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# MURDERING THE MARKET: HOW STIGMATIZED PROPERTY DISCLOSURE REQUIREMENTS IN SOUTH DAKOTA UNREASONABLY DIMINISH ECONOMIC VALUE IN THE RESIDENTIAL REAL ESTATE MARKET

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*Caveat emptor or “buyer beware” was the longstanding rule in America, guiding the actions of buyers and sellers in the real estate market. The doctrine of caveat emptor has slowly eroded away, due in part to statutory disclosures enacted by the states as well as case law. The mandatory disclosure of latent or “hidden” defects unable to be uncovered by reasonable inspection served to balance the uneven knowledge of sellers and buyers in modern real estate transactions. However, in light of case law such as Reed v. King and Stambovsky v. Ackley, some states have gone too far, requiring disclosure of psychological or “stigmatized” residential property defects. Three states currently require mandatory disclosure of a human death by homicide or suicide occurring on the property during the prescribed period of time: California, Alaska, and South Dakota. This comment will address how South Dakota’s mandatory property disclosure of human death is effectively “murdering the market” by unreasonably diminishing economic value in the residential real estate market. This comment will also suggest legislative action to repeal the mandatory disclosure of human death and felonies that have occurred on the property and prescribe a statutory definition of “adverse material fact” that appropriately balances the interests of both sellers and buyers.*

## I. INTRODUCTION

I just moved in my new house today  
Movin’ was hard but I got squared away  
Bells started ringin’ and chains rattled loud  
Knew I’d moved in a haunted house

Still I made up my mind to stay  
Nothin’ was a gonna drive me away  
When I seen somethin’ that give me the creep  
Had a one big eye and a two big feet

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† JD/MBA Joint Degree Candidate, 2019, University of South Dakota School of Law; B.B.A in Business Management, 2015, University of South Dakota. I would like to express my gratitude to the Editors and Staff Writers of Volume 63 of the *South Dakota Law Review* for their support and countless hours of dedication to the proofreading and cite checking of this article. I dedicate this article to my loving husband, Isaac.

...

Say yes I'll be here when the mornin' comes  
 Be right here and I ain't gonna run  
 I bought this house now you know I'm boss  
 Ain't no haint gonna run me off.<sup>1</sup>

Jumpin' Gene Simmons sang about being unfazed by ghosts in his home.<sup>2</sup> However, not everyone has this same mantra when it comes to psychologically stigmatized property, as evidenced by two infamous cases: *Reed v. King*<sup>3</sup> and *Stambovsky v. Ackley*.<sup>4</sup> The holdings in both of these cases have all but put the nail in the coffin for the age old doctrine of caveat emptor, and replaced "buyer beware" with "seller disclosure."<sup>5</sup> The holdings of *Reed* and *Stambovsky* have left states to interpret what constitutes a material defect necessitating disclosure by a seller in residential real estate transactions.<sup>6</sup>

First, this comment will delve into the history and demise of caveat emptor as well as the infamous cases that put the doctrine to death.<sup>7</sup> Next, this comment will discuss South Dakota's statutory property disclosure form and legislative history as well as the standard for required disclosures in other states.<sup>8</sup> This comment will then discuss the unsound logic behind stigmatized property disclosure by comparing other outdated disclosures with the resulting gray area South Dakota's statute creates in the law.<sup>9</sup> Furthermore, this comment will consider the economic impacts of reducing property values due to non-structural "defects."<sup>10</sup> Finally, this comment will offer a two-part recommendation to South

1. JUMPIN' GENE SIMMONS, HAUNTED HOUSE (Hi Records 1964).

2. *Id.*

3. 193 Cal. Rptr. 130 (Cal. Ct. App. 1983).

4. 572 N.Y.S.2d 672 (N.Y. App. Div. 1991). See Robert M. Morgan, *The Expansion of the Common Law Duty of Disclosure in Real Estate Transactions: It's Not Just for Sellers Anymore*, 68 FLA. B.J. 28, 31 (1994) (citation omitted) (defining stigmatized property as "property psychologically impacted by an event which occurred or was suspected to have occurred on the property, such event being one that has no physical impact of any kind"). Stigmatized property in real estate is generally regarded as psychologically negative events that may impact the value of property, although having no effect on the structural integrity of the property, such as a death or felony occurring on the premises. This comment will use the terms "stigmatized property" and "psychological defects" interchangeably when discussing the negative impacts of death which occurred on residential property.

5. *Reed*, 193 Cal. Rptr. at 133-34; *Stambovsky*, 572 N.Y.S.2d at 678.

6. *Reed*, 193 Cal. Rptr. at 133-34; *Stambovsky*, 572 N.Y.S.2d at 678.

7. See *infra* Part II (discussing the history, demise, and relevant case law surrounding the doctrine of caveat emptor).

8. See *infra* Part III (discussing legislative approaches of South Dakota and other states regarding property disclosure duties).

9. See *infra* Part IV (discussing the unsound logic that surrounds mandated disclosures of death, sexual offenders, and previous occupants infected with Acquired Immune Deficiency Syndrome ("AIDS"), the latter two disclosures of which are not required in South Dakota).

10. See *infra* Part V (discussing economic and psychological studies that demonstrate how legally mandated disclosure of stigmatized properties creates financial waste by unreasonably diminishing the economic value of residential real estate absent any structural defects).

Dakota's current property disclosure form and the statute defining an adverse material fact.<sup>11</sup>

## II. THE ASPHYXIATION OF CAVEAT EMPTOR

Caveat emptor or "buyer beware" is the shortened form derived from the Latin maxim, "*Caveat emptor, qui ignorare non debuit quod jus alienum emit*" or translated to English, "Let a purchaser, who ought not to be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution."<sup>12</sup>

### A. HISTORICAL ANALYSIS OF CAVEAT EMPTOR

The doctrine of caveat emptor dates back to market signs in ancient Rome that portrayed the Latin phrase and warned purchasers that it was their responsibility to inspect goods before purchase and to protect themselves from crafty merchants.<sup>13</sup> The doctrine became so engrained in society that it was easily transferred to the common law standard for real estate in England.<sup>14</sup> Real estate during the Middle Ages in England was predominantly centered around transfers of land for agricultural purposes, rather than for residential purposes as is common today.<sup>15</sup> The strict application regarding the law of caveat emptor was proclaimed in an old English real estate case, *Peek v. Gurney*,<sup>16</sup> dating back to 1873 which held the seller has "no duty to disclose facts regardless of how 'morally censurable' silence may be."<sup>17</sup>

Naturally, caveat emptor carried over from English jurisprudence to the American legal system through the birth of American common law regarding real estate transactions.<sup>18</sup> Caveat emptor was predominantly popular in America during the industrial revolution when the courts reflected society's emphasis on

11. See *infra* Part VI (prescribing the repeal of both portions of the South Dakota property disclosure form regarding human death and felonies as well as amending the statutory definition of adverse material fact). Note that what many states refer to as a "material defect" necessitating disclosure, the South Dakota legislature refers to as an "adverse material fact." This comment will use the terms "material defect," "material fact," and "adverse material fact" interchangeably. The rationale of this comment's argument will focus on the diminishment of economic value, specifically regarding disclosure of human death on residential property. However, the same arguments this comment focuses on (diminishments in economic value and unsound logic surrounding the statute) are likewise applicable to the repeal of felony disclosures. Comparing other state laws regarding disclosures of felonies that have occurred on the property is outside the scope of this comment.

12. Alan M. Weinberger, *Let the Buyer Be Well Informed?—Doubting the Demise of Caveat Emptor*, 55 MD. L. REV. 387, 388 n.5 (1996) (citing HERBERT BROOME, A SELECTION OF LEGAL MAXIMS 528 (10th ed. 1939)).

13. John H. Scheid, Jr., *Mandatory Disclosure Law: A Statute for Illinois*, 27 J. MARSHALL L. REV. 155, 157-58 (1993).

14. *Id.* at 158. See also Weinberger, *supra* note 12, at 392-93 (discussing *Chandelor v. Lopus* as the origin of caveat emptor in English common law).

15. Scheid, *supra* note 13, at 158.

16. (1873) 6 LRE & I. App. 377 (HL) 403 (Eng.).

17. Scheid, *supra* note 13, at 159.

18. *Id.*

*laissez faire* values and the government refused to intrude into economic business pursuits on the basis of efficiency.<sup>19</sup> In fact, the very phrase “*laissez faire*,” French for “let (them/it) do,” corresponds seamlessly with the doctrine of caveat emptor.<sup>20</sup> Caveat emptor requires buyers to be responsible for dealing with the consequences of a poor transaction without the remedies of governmental or judicial interference.<sup>21</sup> However, during the latter half of the twentieth century, courts switched positions and adopted the policy that sellers, having superior knowledge of their property, had a duty to disclose certain defects to buyers, thereby descending into the demise of caveat emptor.<sup>22</sup>

## B. FRAUD AND MISREPRESENTATION

Even the common law doctrine of caveat emptor in American jurisprudence did not protect sellers who engaged in fraud or misrepresentation.<sup>23</sup> At common law, sellers could protect themselves by remaining silent on issues; however, the courts have found that in instances of partial disclosure or when asked directly by a buyer, a duty to inform may arise.<sup>24</sup> Therefore, omission of a material fact is now actionable as fraud in states that have expanded the doctrine.<sup>25</sup> Absent statutory definition, the classic definition of a material fact generally relied on is one “to which a reasonable man might be expected to attach importance in making his choice of action.”<sup>26</sup> Similarly, a Florida court held a material fact is one that “substantially affects the value of the property.”<sup>27</sup> Absent statutory provisions excluding stigmatization as a material fact, such as in South Dakota, courts are left with an unclear recourse as to what types of stigmatization implicate the classic definition of a material fact.<sup>28</sup> Historically, courts have held material facts to be those which may affect the structural integrity or use of the property, such as:

prior termite damage, active termite damage, illegal and condemned building, defective roof, defective well, radioactive mine tailings, filled soil, defective septic system, building code violation, lot requiring retaining wall prior to constructing a building, generally

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19. *Id.*

20. *Laissez Faire*, GOOGLE TRANSLATE, <https://translate.google.com/?um=1&ie=UTF-8&hl=en&client=tw-ob#fr/en/laissez%20faire> (last visited Mar. 13, 2018); Scheid, *supra* note 13, at 157-58.

21. Scheid, *supra* note 13, at 158.

22. Tracey A. Van Wickler, *H.B. 2564: The Real Estate Disclosure Act Threatens Arizona's Children with Becoming "Megan" Victims*, 32 ARIZ. ST. L.J. 367, 372 (2000).

23. Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DEPAUL L. REV. 381, 385 (1995).

24. *Id.* at 386-87.

25. *Id.* at 387.

26. *Id.* at 389 (quoting W. PROSSER, LAW OF TORTS § 108 (4th ed. 1971)).

27. *Revitz v. Terrell*, 572 So. 2d 996, 998 (Fla. Dist. Ct. App. 1990). *See also* Washburn, *supra* note 23, at 389 (discussing the various approaches state courts have taken when defining a material fact, including the stance Florida has taken).

28. *See* S.D.C.L. § 36-21A-125 (2015) (defining an adverse material fact by statute as “information that negatively affects the value of the property” but not excluding stigmatized property from this definition).

deteriorated condition of the property, wood beetle damage, water rights, contaminated well, basement flooding, drain tile underneath house, structural defects, artisan well underneath property, prior fire damage, tilting house, sewer connection charges, house insulated with urea formaldehyde insulation, defective earth-sheltered home, and flood damage.<sup>29</sup>

### C. PATENT AND LATENT DEFECTS

Therefore, the question then becomes: what is considered a material fact necessitating disclosure to alleviate the seller against claims of fraud, concealment, or misrepresentation? At common law, sellers were only required to disclose “latent” or “hidden” defects, while “patent” or “non-hidden” defects were considered the responsibility of the buyer to observe through due diligence.<sup>30</sup> However, the latent defect exception to caveat emptor became blurred when courts began characterizing psychologically stigmatized property as a material fact due to its hidden nature, despite the purported defect having no bearing on the structural integrity of a residential property.<sup>31</sup>

### D. THE EROSION OF CAVEAT EMPTOR THROUGH CASE LAW

In 1983, *Reed v. King* was the first case to hold stigmatized property to be a material defect due to its latent nature.<sup>32</sup> In *Reed*, a home was the site of five gruesome murders of a mother and her four children ten years prior to the sale of the home.<sup>33</sup> Although the buyer never specifically asked about any stigmatizing events occurring on the property, the seller purposely did not disclose the murders.<sup>34</sup> In fact, the seller went so far as to ask the neighbors not to inform the prospective buyer.<sup>35</sup> However, as the court quoted the words of Shakespeare, “it

29. Washburn, *supra* note 23, at 389-90 (internal citations omitted).

30. See Kathleen McNamara Tomcho, *Commercial Real Estate Buyer Beware: Sellers May Have the Right to Remain Silent*, 70 S. CAL. L. REV. 1571, 1585 (1997) (“For patent defects, however, caveat emptor continues to be the controlling principle. Patent defects are those that are open and observable to an ordinarily prudent person conducting a reasonable inspection.”).

31. See *Reed v. King*, 193 Cal. Rptr. 130, 133-34 (Cal. Ct. App. 1983) (recognizing a psychological defect as a material fact); *Stambovsky v. Ackley*, 572 N.Y.S.2d 672, 678 (N.Y. App. Div. 1991) (same); Alex Geisinger, *Nothing but Fear Itself: A Social-Psychological Model of Stigma Harm and Its Legal Implications*, 76 NEB. L. REV. 452, 462 (1997) (stating “many courts have denied proximity stigma cases based on the failure to prove actual physical harm to one’s property”); Tomcho, *supra* note 30, at 1586 (discussing “[w]hether a defect is patent or not is a question of fact that turns on the particular circumstances of each case”); Daniel M. Warner, *Caveat Spiritus: A Jurisprudential Reflection Upon the Law of Haunted Houses and Ghosts*, 28 VAL. U.L. REV. 207, 208 (1993) (claiming some states have attempted to bring caveat emptor “back from the edge of its grave” by adopting “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”).

32. *Reed*, 193 Cal. Rptr. at 133-34.

33. *Id.* at 130.

34. *Id.* at 131.

35. *Id.*

seems ‘truth will come to light; murder cannot be hid long.’”<sup>36</sup> Such was the case when, after the purchase, a neighbor informed the buyer of the gruesome murders, and the buyer sued to rescind the contract.<sup>37</sup> For the first time, the court held that stigmatization of property could be a material fact despite there being no “physical defects or legal impairments to use.”<sup>38</sup> In coming to this holding, the court reasoned that

[t]he murder of innocents is highly unusual in its potential for so disturbing buyers 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. 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 upon the buyer.<sup>39</sup>

However, the *Reed* court recognized that the floodgates to litigation based on “idiosyncratic grounds” may prove troublesome if the buyer is unable to establish a significant effect on market value due to undisclosed stigmatizing events.<sup>40</sup>

In fact, *Reed* did pave the way for subsequent litigation regarding rescission of contracts based on stigmatized property. Eight years later, a case from New York resulted in another haunting holding for sellers in the real estate market.<sup>41</sup> In *Stambovsky v. Ackley*, the court permitted rescission of a real estate contract, holding the seller was estopped from denying “as a matter of law, the house [was] haunted.”<sup>42</sup> The seller claimed to have seen poltergeists in the home, and publicized these sightings in *Readers’ Digest*.<sup>43</sup> The court recognized that the state strictly applied the rule of caveat emptor, and therefore could not award damages due to the seller’s mere silence.<sup>44</sup>

However, it was not the ghostly puns expressed in the court’s opinion that were the cause of shrieks by those in the real estate market, but rather the court’s ethereal holding.<sup>45</sup> The court logically reasoned that “if the doctrine of caveat

36. *Id.* at 130 (quoting WILLIAM SHAKESPEARE, *MERCHANT OF VENICE* act 2, sc. 2).

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

38. *Id.* at 131.

39. *Id.* at 133.

40. *Id.* at 134.

41. *Stambovsky v. Ackley*, 572 N.Y.S.2d 672, 678 (N.Y. App. Div. 1991).

42. *Id.* at 674.

43. *Id.* Like *Reed*, the buyer in this case was unaware of the psychological defects associated with the property. However, there was no evidence offered that the seller purposely instructed neighbors to conceal the reported hauntings. *Id.* Contrary, the seller had published these sightings in local newspapers and the *Readers’ Digest*, a national publication. *Id.* Despite these publications, the court held the buyer could not be expected to have learned of the purported hauntings because the buyer was from the city of New York, and the property was located in the Village of Nyack. *Id.*

44. *Id.*

45. *Id.* Some of the witty banter within the court’s opinion included the following: “Plaintiff, to his horror, discovered that the house he had recently contracted to purchase was widely reputed to be possessed by poltergeists . . .” *Id.* (emphasis added). “[I]n his pursuit of a legal remedy for fraudulent misrepresentation against the seller, plaintiff hasn’t a ghost of a chance, I am nevertheless moved by the spirit of equity to allow the buyer to seek rescission of the contract of sale and recovery of his down

emptor is to be discarded, it should be for a reason more substantive than a poltergeist.”<sup>46</sup> The court expounded by stating that the purported hauntings were no more binding upon the seller than they were upon the court.<sup>47</sup> Similarly, the court held the buyer did not have a “ghost of a chance,” in an action for fraudulent misrepresentation.<sup>48</sup> Despite this reasoning, the court contradicted itself when it determined it was “moved by the spirit of equity” and allowed the buyer to seek rescission of the contract and recover his down payment.<sup>49</sup> The court ridiculed the idea of psychic mediums accompanying structural engineers during home inspections, stating that hauntings cannot be expected to be ascertained from a reasonable inspection.<sup>50</sup> Despite *Stambovsky* later being superseded by New York statute, the damage had already threatened to slaughter the market, as states scrambled to enact varying legislative disclosures addressing stigmatized property disclosures in real estate.<sup>51</sup>

### III. THE SLAUGHTER OF SELLER’S DISCLOSURES INVOLVING HUMAN DEATH

Post *Reed* and *Stambovsky*, many states enacted legislation, but with substantial variation and opacity.<sup>52</sup> For example, some states enacted legislation specifically excluding stigmatized property from the definition of a material fact.<sup>53</sup> Other states, including South Dakota, took more extreme measures by codifying property disclosure statutes specifically requiring disclosures of

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payment.” *Id.* (emphasis added). “From the perspective of a person in the position of plaintiff herein, a very practical problem arises with respect to the discovery of a paranormal phenomenon: ‘*Who you gonna call?*’ as the title song to the movie ‘*Ghostbusters*’ asks.” *Id.* (emphasis added). “It portends that the prudent attorney will establish an escrow account lest the subject of the transaction *come back to haunt him and his client* . . . the notion that a haunting is a condition which can and should be ascertained upon reasonable inspection of the premises is a *hobgoblin* which should be *exorcised* from the body of legal precedent and *laid quietly to rest*.” *Id.* (emphasis added).

46. *Id.* at 678.

47. *Id.*

48. *Id.* at 674.

49. *Id.*

50. *Id.* The court in *Stambovsky* likened the idea adhering to strict caveat emptor by requiring buyers to unearth hauntings on a property to a “hobgoblin which should be exorcised from the body of legal precedent and laid quietly to rest.” *Id.*

51. N.Y. REAL PROP. LAW § 443-a (McKinney 2018). See *Bishop v. Graziano*, 804 N.Y.S.2d 236, 238 (N.Y. Dist. Ct. 2005) (addressing the statute which superseded *Stambovsky v. Ackley* fourteen years after the court’s ruling). See also *infra* Part III (demonstrating the various approaches state legislatures took to address disclosure duties of sellers with regards to stigmatized properties).

52. See *Duty to Disclose: 50 State Regulatory Surveys*, 0120 REGSURVEYS 6 (addressing the laws of all fifty states regarding duties of disclosure owed by sellers of residential real property). Although discussing the requirements of all fifty states is beyond the scope of this comment, this section will address various statutes that cover the spectrum of approaches taken by state legislatures.

53. Marc Ben-Ezra & Asher Perlin, *Stigma Busters A Primer on Selling Haunted Houses and Other Stigmatized Property*, 19 PROB. & PROP. 59, 60 (2005). See also ARIZ. REV. STAT. ANN. § 32-2156 (stating no action of any kind may be brought against a seller for “failing to disclose that the property being transferred or leased is or has been . . . [t]he site of a natural death, suicide or homicide or any other crime classified as a felony”).



stigmatized property.<sup>54</sup> State property disclosure laws can be categorized into three groups: (1) states that require disclosure of stigmatized property within some time period; (2) states that do not require disclosure of stigmatized property unless asked; and (3) states that do not require disclosure of stigmatized property even when asked.<sup>55</sup>

#### A. STATES THAT REQUIRE DISCLOSURE OF STIGMATIZED PROPERTY

What is perhaps more supernatural than the radically different legislative approaches to stigmatized property are the contrasting ideological and geographical aggregate of the only three states in the country that require property disclosure due to human death by homicide or suicide absent buyer inquiry: South Dakota, California, and Alaska.<sup>56</sup>

##### 1. South Dakota

Post *Stambovsky*, South Dakota enacted its first statutory property disclosure form in 1993 through House Bill 1212 via the Commerce Committee.<sup>57</sup> This legislation is unique in that the property disclosure form is codified into law in a manner that the statute can be printed and filled in.<sup>58</sup> The original property disclosure form mandated the seller to disclose a human death by homicide that occurred on the property within the previous twelve months.<sup>59</sup> In 2005, the property disclosure form was amended through Senate Bill 83 to include “a human death by homicide *or suicide*” within the previous twelve months.<sup>60</sup> The property disclosure form was subsequently revised in 2007 (Senate Bill 127), 2008 (Senate Bill 97), and 2011 (Senate Bill 70), but none of the subsequent bills amended the

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54. Ben-Ezra & Perlin, *supra* note 53, at 60. See also S.D.C.L. § 43-4-44 (Supp. 2017) (codifying a property disclosure form that has a provision asking the seller the following: “Within the previous twelve months prior to signing this document, are you aware of any of the following occurring on the subject property? . . . A human death by homicide or suicide? If yes, explain”).

55. See *infra* Part III.A (addressing states that require disclosure of stigmatized property within some time period); *infra* Part III.B (addressing states that do not require disclosure of stigmatized property unless asked); *infra* Part III.C (addressing states that do not require disclosure of stigmatized property even when asked).

56. S.D.C.L. § 43-4-44 (Supp. 2017); CAL. CIV. CODE § 1710.2 (West 2016); ALASKA STAT. ANN. § 34.70.010 (West 2017). Although Alaska’s statute does not explicitly mandate disclosure of human death, the statute does give the Alaska Real Estate Commission the power to create the required disclosure form. ALASKA STAT. ANN. § 34.70.050 (West 2017). The Alaska Real Estate Commission mandates disclosure of “any murder or suicide having occurred on the property within the preceding [three] years.” Alaska Real Estate Commission, *State of Alaska Residential Real Property Transfer Disclosure Statement*, 5 (2008), <https://www.commerce.alaska.gov/web/portals/5/pub/rec4229.pdf>.

57. South Dakota Joint Journal and Index and Journal Corrections for the Senate and House of Representatives, Sixty-Eighth Legislative Session 1993 (185).

58. S.D.C.L. § 43-4-44 (2004 & Supp. 2017).

59. H.B. 1212, 68th Leg. Assemb., Reg. Sess. (S.D. 1993).

60. S.B. 83, 80th Leg. Assemb., Reg. Sess. (S.D. 2005) (emphasis added).

clause that mandates sellers to disclose human death by homicide or suicide on the property within the previous twelve months.<sup>61</sup>

## 2. California

California became the first state to enact a property disclosure statute in 1985.<sup>62</sup> Not surprisingly, the legislation was enacted a mere two years following *Reed v. King*, presumably in response to the holding in *Reed* by the California Court of Appeals.<sup>63</sup> California's statute is stricter than South Dakota's statute regarding a seller's duty to disclose because it requires disclosure of a human death by *any means* occurring within the previous *three years*.<sup>64</sup> Therefore, if California's statute had been enacted prior to *Reed v. King*, the outcome in the case would have been much different because the concealment of the gruesome murders from ten years prior would have been deemed non-material based on California's post-*Reed* statutory definition.<sup>65</sup>

## 3. Alaska

Alaska has a similar methodology to South Dakota and California regarding disclosure of death, but has taken a slightly different approach.<sup>66</sup> Alaska requires a written disclosure prior to the transfer of property, but prescribes in the statute that the disclosure form shall be established by the Alaska Real Estate Commission, subject to minor statutory provisions regarding clauses the Real Estate Commission must include on the disclosure form.<sup>67</sup> The form the Alaska Real Estate Commission provides mandates disclosure of "any murder or suicide having occurred on the property within the preceding [three] years."<sup>68</sup>

Therefore, summarizing the legislation of the three states mandating seller's property disclosure of death in order from least strict to most strict are as follows: South Dakota requires disclosure of human death by homicide or suicide within the previous year, Alaska requires disclosure of human death by murder or suicide within the previous three years, and California requires disclosure of any human death occurring on the property within the previous three years.<sup>69</sup>

61. S.B. 127, 82nd Leg. Assemb., Reg. Sess. (S.D. 2007); S.B. 97, 83rd Leg. Assemb., Reg. Sess. (S.D. 2008); S.B. 70, 86th Leg. Assemb., Reg. Sess. (S.D. 2011).

62. Washburn, *supra* note 23, at 381.

63. *Reed v. King*, 193 Cal. Rptr. 130 (Cal. Ct. App. 1983).

64. CAL. CIV. CODE § 1710.2 (West 2016).

65. *Id.* California's statute states a seller is not required to disclose "[t]he occurrence of an occupant's death upon the real property or the manner of death where the death has occurred more than three years prior to the date the transferee offers to purchase, lease, or rent the real property." *Id.*

66. See Washburn, *supra* note 23, at 423 (discussing Alaska enacting "a version of the California Act's Disclosure Article").

67. ALASKA STAT. ANN. § 34.70.010 (West 2017); ALASKA STAT. ANN. § 34.70.050 (West 2017).

68. Alaska Real Estate Commission, *State of Alaska Residential Real Property Transfer Disclosure Statement*, 5 (2008), <https://www.commerce.alaska.gov/web/portals/5/pub/rec4229.pdf>.

69. Note that the test of Alaska's property disclosure form only requires disclosure of "murder or suicide" as opposed to South Dakota's property disclosure which requires the disclosure of "homicide or

## B. STATES THAT DO NOT REQUIRE DISCLOSURE OF STIGMATIZED PROPERTY UNLESS ASKED

The majority of states have enacted legislation that shields sellers for failing to disclose psychologically stigmatized property.<sup>70</sup> While some states are silent on the issue of stigmatized property disclosure, other states have enacted legislation specifically deeming stigmatizing events as “non-material” and therefore unnecessary for legal disclosures.<sup>71</sup> Georgia and Delaware are two states that deem psychological defects to be non-material, but also require disclosure if asked by a prospective buyer.<sup>72</sup>

### 1. Georgia

Georgia enacted legislation in 1989 through what was originally termed the “ghost and goblin bill.”<sup>73</sup> Georgia’s statute expressly states that no cause of action shall arise for the “failure to disclose in any real estate transaction the fact or suspicion that such property . . . [w]as the site of a homicide or other felony or a suicide or a death by accidental or natural causes.”<sup>74</sup> However, the second half of the statute provides some protection to buyers, stating that sellers must answer truthfully to the best of their knowledge if asked about stigmatizing events that occurred on the property, so long as the disclosure does not violate another law.<sup>75</sup>

### 2. Delaware

Delaware has taken a nearly identical approach as Georgia to stigmatized property.<sup>76</sup> Delaware’s statute states “[t]he fact or suspicion that a property might be or is psychologically impacted is not a material fact that must be disclosed in a real property transaction.”<sup>77</sup> The statute also states that no cause of action may be taken against a seller for failure to disclose actual knowledge or suspected

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suicide.” Although Alaska’s statute has a longer, and therefore more restrictive time period to sellers, it could also be argued that the deaths constituting disclosure are less restrictive than South Dakota’s statute. Arguably, if a death did not constitute a death rising to the threshold of the legal definition of murder, that death would not need to be disclosed in Alaska, unlike South Dakota’s statute, which would require disclosure of lesser included homicides. It is unclear whether the term “murder” was used intentionally by the Alaska Real Estate Commission to narrow the scope of deaths necessitating disclosure or if this was an oversight in legal terminology.

70. Van Wickler, *supra* note 22, at 368-69.

71. *Id.*

72. See *infra* Part III.B.1-2 (discussing the statutes of Georgia and Delaware).

73. Stephanie A. Everett, *General Provisions: Provide Protection for Failing to Disclose Certain Information During A Real Estate Transaction*, 18 GA. ST. U.L. REV. 260, 260-61 (2001).

74. GA. CODE ANN. § 44-1-16 (West 2017).

75. *Id.*

76. See *supra* Part III.B (demonstrating the similarities between Georgia and Delaware’s property disclosure statutes).

77. DEL. CODE ANN. tit. 24, § 2927 (West 2012).

knowledge that the property is psychologically impacted.<sup>78</sup> Similarly, the latter half of Delaware's statute states that despite the non-disclosure requirement, a seller shall answer truthfully to the best of their knowledge if specifically asked by a buyer about psychological stigmatizations.<sup>79</sup> However, Delaware's statute goes one step further than Georgia's statute by requiring the buyer's inquiry be made in writing.<sup>80</sup>

### C. STATES THAT DO NOT REQUIRE DISCLOSURE OF STIGMATIZED PROPERTY EVEN WHEN ASKED

The majority of states have enacted legislation terming stigmatized defects as non-material, and therefore unnecessary to disclose.<sup>81</sup> Unlike the approach of Georgia and Delaware, most states do not include a clause in their disclosure statutes mandating disclosure if directly asked by a buyer.<sup>82</sup> Although these states permit silence, they do not permit fraud by asserting false or misleading statements about psychological defects.<sup>83</sup> Arizona, Connecticut, South Carolina, Rhode Island, Maryland, Florida, Oregon, and New York are examples of states taking the majority stance on non-disclosure of psychological defects, even when asked by a prospective buyer.<sup>84</sup>

#### 1. Arizona

In 1995, Arizona enacted legislation stating that no action may be brought for "failing to disclose that the property being transferred or leased is or has been . . . [t]he site of a natural death, suicide or homicide or any other crime classified as a felony."<sup>85</sup> Furthermore, Arizona's statute provides an additional provision, stating that the "failure to disclose a nonmaterial fact or suspicion 'shall not be [considered] grounds for termination or rescission of any transaction in which real property has been or will be transferred or leased.'"<sup>86</sup>

78. *Id.*

79. *Id.*

80. *Id.*

81. *See infra* Part III.C (discussing numerous states which have passed legislation that deem stigmatized defects as non-material).

82. *See infra* Part III.C (addressing statutes that do not require affirmative responses when directly inquired by prospective buyers).

83. *See infra* Part III.C (demonstrating how some states have carefully legislated by adding clauses to stigmatized property statutes by stating the non-disclosure aspect does not permit fraudulent misrepresentations).

84. *See infra* Part III.C (discussing examples of specific statutes that demonstrate the majority view on non-disclosure and permitted silence).

85. ARIZ. REV. STAT. ANN. § 32-2156 (2017).

86. Van Wickler, *supra* note 22, at 385 (quoting ARIZ. REV. STAT. ANN. § 32-2156).

## 2. Connecticut

Connecticut's "ghostbuster" law does not require disclosure of stigmatized property, treating psychologically stigmatizing events as non-material facts and prohibiting a cause of action for failure to disclose these events.<sup>87</sup> Although the statute provides an opportunity for a buyer to inquire about homicide, suicide, or felony on the property, the buyer's request must be made in writing.<sup>88</sup> However, the statute allows the seller to refuse to disclose such information, but the seller must deny the purchaser's request in writing.<sup>89</sup>

## 3. South Carolina and Rhode Island

South Carolina and Rhode Island have nearly identical statutes regarding non-disclosure of psychologically impacted property.<sup>90</sup> While South Carolina's statute makes death of an occupant a non-material fact, Rhode Island's statute lists homicide, suicide, and felony as non-material facts.<sup>91</sup> Both statutes clearly state that psychologically stigmatizing events, whether known or suspected, are not necessary for property disclosures.<sup>92</sup> Both statutes also end with a clause enforcing good faith and fair dealing by stating that the statutes provide no authorization to an agent or seller to make any misrepresentations or false statements about stigmatized property.<sup>93</sup>

## 4. Maryland and Florida

Maryland's statute encompasses the mantra held by the majority of the states by clearly stating stigmatized property is a non-material fact.<sup>94</sup> Maryland's property disclosure statute differs slightly by explicitly stating *any* death—whether homicide, suicide, accidental, or natural—is a non-material fact that does not need to be disclosed to a prospective buyer.<sup>95</sup> Florida's statute also takes an all-encompassing approach to the question of which types of death constitute a stigma, and are therefore non-material, by stating "[t]he fact that a property was, or was at any time suspected to have been, the site of a homicide, suicide, or death is not a material fact that must be disclosed in a real estate transaction."<sup>96</sup>

87. *Duty of Seller of Real Estate and Its Agent to Disclose to Buyer Facts of Past Violent Crimes or Hauntings Within Property Subject to Sale*, 18 A.L.R.7th Art. 1 (2016); CONN. GEN. STAT. ANN. § 20-329cc-ee (West 2018).

88. CONN. GEN. STAT. ANN. § 20-329ee.

89. *Id.*

90. 5 R.I. GEN. LAWS ANN. § 5-20.8-6 (West 2017); S.C. CODE ANN. § 27-50-90 (2018).

91. 5 R.I. GEN. LAWS ANN. § 5-20.8-6; S.C. CODE ANN. § 27-50-90.

92. 5 R.I. GEN. LAWS ANN. § 5-20.8-6; S.C. CODE ANN. § 27-50-90.

93. 5 R.I. GEN. LAWS ANN. § 5-20.8-6; S.C. CODE ANN. § 27-50-90.

94. MD. CODE ANN., BUS. OCC. & PROF. § 17-322.1 (West 2018).

95. *Id.*

96. FLA. STAT. ANN. § 689.25 (West 2018).

### 5. Oregon

Oregon's statute states that all deaths—whether by violent crime, suicide, “or by any other manner”—are non-material to a real estate transaction.<sup>97</sup> However, Oregon takes it one step beyond Maryland and Florida by adding that whether the death occurred on the real property “or a neighboring property” or “was the site of a crime, political activity, religious activity or any other act or occurrence that does not adversely affect the physical condition of or title to real property” also does not constitute a material fact.<sup>98</sup>

### 6. New York

The haunting decision in *Stambovsky v. Ackley* arose from a New York court.<sup>99</sup> Ironically, New York, one of the initial states that triggered the uproar in the real estate market, has since joined the majority of states in the country by enacting legislation for non-disclosure of stigmatized property.<sup>100</sup> In New York, although the buyer is permitted to make a written request for such information, a seller is not obligated to respond or disclose the “property is, or is suspected to have been, the site of a homicide, suicide or other death by accidental or natural causes, or any crime punishable as a felony.”<sup>101</sup>

## IV. A MASSACRE ON LOGIC: MANDATORY DISCLOSURE OF STIGMATIZED DEFECTS

Mandatory disclosure of stigmatized defects is based on unsound logic.<sup>102</sup> Perhaps South Dakota originally enacted the property disclosure statute to protect sellers by prohibiting buyers from rescinding a contract for psychological defects occurring more than twelve months before the disclosure.<sup>103</sup> However, if South Dakota's intent was to protect sellers, the state could have simply enacted legislation, such as the majority of states, by clearly defining psychological defects, including homicide, suicide, and felonies, as non-material defects that

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97. OR. REV. STAT. ANN. § 93.275 (West 2018).

98. *Id.*

99. *Stambovsky v. Ackley*, 572 N.Y.S.2d 672, 678 (N.Y. App. Div. 1991).

100. N.Y. REAL PROP. LAW § 443-a (McKinney 2018).

101. *Id.*

102. See Geisinger, *supra* note 31, at 454 (“The lack of understanding of the stigma phenomenon has led courts to fashion rules of liability and damages that advance few, if any, valid policy concerns.”).

103. See Katherine A. Pancak et al., *Residential Disclosure Laws: The Further Demise of Caveat Emptor*, 24 REAL EST. L.J. 291, 298 (1996) (stating “[b]ecause of an increase in buyer litigation on the ground of misrepresentation, brokers in many states have advised sellers to voluntarily provide written property condition disclosure forms. Thus, disclosure statements have emerged as a mechanism to protect sellers and brokers”); Weinberger, *supra* note 12, at 414 (discussing how state disclosure statutes accomplish the objective of “protect[ing] sellers from liability for failing to disclose psychologically stigmatizing conditions, such as when a homicide, suicide, felony, or death by AIDS occurred on the property”).

cannot be the basis for rescission of a real estate contract.<sup>104</sup> States originally enacting legislation involving psychologically stigmatized properties enacted them at approximately the same time South Dakota passed its now outdated legislation.<sup>105</sup> For example, in the early 1990s, several states enacted legislation addressing other psychological defects, such as sexual offenders in the area or previous occupants of a home infected with Acquired Immune Deficiency Syndrome (AIDS).<sup>106</sup>

#### A. DISCLOSURE OF SEXUAL OFFENDERS IN REAL ESTATE

Megan's Law, enacted in 1996, followed public outcry after a sexual predator lured his seven year old neighbor, Megan Kanka, into his home with the invitation to play with a puppy before brutally raping, murdering, and discarding her body into a nearby dumpster.<sup>107</sup> Megan's Law requires states to implement community notification policies to disseminate sex offender information and addresses.<sup>108</sup> States that do not comply with the federal law lose a portion of their funding, thereby creating an incentive for all fifty states to comply.<sup>109</sup> Today, "[t]he internet has become an important tool for notifying the public of nearby sex offenders."<sup>110</sup> A seller has "no duty to protect a subsequent purchaser against criminal activity that may occur in the future," including criminal activity posed by sex offenders in the neighborhood.<sup>111</sup> However, Megan's Law originally made seller's disclosure unclear.<sup>112</sup>

104. See *infra* Part VI.B (demonstrating a proposed amendment to South Dakota's statutory definition of adverse material fact to exclude stigmatized defects). See also *supra* Part III.B-C (demonstrating the majority view where state legislatures have explicitly excluded stigmatized defects from the definition of material fact necessitating disclosure).

105. Van Wickler, *supra* note 22, at 368-69.

In the last decade, a majority of states enacted laws eliminating the sellers' and real estate brokers' duty to disclose nonmaterial facts which are "psychologically impacting" or "stigmatizing." . . . Such defects include: (1) "natural deaths, suicides, homicides, or . . . felon[ies]" which occurred on the property, (2) ghosts, and (3) an owner's exposure to human immunodeficiency virus ("HIV") or diagnosis of acquired immune deficiency syndrome ("AIDS").

*Id.* (citations omitted).

106. *Id.* Psychological stigmatizations following *Reed v. King* and *Stambovsky v. Ackley* represent "a problem facing brokers in the 1990's—liability for information unrelated to the physical characteristics of real estate or to the financial transaction." Paula C. Murray, *AIDS, Ghosts, Murder: Must Real Estate Brokers and Sellers Disclose?*, 27 WAKE FOREST L. REV. 689, 689 (1992).

107. Thomas D. Larson, *To Disclose or Not to Disclose: The Dilemma of Homeowners and Real Estate Brokers Under Wisconsin's "Megan's Law"*, 81 MARQ. L. REV. 1161, 1161 (1998).

108. Suzanna Hartzell-Baird, *When Sex Doesn't Sell: Mitigating the Damaging Effect of Megan's Law on Property Values*, 35 REAL EST. L.J. 353, 356-57 (2006).

109. Lori A. Polonchak, *Surprise! You Just Moved Next to A Sexual Predator: The Duty of Residential Sellers and Real Estate Brokers to Disclose the Presence of Sexual Predators to Prospective Purchasers*, 102 DICK. L. REV. 169, 175 (1997).

110. Hartzell-Baird, *supra* note 108, at 365.

111. Shelley Ross Saxer, *"Am I My Brother's Keeper?": Requiring Landowner Disclosure of the Presence of Sex Offenders and Other Criminal Activity*, 80 NEB. L. REV. 522, 553 (2001).

112. Flavio L. Komuves, *For Sale: Two-Bedroom Home with Spacious Kitchen, Walk-in Closet, and Pervert Next Door*, 27 SETON HALL L. REV. 668, 697 (1997) (discussing the lack of specificity in the law with regards to whether disclosure of sex offenders was required).

Megan's Law was passed after the psychological stigmatizations in the infamous cases of *Reed v. King* and *Stambovsky v. Ackley* were recognized.<sup>113</sup> Sexual offenders living in a neighborhood negatively affect property values in a manner similar to those of other psychological defects, such as human death in the home.<sup>114</sup> One study determined on average,

houses located within one-tenth of a mile of a sexual offender sold for 17.4[%] less than similar houses located farther away, houses between one-and two-tenths of a mile from an offender sold for 10.2[%] less, and houses between two and three tenths of a mile from an offender sold for 9.3[%] less. Additionally, '[i]f 17[%] [was] the average drop in sale price, then there [were] other sellers who took a much larger hit.'<sup>115</sup>

Due to the economic effect, sellers and brokers were unclear if the courts would treat the presence of sex offenders as a stigmatization necessitating disclosure as a material fact.<sup>116</sup> In response, many states addressed this issue by passing legislation clearly defining necessary disclosures regarding sex offenders.<sup>117</sup> Some states exempted disclosure.<sup>118</sup> Other states required disclosure only if the sex offender was a "high risk," while others considered legislation to inform sellers if the buyer was a sexual offender.<sup>119</sup> The majority of states that enacted legislation excluding sex offenders as a material defect did so because disclosure of a non-structural defect that did not impair the usability or structural integrity of the property was based on unsound logic.<sup>120</sup> Although South Dakota's property disclosure form currently requires disclosure of homicide, suicide, and felonies occurring within the previous twelve months, South Dakota does not require disclosure of sex offenders.<sup>121</sup>

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113. See Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (passing the law on May 17, 1996); *Reed v. King*, 193 Cal. Rptr. 130 (Cal. Ct. App. 1983) (deciding the case in 1983); *Stambovsky v. Ackley*, 572 N.Y.S.2d 672 (N.Y. App. Div. 1991) (deciding the case in 1991).

114. Larson, *supra* note 107, at 1163 ("[A] known sex offender living in a community will likely have a significant impact on the residential real estate market within the surrounding area. If informed that a sex offender lives within a particular area, prospective homebuyers will presumably look elsewhere, causing area real estate values to decline."). Van Wickler, *supra* note 22, at 386 ("Persons in the market to buy a home are less likely to purchase in an area in which a sex offender lives. As buyer demand decreases, so will the market value of the homes in the area.").

115. Hartzell-Baird, *supra* note 108, at 369 (citation omitted).

116. See Komuves, *supra* note 112, at 697 (discussing the lack of specificity in the law with regards to whether disclosure of sex offenders was required).

117. Larson, *supra* note 107, at 1198.

118. *Id.*

119. *Id.*

120. See Stuart C. Edmiston, *Secrets Worth Keeping: Toward A Principled Basis for Stigmatized Property Disclosure Statutes*, 58 UCLA L. REV. 281, 281 (2010) (stating "a majority of states have enacted statutes protecting nondisclosure of stigmas affecting property in residential real estate transactions"); Mark R. Hinkston, *Residential Real Property Disclosure Duties*, 75 WIS. LAW. 10, 12 (2002) (discussing how "[t]he vast majority of defects requiring disclosure are structural and easily identifiable" as opposed to psychological defects).

121. S.D.C.L. § 43-4-44 (2004 & Supp. 2017). This is not to say that South Dakota is not in compliance with Megan's Law. As mentioned above, the law mandates states make information about sex offenders available to the general public. Information regarding sex offenders is made public via the



## B. DISCLOSURE OF AIDS IN REAL ESTATE

Hysteria in the United States regarding AIDS began with the first identified case in 1981, and stigma statutes regarding AIDS disclosure in real estate emerged not long after in 1986.<sup>122</sup> Initial misunderstanding regarding transmittal, combined with a “vivid awareness of the suffering experienced by AIDS victims,” created significant pressure to pass legislation mandating disclosure of a previous home occupant infected with Human Immunodeficiency Virus (HIV) or AIDS.<sup>123</sup> Soon thereafter, science progressed to conclusively determine AIDS could only be transmitted through contact of bodily fluids—not through inhabiting the home of an individual inflicted with AIDS.<sup>124</sup>

Despite scientific advancements, the irrational fear regarding AIDS, termed “the modern day equivalent of leprosy,” prompted buyers to demand disclosure.<sup>125</sup> The psychological effect of AIDS reduced the economic value of homes similar to human death, and was deemed to be a material defect by a significant number of buyers who refused to purchase homes where a prior occupant had AIDS.<sup>126</sup> The fear, albeit irrational, made it unclear whether

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South Dakota Sex Offender Registry website. *South Dakota Sex Offender Registry*, <https://sor.sd.gov/> (last visited Mar. 15, 2018). Megan’s law, however, did not address the requirements of seller’s mandatory disclosure regarding residential real estate. It could be hypothesized that South Dakota does not mandate seller’s disclosure of neighboring sex offenders despite negative economic effects on real property because that information is made available through the sex offender registry website. However, the same argument could then be made that mandatory disclosure of human death is unnecessary because information concerning deaths which have occurred in the home is also available online. See *Died In House*, <http://www.diedinhouse.com/> (last visited Mar. 20, 2018) (providing the option to purchase instant reports to help discern if anyone has died at any valid U.S. address).

122. Edmiston, *supra* note 120, at 293.

123. *Id.*

124. Sharlene A. McEvoy, *Stigmatized Property: What A Buyer Should Know*, 48 J. MO. B. 57, 59 (1992). The author stated:

There is no evidence that the HIV (Human Immune Deficiency Virus) can be transmitted through droplets in the air, food, or through touching infected persons, their clothing or objects handled by such a person. AIDS is not spread by casual contact with those carrying the HIV or by contact with toilet seats, bath tubs, showers, or doorknobs touched by an infected person, unlike such communicable diseases as measles, tuberculosis, or influenza which are spread by inhaled droplets. Thus, there is no evidence to show that purchasing and living in a house that was the home of an AIDS sufferer would be harmful.

*Id.* See also Murray, *supra* note 106, at 695-96 (“Transmission requires direct, intimate physical contact where an exchange of bodily fluids . . . occurs. Medical evidence reveals that AIDS cannot be contracted from casual contact, particularly contact with a physical structure, yet many buyers consider such information material to their decision to buy.”).

125. Murray, *supra* note 106, at 696-97. The author also stated:

The mere thought of AIDS strikes fear in the hearts of otherwise rational people. As a Florida court noted: “AIDS is the modern day equivalent of leprosy.” . . . School authorities have refused to allow a young boy with AIDS to return to school; firemen have refused to give AIDS victims and homosexuals in general, mouth-to-mouth resuscitation; ambulance drivers have refused to transport AIDS victims. Additionally, undertakers in several cities have refused to embalm AIDS victims.

*Id.*

126. *Id.* at 696 (“[A] significant number of buyers would reject any home which had been inhabited by an AIDS victim.”).

disclosure would be deemed mandatory as a material defect by the courts.<sup>127</sup> Some individuals considered the idea of non-disclosure of AIDS to be intolerable due to the psychological and emotional effects on a buyer coupled with the negative effect on real estate.<sup>128</sup>

Due to the *Reed v. King* and *Stambovsky v. Ackley* holdings, the latent nature of psychological defects, and the lack of statutory provisions, speculation leaned toward required disclosure of HIV/AIDS.<sup>129</sup> Ironically, California recognized that decisions from its own judicial system would mandate disclosure and was one of the first states to pass legislation to protect nondisclosure of HIV/AIDS.<sup>130</sup> Mandatory disclosure of HIV/AIDS would be based not only on unsound and unscientific logic, but as one individual noted, “[o]ne person’s right to knowledge is another’s breach of confidentiality.”<sup>131</sup> The same can be said for disclosing deaths or felonies occurring on the property, which may place a seller in the

127. See Edmiston, *supra* note 120, at 310 (“Worries about contracting HIV/AIDS from living in a home previously occupied by someone so afflicted are irrational because it is established that the potentiality addressed by such worries will not materialize.”). Additionally, “[M]any buyers had become hysterical concerning prior occupancy of a home by persons with AIDS, and amendments to the Fair Housing Act made related disclosure obligations unclear.” *Id.* at 289. Also, “While AIDS does not constitute a traditional physical defect, ‘many buyers feel that knowing an inhabitant of a house suffered from AIDS is material information in the home-buying decision.’” Ross R. Hartog, *The Psychological Impact of AIDS on Real Property and A Real Estate Broker’s Duty to Disclose*, 36 ARIZ. L. REV. 757, 758 (1994) (quoting Murray, *supra* note 106, at 689).

128. Weinberger, *supra* note 12, at 397. The author also explained that

[a]s part of the generalized hysteria surrounding Acquired Immune Deficiency Syndrome (AIDS), prospective home purchasers sought to discover the circumstances surrounding the reasons for which a property had come to be placed on the market. In this climate, a rule of law condoning nondisclosure of environmental contamination and public health concerns in real property sales became intolerable.

*Id.* This hysteria led to a debate “regarding whether the seller has to disclose that the house was occupied by someone who is or was HIV positive given the impact such occupancy may have on the market value of the premises.” Alex M. Johnson, Jr., *An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor Doctrine*, 45 SAN DIEGO L. REV. 79, 112 (2008).

129. Weinberger, *supra* note 12, at 409. The author further explained the effect of *Reed* and *Stambovsky* by stating that

[a]pplying the *Reed* and *Stambovsky* logic to the disclosure of other types of nonphysical psychological “defects,” purchasers may in the future seek to rescind or collect damages on the grounds that a home was formerly occupied by a person who died from AIDS-related complications. Although there is no scientific evidence that the AIDS virus is transmitted by contact with a home formerly occupied by an infected person, prospective homebuyers may nevertheless deem it important to know whether a previous occupant had the disease. If it were possible to discover this information, the market value of affected property likely would be reduced. This information, by its very nature, is unlikely to be discoverable during the course of a routine inspection. Therefore, a buyer’s reliance upon a seller’s disclosure is even greater under these circumstances than in the case of physical defects. Accordingly, and following the logic of *Reed* and *Stambovsky*, the fact that a previous occupant died from AIDS-related complications would seem to require disclosure.

*Id.* (emphasis added).

130. CAL. CIV. CODE § 1710.2 (West 2016). California’s property disclosure statute reads “[t]hat an occupant of that property was living with human immunodeficiency virus (HIV) or died from AIDS-related complications” is a non-material fact which does not necessitate disclosure. *Id.*

131. Murray, *supra* note 106, at 695 (quoting David P.T. Price, *Between Scylla and Charybdis: Charting A Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 DICK. L. REV. 435, 437 (1990)).

position to necessitate disclosure of felonies or suicides of their minor children, which may be protected from public record.

The Fair Housing Act (FHA) put to death the uncertainty of property disclosure regarding AIDS by prohibiting discrimination against individuals with handicaps.<sup>132</sup> Although this federal law did not address all psychological defects, it did address the crisis surrounding mandatory disclosure of AIDS, which was rooted in irrational fear, prejudice, and unsound logic.<sup>133</sup> The term “handicap” is not expressly defined in the statute to include those with AIDS, but “both the legislative history of the amendments and the rules promulgated by the Secretary of Housing and Urban Development indicate that purpose.”<sup>134</sup> Similarly, courts have “unanimously interpreted the FHA definition of ‘handicapped’ to include people with AIDS.”<sup>135</sup> Although federal law did not address psychological defects such as death in the home, Congress took a clear stance on the issue of AIDS disclosure by enacting legislation protecting non-disclosure, despite high buyer concern and significant negative effects on property value.<sup>136</sup> In addition to federal law protecting the non-disclosure of AIDS, many states (including South Dakota) also consider the presence of sex offenders in the neighborhood a non-material fact that does not warrant disclosure despite high buyer concern and significant negative effects on property value.<sup>137</sup> Human death on the property is another psychological defect with high buyer concern and negative effects on property value.<sup>138</sup> Yet, South Dakota remains one of the only three states in the country mandating disclosure, even absent buyer inquiry into the death.<sup>139</sup>

## V. MURDERING THE MARKET: AN UNREASONABLE DIMINISHMENT OF ECONOMIC VALUE

Mandating the disclosure of a human death occurring on property creates an unreasonable diminishment of economic value in the real estate market.<sup>140</sup> This

132. Michael Adam Burger & Lourdes I. Reyes Rosa, *Your Money and Your Life! AIDS and Real Estate Disclosure Statutes*, 5 HOFSTRA PROP. L.J. 349, 357-58 (1993).

133. Edmiston, *supra* note 120, at 293 (“Congress perhaps took a step in a similar direction when it amended the Fair Housing Act in 1988 to prohibit discrimination on the basis of a buyer’s or renter’s ‘handicap.’ HIV/AIDS was held to be a handicap for purposes of the FHA in *Baxter v. City of Belleville*.”).

134. *Id.* (internal citation omitted).

135. *Id.* at 358.

136. *Id.* at 357-58.

137. Larson, *supra* note 107, at 1198.

138. *See infra* Part V.A-V.B (demonstrating economic and psychological studies regarding the negative economic impacts created by mandatory disclosure of psychological defects).

139. *See supra* Part III.A (discussing the three states that mandate property disclosure of human death absent buyer inquiry).

140. *See Liability to Purchaser of Real Property for Failure to Disclose That Property is Haunted, or Was Scene of Murder, Suicide, or Other Notorious Death*, 149 Am. Jur. Proof of Facts 3d 1 (2018) (discussing “where real property was the scene of a vicious crime, or is purportedly haunted by spirits or ghosts, the property value may be negatively affected, and prospective purchasers scared off by actual knowledge of these facts”); Geisinger, *supra* note 31, at 492 (stating “stigma harm is embodied in a decrease in property value, which is measurable through empirical appraisal techniques”); Johnson, *supra* note 128, at 110 (addressing how “[t]he market value of affected real estate is significantly reduced once

disclosure creates a psychological defect where one would not otherwise exist if buyers neither learned nor were put on notice about the stigmatizing event.<sup>141</sup> Mandated disclosures of psychological defects, such as those in place in South Dakota, create financial waste absent any effects on the structural integrity of the property.<sup>142</sup> Studies demonstrate that “almost 20% of the buyers indicated that price negotiations were influenced by the disclosed information.”<sup>143</sup> Therefore, laws requiring disclosure of psychological defects create invisible defects, which studies show cause negative economic and psychological ramifications.<sup>144</sup>

#### A. ECONOMIC STUDIES

The impact of psychologically stigmatized properties was analyzed in a study conducted by two professors at Wright State University in Dayton, Ohio by comparing stigmatized properties with non-stigmatized properties listed at the

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potential purchasers become aware of [stigmatized] information”); Murray, *supra* note 106, at 699 (discussing how “[s]ome buyers may want to know such information, but if routine disclosure is required, these properties certainly will be sold below market price. Since these ‘defects’ are not based on the property’s structural integrity, requiring disclosure is unwarranted”); Pancak et al., *supra* note 103, at 314 (arguing that from the perspective of economics, “mandatory disclosure laws are desirable to the extent to which they increase . . . efficiency of the housing market. Disclosure laws are supposed to advance this objective by removing informational asymmetries between buyers and sellers of housing. However, a rigorous analysis . . . casts some doubt on whether they meet the intended objective”); Robert H. Shisler, *Caveat Emptor Is Alive and Well and Living in New Jersey: A New Disclosure Statute Inadequately Protects Residential Buyers*, 8 FORDHAM ENVTL. L.J. 181, 193 (1996) (discussing how psychological defects in stigma cases by “the infamous nature of the sites materially affected the value of the properties, but probably didn’t impair their habitability”).

141. See Julia Kelso, *Death and Real Estate: A Study of the Impact of Death Beliefs on Real Estate Values* 45 (1999) (dissertation on file with Folklore Department Memorial University of Newfoundland) (demonstrating that participants admitted they were bothered by stigmatized property but would not have thought to ask on their own when purchasing a home about any psychological defects). See also SLIM JIM TV COMMERCIAL, ‘REAL ESTATE’ (2016), <https://www.ispot.tv/ad/AMnM/slim-jim-real-estate> (demonstrating a satirical commercial in which a real estate agent attempts to dissuade a woman from purchasing a home by lying to her that a body was found in the closet).

Real Estate Agent: “And down the hall here we have another bedroom, or maybe someday a nursery.

Woman: “This house says to me we’re ready to have kids, and who cares if it’s over budget!”

\*Man to Real Estate Agent shaking head and mouthing “No” behind Woman’s back.\*

\*Real Estate Agent nods to Man in mutual agreement.\*

\*Real Estate Agent opens closet.\*

Real Estate Agent: “Fun fact, this is where they found the body.”

Woman \*Nervous\*: “Body? What body?”

Man: “Oh, he said bodies, hun.” \*Stressing the “s” in bodies.\*

Real Estate Agent: “Yes. Bodies. Plural.”

*Id.*

142. See *infra* Part V.A (demonstrating economics studies which prove psychological defects lower market value of residential real estate despite no issues concerning structural integrity of a home).

143. Megan Peterson, *Seller Beware: Mandatory Disclosure Provisions in Iowa Put Sellers of Residential Real Estate on Alert*, 50 DRAKE L. REV. 569, 578 (2002).

144. See *infra* Part V (discussing economic and psychological studies concerning the negative financial effects on market value when individuals are placed on notice about invisible psychological defects such as human death).

same price.<sup>145</sup> The study of 102 homes sought to determine if the disclosure of a home's psychological defect would affect the market value of stigmatized properties in a similar manner as a material defect affects property value.<sup>146</sup> The findings were convincing—psychologically impacted properties sold for approximately 3% less on average and were reduced by as much as 35% of the sale price compared to properties without “grisly pedigrees.”<sup>147</sup> In addition to reduced sale price, stigmatized homes experienced longer time on the market before selling.<sup>148</sup> For example, “[o]f [78] transactions . . . licensees reported that . . . [23] required (from 31% to 434%) longer than average to sell.”<sup>149</sup> The survey results demonstrated that “the impacted houses in the sample experienced 45% more time-on-market than average. Of course, the additional time-on-market further reduces the selling price of the psychologically impacted property in terms of present value.”<sup>150</sup>

The above study coincides with the decision in the seminal case *Reed v. King* where the court held the property was only worth \$65,000 due to the previous murders, as opposed to the \$76,000 originally agreed to by the parties in the purchase agreement.<sup>151</sup> Similarly, a dentist and a nurse purchased the home made infamous by the cult murders directed by Charles Manson.<sup>152</sup> The couple purchased the house for \$200,000 which was “tens of thousands of dollars below the market value.”<sup>153</sup>

## B. PSYCHOLOGICAL STUDIES

Another study analyzed the impact of death beliefs on the real estate market by incorporating personal interviews of home owners and real estate agents.<sup>154</sup> One real estate agent recounted how a house where a murder took place influenced its resale value, stating that “[The seller] dropped the price considerably lower than it should have been but couldn't even get a look at it.”<sup>155</sup> Another agent reported trying to sell an apartment building comprised of nine units where three

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145. James E. Larsen and Joseph W. Coleman, *Psychologically Impacted Houses: Broker Disclosure Behavior and Perceived Market Effects in an Unregulated Environment*, 4 J. REAL EST. PRAC. EDUC. 1, 1-12 (2001).

146. *Id.*

147. *Id.* at 10.

148. *Id.* at 10-12.

149. *Id.* at 11.

150. *Id.* Therefore, despite there being no defects surrounding structural integrity or usability of the home, “the impacted houses sold for approximately 3% less than non-impacted houses, and were on the market about 45% longer than the average.” *Id.* at 12.

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

152. Warner, *supra* note 31, at n.54 (citing John M. Glionna, *A Haunting Story*, L.A. TIMES, Mar. 31, 1991, at A26).

153. *Id.* (citing John M. Glionna, *A Haunting Story*, L.A. TIMES, Mar. 31, 1991, at A26).

154. See generally Kelso, *supra* note 141 (interviewing real estate agents and home owners regarding their beliefs and subsequent psychological impact resulting from death in the home).

155. *Id.* at 41.

deaths occurred in a row: two from natural causes, and one from a suicide.<sup>156</sup> The deaths diminished the property value so much the agent claimed they “[couldn’t] give that building away.”<sup>157</sup> The same agent believed a death of a child or suicide reduced property value, recalling a house where a five year old girl died of cancer and how prospective buyers wouldn’t even consider the property after the agent disclosed the death.<sup>158</sup>

Of the fifty-one individuals interviewed, twenty-seven found it acceptable to live in a home where someone died a peaceful death, but were against living in a house where a violent death occurred.<sup>159</sup> Additionally, three individuals refused to live in a home where any human death had occurred for any reason, four were uncomfortable with living in a home where a violent death had occurred but would not take extreme measures to avoid it, and seventeen were unaffected by any deaths.<sup>160</sup> Despite the majority of individuals claiming to have an adverse reaction to death in the home, most said that until they were interviewed, they would not have considered asking whether someone died in a home they were interested in purchasing.<sup>161</sup> This finding further evidences the theory that a buyer will artificially treat a psychologically stigmatized property in the same manner as one riddled with material defects; a phenomenon that would not occur but for the mandatory property disclosure laws.<sup>162</sup>

### C. RAMIFICATIONS OF MANDATED STIGMATIZED PROPERTY DISCLOSURES

The below average closing cost, coupled with the exceptionally longer time on the market, demonstrates that disclosure of psychologically impacted homes unnecessarily diminishes economic value and places an economic duress on the seller.<sup>163</sup> Disclosures such as those required by South Dakota law transform a psychological factor into an issue comparable to a material defect on the property.<sup>164</sup> By promulgating the impression of psychological defects into the minds of prospective buyers, laws necessitating disclosure of stigmatized properties effectively murder the market without proper justification.<sup>165</sup>

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156. *Id.* at 49.

157. *Id.*

158. *Id.* at 80.

159. *Id.* at 44-45.

160. *Id.*

161. *Id.* at 45.

162. *Id.* at 97. As one interviewee said, “My guess is that I would care if there had been a murder there. I guess that’s why I’m not all that eager to start asking questions . . . . What you don’t know won’t hurt you kinda thing.” *Id.*

163. *See supra* Part V.A (demonstrating economic studies which show psychological impacted property is on the market longer and sells for below market price).

164. *See supra* Part V.B (demonstrating psychological surveys which demonstrate some buyers were negatively affected by the idea of a death in the home, but admitted they never would have thought to ask on their own).

165. *See supra* Part V (exemplifying the unreasonable negative impacts that accompany mandatory disclosure of psychological defects).

Psychological defects by their nature are subjective—what precludes a purchase for one buyer may not bother another buyer.<sup>166</sup> For example, one homeowner in the study refused to purchase a home where a death—under any circumstances, no matter how long ago—had occurred, going so far as to only consider newly constructed homes for purchase.<sup>167</sup> The study shows a distinction among the preferences of many buyers to permit natural death as opposed to deliberate deaths such as homicide and suicide associated with folklore that spirits may not be able to find rest and may haunt the property.<sup>168</sup> Purchasing a home is not a financial decision to be taken lightly and a buyer has a right to refuse to enter into a purchase agreement of a home for any reason, no matter how unreasonable.<sup>169</sup> However, when the law takes part in encouraging those beliefs, property value is unreasonably, and in many cases, significantly reduced.<sup>170</sup>

The current law in South Dakota mandates disclosure of a homicide or suicide that occurred within the last twelve months.<sup>171</sup> However, for some individuals interviewed in the study, no amount of time could pass to make a violent death in the home more acceptable for purchase.<sup>172</sup> For others, there was more of a concern regarding a lingering presence of blood in the home.<sup>173</sup> The current law in South Dakota also does not mandate disclosure for gruesome, bloody scenes of death if they were accidental in nature, or the death of a child through a natural disease, despite it being a concern to some potential buyers.<sup>174</sup>

166. See Kelso, *supra* note 141, at 44-45 (demonstrating one participant in the study who stated he refused to purchase any home where any death had previously occurred).

167. *Id.*

168. *Id.* at 42. “Potential buyers, too, when approached with questions regarding their feelings toward death in a house they were viewing or had already purchased, had similar but varying reactions, almost always gravitating toward violent death as the source of their hesitations.” *Id.* “When the death was deliberate, the disruption to what can be considered our standard world view becomes more extreme. Deliberateness of the death adds a number of factors to the equation, including fear that the killer or the victim may return to perturb the living . . .” *Id.* at 226.

169. Shisler, *supra* note 140, at 181 (“For most American families, the purchase of a new home is the most significant investment they will ever make.”).

170. *Reed v. King*, 193 Cal. Rptr. 130, 133 (Cal. Ct. App. 1983) (“Reputation and history can have a significant effect on the value of realty.”) See generally Kelso, *supra* note 141 (demonstrating numerous interviews with home owners and real estate agents regarding diminishment in real estate value due to death on property). The law has addressed other areas of law in which discrimination is based on irrational beliefs. For example,

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 . . .” 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 . . . . However, even if racial integration is thought to have a “significant and measurable effect on market value,” segregation is illegal.

Warner, *supra* note 31, at 223 (internal citations omitted) (emphasis added).

171. S.D.C.L. § 43-4-44 (2004 & Supp. 2017).

172. Kelso, *supra* note 141, at 99. Another interviewee stated the house she considered “[p]robably would have served my purposes just as well, but I would not in a million years think of buying that house, because [the previous occupant] killed himself in there and because I knew him.” *Id.*

173. *Id.* at 43.

174. See S.D.C.L. § 43-4-44 (limiting disclosure of human death to that which occurred by homicide or suicide).

Therefore, a gruesome accidental death where an individual fell down a staircase accompanied by pools of blood that may have once adorned now beautiful cherry stained hardwood floors would not be mandated to be disclosed under South Dakota's statute.<sup>175</sup> Contrary, a suicide achieved through less gruesome measures, such as an overdose within the previous twelve months, would be mandated as necessary for disclosure in South Dakota.<sup>176</sup> Yet, some individuals would be more concerned with the first example of the bloody accidental death, which does not necessitate disclosure, than they would be about the second peaceful suicide, which currently requires disclosure.<sup>177</sup> The line South Dakota has drawn in property disclosure legislation is an arbitrary gray line that feeds into the unreasonable psychological concerns of buyers.<sup>178</sup>

Disclosures of psychological stigmatizations such as murders and suicides lead to a slippery slope of other disclosures in similar categories.<sup>179</sup> If the stigma unnerves potential buyers who believe ill-will may befall them by living in a house where a traumatic death occurred, must the state also mandate disclosure if the house was the location of a death by natural means? That the home was the location of an affair that ended a twenty-five year marriage or was once a building used to run a prostitution business? That a woman miscarried in the home? Felonies such as a rape occurred in the back yard, drugs were sold on the premises,

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175. *See id.* (demonstrating how a gruesome, yet accidental death, would not be required to be disclosed by South Dakota's property disclosure form).

176. *See id.* (demonstrating how any suicide within the previous twelve months, despite how the suicide occurred or what residue was left in the house, is mandated to be disclosed under South Dakota's law).

177. Kelso, *supra* note 141, at 43. When asked if death on the property would influence his decision to purchase, another interviewee replied:

I guess it would depend on how they died. What it comes down to for me is the idea of a horribly bloody death, regardless of whether it were murder or suicide. If someone just took some pills or gassed themselves, it probably wouldn't bother me. If it were a bloody death—intentional or not—that would probably bother me. Just the idea that they would probably never be able to get all of [the blood] up.

*Id.* The author of the study proposed the theory that “with the codicil at the simple awareness that the blood had been there in the past would be sufficient to interject discomfort into the concept of residing in such a home.” *Id.* at 96. Similarly, another interviewee stated,

If it were a bloody death-intentional or not-that would probably bother me. Just the idea that they would probably never be able to get all of [the blood] up. For instance, even if it looks “clean,” criminal investigators can still use luminol to detect the presence of blood, and it would still show up. The idea of a bodily fluid having been splattered all about bothers me regardless of the fluid.

*Id.*

178. *See infra* Part V.C (demonstrating the arbitrary distinction South Dakota has chosen with a mandatory twelve month disclosure of certain types of human death, yet not mandating disclosure of other situations which may negatively affect residential real estate values). South Dakota's arbitrary disclosure also creates gray areas where it is unclear whether disclosure is mandated. For example, must a homeowner who shot and killed an intruder disclose the justified killing? Furthermore, if an individual attempts to take their life on the property, but is not pronounced dead until they reach the hospital, must the incident be disclosed as a suicide which occurred on the property?

179. *See infra* Part V.C (analyzing other hypothetical alternatives that may negatively affect residential real estate values, and may be of interest to prospective buyers, but are not necessarily required to be disclosed under South Dakota's property disclosure form).



or child pornography was produced on the premises?<sup>180</sup> That the basement was once used as the site for satanic ritualistic sacrifices? Or, that an individual was removed from the house and committed to a mental institution after being declared a danger to themselves?

In fact, why place the arbitrary time limit of twelve months on the psychological defect at all? What suddenly diminishes a psychological stigmatization in the eyes of the law between 365 days to 366 days? Although any of the above may be reason for a buyer to feel apprehensive about purchasing a home, it would be impractical and illogical for the law to require disclosure of every potentially troubling occurrence that took place on the property. A home is where people spend a large portion of their lives, so it is not surprising that unfortunate events will happen on real estate property. As one real estate agent interviewed in the previous study remarked, “That’s just life, we all live to die, and you’re gonna die somewhere.”<sup>181</sup>

## VI. AN “EXECUTION” OF LEGISLATION: A RECOMMENDATION TO SOUTH DAKOTA CODIFIED LAW

This comment’s recommendation is two-fold: (1) an execution, or the death, of the portion of South Dakota’s statutory property disclosure form regarding disclosure of human death or felonies; and (2) an execution, or implementation, of an amendment to more properly define an adverse material fact.<sup>182</sup>

### A. PART ONE: AN EXECUTION IN SECTION V OF THE PROPERTY DISCLOSURE FORM

If the first part of this recommendation were to be adopted by the South Dakota legislature, Section V (Miscellaneous Information) of the codified property disclosure form would read as follows:<sup>183</sup>

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180. In South Dakota, the seller’s disclosure form currently requires felonies occurring on the property within the previous twelve months to be disclosed. S.D.C.L. § 43-4-44 (2004 & Supp. 2017). It is the author’s position that the felony provision, along with the human death provision, should be excluded entirely from the property disclosure statute. Disclosures of felonies also raise privacy concerns. For example, if a minor was raped in their home, the parents of the child would have to disclose that a felony occurred if the home was sold within twelve months. Naturally, a prospective buyer will want to inquire into the specific felony that was committed, placing a parent who is trying to protect their child after a traumatic event, into an unnecessarily invasive position. Consider also a drug exchange in an alley between two individuals with enough drugs to constitute a felony. If the individuals step off the alley behind a shed onto the property of another individual who is not a participant of the drug deal, and it later comes to the homeowner’s attention that a felony drug exchange occurred on the property, the homeowner would have to disclose the unrelated occurrence to buyers if the home was sold within twelve months.

181. Kelso, *supra* note 141, at 25.

182. See *infra* Part VI.A (recommending the removal of mandated disclosure of human death and felonies from the seller’s disclosure form); *infra* Part VI.B (recommending an amendment to the statutory definition of adverse material fact to exclude psychological defects).

183. Strike-out font denotes a proposed deletion in the current statutory disclosure form.

1. Is the street or road located at the end of the driveway to the property public or private?

Public \_\_\_\_\_ Private \_\_\_\_\_

2. Is there a written road maintenance agreement?

If yes, attach a copy of the maintenance agreement.

Yes \_\_\_\_\_ No \_\_\_\_\_

3. When was the fireplace/wood stove/chimney flue last cleaned?

\_\_\_\_\_

~~4. Within the previous twelve months prior to signing this document, are you aware of any of the following occurring on the subject property?~~

~~a. A human death by homicide or suicide? If yes, explain:~~

~~\_\_\_\_\_~~

~~Yes \_\_\_\_\_ No \_\_\_\_\_~~

~~b. Other felony committed against the property or a person on the property? If yes, explain:~~

~~\_\_\_\_\_~~

~~Yes \_\_\_\_\_ No \_\_\_\_\_~~

5. Is the water source public or private (select one)?

6. If private, what is the date and result of the last water test?

\_\_\_\_\_

7. Is the sewer system public \_\_\_\_\_ or private \_\_\_\_\_ (select one)?

8. If private, what is the date of the last time the septic tank was pumped?

\_\_\_\_\_

9. Are there broken window panes or seals?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, specify: \_\_\_\_\_

10. Are there any items attached to the property that will not be left, such as: towel bars, mirrors, swag lamps and hooks, curtain rods, window coverings, light fixtures, clothes lines, swing sets, storage sheds, ceiling fans, basketball hoops, mail boxes, etc.

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please list \_\_\_\_\_

11. Are you aware of any other material facts or problems that have not been disclosed on this form?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, explain: \_\_\_\_\_ 184

Property disclosure of human death or felonies under Section V of the form unreasonably diminishes economic value based upon unsound reasoning.<sup>185</sup>

184. S.D.C.L. § 43-4-44 (2004 & Supp. 2017).

185. See *supra* Part IV-V (analyzing the economic ramifications of creating statutorily mandated disclosures based on psychological concerns and not logical considerations of structural integrity of property). However, the author of this comment does applaud the South Dakota legislature for creating a

Although a majority of the states have enacted legislation protecting non-disclosure of stigmas, South Dakota remains one of only three states mandating disclosure of a human death, even absent buyer inquiry.<sup>186</sup> Although a buyer's decision to purchase property may not always be a rational decision,

[t]he broker and seller . . . should not be legally required to disclose information based on irrational and scientifically unproven fears. Latent defects which affect the property's physical characteristics should continue to be disclosed. While caveat emptor must not return, disclosure must focus only on the property itself and not on a buyer's peculiarities, sensitivities, and prejudices.<sup>187</sup>

When drafting legislation, a state should strive for "an ideal system of law" that "draw[s] its postulates and its legislative justification from science" as opposed to fear of death and ghosts which have no bearing on the structural integrity of property.<sup>188</sup> Individuals have the right to follow the beliefs of their choosing, but when those beliefs "are not the sort upon which society thrives, [it could be asserted] that efforts to discourage belief in such irrational things is socially useful."<sup>189</sup>

statute that codifies an easily accessible and uniform property disclosure form. *See* S.D.C.L. § 43-4-44 (2004 & Supp. 2017) (codifying a seller disclosure form which is formatted in a manner that a seller can easily access the statute online and print the statute to use as a seller's disclosure form).

186. Edmiston, *supra* note 120, at 281 ("Since the late 1980s, a majority of states have enacted statutes protecting nondisclosure of stigmas affecting property in residential real estate transactions."); McEvoy, *supra* note 124, at 57 ("In the past few years, many state legislatures have been proposing and passing laws which would shield home owners and real estate agents from liability if they fail to disclose that the property being sold was the site of a murder, suicide, or other felony . . ."); Van Wickler, *supra* note 22, at 381 ("Laws relieving sellers, real estate brokers, and lessors from a duty to disclose defects which are 'psychologically impacting' or 'stigmatizing' can currently be found in the majority of states.").

187. Murray, *supra* note 106, at 708.

188. Warner, *supra* note 31, at 217. When South Dakota amended the property disclosure form in 2005, there was discussion on the bill by the Commerce Committee regarding disclosure of properties that were once used for the manufacture of methamphetamines. *Senate Bill 83*, SOUTH DAKOTA LEGISLATURE (last visited Mar. 20, 2018), <http://sdlegislature.gov/sessions/2005/83.htm>. The author of this comment agrees that the previous presence of chemicals used to produce methamphetamines, while they may not have a direct effect on the structural integrity of the property, may affect the usability of the property as "any detritus of a meth lab" may be "likely to affect a buyer's health." Edmiston, *supra* note 120, at 296. The recommendation posed in this comment supports a deletion in the property disclosure form under Section V (Miscellaneous Information) only, which would not affect the disclosure of previous methamphetamine under Section IV (Hazardous Conditions) of the property disclosure form. S.D.C.L. § 43-4-44 (2004 & Supp. 2017).

189. Warner, *supra* note 31, at 219. Although the law does not directly influence personal beliefs, protecting non-disclosure of irrational fears can discourage society from fixating upon them.

Even assuming that the law can alter some beliefs, though, it is not clear that all irrational beliefs are equally susceptible to legislative tinkering . . . . [B]ecause such beliefs, where held, tend to be deeply held—there is good reason to think that some of the beliefs addressed by stigma statutes can be as deep as beliefs come. Consider stigmas associated with disease and death at a property. It makes sense from an evolutionary perspective that people should be fearful, at some level, of places where others have recently died or become ill. To suggest that fear "makes sense" in this context is not, of course, to imply that it is always rational.

Edmiston, *supra* note 120, at 307.

If it is assumed that the law can be designed to promote rationality in a relatively uncomplicated manner, the claim that it should be so designed is uncontroversial. Arguing in the utilitarian tradition . . . suggests that promoting rationality is a means of promoting

South Dakota's express sanction of psychological disclosures effectually amplifies the negative economic impacts of death on the residential real estate market.<sup>190</sup> Encouraging these beliefs through mandatory disclosure becomes even more problematic when coupled with the evidence that nearly 20% of buyers negotiate price due to disclosed information.<sup>191</sup> Therefore, the mandatory disclosure of homicide or suicide diminishes the economic value of property through a defect that bears no influence on the structural integrity or usability of the property.<sup>192</sup> "To hold a real estate professional or seller liable for a failure to disclose such information" as is required by South Dakota's law "is unwarranted and not in the best interest of the public."<sup>193</sup>

#### B. PART TWO: AN EXECUTION OF AN AMENDMENT TO THE STATUTE DEFINING ADVERSE MATERIAL FACT

The second portion of this comment's recommendation involves re-defining "adverse material fact" in South Dakota's statute.<sup>194</sup> Three possibilities exist for re-defining material fact to exclude stigma: (1) stigma is not material and there is no duty to disclose; (2) stigma is not material, but the seller must disclose if asked by the prospective buyer; (3) stigma is not material, and the seller may remain silent if directly asked by a prospective buyer, but may not make any misrepresentations to indicate otherwise.<sup>195</sup> Although each of the three possibilities would be an improvement from the current statutory definition, the author of this comment will focus on the preferred option, option three.<sup>196</sup> Furthermore, the third option is what is already in place by a majority of states.<sup>197</sup>

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psychological health. [B]y not requiring disclosure of reputed hauntings and "bad karma" associated with homicides and other crimes committed at a property, [society] discourage[s] irrational belief in hauntings and bad karma . . . . Setting aside for the moment the significant likelihood that superstitious belief is a symptom rather than the source of many of these problems, if eradicating such beliefs is as simple as enacting and diligently enforcing the right sort of law, we would have every reason to do so. It would be both charitable to the extent that it would improve the lives of those currently plagued by such beliefs and in our own interest to the extent that living in a community full of alienated, irrational people might be dangerous.

*Id.* at 308-09.

190. See S.D.C.L. § 43-4-44 (2004 & Supp. 2017) (mandating disclosure of human death by suicide or homicide within the last twelve months).

191. Peterson, *supra* note 143, at 578.

192. See *supra* Part V (analyzing how mandated property disclosure of psychological defects effectively murders the market without proper justification).

193. Murray, *supra* note 106, at 690.

194. See *infra* Part VI.B (proposing a more detailed definition of adverse material fact in South Dakota's statute).

195. Although option one would also not permit misrepresentations or fraud, option three differs in that the statutory language would expressly denounce the statute's authorization of misrepresentations.

196. See *infra* Part VI.B (focusing on option three which recommends defining stigmas as non-material, and specifying that the seller may remain silent if directly asked by a prospective buyer, but may not make any misrepresentations to indicate otherwise).

197. Edmiston, *supra* note 120, at 297.

Some of these states expressly allow sellers to choose not to answer, while others require agents and/or sellers to disclose certain defects with respect to which a buyer submits a

South Dakota's current statutory definition of an adverse material fact ambiguously reads as follows:

For the purposes of this chapter, an adverse material fact is *information that negatively affects the value of the property* or a party's ability to perform its obligations in a real estate transaction.

Adverse material facts include:

- (1) Any environmental hazards affecting the property which are required by law to be disclosed;
- (2) Any material defects in the property;
- (3) Any material defects in the title to the property which are anticipated to survive the closing; and
- (4) Any material limitation on the client's ability to perform under the terms of the contract.<sup>198</sup>

The issue with the current statute defining adverse material fact, in light of the first portion of this comment's recommendation, resides in the realization that human death and felonies would still require disclosure, even if removed from the property disclosure form, due to their negative effect on the value of the property.<sup>199</sup> Instead, "[a] 'defect' must be defined by focusing on the property's physical condition, not a buyer's unusual sensitivities and prejudices."<sup>200</sup> To address this issue, the proposed amendment to South Dakota's statute excludes psychological and stigmatizing events from the definition of an adverse material fact and would read as follows:<sup>201</sup>

#### SDCL § 36-21A-125. Adverse Material Fact Defined

For the purposes of this chapter, an adverse material fact is information that negatively affects the value of the property or a party's ability to perform its obligations in a real estate transaction.

(A) Adverse material facts include:

- (1) Any environmental hazards affecting the property which are required by law to be disclosed;
- (2) Any material defects in the property;
- (3) Any material defects in the title to the property which are anticipated to survive the closing; and

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*proper inquiry. A third and larger group of states, whose statutes simply note that the protection they offer for nondisclosure does not extend to misrepresentation, seems also to allow sellers to choose not to answer.*

*Id.* (emphasis added).

198. S.D.C.L. § 36-21A-125 (2015) (emphasis added).

199. *Id.*

200. Murray, *supra* note 106, at 708. "The law clearly views material facts as defects which are material to the reasonable objective observer, rather than defects which are material because of the subjective fears of the purchaser." Burger & Rosa, *supra* note 132, at 369.

201. Bold font denotes the author's proposed addition to S.D.C.L. § 36-21A-125 (2015). The original language of the statute remains unbolded.

(4) Any material limitation on the client's ability to perform under the terms of the contract.

**(B) Notwithstanding Subsection (A) of SDCL § 36-21A-125, the following are considered non-material defects and no action of any kind may be brought against a transferor or lessor of property for failing to disclose that the property:**

**(1) Was the site of a human death of any kind, whether natural, accidental, homicide, or suicide;**

**(2) Was the site of a felony offense (with the exception of those felonies specifically listed on the property disclosure form of SDCL § 43-4-44, such as the production of methamphetamine);**

**(3) Was owned or occupied by a person exposed or diagnosed with either the human immunodeficiency virus or acquired immune deficiency syndrome, or any other disease that is not known to be transmitted through common occupancy of real estate;**

**(4) Is located in the vicinity of a sex offender; or**

**(5) Any other psychological or stigmatizing event that does not affect the physical condition or title of the property.**

**(C) Subsection (B) applies regardless of whether the transferor or lessor has actual or suspected knowledge of any of the above.**

**(D) Subsection (B) applies regardless of the time frame in which any of the above occurred.**

**(E) Subsection (B) applies not only to the property being transferred or leased, but also to disclosing such information regarding any other property which may affect the value of the transferred or leased property, such as that of a neighboring property or any other property in the same locale.**

**(F) Subsection (B) permits non-disclosure, or refusal to disclose when directly asked about any of the above by a prospective transferee or lessee.**

**(G) Subsections (B) and (F) do not preclude an action against a transferor or lessor who makes intentional misrepresentations or intentional misleading statements with regard to psychological effects or stigmas associated with the real estate.<sup>202</sup>**

Purchasing a home is one of the largest financial decisions an individual will make and should not be taken lightly.<sup>203</sup> Although buyers have a right to inquire into psychological defects that will influence their purchasing decision, research suggests that most individuals would not think to ask about a death in the home,

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202. This proposed statutory addition is modeled in part from language derived from ARIZ. REV. STAT. ANN. § 32-2156 (2017) and S.C. CODE ANN. § 27-50-90 (2018).

203. See Shisler, *supra* note 140, at 181 ("For most American families, the purchase of a new home is the most significant investment they will ever make.")

indicating it may not be of high importance until it is suggested as a defect on the property disclosure form.<sup>204</sup>

The subjectivity regarding whether an individual buyer will be disturbed by a death in the home leads to no logical reason for “a seller or broker [to] conduct an extensive investigation in order to determine what a particular buyer might consider important. Surely this type of investigation should be conducted by a buyer who feels such information is important. The burden of disclosure should not be on a seller or broker.”<sup>205</sup> In *Reed v. King*, the court focused on the disparity of knowledge between a seller and buyer, stating, “[i]f information known or accessible only to the seller has a significant and measurable effect on market value and the seller is aware of this effect, there is no principled basis for making the duty to disclose turn upon the character of the information.”<sup>206</sup>

However, modern advancements regarding the Internet make disparities between seller and buyer virtually non-existent.<sup>207</sup> In the same way prospective buyers can use the Internet to search for sex offenders in a neighborhood, buyers can also use websites such as [www.diedinhouse.com](http://www.diedinhouse.com) to discover previous deaths in a home.<sup>208</sup> Currently, “[a] handful of states provide for a formal process in which the inquiry and answer must be submitted in writing.”<sup>209</sup> This recommendation will not be as strenuous on the buyer, and therefore an oral inquiry will be sufficient, although a seller will not be required to disclose even if the seller has actual knowledge, and may simply respond that they do not wish to disclose such information.<sup>210</sup> However, a false or misleading statement regarding the seller’s knowledge will not be tolerated under the proposed statute.<sup>211</sup>

204. Kelso, *supra* note 141, at 45.

205. Murray, *supra* note 106, at 701.

Where the evaluation involves a ghost or violent death, it seems reasonable to require a buyer to discover such information by asking a seller if these type of events have occurred in the house. If a buyer is concerned about paranormal occurrences, it is not unreasonable to require that a buyer inquire into such matters . . . . Some buyers may want to know such information, but if routine disclosure is required, these properties certainly will be sold below market price. Since these “defects” are not based on the property’s structural integrity, requiring disclosure is unwarranted.

*Id.* at 699.

206. *Reed v. King*, 193 Cal. Rptr. 130, 133 (Cal. Ct. App. 1983).

207. See Jay Zitter, *Cause of Action for Failure of Seller of Real Estate and Its Agent to Disclose to Buyer Facts of Past Violent Crimes or Hauntings Within Property Subject to Sale*, 76 CAUSES OF ACTION 2d 555, § 16 (2018) (discussing how psychological defects could “be easily discovered through an Internet search”); Van Wickler, *supra* note 22, at 370, n.24 (discussing how internet sites which give prospective buyers access to information on stigmatized events should resolve the issue of disclosure absent statutory mandated disclosure).

208. *Died In House*, <http://www.diedinhouse.com/> (last visited Mar. 20, 2018).

209. Edmiston, *supra* note 120, at 297.

210. Although it can be argued that the seller indicating they wish not to disclose information will leave the buyer with an adverse inference, it will be the seller’s choice whether to respond in the affirmative or to not disclose. If disclosure is important enough, a buyer is free to make the decision to only purchase from sellers who respond to their inquiry and disclose death or felonies.

211. See *supra* Part VI.B (demonstrating the proposed amendments to S.D.C.L. § 36-21A-125, including Subsection (G), which expressly prohibits “intentional misrepresentations or intentional misleading statements with regard to psychological effects or stigmas associated with the real estate”).

## VII. REST IN PEACE: THE FINAL CONCLUSION

Although caveat emptor was the longstanding rule governing the American real estate market, the doctrine has slowly been asphyxiated and today remains a shell of its former self. Latent material defects are now required to be disclosed, and cases such as *Reed v. King* and *Stambovsky v. Ackley* went so far as to hold that real estate contracts could be rescinded for failing to disclose stigmatized defects such as human deaths on the property. South Dakota remains one of three states currently requiring mandatory disclosure of a human death by homicide or suicide within the previous twelve months. Mandatory disclosure statutes for human death were enacted around the same time that other states enacted statutes addressing various psychological defects such as sex offenders in the vicinity or previous occupants diagnosed with AIDS. The Federal Housing Act has since protected non-disclosure of AIDS, and the majority of states have enacted statutes expressly protecting non-disclosure of other psychological stigmatizations such as death, felonies, and sex offenders.

This author's recommendation is a two-prong approach: (1) remove the portion of South Dakota's codified property disclosure form mandating disclosure of human death and felonies; and (2) amend the statute defining an adverse material fact. In doing so, sellers may refuse to disclose psychological defects, but are not authorized to make intentional misrepresentations or intentional misleading statements. South Dakota's legislature must act to put to death the mandated disclosure of stigmatizing events or risk the blood on their hands of continuing to murder the market by unreasonably diminishing the economic value of residential real estate.