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Warner: Caveat Spiritus: A Jurisprudential Reflection Upon the Law of Hau

# CAVEAT SPIRITUS: A JURISPRUDENTIAL REFLECTION UPON THE LAW OF HAUNTED HOUSES AND GHOSTS

DANIEL M. WARNER\*

*From ghoulies and ghosties and long-leggety beasties  
And things that go bump in the night,  
Good Lord, deliver us.  
Cornish Prayer*

## I. INTRODUCTION

A decade ago, a California state court gave judicial countenance to the concept that real estate burdened by a bloody past (the site of a multiple murder) might be "psychologically impacted," i.e., that its value might diminish due to non-physical, non-scientific—even irrational—perceptions by the buyer that the property was "tainted." This court held that failure to disclose such a past could be misrepresentation.<sup>1</sup> It thereby recognized "karmic-based"<sup>2</sup> real estate evaluation. More recently, in 1991, the New York Supreme Court, Appellate Division, found in a vendee's favor that his Nyack, New York, house was

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1. Reed v. King, 193 Cal. Rptr. 130, 131 (Cal. Ct. App. 1983).

2. "Psychologically impacted property" is the term used in several state statutes to describe property that has been the site of some distressing event, such as a murder, suicide, or death of a person from AIDS; see, e.g., OKLA. STAT. ANN. 59, §§ 858-513 (West 1992). "Psychologically impacted real estate" is a poorly worded description. The property is not "impacted" by anything; the purchaser's psychological repose is *affected* by a perception that the property is somehow "tainted" by the previous owner's actions. "Karmic-based" real estate is the author's own term, used to describe this taint; "karma" is defined as "the force generated by a person's actions, held in Hinduism and Buddhism to perpetuate transmigration and in its ethical consequences to determine his destiny in his next existence." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 462 (7th ed. 1967).

haunted, and that he was entitled to rescission.<sup>3</sup> Over the last ten years a number of states have responded to these rulings. They have brought the hoary doctrine of *caveat emptor*—buyer beware—back from the edge of its grave and visited it upon the buyer of such real estate; they have adopted legislation cutting off remedies for vendees claiming to be injured by non-disclosure that the property was the site of a murder, felony, or suicide, or, in some cases, that it was the abode of a person who had or died from AIDS.<sup>4</sup> Commentators have criticized such legislation as unfair to the vendee.<sup>5</sup> However, this Article argues that such legislation is good law, and suggests that karmic-based real estate evaluation and judicial recognition of haunted houses is bad law that harms society. At issue is a fundamental question involving the role of law in the improvement of society.

Part II of this Article examines the nature of "good law." It argues, citing philosophers and legal scholars, that law should promote the kind of mindset that encourages independent, well-adjusted citizens. It offers a psychological and sociological analysis of "bad law adherents," people who tend to believe in ghosts and hobgoblins, and shows why this kind of mindset is harmful to society. It considers whether law can affect people's beliefs regarding the irrational, and what factors influence such beliefs. Part III reviews the two irrationally based common-law cases noted earlier. Part IV discusses the legislative response to these cases. Part V puts forth arguments for and against the legislation. In Part VI, this Article then applies "good law" theory to psychologically impacted real estate. Finally, this Article concludes that legislation eschewing karmic-based evaluation is good and that courts and legislatures should be encouraged, when appropriate, to make realistic, scientifically based law.

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3. *Stamovsky v. Ackley*, 572 N.Y.S.2d 672 (N.Y. App. Div. 1991).

4. Generally, these statutes declare that no cause of action arises against a vendor for failure to disclose that the real estate was the site of a murder or suicide or some occurrence that has no effect on the physical condition of the property (including that the previous occupant had AIDS). CAL. BUS. & PROF. CODE § 1710.2 (West 1992) (effective 9-10-87); COLO. REV. STAT. ANN. § 35.5 (1990 and Supp. 1992) (effective 7-1-91); CONN. GEN. STAT. §§ 20-329cc-ff (1989 & Supp. 1992) (effective 1-1-90); D.C. CODE ANN. § 45-1921 (1990) (effective 3-6-91); GA. CODE ANN. § 44-1-16 (Michie 1991) (effective 7-1-89); ILL. REV. STAT. ch. 225 para. 445/31.1 (1992); LA. REV. STAT. ANN. § 37:1468 (West 1992) (effective 1-1-91); MD BUS. OCC. & PROF. CODE ANN. § 16-322 and REAL PROP. CODE ANN. § 2-120 (1992) (effective 7-1-91); MO. ANN. STAT. § 10.1 (Vernon 1992) (effective 1-1-91); NEV. REV. STAT. § 40.565 (1991) (effective 1-1-91); N.C. GEN. STAT. § 39-50 (1992) (effective 1-1-89); OKLA. STAT. ANN. 59, § 858-513 (1992) (effective 1-1-89); OR. REV. STAT. § 93.275 (1991) (effective 1-1-89); R.I. GEN. LAWS § 5-20.5-23 (1991) (effective 1-1-89); S.C. CODE ANN. § 40-57-270 (Law. Co-op. 1992) (effective 1-1-90); TENN. CODE ANN. § 66-5-110 (1992) (effective 7-1-91); UTAH CODE ANN. § 57-1-37 (1993) (effective 1-1-91); WIS. STAT. ANN. § 452.23 (West 1992) (effective 1-1-89).

5. Sharlene A. McEvoy, *Stigmatized Property: What a Buyer Should Know*, 48 J. MO. B. ASS'N 57 (1992).

## II. WHAT IS "GOOD" LAW, AND CAN IT CHANGE PEOPLES' BELIEFS REGARDING THE IRRATIONAL?

### A. "Good" Law Tends to Better Society by Promoting Psychological Health

We want good laws. Generally, we presume—though certainly it is not always true—that the law will serve to make society better, that it will "be guided by the consideration of the effects of its decisions . . . on social welfare."<sup>6</sup> Law is generally defined as "a body of rules of action or conduct prescribed by controlling authority and having binding legal force."<sup>7</sup> More simply put, law is "a scheme for controlling the conduct of people . . . of social control."<sup>8</sup> Given these definitions, we hope our conduct is to be controlled on some rational basis that reflects and promotes societal values.<sup>9</sup> Certainly there are many positive social values we might wish the law to promote: non-discrimination in employment, clean air, safe airplanes, and so on. Included among the values we might fairly want the law to promote is a healthy citizenry, and the interest here is, in some degree, in psychological health.

The well-known German psychoanalyst Erich Fromm described psychological health as "characterized by the ability to love and to create, . . . by a sense of identity based on one's experience of self as the subject and agents of one's powers, by the grasp of reality inside and outside of ourselves, that is, by the development of objectivity and reason."<sup>10</sup>

A healthy society furthers these individual attributes:

[A healthy society] permits man to operate within manageable and observable dimensions, and to be an active and responsible participant in the life of society, as well as the master of his own life. It . . . stimulates the unfolding of reason and enables man to give expression to his inner needs in collective art and rituals.<sup>11</sup>

An unhealthy society is one that "creates mutual hostility, distrust, which transforms man into an instrument of use and exploitation for others, which deprives him of a sense of self, except inasmuch as he submits to others or

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6. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 5-6 (1990).

7. *BLACK'S LAW DICTIONARY*, 795 (5th ed. 1979).

8. H.E. WILLIS, *INTRODUCTION TO ANGLO-AMERICAN LAW* 10-11 (1931).

9. For example, as a society we disapprove of race-based discrimination and have laws that make it illegal. See *infra* notes 71-76 and accompanying text.

10. ERICH FROMM, *THE SANE SOCIETY* 69 (1955).

11. *Id.* at 276.

becomes an automaton."<sup>12</sup>

These are acceptable descriptions of a psychologically healthy person and a society that, if possible, the law should promote. Of course, it is true that all laws do not flow reasonably from basic, positive social values. The life of the law is not necessarily logic.<sup>13</sup> Rather, it is sometimes illogic and superstition.<sup>14</sup> And, when the body of the law moves toward promoting prejudice, irrationality, and superstition, then correctives are in order if, as here argued, laws promoting irrationality and superstition make bad law and contribute to a bad society.<sup>15</sup>

A law exonerating vendors from liability for failure to disclose a property's "psychological stigma" is only one law, a small part of a much larger whole. However, even one law plays an important role in setting the tone for public behavior and thus for social welfare. Every part contributes to the whole. To those skeptics who questioned whether we should, by personal action and by attentive development of our social systems, attempt to better the world, John Stuart Mill wrote:

All the grand sources . . . of human suffering are in a great degree, many of them almost entirely, conquerable by human care and effort; and though their removal is grievously slow—though a long succession of generations will perish in the breach before the conquest is completed, and this world becomes all that, if will and knowledge were not wanting, it might be made—yet every mind sufficiently intelligent and generous to bear a part, however small and inconspicuous, in the endeavor, will draw a noble enjoyment from the contest itself . . . .<sup>16</sup>

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12. *Id.* at 73.

13. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) [hereinafter HOLMES, *COMMON LAW*]. "The life of the law has not been logic, it has been experience." *Id.*

14. See, e.g., Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 724 (1990-91). The authors review the death penalty and conclude that it "has no effect on the prevalence of homicide"; that is, it is not a deterrent, and that it is much more expensive than long-term imprisonment. *Id.* at 724. And yet they observe it is very popular with politicians and with the public. See *infra* notes 47-69 and accompanying text. In short, the death penalty is an irrational law.

15. Pierce & Radelet contend that the death penalty is useless as an instrument of justice. Insofar as it is promoted by politicians "for the purpose of manipulating voters' attitudes and sentiment, [it] can only further deepen the public's cynicism and sense of malaise . . . . To suggest otherwise is to participate in a charade that prevents us from addressing the real problems facing our nation." Pierce & Radelet, *supra* note 14, at 727-28. Laws that prevent us from addressing the real problems facing our nations are bad laws.

16. John Stuart Mill, *Utilitarianism*, in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL*, 895, 907 (Edward A. Burt ed., 1939).

What will better the world? If good law can help, where should it come from, and what form should it take?

*B. Theories of Good Law: Natural Law, Legal Positivism, and Utilitarianism*

Clearly, much jurisprudential debate exists about whether "good law" is the law that most reflects the eternal truths (natural law), or whether "good law" is simply the law that is (legal positivism, which assigns small relevance to "good"), or whether "good law" is the law that is the most useful (utilitarianism).

To assert that a "good" law is one that promotes social welfare is to articulate a first principle. This also implicates natural law, so far as it posits an eternal truth. Looked at in this light, perhaps natural law deserves renewed respect. However, natural law has its problems. Strict legal naturalists, of theological bent, would have no trouble defining good law. They would hold that the laws of God are necessarily "good," that they are superior in obligation to all other laws, that no human laws should contradict them, that human laws are of no validity if contrary to them, and that all valid laws derive their laws from that Divine original. This approach places "theological philosophy behind law to sustain authority."<sup>17</sup> The obvious difficulty with this position is ascertaining what God's laws are. Such an ascertainment is an exercise of faith, not an exercise of reason or rationality. Even if one asserts that "good law" is obviously—naturally—law that promotes social welfare, legal naturalism does not provide any guide to the process by which this basic concept might be implemented. Moreover, assuming it is acceptable to posit "self-evident" truths as the foundation for law,<sup>18</sup> positing self-evident truths to implement that law could easily result in serious difficulties in a pluralistic society.

Irrational beliefs, those not subject to reasonably universal verification, should not be the foundation of law, nor should the bias or zeal of a few dictate a general standard,<sup>19</sup> for the reason that such laws do not command the general

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17. ROSCOE POUND, *LAW FINDING THROUGH EXPERIENCE AND REASON* 17 (1960).

18. The Declaration of Independence is a statement of natural law: "We hold these truths to be self-evident . . . ." *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

19. For example, in *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505 (N.J. 1980), Dr. Pierce interpreted her Hippocratic oath to compel her to stop work on an experimental medicine formula; she was effectively discharged. The court held that an employee's refusal to work might be based on her perception that the work demanded of her was unethical, but such a perception would have to be based on "a clear mandate of public policy," and not a personal interpretation of medical ethics. *Pierce*, 417 A.2d at 512. The court held that she was not wrongfully discharged. *Id.* at 513-14.

respect—the ultimate consent—of the governed.<sup>20</sup> The First Amendment to the Constitution of the United States makes freedom of religion (including the freedom not to be religious) fundamental, not, of course, because the Framers were anti-religious, but because they recognized that religion is not *reasonable*, not amenable to reason, and therefore not a proper basis upon which to dictate general behavior.<sup>21</sup> The difficulty with legal naturalism is determining what the eternal truths are. Such truths, because they are not subject to any universal verification, are notoriously subjective.

Hans Kelsen, a positivist most certainly, described the problem and proposed a solution. He believed that finding out what laws are “good” gets us tied up with morals, as indeed it does. Kelsen recognized:

[T]he law ought to be moral, that is, good. That requirement is self-evident. What is questioned is simply the view that law, as such, . . . is in some sense and in some measure moral . . . . As a moral category law meant the same as justice . . . . [But] justice is not ascertainable by rational knowledge at all. The history of human speculation for centuries has been the history of a vain striving after a solution of the problem. That striving has hitherto led only to the emptiest of tautologies, such as the formula *sum cuique* or the categoric imperative.<sup>22</sup>

Kelsen theorized that law is based on norms—regulations setting forth how people are to behave—and that its existence can only mean its *validity*, which refers to its connection with a system of norms of which it forms a part, leading ultimately to the “basic norm,” or fundamental regulation. (Is this not natural law creeping in the back door?) Kelsen stated:

A multiplicity of norms constitutes a unity, a system, an order, when validity can be traced back to its final source in a single norm. This basic norm constitutes the unity in diversity of all the norms which

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20. A familiar reflection of our legal system's distaste for decisions that are irrational or unreasonable is the “arbitrary and capricious” standard for judicial review. The federal Administrative Procedure Act, for example, provides that a reviewing court “shall . . . hold unlawful . . . agency action found to be arbitrary [or] capricious . . . .” Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1993).

21. “The Framers of the First Amendment were sensitive to the then-recent history of those persecutions and impositions of civil disabilities with which sectarian majorities in virtually all colonies had visited deviation in the matter of conscience.” *Abington School Dist. v. Schempp*, 374 U.S. 203, 233 (1963) (Brennan, J., concurring) (quoting *McGowan v. Maryland*, 266 U.S. 420, 464-65 (1961)).

22. Hans Kelsen, *The Pure Theory of Law*, in INTRODUCTION TO JURISPRUDENCE 201, 204 (Dennis Lloyd ed., 2d ed. 1965) [hereinafter INTRODUCTION].

make up the system. The Pure Theory of Law [Kelsen's name for his theory] operates with this basic norm as with an hypothesis. Presupposed that it is valid, the legal order which rests on it is valid also.<sup>23</sup>

But this will not do; this does not satisfy.<sup>24</sup> Kelsen did not inquire into the *character* of the norm. He observed that if a monarchy undergoes a republican revolution, the old basic norm is overthrown, and a new one is presupposed, based on a new constitution.<sup>25</sup> The new constitution is valid, not because it is right, but because "the coercive order erected on its basis is efficacious as a whole."<sup>26</sup> But law can, and should, promote a better legal order than that which merely flows forth from its efficaciousness in making an orderly society. One might argue that Stalinist Russia was an orderly society. Thus, legal naturalism is too subjective and individualistic to make "good law," and legal positivism is too amoral.

To assert that the best laws are those that promote the greatest happiness, the most good,<sup>27</sup> is to argue for utilitarianism, pragmatism, or probably sociological jurisprudence.<sup>28</sup> Sociological jurisprudence is the most rational and pro-active theory of law. It presupposes not, as does natural law, that the true law is immanent and subject mostly to discovery. Rather, it supposes that the law is human-made, following a reasoned examination of the ends to be achieved and the means to achieve them. Unlike legal positivism, with its basic norm, sociological jurisprudence suggests that the law is malleable by men and

23. *Id.* at 210-11. Kelsen's positing of a "presupposed" norm really begs the question: Where do people get the idea that such a presupposition is valid?

24. There is, of course, much debate about the value of values. Some insist that jurisprudence, or any science, is incomplete to the extent that it ignores values. In opposition, it is contended that the aim of science is knowledge, that questions of value cannot be rationally determined and hence lie outside the realm of knowledge and therefore outside the realm of science. Jurisprudence, considering its responsibilities—ordering society—seems an unlikely vehicle for valueless operation, and indeed legal systems are permeated with ethical ideals, expressed and unexpressed.

25. Kelsen, *supra* note 22, at 204.

26. *Id.* at 221.

27. "Expedient" is a word Mill used. Mill, *supra* note 16, at 912. Holmes uses the same word; see HOLMES, COMMON LAW, *supra* note 13 and accompanying text.

28. Pound has stated:

More particularly, the sociological jurist of today insists upon five points: (1) Study of the actual social effects of legal institutions, legal precepts, and legal doctrines; (2) study of the means of making legal precepts effective in action; (3) psychological study of the judicial, administrative, legislative and juristic processes as well as philosophical study of the ideals; (4) study not merely of how doctrines have evolved considered solely as legal materials, but study also of what social effects the doctrines of law have produced in the past and how they have produced them; and (5) recognition of individualized application of legal precepts—of reasonable and just solution of individual cases.

POUND, *supra* note 17, at 33.



women who would fashion it into a tool that serves society. Benjamin Cardozo, also a sociological jurist, insisted that legal rules be changeable, mutable:

Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end. If they do not function, they are diseased. If they are diseased, they need not propagate their kind. Sometimes they are cut out and extirpated altogether. Sometimes they are left with the shadow of continued life, but sterilized, truncated, impotent for harm.<sup>29</sup>

### C. *A Sociological Jurist's Analysis of "Good Law"*

The question here examined is this: What is a "good" law? It is asserted that good laws are those that promote social welfare. Undoubtedly, there are a number of ways law can, in general, promote social welfare. But it is argued here that social welfare is promoted when the law has some rational basis (that the law tends to serve the ends set for it) and promotes rational thinking. Social welfare is decidedly not promoted by laws that indulge belief in ghosts and in real estate tainted by bad karma. That law in secular society should be rationally based seems not only intuitively correct, it is also a position advocated by legal scholars and it is, indeed, demonstrable.

The American utilitarian sociological school, as expounded by Roscoe Pound, was not satisfied with positing Kelsenian *a priori* norms, valued only because of their coercive effect. The sociologists asserted that it was no good to *will* the law, that is, to decide without much reference to anything that *here* is the fundamental legal tenet, and all else flows logically from that. The sociologists, building from utilitarianism, opined that the purpose of law was to actively promote legitimate social interests, the social welfare. For example, the law should protect people's personal safety. Pound stated:

Having inventoried the wants or claims or interests which are asserting and for which legal security is sought, we were to value them, select those to be recognized, determine the limits within which they were to be given effect in view of other recognized interests, and ascertain

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29. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 98-99 (1921). This passage is quoted by Richard Posner in *What Has Pragmatism to Offer Law*, 63 S. CAL. L. REV. 1653, 1657 (1990) [hereinafter Posner, *Pragmatism*]. In that essay, Posner labels Holmes, Cardozo, Cohen (*see infra* notes 45-46) and himself as "legal pragmatists" and the theory as "pragmatism." The term used in this article is sociological jurisprudence. Sheldon M. Novick argues that labelling Holmes a "liberal pragmatist" is a misnomer: "It is important to remember, if we are to understand his opinions and not just *The Common Law*, that Holmes was not a philosophic pragmatist." Sheldon M. Novick, *Justice Holmes's Philosophy*, 70 WASH. U. L.Q. 703, 737-45 (1992). Novick's argument is not completely convincing.

how far we might give them effect by law in view of the inherent limitations upon effective legal action.<sup>30</sup>

So, if we are to promote certain interests by valuing them, upon what criteria are they to be valued? Pound claims that there are individual and social interests, corresponding to private and public law, and assigns values to the latter class on this hierarchy:

First we may put the general security, including claims to peace and order, the first social interest to obtain legal recognition, the general safety, long recognized under the maxim that the public safety is the highest law, the general health, the security of acquisitions and the security of transactions.<sup>31</sup>

This catalogue describes what interests are to be promoted, but, again—as with the basic norm—does not characterize the underlying quality of the law. Not all wants, claims, or interests are good. Peace and order certainly are good. But, suppose it is asserted that we want security from witches who, it is said, are disturbing the peace and order. Rounding up suspects, trying them as witches, and executing them contributes to peace and order, but only if you posit a belief in witches. The problem is that after the witches are executed, the community still suffers the plagues for which witches were blamed: butter goes rancid; livestock still sicken and die; storms and fires continue; crop damage still destroys property; women suffer miscarriages; and babies die in their first days.<sup>32</sup> So then you must come up with some other cause for these misfortunes, and think the law against witches has not been very effective (or that there are no such things as witches). Similarly, summarily executing suspected felons would reduce court congestion, and perhaps contribute to peace and order, but it would be unacceptable. The end result sought is good, but not the means; the law seems to have a good head, but no heart.

In *The Common Law*, Holmes demonstrated by legal genealogy<sup>33</sup> that the

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30. Roscoe Pound, *Philosophy of Law*, in INTRODUCTION, *supra* note 22, at 241.

31. Roscoe Pound, *A Contemporary Juristic Theory*, in INTRODUCTION, *supra* note 22, at 249.

32. CAROL F. KARLSON, *THE DEVIL IN THE SHAPE OF A WOMAN: WITCHCRAFT IN COLONIAL NEW ENGLAND* 6-7 (1987). For more modern examples, one might consider the laws and actions of Nazi Germany in response to the "Jewish problem," or the casual tendency in the United States, Germany, and elsewhere to blame recent immigrants for our problems and to seek laws dealing with the "immigration problem."

33. "Legal genealogy" refers to tracing old laws as they gradually changed to fit new times.

underlying quality of law is based on "the felt necessities of the time."<sup>34</sup> Holmes noted changes in what was felt necessary.<sup>35</sup> So far as Holmes' view means that law (and its underlying morality) is relative to its time, he is said to have "enforced the lesson of ethical relativism, thereby turning law into dominate public opinion."<sup>36</sup> There is, as Posner observes,<sup>37</sup> a certain "antimentalism" in Holmes' position: the life of the law has not been based on rationality, but rather on feelings. But at least there is some heart in it.

Two points may be made in support of Holmes. First, while Holmes noted that feelings shape the law, he did not assert that the feelings are irrational. Generally, the change is rational, toward "what is expedient for the community," toward more modern, useful law, "more fitted to the time, . . . at bottom the result of more or less definitely understood views of public policy."<sup>38</sup> For example, the basic feeling of revenge—though eminently understandable—is not very civilized. The various forms of modern liability

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34. HOLMES, *COMMON LAW*, *supra* note 13, at 1. Holmes' interest here was in exploring how the common law changed in response to "felt necessities." Lawrence M. Friedman observes that our media-driven society has changed from one of vertical authority (roles models are parents, priest, school teacher, judges) promoting traditional values, to one of horizontal authority (role models are peers) promoting the values of popular culture. This change in authority makes popular culture important because popular culture "forms or helps form popular *legal* culture," and because "this is a 'public opinion' society, which makes heavy use of referenda, and in which government does not lift a finger or move a muscle, without reading the tea-leaves of public desire." Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1597-98 (1989). Fortunately judges are somewhat more insulated from public opinion than are politicians. If they were not, the changes in law due to "felt necessities" would be in danger of being transient like popular culture: "rapid as a whip, glitzy, intolerant of tradition; it twists and turns and changes color constantly." *Id.* at 1596.

35. However, the necessity of some law never changes: peace and order are universally recognized as primary purposes of law, and these are felt necessities at all times. The means to accomplish the desired end does change. To require by law that cattle be inoculated against wasting disease is more likely to address the necessity of healthy herds than is killing old women as witches, because it is based on scientific reason: witches do not cause cattle to sicken, disease does. But killing people as witches might still serve some useful purpose if it relieves societal tension. Holmes has stated:

If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution. At the same time, this passion is not one which we encourage, either as private individuals or as law-makers.

HOLMES, *COMMON LAW*, *supra* note 13, at 41-42. Whether we should allow a confession into evidence when its author was not advised of his right to remain silent is to balance interests only, to recognize that coerced confessions are sometimes not accurate (at least), not to throw peace and order out of the window. We still want peace and order, but we have other interests, too (accuracy of confession, avoiding physical compulsion).

36. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 240 (1990).

37. *Id.*

38. HOLMES, *COMMON LAW*, *supra* note 13, at 35.

spring from that ancient seed, but temper it.<sup>39</sup> Second, even though some aspect of the law may still be mired in antiquity and irrationality, Holmes, in describing what law *is*, was not condoning its irrationality. He looked forward “to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be obtained and the reasons for desiring them.”<sup>40</sup>

Theodore Roosevelt spoke of judges, not legislatures, when he said to Congress in 1908 that “for the peaceful progress of our people during the 20th Century we shall owe most to those [judges] who hold to a 20th Century . . . social philosophy and not to a long-outgrown philosophy, which was itself the product of primitive . . . conditions.”<sup>41</sup> Roosevelt spoke eighty-five years ago. Today, we still wrestle with law, both common and statutory, that harks back to primitive conditions when beliefs in ghosts, witches, and hauntings were common. In a 1913 speech, Holmes said:

For most of the things that can properly be called evils in the present state of the law I think the main remedy, as for the evils of public opinion, is for us to grow more civilized. If I am right it will be a slow business for our people to reach rational views . . . .<sup>42</sup>

And in regard to promoting a law based more on science (or at least rational thinking) than on feelings (“felt necessities”), Holmes commented:

[T]he present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity. I hope that the time is coming when this thought will bear fruit. An ideal system of law should draw its postulates and its legislative justification from science. As it is now, we rely upon tradition, or vague sentiment, or the fact that we never thought of any other way of doing things, as our only warrant for rules which we enforce with as much confidence as if they embodied

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39. *Id.* at 2-38. Francis Bacon maintained: “Revenge is a kind of wild justice, which the more man’s nature runs to, the more ought law to weed it out.” FRANCIS BACON, *Of Revenge*, in *ESSAYS* 17 (Gordon S. Haight ed., 1942).

40. *The Path of the Law*, in *THE HOLMES READER* 41, 49 (Julius J. Marke ed., 1955) [hereinafter *HOLMES READER*] (containing a collection of works by Oliver Wendell Holmes). See also *HOLMES*, *COMMON LAW*, *supra* note 13.

41. Theodore Roosevelt, Message to Congress, Dec. 8, 1908, *quoted in* *CARDOZO*, *supra* note 29, at 171.

42. *Law and the Court*, in *HOLMES READER*, *supra* note 40, at 66.

revealed wisdom.<sup>43</sup>

Where possible, the means of implementing the law should be based on science, and the ends of law should be the improved welfare of society. Cardozo wrote that "today in every department of the law . . . the social value of a rule has become a test of growing power and importance."<sup>44</sup> Nearly one hundred years after Holmes spoke, we may have somewhat less faith in the blessings of science than Holmes did. Even so, we might agree that it is better to base a law on the rational than on the irrational.

In his essay entitled *Law and the Scientific Method*,<sup>45</sup> Morris Cohen<sup>46</sup> argued that law should embrace science for its precepts and its methods. He recognized the value of *stare decisis* for its emphasis on custom, "a very important condition of law, but not a sufficient determinate of it."<sup>47</sup> He said we need principles—hypotheses—and from there we need to deduce conclusions and then compare these conclusions with the factual world.<sup>48</sup> The principles must duly respect custom but not shrink from eschewing it; they must be based on what will, in a modern society, promote "the good or civilized life."<sup>49</sup> As one commentator has stated:

The law, and especially present American law, is desperately in need of a scientific elaboration . . . . *Stare decisis* means little in a changing society when for every new case the number of possible precedents is practically unwieldy. Without principles as guides, the body of precedents becomes an uncharted sea; and reliance on principles is worse than useless unless these principles receive critical scientific attention.<sup>50</sup>

Richard Posner described three "essential elements" of pragmatism, or what is here called sociological jurisprudence:

43. *Learning and Science*, in HOLMES READER, *supra* note 40, at 72. Erich Fromm in fact prophesied that a "new religion will develop within the next few hundred years . . . [I]ts doctrines would not contradict the rational insight of mankind today, and its emphasis would be on the practice of life, rather than on doctrinal beliefs." FROMM, *supra* note 10, at 352.

44. CARDOZO, *supra* note 29, at 73.

45. MORRIS R. COHEN, *Law and the Scientific Method*, in LAW AND THE SOCIAL ORDER, ESSAYS IN LEGAL PHILOSOPHY 184 (1982) [hereinafter LAW & SOCIAL ORDER].

46. Morris R. Cohen (1880-1947) was an American philosopher who "had a major impact on the development of legal philosophy in the United States and on the law itself." Harry N. Rosenfield, *Introduction to LAW & SOCIAL ORDER*, *supra* note 45, at xiii.

47. LAW & SOCIAL ORDER, *supra* note 45, at 189.

48. *Id.* at 193.

49. *Id.* at 194.

50. *Id.* at 197.

The first is a distrust of metaphysical entities . . . viewed as warrants for certitude whether in epistemology, ethics, or politics. The second is an insistence that propositions be tested by their consequences, by the difference they make—and if they make none, set aside. The third is an insistence on judging our projects, whether scientific, ethical, political, or legal, by their conformity to social or other human needs . . . .<sup>51</sup>

Here we assert, by reference to legal scholars and jurists, that law should be based on some science, not on superstition and irrationality. We have a vision of what we want the law to advance: psychological health. Now, let us turn to the task of promoting such laws, and eschew those that hinder us. It is possible to do more than refer to legal scholars to demonstrate the truth of the assertion that law should be based on the rational and not the irrational. Psychology and sociology also provide support for this contention.

#### *D. A Psychological and Sociological Analysis of "Bad Law" Adherents*

It is useful to slightly rephrase the question: What kind of people (judges excepted,<sup>52</sup> of course) believe in ghosts and bad karma and the unscientific? If these beliefs are not the sort upon which society thrives, we could assert that efforts to discourage belief in such irrational things is socially useful.

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 statements with objective reality), and higher scores on measures of schizotypy.<sup>53</sup> In sum, "superstitious belief appears associated with less effective personality func-

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51. Posner, *Pragmatism*, *supra* note 29, at 1660-61.

52. Judge Smith, dissenting in *Stambovsky*, would have affirmed the lower court: "[I]f the doctrine of caveat emptor is to be discarded, it should be for a reason more substantive than a poltergeist. The existence of a poltergeist is no more binding upon the defendants than it is upon this court." *Stambovsky v. Ackley*, 572 N.Y.S.2d 672, 678 (1991) (Smith, J., dissenting). See *supra* note 3 and accompanying text.

53. All of these findings were made by Jerome J. Tobacyk, and the reports were published in various psychological journals in 1984, 1985, and 1990. The specific citations can be found in Jerome J. Tobacyk & Deborah Schrader, *Superstition and Self-Efficacy*, 68 *PSYCHOLOGICAL REPORTS* 1387, 1388 (1991). The methodology in each case is to administer a test measuring the subject's willingness to accept belief in paranormal phenomena and to compare that scale to college grade point or to scores on tests measuring alienation, confusion of verbal statements, and so on.

tioning.”<sup>54</sup> Moreover,

[T]hose reporting greater superstitiousness . . . also experience more limited success and greater failure (i.e., experience less personal mastery) across various life domains. Self-efficacy is a generalized expectancy that one can successfully perform behaviors that lead to desired outcomes . . . . Findings are consistent with past research linking superstition and less effective personality functioning.<sup>55</sup>

Superstitious people, those inclined to accept evidence of or who claim to have had parapsychological experiences,<sup>56</sup> are also prone to what some research identifies as “fantasy.”<sup>57</sup> “Fantasy” in this context does not mean benign flight of the imagination; instead it refers to the delusional conviction that something imagined is fact.

Also, superstitious people are less capable of critical thinking<sup>58</sup> than non-superstitious people. James Alcock and Laura Otis asked subjects, undergraduate students, to respond to a “seven-item belief-in-parapsychology scale . . . dealing with the reality of basic paranormal phenomena such as telepathy, clairvoyance, precognition and psychokinesis.”<sup>59</sup> Those most skeptical and those most accepting were later, under different circumstances, asked to complete scales measuring critical thinking ability,<sup>60</sup> and dogmatism. The

54. *Id.* at 1387. A professional couple (a dentist and a nurse) purchased the house that was made infamous by the Charles Manson cult murders. As to the bad karma, one of the buyers dismissed it: “We’re both in the medical profession so death and killing and suffering mean little to us in that sense—we’ve seen it all before.” In addition, they also purchased the house for \$200,000, tens of thousands of dollars below the market value. John M. Glionna, *A Haunting Story*, L.A. TIMES, March 31, 1991, at A26. These appear to be the sentiments of successful, effectively functioning, non-superstitious people.

55. Tobacyk & Schrader, *supra* note 53, at 1388. Again, Fromm described a mentally healthy person as one who, among other things, is “an active and responsible participant in the life of society, as well as the master of his own life.” FROMM, *supra* note 10, at 276.

56. “Parapsychology” is “a science concerned with the investigation of evidence for telepathy, clairvoyance, and psychokinesis.” WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 611 (7th ed. 1967).

57. Harvey J. Irwin, *Fantasy Proneness and Paranormal Beliefs*, 66 PSYCHOLOGICAL REPORTS 655 (1990).

58. Critical thinking is precisely what Cohen urged was needed when he said we initially need hypotheses, then to deduce conclusions, and then to compare these conclusions with the factual world. See *supra* text accompanying note 48.

59. James E. Alcock & Laura P. Otis, *Critical Thinking and Belief in the Paranormal*, 46 PSYCHOLOGICAL REPORTS 479, 479-80 (1980).

60. This is defined as “the ability to define and analyze problems, to judge the validity of inferences made, and to draw conclusions while recognizing stated and unstated assumptions.” *Id.* at 480. Critical thinking is a “a mode of thinking that will enable [people] on their own, to determine what is significant and what is not, to avoid being misled by personal biases and other

results showed a strong correlation between skepticism and critical-thinking ability and "put the skeptical students in a favorable light, suggesting that their rejection of paranormal phenomena does not reflect a close-mindedness [hence the dogmatism test], while at the same time indicating that the believers are relatively deficient in their ability to evaluate critically arguments and evidence."<sup>61</sup>

This research suggests that superstitious people are less self-confident and less capable of critical thinking than non-superstitious people. The research is of more than academic interest; there are serious consequences to this superstitious mindset that negatively affect society in general:

[M]illions of dollars are spent on casting horoscopes, purchasing fad foods and pursuing dubious diets and vitamin regimens. Parapsychology also exists at the expense of serious science: Gresham's Law applies to paranormal beliefs, so that bad science, such as creationism or astral projection, drives out good science, or at least muddles it in the public mind.<sup>62</sup>

Quack medicine promoted by ritualistic health-curers not only is generally ineffective, it may cause psychological damage by promoting dependent behavior and a weak self-image. When a person is not cured, his or her "sense of loss and despondency is multiplied."<sup>63</sup> At its worst and most far-ranging, the mindset susceptible to the parapsychological tends, more than other types, to be dangerous religious fundamentalism.<sup>64</sup>

The most famous example of the dangerous effects of superstition are the Salem witchcraft trials. In the summer of 1692, accused witches overfilled the

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distractions, and to get the heart of a matter and to a satisfactory solution as often as possible." J. David Reitzel, *Critical Thinking and the Business Law Curriculum*, 9 J. LEGAL STUD. EDUC. 471, 471 & nn.2, 4-5, 7-9 (citing J. Dewey et al.). Critical thinking involves problem solving, creativity, and decision-making, implicating the higher cognitive processes. *Id.* at 476.

61. Alcock & Otis, *supra* note 59, at 480.

62. James Cornell, *Science vs. The Paranormal: Skeptics Fight an Uphill Battle in their Efforts to Overthrow the Forces of Pseudoscience*, 18 PSYCHOLOGY TODAY 28, 31 (March 1984). Thomas Gresham was an English financier and economist in the 1570s. He observed that when two coins are equal in debt-paying value but unequal in intrinsic value, the one having the lesser intrinsic value tends to remain in circulation, and the other to be hoarded or exported as bullion. Bad money drives out good. *Id.*

63. Cornell, *supra* note 62, at 31 (quoting William Jarvis, M.D., of the California Council Against Health Fraud).

64. *Id.* (discussing the opinions of Lowell Streiker, a California psychologist). In the late winter and spring of 1993, newspapers contained stories about the Davidian Branch affair (shootings and apparent self-immolation) in Waco, Texas, and about the bombing of the World Trade Center in New York City. These acts seem to constitute the product of religious fundamentalism.



town jail in Salem, Massachusetts, and nineteen people were hanged or burned at the stake. Of course, there is little comparison between seventeenth century horrors and today's reasonably benign trends in superstition and witches; certainly there is a difference in the number of believers. In his exhaustively researched book on the matter, George L. Kittredge notes that "belief in witchcraft was practically universal in the seventeenth century, even among the educated; with the mass of the people it was absolutely universal."<sup>65</sup> The point of interest here is not that people generally believed in witches 300 years ago, and that they generally do not now.<sup>66</sup> The point is, given a general background belief in witches, what touched off the spasm of persecution that year? It was, as might be expected, the product of many factors. But of signal importance then<sup>67</sup> was that it "coincided with times of political excitement or anxiety."<sup>68</sup> The colony was emerging from a "political struggle that had threatened its very existence"; the public was nervous.<sup>69</sup> History shows that superstitious, irrational people and hard times are a dangerous mixture.

Now assume that one was able to choose between two groups of people to colonize a new territory or to serve as good citizens in a participatory democracy. This first 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. Its members tend to have poor self-images and feelings of incompetence. Some members of the group have a tendency toward unhealthy cultism. The second group, necessarily by this comparison, is more intelligent, better adjusted, has a better self-image, is better able to engage in critical thinking, and so on. Which group to chose? Obviously the second group, a group more likely to be successful and more likely to overcome the challenges of hard times. And if, instead of leaving one group behind, it was possible to *change* the mindset of the first group more toward that of the second group, such a change would seem worthwhile and beneficial. The law can do so, as discussed next.

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65. GEORGE L. KITTREDGE, *WITCHCRAFT IN OLD AND NEW ENGLAND* 372 (1929).

66. Fourteen percent of the population of the United States in 1990 believed in witches. INDEX TO INTERNATIONAL PUBLIC OPINION, 1990-1991, at 518 (Elizabeth H. Hastings & Philip K. Hastings eds., 1992) [hereinafter PUBLIC OPINION INDEX].

67. And in all the periodic outbreaks of persecution, including the persecution of German Jews in the 1930s and Muslim Serbs in the 1990s.

68. KITTREDGE, *supra* note 65, at 370-71.

69. *Id.* See also KARLSON, *supra* note 32, at 182-85 (discussing in length the strained social conditions at the time).

*E. The Law Can Affect Peoples' Beliefs Regarding the Irrational*

It is posited, by the utilitarians and sociological jurists, that law should serve to promote the welfare of society. We have shown by reference to legal scholars and thoughtful observers that the welfare of society is promoted when laws are based on reason, not on the irrational.<sup>70</sup> We have drawn attention to sociological research suggesting that such scholars and observers are correct: irrational people are less likely to be citizens for a vigorous democracy than are rational, skeptical people. Now we must ask, assuming all this is true, whether the law can actually encourage people to less irrational thought. The procedure to be followed here is to examine some fields of law that do touch on peoples' prejudice and irrationality, and to see if legislation making manifestations of such prejudice illegally affects the prejudice itself.

Indeed, our law eschews the irrational in important ways. It is illegal under federal law "to refuse to sell or rent after the making of a bona fide offer . . . because of race, color, religion, sex, familial status or national origin . . . or because of a handicap . . . ."<sup>71</sup> And why would anyone want to discriminate on such grounds? Because of prejudice, bias, racism, and the like—none of which are rational. In a just and reasonable society, we do not consider irrational racism grounds for discrimination in housing. But discrimination in housing is also based on a less irrational but no less acceptable fear: if a minority group comes in, property values go down. It is perceived that racially integrated neighborhoods adversely affect market value.<sup>72</sup> However, even if racial integration is thought to have a "significant and measurable effect on market value,"<sup>73</sup> segregation is illegal. Therefore, society, at least on a legal level, does not tolerate race-based discrimination.<sup>74</sup> Title VII of the Civil

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70. Of course, history is replete with ancient, irrational animosities living across generations, for hundreds of years, even thousands of years. It is a sad comment on human affairs that the 20th Century is framed by disaster in Sarajevo. See, e.g., ROBERT KAPLAN, *BALKAN GHOSTS: A JOURNEY THROUGH HISTORY* (1993).

71. 42 U.S.C.A. § 3604(a) & (f)(1) (1982).

72. Despite the Fair Housing Act of 1968, 42 U.S.C. § 3604 (1982), which sought to remedy racial discrimination in housing, the prevailing housing reality in the United States is a segregated urban housing picture: about 75% of all blacks live in central cities, while only about 40% of all whites in the metropolitan area live in the central cities. U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *ANNUAL HOUSING SURVEY 1987: INDICATORS OF HOUSING AND NEIGHBORHOOD QUALITY 1* (1989) (table A-1). Regarding the perception, and the reality, that integration causes a decline in market value, see Rodney A. Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs that Discourage Black Entry to Prevent White Flight*, 1981 DUKE L.J. 891, 892 (1981).

73. See Smolla, *supra* note 72.

74. The *Brown* decision, that separate educational facilities for black people are not equal, was, in part, justified by the open use of psychological and sociological data to justify its constitutional reinterpretation. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

Rights Act of 1964 makes employment discrimination against women and minorities illegal in the United States.<sup>75</sup> The Fair Housing Act makes discrimination in housing illegal.<sup>76</sup> Have these laws been successful in reducing discrimination? To some extent, yes. There are two aspects to this. First, have people's mindsets changed ("Are you tolerant?")? Second, have the overt manifestations of discrimination changed ("Would you hire a minority person?")?

Public opinion polls<sup>77</sup> indicate increasing tolerance for racial diversity. In 1963, twenty percent of non-blacks polled were so intolerant of blacks that they would move if black people came to live next door. In 1990, only one percent of non-blacks were so intolerant (see Table 1).

<u>(Asked of non-Blacks only)</u> If colored people/Black people came to live next door, would you move?				
National	Yes, definitely	Might	No, would not	Don't know
1963	20%	25	55	-
1965	13%	22	65	-
1966	13%	21	66	-
1967	12%	23	65	-
1978	4%	9	84	3
1990	1%	4	93	2

Table 1

In 1963, forty-nine percent of people polled would have moved if black people came to live in great numbers in their neighborhood. In 1990, only eight percent expressed such intolerance (see Table 2).

75. 42 U.S.C. § 2000e-2(a) (1982).

76. 42 U.S.C. §§ 3601-3619, 3631 (1982 & Supp. IV 1986). The Fair Housing Act, also known as Title VIII of the Civil Rights Act of 1968, provides in pertinent part that it is unlawful to deny "a dwelling to any person because of race, color, religion, sex, or national origin." 42 U.S.C. § 3604 (1982).

77. PUBLIC OPINION INDEX, *supra* note 66, at 474. Tables 1-5 are reproduced from INDEX TO INTERNATIONAL PUBLIC OPINION, 1990-1991, at 474 (Elizabeth H. Hastings & Philip K. Hastings eds., 1992) with the permission of the editors.

(Asked of non-Blacks only) Would you move if colored people/Black people came to live in great numbers in your neighborhood?

National	Yes, definitely	Might	No, would not	Don't know
1963	49%	29	22	-
1965	40%	29	31	-
1966	39%	31	30	-
1967	40%	31	29	-
1978	20%	31	45	4
1990	8%	18	68	6

Table 2

In general, people express a more tolerant attitude, and they feel that the frequency of "racial comments, jokes, criticisms, and so forth" have decreased or remained the same lately (see Table 3).<sup>78</sup>

Think for a moment about racial comments, jokes, criticisms, and so forth that you might hear from friends, relatives and the people you work with. Has the number of these types of negative racial comments and remarks been increasing lately, decreasing, or has it not changed?

	%
Increasing	7
Decreasing	30
Has not changed	55
No opinion	8

Table 3

78. One opens a book of jokes, such as one published some 50 years ago, at random and finds sexist jokes that would today be considered unacceptable in nearly all quarters. See MILDRED MEIERS & JACK KNAPP, *THESAURUS OF HUMOR* (1940). Jokes belittling or ridiculing men are almost non-existent. Under "Talking" one will find the following jokes: "Have you noticed how a woman lowers her voice whenever she asks for anything? Yes, but have you noticed how she raises it if she doesn't get it?" *Id.* at 154. "My wife can't even send a telegram without saying 'stop' after every sentence." "The police say that you and your wife had some words; I had some, sir, but I didn't get a chance to use them." "Why is Doddie Turner, that dizzy steno of yours, like a pants button? Dunno, unless it's because she's poppin off at the wrong time." *Id.* at 156. Under "Sleep" one will find the following jokes: "He was so henpecked he cackled in his sleep." "I haven't been able to sleep a wink since my wife ran away. Why don't you try counting sheep? I'm too busy counting my lucky stars." *Id.* at 266. Under "Driving" one will find the following jokes: "What does it mean when a woman is holding out her hand? It means she's turning left, turning right, backing up, waving at somebody or going to stop." *Id.* at 407. "Don't you know that you should always give half of the road to a woman driver? I always do, when I find out which half of the road she wants." *Id.* at 409.

The people polled have personally become more tolerant or are just as tolerant as they were lately. They are not less tolerant (see Table 4).

Thinking just about yourself for the moment, do you think you have become more tolerant of people of different colors and races lately, less tolerant, or has there been no change?	
	<u>%</u>
More tolerant	34
Less tolerant	6
No change	58
No opinion	2

Table 4

American society in general has become more tolerant or just as tolerant lately, but not less tolerant (see Table 5).

Now, thinking about American society as a whole, do you think society has become more tolerant of people of different colors and races lately, less tolerant, or has it not changed?			
	Total	By race	
		White	Black
	<u>%</u>	<u>%</u>	<u>%</u>
More tolerant	51	54	29
Less tolerant	17	16	29
No change	26	24	36
No opinion	6	6	6

Table 5

People tell pollsters they are more tolerant. This suggests that people are less likely to discriminate now than they were in 1963.

Empirical measurement of race, ethnic, and sex discrimination is difficult, of course.<sup>79</sup> Still, studies suggest strongly that less employment discrimination exists today than in the past. The chart in Table 6 traces private-sector participation rates of minorities and women in managerial and professional jobs in 1966, 1978, and 1990.<sup>80</sup> The data indicate that women and minorities have

79. For surveys of the literature, see G.G. Cain, *The Economic Analysis of Labor Market Discrimination: A Survey*, in HANDBOOK OF LABOR ECONOMICS (O. C. Ashenfelter & R. Layard eds., 1986).

80. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INDICATORS OF EQUAL EMPLOYMENT OPPORTUNITY—STATUS AND TRENDS 15 (Sept. 1991).

significantly greater managerial-job opportunities in 1990 than they did in 1966, suggesting a decrease in discrimination.

PRIVATE SECTOR EMPLOYMENT PARTICIPATION RATES OF WHITES, MINORITIES  
AND WOMEN IN MANAGERIAL AND PROFESSIONAL JOBS  
U.S. SUMMARY, 1966, 1978 AND 1990

Job Category	Year	Whites	Minorities					Women
			Total	Blacks	Hispanics	Asians, Pacific Islanders	American Indians, Alaskan Natives	
Officials and Managers	1966	98.2	1.8	0.9	0.6	0.2	0.1	9.3
	1978	93.1	6.9	3.7	2.0	0.8	0.4	17.3
	1990	89.6	10.4	5.2	3.0	1.9	0.3	29.3
Professionals	1966 <sup>1</sup>	96.1	3.9	1.7	0.8	1.3	0.1	20.5
	1978	90.8	9.2	4.0	1.8	3.2	0.2	33.9
	1990	87.0	13.1	5.2	2.6	5.0	0.3	47.6

<sup>1</sup> Because this job definition was changed in 1967, the participation rates from that year were used to make the rates comparable to the 1978 and 1990 rates.

Source: Equal Employment Opportunity Commission, *Employer Information Reports (EEO-1)*. Includes employment from those private employers with at least 100 employees.

Table 6

The situation for housing is less sanguine. Although the law prohibits discrimination in housing, and although whites indicate more tolerance for minorities living in their neighborhoods than they did thirty years ago, housing desegregation has not been as successful as employment desegregation. One commentator has stated the following:

Unlike the extraordinary advances in integrating public accommodations, the workplace, and the political system, the Nation's housing has been largely ignored. Although an increasing number of blacks are present in America's suburbs and predominantly white neighborhoods, the stark pattern of racial residential segregation has worsened. America is more segregated—physically separated by race—today than at any time in its history. While Americans are aware of fair housing laws and are a great deal more accepting of a nondiscrimination ethic, the incidence of racial discrimination—bias against racial minority group members—in the sale and rental of housing is extraordinarily high. Of all the civil rights battles fought during the last three decades, only housing discrimination appears to remain totally unabated, entrenched, and impervious to public policy and civil rights enforcement. The inability to abate widespread discriminatory practices within the real estate industry is attributable to the weak enforcement tools and efforts of the past, as well as to the national

preference for segregated lifestyles.<sup>81</sup>

A "national preference for segregated lifestyles" suggests that prejudice against living in mixed housing neighborhoods may be deeply ingrained and may take a long time to change. If we aspire to create a state where each person considers himself "an active and responsible participant in society, as well as the master of his own life,"<sup>82</sup> we cannot fairly deny a person the right to live where he or she wants. It is therefore particularly harmful to promote, even indirectly, any invidious and irrational evaluation of housing, even to count and countenance in evaluation the "presence" of ghosts or poltergeists. If we discount the value of a house because we do not wish to share the neighborhood with a ghost, does it not make equal sense—or more sense—to say we should discount the value of a house because we do not wish to share the neighborhood with Asian-Americans, African-Americans, or Hispanics? If we recognize that a ghost devalues real estate, we may more easily recognize other irrational factors as devaluing.

#### F. *What Factors Influence Whether the Law Can Change People's Mindsets?*

Weak enforcement, repeatedly mentioned by commentators reflecting upon the failure of fair housing laws,<sup>83</sup> may be of greater significance than "national preference." This is because before 1964 there was no doubt that a great "preference" for segregated work places existed. Since 1964, this preference has greatly declined. Kushner notes:

[L]ocal audits . . . indicat[ing] decreased rates of discrimination may reflect the enforcement level, *because aggressive fair housing enforcement reduces the level of bias* . . . . The studies of discrimination in the urbanized counties of Kentucky may suggest that aggressive fair housing enforcement significantly reduces discriminatory housing practices. Kentucky has been a national leader in adopting laws requiring public reporting of minority participation by housing providers and has enjoyed an image of aggressive

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81. James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1050 (1989).

82. FROMM, *supra* note 10.

83. Several commentators have criticized the enforcement provisions of the Fair Housing Act as ineffective. See James P. Chandler, *Fair Housing Laws: A Critique*, 24 HASTINGS L.J. 159, 189-205 (1973); Ronald H. Silverman, *Homeownership for the Poor: Subsidies and Racial Segregation*, 48 N.Y.U. L. REV. 72, 100-03 (1973). At the heart of the problem is the lack of aggressive, efficient, and adequately funded enforcement by the federal agencies. This raises serious doubts about the past Republican administrations' commitment to the enforcement of civil rights law in the housing arena. Barbara Wolfovitz & Jules Lobel, *The Enforcement of Civil Rights Statutes: The Reagan Administration's Record*, 9 BLACK L.J. 252, 257-58 (1986).

public enforcement.<sup>84</sup>

In his treatise on utilitarianism, John Stuart Mill considered the question of whether "moral feelings" (and here he was equating such feelings with a sense of justice) can be changed or influenced. Mill asserted that the moral sense is not innate.<sup>85</sup> Rather, Mill maintained that the moral sense is:

susceptible, by a sufficient use of the external sanctions and of the force of early impressions, of being cultivated in almost any direction; so that there is hardly anything . . . that it may not, by means of these influences, be made to act on the human mind with all the authority of conscience.<sup>86</sup>

Enforcement of the law can change behavior.<sup>87</sup> Moreover, enforcement of the law can promote a change in mindset. Sometimes this change may occur because people do want to believe that what is legally required of them is morally right. Sometimes this change may be because the law *is* a good idea, and once enforced, ignorant people are finally compelled to learn why the law is necessary; when they learn why the law is necessary, they agree.

A further example, on a broader and more sociological scale, is instructive. As the deleterious effects of smoking become better known, the habit becomes impermissible, "illegal." Fewer and fewer people smoke, and it is becoming unfashionable to do so. The habit was formerly pursued by a majority of males in the United States,<sup>88</sup> and was, except where fire was a concern, not restricted in the workplace. In the past fifteen years, smoking has been increasingly restricted. In 1991, smoking was impermissible in fifteen percent of U.S. workplaces, and seventy percent of employers reported some policy limiting it.<sup>89</sup> Smoking, although not generally against the law, is becoming impermissible at work and in society in general. The enforcement of these work-place regulations and the societal "law" is by employee discipline and general societal disapprobation. People's attitudes toward the habit are changing, and with it their behavior. In 1974, forty percent of the adults in the United States smoked cigarettes. In 1987, it was twenty-seven percent, and the trend continues

84. Kushner, *supra* note 81, at 1054 (emphasis added).

85. Except it is innate at this level: we are all *social* creatures, and therefore share a "powerful natural sentiment . . . to be in unity with our fellow creatures." Mill, *supra* note 16, at 920.

86. Mill, *supra* note 16, at 919-20.

87. Personal experience reveals that there is nothing like a well-publicized three-week period of "emphasis patrols" by the state police on a section of the interstate freeway approaching cities to encourage drivers to reduce speed from 65 to 55 miles per hour.

88. In 1949, the American Institute of Public Opinion found 54% of males smoked. PUBLIC OPINION INDEX, *supra* note 66, at 502.

89. James Benson, *Smoke Signals Get Mixed Readings*, INDUSTRY WEEK, May 7, 1990, at 18.



downward (with some aberrations) at about one-half of one percent each year.<sup>90</sup> Today, it is considered quite generally socially unacceptable to "light up" when a guest in someone's house.

To reiterate the immediate thesis, it is possible for law to change not only people's behavior, but to contribute to a change in their mindset as well. Of course, there are a great many variables at work that determine the law's efficaciousness. In addition, there are many incalculable factors at work in changing people's ideas about bigotry and about smoking. Still, it appears that laws prohibiting employment discrimination have reduced employment discrimination. Regulations prohibiting smoking have reduced smoking. And society is generally less accepting of such behavior than it used to be.<sup>91</sup> However, the constitutional amendment declaring the sale of liquor illegal was not very effective in changing people's mindset about drinking, notwithstanding vigorous enforcement attempts.<sup>92</sup> And as noted just above, laws making discrimination in housing illegal have not been successful in significantly reducing that problem. This lack of success can be attributed, at least in part, to the lack of enforcement.

One of the intuitively apparent elements in the efficacy of any law is that people must feel it is *reasonable*, that there is a moral obligation to obey. People will tend to feel the law is reasonable if it conforms more or less to the way they think things ought to be.<sup>93</sup> One, but only one, of the marks of how

90. STATE OF WASHINGTON DEPARTMENT OF HEALTH, HEALTH PROMOTION AND CHRONIC DISEASE PREVENTION 19 (1990). The same percentages appear in PUBLIC OPINION INDEX, *supra* note 66.

91. The interplay between the law and change of mindset is no doubt complex, one of the "many variables." It may be that sometimes public opinion forces a change in law, and sometimes law changes public opinion. Most likely, the two work together. It seems clear, at least, that the official voice of our government, of our leadership, speaks from case law, statute, ordinance, and regulation. From these sources, our leadership directly affects the course of social thought. Certainly, we should not encourage law to countervail social enlightenment by codifying invidious, unscientific prejudice.

92. U.S. CONST. amend. XVIII (the "Volstead" Amendment). On this amendment, Professor Harry W. Jones wrote:

One of the first drinks of bourbon whiskey I ever had I enjoyed in 1932 in the study of a federal judge, who was scrupulous and severe in holding himself and other people to strict observance of all the laws except Congressman Volstead's. The prevailing attitude, that what the law requires is probably the ethically right thing to do is not an irrebuttable presumption, particularly not when a man finds his customary and agreeable habits of behavior interfered with by what he considers trivial and unreasonable enactments.

HARRY W. JONES, EFFICACY OF THE LAW 82 (1960).

93. Holmes commented, "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong." HOLMES, COMMON LAW, *supra* note 13, at 41. However, a wrong law, such as Jim Crow in the South, is

"things ought to be" is whether there are, or are not, sanctions coercing people to make things that way. Therefore, the argument is somewhat circular. It has been stated:

Community awareness that sanctions are being imposed promptly and regularly for violations of law strengthens, except in the most unusual circumstances, the feelings of legal obligation that prevail in that community. People are inclined to believe that what the law requires is probably right, and the fact that sanctions have been imposed on violators of a law is typically regarded as strong further proof of that law's rightness.<sup>94</sup>

This comment restates the earlier comment, that "aggressive . . . enforcement reduces the level of bias."<sup>95</sup> It also makes somewhat more understandable to the modern mind how intelligent, thoughtful people 300 years ago could condone execution of witches: they believed in witchcraft. The lack of societal impediment to this belief and the vigorous prosecution of witches confirmed in their minds the law's rightness.

Similarly, and specifically addressing an issue considered in the psychologically impacted properties statutes mentioned earlier,<sup>96</sup> discrimination in housing against persons with AIDS is illegal. Discrimination against persons with a disability is illegal,<sup>97</sup> and persons with AIDS are considered disabled.<sup>98</sup> There is no scientific or medical reason to discriminate against people with AIDS. Such discrimination works a hardship on its victims, and fairness demands that the law protect people with AIDS. The value of real estate might well be diminished in the minds of some buyers, or even a majority of buyers, because the previous owner had AIDS. However, because no credible evidence exists that such a condition affects the real property itself, that fact need not be disclosed. Today, with a good understanding of the nature of the disease, even critics of the statutory revivification of caveat emptor do not dispute that a seller of real estate should be exonerated if he or she fails to disclose that the previous owner or occupant had AIDS.<sup>99</sup>

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not right because people think it is. At least the law may promote the better feelings and demands. It cannot radically change the rules.

94. JONES, *supra* note 92, at 78.

95. See *supra* text accompanying note 84.

96. See *supra* note 4.

97. See *supra* note 71 and accompanying text.

98. 42 U.S.C. § 3602(h)(1)-(3). See also H.R. REP. NO. 100-711, 100th Cong. 2d Sess., 13, reprinted in 1988 U.S.C.C.A.N. 2173.

99. McEvoy, *supra* note 5, at 70.

## III. INCIDENTS OF IRRATIONALLY BASED COMMON LAW

This Article has, so far, proposed that good laws are those that tend to better society. More specifically, good laws contribute to a psychologically healthy citizenry, a well-adjusted, independent-thinking citizenry. It is argued that such laws are rationally, and, within reason, scientifically based. Such laws are good because irrational and superstitious people do not make for a healthy society. Law can affect people's mindsets regarding the irrational and urge them toward greater rationality and tolerance. With this analysis of "good law" and "bad law" in mind, this Article will now examine in detail the cases that launched the present inquiry.<sup>100</sup> It will also consider whether the case law and the legislative reaction to these cases was "good" or "bad."

In 1971, a woman and her four children were gruesomely murdered in a California house; ten years later, its past deliberately concealed from her, Dorris Reed bought the house, represented to her as "in good condition and fit for 'an elderly lady' living alone."<sup>101</sup> When the buyer discovered that the house was a murder site, she sued for rescission. The California Court of Appeals, Third District, overruled the trial court and decided that she had a cause of action. This strange case provoked the powerful nation-wide legislative reaction already observed:<sup>102</sup> a score of states churned out legislation exonerating vendors from liability for failure to disclose that the marketed premises were "psychologically impacted." The reaction has been vigorously criticized. In this Article, however, it is argued that such criticism is misplaced and that the legislative reaction, even if promoted by selfish real estate interests,<sup>103</sup> is good.

The California case, *Reed v. King*,<sup>104</sup> has become something of a bizarre landmark. After a decade, it remains the sole case decided on this specific issue and is the progenitor, at least in part, of statutes in eighteen states<sup>105</sup> meant to countermand the case. It was a case of first impression: The defects in this house did not affect its structural integrity but rather the buyer's psychological repose. The court recognized that allowing relief here might "permit the camel's nose of unrestrained irrationality admission into the tent,"<sup>106</sup> and such allowance, unless carefully exercised, would undermine the stability of all conveyances because "any fact that might disquiet the enjoyment of some

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100. *Reed v. King*, 193 Cal. Rptr. 130 (Cal. Ct. App. 1983); *Stamovsky v. Ackley*, 572 N.Y.S.2d 672 (N.Y. App. Div. 1991).

101. *Reed*, 193 Cal. Rptr. at 131.

102. *See supra* note 4.

103. McEvoy, *supra* note 5, at 67.

104. *Reed v. King*, 193 Cal. Rptr. 130 (1983).

105. *See supra* note 4 for the legislative statutes enacted.

106. *Reed*, 193 Cal. Rptr. at 132.

segment of the buying public may be seized upon by a disgruntled purchaser to void a bargain."<sup>107</sup> However, the court decided that:

The murder of innocents is highly unusual in its potential for so disturbing buyers that they may be unable to reside in home where it had occurred. This fact may foreseeably deprive a buyer of the intended use of the purchase. Murder is not such a common occurrence that buyers should be charged with anticipating and discovering this disquieting possibility. Accordingly, the fact is not one for which a duty of inquiry and discovery can sensibly be imposed on the buyer.<sup>108</sup>

Moreover, the court noted that physical usefulness is not the sole criterion of value, or else a stamp collection would be insanity, and the fact that "George Washington slept here" would be of no note.<sup>109</sup> The court remanded the case, holding that the homeowner should be given the chance to prove that the decade-old murder had a significant effect on the market value of the house.<sup>110</sup>

One might think *Reed* is such a factual oddity as to be of no importance.<sup>111</sup> But odd or not, legislators reacted with vigor.<sup>112</sup> And, in 1991, the New York Supreme Court, Appellate Division, decided a case,<sup>113</sup> showing that concern about psychological stigmata was not a phenomenon found "only in California" and in legislatures responding to overwrought real estate lobbyists.<sup>114</sup> The case received national, front-page attention:

In 1989, New York bond trader Jeffrey Stambovsky put down a \$32,500 deposit on a sprawling 18-room Victorian overlooking the Hudson River in Nyack. When an architect refused to work there because it was haunted, Mr. Stambovsky discovered that the seller, Helen Ackley, had written in *Reader's Digest* that the house was inhabited by a cheerful "little person" in Revolutionary garb with "a round, apple-cheeked face," who pranced around and once even ate a

<sup>107.</sup> *Id.*

<sup>108.</sup> *Reed*, 193 Cal. Rptr. at 133.

<sup>109.</sup> *Id.*

<sup>110.</sup> *Id.* at 133-34.

<sup>111.</sup> Actually this is not necessarily the case. See, e.g., *infra* note 122 and accompanying text.

<sup>112.</sup> See *supra* note 4 for the legislative statutes enacted, mostly in response to *Reed*.

<sup>113.</sup> *Stambovsky v. Ackley*, 572 N.Y.S.2d 672 (N.Y. App. Div. 1991).

<sup>114.</sup> McEvoy, *supra* note 5, at 67. "It is obvious that the statutes [regarding psychologically impacted properties] were designed to protect the real estate profession . . ." *Id.*

ham sandwich.<sup>115</sup>

Actually, the court did not, as some newspapers had it, rule "that [the] house is haunted."<sup>116</sup> The court noted that the vendor had represented the house as haunted in the *Reader's Digest* and in the local press and had promoted it on local walking tours as "a riverfront Victorian with a ghost."<sup>117</sup> The court then held that because the buyer had no way of discovering the ghost during the caveat-emptor inspection,<sup>118</sup> the vendor was estopped from denying that the house was haunted. The court further held that the house was haunted as a matter of law, not of fact. The court determined that the plaintiff was entitled to rescission. The house was subsequently re-sold to a buyer who was not concerned about the "ghost."<sup>119</sup> This common-law case had the effect of abrogating the doctrine of caveat emptor in "psychologically impacted" property cases in New York.

Psychologically impacted property, as noted earlier, is the term used for real estate tainted with troubled pasts: murders, felonies, suicides, and, more commonly now, a history of owners or occupants with AIDS. It should be common knowledge by now that AIDS cannot be transmitted by casual contact with infected persons or by contact with clothes, doorknobs, and other items touched by infected persons.<sup>120</sup> And yet, irrational fear of the disease remains.<sup>121</sup> One suit, at least, was filed to rescind a purchase agreement and

115. Mitchell Pacelle, *Ghost Stories Haunt Realtors; Who You Gonna Call? Lawyers. People Flee Spooky Houses, Then Call Deal-Busters to Scare Up Their Money*, WALL ST. J., Oct. 31, 1991, at A1.

That the incorporeal—a ghost—should eat something as corporeal as a ham sandwich might give rise to some doubt, in even the mildest of skeptics, about the reality of this spirit, and cause one to think that perhaps the whole assertion that the house was haunted was, after all, rubbish.

116. *Judge Rules that House is Haunted*, BELLINGHAM HERALD (Bellingham, Wash.), August 18, 1991, at A2.

117. *Stambovsky*, 572 N.Y.S.2d at 674.

118. With respect to discovery of a paranormal phenomenon, see "Who you gonna' call," *Id.* at 675. The line, of course, is from the popular 1980s movie *Ghostbusters*.

119. Annemarie Rokentenetz, *Stigmatized Properties: Know the Legal Boundaries*, reprinted in NATIONAL ASSOCIATION OF REAL ESTATE LICENSE LAW OFFICIALS (NARELLO), *PSYCHOLOGICALLY IMPACTED PROPERTY* (1991).

120. Oregon's legislature has adopted this position by statute. OR. REV. STAT. § 93.273 (1992). It states in pertinent part: "[T]here is no known risk of the transmission of human immunodeficiency virus or acquired immune deficiency syndrome by casual contact." *Id.* See also McEvoy, *supra* note 5, at 63 n.27 (citing the Center for Disease Control).

121. "Public speculation about the potential from transmission of this infectious virus, the degree of morbidity, and other factors, has lead to expression of public fears or anxieties approaching, in some circumstances, panic or hysteria." See CAL. CIV. CODE § 1710.2 (West 1985 & Supp. 1993) (quoting 1986 Cal. Stat. 498).

recover earnest money because the purchaser suspected the owners had AIDS.<sup>122</sup>

#### IV. THE LEGISLATIVE RESPONSE: A DOSE OF RATIONALITY

A review of the varying provisions of the statutes protecting sellers and their agents from liability for non-disclosure to buyers that property is psychologically impacted is outside the scope of this article.<sup>123</sup> However, presenting an example of the genre is appropriate. The Colorado statute, "Nondisclosure of Information; Psychologically Impacting Real Property,"<sup>124</sup> provides as follows:

(1) 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. Such facts or suspicions include, but are not limited to, the following:

(a) That an occupant of real property is, or was at any time suspected to be, infected or has been infected with Human Immunodeficiency virus (HIV) or diagnosed with Acquired Immune Deficiency Syndrome (AIDS), or any other disease which has been determined by medical evidence to be highly unlikely to be transmitted through the occupancy of a dwelling place; or

(b) That the property was the site of a homicide or other felony or of a suicide.

(2) No cause of action shall arise against a real estate broker or salesperson for failing to disclose such circumstance occurring on the property which might psychologically impact or stigmatize such property.

The number of properties that might be branded as "stigmatized" is not insignificant; the assertion that "[t]hese laws are a blunderbuss to attack a small problem—that a very small percentage of properties that have been the sites of

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122. See McEvoy, *supra* note 5, at 59 n.30. The Connecticut Association of Realtors mentioned the *Roberts v. Heramb* case (it was settled out of court) in arguing for the state's stigmatized property law.

123. See generally McEvoy, *supra* note 5.

124. COLO. REV. STAT. ANN. § 38-35.5-101(1) & (2) (1990 and Supp. 1992) (effective 7-1-91).

murders, suicides or other felonies"<sup>125</sup> may be incorrect. One commentator on the District of Columbia's law observed:

Only a few years ago, the number of properties in the District of Columbia that could be characterized as stigmatized properties was relatively small. Today, that is no longer the case. Both the increase in deaths resulting from AIDS and drug-related violence have brought the issue of stigmatized properties to the forefront of debate in this jurisdiction.<sup>126</sup>

But even if the number of properties involved is small, an issue fundamental to the welfare of society is at stake. Here, "a keen interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by . . . , yet which have in them the germ of some wider theory."<sup>127</sup>

V. THE ASSERTION THAT SUCH LEGISLATION IS BAD LAW, AND THE  
RETORT THAT IT IS GOOD LAW

A. *The General Argument that Such Legislation is Bad*

It has been argued that common-law rulings, such as those in *Reed* and *Stamovsky*, requiring the seller of real estate to be liable for failure to disclose that the premises were the site of an earlier murder or are haunted, are good laws.<sup>128</sup> It has also been argued that statutes in derogation of such common law, exonerating a vendor of liability for failure to make such disclosures, are bad laws.<sup>129</sup> An argument that it is bad legislation to impose, or re-impose, the doctrine of caveat emptor for psychologically impacted property is presented as follows:

Habitability means more than just a physical structure that complies with all housing code regulations. It means that a property has not been the site of distressing events, knowledge of which may affect a buyer's decision to make a purchase . . . . Material facts are not only issues related to the physical structure of property but to events that may have occurred there that affect its value to a buyer. This last

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125. McEvoy, *supra* note 5, at 70.

126. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS, GOVERNMENT OF THE DISTRICT OF COLUMBIA, *D.C. Limits Disclosure of Stigmatized Properties*, in 3 D.C. REAL ESTATE COMMISSION COMMENTATOR 1 (1991).

127. *Speech on John Marshall*, in HOLMES READER, *supra* note 40, at 78-79.

128. See McEvoy, *supra* note 5, at 71.

129. *Id.*

vestige of caveat emptor should be laid to rest. The purchase of a home is a major emotional commitment as well as a demanding financial one. Fairness demands the law protect innocent buyers as much as sellers and their agents.<sup>130</sup>

The contrary argument is made here: it is good that caveat emptor is revived in this instance. Even if it was true that the legislation is a "blunderbuss to attack a small problem,"<sup>131</sup> the problem is "small" only in its particular application. An important principle is at stake. The matter is not as simple as detractors would have it, and if they "consider[ed] more definitely and explicitly the social advantage on which the rule they lay down must be justified, they [might] hesitate where now they are confident, and see that really they [are] taking sides upon [a] debatable and . . . burning question . . ."<sup>132</sup> The question is whether laws should be based on reason and should work to promote rationality, or whether they should reflect and promote a popular superstitious mentality.

The argument that the "stigmatized property" legislation is bad law is based on the assertion that it is a revivification of caveat emptor, and that caveat emptor, at least as applied here, is bad law. Caveat emptor is indeed moribund, and properly so. But its revival here is not bad, it is good.

#### *B. Caveat Emptor and "Psychologically Impacted" Property—The Decline of Caveat Emptor*

The doctrine of caveat emptor provides that the purchasers of real property should be vigilant in protecting their own interests. If they buy it, they are bound. The ancient doctrine certainly has its limits; it is in retreat, and has been for years. Clearly, there is a growing duty on the seller of real estate to disclose facts that materially affect the value or desirability of the property if the purchaser does not know, and could not discover, those defects.<sup>133</sup> New York is a hold-out. In *Stamovsky v. Ackley*,<sup>134</sup> the New York Supreme Court, Appellate Division, firmly reiterated that state's time-honored rule:

[W]ith respect to transactions in real estate, New York adheres to the doctrine of caveat emptor and imposes no duty upon the vendor to

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130. *Id.* at 63, 71.

131. See *supra* text accompanying notes 123-24.

132. *The Path of the Law*, in HOLMES READER, *supra* note 40, at 49.

133. For a discussion of the traditional rule (not limited to commercial property) and the recent trends, see Frana Powell, *The Seller's Duty to Disclose in Sales of Commercial Property*, 28/2 AM. BUS. L.J. 245, at 246 nn.4-6.

134. 572 N.Y.S.2d 672 (N.Y. App. Div. 1991).



disclose any information concerning the premises unless there is a confidential or fiduciary relationship, or some conduct on the part of the seller which constitutes "active concealment" (dummy ventilation system). Normally some affirmative misrepresentation . . . is required to impose upon the seller a duty to communicate undisclosed conditions affecting the premises.<sup>135</sup>

However, the court decided, caveat emptor does not apply where the seller fails to disclose that the premises are haunted. The reason is that there is no way for even the most prudent buyer to discover the condition.<sup>136</sup>

The slow demise of caveat emptor reflects modern reality; the demise is reasonable, reflecting good law. The rule evolved in an agrarian society when land, not buildings, were most important, when buildings were simple, and when the materials of their construction obvious.<sup>137</sup> Buyers could see the condition of the land and of the buildings for themselves. Buyers did not need the seller to warn them of defects or problems. New York cleaves to the old rule, but other jurisdictions, certainly, have rendered caveat emptor moribund. For example, Washington, in old cases from agrarian days, has found the following to be actionable misrepresentations: false statements by vendors as to numbers of acres sold,<sup>138</sup> sufficiency of a ditch to carry water,<sup>139</sup> presence of a wild snapdragon farm,<sup>140</sup> and quality of soil, proximity to town, and potential for good farming.<sup>141</sup> More generally, the Supreme Court of Washington has held:

Where there are concealed defects in demised properties, dangerous to the property, health, or life of the tenant, which defects are known to the landlord when the lease is made, but unknown to the tenant, *and which a careful examination on his part would not disclose*, it is the landlord's duty to disclose them to the tenant before leasing, and failure to do so amounts to fraud.<sup>142</sup>

The Supreme Court of Washington has further held that "[c]aveat emptor is no longer rigidly applied to the complete exclusion of any moral and legal

135. *Stamovsky v. Ackley*, 572 N.Y.S.2d 672, 675 (N.Y. App. Div. 1991).

136. *Id.* at 676.

137. See Jane P. Mallor, *Extension of the Implied Warranty of Habitability to Purchasers of Used Homes*, 20 AM. BUS. L.J. 361, 363 (1982).

138. *Alexander Myers & Co. v. Hopke*, 565 P.2d 80 (Wash. 1977).

139. *Smith v. Fletcher*, 173 P. 19 (Wash. 1918).

140. *Griffith v. Griffith*, 165 P. 874 (Wash. 1917).

141. *Reilly v. Gottlieb*, 85 P. 675 (Wash. 1906).

142. *Obde v. Schlemeyer*, 353 P.2d 672, 674-76 (Wash. 1960) (involving termite infestation) (emphasis added).

obligation to disclose material facts not readily observable upon reasonable inspection by the purchaser."<sup>143</sup> Similarly, the Supreme Court of Pennsylvania observed:

The modern judicial trend is away from a strict application of the caveat emptor doctrine and toward the more fair and equitable doctrine requiring disclosure of latent defects which are of a serious and dangerous nature. . . . The object of the law in these cases should be to impose on parties to the transaction a duty to speak whenever justice, equity, and fair dealing demand it.<sup>144</sup>

It is a laudable trend in the law to hold vendors liable for disclosing latent defects. Certainly, it makes sense that buyers should not be responsible for protecting themselves against material or serious defects known to the seller that the buyers cannot discover.

What is a material non-disclosure? A problem in these property-disclosure cases is in deciding what is material. The Fifth Circuit, applying Florida law, has held:

A fact is material if but for the alleged non-disclosure or misrepresentation the complaining party would not have entered into the transaction . . . . Furthermore, the issue of materiality of an alleged non-disclosure [is] a question of fact . . . [I]t is evident that it is the function of the trier of fact to weigh the evidence and determine whether the party would have entered the transaction if the information had been disclosed.<sup>145</sup>

The California Court of Appeals has stated, "Undisclosed facts are material if they have a significant and measurable effect on market value."<sup>146</sup>

The slow demise of caveat emptor is, for the most part, appropriate, but its partial rejuvenation as to stigmatized property is not bad. On the contrary, it may be both good and necessary. The problem is that the concept of

143. *Hughes v. Stusser*, 415 P.2d 89, 92 (Wash. 1966).

144. *Quashnock v. Frost*, 445 A.2d 121, 126 (Penn. 1982) (involving termite infestation).

145. *Hauben v. Harmon*, 605 F.2d 920, 925 & n.1 (5th Cir. 1979).

146. *Karoutas v. Homefed Bank*, 232 Cal. App. 3d 767, 771 (1991). In the *Reed* case, the court noted:

*Reed* alleges the fact of the murders has a quantifiable effect on the market value of the properties. If information known . . . only to the seller has a significant and measurable effect on market value and . . . the seller is unaware of this effect, we see no principled basis for making the duty to disclose turn upon the character of the information.

*Reed v. King*, 193 Cal. Rptr. 130, 131 (1983).

"materiality" in these caveat emptor cases takes too narrow a view of the matter. It is not enough to say that a party would not have entered into the transaction if the undisclosed facts had been known, or that some relief should be granted because the undisclosed facts had a significant effect on market value. It is not enough to assert that "fairness demands the law protect innocent buyers as much as the sellers."<sup>147</sup> It is not enough to finish burying caveat emptor on the grounds of "fairness." What is needed, in a rational legal system, is some broader examination of "fairness," some analysis of whether the law promotes the welfare of society. Clearly, sellers should not be allowed to foist materially, physically defective real estate off onto unsuspecting buyers who cannot, because of the circumstances, protect themselves. But, do we wish to recognize as a matter of law that purely non-physical attributes of property should be "material," and that the irrational beliefs of a buyer should decide market price and so dictate law? In other contexts, such as race-based and AIDS-based real estate evaluation, the answer is "no." The same answer should apply in these cases of psychologically impacted property.

## VI. APPLYING "GOOD LAW" THEORY TO PSYCHOLOGICALLY IMPACTED REAL ESTATE CASES

### A. *Psychologically Impacted Real Estate Evaluation is Irrational*

Even though race may affect property value, the law refuses to countenance race-based real estate evaluation. Even though AIDS may affect property values, the law refuses to accept AIDS-based real estate evaluation. These negative evaluations are deemed invalid, not because they are not real to the buyer, but because they are irrational and harmful to society. Psychologically impacted real estate evaluation is irrational and harmful, and it should be legally unacceptable.

The *Reed* court opined: "The 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. This fact may foreseeably deprive a buyer of the intended use of the purchase."<sup>148</sup> The murder of innocents (but not of non-innocents?) is disturbing, but the chance of buying a house where innocents were murdered may be one of the vicissitudes of modern life,<sup>149</sup> and the house is

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147. McEvoy, *supra* note 5, at 71.

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

149. See McEvoy, *supra* note 5, and consider the following:

Southern California, with its propensity for violence, is home to many abodes where murder has come calling—from 1920's-era Santa Barbara bungalows and glamorous houses in the Hollywood Hills to dusty dwellings in San Bernadino and mountain-view mansions in San Diego . . . . Authorities estimate that residential murders account for

not physically affected by the event.<sup>150</sup>

In these cases, upon what basis does this potential for being disturbed arise? Is it a free-floating anxiety about "bad karma" tainting the air? Is it a kind of unexpressed, or expressed, fear of ghosts? Just as there is no credible evidence to support fear that AIDS may be contracted by touching a doorknob handled by an infected person, so there is no credible evidence to support the existence of ghosts or haunted houses. Some people actually make it their business, or vocation, at least, to investigate stories of haunted houses. "There is," asserts one such investigator, "a scientific explanation for all haunts."<sup>151</sup> That twenty-five percent of people asked in a Gallup poll reported a belief in ghosts<sup>152</sup> makes such a belief no more valid than that ninety-six percent of people in one study apparently believe discrimination against Mexican-Americans is in some way acceptable.<sup>153</sup> The law should not, and does not, countenance race-based real estate evaluation, and by its denunciation of racism,

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more than a third of the Southland's annual killings. With rising numbers of murders in many areas—Los Angeles experienced its second worst homicide tally last year with 991—houses with troubled pasts are becoming more common.

Glionna, *supra* note 54, at A26.

150. The California statute is the only one of the type here in question to condition the seller's insulation from liability by the passage of time: if the murder occurred more than three years prior to the date of the sale, "no cause of action arises" against the seller for failure to disclose. This is really to compound the irrationality, not to exorcise it. No rational basis exists to assert that whatever disturbing quality the stigmatized property possess vanishes in three years. Why not two years, or six, or twenty? If a vendee has a right to rescind a contract because the purchased house was the site of a murder two years ago, why deprive him or her of the right because the murder was five years ago? Holmes commented on this issue—statutes of limitation—as follows:

[W]hat is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time? . . . Sometimes the desirability of peace [is referred to], but why is peace more desirable after twenty years than before?

*The Path of the Law*, in HOLMES READER, *supra* note 40, at 55.

151. Richard Busch, a professional musician and head of the Pittsburgh branch of the Committee for the Scientific Investigation of the Paranormal, as reported by Bill Richards, *And You Thought 'Ghostbusters' Was Just a Movie Farce?*, WALL ST. J., Oct. 31, 1989, at A1. Paul Kurtz, a philosophy professor at the State University of New York at Buffalo is the national head of the committee, formed in 1967. It has 60 chapters around the world. Kurtz observes that there is no scientifically verifiable evidence at all of any kind to substantiate any claim about any kind of paranormality. See Cornell, *supra* note 62, at 30.

152. PUBLIC OPINION INDEX, *supra* note 66, at 517-19; 29% of the people polled expressed a belief "that houses can be haunted"; 49% that "people on this earth are sometimes possessed by the devil."

153. Kushner, *supra* note 81, at 1053 n.15 (citing J. HAKKEN, DISCRIMINATION AGAINST CHICANOS IN THE DALLAS RENTAL HOUSING MARKET (1979)) (finding that dark-skinned Chicanos faced a 96% probability of encountering discrimination; light-skinned Chicanos experienced a 65% level). Indeed, of course, the law cannot—as positivists would have it—accept anything as legal merely because it is the practice of a large number of people. As to prophylaxes, Learned Hand noted: "There are precautions so imperative even their universal disregard will not excuse their omission." *T.J. Hooper v. Northern Barge Corp.*, 60 F.2d 737 (2d Cir. 1932).

racism has decreased. The law should not countenance karmic-based real estate valuations. By its legal denunciation, such irrational ideas also will become less and less acceptable.

*B. Objections and Responses Regarding Legislation Eschewing Such Evaluations*

Three questions may be raised to the assertion that the law ought not to recognize real estate's "bad karma" in considering its worth. The first question is, should the law be based on science, notwithstanding Holmes, Theodore Roosevelt, and Cohen? The second question is, who is harmed by karmic-evaluation? The third question is, if karmic evaluation is disallowed, is not the sensitive vendee damaged?

As to the first question, many legally recognized valuations are unscientific. Why is a Rembrandt painting worth as much as it is? Not for any *scientific* reason, but only because people have a "feeling" that it is valuable and are willing to pay for it. The law could support a buyer's contention for misrepresentation if she purchased a Rembrandt for a million dollars and the painting were a forgery, so why shouldn't the law support the stigmatized-property vendee when he contends that the house he bought was represented as being not-haunted when it "is"?<sup>154</sup> The "fact" of a haunting is no more scientifically based than the "fact" that a Rembrandt painting is valuable.

Granted, not all legally recognized valuations, such as the Rembrandt, are scientific. The Rembrandt is valuable partly because market forces are at work. There is a certain science or social science to the "law" of supply and demand. And certainly discrimination (in its best or worst sense), fame, ignorance, prejudice, and cultural conditioning—all irrational, unscientific—are market forces, and are often protected by the law. But scientific fact is not an anathema to the law either. Court procedures to determine, for example, whether *A* and *B* made a contract, or how fast *C*'s car was going when it crashed, or whether *D* committed a crime show a regard for the orderly attainment of truth that compares very favorably with traditional scientific inquiry. You cannot, as Holmes said, "argue a man into liking a glass of beer,"<sup>155</sup> or a Rembrandt for that matter, but you can reasonably demonstrate (and more and more as technology provides us with video cameras, sonar detectors, and micro-sensitive

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154. The implication of the *Reed* and *Stambovsky* cases certainly appears to be that there is an implied warranty in the sale of a house that it is not haunted or tainted; failure to disclose the opposite is misrepresentation. For a discussion of warranties in the sale of houses, see Jeff Sovern, *Toward a Theory of Warranties in Sales of New Homes: Housing the Implied Warranty Advocates, Law and Economics Mavens, and Consumer Psychologists Under One Roof*, 1993 WIS. L. REV. 13.

155. *Natural Law*, in HOLMES READER, *supra* note 40, at 81.

seismic sensors) that there is no such thing as phantom beer. At any rate, non-scientific valuation may be indulged in by society if such valuation is not harmful to society.<sup>156</sup> This thought leads to the second question.

As to the second question, who is harmed by indulging in karmic real estate assessments, irrational though they may be? Few would argue that racism is anything other than irrational and superstitious (that it has real economic consequences is not an issue here). Yet compared to a belief in bad karma or ghosts, it may be said, discrimination against blacks or chicanos or AIDS victims is not only irrational, it is also harmful to the victim of discrimination.<sup>157</sup> In contrast, accommodating a purchaser's anxiety about stigmatized property by revealing its history to her and granting a price reduction may be based on her irrational fear—it may be irrational, but it is not harmful to anyone. Indeed, the argument goes, such accommodation only reflects market forces: if the house's past is revealed, the new owner (disregarding her anxiety about living in the house) may not be able to sell it for as much as she could if it were not stigmatized.<sup>158</sup> The courts' willingness to follow the argument that ghosts and bad karma influence price and therefore that ghosts and bad karma are legally "material"—what the *Reed* court did—assumes that the fear of ghosts and bad karma are legally cognizable because such fears have a material effect on the purchase price.<sup>159</sup>

But economic reality, market force, is descriptive, not normative or regulative. Rational as it seems, economic reality is not society's standard for

156. Posner observes,

The pragmatist is apt also to be sympathetic to the argument that art and other nondiscursive modes of communication . . . ought to be protected. The pragmatist doubts that there are ascertainable, "objective" standards for establishing the properties of expression and therefore prefers to allow the market to be the arbiter.

Posner, *Pragmatism*, *supra* note 29, at 1662.

157. The baleful effects of discrimination were, of course, the salient argument in *Brown v. Board of Education*: discrimination itself is psychologically injurious to the persons discriminated against. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

158. It is observable that the discomfort felt by a potential purchaser about living in a stigmatized house is remarkably easily remedied by a price reduction. See *supra* note 54, *infra* note 159, and accompanying text.

159. And such fear may effect price. Glionna reports:

In real-estate crazy Southland [Los Angeles] scores of would-be home buyers have proved willing to forgive a house for its deadly past—in return for a bargain. Often reduced in price to lure buyers, some 'murder houses' have been snapped up at costs well below their market value. [Quoting a realtor]: "If the price is right, it doesn't matter what happened at the house . . . people will buy it. Some purchasers are amazed at this price-cutting, some can't believe they're getting a break in price for something that happened in the past. It's not like they'll have to spend thousands replacing the plumbing."

Glionna, *supra* note 54, at A26.

law. If it were, refusal to sell to minorities because of the effect of their home ownership on neighborhood values would be legal, or paying women lower wages than men for the same work would be legal. After all, supporters can argue these are merely market forces at work. Arguments based on such "economic reality" seem rational, but it is really only a liquidation or tangible measure of irrationality. When it is urged that the law be rationally based, it is hoped that the rationality exists at a more sophisticated level than observation and approval of irrationality's own effect (market value). The analysis should *not* be, "Is race-based real estate evaluation rational, considering the validity of the economic effect race has on real estate?" Rather, the analysis should be, "Is race-based real estate evaluation rational, considering the validity of racism?" The irrational evaluation of a Rembrandt has no potential deleterious effects, so it is legally unobjectionable. The irrational evaluation of real estate by countenancing racist or karmic factors gives a judicial stamp of approval to something that, as argued above, promotes the worst kind of mentality for a democratic society, a mentality tending to dependency, lack of critical-thinking ability, delusional fantasy, and poor self adjustment. No such judicial approbation should be advocated.

The third objection, that disallowing lawsuits by vendees aggrieved when they discover their real estate is stigmatized is unfair to vendees, also cannot stand. It is true that what the law may appear to say to such vendees is, in effect, this: "You bought a house that was the site of a gruesome murder, or is haunted, and these things may well diminish its resale value or cause you distress. Too bad. We don't care." Yet again, the law says to vendors, "You cannot refuse to sell your house to a black person, even if you would rather not, even if doing so would diminish the house's value or cause you distress. Too bad. We don't care." And this apparent callousness is acceptable because the ends sought (racial integration, equality of opportunity, and so on) are recognized as highly valuable. In war time, young men are compelled to serve, and not infrequently die, sometimes against their own and their parents' wishes, because we place a higher value on the ends of winning the war than on the life of any individual person. Frequently, the law is compelled to choose between two innocent parties, and the welfare of society in general determines the winner.<sup>160</sup> We must weigh the interests.

If, as the critics would have it, the only effect of legislation denying a cause

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160. For example, a man takes his watch to a dealer to be repaired and entrusts it to the dealer. The dealer, rather than putting it in the "will call" drawer, puts it on display for sale. A good-faith purchaser for value buys it. The purchaser receives good title, even as against the true former owner, even though the dealer did not have title. As between the innocent former owner and the innocent purchaser, the law favors the latter in order not to discourage the free flow of commerce. U.C.C. § 2-403 (1989).

of action for vendees of stigmatized property is to further the interests of the real estate lobby,<sup>161</sup> we may agree that is not enough to overcome the unfairness sensed by the vendee. But if we posit that a larger issue (that of denying judicial legitimacy to superstition) is at stake, the weighing of interests is in favor of such legislation.

What the *Reed* and *Stamovsky* courts should have done was rule that there was no evidence of negligence in the vendors' failure to reveal (in the first case) that the house was the site of a decade-old murder, and (in the second case) no evidence that the house was haunted. The psychologically impacted real estate statutes, of course, do that legislatively. A judicial determination that no negligence is shown is more than a mere ruling on the sufficiency of the facts:

When a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling that there is no evidence of a fact. He rules that the acts or omissions proved or in question do not constitute a ground of legal liability . . . .<sup>162</sup>

Because the courts did not so rule, it is appropriate that the legislatures did. Only temporary good and personal gain to the aggrieved vendee can come from a common law that, tacitly or indirectly, promotes a belief in such superstitious and socially harmful nonsense as bad karma and ghost-tainted real estate.

## VII. CONCLUSION

Following a California decision judicially recognizing the validity of "karmic-based" real estate evaluation, a number of jurisdictions legislated a revival of caveat emptor to "psychologically impacted" or "stigmatized" real estate. It has been argued that such legislation is bad law. However, this Article argues to the contrary. Good law is that which promotes social welfare. Social welfare is promoted when the law is rationally based and when it encourages the development of well-adjusted, critically thinking citizens. A belief in "karmic-based" real estate is consonant, not with healthy mindsets, but with superstition, prejudice, and irrationality. The law, by discouraging such beliefs, may change people's mindsets and thus promote social welfare.

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161. McEvoy, *supra* note 5, at 70.

162. HOLMES, COMMON LAW, *supra* note 13, at 120-21.



