,<sup>158</sup> and often expensive.<sup>159</sup>

## 2. Procedural Due Process Under the ADA

This section will focus on the procedures and remedies available

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150. *Id.* § 3610(c).

151. *Id.* § 3612(a). However, if HUD determines that there was no discrimination upon completion of the investigation, the seller is not precluded from exercising his right to sue in civil court. *Id.* § 3613(a)(1)(B)(2).

152. *Id.* § 3612(a).

153. *Id.* § 3612(b).

154. *Id.* § 3613(a)(3). Conversely, if the seller has already instituted proceedings in civil court, the administrative law judge must stop hearing the case. *Id.* § 3612(f).

155. *Id.* § 3612(g).

156. *Id.*

157. However, depending upon the seller's medical condition, a motion can be filed to expedite a hearing. *See* FED. R. CIV. P. 65; *Sanfilippo v. Carrington's of Melville, Inc.*, 601 N.Y.S.2d 663 (Sup. Ct. 1993) (granting trial preference to an individual infected with HIV given the testimony presented by his physician about the severity of his illness and danger of imminent death); *see infra* note 194 (discussing the various stages of the AIDS virus).

158. *See, e.g., Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989). This case lingered for 20 years before it was finally decided in the Supreme Court.

159. The seller may be able to get a court-appointed attorney if he can show an inability to carry out the action without public assistance. 42 U.S.C. § 3613(b).

to a party in a civil action when the State is in violation of the ADA. Title II and Title III of the ADA are analyzed below. The language in section 505 of the Rehabilitation Act of 1973 has been duplicated to ensure that the ADA will be enforced in accordance with the meaning that has already been attributed to it by the courts.<sup>160</sup> Under Title III, the method of enforcement is structured in accordance with the Civil Rights Act of 1964.<sup>161</sup>

#### a. Title II of the ADA

Under Title II of the ADA, an individual who has been discriminated against by a public entity<sup>162</sup> may file a lawsuit based on the procedures established under the Rehabilitation Act of 1973.<sup>163</sup> However, the procedures under the Rehabilitation Act do not completely establish the guidelines for enforcement. One must cross-reference sections 706(f) through 706(k) of the Civil Rights Act of 1964 in order to be fully informed about the methods of enforcing the Rehabilitation Act.<sup>164</sup>

Under the Civil Rights Act of 1964, a complaint must be filed by the seller with the Equal Employment Opportunity Commission (EEOC)<sup>165</sup> against the discriminating public entity.<sup>166</sup> Within thirty

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160. "The remedies, procedures, and rights set forth in section 794(a) of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." 42 U.S.C. § 12133 (Supp. II 1991).

161. Title III provides that:

[t]he remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title:

*Id.* § 12188(a).

162. *See supra* note 84 and accompanying text.

163. Title II of the ADA focuses on public entities, defined as "any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government . . ." 42 U.S.C. § 12131(1)(A), (B). However, should the seller wish to file a lawsuit against a federal agency or entity that receives federal financial assistance, the seller would have to sue under Title VI of the 1964 Civil Rights Act. 42 U.S.C. § 2000d (1989).

164. 42 U.S.C. § 2000e-5(f) to (k) (1989); 29 U.S.C. § 794a(a)(1) (1988).

165. The EEOC works in conjunction with the Interagency Committee which is comprised of the Chairman of the EEOC, the Administrator of Veterans Affairs, the Secretary of Labor, the Secretary of Education, and the Secretary of Health and Human Services. 29 U.S.C. § 791(a). The purpose of the Committee is twofold:

(1) [T]o provide a focus for Federal and other employment of individuals with disabilities . . . and to insure that the special needs of such individuals are being met; and

days after the seller has filed a charge, if an acceptable compromise cannot be reached, the EEOC must refer the case to the Attorney General who may bring a civil action against a public entity in the corresponding United States District Court.<sup>167</sup> A United States District Court or any United States Court<sup>168</sup> has jurisdiction over any action brought under the ADA.<sup>169</sup> If the charge is dismissed by the EEOC, or if 180 days pass after the filing of the charge and the Attorney General has not filed a civil action, the Attorney General must notify the seller.<sup>170</sup> The seller then has ninety days from the date of notice to file a civil suit on his own.<sup>171</sup>

In the event that the Attorney General finds discriminatory behavior, she may file a civil suit on behalf of the seller.<sup>172</sup> Should the Attorney General determine that, based on the EEOC's investigation, immediate judicial action, such as injunctive relief,<sup>173</sup> is required, the court must assign the case for the earliest practicable date and resolve it expeditiously.<sup>174</sup>

If a hearing has not been scheduled within 120 days the judge may appoint a master to hear the case.<sup>175</sup> If the court determines that a public entity intentionally engaged in discriminatory behavior, the court may enjoin the public entity from continuing such behavior and order any equitable relief that the court deems appropriate.<sup>176</sup>

In the event that the seller files the suit on his own behalf, the court may grant him reasonable attorney's fees and expert's fees, if he prevails.<sup>177</sup> While the Attorney General may not be awarded such

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(2) [T]o consult with the Commission to assist the Commission to carry out its responsibilities under subsection (b) [Federal agencies; affirmative action program plans] (c) [State agencies; rehabilitated individuals, employment] and (d) [Report to congressional committees] of this section.

29 U.S.C. § 791(a).

166. 42 U.S.C. § 2000e-5(f)(1).

167. *Id.*

168. When the respondent is a public entity, as defined under 42 U.S.C. § 12131, the Attorney General must file a complaint in the District Court proximate to the location of the discriminatory act. *Id.* If respondent is not a public entity, the seller or the Commission may choose the forum. *Id.* § 2000e-5(f)(1).

169. *Id.* § 2000e-5(f)(3).

170. *Id.* § 2000e-5(f)(1).

171. *Id.* However, the Attorney General or the Commission may apply to the court to intervene when the case is of general public importance. *Id.*

172. *Id.* § 2000e-5(f)(2).

173. *See id.* § 2000e-5(f)(2).

174. *See id.* § 2000e-5(f)(5).

175. *See id.*

176. *See id.* § 2000e-5(g)(1).

177. *See id.*

costs, the Attorney General may be liable for costs as if she were a private person, if she loses at trial.<sup>178</sup>

### b. Title III of the ADA

The applicability of Title III, unlike that of Title II, is limited to actions against private entities<sup>179</sup> offering public accommodations<sup>180</sup> whose practices have a discriminatory effect on individuals with disabilities.<sup>181</sup> Congress incorporated the procedures and remedies for a civil action from section 204(a) of the Civil Rights Act<sup>182</sup> into Title III of the ADA.<sup>183</sup>

The Civil Rights Act of 1964 provides that "all persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin . . . ."<sup>184</sup> The restrictions that exist under the Civil Rights Act of 1964 apply to any discriminatory practices of businesses that provide services to the public. The incorporation of this concept into the ADA has broadened the definition of "all persons" to include disabled individuals.<sup>185</sup>

The Civil Rights Act provides that any person who has engaged in or is about to engage in any discriminatory behavior<sup>186</sup> may be

178. *See id.* § 2000e-5(k).

179. 42 U.S.C. § 12181(6). "The term 'private entity' is any entity other than a public entity (as defined in [42 U.S.C. § 12131(1) . . . .])" *Id.*

180. *See id.* § 12181(7)(A) to (L).

181. *See id.* § 12188(a).

182. 42 U.S.C. § 2000a-3(a).

183. *See supra* note 161 and accompanying text.

184. 42 U.S.C. § 2000a-1.

185. *Compare* 42 U.S.C. § 12182(b)(2)(i)-(v) ("all persons" specifically includes persons "discriminated against on the basis of disability") *with* 42 U.S.C. § 2000a-2 (1989) (contains no language making the statute applicable to persons with disabilities).

186. Two relevant discriminatory behaviors under Title III include:

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations . . . .

42 U.S.C. § 12182(b)(2)(A)(i)-(ii).

enjoined from such behavior via a civil action for injunctive relief.<sup>187</sup> As under sections 706(f) through 706(k) of the Civil Rights Act of 1964, the Attorney General can intervene under the ADA if, in the court's discretion, the case is considered of general public importance.<sup>188</sup> The prevailing party may also request reasonable attorney's fees as part of the costs and the United States shall be liable for costs if it loses; however, the United States may not claim such attorney fees if it prevails.<sup>189</sup> Finally, Title III allows an individual to file a civil suit directly and explicitly sets forth the responsibilities of the Attorney General<sup>190</sup> and the responsibilities and authority of the court.<sup>191</sup> By contrast, under Title II, claims must be filed with the EEOC for investigation before a civil suit may be filed because a public entity is being sued.<sup>192</sup>

c. The Effects These Procedures May Have on the HIV-positive Seller

In the hypothetical outlined above,<sup>193</sup> the seller knew he was in the late stages of AIDS.<sup>194</sup> He, therefore, wanted to properly arrange his financial affairs and acquire some peace of mind regarding his medical care and funeral arrangements. In order to do so, he placed his home on the market, accepted an offer, and was attempting to determine how to reinvest the money for maximum liquidity.

The buyer, on the other hand, wanted to rescind the contract for sale of the house because of the AIDS-inflicted death of the seller's

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187. The court has the discretion to order a permanent or temporary injunction, restraining order, or any other order presented by the seller to stop the discriminatory behavior. *Id.* § 2000a-3(a).

188. *See id.*

189. *See id.* § 2000a-3(b).

190. *See id.* § 12188(b) (Supp. II 1991).

191. *See id.* § 12188(b)(2).

192. *See id.* § 2000e-5(f)(1).

193. *See supra* part III.B.

194. *See generally* ALBERT, *supra* note 1, at 2-7 to 2-9 (describing the progress of AIDS). Staging is an evaluation of the HIV infection based on medical findings and the CD4 (white blood cells which are part of the immune system) cell count. JOHN G. BARTLETT, M.D., RECOMMENDATIONS FOR THE MEDICAL CARE OF PERSONS WITH HIV INFECTION: A GUIDE TO HIV CARE FROM THE AIDS CARE PROGRAM OF THE JOHNS HOPKINS MEDICAL INSTITUTIONS 17 (2d ed. 1992-1993).

The average CD4 count of a healthy individual who is not HIV-positive is 1000/cu. mm. *Id.* An individual who is HIV-positive tends to have a count of 200-300/cu mm in the first year, subject to an average decline of 50-80/cu mm per year. *Id.* The rates of progression, however, vary substantially. *Id.* at 20. Therefore, it is quite possible that some patients will experience life-threatening infection within two years of the viral transmission. *Id.* However, the average adult's progression is approximately ten years. *Id.*

live-in lover and the seller's own HIV-positive status. The seller's only choice was to file a civil suit to enforce the contract. The question is: *which available option best serves the seller's needs?* Naturally, time is of the essence.

As discussed earlier, under the Fair Housing Act the seller would find the procedures under HUD more advantageous than filing a civil action through the courts on his own behalf.<sup>195</sup> The fact that there are no time restrictions placed upon the court under a standard civil suit means that should the seller choose to sue on his own he would be totally reliant upon the speed of the court's docket.<sup>196</sup> On the other hand, under the FHA there is a specific timetable which ensures the seller an expeditious determination and, if HUD determines that the behavior was discriminatory, HUD will file the claim on behalf of the seller.<sup>197</sup>

Under Title II of the ADA, the seller has options similar to those that exist under the FHA. However, under Title II, the seller may have the Attorney General file the lawsuit only if a public entity is the defendant.<sup>198</sup> This is a viable option because the buyer can obtain the seller's private medical history (and decide to terminate the deal on that basis) only as a result of AIDS disclosure legislation which is enacted and enforced by the public entity (i.e., the government).<sup>199</sup> However, filing such a lawsuit is very demanding in terms of time, money, and energy, not to mention mental health.<sup>200</sup> Since Title II also prescribes time constraints which the courts, agencies, and attorneys must meet, a civil suit under Title II is an extremely attractive option for the determined seller.

Under Title III, the seller again has the opportunity to have his case resolved with a minimum of delay. Title III only allows the seller to sue an individual or an office that *provides* public accommodations.<sup>201</sup> Therefore, the seller has three avenues by which to pursue his rights: (1) he may choose to file a private civil action, or (2) he

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195. See *supra* part III.B.1.

196. But see *supra* note 157 (discussing FED. R. CIV. P. 65).

197. Such a situation is financially advantageous to the seller because he will not incur the expense of attorney's fees. See *supra* note 139 and accompanying text.

198. 42 U.S.C. § 12131(1).

199. See *supra* notes 2-3 and accompanying text.

200. The often lengthy and intrusive process of discovery alone can be prohibitively demanding on a person with AIDS or, for that matter, any individual with a terminal disease.

201. See *supra* notes 180-81 and accompanying text. In order to enforce the ADA under Title II, the violation must have been due to a service offered by a public entity; therefore, the seller can only sue a public entity under Title II. 42 U.S.C. § 12131(A), (B).

may choose to follow the guidelines established under the FHA, or (3) he may choose to follow the guidelines established under Title III of the ADA as tools to facilitate the enforcement of his rights.

#### IV. SOLUTIONS TO THE DILEMMA

Unfounded fears are as real as ones based on fact, and, in all fairness, must be considered. The following are some suggestions about how the needs of people who have unfounded fears regarding AIDS can be addressed without trampling on the rights of people afflicted with AIDS.

The key to a solution lies ultimately with education. More programs which teach tolerance of AIDS sufferers and their families and the basic facts about the transmission of AIDS are needed. While fear of the unknown can be healthy and can serve to stem the spread of disease by making people cautious, science has now determined that casual contact does not, and cannot, transmit the AIDS virus.<sup>202</sup>

##### A. *The Eve Tucker Resolution*

A supplemental method of allaying the public anxiety has been proposed. This proposal calls for allowing the buyer to negotiate for a "clean bill of health" as a condition precedent to the purchase of a home.<sup>203</sup> Use of the term "clean bill" is not meant to imply that the house is dirty or that AIDS can make it so.<sup>204</sup> A "clean bill of health" condition may be analogized to a condition upon which the buyer's lender grants her a mortgage. This would harmlessly cater to those with fears about infection.

The proposal would work in the following manner: the buyer of real estate, while not being permitted to discover the HIV status of the seller,<sup>205</sup> would have the duty to have the house inspected by an independent firm or agency created for that purpose—similar to a termite inspection.<sup>206</sup> When the home is certified as "disease free,"<sup>207</sup>

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202. See *supra* notes 8-11, 105 and accompanying text.

203. Telephone Interview with Eve Tucker, Political Civil Rights Activist and Social Scientist (Jan. 2, 1993).

204. See *supra* notes 8-11, 105 and accompanying text.

205. The term seller refers not only to the actual seller, but also to members of the seller's household, past or present.

206. See *supra* note 203.

207. Due to the frailty of the AIDS virus, a "clean bill of health" would be a foregone conclusion. See *supra* notes 10-11 and accompanying text.

the buyer would receive a clean bill of health.<sup>208</sup> At this point the sale could go forward with both parties free of concerns about health hazards. Although such a law may seem expensive for the buyer (should she choose to insist upon the condition), the marketplace would adjust itself to compensate for the expense.<sup>209</sup> Eventually, this would become merely another cost attendant to buying a home. Much like a title search, which is often simply an exercise in quadruple checking, the health inspection would be one more instrument for insuring peace of mind.

A bright line rule for the proposal outlined above might be verbalized as follows: the freedom of the buyer to gather information about a home ends where that information creates no danger to the buyer and opens the door to discrimination against the seller. We do not advocate going much farther than this to quell the fears and prejudices held by a prospective buyer.

### B. *Amend the Statutes*

The most effective solution to the current laws dealing with AIDS and disclosure in real estate transactions is the amendment of these statutory provisions. An Oregon statute provides a model for such an amendment.<sup>210</sup> This statute provides, in relevant part, that "[i]n the sale, lease or rental of real estate, *no person shall disclose to any person that an occupant or owner of real property has or died from human immunodeficiency virus or acquired immune deficiency syndrome.*"<sup>211</sup>

This law *affirmatively* prohibits the disclosure of the HIV status of a party to a real estate transaction.<sup>212</sup> Anything less would be, as discussed above, ineffective for the purpose of arresting discrimination, complying with federal law,<sup>213</sup> and staying within the parameters of the Constitution.<sup>214</sup>

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208. See *supra* note 203.

209. *Id.*

210. OR. REV. STAT. § 659.033 (1991).

211. *Id.* § 659.033(7) (emphasis added).

212. Since our society has elected not to adopt Adam Smith's concept of a free "*laissez-faire*" marketplace in many other respects (e.g., Sherman Anti-Trust Act, Affirmative Action, Public Utilities), in favor of protecting more sacred ideals (e.g., democracy), one more control in the form of a prohibition on the disclosure of nonmaterial data would seemingly do little harm.

213. See *supra* part II.

214. See *supra* part III.



## V. CONCLUSION

Discrimination often manifests itself in seemingly innocuous forms. This is most apparent in laws which, although perhaps well-intentioned, nonetheless, overlook the unrepresented.<sup>215</sup> The concept of society cannot exist without compromise. And so it is here: unfounded fears must yield to the right to privacy when the deprivation of that right would subject the deprived individuals to the horrors of discrimination.

The current law in the aforementioned states is unacceptable from the perspective of a person with AIDS. If a person with AIDS chooses to sell her home, she is confronted with the potential obligation to disclose her HIV status. This entails letting strangers into the most private area of her life, *and* greatly increasing the chance that she will receive substantially less than fair market value for her home. In essence, the statutes examined here seem to leave the person with AIDS (or the members of her household that survive her) with even less choice than the common mugger leaves his victim—either your money *or* your life. Indeed, the California statute and its progeny appear to demand both “*your money and your life!*”

*Michael Adam Burger*<sup>216</sup>  
*Lourdes I. Reyes Rosa*<sup>217</sup>

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215. We do not endeavor to find fault here, but merely to correct injustice. The oppressed, by definition, are not in a position to be heard and, therefore, go unrepresented. Our aim in this Note is to give them a voice.

216. To my Grandmother, who taught me to speak up.

217. This Note is dedicated to Victor J. Reyes, Jr., my brother and mentor (Born 9/2/54; Died 12/29/91). Victor taught me that behind knowledge there is a power to make changes and that it is my responsibility to fight for these changes. Throughout his life, Victor struggled with his Puerto Rican and homosexual identities. He strove to obtain all the rights this country claims that all its citizens enjoy.

Ultimately, Victor died fighting a slightly different war. A war that this country continues to ignore. This war was not only against discrimination and ignorance. This war proved to be the most costly to Victor and my family; the one that cost him his life. The war against AIDS.