SECRETS WORTH KEEPING: TOWARD A PRINCIPLED BASIS FOR STIGMATIZED PROPERTY DISCLOSURE STATUTES

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Since the late 1980s, a majority of states have enacted statutes protecting nondisclosure of stigmas affecting property in residential real estate transactions. While many of these statutes have elements in common, there are substantial differences with respect to the set of stigmas covered, the duty to answer direct inquiries concerning particular stigmas, the relevance of time elapsed since the stigmatizing event, and whether brokers, sellers, or both are protected. This Comment argues that much of this variation is due to some legislatures' justified reluctance to fully embrace the traditional arguments in favor of stigma statutes. Assessing the validity of arguments focusing on stigma statutes' capacity to promote efficiency and rationality, this Comment suggests problems for both. The efficiency argument is criticized for exaggerating the stability and other virtues of "hard-edged" rules and for underestimating the potential for consistent application of more flexible rules in this area. The rationality argument is criticized for its unrealistic notion of the potential for legislation to influence people's beliefs, particularly with respect to stigmas associated with death and disease. This Comment recommends an alternative approach by which nondisclosure of most stigmas is protected because the seller's interest in maintaining her privacy or in ridding herself of a property at which she has suffered some calamity outweighs the puzzling but real harm to buyers concerned about such stigmas.

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INTRODUCTION

It has been a few weeks since you bought your new house. The creaks and groans that keep any new homeowner awake at night have faded into the background: The house hasn't yet slid from its foundation, and the pipes have not burst through the walls even once. Content that all is right and sound with this, what will become your most valuable asset,[1] you are enjoying washing your car on a pleasant Saturday morning when a neighbor you haven't gone out of your way to meet comes over to inform you (1) that you're going to end up with water spots washing your car so late in the morning, and (2) that your house was the site of a quintuple homicide some years ago.[2]

As legislation, case law, and a bit of imagination suggest, any number of potentially disturbing[3] facts might fill in for the quintuple homicide in this

1. *See* Doug Waggle & Don T. Johnson, *Homeownership and Mixed-Asset Portfolio Allocations*, 49 Q. REV. ECON. & FIN. 484, 484–85 (2009) (noting that "for the majority of homeowners their home equity exceeds their total stockholdings").

2. Neighbors will consistently see to it that a buyer is made aware of any scandal involving her new home. *See* Reed v. King, 193 Cal. Rptr. 130, 130 (Ct. App. 1983) (plaintiff "learned of [a quintuple homicide that had taken place in her new home] from a neighbor after the sale"); Stephen Hudak, *Buyers Were Unaware of Lake Home's Violent Past*, ORLANDO SENTINEL, May 19, 2007, at A1 (describing a family's distress upon learning that their new home was the site of a triple murder and suicide when "a new neighbor casually mentioned it").

3. To say that these facts are "potentially disturbing" is not, of course, to say that it might turn out that one objectively ought to be worried about these sorts of things; rather, the point is simply that some people may in fact be disturbed by them.

situation: Someone lived with, or died of, AIDS in your house;[4] someone committed suicide in your house;[5] your kitchen was used as a "meth lab";[6] your house was the site of a sexual assault;[7] your house has been frequently burglarized;[8] your house was the site of some fringe religious practice;[9] and the list goes on. Any such revelation obviously changes nothing about the physical state of your house and yet, you may be bothered. In the quintuple homicide scenario, those creaks and groans you had written off earlier may suddenly take on a ghostly tenor.[10] Alternatively, you may be unfazed until you realize that when you decide to sell your house, some prospective buyers might tend to hear in utterly insignificant creaks and groans the stuff of scary movies. Although experts disagree about the magnitude of the effect that such stigmas have on property value, there is no question that it is unfavorable to sellers.[11] In any case, you may be left feeling that you have been cheated by the previous

4. *See, e.g.*, CAL. CIV. CODE § 1710.2(a) (West 2009).
5. *See, e.g.*, GA. CODE ANN. § 44-1-16(a)(1)(B) (Supp. 2009).
6. *See, e.g.*, NEV. REV. STAT. ANN. § 40.770(1)(b) (LexisNexis Supp. 2006).
7. *See, e.g.*, N.M. STAT. ANN. § 47-13-2(B) (LexisNexis 1995).
8. *See, e.g.*, MO. ANN. STAT. § 442.600 (West 2000).
9. *See, e.g.*, OR. REV. STAT. § 93.275(1)(b) (2009).
10. *See* Stambovsky v. Ackley, 572 N.Y.S.2d 672, 674 (App. Div. 1991). This painfully pun-filled decision, a staple in first-year Contracts and Property courses, is discussed further in Part I.A, *infra*. *See also* RENT.COM, RENT IN PEACE: AVOIDING COMMON RENTAL HORRORS (2009), *available at* http://www.rent.com/press-room/media/Rent+com+RIP+InfoFlash+FINAL-+9+17+09.pdf (presenting survey results indicating that 31 percent of *renters* would not live in a "haunted" unit even for "a million bucks").
11. While appraisers specializing in stigmatized properties agree that a stigmatized house is typically "worth somewhat less than it would be without the stigma," lack of "local comparables" may make precise valuation difficult. FRANK E. HARRISON, APPRAISING THE TOUGH ONES 263–67 (Stephanie Shea-Joyce ed., 1996). As appraiser George Ryon notes, there are relatively few sales of such properties, and the effects of different stigmas may vary significantly: "You [might] have to subjectively measure how the public feels about [the Menendez brothers] killing their parents, as opposed to a home invasion robbery in which two people got killed." Carole Fleck, *Stigma or Superstition? Appraisers Weigh Diminished Value of Tainted Properties*, REALTOR, May 1, 1997, http://www.realtor.org/archives/stigmaorsucararchive1997may. Appraiser Randall Bell estimates that for a property at which a homicide has occurred, there is a "15 percent to 25 percent diminution in value for two to three years after the fact. Over time the discount evaporates, but it takes 10–25 years . . . ." *Id. See also* Reed v. King, 193 Cal. Rptr. 130, 133 (Ct. App. 1983) (reasoning that "reputation and history can have a significant effect on the value of realty. 'George Washington slept here' is worth something, however physically inconsequential that consideration may be. Ill-repute or 'bad will' conversely may depress the value of property"); James E. Larsen & Joseph W. Coleman, *Psychologically Impacted Houses: Broker Disclosure Behavior and Perceived Market Effects in an Unregulated Environment*, 4 J. REAL EST. PRAC. & EDUC. 1, 2 (2001) (reporting survey results suggesting that stigmatized properties were "listed at the same price as comparable non-impacted houses, but on average sold for approximately 3% less than non-impacted houses, and averaged 45% longer time-on-market compared to non-impacted properties"). *But see* Vivian Marino, *4 Bdrms, 2 Baths, 1 Ghost: Homes That Have Skeletons in Their Closets Can Be a Nightmare to Sell*, ST. LOUIS POST-DISPATCH, July 7, 1995, at 5C (quoting appraiser Frank Harrison's opinion that there is not "any real loss [with respect to property values] attached to suicides").

owner and/or her broker, who failed to disclose the stigma.[12] Discovering that your state allows nondisclosure in such instances might bring some measure of relief—after all, you will not have to disclose when you decide to sell—but what justifies all of this secrecy?

In recent decades, more than half the states[13] have enacted "stigma statutes" limiting sellers' and/or brokers' liability for failure to disclose so-called psychological defects in residential real estate transactions. Substantial (and increasing) diversity with respect to both the class of psychological defects covered and the class of persons protected reflects the confused variety of rationales offered in support of such legislation. This Comment identifies principles that might help to guide those states that have enacted such legislation toward greater consistency and to move the debate beyond deadlock in those states that have yet to adopt such legislation.

Part I provides a brief sketch of the development of stigma statutes in the 1980s and '90s and a glance at recent amendments that arguably present difficulties for some of the traditional justifications. A number of commentators have discussed the legislative history of statutes enacted in response to concerns raised by a handful of notorious cases[14] and amendments to the Fair Housing Act.[15] While accounts focusing on these developments are accurate as far as they go, this Comment suggests that focusing on the early history of stigma statutes tends to obscure the significant differences among them today, misleadingly encouraging the inference that legislatures have been uniformly animated by a concern to purge the general homebuyer's mind of irrational concerns. Some states that protect a seller who chooses not to disclose the fact that a house was once occupied by someone living with HIV/AIDS do not explicitly protect a seller

12. *See* Hudak, *supra* note 2 (noting that the buyers of a home in which a triple murder and suicide took place felt that the broker "should have told them"); Laura Northrup, *Nobody Told Me I Was Buying a Suicide House*, CONSUMERIST, Feb. 12, 2010, http://consumerist.com/2010/02/nobody-told-me-i-was-buying-a-suicide-house.html (discussing a buyer's sense that the seller of a "suicide house" had a "moral obligation" to inform her of its history).

13. The list includes Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and the District of Columbia.

14. *See, e.g.*, *Reed*, 193 Cal. Rptr. 130 (superseded by CAL. CIV. CODE § 1710.2 (West 2009)); *Stambovsky*, 572 N.Y.S.2d 672. Both cases are discussed in Part I.A, *infra*.

15. *See, e.g.*, Ronald Benton Brown, *Buyers Beware: Statutes Shield Real Estate Brokers and Sellers Who Do Not Disclose That Properties Are Psychologically Tainted*, 49 OKLA. L. REV. 625, 628 (1996) ("In response to the uncertainty created by case law and the Fair Housing Act, twenty-nine states and the District of Columbia passed laws to provide protection for brokers and sellers involved with psychologically impacted property.") (citations omitted); Paula C. Murray, *AIDS, Ghosts, Murder: Must Real Estate Brokers and Sellers Disclose?*, 27 WAKE FOREST L. REV. 689, 705 (1992) ("In response to *Reed* and the AIDS disclosure problem, the California Legislature enacted a disclosure statute.").

who chooses not to disclose that someone died on the property;[16] some states that protect a seller who chooses not to disclose the fact that someone was murdered on the property do not protect a seller who chooses not to disclose that the property was once occupied by someone living with HIV/AIDS;[17] some states protect sellers who choose not to disclose *any* psychological defect;[18] some states only extend explicit protection to *brokers* (but not their clients) who do not disclose psychological defects.[19] The variety of exceptions recently carved out of several states' blanket provisions protecting nondisclosure of "other felonies" further complicates a truly comprehensive analysis.[20]

Though a history of the evolution of stigma statutes accounting for all of the motivations swirling about in the legislative environment would be interesting—and perhaps, with respect to the influence of realtors' associations,[21] also somewhat disillusioning—this Comment addresses only the articulable normative principles offered in their defense. As I describe in Part I, three principles have some immediate appeal: (1) the desirability from an economic standpoint of clarifying the disclosure obligations of sellers and/or brokers;[22] (2) the desirability of reducing irrationality among homebuyers (as a substantial portion of the population at large);[23] and (3) the desirability of eliminating a burden under which sympathetic victims or loved ones of victims might struggle when they attempt to sell their homes.[24]

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16. *See, e.g.*, KY. REV. STAT. ANN. § 207.250 (LexisNexis 2007).

17. *See, e.g.*, N.H. REV. STAT. ANN. § 477:4-e(I) (2001).

18. *See, e.g.*, LA. REV. STAT. ANN. § 37:1468 (2007).

19. *See, e.g.*, COLO. REV. STAT. § 38-35.5-101 (2009).

20. *See, e.g.*, NEV. REV. STAT. ANN. § 40.770(1)(b) (LexisNexis Supp. 2006).

21. *See, e.g.*, S.B. 324, 1987–88 Leg., Reg. Sess. (Cal. 1987) (noting that "[t]he California Association of Realtors (CAR) [was] the source of [the] bill" that would be codified at CAL. CIV. CODE § 1710.2).

22. In the language of one excellent and widely cited article, this principle amounts to a preference for "crystalline" rules over "muddy" rules. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 580 (1988). While Rose's thesis that "crystals and mud dissolve into each other" in "a genuine social context" is an important basis for my rejection of this rationale in Part II.A, *infra*, she notes that it is commonly believed that crystalline rules promote efficiency. Rose, *supra*, at 590, 609–10.

23. For a thoughtful and on-point defense of this principle, see Daniel M. Warner, *Caveat Spiritus: A Jurisprudential Reflection Upon the Law of Haunted Houses and Ghosts*, 28 VAL. U. L. REV. 207 *passim* (1993) (arguing that scientifically based law helps to make society generally more rational).

24. *See* S.B. 324, 1987–88 Leg., Reg. Sess. (Cal. 1987) (noting in support of an amendment to California's anti-stigma legislation "the case of a Sacramento property owner whose two daughters were murdered in her home. According to [the California Association of Realtors (CAR)], for five years her attempts to sell [had] been unsuccessful. The owner believes that disclosure of the murderers [sic] has impeded the sale. CAR argues that the requirement of disclosure has 'further victimized' the owner"); Hudak, *supra* note 2 (quoting a grandmother who did not disclose to buyers that her deceased daughter's home was the site of a triple murder and suicide: "'I'm trying to raise a little boy who lost both his parents. . . . I just wanted the house gone'").

Part II, the heart of this Comment, discusses the relative persuasiveness of these principles in turn. Their persuasiveness is measured against the central criticism of stigma statutes generally: In line with the widely proclaimed demise of the caveat emptor doctrine,[25] buyers ought to be entitled to know of any characteristics, physical or nonphysical, that might affect their use and enjoyment of a piece of property.[26]

The discussion begins from the basic observation that nonphysical characteristics of a property generally do not matter from an objective standpoint.[27] Take two physically identical houses, let one be "tainted" by a quintuple homicide, and even the most delicate buyer will not be sensitive to any difference between them until or unless her neighbors drop by to tell her about her home's notorious past.[28] Call this the no-difference thesis.[29] Though the literature includes some resistance to this point with respect to particular stigmas,[30] it is important to keep separate the issues of where to draw the line between physical and nonphysical defects and whether or not nonphysical defects are detectible.[31]

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25. *See* Katherine A. Pancak, Thomas J. Miceli & C.F. Sirmans, *Residential Disclosure Laws: The Further Demise of Caveat Emptor*, 24 REAL EST. L.J. 291, 292 (1996) ("In general, the law no longer recognizes caveat emptor in residential real estate transactions.") (citation omitted); *cf.* Craig W. Dallon, *Theories of Real Estate Broker Liability and the Effect of the "As Is" Clause*, 54 FLA. L. REV. 395, 405 (2002) ("Most courts and commentators probably would agree that caveat emptor has been sharply limited but continues to play a role in real property sales in most jurisdictions.").

26. *Cf.* Lingsch v. Savage, 29 Cal. Rptr. 201, 204 (Dist. Ct. App. 1963) (holding that a seller is obligated to disclose latent defects that "are not known to, or within the reach of the diligent attention and observation of the buyer").

27. I am not referring here to the standpoint of an idealized "scientifically minded" person who is not prey to superstitious worries. Rather, this is the position of *anyone* prior to a third party's mention of the home's history. I do not doubt that some might in fact find "something odd" about a house that happens to have a bothersome history, or that some might even correctly guess at a home's history, but it is necessary and straightforward for present purposes to dismiss this sort of "intuition" as pure coincidence.

28. *See supra* note 2.

29. This first principle will not be universally accepted. The New York Ghost Hunting Team (NYGHT) identifies "[c]ommon [s]igns of a [h]aunting," including "[u]nexplained noises," "[h]ot and or cold spots that create significant temperature changes," and "[f]eelings of being watched when no one is near." New York Ghost Hunting Team, http://www.nyghteam.com/index.html (last visited Sept. 16, 2010).

30. *See, e.g.*, Ross R. Hartog, Note, *The Psychological Impact of AIDS on Real Property and a Real Estate Broker's Duty to Disclose*, 36 ARIZ. L. REV. 757, 768 (1994) (making the argument, rather beyond the pale even in 1994, that "while the risk of household transmission [of HIV/AIDS] is small, it cannot be ignored"). With respect to certain other stigmas, however, especially the manufacture of illegal drugs, this is not a trivial question. *See infra* Part I.B.1.

31. The fact that a stigma is not detectible does not imply that it may not be predictive of some other all-too-detectible future event. This is not a concession to the ghost-hunters: As courts and legislatures have recognized, some criminal happenings, for instance, might indicate a greater likelihood of repeat occurrences at a property. This issue is addressed at various points below, most thoroughly in Part III.A, *infra*.

The no-difference thesis supports the proposition that nonphysical characteristics have no inherent power to interfere with a buyer's use and enjoyment of a home.[32] Call this the no-power thesis. From the no-power thesis alone, it does not follow that sellers and brokers should not be obligated to disclose nonphysical defects—an additional premise is needed. This Comment evaluates the several premises offered in support of particular elements of stigma statutes.

Surprisingly, perhaps, a version of the no-difference thesis figures into arguments *against* stigma statutes generally.[33] The no-power thesis is downplayed as a point *in spite of which* nonphysical defects may be material, while the no-difference thesis is brought to center stage as a fact demonstrating that nonphysical defects *especially* ought to be disclosed. It is noted, initially, that nonphysical defects in fact interfere with some buyers' use and enjoyment of a home: Neighbors will talk,[34] and some people will be bothered by what they have to say.[35] Enough people will be bothered that such defects will have a negative effect on the value of the home.[36] Thus, it is argued, the no-power thesis carries little weight in the world in which we live. Further, the general trend with respect to land transactions is toward greater disclosure. Most are roughly familiar with the story of the origins of caveat emptor in the days when land and improvements thereon were simple, and buyers were clever farmers well competent to inspect them.[37] As the objects of our real estate transactions have grown more complex, and it has become impossible for buyers

32. Fully (and perhaps needlessly) articulated, the argument is as follows: A nonphysical defect has no inherent power to interfere with a buyer's use and enjoyment of a home unless she can distinguish a home with the defect from a home without the defect without having to be *told* about the defect. No buyer can distinguish a home with a nonphysical defect from a home without a nonphysical defect without being told about the defect. Therefore, a nonphysical defect has no inherent power to interfere with a buyer's use and enjoyment of a home.

33. *See, e.g.*, Hartog, *supra* note 30, at 783 ("Purchasers of real property have the right to be privy to any material fact they would be unable to discover with a reasonable inspection.").

34. *See supra* note 2.

35. With respect to a home in which a homicide had occurred, see Hudak, *supra* note 2 (quoting the buyer as remarking that staying put "would be like living in a morgue"); with respect to HIV/AIDS, see Hartog, *supra* note 30, at 768 ("[W]hile the risk of household transmission is small, it cannot be ignored."); with respect to suicide, see Brannon v. Mueller Realty & Notaries, No. A-8205753, 1984 WL 7018, *3 (Ohio Ct. App. Oct. 24, 1984) (addressing a case in which a man who learned that a prior occupant had committed suicide in his home experienced "emotional trauma" and eventually "refus[ed] to return to the home").

36. *See supra* note 11.

37. Alex M. Johnson, Jr., *An Economic Analysis of the Duty to Disclose Information: Lessons Learned From the Caveat Emptor Doctrine*, 45 SAN DIEGO L. REV. 79, 98 (2008) ("[A]t the time the doctrine developed, disclosure of defects of the typical agrarian structure would have been unnecessary since the party upon whom the disclosure was placed correctly assumed that the other party—the purchasing party—was in possession of that information as a result of that party's inspection of the premises.").

to acquire all of the specialized knowledge relevant to the construction of a modern home,[38] exceptions to caveat emptor have grown more numerous.[39] It is well established that the more difficult it is for a prospective buyer to discover a defect, the stronger the case is for requiring a seller or broker to disclose that defect.[40] According to the no-difference thesis, it is *impossible* for a prospective buyer to become aware of a nonphysical defect until the neighbors decide to open their mouths.[41]

Buyers' interest in having a seller or broker inform them of a defect that may be important to them and that they cannot discover by other means must be weighed against (1) sellers' and brokers' interest in knowing exactly what they do and do not have to disclose, (2) the public interest in eradicating or diminishing irrationality, and/or (3) sympathetic sellers' interest in not suffering further loss when a calamity they have suffered amounts to or creates a stigma. Endorsing a general argument in favor of stigma statutes that gives primary weight to sellers' interest in not suffering further loss when personal calamity gives rise to a stigma, Part III provides a sketch of what a statute so justified ought to look like. The key features discussed include (1) which defects ought to be covered and whether or not these ought to be

38. This proposition hardly requires support, but just for sport the reader might consider the following question: *Which of the following R-values is appropriate for insulating a slab-on-grade foundation in a residence? R5; R10; R19; R30.* The correct answer in California, as perhaps one in several hundred thousand homebuyers knows, is *R-10*. CONTRACTORS STATE LICENSING BOARD, STUDY GUIDE FOR THE INSULATION AND ACOUSTICAL (C-2) LICENSE EXAMINATION 2 (2007), *available at* http://www.cslb.ca.gov/Resources/StudyGuides/C02StudyGuide.pdf.

39. *See* George Lefcoe, *Property Condition Disclosure Forms: How the Real Estate Industry Eased the Transition From Caveat Emptor to "Seller Tell All"*, 39 REAL PROP. PROB. & TR. J. 193, 195–97 (2004) ("In all but a few states . . . home sellers are now expected to provide buyers with a detailed account of known material defects. This requirement is a statutory norm in about two-thirds of the states and is an accepted practice of real estate sales agents nationwide. Silence is no longer golden. In fact, silence can become extremely costly to unduly laconic sellers and their brokers.") (citations omitted).

40. *See* Lingsch v. Savage, 29 Cal. Rptr. 201, 204 (Dist. Ct. App. 1963) ("It is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer."); Van Camp v. Bradford, 623 N.E.2d 731, 736 (Ohio Ct. Com. Pl. 1993) (noting that "any psychological stigma that may be attached to a residence is even more undiscoverable than the existence of termites in a home . . . or a defect in the title to the property, . . . both of which have been deemed latent defects despite the fact that they could have been discovered through a professional inspection or title search") (citations omitted).

41. Though a buyer may run a basic Google search of her prospective address, this is not likely to turn up information concerning such extremely private matters as a prior owner's suicide or affliction with HIV/AIDS. Contrast the well-known and easily navigated databases listing the whereabouts of registered sex offenders, which have prompted one commentator to suggest that "the issue of whether sellers have a legal or moral obligation to disclose nearby sex offenders may become moot because buyers can now easily do their own research on the topic." Suzanna Hartzell-Baird, *When Sex Doesn't Sell: Mitigating the Damaging Effect of Megan's Law on Property Values*, 35 REAL EST. L.J. 353, 368 (2006).

specifically enumerated or described as a class, (2) whether and how a buyer who thinks to ask about such defects may do so, and how a seller or broker may answer, and (3) who, precisely, is to be protected by stigma statutes.

I. EARLY AND CONTINUING DEVELOPMENT OF STIGMA STATUTES

A. Framing the Problem: Notorious Cases and HIV/AIDS

Two developments combined to make the duty to disclose nonphysical defects or stigmas a visible issue in the 1980s and '90s. First, courts were handing down controversial decisions requiring disclosure with respect to stigmas ranging from homicide on the premises[42] to a home's reputation for being haunted.[43] Second, many buyers had become hysterical concerning prior occupancy of a home by persons with AIDS, and amendments to the Fair Housing Act made related disclosure obligations unclear.[44] These issues are briefly described in the following two Subparts. While a central purpose of the second Subpart is to emphasize that no analysis of the treatments of these issues prior to the introduction of stigma statutes can explain the latter in all their diversity, the former remain relevant to the extent that they give concrete expression to enduring tensions.

1. A Homicide in California, a Haunting in New York, and Ohio as an Anomaly

Reed v. King[45] remains a leading stigmatized property case. Dorris Reed sued Robert King seeking rescission and damages when she learned that the California home she bought was the site of the murder of a woman and her four children ten years earlier.[46] The appellate court reversed the trial court's determination that Reed's complaint failed to state a cause of action: While King had not engaged in any active concealment or made any false

42. *See* Reed v. King, 193 Cal. Rptr. 130, 133 (Ct. App. 1983); *Van Camp*, 623 N.E.2d 731.

43. Stambovsky v. Ackley, 572 N.Y.S.2d 672, 674 (App. Div. 1991).

44. *See* Brown, *supra* note 15, at 627 ("Real estate agents were unsure whether the amendments prohibited the unsolicited disclosure of [occupants' HIV/AIDS status]. The National Association of Realtors (NAR) requested the Department of Housing and Urban Development (HUD) to clarify the issue. HUD responded that unsolicited disclosure of a seller's AIDS infection would violate the Fair Housing Act. However, the ruling did not answer whether an agent could respond to a direct inquiry concerning AIDS from a potential buyer. To be safe, NAR advised its members not to respond to such inquiries.") (citations omitted).

45. 193 Cal. Rptr. 130.

46. *Id.* at 130.

representation with respect to this condition,[47] he may have been under an obligation to disclose the homicides to Reed.[48] Though the court worried about "permit[ting] the camel's nose of unrestrained irrationality admission to the tent,"[49] it was reassured by both the "highly unusual" nature of the stigma associated with "the murder of innocents"[50] and the alleged effect on the market value of the home.[51]

The *Reed* court was determined to maintain a standard by which "peripheral, insubstantial, or fancied harms" need not be disclosed.[52] Speaking broadly, the purpose of subsequently enacted stigma statutes is to define the class of "peripheral, insubstantial, or fancied harms." In some states, some but not all psychological stigmas belong to this class.[53] In other states, all psychological stigmas belong to this class.[54] The *Reed* court's treatment of the extent of a stigma's "potential for . . . disturbing buyers"[55] as the determinative factor in classifying such putative harms is arguably broad enough to accommodate either approach.

In *Stambovsky v. Ackley*,[56] Ackley, the seller, had shared her home's reputation for being haunted with walking tours, the local newspaper, and *Readers Digest*.[57] When Stambovsky, a buyer from New York City unfamiliar "with the [local] folklore," was brought up to speed, he sought to rescind the contract of sale and recover his down payment.[58] The court held that "where, as here, the seller not only takes unfair advantage of the buyer's ignorance but has created and perpetuated a condition about which he is unlikely to even inquire,

47. The court did not regard King's statement that the home was "fit for an 'elderly lady' living alone" as a false representation: "To view the representation as patently false is to find 'elderly ladies' uniformly susceptible to squeamishness. We decline to indulge this stereotypical assumption." *Id.* at 131 & n.2.

48. *Id.* at 130.

49. *Id.* at 132. The court here was addressing the objection that a finding for Reed would make the first of the following three "materiality" factors unworkably broad: "the gravity of the harm inflicted by non-disclosure; the fairness of imposing a duty of discovery on the buyer as an alternative to compelling disclosure, and [the] impact on the stability of contracts if rescission is permitted." *Id.*

50. *Id.* at 133.

51. Because it reflects potential buyers' attitudes generally, a decline in market value would "still the concern that permitting [the plaintiff] to go forward [would] open the floodgates to rescission on subjective and idiosyncratic grounds." *Id.* at 134.

52. *Id.* at 133.

53. For example, California's stigma statute (ironically) would *not* protect nondisclosure of the multiple homicide at issue in *Reed*: "death . . . or the manner of death where the death has occurred more than three years prior" need not be disclosed. CAL. CIV. CODE § 1710.2(a) (West 2009).

54. *See, e.g.*, COLO. REV. STAT. § 38-35.5-101 (2009).

55. *Reed*, 193 Cal. Rptr. at 133.

56. 572 N.Y.S.2d 672 (N.Y. App. Div. 1991).

57. *Id.* at 674.

58. *Id.*

enforcement of the contract (in whole or in part) is offensive to the court's sense of equity."[59] Given the highly unusual facts of the case (not many stigmas are both promoted and hushed[60]), the holding is important primarily to the extent that it suggests a perhaps intolerable generosity to plaintiffs suing based on "peripheral, insubstantial, or fancied harms."[61] Unlike *Reed*,[62] it is not clear that legislators ever considered the case.[63] Commentators, however, have frequently addressed the case,[64] and it has come to inform a distinctive approach to rationalizing stigma statutes generally.[65]

Ohio's legislature has not enacted legislation spelling out sellers' disclosure obligations with respect to stigmatized property.[66] Instead, Ohio courts have developed a unique body of case law offering limited protection for nondisclosure of psychological stigmas. The general rule appears to be that while psychological stigmas may be material in real estate transactions,[67] the seller is liable only for harm resulting from misrepresentations (not mere nondisclosure).[68] This brings the law in Ohio very roughly in line with that of a number of states that protect nondisclosure of certain stigmas but provide for a mechanism by which buyers can make formal inquiries.[69]

The development of the Ohio rule has been anything but clean, subtly expanding and contracting in *Brannon v. Mueller Realty & Notaries*,[70] *Van*

59. *Id.* at 677. This straight-faced language is exceptional in an opinion that includes a ghost-related pun on every other line.

60. Surprisingly, perhaps, this proposition requires some qualification. Property owners might play up a dwelling's reputation as being haunted in advertising it for rent but shy away from disclosing such reputation when they go to sell. *See* Cherlyn Gardner Strong, *"Haunted" Rentals: Advertising a Ghostly Roommate*, TUCSONCITIZEN, Nov. 22, 2009, http://tucsoncitizen.com/paranormal/2009/11/22/haunted-rentals-advertising-a-ghostly-roommate.

61. *See supra* note 52 and accompanying text.

62. Uncertainty arising from the holding in *Reed* was cited, for example, in the California legislation protecting nondisclosure of HIV/AIDS. *See* 1986 Cal. Stat. 1823.

63. Only a handful of states expressly protect nondisclosure of "hauntings" and related stigmas. *See, e.g.*, MASS. ANN. LAWS ch. 93, § 114(c) (LexisNexis 2005) (protecting nondisclosure of the "fact or suspicion that . . . the real property has been the site of an alleged parapsychological or supernatural phenomenon").

64. *See, e.g.*, Brown, *supra* note 15, at 626.

65. This approach, tending to endorse the statutes' supposed capacity to combat irrationality, is the focus of Part II.B, *infra*.

66. For a somewhat dated but nonetheless interesting commentary on this fact, see Daivia S. Kasper, Note, *Ohio's Homeowner Disclosure Law*, 45 CASE W. RES. L. REV. 1149, 1180–82 (1995).

67. Contrast many states' stigma statutes, which declare that psychological stigmas are *not* material. *See, e.g.*, COLO. REV. STAT. § 38-35.5-101 (2009); OR. REV. STAT. § 93.275 (2009).

68. *See* Archer v. Amick, No. CV 2002-01-0087, 2003 WL 25681712 (Ohio Ct. Com. Pl. Oct. 31, 2003).

69. *See, e.g.*, CONN. GEN. STAT. ANN. § 20-329ee (West 2008).

70. No. A-8205753, 1984 WL 7018 (Ohio Ct. App. Oct. 24, 1984).

Camp v. Bradford,[71] and *Spinelli v. Bair*.[72] Particularly interesting and distinctive in this trio of cases, however, is the courts' sensitivity to the nature of the stigma involved in each case: "Psychological stigmas" are not treated as a monolithic class. In *Brannon*, the court upheld summary judgment in favor of a seller who told the buyers that her husband had died of a heart attack when in fact he had committed suicide in the house.[73] The court held that this stigma was not material to the extent that "its importance, insofar as it might have existed, would have been apparent only to such individuals as those with some belief in the occult [i.e. not a 'reasonable person']."[74] In *Van Camp*, the buyer asked about the purpose and necessity of security bars over the windows. In answering, the seller failed to disclose that the neighborhood, including the house at issue, had recently been the site of multiple rapes and that the perpetrator was still at large.[75] The court denied summary judgment for the defendant, implicitly recognizing that such a defect might be material.[76] In *Spinelli*, the buyers specifically asked whether a murder or "something horrible had happened" at the property.[77] The sellers and their agents failed to disclose that previous owners had allegedly raped and murdered their own children (with some of the incidents of rape occurring at the property).[78] Still, the court upheld summary judgment in favor of the defendants, stating that "a psychological stigma is not a material defect."[79]

The unstated rule that emerges from these decisions is that psychological stigmas are not material unless they plausibly suggest some continuing risk of physical harm to an occupant (in other words, unless the no-power thesis does not apply). A fugitive rapist who has repeatedly targeted the neighborhood (and the specific house) at issue arguably presents such a risk, while suicide and incestuous rape on the property clearly do not. With other states beginning to carve exceptions out of broad nondisclosure statutes,[80] the principles

71. 623 N.E.2d 731 (Ohio Ct. Com. Pl. 1993).
72. No. 1999CA00399, 2000 WL 34335853 (Ohio Ct. App. July 3, 2000).
73. *Brannon*, 1984 WL 7018, at *1, *5.
74. *Id.* at *4.
75. *Van Camp*, 623 N.E.2d at 734.
76. *Id.* at 741.
77. *Spinelli*, 2000 WL 34335853, at *1.
78. *Id.*
79. *Id.* at *5. The court further distinguished *Van Camp* on the bases that (1) the Spinellis had not informed the defendants that they were concerned about the home's criminal history, (2) Mr. Spinelli testified that he was not bothered by this history, and (3) the Spinellis independently found out about the stigma a few days prior to closing. *Id.*
80. *See infra* Part I.B.

traditionally offered in support of these statutes need to be reexamined. As developed below,[81] the Ohio stigma cases hint at some overlooked possibilities.

2. HIV/AIDS and the Fair Housing Amendments Act of 1988

The first HIV cases in the United States were identified in 1981,[82] and the first stigma statute appeared in 1986.[83] Widespread misunderstanding of the avenues by which the disease is transmitted (combined with a vivid awareness of the suffering experienced by AIDS victims) created significant pressure in favor of requiring disclosure.[84] Though state and federal laws now offer fairly broad protection to sellers afflicted with HIV/AIDS, the problem of how to address sincerely held but utterly irrational fears remains a central issue in framing stigma disclosure laws.

California acted relatively early to protect nondisclosure of the HIV/AIDS status of prior occupants of real property,[85] in part because the *Reed* decision arguably would have required disclosure.[86] Congress perhaps took a step in a similar direction when it amended the Fair Housing Act in 1988 to prohibit discrimination on the basis of a buyer's or renter's "handicap."[87] HIV/AIDS was held to be a handicap for purposes of the FHA in *Baxter v. City of Belleville*,[88] but confusion remained concerning whether or not *sellers* (in addition to buyers and renters) were protected. The Texas Attorney General issued an opinion[89] suggesting that a Texas bill was invalid under the FHA because it required disclosure when a broker had actual knowledge of a previous occupant's infection with HIV/AIDS and a potential buyer requested the information.[90]

81. *See infra* Part III.C.

82. Centers for Disease Control and Prevention, Basic Information About HIV/AIDS, http://www.cdc.gov/hiv/topics/basic (last visited Sept. 16, 2010).

83. CAL. CIV. CODE § 1710.2 (West 2009).

84. Murray, *supra* note 15, at 694 (noting, in the context of property disclosure laws, that "[b]ecause stories of the AIDS epidemic fill the news, the public understandably is concerned. This concern, however, often turns to panic and as a result AIDS victims many times are harassed, persecuted, and ostracized").

85. CAL. CIV. CODE § 1710.2(a), which initially protected nondisclosure *only* of an occupant's HIV/AIDS status, was enacted in 1986.

86. *See supra* note 62.

87. 42 U.S.C. § 3604 (2006).

88. 720 F. Supp. 720, 729 (S.D. Ill. 1989); *see also* Ass'n of Relatives & Friends of AIDS Patients v. Reg. & Permits Admin., 740 F. Supp. 95, 103 (D.P.R. 1990) ("There is little question that persons terminally ill with AIDS are considered "handicapped" within the meaning of the Fair Housing Act."). For discussion of both cases, see Murray, *supra* note 15, at 702–03.

89. Op. Att'y Gen. of Tex JM-1093, 1989 WL 430745, at *1 (1989).

90. For thorough discussion of this opinion, see Murray, *supra* note 15, at 703–05.

Lingering confusion was an important catalyst for the adoption of stigma statutes in a majority of states.[91]

B. Key Elements of and Differences Among Stigma Statutes

1. Scope of Stigmas Covered

This Subpart is not intended to be an exhaustive survey of current stigma statutes. Its purpose, rather, is to provide a sense of the significant diversity that presently exists and to illuminate an emerging trend toward restricting the scope of especially broad statutes. It is suggested that this trend indicates a growing perception that the most compelling arguments in favor of nondisclosure apply to a smaller class of stigmas than do the traditional arguments.[92]

At one end of the spectrum is Kentucky, which only protects nondisclosure of the HIV/AIDS status of an occupant.[93] At the other end are states like Colorado, which protect nondisclosure of any nonphysical stigma.[94] While a handful of states go only slightly further than Kentucky[95]—California[96] and South Carolina[97] are notable examples—most states either follow Colorado in offering general protection for nondisclosure of psychological stigmas[98] or else protect nondisclosure of an extremely broad class of enumerated stigmas. In the latter group, Maryland's statute protecting nondisclosure of the fact that an occupant was diagnosed with HIV/AIDS or that "a homicide, suicide, accidental death, natural death, or felony occurred on the property"[99] is typical.[100]

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91. *See* Brown, *supra* note 15, at 628 (noting that states adopted stigma statutes "in response to uncertainty created by case law and the Fair Housing Act").

92. The relative persuasiveness of these arguments is the focus of Part II, *infra*.

93. KY. REV. STAT. ANN. § 207.250 (LexisNexis 2007).

94. COLO. REV. STAT. § 38-35.5-101 (2009).

95. It is worth noting that New Hampshire's statute, which protects nondisclosure of a broader range of stigmas than does Kentucky's, does *not* protect nondisclosure of an occupant's HIV/AIDS (or other disease) status. N.H. REV. STAT. ANN. § 477:4-e (2001).

96. In addition to occupants' HIV/AIDS status, California's statute protects nondisclosure of death (and manner of death) on the premises after three years of the event's occurrence. CAL. CIV. CODE § 1710.2(a) (West 2009). For further discussion of time constraints in stigma statutes, see *infra* Part I.B.3.

97. In addition to the fact that the property was occupied by someone infected with a virus or other disease "highly unlikely to be transmitted through his occupancy of a dwelling place," South Carolina's statute protects nondisclosure of the death of an occupant or the manner of death and public information from the sex offender registry. S.C. CODE ANN. § 27-50-90 (2007).

98. "Facts or suspicions regarding circumstances occurring on a parcel of property which could psychologically impact or stigmatize such property are not material facts subject to a disclosure requirement in a real estate transaction." COLO. REV. STAT. § 38-35.5-101(1) (2009).

99. MD. CODE ANN., REAL PROP. § 2-120 (LexisNexis 2003).

100. For statutes protecting nearly the same stigmas, see, for example, ARK. CODE ANN. § 17-10-101 (Supp. 2009), D.C. CODE ANN. § 47-2853.198 (LexisNexis 2007), FLA. STAT. ANN. § 689.25 (West

Beyond the typical, other statutes include provisions specifically protecting nondisclosure of stigmas relating to "parapsychological or supernatural" phenomena[101] and religious or political activity.[102]

A number of states protect a seller's nondisclosure of the fact that a felony occurred on her property.[103] A handful of states have recently carved out specific exceptions to such protection: Nevada and Mississippi do not protect nondisclosure of certain drug-related activities under specific circumstances,[104] while Delaware does not protect nondisclosure of arson[105] (some states take the rather messier approach of requiring elsewhere in their codes disclosure of facts that would otherwise seem to be covered by sweeping stigma statutes.).[106] The apparent rationale is that these felonies are likely to affect the physical character of the property. It is clear enough that these (as well as other) felonies might create latent physical defects, but it is also clear that known latent physical defects must be disclosed.[107] So why these particular exceptions?

The Nevada stigma statute's exception concerning nondisclosure of the fact that a property was used as a methamphetamine (meth) lab is worth a closer look. The statute protects nondisclosure only when the property has been cleaned by a certified expert or declared safe by a designated government official.[108] The bill amending the statute apparently owes much to the crusading spirit of a landlord whose young daughter suffered a chemical burn from contact with the carpet in a home she had bought.[109] Other health risks associated with chemical residue left behind at many former meth labs, "ranging from skin irritation and vomiting to birth defects and kidney

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Supp. 2010), GA. CODE ANN. § 44-1-16 (Supp. 2009), MO. ANN. STAT. § 442.600 (West 2000), and N.M. STAT. ANN. § 47-13-2 (LexisNexis 1995). Several of the states offering blanket protection for nondisclosure of psychological stigmas mention these stigmas in nonexhaustive lists of examples. *See, e.g.*, COLO. REV. STAT. § 38-35.5-101 (2009).

101. MASS. ANN. LAWS ch. 93, § 114 (LexisNexis 2005).

102. OR. REV. STAT. § 93.275 (2009).

103. *See supra* notes 99–100 and accompanying text.

104. MISS. CODE ANN. § 89-1-527 (1999); NEV. REV. STAT. ANN. § 40.770 (LexisNexis 2006).

105. DEL. CODE ANN. tit. 24, § 2930 (2005).

106. *See, e.g.*, COLO. REV. STAT. § 38-35.7-103 (2009) (providing that a seller shall disclose in writing that a property was previously used as a methamphetamine lab); MO. ANN. STAT. § 442.606 (West Supp. 2010) (same). Note that "other felony" is explicitly mentioned as a protected stigma class in both states' stigma statutes. COLO. REV. STAT. § 38-35.5-101 (2009); MO. ANN. STAT. § 442.600 (West 2000).

107. *See* Lingsch v. Savage, 29 Cal. Rptr. 201, 204 (Dist. Ct. App. 1963).

108. NEV. REV. STAT. ANN. §§ 40.770(6)(a)–(b) (LexisNexis 2006).

109. *See Minutes of the Meeting of the Assem. Comm. on Judiciary*, 2003 Leg., 72d Sess. (Nev. 2003).

damage,"[110] are well documented and have spawned a host of recent articles regarding the treatment of such properties.[111] In its discussion of the bill, members of Nevada's Senate Committee on Judiciary emphasized that they were primarily motivated by these health risks.[112] It is clear, however, that any detritus of a meth lab likely to affect a buyer's health constitutes a physical defect that would have had to be disclosed notwithstanding the unamended stigma statute. So what did the Nevada legislature achieve? The amendment did more than merely clarify the obligation to disclose a latent physical defect: Absent professional cleaning or an official declaration that the property is safe, even the nondisclosure of a meth lab run by a technician with the scruples and competence to clean up after herself might be material. If this is correct, then, barring some physical defect, sellers in other states whose stigma statutes include an "other felony" clause[113] would not have to disclose the use of a property as a meth lab under these circumstances. This is problematic because, to the extent that a reasonable buyer might still incur the cost of having the home inspected for chemical residue, such history might well be material. Delaware's arson exception functions in much the same way: Though a seller would have to disclose physical defects caused by an act of arson even without the exception, the exception closes off the stigma statute's safe harbor when there may be *no* latent physical defects due to the arson (as, for example, when a structure has been burned to the ground and rebuilt entirely).[114]

Why do states acknowledging the increased likelihood of physical harm to buyers of homes previously used as meth labs not also recognize the increased likelihood of physical harm indicated by other felonies likely to affect the physical character of a home? A more interesting question is why states acknowledging the increased likelihood of physical harm to buyers

110. Nancy A. Allen, *Clandestine Meth Labs and Landowner Duties of Cleanup and Disclosure*, 35 REAL EST. L.J. 338, 339 (2006).

111. *See, e.g.*, Signe Land Levine, Note, *Poison in Our Own Backyards: What Minnesota Legislators Are Doing to Warn Property Purchasers of the Dangers of Former Clandestine Methamphetamine Labs*, 31 WM. MITCHELL L. REV. 1601 (2005); Anna S. Vogt, Comment, *The Mess Left Behind: Regulating the Cleanup of Former Methamphetamine Laboratories*, 38 IDAHO L. REV. 251 (2001).

112. *See Minutes of the Meeting of the Assem. Comm. on Judiciary*, 2003 Leg., 72d Sess. (Nev. 2003) (statement of Sen. Terry Care, Member, S. Comm. on Judiciary) ("We are framing this as a health issue."); *see also id.* at 7 (statement of Sen. Dennis Nolan, Member, S. Comm. on Judiciary) (noting that while he agreed with the intent to make sure that buyers are informed of safety hazards, the senator was concerned that the bill might not go far enough).

113. *See, e.g.*, GA. CODE ANN. § 44-1-16 (Supp. 2009); R.I. GEN. LAWS § 5-20.8-6 (2004).

114. Under what circumstances would the arson be a material fact in this scenario? One possibility is that the property has been specifically targeted by an arsonist animated by an objection to a particular use of the property.

indicated by felonies likely to affect the physical character of a home do not consider the increased likelihood of physical harm to buyers indicated by certain other felonies that do not affect the physical character of a home. Imagining a situation similar to that in *Van Camp*,[115] it is conceivable that the occupants of a home that has been repeatedly targeted by a rapist in recent months would face a relatively high risk of suffering some physical harm: Is the fact that this harm would not be caused by chemicals in the carpeting a relevant distinction? These questions are taken up again in Part III, but the upshot of these reflections is that the traditional arguments in favor of stigma statutes might have led legislatures to protect nondisclosure of an overbroad class of stigmas.

2. Direct Inquiries and the Duty to Answer

All stigma statutes protect nondisclosure of facts about which a prospective buyer does not inquire, but there is significant divergence with respect to sellers' and agents' obligations when the buyer specifically asks about the relevant stigma. A handful of states provide for a formal process in which the inquiry and answer must be submitted in writing. Some of these states expressly allow sellers to choose not to answer,[116] while others require agents and/or sellers to disclose certain defects with respect to which a buyer submits a proper inquiry.[117] A third and larger group of states, whose statutes simply note that the protection they offer for nondisclosure does not extend to misrepresentation,[118] seems also to allow sellers to choose not to answer. Two issues emerge from these different approaches.

115. Van Camp v. Bradford, 623 N.E.2d 731, 736 (Ohio Ct. Com. Pl. 1993); *see supra* notes 71–81 and accompanying text.

116. *See, e.g.*, CONN. GEN. STAT. ANN. § 20-329ee (West 2008) ("[I]f a purchaser or lessee of real estate . . . advises an owner of real estate or his or her agent, in writing, that knowledge that the property was at any time suspected to have been the site of a homicide, other felony or a suicide is important to the purchaser's decision to purchase or lease the property, the owner through his or her agent shall report any findings to the purchaser or lessee, in writing subject to and consistent with applicable laws of privacy. *If the owner refuses to disclose* such information, his or her agent shall so advise the purchaser or lessee in writing.") (emphasis added).

117. *See, e.g.*, DEL. CODE ANN. tit. 24, § 2930(f) (2005) ("If a potential transferee makes a specific written request to the owner or agent about [the occurrence of a homicide, suicide, or other felony except arson] regarding a specific property, the owner or agent *shall answer* the transferee's questions truthfully, to the best of such owner's or agent's knowledge.") (emphasis added).

118. *See, e.g.*, CAL. CIV. CODE § 1710.2(d) (West 2009) ("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.").

First, do sellers have a substantial advantage in those states that do not require that they or their agents disclose stigmas that might lower the value of their property? As commentators have pointed out, silence in such situations raises a "red flag."[119] On the other hand, extending the metaphor, a red flag might effectively obscure a stigma that is "worse" than a prospective buyer would likely imagine. Further, it seems at least plausible that buyers would be less disturbed by the vague assumption that something horrible probably happened at the property than concrete knowledge that a particular horrible something happened.

Second, what are the relative advantages and disadvantages of laying out a formal process by which a prospective buyer can submit formal inquiries versus simply providing that a stigma statute does not give a seller license to misrepresent the property's history? One commentator worries that requiring concerned buyers to make formal inquiries might exacerbate "ill will" toward brokers who are unlikely to alert buyers to the potential desirability of investigating stigmas,[120] let alone explain to them the proper channels by which to submit inquiries. On the other hand, for those buyers who do submit formal inquiries, sellers' heightened awareness of their potential liability for misrepresentation may render formally submitted answers (or refusals to answer) more reliable than casual oral assurances. A related advantage to sellers is that heightened awareness of their potential liability would make them more likely to become fully apprised not only of their responsibilities, but also of their rights.

3. Time-Sensitive Protection

A couple of states have experimented with provisions protecting nondisclosure of certain stigmatizing events only after a specified number of years have elapsed. Until 1996, Hawaii's statute mandating disclosure of material information excluded as nonmaterial the fact that "[a] homicide, felony, or

119. *E.g.*, Brown, *supra* note 15, at 631; *see also* Michael Adam Burger & Lourdes I. Reyes Rosa, Note, *Your Money and Your Life! AIDS and Real Estate Disclosure Statutes*, 5 HOFSTRA PROP. L.J. 349, 350 n.4 (1993) (going beyond the reasonable observation that silence supports the inference that a stigma exists and arguing the more controversial point that silence is tantamount to disclosure in such cases). Alternatively, silence might be a signal to buyers to imagine a stigma "worse" than the one not disclosed. Thanks to Darcy Pottle for raising this point.

120. *See* Brown, *supra* note 15, at 646. While it is fairly clear that buyers should not count on sellers' brokers to prompt them to make all permissible inquiries, even buyers' brokers may not always have an incentive to do so. *See* Katherine A. Pancak, Thomas J. Miceli & C.F. Sirmans, *Real Estate Agency Reform: Meeting the Needs of Buyers, Sellers, and Brokers*, 25 REAL EST. L.J. 345, 347, 359 (1997). Though many brokers appreciate the value of keeping clients satisfied even at short-term cost to themselves, pressure to close a deal and collect one's share of the commission cannot be ignored.

suicide occurred on the real property more than three years [earlier]."[121] In California, information relating to a death (and the manner of death) at a property need not be disclosed if the death occurred more than three years prior to the date on which an offer is received.[122]

Why *three* years? Recall that in *Reed v. King*,[123] the California case that put the issue of stigmatized property disclosures on the legislative radar, the court held that a seller could be liable for nondisclosure of a *ten*-year-old multiple homicide.[124] Further, the legislative history for the bill adding protection for nondisclosure of death or manner of death to California's stigma statute (which did not contain the three-year restriction) notes with sympathy the case of a woman unable to sell the home in which her daughters were murdered at least *five* years earlier.[125] Moreover, this relatively short disclosure period might create an artificial and rather morbid incentive for speculators to buy recently stigmatized property from grieving sellers at a discount, sit for three years, and then resell without having to disclose the stigma.[126]

Arguably the strongest rationale for limiting protection for nondisclosure of a stigma to cases in which the stigmatizing event occurred in the distant past is that the passage of time indicates a diminished risk of related injury to the buyer.[127] In other words, time is treated as a proxy for actual danger. The most important problems for this argument, picked up again in Part III, are that (1) not all stigmatizing events imply such a risk and (2) even with respect to stigmatizing events that do imply such a risk, time alone is a highly imperfect indicator of the degree of risk.

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121. H.B. 1317, 17th Leg. Reg. Sess. (Haw. 1994). This language was removed in 1996. S.B. 3266, 18th Leg. Reg. Sess. (Haw. 1996). At all times, however, Hawaii Revised Statutes has included a provision protecting nondisclosure of the fact that "residential real property was the site of an act or occurrence that had no effect on the physical structure or the physical environment of the residential real property, or the improvements located on the residential real property . . . ." HAW. REV. STAT. ANN. § 508D-8 (LexisNexis 2006). Since most homicides, felonies, and suicides have no such effect, the statute following the 1996 amendment protects nondisclosure of recent events of these kinds.

122. CAL. CIV. CODE § 1710.2(a) (West 2009).

123. 193 Cal. Rptr. 130, 133 (Ct. App. 1983). *See* discussion *supra* Part I.A.1.

124. *Reed*, 193 Cal. Rptr. at 130.

125. S.B. 324, 1987–88 Leg., Reg. Sess. (Cal. 1987).

126. I have yet to come across any published discussion of this strategy, but it has occurred to just about everyone with whom I have discussed the California statute.

127. For example, it would seem that the buyers' fears in *Van Camp v. Bradford*, 623 N.E.2d 731, 736 (Ohio Ct. Com. Pl. 1993), in which a fugitive sex offender had raped a prior occupant and others in the neighborhood within a year of the transaction at issue, were a good deal more reasonable than the buyer's fears in *Reed*, in which a multiple homicide had been committed at the property ten years prior to the transaction at issue. Both cases are discussed in Part I.A.1, *supra*.

4. Protected Parties: Sellers, Brokers, or Both?

Though many states protect both a seller's and a broker's nondisclosure of a stigma, some provide express protection only to the latter. Colorado, for instance, protects nondisclosure of "facts or suspicions regarding circumstances occurring on a parcel of property which could psychologically impact or stigmatize such property," but only for "real estate broker[s] and sales[people]."[128] Other states, which also offer protection to sellers, offer broader protection to other real estate licensees as well.[129] Given the influence of realtors' associations in the enactment of states' stigma statutes,[130] it is no surprise that real estate professionals are protected: Indeed, there is no good reason to deny real estate professionals the same protection generally extended to sellers. Is there any reason, though, that brokers should be protected in instances in which sellers are not? The strongest argument is that these statutes should serve to protect only brokers, who are likely unaware that a property is affected by some stigma.[131] While this rationale cannot generally be extended to cover owners,[132] it does not, of course, rule out others that might.[133]

II. APPROACHES TO JUSTIFYING STIGMA STATUTES

A. The Economics of Nondisclosure

When, if ever, is it efficient to permit a seller not to disclose information material to a transaction? A naïve answer is *never*: Requiring a seller to pass along information that she possesses would seem to have the effect only of preventing waste resulting from misunderstanding. As Anthony Kronman points out in developing a more sophisticated answer to this question, however, this is a misleadingly narrow view of the consequences of a

128. COLO. REV. STAT. § 38-35.5-101 (2009).

129. *See, e.g.*, OKLA. STAT. tit. 59, § 858-513 (West 2000).

130. *See supra* note 21.

131. *See* Hudak, *supra* note 2 ("[Florida Senator Bill Posey, who introduced Florida's stigma legislation,] said Florida's law was drafted to protect brokers who are unaware of a home's dark secrets."). Note, however, that Florida's stigma statute today protects both brokers and sellers. FLA. STAT. ANN. § 689.25 (West Supp. 2010). In any event, the no-difference thesis implies the absence of "red flags" generally required to put an agent on notice of potential stigmas. *Cf.* Easton v. Strassburger, 199 Cal. Rptr. 383 (Ct. App. 1984) (holding brokers liable to the buyer for failure to inspect property for erosion problems when they were aware of "red flags" indicating such problems).

132. Landlords, who often have no reason to know, for instance, that a tenant has AIDS, are an obvious exception to this proposition. It might be suggested that parents, too, are often in the dark with respect to stigmatizing events affecting children in their households.

133. *See infra* Part III.C.

mandatory disclosure rule: Acquiring the relevant information is a costly activity, and requiring disclosure diminishes a seller's incentive to do so.[134] A better answer, then, is that nondisclosure should be permitted when the buyer is the better (cheaper) information-gatherer.[135] Kronman argues that the determination of which party is the better information-gatherer turns on whether the relevant information was "casually" or "deliberately" acquired.[136] To the extent that information is acquired deliberately, in other words, at a cost to the acquirer, the relevant cost weighs against requiring disclosure. Allowing a party to withhold deliberately acquired information (tantamount to giving her a property right in the information) preserves the incentive to incur such cost in the future.[137] Assuming for the moment that stigma information may be material in a real estate transaction, such information is not the sort that is likely to warrant protection for nondisclosure on Kronman's theory.[138] Beyond being merely casually acquired, knowledge of the relevant stigma is generally *thrust upon* a seller—either by the neighbors or by virtue of the fact that the stigmatizing event has befallen the seller or her loved ones.[139] Even otherwise, society at large has no obvious interest in the production of stigma information: Unlike information about a termite infestation, for instance, which dictates whether or not a structure should be treated, information concerning a prior occupant's suicide is not terribly useful.

Though stigma statutes are not justified on this direct approach to the question of efficiency, it might be argued that a compelling efficiency argument may be found along a more winding route. The focus of this Subpart is the argument that stigma statutes in their present, generally sweeping form may be justified by their tendency to promote efficiency by clarifying sellers' disclosure obligations. Drawing heavily on Carol Rose's classic article[140] and emphasizing the exceptions recently carved out of a handful of statutes, this

134. *See* Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 9 (1978); *see also* Florise R. Neville-Ewell, *Residential Real Estate Transactions: The AIDS Influence*, 5 HOFSTRA PROP. L.J. 301, 319–23 (1993) (discussing Kronman's argument with respect to disclosure of an occupant's HIV/AIDS status in a real estate transaction).

135. *See* Kronman, *supra* note 134, at 4.

136. *Id.* at 13.

137. *Id.* at 13–15.

138. *See* Neville-Ewell, *supra* note 134, at 322.

139. Moreover, even in an odd case in which a seller has learned of her home's troubling past at a substantial cost, a duty to disclose would possibly have no impact upon whatever morbid impulse drives such an investigation. Compare a seller's costly acquisition of information regarding a latent physical defect such as termite infestation: Requiring disclosure presumably does not substantially affect incentives that have more to do with protecting one's investment than with "obtain[ing] an advantage over potential purchasers." Kronman, *supra* note 134, at 25.

140. Rose, *supra* note 22.

Comment suggests that broad stigma statutes may not in fact promote efficiency any more than an approach allowing for greater interpretive flexibility.

The *Reed* court's reasoning that recovery might be allowed for nondisclosure of a multiple homicide without "permit[ting] the camel's nose of unrestrained irrationality admission to the tent"[141] because "[t]he murder of innocents is highly unusual in its potential for so disturbing buyers [that] they may be unable to reside in a home where it has occurred"[142] raised more questions than it answered. Though it was clear enough that a buyer would not have a claim for nondisclosure of a mild stigma such as the fact that the house at issue had once been burglarized, other stigmas seemed to fall within a gray area. What about a suicide or natural death on the premises? Though many realtors would have played it safe and disclosed these facts,[143] the temptation to test the boundaries when a stigma made a property extremely difficult to sell would have been great.[144] Moreover, with respect to AIDS status, amendments to the Fair Housing Act in 1988 would make it unclear whether disclosure was in fact a safe play.[145] Rather than forcing parties to waste resources litigating these issues and fleshing out a "muddy" standard, it might be argued, legislatures acted wisely in adopting clear, "crystalline" rules spelling out exactly which stigmas must be disclosed and when.[146] In her general account of the conflict between "crystals" and "mud," Rose suggests that those who favor hard-edged rules are motivated by a concern to "encourage people to plan and to act carefully, knowing that no judicial cavalry will ride to their rescue later."[147] In other words, stigma statutes might enable sellers to decide not to disclose a psychological stigma with the security that a court will not later

141. Reed v. King, 193 Cal. Rptr. 130, 132 (Ct. App. 1983).

142. *Id.* at 133.

143. Indeed, at the risk of hobbling the argument before I properly engage it, it is worth noting that many agents will exercise an abundance of caution and disclose a stigma even when nondisclosure is protected by statute. *See, e.g.*, Polk v. Polk, No. C05-01667, 2009 WL 2614292, at *28 (Cal. Ct. App. Aug. 26, 2009) (describing how Colleen Badagliacco, president of the California Realtors Association, would disclose the fact of a murder even after the legal requirements had expired because "[i]t's better to be safe than sorry") (quoting Badagliacco).

144. *See supra* note 126 and accompanying text.

145. *See* discussion *supra* Part I.A.2.

146. Findings listed in California's stigma statute (which originally addressed only HIV/AIDS status) offer some evidence that lawmakers were actually motivated by this argument:

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

1986 Cal. Stat. 1823–24 (citation omitted).

147. Rose, *supra* note 22, at 592.

find that the stigma is sufficiently similar to a multiple homicide that the buyer should have a claim for nondisclosure.

The response to this argument proceeds on two distinct fronts: First, it is suggested that crystalline rules established by stigma statutes will tend to become muddied; second, it is argued that a muddier standard would not unduly compromise buyers' and sellers' ability to make plans with a sufficiently clear understanding of their obligations.

Beginning on the first front, Rose supplies a persuasive argument suggesting a "back-and-forth pattern between crystals and mud" in property law generally.[148] Among the illustrations she offers in support of this theory, her discussion of "the demise of caveat emptor" is particularly relevant. The story begins with caveat emptor reigning as a model of crystal clarity: "Short of outright fraud that would mislead the buyer, the seller had no duties to disclose anything at all."[149] With the widespread adoption of the exception requiring sellers to disclose latent material defects "known to the seller but undiscoverable by the purchaser upon reasonable inspection," however, the rule has become muddy in the last century: "What defects are 'material'? What does the seller 'know'? To what extent should the buyer 'reasonably' have to inspect for herself?"[150] Rose also mentions the *Reed* decision as further muddying the situation by complicating the concept of materiality.[151] Though Rose goes on from here to discuss attempts to recrystallize obligations through "as is" and "no warranty" sales and a corresponding muddying of things as courts refuse to recognize such waivers,[152] the cycle is manifest in the post-*Reed* history of stigmatized property law itself. From the crystalline rule of caveat emptor to the muddy doctrine of *Reed*, *Stambovsky*, and *Van Camp*, statutes defining certain psychological stigmas as nonmaterial represent a trend back in the direction of crystal.

If Rose is right, though, these statutes, at least in their current form, are not the end of the story. Already, exceptions carved out of broadly phrased statutes look like splashes of mud. Nevada and Mississippi's lack of protection for nondisclosure of drug-related crimes under certain circumstances and Delaware's lack of protection for nondisclosure of arson suggest that legislatures may be receptive to the idea that psychological stigmas indicating the possibility of a dangerous physical defect may be material. This is not far from the rule emerging from the case law in Ohio that a stigma may be material if it

148. *Id.* at 580.
149. *Id.* at 581.
150. *Id.*
151. *Id.* at 582.
152. *Id.* at 582–83.

plausibly indicates a continuing risk of harm to the occupant.[153] Should we be surprised if legislatures decide that there should be exceptions for other crimes and that a standard of this sort is more useful than the plain text of currently crystalline statutes? Real estate agents who "play it safe" and disclose stigmas even when nondisclosure is specifically protected[154] betray concern that seemingly crystalline nondisclosure rules will turn to mud in extreme cases.

Even if the "back-and-forth" between crystal and mud rules is inevitable, it may be argued that moves toward muddy rules show nothing more than that we do not learn from our mistakes: Working to establish crystalline rules may be futile in the long-term, but such rules do substantial good while they stand.

Moving to the second front, the problem with this view is that people are rarely either inclined to push the limits of hard-edged rules or paralyzed with doubt in the face of "mushy" rules when acting in what Rose calls a "genuine social context."[155] While it seems at least partly true that real estate agents' inclination to "play it safe" and disclose psychological stigmas even when they are apparently not obligated to do so indicates some doubt about whether safe harbors are as safe as they seem, it is also true that most agents have no desire to provoke bitterness and earn a reputation as a "dirty player." On the other hand, there is no reason to suppose that a muddier standard, like that in *Reed*[156] or the Ohio cases,[157] would necessarily prompt sellers or brokers to disclose all "facts predicating peripheral, insubstantial, or fancied harms."[158] Indeed, Ohio plaintiffs have not succeeded in either of the two[159] stigmatized property cases citing *Van Camp*.

For Rose, these observations suggest that the conflicts between proponents of mud rules and proponents of crystal rules[160] are fundamentally rhetorical: "However much crystal rules may have a dialogic side like mud, and however much mud rules may lend the certainty of crystal, as *rhetoric*, crystals and mud bear sharply divergent didactic messages."[161] These messages address the distance at which we should engage others: Crystal rhetoric suggests that everyone be treated as a stranger, while mud rhetoric suggests that everyone be treated

153. *See supra* notes 70–80 and accompanying text.
154. *See supra* note 143 and accompanying text.
155. Rose, *supra* note 22, at 609.
156. Reed v. King, 193 Cal. Rptr. 130, 133 (Ct. App. 1983).
157. *See supra* notes 70–80 and accompanying text.
158. *Reed*, 193 Cal. Rptr. at 133.
159. Archer v. Amick, No. CV 2002-01-0087, 2003 WL 25681712 (Ohio Ct. Com. Pl. Oct. 31, 2003); Spinelli v. Bair, No. 1999CA00399, 2000 WL 34335853 (Ohio Ct. App. July 3, 2000).
160. Rose, *supra* note 22, at 592–93, 609. These camps are broadly identified as those sympathetic to the Critical Legal Studies movement and those likely to be in sympathy with the Law and Economics movement, respectively.
161. *Id.* at 610 (footnotes omitted).

as a "friend and partner."[162] In the context of psychological stigmas, the rhetorical conflict is perhaps even more profound. If we argue that a seller should never have to inform a buyer of a latent physical defect—a crystalline rule—we merely suggest that the buyer is out of luck if she does not take care to see that she has made a good deal. When we argue that a seller should not have to disclose that her home is psychologically impacted—another crystalline rule—we suggest that the buyer is out of luck if she is thick-skulled enough to care about that sort of thing. The discussion in the following Subparts is informed by a muddy perspective: While it would be senseless to *indulge* irrational worries at the expense of sellers who have suffered terrible misfortune, there is something distasteful in absolutely *discounting* people's sincere worries simply because they are irrational.

B. Combating Irrationality

1. Overview

Concerns about a home's nonphysical history may be generally irrational, but from this proposition (a crude summary of the consequences of the no-difference and no-power theses discussed above)[163] it does not immediately follow that sellers should not have to disclose such histories. The pejorative force of the word "irrational," however, is strong enough that the argument discussed in this Subpart is nearly automatic: Irrationality is a bad thing, and to the extent that we can reduce irrationality by refusing to give legal countenance to irrational fears, we should do so.[164] Most of this Subpart is devoted to unpacking two hidden premises: (1) that the law's "attitude" toward a set of irrational beliefs might have the effect of eliminating or reducing subscription to such beliefs and (2) that reducing irrationality is a proper end of lawmaking. I suggest that support for the first premise is fairly weak, particularly with respect to the sorts of beliefs that are relevant to stigmatized real estate, and that while the second premise is plausible, the conclusion to which it leads is less powerful than one might think. A final problem for this argument is that the exceptions recently carved out of broad stigma statutes[165] suggest that buyers' concerns about different stigmas might not be uniformly irrational.

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162. *Id.*
163. *See* Introduction, *supra*.
164. *See* Warner, *supra* note 23, at 209–10. Though I have serious problems with this argument, Warner's presentation is excellent, and I draw heavily from his article in the following discussion.
165. *See* discussion *supra* Part I.B.1.

2. Can Legislation Promote Rationality?

When, if ever, has legislation had the effect of reducing or eliminating subscription to an irrational belief or set of beliefs? Daniel Warner suggests that civil rights legislation of the last half-century has reduced racial prejudice.[166] He notes, in particular, a correlation between adoption of Title VII of the Civil Rights Act of 1964,[167] prohibiting race and gender discrimination in employment, and increased racial tolerance as reflected in employment statistics.[168] He cites public opinion polls to bolster the inference that this progress is not explainable solely in terms of grudging compliance with the law, but that it actually indicates a gradual erosion of irrational racist beliefs.[169]

Bare correlation, of course, does not prove a causal link between enactment of a law and a shift in people's beliefs. Moreover, it is not difficult to think of cases in which this correlation does not hold.[170] Warner himself focuses on the persistence of a special class of racist beliefs relevant to housing following adoption of the Fair Housing Act.[171] Such counterexamples call for a causal story more sophisticated than the public's being so impressed by legislators' intelligence that legislators need only speak and the public will adopt their beliefs as their own. Warner begins such an account by noting the weak enforcement of equal housing laws.[172] On his view, vigorous enforcement is a crucial element of the law's capacity to affect people's beliefs: "People will tend to feel the law is reasonable if it conforms more or less to the way they think things ought to be. One . . . of the [perceived] marks of how 'things ought to be' is whether there are, or are not, sanctions coercing people to make things that way."[173] In other words, legislators enact a law implying a particular belief and then encourage assimilation of that belief through strategic distribution of incentives and disincentives.[174] Though Warner no doubt overstates the role of civil rights laws in reducing racial prejudice to the extent that society at large distributes arguably more subtle and potent rewards and punishments (to which legislators themselves respond), his theory is at least intuitively plausible.

166. Warner, *supra* note 23, at 223–28.
167. 42 U.S.C. § 2000e (2006).
168. Warner, *supra* note 23, at 226–27.
169. *See id.* at 224–26.
170. An example Warner does not discuss, the persistence or perhaps exacerbation of racial prejudice following ratification of the Civil War Amendments, stands out.
171. Warner, *supra* note 23, at 227–28.
172. *Id.* at 228–31.
173. *Id.* at 230–31 (citation omitted).
174. Whether employing these rather rough means of persuasion is the sort of thing that government ought to do is a question to which I return in Part II.B.3, *infra*.

Even assuming that the law can alter some beliefs, though, it is not clear that all irrational beliefs are equally susceptible to legislative tinkering. Though Warner's strategy of looking at the effect of civil rights laws on racist beliefs is fairly compelling—because such beliefs, where held, tend to be deeply held—there is good reason to think that some of the beliefs addressed by stigma statutes can be as deep as beliefs come. Consider stigmas associated with disease and death at a property. It makes sense from an evolutionary perspective that people should be fearful, at some level, of places where others have recently died or become ill.[175] (To suggest that fear "makes sense" in this context is not, of course, to imply that it is always *rational*.[176]) Though racist beliefs may die hard, it is fair to suppose that beliefs rooted in survival instincts reinforced over millions of years of evolution die even harder. From a cultural perspective, as well, reverence and even fear of places associated with death make sense. A recent decision in Maryland,[177] which has a broad stigma statute in place,[178] illustrates this point nicely. Developers, coming across a small, abandoned eighteenth-century cemetery on what was to be a residential lot, solved their problem by removing the twenty headstones and keeping quiet. When the buyers learned of the desecrated cemetery thirteen years later, they sued for damages.[179] Though the alleged defect affected the physical condition of the property (so the state's stigma statute did not apply), the Court of Special Appeals gave substantial attention to the question of whether or not the presence of a centuries-old desecrated cemetery constituted a material defect.[180] The court noted that, after all, probably most real property today contains human remains.[181] With faint echoes of *Reed v. King*,[182] however, the court held that, along with potentially foreclosing certain uses of the land (for example, building a swimming pool), the "cultural significance"[183]

175. *See* Valerie A. Curtis, *Dirt, Disgust and Disease: A Natural History of Hygiene*, 61 J. EPIDEMIOLOGY & COMMUNITY HEALTH 660, 661–62 (2007) (arguing that an evolved sense of "disgust," manifest in avoidance of "dead bodies" and those "exhibiting signs of sickness," motivates hygienic behavior).

176. *See id.* at 664 (noting that while disgust is generally salutary, it can "mislead": Disgust associated with HIV/AIDS has given rise to attempts to quarantine its victims, a practice which, as Curtis mildly points out, is "not a good response").

177. Rhee v. Highland Dev. Corp., 958 A.2d 385 (Md. Ct. Spec. App. 2008).

178. MD. CODE ANN., REAL PROP. § 2-120 (LexisNexis 2003) (protecting nondisclosure of an owner or occupant's HIV/AIDS status or the fact that "[a] homicide, suicide, accidental death, natural death, or felony occurred on the property").

179. *Rhee*, 958 A.2d at 388–89.

180. *Id.* at 400–01.

181. *Id.* at 399.

182. Reed v. King, 193 Cal. Rptr. 130, 133 (Ct. App. 1983) (noting the "highly unusual" potential of a history of murder to disturb buyers).

183. *Rhee*, 958 A.2d at 399.

of a cemetery created a stigma reducing the owners' enjoyment of the land.[184] The court seemed to appreciate that, though irrational, certain beliefs are not likely to be altered by legislative or judicial declarations.

Finally, in the absence of negative feedback from society more generally, the tendency of misperception to reinforce irrational beliefs might negate any effect that stigma statutes would otherwise have.[185] While broad and intensive efforts to educate people about the means by which HIV/AIDS is actually transmitted[186] have had some effect,[187] it is likely that people worried about a stigma like a home's reputation for being "haunted" will only discuss their ghostly problems with fellow believers, more or less ensuring that their theories about the causes of bumps in the night will go unchecked.

3. Should the Law Be Designed to Promote Rationality?

If it is assumed that the law can be designed to promote rationality in a relatively uncomplicated manner, the claim that it should be so designed is uncontroversial. Arguing in the utilitarian tradition, Warner suggests that promoting rationality is a means of promoting psychological health.[188] He argues that by not requiring disclosure of reputed hauntings and "bad karma" associated with homicides and other crimes committed at a property, we discourage irrational belief in hauntings and bad karma. The benefits of doing so are obvious, Warner argues, when we look at the sort of people who harbor such beliefs:

> People who believe in ghosts and bad karma, superstitious people, demonstrate the following characteristics more often than non-superstitious people do: lower college grade-point averages, greater alienation and anomie (inability to "fit in"), greater intensionality (confusion of verbal

184. *Id.* at 401. As an aside, is it puzzling that a psychological stigma should be held to support the materiality of a physical defect in a jurisdiction where psychological stigmas *alone* generally are not material? A handful of centuries-old skeletons don't possess any physical properties that make squeamishness in their presence any more rational or worthy of compensation than fear of imagined ghosts.

185. Consider the story of a family from my hometown. Just months after a church figure visited their home to bless the house and take care of a "malicious ghost," one of the boys was mildly injured after falling from the roof. *Or was he pushed?* When it was discovered that the priest had neglected to bless the roof, fingers were pointed at the ghost.

186. *See* AVERT, Introduction to HIV and AIDS Education, http://www.avert.org/aids-hiv-education.htm (last visited Sept. 16, 2010).

187. *See, e.g.*, Gregory M. Herek, John P. Capitanio & Keith F. Widaman, *HIV-Related Stigma and Knowledge in the United States: Prevalence and Trends, 1991–1999*, 92 AM. J. PUB. HEALTH 371, 375 (2002). Though the authors note the troubling persistence of misunderstanding about the transmission of HIV, they found significantly decreased support for quarantine of persons with AIDS in 1999 as compared with 1991.

188. Warner, *supra* note 23, at 209.

> statements with objective reality), and higher scores on measures of schiztypy. In sum, "superstitious belief appears associated with less effective personality functioning."[189]

Setting aside for the moment the significant likelihood that superstitious belief is a symptom rather than the source of many of these problems, if eradicating such beliefs is as simple as enacting and diligently enforcing the right sort of law, we would have every reason to do so. It would be both charitable to the extent that it would improve the lives of those currently plagued by such beliefs and in our own interest to the extent that living in a community full of alienated, irrational people might be dangerous.[190]

The problem for this argument is that using the law to correct irrational beliefs might carry significant costs. In the previous Subpart, I argued that using the law to alter people's beliefs is, at the very least, not a frictionless process. In the context of stigma statutes, there are numerous accounts of frustrated would-be plaintiffs who, far from reflecting on whether or not their misgivings about living in a home in which someone has been murdered have any basis in reason, express a sense of having been betrayed or neglected by the law.[191] If these people are not prompted to reevaluate their beliefs, the harm they suffer appears gratuitous. (Gratuitous, of course, considered only from the perspective of one focused on the psychological well-being of the irrational believer: We may well decide that mitigating *harm to others* justifies ignoring buyers' irrational beliefs regardless of whether or not doing so will make anyone more rational.[192] This is a separate, competing rationale, and I return to it below.[193])

This is a complicated sort of harm. Some might argue that it is not the sort of harm that should give us any worry. Disregarding a person's objectively rational interest in having a roof over her head is one thing, it might be argued, but disregarding a person's irrational interest in living in a house free of a reputation for being haunted is quite another. This point does not, however, diminish a "second-order" interest in not having one's sincerely held beliefs discounted for no other reason than a misguided hope that doing so will cause one to abandon them. Attempts to persuade and educate in such a situation are blameless, even noble, but there is something arguably sinister about attempts

189. *Id.* at 219–20 (footnote omitted).

190. *Id.* at 221–22 (citing the Salem witchcraft trials as an extreme illustration of the point that "irrational people and hard times are a dangerous mixture").

191. *See, e.g.*, Hudak, *supra* note 2.

192. It is certainly true that harm to an irrational believer does not mean that lawmakers should always or even often indulge irrational beliefs: The fact that racists sincerely lament the adoption of civil rights legislation obviously does not mean that we should apologize and reinstitute legal segregation.

193. *See infra* Part II.C.

to improve basically intelligent adults by discounting their sincerely held beliefs, foolish and irrational or otherwise.

In a somewhat peculiar passage, Warner presents a hypothetical choice "between two groups of people to colonize a new territory or to serve as good citizens in a participatory democracy."[194] One group "tends to be relatively less intelligent, less well-adjusted, less able to sort out fact from fantasy, less capable of critical thinking, and more gullible," while the other "is more intelligent, better adjusted, has a better self-image, is better able to engage in critical thinking, and so on."[195] While Warner's talk about "leaving [the first] group behind"[196] is reasonable enough under the unusual hypothetical circumstances he describes, its real-world implications are troubling. If, as I have suggested, stigma statutes cannot be expected to have any impact upon irrational beliefs in some cases,[197] a portion of the community is "left behind" on this approach. An approach accounting for and weighing the interests of both buyers *and* sellers avoids this result in an important (if subtle) respect: Irrational buyers' membership in the community is not held to be less valuable than that of anyone else. Rather, some of their interests are held to be less important than those of others. To recognize that this aspect of the dispute is not much more than rhetoric is not, of course, to say that it is unimportant.[198]

4. Are Concerns About All Protected Stigmas Irrational?

This Subpart has focused so far on problems that the argument for combating irrationality faces with respect to clearly irrational worries about stigmas like reputed hauntings, homicides, and the HIV/AIDS status of former occupants. Given the extremely broad scope of some statutes, though, it is not clear that even if the argument justifies protecting nondisclosure of these stigmas, it necessarily justifies protecting nondisclosure of all covered stigmas. To get at this point, it is helpful to clarify what we mean by the term irrational. Worries about contracting HIV/AIDS from living in a home previously occupied by someone so afflicted are irrational because it is established that the potentiality addressed by such worries will not materialize. Worries about, say, the return of a fugitive rapist who attacked a previous occupant on the

194. Warner, *supra* note 23, at 222.
195. *Id.*
196. *Id.*
197. *See supra* Part II.B.2.
198. *Cf.* Rose, *supra* note 22, at 610 ("And for this reason—for the sake of the different social didactics, the different modes of conversation and interaction implicit in the two rhetorical styles—we debate endlessly the respective merits of crystals and mud.").

premises[199] are irrational, if at all, not in the sense that we have scientific certainty that this will not happen, but in the sense that the risk is perhaps so minimal that it should be mooted by other considerations. Is there a relevant distinction between these cases—that is, between irrationality manifest as superstition and irrationality manifest as what might be regarded as a lack of perspective? In the latter case only, the court or legislature must carry out an analysis that incorporates both subjective valuation of the potential (but unlikely) harm and a counterweight such as sympathy for the seller or concern for the seller's privacy.[200]

As discussed earlier, state legislatures have recently begun to recognize the necessity of this sort of balancing with respect to certain stigmas.[201] Nevada's recently enacted exception to the clause in its stigma statute protecting nondisclosure of "other felonies," which removes protection for nondisclosure of a home's use as a meth lab under certain circumstances,[202] represents an instance in which the risk to buyers has been judged to outweigh competing interests favoring protection for nondisclosure. It is worth noting, however, that even when the risk of harm associated with a particular stigma is not so great as to outweigh competing interests, it does not necessarily follow that a buyer is irrational if she exhibits bare concern about the stigma.[203] The law may be just *in spite of* its discounting such concern, but it would be bizarre to suggest that it is just *by virtue of* its discounting such concern.

C. Declining to Compound Sellers' Misfortunes to Indulge Buyers' Superstitions: A Balancing Approach

In each of the two preceding Subparts, I suggest that, though generally irrational, people's concerns about nonphysical stigmas ought to carry some weight. The problem with the efficiency and rationality arguments is not that these are not important social interests worth promoting, but that they preclude any consideration of buyers' interest in knowing that a home is one in which they will be comfortable living. All the same, the inefficiency and irrationality of indulging buyers' every concern suggests that such interest should not carry *much* weight. This Subpart is an attempt to sketch a justification for

199. *Cf.* Van Camp v. Bradford, 623 N.E.2d 731 (Ohio Ct. Com. Pl. 1993) (addressing the nondisclosure of rape in a home and a neighboring home).

200. *See infra* Part II.C.

201. *See supra* Part I.B.1.

202. NEV. REV. STAT. § 40.770 (LexisNexis 2006).

203. She may, of course, be irrational to the extent that she expects the law to protect her interest at the expense of some more substantial interest, but this is a wholly separate instance of irrationality.

stigma statutes driven by consideration of a significant counterweight: sympathy for sellers of stigmatized property. This balancing approach has two major advantages over the one-sided efficiency and rationality arguments. First, though it does not pander to buyers haunted by irrational worries, it does not write them off entirely. Second, it is more conducive to treating psychological stigmas as a heterogeneous group and making exceptions for those few that indicate perhaps slight, but real danger to buyers.

1. Sellers' Interests

On February 5, 2006, police officer Michael Mount entered the home of Joe and Serena Gomez and shot and killed the couple, along with his estranged wife, before killing himself.[204] Months later, Serena Gomez's mother, who was also in the home at the time of the shooting, sold the Florida property without disclosing the tragedy.[205] When the buyers learned of the homicides, and their story ended up in a local newspaper,[206] the seller's explanation was simple: "I'm trying to raise a little boy who lost both his parents. . . . I just wanted the house gone."[207] Survivors of various types of stigmatizing events find themselves in a similar position: From the death of a loved one from AIDS, a suicide, or even natural death, to sexual assault or some other crime, the impulse to quickly dispose of the property and move on is understandable. And yet we may wonder whether this impulse is any more rational than that of a buyer to shun the property or to pay substantially less than she otherwise would. It seems certain that a seller's concern to move on under such circumstances is at least more universal than buyers' qualms about living in the home. While this does not answer the question, it provides a clear basis for a policy decision to spare the seller the burden of disclosure.[208] This is the difference between glibly telling irrational buyers that their interests are irrelevant and more gently insisting that their interests are outweighed by those of sellers.

However, a seller's interest in not having to disclose a stigmatizing event goes beyond an understandable desire to walk away from a property at which she has suffered some calamity. Many stigmas involve extremely personal

204. Hudak, *supra* note 2.

205. Nondisclosure in this situation is protected under FLA. STAT. ANN. § 689.25 (West Supp. 2010).

206. Hudak, *supra* note 2.

207. *Id.*

208. *Cf.* Brown, *supra* note 15, at 645 (describing how states that have adopted nondisclosure statutes endorse the policy of protecting "sellers' privacy and economic interests from the adverse effects of psychological taints" because the only viable alternative is state compensation to sellers for the loss in value that disclosure would cause).

experiences that sellers would prefer (and that we generally think they should be entitled) to keep private. The most obvious example is someone's HIV/AIDS status.[209] While information about other stigmas, such as a sexual assault or the suicide of a loved one, is perhaps less sensitive, buyers' irrational concerns about these sorts of events should not tip the scales in favor of requiring disclosure. Again, we can reach what is intuitively the correct result without dismissing buyers' concerns out of hand. Indeed, we do more than pay lip service to these concerns when we recognize that sellers' privacy interests carry less weight and that the scales are considerably more balanced when sellers have been complicit in or perhaps culpably blind to stigmatizing events such as a property's use as a meth lab.[210]

An obvious objection to this line of argument is that not all sellers of stigmatized property are personally affected by stigmatizing events, either because they bought the property from the affected party or leased the property to the affected party. In the case of a seller who has purchased from a party directly affected by the stigmatizing events, this objection is overcome easily enough by pointing out that permitting nondisclosure of the stigma in the first sale but not the second would unfairly penalize the second seller, and so on down the line. Moreover, if such a penalty existed, it is possible that savvy buyers (that is, those more concerned about resale value than the prospect of living in a stigmatized home) would go to greater lengths than they do now to uncover stigmas affecting properties in which they are interested.[211] This argument does not work in the case of a landlord whose tenant is the primary victim of a stigmatizing event,[212] but an alternative is available. Just as those states that have enacted statutes protecting only brokers have emphasized that brokers are often not in a position to discover a stigma affecting a property,[213] a landlord is often not privy to, and indeed in many instances should not be privy to, information regarding possible stigmatizing events.

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209. It is not an accident that this was the first stigma nondisclosure protected by statute. *See* CAL. CIV. CODE § 1710.2 (West 2009). Nor is it surprising that it is one of the most commonly protected stigmas: Among those states that have stigma statutes, only New Hampshire does not explicitly protect nondisclosure of HIV/AIDS status. N.H. REV. STAT. ANN. § 477:4-e (2001).

210. *See supra* Part I.B.1. Of course, not every seller whose property has been used as a meth lab, even during her tenure as owner, is a criminal or otherwise blameworthy. Many homes used as meth labs are rentals. *See, e.g.*, Donna Hales, *Meth Lab Found, Renter Sought*, MUSKOGEE PHOENIX, Nov. 17, 2009, *available at* http://muskogeephoenix.com/local/x546268966/Meth-lab-found-renter-sought.

211. *Cf.* Brown, *supra* note 15, at 647 (speculating on related grounds about the potential for an "underground" industry to investigate possible stigmas in anticipation of the purchase of a property).

212. *See, e.g.*, Van Camp v. Bradford, 623 N.E.2d 731, 734 (Ohio Ct. Com. Pl. 1993) (describing the alleged defect arising from the fact that "a renter's daughter was raped at knifepoint in the residence owned by defendant").

213. *See supra* note 131 and accompanying text.

2. Making Sense of the Exceptions

The efficiency and rationality arguments offer little explanation of why exceptions to the sweeping protection many stigma statutes offer have begun to emerge and no suggestions to guide or limit additional exceptions. On a balancing approach, these exceptions represent a straightforward recognition of the fact that some psychological stigmas may indicate a risk of something more than mere psychic harm to the buyer. With respect to the manufacture of methamphetamine at a property that has been neither professionally remediated nor officially declared safe,[214] for example, nondisclosure may be material to the extent that such activity is likely to prompt a reasonable buyer to incur nontrivial costs in having the property inspected once she learns of the stigma.[215] Whether or not the seller is responsible for the stigmatizing event,[216] the risk of harm and expense to the buyer might well be judged to weigh against protecting nondisclosure. Other stigmatizing events, such as a rape on the premises by a fugitive serial rapist,[217] give rise to similar considerations: Though the seller might reasonably want to unload the property quickly and maintain her privacy, a substantial risk of physical harm to the buyer might outweigh these interests.

III. PROPOSAL

In this final Part, I sketch the features of a stigma statute shaped by the balancing approach endorsed above.[218] The three Subparts address the questions of which stigmas should be covered, how parties should be required to pose and respond to inquiries concerning specific stigmas, and who should be protected.

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214. NEV. REV. STAT. ANN. §§ 40.770(6)(a)–(b) (LexisNexis Supp. 2006).

215. Home drug testing costs can run to hundreds of dollars. *See* Tessa Schweigert, *Boise Home Inspector Now Can Test Homes for Drug Residues*, IDAHO STATESMAN, July 4, 2007, *available at* http://idaho.realestaterama.com/2007/07/13/boise-home-inspector-now-can-test-houses-for-drug-residues-2-ID07.html.

216. *See supra* notes 208–210 and accompanying text.

217. *Cf. Van Camp*, 623 N.E.2d 731 (discussing rape in plaintiff's home before she purchased the property, as well as in several neighboring homes before and after she purchased the property). Stigmas of this sort, in which a property has a history or some intangible feature that makes its occupants likely victims, are distinguishable from cases in which an off-site condition creates a threat or nuisance. *See, e.g.*, Alexander v. McKnight, 9 Cal. Rptr. 2d 453 (Ct. App. 1992) (involving obnoxious neighbors); Strawn v. Canuso, 638 A.2d 141 (N.J. Super. Ct. App. Div. 1994) (involving an undisclosed landfill in the neighborhood).

218. *See supra* Part II.C.

A. Scope of Protection: The Argument for a Flexible Standard

The aim of this Subpart is to define the parameters of a broad, but not sweeping class of protected stigmas. Sweeping language protecting nondisclosure of "[f]acts or suspicions regarding circumstances occurring on a parcel of property which could psychologically impact or stigmatize such property,"[219] for example, obviously captures every stigma nondisclosure worthy of protection, but it also captures nonphysical defects that might actually pose a risk of physical harm to a buyer. By expressly withholding protection from the general class of nonphysical characteristics of a property that *plausibly indicates a continuing risk of direct physical harm to occupants*, legislators might tighten the applicability of these statutes without making them underinclusive. The bulk of this Subpart is dedicated to developing the argument that a broad formulation incorporating muddying language of this sort would capture just those stigmas that the balancing approach endorsed in Part II.C suggests are worthy of protection. I close this Subpart with the tentative suggestion that such a formulation would have the collateral benefit of mitigating the alienation of irrational buyers.

The greatest risk associated with a muddying limitation of the sort mentioned above is that the exceptions it engenders will swallow the rule. The first step in neutralizing this objection is to point out that some of the limiting aspects of present hard-edged rules necessarily withhold protection from sellers for whom nondisclosure of certain stigmas is justified. Statutes withholding protection for nondisclosure of a stigma for a period of *x* years following the stigmatizing event, for example, treat time as a proxy for a continuing risk of physical harm.[220] But what if the danger is eliminated after *x–1* years? This lack of precision in hard-edged statutes is a familiar problem. Muddier standards, where otherwise appropriate, can be a solution.[221]

Would limiting protection to nondisclosure of stigmas that do not plausibly indicate a continuing risk of direct physical harm to an occupant actually provide sufficient guidance to courts? Or, given courts' historical tendency to sympathize with buyers,[222] would such a flexible standard invite a return to the buyer-friendly doctrines that legislatures enacting stigma statutes in the 1980s and '90s intended to resist? To the extent that there is genuine reason to worry that courts might get the *easy* cases wrong, a hybrid crystal-and-mud

219. COLO. REV. STAT. § 38-35.5-101(1) (2009).
220. *See, e.g.*, CAL. CIV. CODE § 1710.2(a) (West 2009) (discussed in *supra* Part I.B.3).
221. *See supra* Part II.B.
222. *See, e.g.*, Reed v. King, 193 Cal. Rptr. 130, 133 (Ct. App. 1983); Stambovsky v. Ackley, 572 N.Y.S.2d 672, 674 (App. Div. 1991).

statute could explicitly address the easy cases while maintaining some flexibility with respect to hard cases. The class of stigmas that do not plausibly indicate a continuing risk of direct physical harm to the occupant might be defined as "including, but not limited to" a reputation for being haunted, a previous occupant's natural death or suicide, the HIV/AIDS status of a previous occupant, and so forth. Such a list resembles, but does not precisely mirror, the lists included in the sweeping formulations found in many current stigma statutes.[223]

Violent crimes and drug crimes generally present harder cases, but the standard suggested above provides adequate guidance while allowing flexibility. With respect to violent crimes, the presence of a continuing risk of direct physical harm to an occupant is a crucial distinction between a case like *Reed v. King*,[224] in which the house at issue was the site of a murder ten years prior to the contested sale,[225] and *Van Camp v. Bradford*,[226] in which a fugitive rapist had preyed on occupants of the home at issue and others in the neighborhood several times within the last year.[227] The suggested standard is amenable to factors, including whether or not there were preexisting relationships between the criminal and her victims,[228] whether or not the criminal has been apprehended,[229] and the likely significance of location to potential copycats,[230] which may provide a framework for predictable analysis. Drug crimes, too, may fall on either side of such a standard. A crime such as simple possession would almost certainly not present a continuing risk to occupants, while drug

223. *See, e.g.*, COLO. REV. STAT. § 38-35.5-101 (2009) (providing a nonexhaustive definition of "[f]acts or suspicions regarding circumstances occurring on a parcel of property which could psychologically impact or stigmatize such property," including the fact that a prior occupant was infected with HIV/AIDS and the fact "[t]hat the property was the site of a homicide or other felony or of a suicide").

224. 193 Cal. Rptr. 130.

225. Though the *Reed* court found for the buyer, it is important to remember that the court focused on the buyer's psychic discomfort stemming from her knowledge that the murders *had taken place* in the home rather than (obviously unfounded) fear that *she* would meet a similar fate. *Id.* at 133.

226. 623 N.E.2d 731, 734 (Ohio Ct. Com. Pl. 1993).

227. *Id.* at 734.

228. Consider *Spinelli v. Bair*, No. 1999CA00399, 2000 WL 34335853 (Ohio Ct. App. July 3, 2000), in which prior occupants of the home at issue had allegedly sexually abused their own children on the premises. A court might distinguish between such a case, in which the relationship between the criminal and her victim makes the latter particularly vulnerable, and one in which the attacker and victim are strangers.

229. In finding for the plaintiff, the court in *Van Camp* emphasized the fugitive status of the rapist who had targeted the house at issue. 623 N.E.2d at 734.

230. The site of a one-off murder like that in *Reed* is unlikely to attract copycats, but, to take an extreme example, occupants of a home that was the site of a murder by Charles Manson's followers might have greater cause for apprehension. *See* Ruth Ryon, *The Big, the Bad and the Lovely: Some Houses Have to Live Down Their Notorious Pasts; Others Are Infamous for Size and Price*, L.A. TIMES, Aug. 13, 2000, at 1 (describing the unique stigma attached to a house at which Manson's followers murdered five people).

manufacture or trafficking might very well present such a risk. Again, courts could look to factors including the likelihood of accompanying physical defects (as legislators have done in withholding protection for nondisclosure of the fact that a property has been used as a meth lab[231]), the likelihood of customers or confederates returning to the property, and perhaps the seller's fault in creating the stigma.

Whether or not this standard yields satisfactory results in litigated cases, though, it might be criticized on the grounds that it creates uncertainty for sellers and other potential litigants. To the extent that the easy cases may be covered explicitly in the statutory text, the objection primarily concerns the harder cases. Though this issue is treated more fully above,[232] two points bear repeating. First, many brokers are reluctant to encourage sellers to exercise their full nondisclosure rights under current, hard-edged statutes. Though a more flexible standard would not make brokers (whose efforts to maintain reputations for fair dealing generally go beyond merely avoiding liability[233]) more aggressive on this front, neither would it be likely to make them more conservative. After all, the muddy standards established by *Reed v. King* and *Van Camp v. Bradford* did not set off an explosion of stigmatized property litigation. No stigmatized property cases citing *Reed* were decided in California between the date of the decision and the passage of California's stigma statute,[234] and plaintiffs have been unsuccessful in each of the two[235] stigmatized property cases citing *Van Camp* in Ohio. Second, hard-edged rules may break down in extreme cases, whether through judges' openness to formalistic routes around the rule or through legislative action. Writing stigma statutes that express a clear and coherent purpose will constrain and guide judges and legislators in such situations: By engineering joints that flex rather than rupture, we ensure greater stability.

Finally, a standard such as this one grounds legal disputes in the concrete stakes for the parties involved. It requires courts to thoughtfully address the question of whether a stigmatizing event presents any real risk to the buyer and, if so, whether this risk is greater than the harm that requiring disclosure does to the seller. Avoiding the tempting shortcut of formalistic analysis of

231. *See* NEV. REV. STAT. ANN. § 40.770(6) (LexisNexis 2006).
232. *See supra* Part II.A.
233. *See supra* note 143 and accompanying text.
234. As indicated by a check of the citing references listed for *Reed* on Westlaw.
235. Archer v. Amick, No. CV 2002-01-0087, 2003 WL 25681712 (Ohio Ct. Com. Pl. Oct. 31, 2003); Spinelli v. Bair, No. 1999CA00399, 2000 WL 34335853 (Ohio Ct. App. July 3, 2000).

whether or not a stigma constitutes a purely nonphysical defect, such a standard reflects an intellectual openness essential to a cohesive community.[236]

B. Formal Inquiries

Neither the efficiency argument nor the rationality argument provides very sturdy support for mandating disclosure or removing protection for nondisclosure when a prospective buyer asks the right sort of question about a stigma.[237] On a balancing approach, however, a formal process by which buyers might specifically inquire about stigmas that concern them makes some sense. Though inquiries regarding certain stigmas (occupancy by someone afflicted by HIV/AIDS, for instance) can and should be excluded by statute, and current statutes permitting sellers to answer with silence are a sensible alternative to forcing reticent sellers to simply call off a deal upon receipt of an indelicate inquiry, it is reasonable to provide potential buyers who are unusually sensitive to a particular stigma a means by which to secure peace of mind. First, heightened sensitivity to a particular stigma may be due to something more than mere touchiness. The buyer in *Van Camp*, for example, was particularly bothered by the fact that a fugitive rapist had targeted the property because she was living with her young daughters.[238] Second, so long as a relatively small number of prospective buyers inquire about a given stigma, silence or disclosure need not be particularly burdensome to sellers. Though some buyers will understandably be put off by the fact that such information is restricted to those who utter the magic words,[239] using a buyer's initiative in inquiring about a particular stigma as an objective indication of how much it might bother her is a legitimate measure to protect sympathetic sellers.

C. A Bigger Umbrella: Protected Parties

Though it nearly goes without saying on the balancing approach sketched above, stigma statutes should offer protection to both sellers and their agents. Statutes restricting explicit protection to brokers[240] and (in some cases) other agents[241] give no consideration to the plight of sympathetic sellers. Though the goal of protecting sellers supplies a straightforward argument in favor of

236. *Cf.* Rose, *supra* note 22, at 610 (describing the rhetorical significance of crystal and mud rules in the context of "lapses of community").

237. See *supra* Part I.B.2 for further analysis of existing "direct inquiry" clauses.

238. Van Camp v. Bradford, 623 N.E.2d 731 (Ohio Ct. Com. Pl. 1993).

239. *See* Brown, *supra* note 15, at 648.

240. *See, e.g.*, COLO. REV. STAT. § 38-35.5-101 (2009).

241. *See, e.g.*, OKLA. STAT. tit. 59, § 858-513 (2001).

protecting their agents, as well—namely, that sellers of stigmatized properties would otherwise have to choose between employing an agent who is likely to disclose the stigma and forgoing the advantages associated with hiring an agent—there remains the issue of whether agents ought to receive broader protection than sellers. Current agent-only statutes recognize that it may be extremely difficult for agents to uncover nonphysical defects when sellers are less than forthcoming.[242] Though it should supplement the latter, there is no reason that the balancing approach should crowd out this agent-only rationale. A seller might, for instance, fail to disclose to a buyer that her house has been used as a meth lab *and* conceal this fact from her agent. The balancing approach will likely dictate that the seller be held liable, but insulating agents from liability for failing to uncover this stigma is a reasonable option.

CONCLUSION

The arguments in favor of traditionally sweeping stigma statutes are founded on the assumption that the buyers' concerns about nonphysical stigmas must be discounted in the name of either efficiency or buyers' edification. Courts and legislators have recently begun to express discomfort with these approaches, and this Comment attempts to synthesize scattered grumblings into sustained critiques. The efficiency argument is defective to the extent that it both overestimates the efficacy of hard-edged rules and underestimates the efficacy of muddier rules. Exceptions recently carved out of sweeping stigma statutes demonstrate that the predictive value of hard-edged rules is diminished in extreme cases, while brokers, as repeat players with reputations on the line, are reluctant to press the boundaries of hard-edged statutes anyway. On the other hand, jurisdictions with muddier standards in place have not seen an excessive amount of litigation in this area. The argument that discounting irrational worries is necessary in order to eliminate irrationality is vulnerable to the extent that the causal link between legislation and popular belief, though generally shaky, is particularly dubious with respect to the extremely basic beliefs at issue in stigmatized property cases. Moreover, it ignores the fact that some stigmas reflect an actual risk of physical harm to occupants.

These approaches, though flawed, nonetheless indicate that buyers' concerns about psychological stigmas should not count for much. I have argued that we therefore risk very little in adopting a rule that weighs the buyer's risk against harm to the seller. In fact, we stand to gain quite a lot.

242. *See supra* note 131 and accompanying text.

Sellers would not be liable for nondisclosure of a broad class of stigmas, but judges would have flexibility and guidance in extreme cases. The price of this flexibility—a commitment to explaining results without recourse to formal categories that obscure concrete issues—is no burden in an honest and open society.