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THE GREAT ONYX CAVE CASES — A MICRO-HISTORY

Bruce Ziff

I. INTRODUCTION

Controversies surrounding property rights to the Great Onyx Cave in Kentucky have given rise to two legendary decisions with enduring legal importance. The first of these, Edwards v. Sims (1929),¹ is a leading authority on the extent of ownership rights below the surface of land. The second, Edwards v. Lee’s Administrator (1936),² concerns the appropriate measure of damages for trespass. Stripped to essentials, the facts that led to these two important rulings are quite straightforward: “E” discovered a cave beneath the surface of his land, which he developed into a thriving tourist attraction. However, it turned out that approximately one-third of the cave passed below (albeit at a considerable depth) the surface of land owned by “L,” who had no ready means of access to the cave. These facts suggest two obvious questions: Should title to a whole cave belong to the party who owns the mouth and who has taken possession? And if not, how might one assess damages for trespass where E has benefited financially from the acts of trespass, but L has no practical use for his portion of the cave?

Of course, life is rarely as simple as suggested by these sparse facts, and if one delves into the background of this famous dispute, a story that has been largely neglected over the years, additional insights emerge. At first glance, the case seems to reflect merely a feud between two neighbors over the spoils of a successful tourism business. It looks like an entirely local, indeed personal, spat. On closer inspection it is apparent that this was one episode in a tempestuous time – the ‘cave wars’ period – in which confrontations and lawsuits over cave rights and tourism in the region were commonplace.³ Moreover, the fight over Great Onyx Cave arose amid a campaign to acquire the caves in the region for a

¹ Edwards v. Sims, 24 S.W.2d 619 (Ky. 1929).
² Edwards v. Lee’s Adm’r, 96 S.W.2d 1028 (Ky. 1936).
³ Ben L. Burman, Kentucky’s Crazy Cave War, COLLIER’S WEEKLY, June 6, 1953, at 62.
national park, a project that seemingly held out hope for local landowners as the clouds of the Great Depression loomed.4

One judge of the Kentucky Court of Appeals, Marvel Mills Logan, played a significant and somewhat unconventional role in the Great Onyx Cave litigation and the surrounding events. Logan was born and raised in Edmonson County, Kentucky, the heart of cave territory.5 He served as a member of the Court of Appeals in the first Great Onyx Cave hearing, and his passionate, colorful, and evocative dissenting opinion in that case is remarkable.6 Seven years later, Logan, no longer on the bench, acted as counsel for one of the parties in the second Great Onyx Cave appeal.7 All the while he was a leading light in the movement to create the national park of which Great Onyx Cave eventually became a part.8 Logan’s stake in the outcome, and the manner in which it might have affected his judicial posture in the case, if at all, remains uncertain. Yet, that the Great Onyx Cave dispute was of especial importance to him seems undeniable. His part in the history of Edmonson County in general, and the Great Onyx Cave dispute in particular, is central to an understanding of both.

This article presents a micro-history. It is at its core an exploration of the nexus between law and its social setting. In conducting this exploration I adopt a methodology sometimes called “legal archaeology.”9 That term applies to work that explores the ‘case’ beyond the contents of law reports, or, for that matter, the pleadings and other legal proceedings connected to litigation. Rather, legal archaeology strives to dig as deep within the layers of the controversy in the hope that insights into the operation of law are exposed.10

The presentation unfolds as follows: I will first outline the history of cave exploration and development in the region where the cases arose, and place the Great Onyx Cave within that context. Next, I will consider the events leading up to the spate of litigation. Finally, I will discuss the rulings, and outline the ways in which they continue to inform the law. Both of these cases still matter. With the development of carbon capture sequestration and other below-ground technologies, the question of the extent of subsurface title has gained a new significance. Likewise, the principles employed by the judges in ruling on damages have served as valuable tools for refining the law of restitution for

6. Sims, 24 S.W.2d 619.
7. Lee’s Adm’t, 96 S.W.2d 1028.
8. GOODE, supra note 4.
10. Threedy, supra note 9.
wrongs, and continue to be debated in works published in the United States, Britain, and elsewhere.11

II. THE HISTORY OF CAVING IN KENTUCKY

South-central Kentucky is renowned for its caves, and for decades they have attracted tourists from across North America and beyond.12 Hundreds of miles of passages (called avenues) and chambers honeycomb the subterranean spaces.13 Some caves are narrow and shallow, while others, such as those suitable for public exhibition, are extensive and complex structures.14 Caves are often multiple-level: in effect, they contain a series of river beds cut over time, with each new bed lower than its predecessor.15 Along a horizontal plane, there can be a tangle of avenues with forks, spurs, and intersections of various kinds.16

Most of the better-known caves of Kentucky are located in Edmonson, Barren, and Hart counties, with the lion’s share being in Edmonson.17 The soil in this locale was not particularly fertile, and the land was undulating and rocky.18 Still, it was sufficient to support some farming, with corn, wheat, and tobacco being common crops.19 Timber was also harvested, though this accelerated soil erosion.20 Farms were modest in size, as were the incomes that they were capable of generating.21 Several small churches, virtually all Baptist, dotted the landscape.22

Mammoth Cave is the most magnificent cave in the region.23 Taking all of its known avenues together, it is now estimated to be almost 400 miles in length, making it the largest cave structure in the world, by far.24 Archeological evidence indicates that it was used thousands of years ago by the indigenous inhabitants of the area, who mined it for gypsum and other materials.25

11. See infra references in Part F.
13. Id. at I, 1.
14. Id.
15. Id.
16. Id.
18. Id. at III, A-4.
19. Id. at III, A-6.
20. Id.
21. Id.
23. Id. at I, 1.
24. Id.
25. Id. at III, B-1.
Prehistoric mummies have been discovered within Mammoth Cave, pointing to its use as a burial site.26 By the end of the 18th century, European settlers had learned of Mammoth Cave, and over time it was used for a host of functions.27 It held large deposits of saltpeter, a key ingredient in the gun powder manufactured for use during the War of 1812.28 The cave was acquired by Dr. John Croghan in 1838, and during his life it was used, among other things, as a tuberculosis sanatorium, a church, and a hotel.29 Importantly, it was during Croghan’s ownership that tourism grew substantially.30 This would turn out to be the most lucrative use of Mammoth Cave.

Although Croghan owned the cave for only ten years, he controlled its destiny for decades afterwards. When Croghan died of tuberculosis in 1849, his will called for his Mammoth Cave Estate to be held in trust for nine nieces and nephews.31 The trustees were directed to continue to operate the cave as a tourist attraction.32 The will further stipulated that once the last of these beneficiaries had died, the Estate was to be offered at a public sale and the proceeds divided among the heirs of the nine beneficiaries.33 It was not until 1926 that the trust would be wound up and sale provisions put into effect.34

By the 1850s, train service brought sightseers to nearby Glasgow Junction (now Park City), and from there one could take a stage coach to Mammoth Cave.35 Visitors could stay at the 25-room Mammoth Cave Hotel, located a short walk from the cave’s entrance.36 Full rail service was introduced in 1886, when the Louisville and Nashville Railway (L & N) built a spur to the hotel.37 By the early part of the 20th century, one could also travel along the Green River by steamboat.38 In the 1920s, travel by automobile started to overtake these other forms of transportation, and the L & N spur line was discontinued in 1931.39

27. Duane DePape, Gunpowder from Mammoth Cave: The Saga of Saltpetre Mining Before and During the War of 1812 (1985).
28. Id.
30. Id.
31. Id.
32. Id.
33. Id.
35. Id. at III, C-2.
36. Id.
37. Id.
38. Id.
Mammoth served as the “anchor cave,” drawing tourists to the area, which in turn enabled the owners of a handful of smaller caves to attract some of them. Show caves with names such as Colossal Cavern, Crystal, Salts, and Diamond offered guided tours. The success of these operations led local landowners to search for caves on their respective properties that might serve as tourist destinations. This was a risky undertaking; cave ceilings could collapse, floors might give way, or one’s footing could be lost on the flowstone, all with fatal consequences. In one sad but celebrated incident, Floyd Collins, the area’s most famous explorer, became trapped in Sand Cave. The efforts to rescue him, in the end unsuccessful, became a national story. He remains a folk hero, remembered in story and song.

At least as early as the 1880s, cut-throat business practices were emerging. The time is not-so-fondly remembered as the cave wars period. Cave operators were well aware that sightseers would likely visit only a few choice attractions. As tourism became increasingly important in the 1920s, competitive tensions swelled. Cave owners would typically hire agents to solicit tourists along the road side, sometimes building wooden booths to provide information and sell tickets. Hand bills and road signs would frequently misrepresent the features of the competitor caves. Fake advertisements were also used. Ticket huts were vandalized. Employees from one cave would heckle tour guides from another. On occasion, cave agents would impersonate police officers, diverting traffic to their caves. Usually it was Mammoth Cave, everyone’s prime competition, which was targeted. One common ploy was for agents (called cappers) to jump onto a car’s running-board to advise that Mammoth Cave was

40. Id. at III, C-4.
41. Id.
42. Id.
43. Id. at III, C-1.
44. NATIONAL PARK SERVICE STUDY, supra note 12, at III, C-1.
46. GOODE, supra note 4.
47. NATIONAL PARK SERVICE STUDY, supra note 12, at III, C-4.
49. Id.
50. NATIONAL PARK SERVICE STUDY, supra note 12, at III, C-5.
51. Id.
52. Id.
53. Burman, supra note 3.
closed to the public owing to an order of quarantine, a cave-in, or for some other reason.54

Many of the disputes among the cave owners were settled informally, using rough measures, though a surprising number wound up in court. Wyatt v. Mammoth Cave Development Co.,55 which has been described as the “most notorious event of the Cave Wars period,” illustrates both the lengths to which proprietors would go for an edge in promoting their caving businesses, and the willingness of operators to pursue their grievances through litigation.56

In or around 1916, one George Morrison surreptitiously entered Mammoth Cave on the Estate lands to conduct a survey, his aim being to see if the cave extended to his own nearby parcel.57 It was all very clandestine, and Morrison evidently found what he wanted; nine years later he opened an entrance which connected with an avenue of Mammoth Cave.58 Morrison began offering tours, and in 1927 he opened his own 25-room hotel located next to what was termed the “Mammoth Cave New Entrance.”59 The enterprise was owned and operated by the Mammoth Cave Development Company (“MCDC”).60 Morrison was the company’s alter ego.61

Not long afterwards, a lawsuit was filed by the trustees of the Estate challenging the legality of Morrison’s operation.62 At the heart of the claim were two complaints. One was that by using the name Mammoth Cave, Morrison’s MCDC was free-riding on the decades-long efforts of the Estate to establish a profitable tourist attraction.63 Second, it was alleged that patently false claims were being made by Morrison and his agents to the effect that popular features of the cave found under the Estate’s surface could be viewed by sightseers entering through the New Entrance.64 That was not so.

It was a bitter and lengthy dispute, replete with accusations of threats of violence and more.65 In the end, both sides walked away wounded. The Court of Appeals for the Sixth Circuit held that the Estate did not have the sole right to use the name Mammoth Cave, because that geographical name described a cave

54. See also Cave Wars, NATIONAL PARK SERVICE, http://www.nps.gov/maca/historyculture/cavewars.htm (last visited Feb. 18, 2013); Burman, supra note 3; GOODE, supra note 4, at 46-47.
55. Wyatt v. Mammoth Cave Development Co., 26 F.2d 322 (6th Cir. 1928).
56. NATIONAL PARK SERVICE STUDY, supra note 12, at III, C-5.
57. Id.
58. Id.
59. Id.
60. Id.
61. NATIONAL PARK SERVICE STUDY, supra note 12, at III, C-6.
62. GOODE, supra note 4.
63. Id. at 324.
64. Id.
65. NATIONAL PARK SERVICE STUDY, supra note 12, at III, C-6.
network that extended far beyond the boundaries of the Estate, including under the defendant’s lands. The Estate would have been able to receive legal protection had the name acquired a secondary meaning, that is, if it was understood in the region that the name referred only to the Estate’s cave. However, the court did not find that kind of secondary meaning. The second allegation against Morrison, false advertising, was sustained. As a result, the court upheld an injunction mandating that MCDC’s promotional materials state that the New Entrance did not provide access to that part of the cave known prior to 1907 as the Mammoth Cave, and that access to that portion could be obtained only through the Estate lands.

While the cave wars were being waged, a movement was afoot to establish a national park, with the centerpiece being Mammoth Cave. The idea was first raised in 1905, and in 1911 a bill was drafted calling for a small park of less than 2,000 acres to be dedicated. Congressional hearings were conducted in the following year but nothing came of the bill. There was no concerted forward momentum on the park initiative until the 1920s; in 1924, the L & N Railroad, which operated the spur line and owned Colossal Cavern, offered to donate its lands for a park, provided that local support was shown for the idea. That move led later that year to the creation of the Mammoth Cave National Park Association (MCNPA), a private organization whose goals were the promotion of a national park and the acquisition of lands for that purpose.

The stated rationales for the park focused on the geological significance of Mammoth Cave and the smaller caves scattered around its perimeter. Places of such grandeur and geological importance were seen as belonging to the nation as a whole, with the government being best suited to assume the role of steward. Never mentioned explicitly was the regrettable way in which the private tourism had degenerated, though this was probably in the back of everyone’s mind. The disadvantages of the private-enterprise approach would be largely eliminated once a public park was in place.

66. GOODE, supra note 4, at 325.
67. Id.
68. Id.
69. Id. at 326.
70. Id. at 324, 326.
71. See generally Goode, supra note 4; see also NATIONAL PARK SERVICE STUDY, supra note 12, at III, D-1.
72. NATIONAL PARK SERVICE STUDY, supra note 12, at III, D-1.
73. Id. at III, D-5.
74. See generally Goode, supra note 4.
75. NATIONAL PARK SERVICE STUDY, supra note 12, at III, D-5.
76. Goode, supra note 4.
77. Id.
78. Id.
In 1926, President Coolidge signed a bill to create the legal foundation for the national park. The legislation authorized the Secretary of the Interior to acquire just over 70,000 acres. Certain benchmarks were established; once 20,000 acres were assembled, the area would fall under the aegis of the National Park Service, and formal park status was achieved once 45,310 acres were acquired. In addition, the statute provided that “no general development of . . . area shall be undertaken until a major portion of the remainder in such area, including all the caves thereof” had been obtained.

Cost was a major concern. The earliest national parks were in the western states, and the areas designated for those sites were, for the most part, unpatented public lands. Here, however, virtually all of the needed parcels were in private hands, and therefore had to be acquired by donation, sale, or through expropriation. The latter two options obviously required a sufficient revenue stream, but no federal money for the acquisition of land was set aside in the 1926 statute. The Mammoth Cave National Park Association (“MCNPA”) was responsible for raising money, seeking land donations, and purchasing property. A fund-raising campaign in 1927 and 1928 yielded nearly $800,000, and a buy-an-acre campaign was also launched. The first property was acquired in late 1928, when the MCNPA purchased a two-thirds interest in the Mammoth Cave Estate, comprising over 2,000 acres. In time, full ownership of Mammoth would be secured, at a cost of approximately $700,000.

The creation of the park might have seemed a godsend to the local population. Instead, it was met with suspicion, and few properties were acquired in the early years. In response, in 1928 the state legislature created the Kentucky National Park Commission, a body endowed with the power to acquire properties by the exercise of eminent domain. Where necessary, therefore, the

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79. NATIONAL PARK SERVICE STUDY, supra note 12, at III, D-2.
80. Id. at III, D-4.
81. Id.
82. 16 U.S.C. § 404(b) (1926).
83. NATIONAL PARK SERVICE STUDY, supra note 12, at III, D-4.
84. Id.
85. Id.
86. Id. at III, D-2.
87. Report Shows $792,479.46 Total In Mammoth Cave Park Campaign, EDMONSON COUNTY NEWS, Oct. 11, 1928.
88. NATIONAL PARK SERVICE STUDY, supra note 12, at III, D-4.
89. CHRONOLOGICAL HISTORY OF THE MOVEMENT TO OBTAIN A NATIONAL [PARK] AT MAMMOTH CAVE, MSS 296, B6 F2, Manuscripts and Archives, Kentucky Library & Museum, Western Kentucky University, Bowling Green, KY [WKU Archives].
90. Id.
91. See infra text accompanying notes 344-49.
92. NATIONAL PARK SERVICE STUDY, supra note 12, at III, D-6.
state could initiate condemnation proceedings, and if the valuation of the land in issue was disputed, judicial hearings could be held to fix the measure of compensation. In 1930, the state earmarked $1.5 million for this purpose.

III. GREAT ONYX CAVE

Three miles from Mammoth Cave lies Great Onyx Cave. Estimated to be some 240 million years in the making, Great Onyx contains many of the attributes common to the myriad caverns found in the state. It contains spectacular natural formations – stalactites, stalagmites, and helictites. The stone comprising these resembles onyx in appearance, though in fact it is composed of a material known as travertine. On proceeding through the main avenue of the cave one encounters a series of large vaulted avenues and domes.

In addition, there are more subtle, yet exquisitely beautiful, features. For example, the walls and ceilings sparkle with gypsum, sometimes appearing as small, delicate flowers, and at other times as feathers. About halfway through the main route (known as the Flower Route) a second avenue (the River Route) forks off to the right. It leads to a deep, rather treacherous vertical opening, which permits access to what is known as the Lucikovah River, home to sightless fish and crayfish. The river is in reality a slender and shallow pond or pool, created by damming. A subterranean body of water was generally regarded as a necessary ingredient to a successful show cave, something that could serve as a counterpart to the Echo River found in Mammoth Cave.

Impressive though it certainly is, Great Onyx Cave must be understood in perspective: it is about one percent the size of Mammoth Cave. It is no surprise,
therefore, that the Onyx’s owners, as with other small operators, participated in questionable business practices during the cave wars.106

There is a serious difference of opinion as to who discovered Great Onyx.107 The published accounts agree on the time of discovery – June 12, 1915 is generally recited as the date.108 There is also consensus that Great Onyx was a sealed cave, that is, there is no natural entrance capable of providing access to humans.109 An opening was created by forcing an entrance with the aid of dynamite, shovels, and arduous labour.110

Beyond that, the stories diverge. One version credits L.P. (Levi Porter) Edwards, the most central figure in the story of the Great Onyx Cave controversy, with the discovery.111 Edwards was a farmer and a Baptist minister.112 Together with his wife Sallie Edwards (née Slemmons), he owned a 220 acre parcel atop Flint Ridge.113 It has been suggested that Edwards discovered the cave quite serendipitously while blasting rocks on the farm.114 Another version has it that the discovery was prompted by the chance finding of limestone blocks on the surface that looked as if the roof of a cavern had fallen in.115 Alternatively, he is thought to have stumbled upon evidence of a cave while seeking water for his plough-horse at a woodland spring.116 Edwards found both sawdust and peach pits at the site.117 There was a sawmill and a peach brandy distillery some two miles away, prompting him to surmise that the debris had been carried to his farm through a subterranean river.118 It was well understood that the presence of an underground watercourse signaled the likelihood that a cave lay below.119

A detailed account, found in a book published by L.P. Edwards,120 sets the discovery of the sawdust and peach pits in the 1880s, when the land was owned by Sallie Edwards’ father, John Slemmons.121 The debris had blocked up a

106. See generally Burman, supra note 3.
107. Richardson, supra note 98; NATIONAL PARK SERVICE STUDY, supra note 12, at III, C-5.
108. Id.
109. Id.
110. Richardson, supra note 98. See also ANNETTE WYNNE, THE TRIP THRU FAIRYLAND: GREAT ONYX CAVE 3 (1924).
112. Id.
113. Id.
114. Id.
115. Richardson, supra note 96.
116. Great Onyx Cave, supra note 95.
117. Id.
118. Id.
119. Id.
120. WYNNE, supra note 110, at 1-4.
121. Id. at 1.
spring on the property, and the blockage increased over the years. Sallie acquired a share of the farm on her father’s death around 1905, and she and her husband bought out the other heirs. Some ten years later, Edwards began to search in earnest for either a natural opening or an avenue close enough to the surface that it could be reached by excavation. A likely location was selected, presumably near the spot where the sawdust and pits had once accumulated. After about six weeks of digging, an underground crawlway was unearthed forty-five feet below the surface.

A competing narrative credits the discovery to L.P. Edwards’ business partner, one Edmund Turner. Turner was a geologist and civil engineer who moved to the Mammoth Cave region from Buffalo, New York. He worked for Edwards from time to time and lived on the Edwards’ property. Turner, the story goes, entered into a partnership agreement with Edwards under which Turner was to use his talents to find a cave, and if he succeeded they were to own and operate it as a show cave on a fifty-fifty basis. Among current researchers the accepted view is that it was Turner who found the cave and who then did most of the heavy lifting to render the cave suitable for tourism.

A variation on this story suggests that Turner was merely hired by Edwards to help with excavation. In this account, described by Edwards’ daughter, Lucy Cox, the two men dug for weeks without success. On one exasperating day, her father sat down to rest only to discover an exposed onyx rock, which they surmised might be the side wall of a cave. Penetrating the rock to locate a chamber proved difficult, but in one “last try” at sledging, blasting and digging, Edwards and Turner were able to create an opening that led to the main Great Onyx chamber.

122. Id. at 2.
123. Id.
124. Id.
125. Wynne, supra note 110, at 3.
126. Id. "Thus was fairyland found."
128. Id.
129. Id.
132. Great Onyx Cave, supra note 95.
133. Id.
134. Id.
135. Id.
We do know this much: in November 1916 Turner sued Edwards for breach of contract.\textsuperscript{136} Turner alleged that the two had reached an agreement in February 1915, and that the deal was that Turner was to use his technical expertise and experience to locate and develop caverns under Edwards’ surface, and if a cave was found and later opened to the public, the partners would each be entitled to a fifty percent share of the profits.\textsuperscript{137} Turner was also to be given a one-half share in the title to the cave, and (of course) access to the cave entrance on Edwards’ surface.\textsuperscript{138}

Turner pleaded that he found Great Onyx Cave at a place “that gave no outward evidence to the unskilled and inexperienced person of any cave or hollow formation beneath the surface so completely hidden and concealed as it was.”\textsuperscript{139} What followed this discovery, it was alleged, were months of back-breaking work to prepare the site for exhibition.\textsuperscript{140} The avenues were cleared and in certain places footpaths were dug so as to increase the headroom.\textsuperscript{141} In the early months of operation as a tourist site, the profits were divided between the two.\textsuperscript{142} However, Turner claimed that by May, 1916 Edwards denied him both access to the property and a share of the income.\textsuperscript{143} No deed transferring an interest in the cave was ever executed.\textsuperscript{144}

The matter never proceeded to trial. In March 1917, Edwards filed a demurrer.\textsuperscript{145} Two months later, before that motion could be heard, Turner died at the age of forty.\textsuperscript{146} He was a pauper at the time of his death, and left no will.\textsuperscript{147} George McCombs, an attorney, was appointed as the administrator of the Turner estate, and he revived the legal action.\textsuperscript{148} The demurrer was heard – and sustained.\textsuperscript{149} McCombs was granted leave by the Circuit Court to appeal, but there is no record that the lawsuit was pursued further.\textsuperscript{150} It is difficult to understand how a demurrer could succeed here, given that the claim disclosed a

\begin{itemize}
\item \textsuperscript{136} Petition in Equity, Court Records: Turner v. Edwards, File 2747, Edmonson County Court House, Brownsville, KY.
\item \textsuperscript{137} Id.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Petition in Equity, Court Records: Turner v. Edwards, \textit{supra} note 136.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Id.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Court Records, Turner v. Edwards, File 2747, Edmonson County Court House, Brownsville, KY.
\item \textsuperscript{146} Id.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Id.
\item \textsuperscript{149} Id.
\item \textsuperscript{150} See Court Records: Turner v. Edwards, \textit{supra} note 136.
\end{itemize}
cause of action for breach of contract. Nevertheless, without Turner’s *viva voce* evidence it seems likely that the lawsuit was destined to fail.\(^\text{151}\)

Great Onyx Cave was a successful attraction. Edwards built a two-story hotel near the entrance to accommodate its visitors, as had been done at Mammoth Cave.\(^\text{152}\) Several small cabins and a dance hall were also built on the site.\(^\text{153}\) There was a retail gasoline service there as well, and a restaurant in Glasgow Junction, which was principally used as a ticket office for the cave.\(^\text{154}\)

Edwards was aided in promoting and operating the cave by his wife Sallie until her death in 1926.\(^\text{155}\) His daughter and son-in-law, Lucy Edwards Cox and Perry Cox, also worked at Great Onyx.\(^\text{156}\) In time, they assumed the chief managerial roles, though L.P. Edwards remained a patriarchal figure until his death in 1938, at the age of eighty.\(^\text{157}\)

About one-quarter of a mile from the entrance to Great Onyx Cave was a property owned by the other main protagonist in the story, Fielding Payton Lee, known to everyone as Pate.\(^\text{158}\) He owned an eighty-six acre parcel, on which he lived with his wife Ida and their children.\(^\text{159}\) Lee grew corn and tobacco on the land, and, like so many others in the area, eked out a modest living.\(^\text{160}\)

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151. There is another possible version, one advanced by Norman Warnell, Fred Douglas and Doug Alderman, all of whom have extensively studied the region's caves. They suggest that Turner and the legendary Floyd Collins might have found the cave in 1914, perhaps even earlier. We do know that these two had met while exploring caverns known as Dossey Domes around 1912. Turner acquired rights to the subsurface of land (referred to later as the Davis tract) near the Slemmons/Edwards farm, and from there may have located what became known as Great Onyx Cave. With that knowledge in hand, Turner then approached Edwards with his partnership proposal. This theory would account for the presence of a signature that reads "Floyd Collins, 1914" scratched on a wall along the Flower Route of Great Onyx Cave. A variant of this version is that Turner approached Edwards and formed the partnership on the understanding that Turner would show Edwards the location of the cave. However, the pleadings in the Turner lawsuit suggest, whether honestly or not, that the parties were to share in the venture only if a cave was found and opened to the public.


153. *Id.*


155. *L.P. Edwards Dies After Long Illness*, EDMONSON COUNTY NEWS, Jan. 5, 1939. L.P. Edwards, together with Lucy and Perry Cox, can be understood as the Great Onyx Cave triumvirate. For the sake of brevity, I will refer mainly to L.P. Edwards as the defendant in the lawsuit. The suit also names Harry Bush, who was L.P. Edwards’ grandson and ward. Bush was on the title and worked at Great Onyx in various capacities.

156. *Id.*

157. *Id.*


159. *Id.*

160. *See id.*
to time, Pate Lee had worked for Edwards, distributing circulars along roadsides and extolling the wonders of Great Onyx Cave to potential visitors.\textsuperscript{161}

In 1928, Pate Lee filed a lawsuit against L.P. Edwards in claiming that part of the Great Onyx Cave was located below the Lee farm.\textsuperscript{162} But before that, the title to that parcel was called into question.\textsuperscript{163} As with the Turner-Edwards dispute, this title question was part of the undercard to the main event of Lee versus Edwards.

In 1926, Pate’s half-brother Lonnie claimed a one-third interest in the farm.\textsuperscript{164} According to the suit, in 1891 or 1892 their father, John J. Lee, executed a deed in which one-third joint interests were given to Lonnie Lee (then eighteen or nineteen years old), his father, and his step-mother (Mattie Lee).\textsuperscript{165} The deed was never recorded, and had been lost in the interim, but the father’s oral evidence supported Lonnie’s claim.\textsuperscript{166} It was accepted that Pate had acquired the remaining two-thirds from his parents, and that he had lived on the land for many years.\textsuperscript{167}

The litigation twice required the intervention of the Court of Appeals. At the trial the father’s testimony was improperly presented, which triggered procedural wrangling.\textsuperscript{168} The Court of Appeals, noting that “[t]he case has been meagerly prepared for trial,”\textsuperscript{169} held that the parties could present additional evidence; in effect, they were permitted to start again from scratch. At the second hearing, it was concluded that an interest in land had not in fact been transferred to Lonnie Lee, and that in any event his claim was statute-barred.\textsuperscript{170} A second appeal was launched. The limitations issue, a logical line of argument, had not been pleaded in the case, and so the Court of Appeals rejected that part of the trial judge’s reasons.\textsuperscript{171} But the record again demonstrated an unnecessarily confused proceeding, so much so that the appellate court was unable to conclude that an error had been made at first instance.\textsuperscript{172} Lonnie Lee’s claim was therefore dismissed.\textsuperscript{173}

\textsuperscript{161} Id.\textsuperscript{162} Edwards v. Lee, 19 S.W.2d 992 (Ky. 1936).\textsuperscript{163} Lee v. Lee, 284 S.W. 1052 (Ky. 1926).\textsuperscript{164} Id.\textsuperscript{165} Id. at 1053.\textsuperscript{166} Id. at 1054.\textsuperscript{167} Id.\textsuperscript{168} Lee, 284 S.W. at 1054.\textsuperscript{169} Id.\textsuperscript{170} Lee v. Lee, 11 S.W.2d 956 (Ky. App. 1928).\textsuperscript{171} Id. at 958.\textsuperscript{172} Id. at 959.\textsuperscript{173} Id.
IV. **Edwards v. Sims** (1929)

**A. Judge Sims' order**

Even before the Lee brothers’ dispute had been put to rest, Pate Lee launched his suit against L.P. Edwards. One suspects that by that time the enmity between the two was deep-seated. After Edmund Turner and Edwards fell out, Turner lived for a short period on Lee’s property, and it is believed that Lee learned of the location of Great Onyx Cave from Turner. Edwards and Lee also had crossed swords over their shared surface boundary. At one point, Edwards built a fence some ten feet in from the property line to annoy Lee, who did the same, and for the same reason. In Lee’s words, “when we got even with one another we pulled it up and put the fence together.”

Lee sought an order for a proportionate share of the profits of the tourist business and a permanent injunction to prevent Edwards from trespassing on the Lee side. As initially pleaded, the action sought $60,000 for the period from 1923 to 1928, plus interest and a share of income accruing after the filing of the suit. The petition was amended at Pate Lee’s insistence to embrace the revenue from 1916 to 1922, thereby covering the entire time span of the tourist operation. The principal claim for the full twelve-year period was $71,095. No doubt the more limited initial timeframe was based on the belief that a claim for the earlier years was statute-barred, that is, no action could now be brought for those years because the suit was filed too late. Once the petition was amended, a reply based on the statute of limitations was, predictably, raised by the defendants.

As a result, the relevant period was as originally pleaded, 1923 to 1928.

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175. *Id.*
176. *Id.*
178. *Id.*
180. *Id.* at 8.
183. When the action was launched in 1928, Edwards was, arguably, edging towards acquisition of title to the Lee portion of the cave by virtue of the operation of the law of adverse possession. The limitation period for adverse possession in Kentucky is fifteen years. See, e.g., Wallace v. Neal, 11 S.W.2d 1002 (Ky. 1928). Taking the starting date as 1915, Lee's title could have been extinguished as early as 1930. To succeed in such a claim, the possession must, *inter alia*, be open and notorious throughout the period, and a claim for subterranean space raises factual issues in that regard. For example, in Marengo Cave Co. v. Ross, 10 N.E.2d 917 (Ind. 1937), a squatter's claim to a cave failed to satisfy these criteria. However, if one can assume that Edmund Turner was the source of Lee's knowledge of the location of the cave, one can fix the time that Lee learned of Edwards' occupation in 1916 or 1917. One would then count 15 years from that point in time.
The revenue calculations in the Lee petition were guesswork. However, there was an even more central, yet uncertain, fact: to what extent—if at all—did the cave meander under Pate Lee’s farm, located some 1,500 feet from the entrance? Lee tendered a survey made by the late Edmund Turner that described the cave’s path. The defendants asserted that the document was “bogus.” In response, Lee sought a preliminary order that the cave be surveyed. That order was granted by Circuit Judge Porter Sims on December 1st, 1928. It called for a survey to be conducted by officials from nearby Warren and Barren counties. The court permitted the parties and their attorneys to be present during the surveying process. The cost of the survey was to be borne by Pate Lee, and the results were not to be disclosed except to the court.

B. The Court of Appeals ruling in Edwards v. Sims

Edwards launched an appeal. However, counsel for Lee maintained that an appeal was premature: the survey order was interlocutory in nature, not final, and so not amenable to an appeal proper. Lee prevailed on that point, but in an effort to circumvent that holding, Edwards’ attorneys sought an order of prohibition against Judge Sims; if successful, it would prevent the carrying out of the order of survey. The technical legal question, given this procedural turn, was whether a Circuit Court Judge had jurisdiction to require a survey that would permit what would otherwise be a trespass on Edwards’ land. It was an appeal in all but name. Although Judge Sims was the nominal respondent in this application, he was not represented at the hearings and took no part in it personally. Pate Lee, as the party in whose favor the survey had been granted, opposed Edwards’ petition.

184. Petition in Equity, Court Records: Edwards v. Sims, supra note 158.
186. Id.
187. See Edwards v. Lee, 19 S.W.2d 992 (Ky. 1929).
188. Id.
189. Id.
190. Id.
191. Id.
192. Lee, 19 S.W.2d.
193. Id.
194. Edwards v. Sims, 24 S.W.2d 619 (Ky. 1929).
195. Id.
196. Id.
197. Id.
A continuous refrain throughout the prohibition motion was that Lee was launching the suit out of malice.\textsuperscript{198} Returning fire, Lee accused Edwards’ attorneys of a range of sins. It was alleged that they had engaged in “bold and flagrant misrepresentation” of the evidence.\textsuperscript{199} It was also asserted that without a survey the trial “[would] BE A SILLY FARCE.”\textsuperscript{200} Moreover, the arguments of Edwards’ attorneys were characterized as “petty and childish,”\textsuperscript{201} and “laughable.”\textsuperscript{202} This was a tooth and nail fight.

It was strongly insinuated that Edwards had conducted a survey of his own, and knew full well that the cave extended into Lee’s property.\textsuperscript{203} In 1921, a concern over the location of the avenues of Great Onyx prompted Edwards to purchase cave rights under land then owned by one Frank Davis.\textsuperscript{204} The Lee lands were sandwiched between Edwards parcel and that owned by Davis.\textsuperscript{205} Moreover, it was alleged that not long after the cave was discovered, Edwards had constructed a wooden wall with a door in the cave near the spot at which the court-ordered survey eventually marked as the boundary line.\textsuperscript{206} The wall remained in place until the Davis lands were acquired.\textsuperscript{207}

Edwards’ attorneys attacked the request for a survey from all possible legal angles. There were concerns raised about the specter of irreparable damage being done to the many extremely delicate cave formations.\textsuperscript{208} For that reason, counsel for Edwards requested that Lee post a bond as a protection against the prospect of physical damage.\textsuperscript{209} It was assumed by the Edwards side, with good reason, that imposing a substantial bond would delay the survey, perhaps indefinitely, since Lee would likely find it difficult to raise the necessary funds.\textsuperscript{210} It was also argued that the survey would compromise the long-term security of Great Onyx Cave.\textsuperscript{211} A survey, once a matter of record, might aid

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would-be trespassers in creating a means of access from the surface.\textsuperscript{212} Such action could result in vandalism to the formations and to the removal of valuable materials.\textsuperscript{213} Edwards claimed that, for such reasons, there was a custom in the Mammoth Cave region not to survey cave holdings.\textsuperscript{214}

The defendants characterized Lee as being on a voyage of discovery, there being no proper evidence that avenues of Great Onyx Cave extended to his land.\textsuperscript{215} They further complained that the desire for a survey was a contrivance by Lee to avoid the costs of exploration.\textsuperscript{216} Lee could, without the aid of the court or entry under Edwards’ land, determine whether there were caves (of any kind) by digging shafts or searching for sinkholes.\textsuperscript{217} During cross-examination, Lee had acknowledged that he had looked for caves on his farm, and had been able to locate a small avenue.\textsuperscript{218}

Finally, there was the more general plea that to order a survey in such circumstances would violate Edwards’ private property rights.\textsuperscript{219} A man’s home is his castle, in Kentucky as in England, it was said.\textsuperscript{220} To order a survey was tantamount to a search and seizure, as well taking of Edwards’ property, albeit a temporary one.\textsuperscript{221} Couched in this way, it was argued that Edwards’ constitutional rights were being infringed.\textsuperscript{222}

The entire Court of Appeals heard the case.\textsuperscript{223} The application for a writ of prohibition to prevent the trial judge’s order was rejected.\textsuperscript{224} Four months later, a motion to have that decision reconsidered, a last ditch effort, was likewise dismissed. The survey was to proceed under the terms of the Sims order.

Commissioner Osso W. Stanley, for the majority, acknowledged at the outset that the case presented a novel question, presumably meaning cave title rights.\textsuperscript{225} However, most of the reasoning in the majority opinion concerned the state

\begin{itemize}
\item \textsuperscript{212} \textit{Id.}
\item \textsuperscript{213} Response to Motion of Plaintiff for Order of Survey, Court Records: Edwards v. Sims, supra note 158, vol. 1 at 51.
\item \textsuperscript{214} \textit{Id.}
\item \textsuperscript{215} \textit{Id.}
\item \textsuperscript{216} \textit{Id.}
\item \textsuperscript{217} \textit{Id.}
\item \textsuperscript{218} Testimony of F.P. Lee, Court Records: Edwards v. Sims, supra note 158, vol. 1 at 97.
\item \textsuperscript{219} Brief for Appellants, Court Records: Edwards v. Sims, supra note 158, vol. 1 at 33.
\item \textsuperscript{220} \textit{Id.}
\item \textsuperscript{221} \textit{Id.}
\item \textsuperscript{222} \textit{Id.}
\item \textsuperscript{223} Edwards v. Sims, 24 S.W.2d 619 (Ky. 1929). The panel was comprised of Chief Justice Gus Thomas; Associate Justices Richard Priest Dietzman, William H. Rees, M.M. Logan, Simeon S. Willis, William Rogers Clay, W.F. Grigsby; and Commissioners J.P. Hobson, W.T. Drury, Osso W. Stanley, and Thomas D. Tinsley.
\item \textsuperscript{224} \textit{Id.}
\item \textsuperscript{225} \textit{Id.} at 619.
\end{itemize}
It was said that resort to the constitution would be appropriate in two circumstances: first, where a lower court has acted without jurisdiction, but there is otherwise no available appeal mechanism; and second, where three elements are present: (i) the inferior court possesses jurisdiction but exercises it erroneously; (ii) enforcing the order would result in great injustice and irreparable injury; and (iii) there is no adequate remedy by appeal or otherwise.

The majority held that the case fell, if at all, under the second situation. In other words, the trial court had authority to order the survey. The issue as to whether Judge Sims has acted erroneously turned on the key substantive law question for which this case is a leading authority: if Lee held title to the portion of the cave below his surface, it was perfectly sensible to order a survey to determine if a trespass had occurred, but if title does not extend to that depth, the survey would of necessity involve an invasion of Edwards’ property rights for no valid purpose. The majority held that Judge Sims had not erred. Hence, a claim under the second basis of constitutional protection failed at the first of the three hurdles.

A conventional point of departure for legal analysis of both airspace and subsurface rights is an ancient Latin brocard, most commonly recited as follows: *cujus est solum, ejus est usque ad coelum et ad inferos.* This means that the owner of the surface of land is taken to own all of the airspace above, as well as the subsurface to the very centre of the earth. The maxim is thought to have been coined in the thirteenth century by Accursius, an Italian jurist, and was applied to airspace rights in a sixteenth century English decision. In Blackstone’s Commentaries (circa 1765-9) it was stated to represent the law of England.

At the time of the Court of Appeals decision in Edwards v. Sims, the validity of the maxim as it relates to airspace was being called into question. To apply
the maxim to the entire column of air above privately owned land would mean that airplanes would perpetrate multiple acts of trespass during any given flight.\textsuperscript{239} For that reason, by the 1930s American cases began adopting the position that one’s title to airspace was limited to that which could reasonably be used and enjoyed by the owner of the surface.\textsuperscript{240} This created an indeterminate upward boundary line, but one that would not normally extend into commercial flight paths.\textsuperscript{241} In 1946, the Supreme Court definitively limited the scope of the \textit{cujus est solum} maxim along those lines.\textsuperscript{242}

The extent of the maxim’s operation below the surface is not subject to precisely the same kinds of issues,\textsuperscript{243} but neither was it a forgone conclusion that the maxim would be applied as a matter of course by the Court of Appeals.\textsuperscript{244} There were few cases to provide guidance in American jurisprudence or elsewhere.\textsuperscript{245} Moreover, just two years following this hearing, a New York court accepted the analogue with airspace rights, holding that a sewer line that ran some 150 feet below a residential property did not invade the surface owner’s property; title did not extend that deep.\textsuperscript{246}

In the end, however, the majority ruled that the \textit{cujus est solum} maxim applied without qualification to subsurface ownership.\textsuperscript{247} There was therefore no downward legal limit to the extent of Lee’s title.\textsuperscript{248} Accordingly it was appropriate – actually imperative and necessary – that a survey be conducted to ensure that justice would be done.\textsuperscript{249} As in mining disputes, which the majority treated as highly analogous, it is sometimes necessary to collect evidence of title in that way.\textsuperscript{250}

\textbf{C. The Dissenting Opinion}

Judge Marvel Mills Logan was the sole dissenter.\textsuperscript{251} He was harshly critical of the majority ruling, declaring at the outset that it would “allow[ ] that to be done that will prove of incalculable injury to Edwards without benefiting

\begin{itemize}
\item \textsuperscript{239} See, e.g., Hinman v. Pacific Air Lines Transport Corp., 84 F.2d 755 (9th Cir. 1936).
\item \textsuperscript{240} Id.
\item \textsuperscript{241} Id.
\item \textsuperscript{242} U.S. v. Causby, 328 U.S. 256 (1946). \textit{See also} STUART BANNER, WHO OWNS THE SKY? THE STRUGGLE TO CONTROL AIRSPACE FROM THE WRIGHT BROTHERS ON (2008).
\item \textsuperscript{243} See BRUCE ZIFF, PRINCIPLES OF PROPERTY LAW 94-95 (5th ed. 2010).
\item \textsuperscript{244} Edwards v. Sims, 24 S.W.2d 619 (Ky. 1929).
\item \textsuperscript{245} Id.
\item \textsuperscript{246} Boehringer v. Montalto, 254 N.Y.S. 276 (N.Y. Sup. Ct. 1931).
\item \textsuperscript{247} Sims, 24 S.W.2d at 620.
\item \textsuperscript{248} Id.
\item \textsuperscript{249} Id.
\item \textsuperscript{250} Id.
\item \textsuperscript{251} Id. at 621.
\end{itemize}
Lee.” He concluded that Edwards was the sole owner of Great Onyx Cave. In a handwritten addendum to the typed copy of his opinion he wrote: “Any ruling by a court which brings great and irreparable injury to a party is erroneous.”

The dissent contains no cases or authorities. Even so, Judge Logan rejected the view that *cujus est solum* maxim had ever represented the law, either for rights above or below the surface. As with the reassessment of the correct approach to airspace rights prompted by the advent of air travel, so should subsurface entitlements be responsive to present-day circumstances. Judge Logan’s preferred rule was based on a mixture of surface rights, labor theory, and first occupancy. He endorsed the notion, consonant with the majority opinion, that title to the surface gives to that owner of everything that may be taken from the earth and used for profit or happiness. He was presumably thinking of mineral rights. However, he declared that surface owners acquired nothing that cannot be subjected to their dominion. The “Stygian darkness” of a cave cannot belong to the surface owner unless there is an entrance on that land. Rather, a cave should belong to the owner of the entrance and that ownership should extend to those parts of the cave that have been explored and connected to the surface. As a result, Judge Logan would have awarded ownership of the cave to Edwards by virtue of his discovery, exploration, development, advertising, exhibition, and conquest. No survey would be warranted. Quite the contrary: Edwards’ title to the cave should be affirmed.

The above summary conveys the distilled essence of Judge Logan’s conclusions and supporting reasons. What it does not capture is the passionate language he chose to invoke. Mills Logan’s dissenting opinion contains very
unique stylistic flourishes. Not only is it unusual as a form of judicial writing, but it is not at all comparable to any of his other reported opinions (which were numerous). He narrated the story of cave exploration in Kentucky, relating this history to the claim before him. The majesty of Great Onyx Cave is reverently celebrated; Pate Lee is cast as an opportunist Johnny-come-lately; L.P. Edwards is depicted as an intrepid explorer, and a visionary. Floyd Collins makes a cameo appearance, though there is no trace of Edmund Turner in this florid exposition. Nor would one appreciate from this depiction that the success of Great Onyx as a show cave owes much to the spillover effect of the popularity of Mammoth Cave.

Here is the heart and soul of Judge Logan’s dissenting opinion:

Men fought their way through the eternal darkness, into the mysterious and abysmal depths of the bowels of a groaning world to discover the theretofore unseen splendors of unknown natural scenic wonders. They were conquerors of fear, although now and then one of them, as did Floyd Collins, paid with his life, for his hardihood in adventuring into the regions where Charon with his boat had never before seen any but the spirits of the departed. They let themselves down by flimsy ropes into pits that seemed bottomless; they clung to scanty handholds as they skirted the brinks of precipices while the flickering flare of their flaming flambeaux disclosed no bottom to the yawning gulf beneath them; they waded through rushing torrents, not knowing what awaited them on the farther side; they climbed slippery steeps to find other levels; they wounded their bodies on stalagmites and stalactites and other curious and weird formations; they found chambers, star-studded and filled with scintillating light reflected by a phantasmagoria revealing fancied phantoms, and tapestry woven by the toiling gods in the dominion of Erebus; hunger and thirst, danger and deprivation could not stop them. Through days, weeks, months, and years – ever linking chamber with chamber, disclosing an underground land of enchantment, they continued their explorations; through the years they toiled connecting these wonders with the outside world through the entrance on the land of Edwards which he had discovered; through the years they toiled finding safe ways for those who might come to view what they had found and placed their seal upon. They knew nothing, and cared less, of who owned the surface above; they

267. See id. at 621-23.
268. Compare id. with Prall v. Bullitt County Bank, 36 S.W.2d 376 (Ky. 1931).
269. Sims, 24 S.W.2d at 622.
270. Id.
271. Id. at 623.
272. Id.
273. See id. at 621-23.
were in another world where no law forbade their footsteps. They created an underground kingdom where Gulliver’s people may have lived or where Ayesha may have found the revolving column of fire in which to bathe meant eternal youth.

When the wonders were unfolded and the ways were made safe, then Edwards patiently, and again through the years, commenced the advertisement of his cave. First came one to see, then another, then two together, then small groups, then small crowds, then large crowds, and then the multitudes. Edwards had seen his faith justified. The cave was his because he had made it what it was, and without what he had done it was nothing of value. The value is not in the black vacuum that the uninitiated call a cave. That which Edwards owns is something intangible and indefinable. It is his vision translated into a reality.

Then came the horse leach’s daughters crying: “Give me,” “give me.” Then came the “surface men” crying, “I think this cave may run under my lands.” They do not know they only “guess,” but they seek to discover the secrets of Edwards so that they may harass him and take from him that which he has made his own. They have come to a court of equity and have asked that Edwards be forced to open his doors and his ways to them so that they may go in and despoil him; that they may lay his secrets bare so that others may follow their example and dig into the wonders which Edwards has made his own. What may be the result if they stop his ways? They destroy the cave, because those who visit it are they who give it value, and none will visit it when the ways are barred so that it may not be exhibited as a whole.274

Debora Threedy has observed that legal archeology, a concept mentioned at the outset, is often informed by legal realism.275 The realists were skeptical of the idea that judges are able to inoculate themselves fully against the possibility that subjective preferences might affect their decision-making.276 They argued that the reasons for decision in a legal dispute can involve far more than that which is found in a published judgment.277 Biases of all kinds, whether working subconsciously or otherwise, can affect judicial perceptions.278 Legal archeology allows one to take these insights and bring them to bear on a given case.279 With that in mind, it is virtually impossible to read Judge Logan’s opinion without wondering about his underlying motivations. Who was this man? What could have sparked this unorthodox and moving judicial pronouncement?

274. Sims, 24 S.W.2d at 622-23.
275. Threedy, supra note 9, at 1201.
276. Id. at 1227.
277. Id.
278. See further Brian Z. Tamanaha, Beyond the Formalist-Realist Divide: The Role of Politics in Judging (2010).
279. Threedy, supra note 9, at 1201.
D. Who Was Marvel Mills Logan?

Marvel Mills Logan, who lived from January 7, 1875 to October 3, 1939, was the third of ten children born to Gillis and Georgiana Logan. The family lived on a hundred-acre farm in Edmonson County, not far from Great Onyx Cave. He was a studious young man and on completing high school took a position as a teacher, working one year at a school near Mammoth Cave.

Mills Logan (as he was known) was a person of strong intellect, coupled with great drive and ambition. In 1896, Logan began the study of law, working for a small firm in Brownsville, the Edmonson County seat. Within a year he had passed the Kentucky bar exam, received his call and opened an office in Brownsville. In that same year he assumed the position of chair of the County’s Democratic Executive Committee, and was elected as chair of the Brownsville Board of Trustees. He held a number of such public positions over the course of his life. A devout Baptist, he is said to have taught Sunday school for some thirty years.

In 1911, Logan was appointed Assistant Attorney General for Kentucky, and four years later he was elected Attorney General, unopposed. After about two years in that position, and a comparable period as inaugural chair of the Kentucky Tax Commission, Logan returned to private practice, first in Louisville, and later in Bowling Green. While there he became heavily involved in several business ventures, including Kentucky Rock Asphalt Company (which proved to be a highly profitable firm). From humble beginnings he had become a wealthy, successful, and respected public figure.

280. Wilmer G. Mason, Marvel Mills Logan, Jurist Extraordinary, M.M. LOGAN COLLECTION, at 96M5 (undated newspaper article) (on file with author and with University of Kentucky Special Collections, Lexington, KY [UK Archives]).
281. Id.
282. Id.
283. Id.
286. In 1901, the 26-year-old Logan lost a close election for the position of County Attorney. A legal challenge of the result failed. See Edwards v. Logan, 70 S.W. 852 (Ky. 1902), petition for rehearing overruled 75 S.W. 257 (Ky. 1903).
288. Id. at 50.
289. Id. at 38.
290. Id.
292. HISTORY OF KENTUCKY, supra note 5.
In 1926, Mills Logan was elected to the Kentucky Court of Appeals.\(^{293}\) He sat for five years, serving as the Chief Justice for a brief period in 1931.\(^{294}\) In late 1930, he was elected to the U.S. Senate, and assumed that high office in March, 1931.\(^{295}\) While in the Senate he lobbied for an appointment to the Court of Appeals for the Sixth Circuit, and expressed interest in having his name go forward for a seat on the United States Supreme Court.\(^{296}\) Despite misgivings about being in Washington, he had achieved a measure of stature among his Senate colleagues, and in 1936 he won a second term in a hard-fought election.\(^{297}\) Logan died of a heart attack in October, 1939.\(^{298}\) He was buried in the family plot in Edmonson County after lying in state in Brownsville. He was remembered as a kind, able, honest, hard-working, and unselfish man.\(^{299}\)

The fact that Logan was from Edmonson was not inconsequential. The counties in Kentucky are small (there are 120),\(^{300}\) and at the time the population of Edmonson was approximately 11,500.\(^{301}\) County events are inherently local, and those living within the vicinity share a common knowledge. However, although Logan favored Edwards’ position, and, as we will see, acted for Edwards later in this very dispute, there is nothing to suggest that he held personal views about the litigants, much less that he would let these views sway his attitude about the merits of the case. Apart from all else, the Reverend Edwards was not a sympathetic figure. His dispute with Turner, which Lee’s attorneys tried to inject into the case at every opportunity, cast a shadow over Edwards’ development of Great Onyx Cave. This was no secret in and around the county.

If Logan can be said to have had a stake in the outcome of Edwards v. Sims it is likely to relate to the national park project.\(^{302}\) He played a leading role in the creation of Mammoth Cave National Park.\(^{303}\) Indeed, Mills Logan is credited with having first advanced the idea.\(^{304}\) In 1905, he wrote to his local

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293. MEMORIAL SERVICES, supra note 285, at 5.
294. Id.
295. Id. at 63.
296. Letter from Clifford E. Smith to M.M. Logan (July 11 1938) (on file with author and with the M.M. Logan Collection, at 96M5 [UK Archives]). See also Logan is Supported for High Court Post, PORTSMOUTH TIMES, Jan. 10, 1938 (The appointment was given to another Kentuckian, Stanley F. Reed.).
297. MEMORIAL SERVICES, supra note 285, at 39.
299. See the eulogies in MEMORIAL SERVICES, supra note 285.
301. NATIONAL PARK SERVICE STUDY, supra note 12, at III, A-5.
302. GOODE, supra note 4, at 20-21.
303. Id.
304. Id.
congressman, who in turn took the proposal to the Secretary of the Interior.\textsuperscript{305} Although the concept was viewed with favour, the political winds shifted and no immediate steps were taken.\textsuperscript{306} When the Mammoth Cave National Park Association was created in 1924, Mills Logan was its founding president.\textsuperscript{307} He served in that capacity for about a year, during which time he led a delegation to Washington to meet with President Coolidge and the Secretary of the Interior.\textsuperscript{308}

Mills Logan would have been aware that the ruling in the Lee-Edwards lawsuit would establish the rules of the game for other caves in the region. Dozens of properties, maybe hundreds, might be affected. There was real potential that the title problems raised by the case could recur elsewhere in the area. Virtually all of the lands had to be acquired from private owners on a parcel-by-parcel basis.\textsuperscript{309} It was known that Mammoth Cave itself extended beyond the lands of the Estate. Therefore, it was entirely possible that any number of landowners around the perimeter of that cave might launch law suits, seeking surveys as Lee had done in the hope of raising the possibility that they, too, were entitled to be paid for their cave rights. Strategic bargaining would almost certainly raise the costs for the MCNPA. As a result, in this setting a rule based on first discovery might work to quiet titles in a way that a simple application of the \textit{cujus est solum} maxim might not. In other words, it would be simpler to identify and compensate those landowners who had openings on their lands and had developed a cave, than to locate every surface owner that might now be able to assert title to a share of the cave.

John B. Rodes, lead counsel for Edwards, likewise understood what was at stake. He was as involved in the park initiative as Logan, and had worked shoulder-to-shoulder with Logan on the national park campaign.\textsuperscript{310} Both were charter members of the MCNPA, and they had gone to Washington together to lobby for the park.\textsuperscript{311} Rodes highlighted this dimension of the case in a way that Logan could readily appreciate: he claimed that Lee’s actions were undertaken with an eye to obtaining a tidy profit from sale of any caves on his property to the MCNPA. If Great Onyx did extend under Lee’s land, it was cautioned, he would be perched “to demand or require an exorbitant price therefor if ever purchased by the Mammoth Cave National Park Association.”\textsuperscript{312} Likewise, one

\textsuperscript{305} M.M. Logan & J.B. Rodes, \textit{Submission to Hon. Hubert Work, Secretary of the Interior} (Feb. 5, 1925) (on file with author and with WKU Archives, at MSS 296, B1, F2).
\textsuperscript{306} Goode, \textit{supra} note 4, at 20-21.
\textsuperscript{307} \textit{National Park Service Study}, \textit{supra} note 12, at III, D-1.
\textsuperscript{308} Logan & Rodes, \textit{supra} note 305.
\textsuperscript{309} \textit{National Park Service Study}, \textit{supra} note 12, at III, D-4.
\textsuperscript{310} Logan & Rodes, \textit{supra} note 305.
\textsuperscript{311} Id.
courth brief concluded with what was captioned “a word of warning” as to the impact that the court’s ruling could have in the region: every property owner, on the strength of a simple affidavit, would be entitled to a survey, something that was “likely to set the whole cave region in turmoil.” It was added that “[e]very native of the cave region knows this to be true, including Judge Logan.”

This background takes one only so far in trying to discern Logan’s approach to the case. Logan chose to advance his position, one he evidently held ardently, with a stylistic flourish not found elsewhere in his judicial writings. But why? For whom was he writing? If he was attempting to sway the other members of the court, one wonders why he believed that this kind of prose would be effective to that end. It is not the stuff of lawyerly logic. Nor would it seem to be directed at the local community. There is no obvious explanation, and few clues.

E. The Immediate Aftermath of the Decision –1929 to 1935

Edwards v. Sims affirmed the validity of the order of a survey, and established that the *cujus est solum* maxim governed ownership rights below the surface in Kentucky. Until the survey was carried out, there could be no finding as to the precise location of the boundary, let alone the measure of damages should a trespass have been perpetrated. Lee was broke, and following the Sims order he found it very difficult to arrange financing for the survey. Lenders were wary, but he did eventually manage to obtain a loan of $1,000 from the Bank of Glasgow Junction. He did not want to mortgage his farm to secure the loan because he did not want Edwards to find out about his financial problems. Instead, his attorney, John Richardson, agreed to sign as a guarantor for the loan in return for a supplemental fee arrangement. In time, there would be a disagreement about the terms of that added retainer, which, as with so much else in this dispute, eventually required resolution by the Court of Appeals.

A team led by the two court-appointed surveyors carried out the work in early 1930 and by mid-May the survey had been completed. No damage to the cave seems to have occurred, and no vandals exploited the information to enter...
the cave from Lee’s land. The surveyors reported that about one-third of the Great Onyx Cave was below the Lee farm. A line was marked in blue on a cave wall, and a row of small rocks some ten feet inwards on the Edwards side was placed across the footpath. From June 1930 onwards the Great Onyx Cave tours did not extend past those rocks.

Despite the completion of the survey there were still outstanding issues relating to the surface boundary, and this brought the parties back to court.320 The legal description of the Lee farm referred to two trees, a post oak and a hickory, as the monuments to describe one corner of his parcel.321 However, by the late 1920s these trees were no longer standing, and there were questions as to precisely where they had been situated.322 Only a few hundred square feet were at issue, but the point was not trivial, or motivated by spite, or to advance some ill-conceived matter of principle; what drove this aspect of the case were the implications that the placement of the surface markers held for title to the Lucikovah River.323 It happened to be located directly below the contested boundary.

Given that the trees were long gone, extrinsic evidence was introduced to determine where they had once stood.324 Testimony was given as to fence lines, a road, a monument cornerstone, and so on.325 Those testifying believed that the corner had been marked by a stone, since moved. A large number of witnesses were called, including Lee and Edwards, but as the trial judge noted, “it is not amazing that the numerous witnesses differ as to this corner.”326 In the end it was decided that Lee “[came] nearer than any other person as to the exact location of this cornerstone.”327 In the result, the line was placed in such a way as to situate most of the Lucikovah River, and the steps leading down to it, on Lee’s side.328 An appeal from that ruling was dismissed.329

While these proceedings were underway, attempts were being made to acquire properties for the park, including Great Onyx Cave. Efforts to reach a negotiated price for its sale having fallen through, the Kentucky National Park Commission brought condemnation proceedings in the Edmonson Circuit Court against the owners of Great Onyx Cave.330 The application pertained to the

320. Edwards v. Lee, 61 S.W.2d 1049 (Ky. 1933).
321. Id.
322. Id.
323. Id.
324. Id.
325. Lee, 61 S.W.2d at 1049.
326. Id.
327. Id.
328. Id.
329. Id.
Edwards farm and to caving rights held by Edwards on the other side of Pate
Lee’s property (the Davis lands). For reasons that are not clear, no application
was made for Lee’s land. 331 Three so-called “impartial housekeepers,” 332
appointed for the purpose of establishing the fair market value of condemned
properties, collected the relevant information. John Rodes, L.P. Edwards’
attorney in Edwards v. Sims, acted for the Commission. 333

In August, 1930 the valuators reported. The holdings were assessed as
follows: 334

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>Edwards surface</td>
<td>$ 3,150.00</td>
</tr>
<tr>
<td>Timber</td>
<td>750.00</td>
</tr>
<tr>
<td>Buildings and improvements</td>
<td>13,000.00</td>
</tr>
<tr>
<td>Cave and other underground rights</td>
<td>272,408.70</td>
</tr>
<tr>
<td>Davis subsurface</td>
<td>4,697.00</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>$294,004.70</strong></td>
</tr>
</tbody>
</table>

The key figure here is that for the cave rights for the Edwards property –
$272,408.70. What is noteworthy about that valuation is the basis upon which it
was determined. Pages and pages of financial information covering the
preceding five years form part of the record. 335 Precise numbers of ticket sales
per month are recited. 336 The costs of bumper strips, and other minor expenses
are itemized in excruciating detail. 337 However, that information was not
ultimately relevant, except as it related to one year, 1929. The report found that
the net income for the cave and hotel in that year was $27,240.87. That sum
was, inexplicably, multiplied by ten to produce the figure $272,408.70. 338

Neither side was satisfied with the bottom line. Objections were filed, and
in consequence a jury of twelve was empanelled to try the issue. Prior to these
proceedings it had been feared that Edwards would seek $250,000, which the

331. Minutes of the Meeting of the Kentucky National Park Commission, Mar. 19, 1931, MSS
329, B3, F13 (on file with author and with WKU Archives) (discussing the acquisition of Lee’s
land).
330.
333. Id.
334. Appraisal of Great Onyx Cave, Including Land[,] Timber[,] Improvements and Cave
Rights[,], Court Records: Edwards v. Lee's Administrator, File 63359, Location D10/A8-C, Box
4316, KDLA, vol. 8 at 1036.
335. Id.
336. Id.
337. Id.
338. Valuations of Great Onyx Cave and Appurtenances Based on Earnings for Year 1929,
Court Records: Edwards v. Lee's Administrator, supra note 334, vol. 8 at 1035.
MCNPA regarded as an unreasonable and unaffordable sale price.\textsuperscript{339} As it turns out, they underestimated their opponent. Edwards claimed that his holdings were worth $575,000.\textsuperscript{340} One can only imagine what the asking price would have been had Edwards prevailed against Pate Lee. The state argued that the correct valuation was $52,250, less than one-tenth of the amount claimed by Edwards.\textsuperscript{341}

The jury accepted the initial valuation to the penny, and the court affirmed the validity of the deliberations and finding. However, the matter did not rest there. Applications were brought by both sides seeking to set aside the jury verdict. In the end, the trial judge increased the award, setting the value of all of the relevant properties at $398,000. Accounting for inflation, that is the equivalent of almost $6 million in current dollars. If that amount had been paid, Edwards would have become a multi-millionaire just as the Depression was taking its heavy toll on the nation.

The Commission and the MCNPA took the decision hard. Six years earlier,\textsuperscript{342} Mills Logan had advised the federal government that the Mammoth Cave Estate could likely be acquired for less than $1 million, and that the surrounding caves and surface lands, all in, could be obtained for a similar amount. Although he feared that costs might escalate if prompt action was not taken, the award was completely out of kilter with his expectations and calculations.

An appeal was contemplated, but it was appreciated that a more fundamental response was needed if the park project was to come to fruition. There was an unexpected hostility to the park in Edmondson, an attitude both fueled and channeled by Perry Meloan, the editor of the \textit{Edmonson County News}.\textsuperscript{343} In testimony in the Lee-Edwards case, Meloan put the matter starkly: “I have criticized the Association on account of the way they have tried to gyp [sic] the people of Edmonson County.”\textsuperscript{344} One must appreciate that in the end more than 500 families were displaced, by one means or another, to make way for the park.\textsuperscript{345} For many, these hardscrabble tracts, some of which had been family

\textsuperscript{339} Letter from M.B. Harlin to B. Helm (Jan. 25, 1929) (on file with author and with WKU Archives, at MSS 296, B4, F1).
\textsuperscript{340} See also Brief for Appellees, Court Records: Edwards v. Lee's Administrator, \textit{supra} note 334, vol. 8, at 2, (on file with author) (stating that during the condemnation proceedings an appraisal of $800,000 had been submitted by Edwards).
\textsuperscript{341} Id.
\textsuperscript{342} Logan & Rodes, \textit{supra} note 305, at 10.
\textsuperscript{344} Testimony of Perry Meloan, \textit{supra} note 334, vol. 10 at 1213. See also Letter from W.W. Thompson to M.B. Nahm, \textit{supra} note 343.
\textsuperscript{345} \textit{NATIONAL PARK SERVICE STUDY}, \textit{supra} note 12, at III, D-4.
holdings for generations, were worth more than their notional market value.\textsuperscript{346} In addition, some residents felt that the park concept was somehow a ploy by the L & N Railway to gain control of the caves for a private project.\textsuperscript{347} Similarly, the secretary of the MCNPA was accused of land speculating.\textsuperscript{348} At a meeting of the executive of the MCNPA, Senator Logan (as he then was) weighed in:

With reference to the recent verdict in the Great Onyx Cave condemnation suit amounting to $398,000, Senator M.M. Logan of Bowling Green, a native of Edmonson County, stated that the verdict was altogether too high but that he felt that some kind of arrangement could be made to complete the purchase of the required land and caves during the next three or four months. He stated that while the verdict was unfortunate, it was not disastrous and that while a bad situation existed in Edmonson County in so far as the feeling of the people was concerned he thought we could go ahead with the project. He stated that the ordinary rules of business would not apply to the establishment of a national park and that the Edmonson County people felt that no citizen of that County had been placed on the Kentucky National Park Commission.\textsuperscript{349}

It was apparent to all that the verdict had greatly strengthened Edwards’ bargaining position, for he now held three powerful cards in his hand: the verdict; the view among MCNPA members that time was of the essence and that the project might now falter; and the legal requirement that Great Onyx Cave be obtained before national park status would be conferred. As mentioned, the 1926 legislation provided that before the national park could be created, \textit{all} of the caves in a designated area had to be included.\textsuperscript{350}

Senator Logan proposed a response that would realign the balance of power.\textsuperscript{351} He was going to move an amendment to the governing legislation that would allow national park status to be achieved without the incorporation of Great Onyx Cave.\textsuperscript{352} The MCNPA approved of that strategy,\textsuperscript{353} and Logan

\begin{itemize}
\item \textsuperscript{346} \textit{Id.} at III, D-8.
\item \textsuperscript{347} Letter from W.W. Thompson to M.B. Nahm (Apr. 30 1931) (on file with author and with WKU Archives, at MSS 296, B7, F3) ("I believe that at least fifteen . . . citizens made the statement within my hearing that the whole of the idea was a scheme of the L. & N. RR Company to obtain control of the caves and that the Association and Commission were tools in the hands of that company.").
\item \textsuperscript{348} \textit{Id.} (The person in question was George Zubrod, a real estate agent.).
\item \textsuperscript{349} Minutes of the Executive Committee of the Mammoth Cave National Park Association (May 5, 1931) (on file with author and with WKU Archives, at MSS 296, B7, F3).
\item \textsuperscript{350} \textit{See supra} text accompanying note 82.
\item \textsuperscript{351} Letter from M.B. Nahm to W.C. Montgomery (Apr. 27, 1931) (on file with author and with WKU Archives, at MSS 296, B7, F2).
\item \textsuperscript{352} \textit{Id.}
\end{itemize}
introduced a bill in the United States Senate that gave the federal government authority to designate the park officially even though Great Onyx Cave (and Crystal Cave) had not been acquired. That bill did not proceed but comparable legislation became law in 1937.\footnote{H.R. 5594, 75th Cong. (1937) (Logan's Bill was Senate Bill 1996.).}

The crisis had been averted. Great Onyx Cave was an important site in the region, but it was no longer indispensible. Edwards was left with a condemnation verdict that suddenly had little monetary value. (In fact, as will be seen shortly, those proceedings proved in the end to be financially damaging to him.) In addition, in 1934, the task of acquiring lands was transferred to the National Park Service.\footnote{\textsc{National Park Service Study}, supra note 12, at III, D-8.} That allowed for future condemnation proceedings to be heard in the federal court, a move designed, no doubt, to reduce the likelihood that there would be a repeat of the Great Onyx Cave verdict.\footnote{\textit{Id.}}

Throughout this period, cave-war friction continued, with Great Onyx Cave often being caught in a swirl of controversy. During the time of the litigation over the survey, Mammoth Cave obtained an injunction against Edwards for inappropriate solicitation practices designed to divert visitors away from Mammoth Cave.\footnote{Letter from J.B. Rodes to G.E. Zubrod (Aug. 4, 1930) (on file with author and with WKU Archives, at MSS 296, B6, F2).} Yet compliance with the court order remained an ongoing struggle. John Rodes, as attorney for Mammoth Cave in this instance, reported to his principals in 1930 that he had personally witnessed the injunction being flouted by agents for Great Onyx Cave along the roadside and in a local store, and had served those involved with written notice demanding compliance.\footnote{\textit{Id.}}

A dispute also erupted over the use of the term “Frozen Niagara” to describe cave formations.\footnote{Letter from W.W. Thompson to Hon. B.F. Wotton (A.G. Kentucky) (May 24, 1933) (on file with author and with WKU Archives, at MSS 329, B3, F13).} That name had been used by Mammoth Cave for years to denote one of its chief tourist features – a limestone formation near the entrance that resembled a cascading waterfall. The owners of Great Onyx Cave erected several billboards claiming that the Frozen Niagara was in (and only in) its cave. L.P. Edwards claimed that he had copyrighted the term in 1922, and it can be seen in the surviving promotional material.\footnote{\textit{Id.}}

In 1933, Pate Lee died of pneumonia; he was not yet fifty years old. A prominent local attorney, Bev M. Vincent, was appointed the administrator of the estate.\footnote{Richardson v. Lee's Adm'r, 129 S.W.2d 147 (Ky. 1939).} Vincent continued the action for damages, as one might expect.\footnote{\textit{Id.}}
However, in addition he acceded to the request of the heirs to sell Lee’s portion of the cave to the Kentucky National Park Commission.\textsuperscript{363} The price was $8,000.\textsuperscript{364} That is almost $140,000 in current dollars, an impressive sounding figure. However, it looks quite paltry when placed beside the condemnation verdict for Edwards’ rights ($398,000). There were liens on the Lee property, and land values had fallen with the onset of the Depression, both of which help to account for the fire-sale price. Still, as a strategic matter it does not seem wise to have agreed to that price while at the same time trying to obtain the highest measure of damages possible in the suit against Edwards.

V. \textit{EDWARDS V. LEE’S ADMINISTRATOR} (1936)

\textbf{A. The Outcome at First Instance}

The stage was at long last set for the resolution of the final aspect of the Lee claim: the compensation, if any, that Lee (now his estate) would be entitled to receive. The case returned to Judge Sims in the Edmonson Circuit Court in Brownsville for the trial of that issue.\textsuperscript{365}

The measure of damages proved difficult for one main reason: Edwards’ use of Lee’s portion of the cave did not interfere with Lee’s use whatsoever, for during the relevant period (1923 to 1930) Lee had no capacity to occupy his part. Owing to the 1929 ruling, Lee could now prevent Edwards from trespassing in the future by injunction, but it did not inevitably follow that Lee should be entitled to compensation for Edwards’ prior trespasses. In essence, the issue reduces to this: when should the law focus on the \textit{losses suffered by the plaintiff} (which were minimal), and when should our principal concern be the \textit{gains reaped by the defendant} (which were considerable)?

A parade of witnesses testified on the location of the key attractions in the cave and whether or not Edwards had knowingly trespassed.\textsuperscript{366} However, some highly pertinent evidence, that having to do with the income received by the operation of Great Onyx Cave, was in short supply. Edwards resisted the plaintiff’s attempts to acquire a proper accounting of the financial information of the tourist business. These “obstructive tactics,”\textsuperscript{367} as Lee’s counsel aptly described them, severely hampered the plaintiff’s case. The financial information for the years 1923 and 1924 could not be reliably proven.

\textsuperscript{363} Reply Brief for Appellant, Court Records: Richardson v. Lee's Administrator, \textit{supra} note 316, at 2.
\textsuperscript{364} \textit{Id.}
\textsuperscript{365} Edwards v. Lee's Adm’r, 96 S.W.2d 1028 (Ky. 1936).
\textsuperscript{366} Brief for Appellees, Court Records: Edwards v. Lee's Administrator, \textit{supra} note 334, vol. 8 at 2.
\textsuperscript{367} \textit{Id.}
Without adequate business records for two years before the court, no award was made for that period.\textsuperscript{368} Given that it had earlier been determined that the claim for 1917 to 1922 was statute-barred, Lee received damages for only about half the period of trespass.\textsuperscript{369} Edwards might have fared even better had there not been an alternative source of financial information for the period from 1925 to 1930. That source was the 1931 condemnation proceedings in which the Edwards property had been valued at nearly $400,000. In those hearings it was obviously in Edwards’ interest to accentuate the earning power of the caves. We know that the handsome valuation proved to be a hollow victory, and as concerns the Lee dispute it was now also manifestly detrimental.

The method of calculating damages was also advantageous to the plaintiff. The exhibited portion of the cave during the years in question was found to be 6,499.88 feet, of which 2,048.60 feet were on Lee’s side of the line.\textsuperscript{370} Hence, for the purpose of allocating entitlements, approximately two-thirds of the cave belonged to Edwards and one-third to Lee. To be more precise, Lee’s portion was 31.7% of the whole. But the figures pegged by the trial judge were premised not merely on the strict measurements of each section of the cave, but also on the view that the cave’s points of interest were distributed fairly evenly throughout the cave.\textsuperscript{371}

Importantly, Judge Sims concluded that Edwards was aware that the cave extended under the Lee farm.\textsuperscript{372} As a result of this willful trespass, the Court held that the plaintiff was entitled to an award based on a proportionate share of the net profits.\textsuperscript{373} In other words, given the wrongdoing, the damages were to be based on the \textit{gain} to the defendant and not the \textit{loss} to the plaintiff. In the result, Lee’s estate was to receive a one-third share of the net profits of the tourist business, plus six-percent interest.\textsuperscript{374} The principal was slightly more than $25,000, and the interest element raised the total to about $35,000. Both parties appealed.

\textbf{B. The Court of Appeals Ruling}

In preparation for this final showdown, the two sides maneuvered to bolster their legal teams. Two former jurists were retained on the Edwards side. One was Charles Dawson, a former state Attorney-General and a judge of the federal

\begin{flushleft}
\textsuperscript{368} Lee’s Adm’r, 96 S.W.2d 1028.
\textsuperscript{369} Id.
\textsuperscript{370} Id. at 1029.
\textsuperscript{371} Id.
\textsuperscript{372} Id.
\textsuperscript{373} Lee’s Adm’r, 96 S.W.2d at 1029.
\end{flushleft}
district court from 1925 to 1935. The other was, of all people, Senator Marvel Mills Logan, the man who had penned the spirited dissent in Edwards v. Sims. Well-acquainted with the nuances of the case, he now acted for the party that he believed should have prevailed in the first place. As a direct response, Lee’s attorneys approached Richard Priest Dietzman of Louisville, a very seasoned and respected attorney. He had also served as a member of the Kentucky Court of Appeals, including two years as Chief Justice. He, too, had sat on the 1929 hearing of this case, siding with the majority.

Detailed legal briefs were prepared by both sides. Edwards disputed both the basis for establishing the proper measure of damages and the way in which it was applied to the facts. The first line of defense was that, as there was (i) no appreciable physical damage to the Lee property, (ii) no use denied to Lee, and (iii) no evidence that anything had been extracted from Lee’s property, damages were not warranted. Alternatively, if the plaintiff was nevertheless entitled to an award, at most this should be based on a reasonable rental value. And because Lee’s part of the cave could only be reached via Edwards’ lands, it was asserted that the rent should be a purely nominal amount. Even if that were not the correct approach, the estimated rent had to be set at a level that was lower than the profits received. It was asserted that no rational tenant would lease space for a rent equivalent to the entire profit that could be recouped by using that space.

The holding that Lee should receive a share of net profits was, of course, vigorously opposed. The finding of willful trespass, which had served as the basis for the net profits standard, was questioned. Moreover, it was said that an order based on that calculus would, in effect, produce the counter-intuitive result of transforming Lee into a business partner. If that odd position were to be adopted, then presumably Lee would be bound to pay a rental fee for both the use of the entrance and Edward’s section of the cave. As Edwards’ attorneys

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375. Lee’s Adm’r, 96 S.W.2d 1028.
376. Id.
380. Id.
381. Id.
382. Id.
385. Id. at 3.
386. Id. at 8.
387. Id. at 9.
explained, to award net profits here would be equivalent to requiring a telephone company to disgorge a portion of its profits merely because it had wrongly placed a pole on someone else’s land.\textsuperscript{388} It was also argued that the award was in large measure a computation of \textit{gross} profits, because no reduction had been made for the work of the defendants in the management and operation of the Great Onyx Cave business.\textsuperscript{389}

Even if the trial judge had been correct in assessing damages based on net profits, it was maintained that the use of the proportionate ownership of the caverns to determine the respective shares was flawed.\textsuperscript{390} It was argued that during the most of the period at issue, only a small part on the Lee side had been exhibited, the proof of which was said to be the absence of electric lights in that part of the cave.\textsuperscript{391} Along the Flower Route, the lights extended only about 175 feet into Lee’s property.\textsuperscript{392} As to the River Route, there was evidence that the lights were a mere twelve feet over the line.\textsuperscript{393} Based on such considerations, counsel argued that the Lee should receive no more than 1/18 of the net profits, not 1/3 as ordered at trial.\textsuperscript{394}

As one would expect, the award in favor of Edwards in the condemnation suit (nearly $400,000) was compared to the sale price by the Lee estate ($8,000).\textsuperscript{395} For the sake of argument, it was allowed that the Lee portion might have been worth twice that amount, which was still a fraction of the condemnation assessment.\textsuperscript{396} It was argued that the award of $35,000 – more than four times the price received by Lee for his surface and subsurface – was tantamount to awarding punitive damages to Lee.\textsuperscript{397} Such damages, it was conceded, would be tenable were the trespass not just willful (which they did not concede), but also wanton and malicious.\textsuperscript{398} It was asserted that there was no warrant for concluding that those additional requirements were present here.\textsuperscript{399} Finally, it was argued that even if all else was to be sustained (and it was), the trial judge should not have awarded any sum for the period from June 1930 to

\begin{thebibliography}{99}
\bibitem{388} Id. at 8-9.
\bibitem{389} Petition for Rehearing, Court Records: Edwards v. Lee's Administrator, \textit{supra} note 334, at 2.
\bibitem{390} Reply Brief for Appellants, Court Records: Edwards v. Lee's Administrator, \textit{supra} note 334, at 28.
\bibitem{391} Id.
\bibitem{392} Id.
\bibitem{393} Id.
\bibitem{394} Id.
\bibitem{395} Petition for Rehearing, Court Records: Edwards v. Lee's Administrator, \textit{supra} note 334, at 14.
\bibitem{396} Id.
\bibitem{397} Id.
\bibitem{398} Id.
\bibitem{399} Id.
\end{thebibliography}
the end of that calendar year because no part of the Lee property was used during that time.  

Counsel for Lee stressed the cave features found on Lee’s side, especially the Lucikovah River. It was suggested that lanterns were used to show the cave features in areas beyond with light fixtures had been installed. They also took the offensive, claiming that in cases of willful trespass the measure of damages should be *gross*, not net profits. There was some judicial authority marshaled to support that position. Indeed, in the trial decision Judge Sims strongly intimated that he would have taken that position, but refrained from doing so because it was not argued.

The Court of Appeals affirmed the trial judge’s conclusions that (i) the measure of damages should be based on net profits, and (ii) the ratio set at trial should stand. However, the Court also found that the award based on profits obtained from June 1930 onwards was clearly wrong, and the award was revised to delete that amount. As in 1929, Edwards brought a motion for rehearing; again it was denied.

Judge James W. Stites delivered the majority opinion. For him the most vexing issue was whether the appropriate measure of damages should be based on rental value or net profits. His reading of the case law suggested to him that when rental value was used to determine damages, it was done, in effect, as a proxy for awarding net profits. Where, as here, those profits were known, there was no need to use proxy measures. Reliance was placed on analogous intellectual property claims, where damage *per se* may not be provable.

When no tangible harm can be shown, the value received by the wrongdoer is taken to supply the correct quantum of damages.

402. *Id.*
403. *Id.* at 12 (Among the cases cited was the Kentucky decision of *J.M. Thompson Coal Co. v. Dentzell*, 287 S.W. 548 (Ky. 1926)).
405. Edwards v. Lee's Adm'r, 96 S.W.2d 1028 (Ky. 1936).
406. *Id.*
407. *Id.*
408. *Id.* at 1030.
409. *Id.* at 1032.
410. *Lee's Adm'r*, 96 S.W.2d at 1032.
411. *Id.*
412. *Id.*
Hovering above all of this reasoning was a policy concern: “a wrongdoer should not be permitted to make a profit from his own wrong.”413 Trespass is considered tortious even if committed innocently, that is, even when the defendant is unaware that the property belongs to someone else. The notion that a party should not be allowed to profit from a wrongdoing contemplates that the relevant act be knowing or willful, as was found to be the case here. Hence, a good deal turns on a finding of fact that Edwards was aware throughout the time in question that part of his tourist operation was being conducted under Lee’s surface. That does seem likely. As mentioned, Edwards purchased the cave rights to the Davis lands on the far side of the Lee parcel in 1921, and it was alleged that prior to that time he had installed a wall with a door at a point near to what turned out to be the Edwards-Lee boundary line.414

Judge Gus Thomas wrote a separate concurring judgment.415 He took the position that the entire cave should be regarded as being co-owned by the two surface owners in proportion to the ratio of their respective surface titles.416 Under Kentucky law, one co-owner would be entitled to a proportionate share of net profits realized by the other.417 Therefore here, the shares of entitlement (two-thirds to Edwards, and one-third to Lee) would remain the same.418 This line of reasoning was markedly different from that of the majority, and calls into question the underlying basis of subterranean title that was resolved in Edwards v. Sims seven years earlier. Judge Thomas characterized that ruling as interlocutory and hence not a binding authority on the title issue.419

Judge Thomas preferred his approach for two main reasons. First, by treating title as being co-owned, the assumption that Lee had suffered no real loss would be wrong.420 Rather, Lee would have been entitled to access to an undivided one-third share of the entire cave, and hence to the profits for activity that he, too, could have undertaken.421 Second, he reasoned that his approach would optimize the productive value of the cave, since neither owner could have prevented the other from operating the cave as a tourist attraction for its full length and breadth.422 That, in turn, would be beneficial to the public at large.423

413. Id.
415. It is curious that Judge Thomas did not advance this position in the 1929 appellate hearing, given the fact that he presided over that case as well.
416. Lee’s Adm’r, 96 S.W.2d at 1035-36.
417. Id.
418. Id.
419. Id.
420. Id.
421. Lee’s Adm’r, 96 S.W.2d at 1035-36.
422. Id.
423. Id. at 1035.
In the end, the net profits from 1925 to the end of May 1930 were calculated to be $70,844.36. The damages award was one-third of that amount – $23,614.79 – plus interest (at 6% from the relevant year) and court costs. In May 1937, the defendants satisfied the judgment by paying $35,397.00 to the administrator. Attorney fees and other expenses were deducted, leaving the Lee beneficiaries approximately $20,000. That amount is over $300,000 in current dollars.

VI. WHY ARE THESE CASES IMPORTANT?

A. The Impact of Edwards v. Sims

Edwards v. Sims was, and remains, a controversial decision. A brief commentary in the Kentucky Law Journal in the immediate aftermath of the case declared a preference for what was termed “the well-considered opinion” of Judge Logan’s dissent. Likewise, Prosser and Keeton treated the majority decision as wrong because it condoned a dog-in-the-manger attitude for those in Lee’s position.

But not everyone joined that chorus, and rightly so. Pate Lee should not be so pejoratively characterized; he did have a use for the cave, even though he had no means of access (at the time). The right to occupation is merely one stick in the bundle of property rights. Another is the right to sell. In this case it was the most valuable stick, just as it would have been had Lee enjoyed easy access but never ventured below because he hated caves, or was allergic to bat guano, or was disabled, etc. The law does not normally deny property rights merely because the owner allows land to lie fallow. What is more, for the purposes of the litigation it made sense to treat Lee’s area of the cave as inaccessible to him. It had been so at all of the relevant times and was likely to remain so for the foreseeable future. But perhaps that would not have been the case forever; with enough time, money, determination, and dynamite the cave could have been reached by Lee, probably even in 1929, and certainly today.

Whatever its shortcomings, the case of Edwards v. Sims remains the leading authority on cave rights in Kentucky, and it stands among a handful of American

424. Id. at 1033.
425. Id. at 148-49.
426. Richardson v. Lee's Administrator, 129 S.W.2d 147, 148 (Ky. 1939).
427. Id. at 148-49.
cases that have met the issue of subterranean title head on. The case is referred to in both Canadian and Australian textbooks, for in those jurisdictions there is no direct authority on point. 431 Still, it is not certain that a modern-day court would necessarily follow Edwards v. Sims to the letter.

Richard Epstein has identified six plausible rules that might have been applied to cave disputes of this kind. 432 A court might confer ownership on: (i) the owner of the surface (as the Court held); (ii) the discoverer of the cave; 433 (iii) the owner of the entrance; (iv) co-ownership of the entire cave based on the surface title proportions; 434 (v) the party most willing to buy out the claim of the other party; or (vi) the state.

In terms of economic efficiency, Epstein prefers the rule that sole ownership of the cave should go to the owner of the entrance. 435 His starting premise is that the law should strive to repose title in a single owner in order to avoid the “horrendous” problem that one party could holdout to prevent unification of title. 436 Epstein acknowledges, however, that an externality might emerge under this approach. The surface owner may wish, say, to work the minerals under the land, a use that could result in substantial damage to the cave. 437 His preference to award title to the owner of the mouth is predicated on “an empirical judgment that it is worth trading in a huge holdout problem for a far smaller externality problem.” 438

However, Epstein’s attempt to secure a single owner under his proposed rule can easily fail. A cave might have several surface openings, which might not be easy to discern at the outset. We now know that all but one of the smaller show caves on Flint Ridge connect to Mammoth Cave; Great Onyx Cave is the apparent exception. 439 In addition, it is not clear whether Epstein intends that the rule conferring cave rights on the owner of the mouth of the cave would be

433. Presumably, Epstein would have been thinking of Edwards here. But, if Edmund Turner discovered the cave, then Turner would be the owner under this rule, subject to the agreement to share his ownership (as discoverer) with Edwards on a fifty-fifty basis.
434. This is the outcome preferred by Judge Thomas in Edwards v. Lee’s Adm’r, 96 S.W.2d 1028 (Ky. 1936).
435. Epstein, supra note 432.
436. Id. at 567.
437. Id.
438. Id.
439. One legend has it that Edmund Turner did find a connecting avenue but closed it off as an act of revenge against Edwards. It is now known, however, that avenues of Mammoth Cave run under Great Onyx Cave.
applied when that surface access was non-natural. As stated, he would confer title on the owner of the entrance regardless of who discovered it, and that suggests that he had in mind natural entrances only under approach (iii). If he was contemplating only a natural opening under item (iii), that rule would, ironically perhaps, not be applicable to Great Onyx Cave. As already mentioned, all of the accounts of its discovery agree that it was a sealed cave. The entrance had to be artificially created.440

If the law should confer title on the owner of the mouth howsoever created, then we in fact are applying a first occupancy norm. That would be rule (ii) on Epstein’s list, which confers title on the person discovering the cave. That is, in essence, more consistent with the result preferred by Judge Logan, who stressed that Edwards’ title ripened by reason of his exploration, occupation and development. Ownership is therefore determined by a race between competing surface owners to occupy and improve the cave. Like all first occupancy (and labor) norms, determining title by a race can produce wasted effort by the losing party, and in the present setting might also lead to damage to the cave formations. And one might easily arrive at the result that different sections of the same cave have been reached first by different owners. Again, that is real possibility in and around Mammoth Cave. The information and transaction costs incurred just to secure title can mount under such a regime. Squabbles seem inevitable. By comparison, a rule based on the general principle of cujus est solum requires only that a survey be undertaken.

Even putting all this aside, the effect of the proposed rule on surface owners might be more serious than Epstein appreciates. For example, no account is taken of the proximity that could exist between the cave and the surface. A split vertical title occurring close to the surface can adversely affect the surface owner’s ordinary uses. Would that owner be entitled to lay a building foundation if part of the cave ceiling is destroyed?

The problems associated with split ownership of cave lands were examined in another Mammoth Cave region decision, Cox et ux. v. Colossal Cavern Co.441 Coincidentially, that case involved land owned by Perry and Lucy Cox.442 The surface of the property in question had been conveyed to the Cox family in 1883, but cave rights had been retained by the vendor.443 The rights of these vertical neighbors eventually came into question.444 The cave title, it was decided, included not merely a right of exclusive possession of the cavity, but also as much of the land around it as was necessary to preserve and maintain the

440. See supra text accompanying note 112.
442. Id.
443. Id.
444. Id.
The cave owner has “the right to maintain the ground beneath his feet and the curving vault above his head.” The precise depth of this buffer layer was not specified and would likely be both cave-specific and difficult to ascertain. Moreover, the court found that the surface owner was not permitted to take any action that detrimentally affected the cave, by mining operations or otherwise. By the same token, it was decided that a cave owner cannot undermine the subjacent support of the surface. And, while the owner of the Colossal Cavern was entitled to access via the surface (presumably in the form of an easement of necessity), that access could not unreasonably interfere with surface activities. In other words, both entitlements were accorded robust and roughly equal protection against damage.

In sum, it can be seen that Richard Epstein’s preferred regime merely threatens to replace a bilateral monopoly based on split title on the horizontal plane (as in Edwards v. Sims) with one on both the horizontal and vertical planes. In the latter case, we also run the risk of recurrent problems of conflicting uses (as reflected in Cox v. Colossal). In contrast, the cujus est solum approach establishes a bright-line entitlement which does not on its own produce split vertical titles.

The basis for fixing subterranean titles remains a live issue, as is demonstrated by the 2010 United Kingdom Supreme Court decision in Star Energy Weald Basin Ltd. v. Bocardo SA. The case involved three petroleum and natural gas wells that were drilled diagonally on A’s land and extended under B’s property. The shafts entered B’s subsurface at distances of 1300, 800, and 950 feet below ground level, and terminated at about 2900, 2800, and 1400 feet, respectively. B did not have title to the minerals beneath its property, but claimed that the drilling to obtain access to the reservoirs constituted trespass of its subsoil.

The English Court of Appeal held that title extended to the depths at issue, though it cast doubt on the place of the cujus est solum maxim in English law. It was wryly observed that were the maxim to apply in full force, landowners would “all have a lot of neighbours.” The finding of trespass was affirmed by

445. Id. at 542.
446. Cox, 276 S.W. 542.
447. Id.
448. Id.
450. Id. at [2].
451. Id.
452. Id. at [3].
454. Id. at [60].
the Supreme Court. It likewise recognized that the maxim might not be applicable at reaches far below the earth’s crust, but held that the case at hand involved depths that were nowhere near the point at which the strict application of *cujus est solum* would be absurd. After all, this dispute demonstrated that the oil and gas could be reached from the surface. Counsel for the parties cited an extensive array of authorities and scholarly works, including *Edwards v. Sims* and *Edwards v. Lee’s Administrator*.

As a general matter, plumbing the depths of the earth’s crust is becoming ever more viable, from both economic and technological perspectives. As in the *Bocardo* case, one motivation is mineral exploration and development. Another is the effort to tap the earth’s liquid core as a source of heat and energy. A third is the use of subsurface reservoirs as long-term storage tanks for carbon pollution: so-called carbon capture sequestration (CCS). In brief, the CCS process involves injecting carbon dioxide (CO₂) into the pore spaces of permeable rock in the Earth’s crust located at least one-half mile below the surface. The gases are stabilized, trapped, by less permeable rock formations. Such phenomena are found in nature, with CO₂ deposits being locked in place for millennia. CCS technologies are still in their infancy, although there are a small number of projects already in operation.

Geological sequestration technologies have been touted as a highly effective response to global warming. But they also give rise to issues around title. When the sequestration occurs in public lands, there is no substantial ownership question. However, large areas are needed for this purpose, and not all land can serve as a suitable repository. In consequence, some prime sites that are currently in private hands may be needed for sequestration. If that pore space

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456. *Id.*
457. *Id.*
460. *Bocardo*, 3 All E.R. 980.
464. *Id.*
465. *Id.* at 374.
466. See generally id.
468. See further Klass & Wilson, *supra* note 459, at 373.
forms part of a surface owner’s title, then an appropriation by the state must be carried out in compliance with the rules governing the exercise of the power of eminent domain. If Edwards v. Sims is good law, an otherwise valid governmental taking of pore space would require just compensation, though, of course, the measure of that compensation may well be affected by the depth below the surface at which the expropriation occurs.\textsuperscript{469} Recognizing such questions, several states have declared that title to pore space is vested in the owner of the surface,\textsuperscript{470} in effect, codifying Edwards v. Sims.\textsuperscript{471}

B. The Impact of Edwards v. Lee’s Administrator

As with the 1929 case, the early commentary on Edwards v. Lee’s Administrator was divided.\textsuperscript{472} And as with the underground boundary controversy, there are several lines of reasoning that one might adopt to fix the quantum of damages. A court could award: (i) nominal damages on the ground that there was no harm to the property and no use of the cave was denied to Lee; (ii) an amount equal to the fair market rental value of the property, assuming a willing lessor and lessee; (iii) punitive damages against Edwards; (iv) a share of the net profits; or (v) a share of the gross profits.

A majority of commentators have regarded the case as having been rightly decided, though the reasons given in support vary. Some have viewed the willfulness of the trespass as an essential feature of the outcome, as had the Kentucky Court of Appeals. In a case of intentional wrongdoing (as here), it becomes important as a matter of justice and deterrence to strip the defendant of all ill-gotten gains. An award based on net profits produces that result. However, had the trespass been innocent, the correct response, the reasoning goes, would have been to award an amount equal to a rental value.

Others have accepted the net-profit approach as providing rough justice, one that is acceptable because it would have been difficult to determine the fair rental value of the property. It has been said, for example, that in the peculiar situation here – a classic bilateral monopoly\textsuperscript{473} with plenty of bad blood between the parties – the idea of establishing a market value makes no sense, since there

\textsuperscript{469} Id.
\textsuperscript{470} Id. at 382.
\textsuperscript{471} Cf. Sprankling, supra note 235.
\textsuperscript{472} Compare Walter Probst, Note, 35 Mich. L. Rev. 1190 (1937); Restatement (First) of Restitution, §129 cmt. a (1937); with Note, 37 Colum. L. Rev. 503 (1937); Francis E. Crosby, Note, 2 Mo. L. Rev. 115 (1917); Note, 31 Ill. L. Rev. 680 (1937).
\textsuperscript{473} See David Fagundes, Crystals in the Public Domain, 50 B.C.L. Rev. 139, 163 n.131 (2009).
is no actual market. It has also been asserted that the award was fair because the defendant's profits were knowable, whereas the plaintiff's losses (in rent) were conjectural.

Controversially, the trial judge and the Court of Appeals discounted the spade work (literally and figuratively) undertaken by Edwards and his family to create and promote the cave over the years. That work was not treated as relevant in determining net profits. The rationale for not taking those contributions into account seems based on fault-based grounds. Along the same lines, Edwards' conduct as a willful trespasser impeded the court's ability to determine the measure of damages based on a rental value of the Lee portion of the cave, thereby justifying resort to a measure based on actual profits. That rental basis for calculation having been lost, the uncertainty was resolved in a way that was adverse to Edwards.

One can see the logic of resolving an unknown variable – the rental cost – against a defendant, at least where the defendant's actions have contributed substantially to the uncertainty. In this case, however, that hard-line stance is inconsistent with how the Court responded to the dearth of the financial evidence. I am thinking here of the plaintiff's failure to prove the profits made by the owners of Great Onyx Cave in 1923 and 1924. It will be recalled that the failure to prove those figures meant that no damages were awarded for those two years. That kind of information was solely within the possession of the defendants in this action. That being so, one would have thought that the Court might have presumed that the profits in those years matched the highest annual profit for the known years, or the lowest, or perhaps an average profit, unless the


478. A further refinement of this point has been suggested: Kenneth E. Burdon, Accounting for Profits in a Copyright Infringement Action: A Restitutionary Perspective, 87 B.U. L. Rev. 255, 283 (2007) ("[I]n Edwards, the conscious trespasser neglected his duty to contract with his neighbor for the use of the portions of cave under his neighbor's property. . . . [T]he conscious trespasser did not contract with his neighbor at all. Thus, requiring the neighbor to pay for the trespasser's labor and entrepreneurial skill would be forcing the neighbor to accept a contractual arrangement that he might have rejected.").

479. See supra Part E (i).
defendants could show otherwise. Instead, the plaintiff was left with nothing for 1923 and 1924. Even a conservative estimate would have been preferable.

Other computation issues have been debated. It has been argued that the fact that Edwards held the only means of access to Great Onyx Cave should have affected the calculations in his favor, as should the fact that the parts of the cave closest to the entrance were of greater value. On the other side of the ledger, it has been argued that Lee should have been given a share of the profits of not just the cave, but also the hotel. After all, it is very likely that virtually every hotel guest intended to take a tour of the cave. One explanation for the court’s reluctance to go that far is that ignoring the hotel profits served as a crude way to compensate the defendants for their entrepreneurial contributions. Another more convincing reason for excluding the hotel revenue is that those profits were too remotely connected to the acts of trespass.

VII. Conclusion

Very few interpersonal disputes lead to lawsuits, and most that do are resolved before trial. A select number are taken to appeal and of those only a small fraction give rise to legal precedents that matter. Bearing all of this in mind, it is remarkable that the Great Onyx Cave litigation produced two appellate rulings with continuing legal value. Pate Lee and the Reverend L. Porter Edwards could not have imagined that their grudge match over cave rights would become so notorious and well-studied. It presents an ideal set-piece – one cave, two would-be owners – that has proven to be a very useful heuristic for the study of property law, restitution, and law and economics. As we have seen, when the myriad details of this micro-history are unearthed, another intriguing stratum is visible.

One noteworthy aspect that emerges from the events is the extent to which the main participants chose to resort to the law to resolve their differences. With regard to the Great Onyx Cave lands alone, there were eight trials in the Edmonson Circuit Court, six appellate hearings, and three motions for re-hearings. Added to that total are various other cave-war lawsuits during the same period. How the parties were able to devote the time, energy, and money needed to pursue and defend their grievances in this way is a mystery.

482. Glover, supra note 474, at 192.
483. Friedmann, supra note 474, at 1919.
484. Id. See also George B. Klippert, Unjust Enrichment 272 (1983).
The timing of the Lee-Edwards lawsuit hints at a key contextual feature – the national park initiative. It is not clear why Pate Lee waited until 1928 to sue Edwards, given that he was probably aware of the situation for a decade or more. The ability to reap a tangible gain by sale to the MCNPA or via condemnation proceedings might have been the triggering event. Lonnie Lee’s lawsuit claiming an interest in Pate Lee’s land could well have been motivated by the same considerations.

These cases also serve to highlight an interesting aspect of legal practice in close-knit communities – a small number of lawyers take part, changing roles frequently in what looks like a game of musical clients. It has already been noted that John Rodes acted for L.P. Edwards in the main litigation but was on the opposite side of the file in skirmishes between Great Onyx Cave and Mammoth Cave. Likewise, John Richardson represented Pate Lee, but later acted for Edwards in at least one cave war dispute. Bev Vincent was Lee’s administrator, but was also a member of the MCNPA, and was retained by the Kentucky State Park Commission in the Great Onyx Cave condemnation proceedings. One wonders whether Vincent was affected by his divided loyalties when the Lee estate sold its portion of the cave to the government.

Nobody wore more hats than Marvel Mills Logan, and the temptation to speculate about his motivations is difficult to resist. He had an intimate familiarity with the litigants, their lawyers, the property at issue, and its environs. Probably no other member of the Court understood the dispute in *Edwards v. Sims* better that Judge Logan. Whatever else may be said, all of this must have tested his ability to act as a disinterested arbiter of justice. Indeed, his acquaintance with counsel, especially John Rodes, might have prompted his recusal from the panel. At the same time, it should be observed that he had essentially no impact on the outcome of the legal dispute. He was in dissent in the first case, and acted for the unsuccessful party in the second. In the end, he was far more effective in depriving his former client (Edwards) of a windfall gain following the condemnation proceedings in 1931 than he had been in advancing Edwards’ side in the litigation.

What of the fate of the national park project and Great Onyx Cave? By 1941, the holdings had surpassed 45,000 acres. As a result, on July 1 of that year the Mammoth Cave National Park came into being (though its formal dedication was delayed unto the end of World War II). It has since been declared as a World Heritage Site (1981) and an international Biosphere Reserve (1990). There are

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486. Burt, supra note 485.
now just over 52,000 acres within its boundaries, and about half a million people visit the park annually. It has been a resounding success.

Lucy and Perry Cox, who for many years had operated the tourist business, assumed full ownership when L.P. Edwards passed away in 1938. They (and Lucy especially) developed a reputation as strict and demanding employers. Touching the cave formations could lead to summary dismissal. Guides were required to live on the grounds. Great Onyx Cave brochures promised access to the cave day or night, and at any moment a guide might be summoned to the entrance to conduct a tour. When the national park became a reality in 1941, Great Onyx Cave remained on the outside looking in. While the park lands were re-forested, and sundry improvements were made to the park grounds, no comparable work was undertaken for the benefit of Great Onyx Cave. The only point of access to that cave was through the well-appointed park and then along a three-mile gravel road.

A second concerted effort was made around 1950 to acquire Great Onyx, and federal money appropriated for the purpose, but no agreement resulted. Throughout the next decade the issue occasionally resurfaced, and in late 1960 an agreement was finally reached. The following year, Great Onyx Cave was conveyed to the federal government for $365,000. Accounting for inflation, that figure is less than half the amount of the condemnation valuation from 1931, and about $2.5 million in today’s dollars.

Great Onyx was closed for a period following the sale, but by 1975 at the latest it had been re-opened to the public. Currently, tourists are permitted to visit for several weeks in the fall. The original wiring has been stripped out; only a small, non-functioning sprig remains. Tours are conducted by lantern, or as Judge Logan once put it, “by the flickering flare of . . . flaming flambeaux.” In that light, about two-thirds of the way along the main avenue one finds a line of small rocks, and just beyond that, blue survey markings are visible on one of the walls. These artifacts bear witness to a remarkable episode in the history of Great Onyx Cave, one of lasting significance.

489. $803,745 Price Tag on 2 Caves, PARK CITY DAILY NEWS, July 13, 1958; New Negotiations, PARK CITY DAILY NEWS, Aug. 15, 1958 (“The owners have set a value of $403,745.45 on Great Onyx Cave, a property for which the government is offering $350,000.”); Cave Purchase to be Delayed, KENTUCKY NEW ERA, June 24, 1959; Cave Purchase Talks Begin Here Today, PARK CITY DAILY NEWS, Oct. 18, 1960. See also KENTUCKY NEW ERA, Apr. 7, 1954 (detailing a 1954 lawsuit launched by thirty-six heirs of John Slemmons claiming an interest in the cave and seeking to prevent its sale).
492. Edwards v. Sims, 24 S.W.2d 619, 623 (Ky. 1929).
A HOSTILE ENVIRONMENT FOR STUDENT DEFENDANTS: TITLE IX AND SEXUAL ASSAULT ON COLLEGE CAMPUSES

Stephen Henrick*

[The federal government] has determined that the College addressed the complainant’s allegation of sexual assault by assisting with the police investigation. The College was under no obligation to conduct an independent investigation of the alleged sexual assault, as it involved a possible violation of the penal law, the determination of which is the exclusive province of the police and the office of the district attorney.1

PREFACE

Many of the numerous articles written about Title IX’s applicability to claims of sexual assault on college campuses frame the issue in terms of the struggle of (female) rape survivors to overcome an entrenched patriarchal culture that condones violence and is otherwise indifferent to women.2 Empowering victims of sexual violence to seek justice is critically important, and the author fully supports gender equality in all aspects of life including higher education. The author nevertheless takes three approaches to Title IX in this paper, which should not be confused with a lack of concern for the feminist ideals reflected in other publications. First, the author uses gender-neutral pronouns to describe both alleged perpetrators of sexual violence and alleged survivors in recognition of the fact that both men and women can suffer and commit such acts. Second, he uses the label “complainant” instead of “victim” or “survivor” to recognize that student defendants are, and should be, presumed innocent until proven otherwise. Finally, and most fundamentally, the author seeks to shift the reader’s focus to the rights of accused students in campus disciplinary processes for sexual misconduct

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1. United States Department of Education (“DOE”) Office for Civil Rights (“OCR”), Letter of Resolution in Buffalo State College, OCR Complaint No. 02-05-2008 (Aug. 30, 2005). As explained infra Part II(C), the DOE issued a letter in April 2011 that both purports to disavow this position while simultaneously claiming that the letter is not a change in law or OCR’s enforcement policy.

2. See, e.g., Diane Rosenfeld, Changing Social Norms? Title IX and Legal Activism: Concluding Remarks, 31 HARV. J. L. & GENDER 407, 421 (2008) (claiming that “schools will often privilege the rights of their profit-generating football players over the rights of their female students” in sexual violence cases involving student-athletes).
because he believes the attainment of Title IX’s noble goals cannot come at the expense of the civil rights of innocent people. Those who might be inclined to dismiss the author’s viewpoint or the remedy he advocates as insensitive to the needs of rape survivors or somehow anti-feminist should keep an open mind as they read. Also, readers should consider what they would feel if they or a loved one were falsely or erroneously accused of sexual assault and subject to the current standard campus operating procedures outlined herein. If the reader cannot say with confidence that an accused student would get a fair trial if charged with sexual assault, is it justifiable to allow colleges and universities to continue adjudicating such offenses?

I. INTRODUCTION

In April of 2011, the U.S. Department of Education’s Office for Civil Rights (“OCR”) issued a “Dear Colleague” letter (“the Letter”) to all institutions under its purview, addressing sexual violence in educational programs and activities. The Letter is OCR’s first publication focusing primarily on instances of student-against-student rape and sexual assault in school settings; among other innovations, it lays out specific procedures educators must now follow in investigating and resolving these claims. While some have “applaud[ed]” the Letter and others have expressed concern with its implications, almost all commentators agree that it is one of the most significant developments in the current body of law governing claims of sexual violence on college campuses. Given the extraordinary impact that these policies have on the lives of thousands of students each year, this paper will examine the Letter and the forty years of administrative and judicial development preceding it to determine whether colleges and universities are the most effective adjudicators of sexual assault and rape allegations. Unfortunately, institutions of higher learning are hindered by several powerful and problematic incentives to falsely


4. See infra Part II(C).


convict accused students in these types of cases. Removing claims of sexual violence from college campuses to civil and criminal judicial systems is the only viable way to fix the problem and ensure that sexual assault adjudication is equitable and impartial for all affected parties.

By way of background, the Letter represents the latest interpretation of Title IX of the Educational Amendments of 1972. Title IX states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” As the wording suggests, Title IX was not originally designed to adjudicate claims of sexual violence on college campuses; nothing in its legislative history and first seven years of existence suggests an intent to reach claims of sexual misconduct in any setting. In 1979, however, Catharine Mackinnon published a groundbreaking book arguing that “sexual harassment” is a form of sex discrimination. Over the next thirteen years, OCR issued administrative guidance prohibiting school employees from sexually harassing students and the Supreme Court expanded Title IX’s private right of action to allow suits for money damages in teacher-to-student harassment cases. By 2000, both OCR and the Supreme Court had also expanded Title IX’s harassment prohibitions to include cases of student-to-student conduct in higher education settings.

Sexual harassment under Title IX is “unwelcome conduct of a sexual nature,” subject to caveats that the behavior must be serious enough to impact the survivor’s access to educational opportunities by creating a hostile environment. The definition encompasses a wide range of

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7. For details as to the incentives universities face to convict based on OCR’s administrative enforcement, including OCR’s ability to terminate an institution’s federal funding and OCR’s current obsession with complainant rights at the expense of fairness for accused students, see infra Parts II (A) and (C). For information regarding the incentives for conviction created from the imbalance of power between alleged victims of sexual violence and alleged perpetrators vis-à-vis bringing civil damage claims against colleges, see infra Parts III (A) and (B).

8. For a more detailed examination of why colleges are inherently incapable of resolving claims of sexual violence between students, see infra Part IV(A). For a response to some of the common arguments as to why colleges must handle these allegations anyway, see infra Part IV(B).


10. CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 143-49 (1979). Although some scholars reject the idea that sexual harassment is per se discriminatory in nature, see Michael S. Greve, Sexual Harassment: Telling the Other Victims’ Story, 23 N. Ky. L. Rev. 523, 540 n.45 (1996), the law is now well-settled that it is.


13. See infra Part III(A).

activities, including “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature” such as posting sexual materials in classrooms. At its most extreme, “sexual harassment” also encompasses allegations of sexual violence between students. A felony-equivalent claim that a student suffered a rape, sexual assault or sexual battery at the hands of a classmate is certainly “unwelcome conduct of a sexual nature,” to understate the issue.

Under Title IX, schools are required to conduct a “prompt, thorough, and impartial” investigation into any allegation of rape or sexual assault reported on campus. If the school finds that harassment occurred, administrators must stop the behavior, prevent its recurrence, and remedy its effects on the victim (including, as needed, by disciplining the harasser).

Like any statutory right, Title IX is only as effective as the remedy it provides for a school’s noncompliance. Title IX has a dual enforcement scheme: someone who claims to have been a victim of sex discrimination, i.e., a “complainant,” can both sue his or her educational institution directly in civil court and also file a complaint with OCR, a federal executive agency with the power to terminate the federal funding of any institution that violates the statute.

This paper begins in Part II by examining OCR’s Title IX administrative enforcement. Part II draws upon significant original research, including more than 220 administrative enforcement decisions from OCR’s national headquarters and twelve regional offices obtained via Freedom of Information Act requests. Most of these decisions have never before been published or examined in academic literature, and they provide an inside look at how OCR operates and carries out its mandate to enforce Title IX on college campuses. This section also traces the history of Title IX by examining the agency’s various guidances and directives, reviewing every major OCR publication from the year of Title IX’s enactment in 1972 to the latest Letter of April 4, 2011.

As noted infra, OCR’s primary concern is now decidedly the rights of complainants. Since 1997, the agency has devoted little if any time to

available at http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [hereinafter 2001 GUIDANCE].

15. Id. at 12-13, 16.
ensuring that sexual assault hearings are “equitable” \(^{20}\) and “impartial” \(^{21}\) for both the defendant and the complainant, despite the fact that OCR’s mission is exactly that. Over the years, OCR has issued a series of publications that escalate complainant rights and mandate new procedures for resolving complaints in a way that does not sufficiently protect the due process rights of falsely accused students. Beginning with OCR’s first sexual harassment guidance dealing with student-to-student harassment, which has remained in effect with limited modification since 2001, these procedures have limited complainant control of the grievance process and conflicted with accused student constitutional rights. The April 4, 2011 Letter added still more rights and protections for complainants, such as a mandatory “preponderance of the evidence” standard for all campus tribunals and new evidentiary and appeal rules. This Letter also included a new provision that complainants (but not accused students) must be notified of their legal rights.

While OCR has issued these formal policy documents, actual enforcement is frequently inconsistent as Part II explains, with various offices resolving similar issues in different and often conflicting ways. Nevertheless, administrative enforcement decisions like the often-cited case of Sonoma State University \(^ {22}\) strongly suggest that anti-due-process ideological biases can be present in OCR enforcement officers, and individual cases can go further than OCR policies in deciding what Title IX requires. In some instances, and in total violation of basic principles of double jeopardy, OCR has also enticed schools to re-examine an acquitted student without notice to him or her until the second investigation begins. \(^{23}\)

The net effect of the administrative enforcement scheme is that schools have an incentive to convict anyone who is charged with sexual assault or rape as a matter of risk aversion for the institution. As noted, OCR has the authority to revoke a college’s federal funding if it finds the institution violated Title IX (although OCR has never exercised that power). For some schools, the sums at stake exceed half a billion dollars. Because OCR primarily cares about the complainant’s rights, as evidenced by its guidances and enforcement opinion letters, conviction carries a much lower risk of administrative enforcement than acquittal.

As Part III notes, legal rights for complainants and accused students in civil court further compound a university’s incentive to convict in every case. Under Title IX, a school’s deliberate indifference to a complainant’s claim that he or she was raped or sexually assaulted is automatically an

\(^{20}\) 34 C.F.R. § 106.8(b) (2012).
\(^{21}\) 2001 GUIDANCE, supra note 14, at 15.
\(^{22}\) Sonoma State University, OCR Complaint No. 09-93-2131 (Apr. 29, 1994).
\(^{23}\) See infra Part II(D).
actionable violation for money damages. Deliberate indifference to an accused student’s innocence, by contrast, is not actionable absent further proof of sex discrimination (which for all practical purposes is impossible to muster). Schools thus only face liability exposure to complainants under Title IX, meaning conviction does not carry any risk of significant penalty. The exposure is all the more compelling because of its potential magnitude: in recent years, Title IX suits have led to six-figure settlements in at least three cases.

Nor do accused students have any meaningful guarantees outside of Title IX’s framework that a school would have to weigh as a counterbalance to the threat of litigation from a complainant. Approaches an accused student could use to challenge unfair discipline for sexual misconduct, such as alleging breach of contract or a due process violation, rarely if ever succeed and are subject to minimal damage awards. As a result, schools providing the bare minimum processes without sufficient procedural safeguards have little to fear from students who are subject to biased or erroneous proceedings.

Quite simply, the process of resolving sexual misconduct allegations under Title IX is fundamentally unfair to the accused and unduly prone to false convictions. Part IV concludes that the only viable reform is to leave claims of rape and sexual assault to the professionalism and impartiality of civil and criminal courts. Courts, unlike universities, lack direct financial incentives to convict or acquit and can thus judge cases properly. Similarly, the actors in a court system such as jurors drawn from the community do not have career ambitions that are readily tied to the verdict in sexual assault trials (in contrast to college officials). Furthermore, judicial systems do not have inherent reputational interests that come into play during sexual assault adjudication, unlike their university counterparts. Finally, courts are less susceptible to bias and ideological prejudice than are campus disciplinarians because courts diffuse power and accountability across a number of independent actors and institutions while simultaneously imposing fair and impartial adjudication procedures before a case arises.

Although there are a number of criticisms that might militate in favor of attempting to reform university adjudication of sexual violence instead of abolishing it outright, none of them are sufficiently persuasive to allow the present system to continue. As Part IV explains, nothing about an institution’s mandate to provide an educational environment that is free from sex discrimination requires it to actually adjudicate rape or sexual assault claims (and analogies to the contrary from Title VII are inapposite). Furthermore, concerns about the underreporting of sexual assault or speculations about the frequency of false or mistaken complaints cannot justify imposing a system of adjudication in which innocent people are prone to conviction for offenses they did not commit. Nor can claims
about the uniqueness of university discipline or academic freedom justify
the status quo. Finally, if the court system is still not up to the task of
handling rape and sexual assault, reform efforts should focus on making it
fair and accessible for everyone.

II. ADMINISTRATIVE ENFORCEMENT OF TITLE IX

A. Background

OCR’s administrative enforcement begins upon receipt of a complaint
alleging that a college or university has violated Title IX. OCR
investigates and, to the extent the institution is in violation, attempts to
secure voluntary compliance. If those efforts fail, OCR has the authority
to refer the institution to the Justice Department for criminal prosecution
and/or to begin proceedings to terminate the institution’s federal funding.

In practice, OCR’s Title IX enforcement rarely if ever becomes
adversarial. In fact, OCR has never once used its power to terminate
funds.24 Given the amount of federal money most universities receive, the
threat of losing it is enough to secure “voluntary” compliance with OCR’s
requests.25

Importantly, OCR’s jurisdiction does not extend to individual students.
OCR can only investigate the university as a recipient of federal funding;
it does not have the authority to directly punish or sanction an accused
student in any way, leaving that up to the institution itself.26

Eight key documents from the past forty years reflect OCR’s
administrative Title IX policy:
• A 1981 memorandum that was OCR’s first foray into sexual
harassment law;
pamphlet titled “Sexual Harassment: It’s Not Academic”;

24. See Nat’l Wrestling Coaches Ass’n v. U.S. Dep’t of Educ., 263 F. Supp. 2d 82, 88 n.2
(D.D.C. 2003); Kristin Jones, Lax Enforcement of Title IX in Campus Sexual Assault Cases, Ctr.
FOR PUB. INTEGRITY (Feb. 25, 2010, 12:00 PM), http://www.publicintegrity.org/2010/02/25/4374/
lax-enforcement-title-ix-campus-sexual-assault-cases-0.

25. For example, Yale’s federal funding totaled $510.4 million in 2010, and the University of
Illinois received roughly $600 million (which accounted for almost a fifth of its entire operating
Univ. of Ill. Bd. of Trs., Case No. 10 C 0568 (N.D. Ill. Apr. 12, 2011),


27. OCR has required schools to conform their sexual harassment procedures to this pamphlet.
E.g., Vatterott College, OCR Complaint No. 07-10-2034 (Aug. 26, 2010).
1997 and 2001 Guidances OCR issued via notice-and-comment rulemaking concerning student-to-student sexual harassment; and

The Letter OCR issued on April 4, 2011 purporting to clarify existing requirements in the 2001 Guidance that pertain to claims of rape or sexual assault.

The above documents are written in a style that is at best dense, vague, and self-contradictory, and all focus primarily on the rights of complainants. In fact, despite its legal duty to ensure that college sexual assault adjudications are “equitable” and “impartial” to all parties including the accused, OCR has never defined a university’s obligation to provide due process protections for student defendants except to say that doing so should “not restrict or unnecessarily delay” a complainant’s Title IX rights. OCR’s enforcement seems predicated on an unspoken and rather naive assumption that all complaints of harassment are brought in good faith; there is no OCR publication or federal regulation mandating any punishment for false accusations of rape or sexual assault (no matter how malicious or injurious to the reputation and academic standing of the accused).


From Title IX’s passage in 1972 until 1997, OCR never claimed authority over rape or sexual assault between students. OCR’s 1981 memorandum defined “sexual harassment” as “verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of the recipient [of federal funding], that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX.” Similarly, both the 1988 and 1995 versions of “Sexual

See, e.g., 2001 GUIDANCE, supra note 14, at 9 (advising that a student’s immediate reaction after experiencing alleged harassment is both relevant and irrelevant in determining whether a hostile environment exists, and also advising that the timeliness of a harassment complaint both does and does not go to the complainant’s credibility). See also Grayson Sang Walker, Note, The Evolution and Limits of the Title IX Doctrine on Peer Sexual Assault, 45 HARV. C.R.-C.L. L. REV. 95, 103-04 (2010).

29. 34 C.F.R. § 106.8(b) (2012).
30. 2001 GUIDANCE, supra note 14, at 15.
Harassment: It’s Not Academic" disclaimed any Title IX applicability to student-to-student allegations.33

The 1988 and 1995 versions also valued complainant control of the sexual harassment grievance process. Both emphasized that “[a]n exemplary procedure would provide the [complainant] with a variety of sources of initial, confidential and informal consultation concerning the incident(s), without committing the individual to the formal act of filing a complaint with its required subsequent investigation and resolution,” implying that not every complaint of sexual harassment had to end with a full-dress formal investigation.34 OCR advised colleges to offer students several alternative courses of action beyond pursuing charges, including doing nothing, taking personal action such as sending a letter to the alleged harasser, or requesting informal third-party mediation (with no qualifications that an incident of “severe” harassment could not be mediated should the complainant want it to be).35

Furthermore, the pamphlets stressed that those accused of sexual harassment have rights. They each pointed out that sexual harassment is an “especially sensitive nature of . . . sex discrimination,” and emphasized that “[i]nvestigating sexual harassment complaints often requires inquiries into interpersonal relations and may also involve professional ethics, behavior and judgment. Awareness of and sensitivity to the potentially negative effect on the lives and careers of both parties involved is of great importance in handling an investigation.”36 In keeping with the goals of fairness and sensitivity, both pamphlets also asked of institutional grievance procedures, “[i]s every effort made to protect the confidentiality of the parties?”37

In 1997, however, Title IX policy changed with the issuance of OCR’s new Sexual Harassment Guidance and revised Pamphlet. The 1997 Guidance dispensed with complainant control of the grievance process, stating that “[i]n some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.”38 (Notably, because the Guidance does not define “sexual assault,” the mere label a

34. 1988 PAMPHLET, supra note 33, at 4 (emphasis added); 1995 PAMPHLET, supra note 33, at 3 (emphasis added).
35. See 1988 PAMPHLET, supra note 33, at 3-4; 1995 PAMPHLET, supra note 33, at 2-3.
36. 1988 PAMPHLET, supra note 33, at 3, 5 (emphasis added); 1995 PAMPHLET, supra note 33, at 2-3 (emphasis added).
37. 1988 PAMPHLET, supra note 33, at 9; 1995 PAMPHLET, supra note 33, at 6.
complainant attaches to an encounter could preclude mediation.)\(^{39}\) The 1997 version of “Sexual Harassment: It’s Not Academic” similarly mandated that “if a school receives information that sexual harassment may have occurred, the school should move quickly to determine what happened,” no matter what the complainant requests be done.\(^{40}\)

Furthermore, although portions of the 1997 Guidance were supportive of student defendants, other parts curtailed rights of the accused.\(^{41}\) For example, one section required a school to process a sexual assault allegation even if criminal charges are pending for the same incident\(^{42}\) (although subsequent OCR decisions have inexplicably declined to enforce that policy).\(^{43}\) The 1997 Guidance could thus force accused students to choose between a rock and a hard place:

Because college disciplinary boards generally do not afford a right against self-incrimination, the accused may be forced to testify or face expulsion. Statements made by the accused during the hearing, or to the investigating dean, may then be used against the student in the criminal case, even though he could not have been forced to testify in the criminal trial itself.\(^{44}\)

In this way, the Guidance could potentially conflict with an accused student’s constitutional right against self-incrimination.

OCR’s most current Revised Sexual Harassment Guidance (2001) did not fix these problems.\(^{45}\) In fact, despite specific requests to “expand and

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41. One part advised that “because of the sensitive nature of incidents of harassment, it is important to limit or prevent public disclosure of the names of both the student who alleges harassment and the name of the alleged harasser,” 1997 Guidance, supra note 31, at 12037, while another stated that students at both public and private colleges have rights (albeit implying that those rights must not restrict or unnecessarily delay the Title IX rights of the complainant), id. at 12045.
42. Id. at 12045. In applying this rule, OCR has at least stated that “investigations into sexual assault allegations may be delayed for reasonable periods of time when criminal investigations are simultaneously underway and institutions do not want to interfere with those proceedings.” Vermont Law School, OCR Complaint No. 01-06-2045 (Dec. 1, 2006).
45. See 2001 GUIDANCE, supra note 14, at 21 (stating that it would keep the preclusion of voluntary mediation in sexual assault cases and the requirement that a school investigate even while criminal charges are pending).
strengthen” due process rights, OCR merely opted for a new heading (“Due Process Rights of the Accused”) while using language from the 1997 Guidance in a slightly rearranged form.\(^46\) By 2008, “Sexual Harassment: It’s Not Academic” did not mention the accused at all, except to say: “[i]t also may be appropriate to counsel the harasser to ensure that he or she understands that retaliation is prohibited.”\(^47\)

Defenders of the Guidances might argue that precluding the voluntary mediation of sexual assault complaints and requiring an investigation of all sexual harassment allegations (irrespective of the complainant’s wishes or pending criminal charges) are good developments, even though they infringe on complainant autonomy and accused student rights. These commentators would likely say such policies lead to justice for survivors who are too traumatized or intimidated to come forward voluntarily. They would probably also argue that these developments help ensure that victims can find timely vindication before the students have graduated or sacrificed their college careers waiting for the court process to conclude. As scholars have noted in the context of domestic violence, however, one-size-fits-all requirements and mandatory “no-drop” provisions are debatable in terms of their fairness and effectiveness.\(^48\) Some complainants would also contest the idea that they need the government to inform them of their own best interests; in one recent case, for example, a complainant so rejected Title IX’s demand for colleges to handle cases while criminal charges were pending that she went to court to try to enjoin her school’s process until after the criminal proceedings had concluded.\(^49\)

C. OCR Policy Guidance: April 4, 2011-Present

OCR’s latest pronouncement on Title IX and sexual violence, the April 4, 2011 Dear Colleague letter, perpetuates and also exacerbates the problems of the 2001 Guidance. The Letter suffers from drafting defects and a failure to conform to the laws governing administrative rulemaking. As will be explained, it also effectuates a presumption that all accused students are guilty and institutes four reforms that will increase convictions without regard to guilt or innocence: (1) lowering the burden

\(^{46}\) See id. at viii, 22; 1997 Guidance, supra note 31, at 12045. The 2001 version ends with an admonition to respect accused rights, rather than ending as the 1997 version did with a caveat that accused rights should not unduly delay the rights of the complainant.

\(^{47}\) U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT’S NOT ACADEMIC 15 (2008). The 1997 version of “Sexual Harassment: It’s Not Academic” had already dropped all language from the 1995 version about the need to be sensitive to the potentially negative effects of a sexual harassment investigation.

\(^{48}\) See generally Erin L. Han, Note, Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases, 23 B.C. THIRD WORLD L.J. 159 (2003).

of proof in campus sexual assault trials to “preponderance of the evidence,” (2) establishing suspect evidentiary rules, (3) requiring schools to inform only complainants of their legal rights, and (4) giving a college’s Title IX coordinator unbridled discretion to revise any sanction issued in a sexual assault proceeding. As applied, the Letter’s requirement that those who handle sexual assault proceedings have “training” also poses grave concerns for accused student rights.

To begin, the Letter is sloppy and hastily drafted. Page five of the Letter imposes two contradictory obligations on schools at once, stating that “[i]f the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation” (emphasis added). One has to wonder, how is a school supposed to investigate consistent with a complainant’s request that no investigation happen?

While OCR’s puzzling requirement might have been clarified via feedback from notice-and-comment rulemaking, OCR did not employ that procedure in promulgating the Letter (in contrast to its promulgation of both the 1997 and 2001 Guidances). At least one law professor at Cornell University has noted that OCR’s refusal to use notice-and-comment rulemaking means the Letter has no legal authority whatsoever. Furthermore, even though OCR justified its actions by claiming that the Letter “does not add requirements to applicable law,” at least three different facts demonstrate that the Letter does impose new legal obligations. First, while the Supreme Court and OCR have previously held that schools have no obligation to investigate or respond to

50. The Letter’s poor quality is perhaps explained by the fact that it had to be published in time for President Obama to announce his candidacy for reelection and for Vice President Biden to speak about sexual assault on college campuses, both of which occurred on the same day it was released. See Michael D. Shear, Obama Begins Re-Election Facing New Political Challenges, N.Y. TIMES (Apr. 4, 2011, 6:24 PM), http://thecaucusblogs.nytimes.com/2011/04/04/obama-launches-re-election-facing-new-political-challenges; Cathy Young, Sexual Assault on Campus—Is It Exaggerated?, MINDINGTHECAMPUSS.COM (Apr. 18, 2011), http://www.mindingthecampus.com/originals/2011/04/_by_cathy_young_1.html (“On the same day, April 4, Vice President Joe Biden kicked off a nationwide ‘awareness campaign’ on schools’ obligations toward victims in a speech at the University of New Hampshire.”).

51. Michael Linhorst, Rights Advocates Spar Over Policy on Sexual Assault, CORNELL DAILY SUN (Apr. 4, 2012), http://www.cornellsun.com/section/news/content/2012/04/04/rights-advocates-spar-over-policy-sexual-assault (quoting a letter from Professor Cynthia Bowman stating that OCR’s letter “is not an administrative regulation, has not been subjected to notice and comment, and thus does not have the status of law”).

harassment that takes place off-campus and outside of an educational program or activity.\footnote{Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999) (“[B]ecause the harassment must occur ‘under’ the operations of a funding recipient . . . the harassment must take place in a context subject to the school district’s control . . .”); University of Wisconsin-Madison, OCR Complaint No. 05-07-2074 (Aug. 6, 2009); Oklahoma State University, OCR Complaint No. 06-03-2054 (June 10, 2004) (“A University does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient.”). \textit{See also} Lam v. Curators of the Univ. of Mo., 122 F.3d 654 (8th Cir. 1997) (holding that a professor’s off-campus sexual harassment of a student in his private practice was not actionable under Title IX).} Page four of the Letter now states “[i]f a student files a complaint with the school, \textit{regardless of where the conduct occurred}, the school must process the complaint in accordance with its established procedures” and “[t]he school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates” (emphasis added). Second, even though OCR has stated that “there is no requirement under Title IX that a recipient provide a victim’s right of appeal,”\footnote{University of Cincinnati, OCR Complaint No. 15-05-2041 (Apr. 13, 2006); \textit{accord} Suffolk University Law School, OCR Complaint No. 01-05-2074 (Sept. 30, 2008) (“[A]ppeal rights are not necessarily required by Title IX, whereas an accused student’s appeal rights are a standard component of University disciplinary processes in order to assure that the student is afforded due process before being removed from or otherwise disciplined by the University.”); Skidmore College, OCR Complaint No. 02-95-2136 (Feb. 12, 1996) (approving a school’s limiting appeal rights to the accused because “he/she is the one who stands to be tried twice for the same allegation”).} Page twelve of the Letter admonishes “[i]f a school provides for appeal of the findings or remedy, it must do so for both parties.” Finally, portions of the Letter contain requirements that OCR has not defined, a fact that raises considerable questions as to how those requirements could have predated the letter.\footnote{For example, page 18 tells schools to “conduc[t], in conjunction with student leaders, a school or campus ‘climate check’ to assess the effectiveness of efforts to ensure that the school is free from sexual harassment and violence” without defining the term “climate check.”}

Of course, the Letter’s most problematic aspect is its formalization of a presumption of guilt in campus adjudications. Part of the problem comes from what OCR does not say. Just two sentences out of the Letter’s nineteen pages discuss due process protections for only those defendants fortunate enough to attend state universities.\footnote{April 4, 2011 Letter, \textit{supra} note 3, at 12 (“Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.”).} OCR’s language implies that the rights of accused students at public colleges do not merit lengthy discussion and further suggests by negative implication that accused students at private institutions, which are still subject to Title IX, do not
The Letter also states that “[w]hen taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain.” In other words, alleged perpetrators should automatically suffer life-upending punishments like expulsion from their residences upon accusation because they are likely guilty. The writing on the wall from this treatment of due process rights is unmistakable: it implies, “oddly and ominously, that the statutory rights of the accuser trump the constitutional due-process [sic] rights of the accused.”

To effectuate its new presumption, the Letter institutes four procedural reforms of campus sexual assault trials that will lead to increased convictions, irrespective of an accused student’s guilt or innocence. First, pages ten and eleven mandate a new burden of proof of “preponderance of the evidence”—the lowest possible threshold. A broad consensus of those involved in university adjudication, including the Committee on Women in the Academic Profession of the American Association of University Professors, would argue that this burden is inappropriately low. So would Congress, which has already rejected legislation that would lower the burden as OCR has done and appears poised to do again.

Second, the Letter establishes a quasi-code of procedure that raises serious constitutional concerns. Page eleven, note twenty-nine, admonishes that “[a]ccess should not be given to privileged or confidential...
information . . . [such as] communications between the complainant and a counselor,” without defining whose law determines what information is considered “privileged” or who is a “counselor.” Notably, the provision includes “information regarding the complainant’s sexual history” (albeit without defining what that phrase means). Because an accused student cannot introduce evidence to which s/he has not been given access, this provision presumably operates as a new de facto rape shield law for college disciplinary proceedings. While Federal Rule of Evidence 412 bars the introduction of a complainant’s sexual history in court, both legislative and constitutional exceptions exist. The Letter, by contrast, does not mention exceptions of any kind. Will the Letter’s evidentiary policy apply to discipline at public universities in a manner that is consistent with accused student constitutional rights?

Third, the Letter creates a mismatch in all proceedings by requiring schools to inform only complainants of their legal rights. Page sixteen orders schools to “ensure that complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental services, and their right to file a complaint with local law enforcement,” without specifying that accused students, too, are entitled to similar notice. Such an imbalance of notice is hardly equitable.

Finally, complainants now have a new right to request a supreme review of all sanctions in sexual harassment cases. In seeming contrast to the requirement at page 12 that appeals of remedies for sexual harassment be equal for both accused and complaining students, page 18 now gives the college’s Title IX coordinator jurisdiction over all discipline to determine if “the complainant is entitled to a remedy under Title IX that was not available through the disciplinary committee” (without specifying any criteria to gauge the Title IX coordinator’s exercise of discretion or stating that the accused is entitled to any similar kind of review).

It is also worth noting that although OCR’s vague requirement insisting upon “training” for those who adjudicate claims of sexual

61. Federal and state law diverge on privileges as federal courts do not recognize a reporter’s privilege. See In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 970 (D.C. Cir. 2005) (citing Branzburg v. Hayes, 408 U.S. 665, 690 (1972)). It could be argued that Title IX applies federal law regarding privilege to define this term in the April 4, 2011 Letter because Title IX is a federal statute, but it could just as easily be that the law of the state where the college is located controls.


63. Similarly, many schools have a “women’s center” that supports complainants (among other activities) without any institution akin to a public defender’s office to provide support to the accused. See, e.g., NWSA Campus Women’s Center Database, NAT’L WOMEN’S STUDIES ASS’N, 72.32.34.202/research/centerguide/index.php (last visited Nov. 23, 2012) for a list of such centers.
violence sounds reasonable and consistent with past practices, it poses a strong threat to accused student rights. From instructing their Title IX coordinators to revising their misconduct procedures, over 800 educational institutions have turned to the National Center for Higher Education Risk Management (“NCHERM”) for guidance. NCHERM’s founding partner, Brett Sokolow, a self-described sexual assault activist, has publically stated he looks forward to seeing more accused students expelled. Universities, acting on NCHERM’s advice, have changed their definitions of “sexual assault” to require a showing of affirmative consent for acquittal, which sounds perilously close to requiring an accused to prove his or her innocence as an affirmative defense. NCHERM also urges schools to redefine sexual misconduct to criminalize voluntary sex resulting from “unreasonable pressure;” these opaquely worded guidelines thus turn many consensual encounters into potential violations. The Letter does not condemn these practices.

Defenders of the Letter would likely argue that developments such as a complainant right of appeal or a lower burden of proof simply create an “equitable” process; although they may appear to be victim-centered, these

64. See April 4, 2011 Letter, supra note 3, at 12 n.30 (stating that “[i]f an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner,” without defining what constitutes either forensic evidence or a trained forensic examiner).


66. Hingston, supra note 65.

67. See Kristin Jones, An Uncommon Outcome at Holy Cross, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010, 12:00 PM), http://www.publicintegrity.org/2010/02/24/4373/uncommon-outcome-holy-cross-0 (“[Sokolow] recommends that schools frame sexual assault as an offense without consent, rather than an offense against the will of the victim. The difference, he says, shifts the responsibility from the victim having to prove refusal to consent, and requires the initiator of the sexual activity to demonstrate that consent was given.”).

68. BRET A. SOKOLOW, NCHERM MODEL SEXUAL MISCONDUCT POLICY 9 (2010), available at http://www.ncherm.org/documents/MODELEXSEXUALMISCONDUCTPOLICY1-10.pdf. The following example appears at 9: “Amanda and Bill meet at a party. They spend the evening dancing and getting to know each other. Bill convinces Amanda to come up to his room. From 11:00pm until 3:00am, Bill uses every line he can think of to convince Amanda to have sex with him, but she adamantly refuses. He keeps at her, and begins to question her religious convictions, and accuses her of being ‘a prude.’ Finally, it seems to Bill that her resolve is weakening, and he convinces her to give him a ‘hand job’ (hand to genital contact). Amanda would never had [sic] done it but for Bill’s incessant advances . . . Bill is responsible for violating the university Non-Consensual Sexual Contact policy. It is likely that a university hearing board would find that the degree and duration of the pressure Bill applied to Amanda are unreasonable. Bill coerced Amanda into performing unwanted sexual touching upon him. Where sexual activity is coerced, it is forced. Consent is not effective when forced. Sex without effective consent is sexual misconduct.” (emphasis in original).
commentators would argue, that it is only because campus judicial processes have usually focused exclusively on accused student rights. Critics of the author’s views might also argue that to insist on higher burdens of proof is to return to the dark days of presuming that all complainants are dishonest. It would be highly unlikely for defenders to adopt OCR’s stated justifications for the lower burden, as even former OCR attorneys have noted that they make little sense.

The first response to these disagreements is that they should have been discussed before the Letter’s issuance. OCR’s Letter, which purports to not add new requirements to existing law but does so in reality, should have gone through notice-and-comment rulemaking to give everyone a chance to be heard and to give these important issues thorough consideration. A second response is that the Letter by its own admission does not seek equal rights for both the accused and the complainant, but rather superior rights for complainants. Only complainants are entitled to have a school inform them of their rights and, even in the realm of appeals (which are theoretically supposed to be “equal” under the Letter) only complainants can ask the Title IX coordinator to review a sanction against the accused to see if another remedy should have been provided. An accused student has no right of review to the Title IX coordinator in any circumstance. Third, there is nothing about insisting on more proof that is tantamount to calling complainants liars. Instead, a higher burden reflects the necessity of certainty before convicting an accused student of the highly stigmatizing offense of sexual assault:

69. See W. SCOTT LEWIS, SAUNDRA K. SCHUSTER, AND BRETT A. SOKOLOW, DELIBERATELY INDIFFERENT: CRAFTING EQUITABLE AND EFFECTIVE REMEDIAL PROCESSES TO ADDRESS CAMPUS SEXUAL VIOLENCE 4 (2011), available at http://ncherm.org/documents/2011NCHERMWHITEPAPERDELIBERATELYINDIFFERENTFINAL.pdf. As explained infra Part III(B), the suggestion that there are even minimally effective safeguards to protect accused students in disciplinary proceedings is preposterous.

70. See Michelle J. Anderson, The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault, 84 B.U. L. REV. 945, 953, 1052 (2004) (arguing that colleges should employ a preponderance standard as a way of rejecting the legacy of the corroboration requirement from criminal law in campus disciplinary proceedings).

71. Hans Bader (former OCR Civil Rights Attorney), Education Department Changes Burden of Proof in Sexual Harassment Cases Under Title IX, OPENMARKET.ORG (Apr. 11, 2011), http://www.openmarket.org/2011/04/11/education-department-changes-burden-of-proof-in-sexual-harassment-cases-under-title-ix/ (“It is completely true, and completely irrelevant, that the preponderance of the evidence standard applies in lawsuits in general, as well as civil-rights cases. But that burden of proof applies to whether the school violated Title IX by behaving inappropriately, not whether students or staff engaged in harassment . . . Since an institution itself must behave in a culpable fashion, not just the harasser, federal courts have held that there is no violation of the civil rights laws even if harassment occurs, as long as the institution investigates in good faith in response to the allegation of harassment. That’s true even if the institution ultimately refuses to discipline a harasser based on the reasonable belief that he is innocent, after applying a firm presumption of innocence.”) (emphasis in original).
Mindful that the function of legal process is to minimize the risk of erroneous decisions, the Supreme Court has noted that an intermediate standard of proof (e.g., the “clear and convincing” standard) may be employed in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant, because the interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff’s burden of proof. 72

A higher burden of proof is also especially appropriate in academic settings because college officials do not have the same degree of professional competence as do trained judges and police officers. Also, the evidence of what happened in a typical sexual assault case is usually murky and prone to an increased risk of erroneous conviction. Finally, even OCR has previously explained why complainants should not have appeal rights: it approved of a school’s limiting appeal rights to the accused because “he/she is the one who stands to be tried twice for the same allegation.” 73

D. OCR Administrative Enforcement Opinions

This section of the paper explores Title IX policy as reflected in OCR administrative enforcement opinions, 74 which although publicly available must be obtained through a lengthy and cumbersome process of filing a Freedom of Information Act (FOIA) request. While OCR’s letters are not binding judicial precedents, 75 the office has cited them in support of policies announced in its Guidances 76 and, as detailed supra, some contradict recent OCR assertions about what Title IX requires of sexual assault investigations.

A note on the difficulty of researching and writing this section is in order. The material cited herein came from FOIA requests with the twelve regional OCR offices that process Title IX complaints and OCR’s national headquarters in Washington, D.C. The offices are not consistent in how they code, classify, and retrieve information, and some do not follow their

72. Letter from Will Creeley, supra note 6 (citing Addington v. Texas, 441 U.S. 418 (1979)).
73. Skidmore College, OCR Complaint No. 02-95-2136 (Feb. 12, 1996).
74. Most letters reviewed for this section predate OCR’s April 4, 2011 Letter.
75. “Dear Colleague” Letter from Stephanie Monroe, Assistant Secretary for Civil Rights, U.S. Department of Education (Jan. 25, 2006), available at http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html (“OCR resolution letters . . . are fact-specific statements of the investigative findings and dispositions in individual cases and are not formal statements of OCR policy.”).
own self-imposed systems. Thus, many offices produced irrelevant and/or non-responsive material. Two FOIA requests seeking the same information from the same office can further result in the production of different documents, and OCR’s FOIA officers may issue contradictory advice and instructions regarding the regulations that govern the Department’s responsibilities. OCR also destroys its case files roughly fifteen years after monitoring the final Title IX settlement, meaning some cases are lost forever. While the author tried to review every Title IX enforcement letter ever issued concerning sexual violence at colleges and universities, the difficulties of obtaining the material mean that this section is likely incomplete.

OCR’s enforcement is best described as inconsistent. OCR has held, for example, that giving an accused student access to the complainant’s statement before requiring a response to the charges is, and is not, a Title IX violation; that a complainant does and does not have any obligation to prove that s/he has been sexually harassed; and that a university does and

77. While OCR Atlanta has codes that include “sexual harassment” and “sexual violence,” the case of Erskine College, OCR Complaint No. 04-04-2016 (date not given), was miscoded as “different treatment/denial of benefits” even though it involved sexual assault. In addition, OCR San Francisco chose to redact a paragraph of its opinion in Sonoma State University, OCR Complaint No. 09-93-2131 (Apr. 29, 1994), on grounds of “unwarranted invasion of personal privacy” while a different OCR office provided the Sonoma opinion in full.

78. The author filed a request with OCR Boston in April 2011 seeking “all OCR documents, including settlement agreements and letters of explanation/closure, pertaining to Title IX complaints of sexual harassment and sexual violence (rape, sexual assault, etc), filed by college/university students within your region,” as limited to peer-to-peer harassment complaints. The materials produced in response omitted the student-to-student sexual assault case of Vermont Law School, OCR Complaint No. 01-06-2045 (Dec. 1, 2006), which was produced in response to a request by another requester on file with the author from October 2010 seeking “decisions from the Office of Civil Rights addressing Title IX complaints regarding sexual harassment and sexual violence filed by College and University students.” As one other commentator recently noted, “it appears that the DOE is engaging in a systemic FOIA violation.” Cantalupo, supra note 16, at 236-42.

79. For example, in denying the author’s initial request for a fee waiver, OCR New York informed him that he should appeal pursuant to 34 C.F.R. § 5.64(b). The author discovered, however, that the cited provision had been repealed over a year and a half earlier. See Availability of Information to the Public, 75 Fed. Reg. 33509 (June 14, 2010). OCR Philadelphia also purported to charge the author a $3.00 processing fee, yet OCR’s national headquarters mailed the author’s check back uncashed with a note stating that the minimum fee that can be assessed is $5.00.

80. Compare Bethany Lutheran College, OCR Complaint No. 05-08-2043 (June 23, 2008) (giving the accused access to the complainant’s statement before requiring him to respond to sexual assault allegations does not violate Title IX) with Sonoma State University, OCR Complaint No. 09-93-2131 (Apr. 29, 1994) (giving the accused access to the complainant’s allegations before requiring him to respond does violate Title IX).

81. Compare Erskine College, OCR Complaint No. 04-04-2016 (date not given) (finding a Title IX violation when the school “required the complainant to prove that she had been sexually harassed rather than requiring the college to fully investigate the charge and issue findings and a report”) with Central Washington University, OCR Complaint No. 10-94-2068 (Dec. 28, 1994)
does not violate Title IX by providing the accused with an opportunity to appeal an adverse decision without notifying the complainant that the appeal will take place. OCR also is and is not concerned when one party to a sexual assault allegation receives more information about how the grievance process works than the other, depending on whether the disadvantaged student is the complainant or the accused. It is especially puzzling that the letters in two of those four sets of contradictory opinions were issued in the same year as each other.

Surprisingly, many OCR enforcement letters also challenge popular assumptions about best practices for sexual misconduct resolution. For example, despite the widespread belief that victims must be afforded amnesty for underage drinking in order to come forward, OCR has allowed schools to punish complainants for alcohol and/or drug use that occurred during their alleged assaults. OCR has also said that a nine-month delay between filing charges and resolution satisfies Title IX’s requirement that grievance procedures be “prompt.” Nor do accused students have to be suspended or expelled from an institution when found guilty in order for their schools to be Title IX compliant.

(stating that a school did not violate Title IX even though under its procedures, “the complainant is responsible for presenting the evidence to support his/her claim of discrimination”).

82. Compare Temple University, OCR Complaint No. 03-06-2060 (June 4, 2007) (“[W]e further find that the University’s policy of not providing notice that an appeal may take place is not equitable.”) with Duke University, OCR Complaint No. 11-07-2024 (June 29, 2007) (“Because [the two] appeals were decided on procedural grounds, OCR is unable to conclude that there was a violation of Title IX” for failing to inform the complainant that they would occur).

83. Compare Temple University, OCR Complaint No. 03-06-2060 (June 4, 2007) (“We also find that the pre-hearing procedures are not equitable because the student charged is given a great deal more information than the victim, including a pre-hearing meeting where the student charged is given an opportunity to present his/her side of the story and discuss the hearing procedures, notified of his/her right to a representative or counsel, provided copies of the Code of Conduct, hearing procedures, and a summary of the evidence.”) with Indiana University, OCR Complaint No. 05-06-2138 (Mar. 6, 2007) (finding no Title IX violation even though the college supplied the complainant with a special advocate who showed the complainant a video about how the disciplinary process works, answered the complainant’s questions, and served as the complainant’s advocate during the hearing while the complainant participated via conference call, while refusing to supply the accused with a similar advocate).

84. Wenatchee Valley College at Omak, OCR Complaint No. 10-05-2010 (June 24, 2005) (drinking); Boston University, OCR Complaint No. 01-02-2037 (Apr. 25, 2003) (marijuana); Boston University, OCR Complaint No. 01-02-2006 (Apr. 25, 2003) (drinking).

85. University of Wisconsin-Madison, OCR Complaint No. 05-07-2074 (Aug. 6, 2008); University of Vermont, OCR Complaint No. 01-95-2022 (Mar. 27, 1995).

86. Massachusetts College of Art and Design, OCR Complaint No. 01-10-2046 (Oct. 8, 2010) (approving a sentence of disciplinary probation, a no-contact order, educational counseling, and an educational workshop in a case of sexual assault, noting that “the sanctions that the College did impose appeared reasonably calculated to prevent further harassing conduct by the Student”); Vermont Law School, OCR Complaint No. 01-06-2045 (Dec. 1, 2006) (approving of a written reprimand and a letter of apology in a sexual assault case); University of Cincinnati, OCR Complaint No. 15-05-2041 (Apr. 13, 2006) (holding in a case of rape that “there is no indication that the sanctions were not reasonably calculated to end the harassment and prevent it from
In general, accused students do not file Title IX grievances. There is only one case, Bates College, which concerns a Title IX administrative complaint alleging wrongful discipline for sexual misconduct. The opinion noted that the complainant was allowed to revise her statement midway through the hearing, the only transcript of the proceedings was an incomplete handwritten note, the Dean of Students served as both investigator and counselor to the complainant, the complainant’s therapist was added as a witness on the morning of the hearing, and those determining the accused’s sentence considered allegations for which he had never been sanctioned or found guilty. OCR’s investigation also discovered that the college was violating the terms of a court order that required the university to amend its procedures to protect accused student rights. Yet unlike in letters analyzing complainant claims, which focus merely on whether hearings are “equitable” and find Title IX violations when they are not, Bates College applied a “different treatment” analysis. It required the accused, in essence, to prove that a female accused student would not have been treated as unfairly as he was. Unsurprisingly, the opinion concluded that there was insufficient evidence of a Title IX violation.

As for how OCR resolutions of complainant grievances treat accused students, not all of them are actively hostile to accused student rights. OCR letters have held that a school has no Title IX obligation to investigate harassment charges after a complainant or the accused graduates. Nor does a college have to hold a formal hearing if after an recurring,” where the sanctions were a two-quarter suspension (including one summer quarter), one year of academic probation, a requirement that the accused write a paper and a book report about sexual harassment, suspension from residence until the papers were completed, and prohibition from further contact with the complainant); Skidmore College, OCR Complaint No. 02-95-2136 (Feb. 12, 1996) (approving a sentence of one year of social probation). Skidmore even suggests that asking OCR to review a penalty is per se inappropriate. Id. (“In determining whether a violation of Title IX exists, OCR examines whether the institution in question has taken appropriate action in response to the alleged violation; it does not review the sufficiency of any findings made, or any penalties imposed.”) (emphasis added).

87. Bates College, OCR Complaint No. 01-00-2085 (Oct. 19, 2001).
88. Courts apply the same double standard to Title IX’s private right of action. See infra Part III(A).
89. One letter said, “Title IX does not prohibit the use of due process,” Harvard University, OCR Complaint No. 01-02-2041 (Apr. 1, 2003). Accord Suffolk University Law School, OCR Complaint No. 01-05-2074 (Sept. 30, 2008) (“OCR recognizes (and does not question) that the University chose to employ its Disciplinary Process in this case in order to afford [the accused] his due process rights before taking potential disciplinary action against him.”). While these statements about due process are tautological as applied to public schools, it is significant that OCR said them while investigating private universities.
90. Texas Women’s University, OCR Complaint No. 06-95-2023 (Mar. 8, 1995) (“Prior to the initiation of an investigation of the complaint allegations, OCR determined that the allegations, whether true or not, are now moot due to the fact that the complainant has completed her studies at TWU. In consideration of the fact that, since the complainant’s graduation, no personal remedy
investigation it concludes that a sexual assault charge is unsubstantiated. Prior OCR letters have also ruled that a school’s failure to engage “emergency discipline” features in sexual assault cases, such as temporarily suspending accused students, is not a Title IX violation. Finally, at least one OCR opinion approved a process whereby an accused student brought disciplinary counterclaims against a complainant.

Some letters, however, are blatantly against the accused in their tone and holdings. Sonoma State University, a case that many commentators cite in discussing Title IX policy, is particularly noteworthy for three reasons. First, despite the fact that OCR did not recognize student-to-student sexual harassment as a form of conduct that Title IX prohibits until 1997, the OCR investigator who handled the case in 1994 unilaterally declared that allegations of student-to-student sexual violence were within OCR’s jurisdiction. Second, Sonoma employed a bizarre definition of the phrase “hostile environment,” stating that sanctions which deter future harassment are sufficient to “cleanse” a hostile environment in a given case while also opining that harassment that occurs in private between two people can “poison” an entire educational atmosphere. Third – and in contrast to both civil and criminal court systems, where a defendant must

remains and no class or systemic violations are alleged, we will pursue this matter no further.”); University of Wisconsin-Madison, OCR Complaint No. 05-07-2074 (Aug. 6, 2008) (approving of the fact that “[t]he University took no action against Student C because he had graduated and it had no jurisdiction over him”). See also University of California-Santa Cruz, OCR Complaint No. 09-93-2141 (June 15, 1994), and attached Voluntary Resolution Plan (requiring a school to reopen an investigation of a student who voluntarily withdrew should he be readmitted, implying that voluntarily withdrawal precludes such investigations).

91. Bates College, OCR Complaint No. 01-04-2051 (Feb. 3, 2005).
93. Boston University, OCR Complaint No. 01-02-2006 (Apr. 25, 2003).
94. Sonoma State University, OCR Reply No. 09-93-2131 (Apr. 29, 1994).
96. See Part II(B) supra.
97. Sonoma State University, OCR Complaint No. 09-93-2131 (Apr. 29, 1994). All of OCR San Francisco appears to have acted similarly, as numerous other opinions predating the 1997 Guidance applied a similar definition either explicitly or by investigating allegations of student-to-student harassment. See Humboldt State University, OCR Complaint No. 09-94-2105 (Oct. 3, 1994); University of California-Santa Cruz, OCR Complaint No. 09-93-2141 (June 15, 1994); Foothill College, OCR Complaint No. 09-94-2021 (June 10, 1994); Occidental College, OCR Complaint No. 09-93-2100 (May 2, 1994); California State Polytechnic University-Pomona, OCR Complaint No. 09-92-2127-I (Dec. 28, 1992). See also Doe by & Through Doe v. Petaluma City Sch. Dist., 54 F.3d 1447, 1452 (9th Cir. 1995) (holding that no duty to respond to peer-to-peer harassment existed at this time).
98. Sonoma State University, OCR Complaint No. 09-93-2131 (Apr. 29, 1994) (“A hostile environment not only affects the direct victims of the sexual harassment, but poisons the educational environment for all students and staff. Appropriate sanctions must be designed to persuade potential harassers to refrain from unlawful conduct and thus, [sic] cleanse the hostile environment.”).
always be served with a complaint or an indictment before being required to respond – Sonoma declared that telling the accused what he or she is accused of, even seconds before demanding the accused explain him/herself without the benefit of counsel, violates Title IX. As Sonoma illustrates, specific OCR enforcement officers may have agendas beyond OCR’s top-down guidance materials and there are no clear checks and balances on any one officer to prevent him or her from having his or her way in a given case.

Even worse, in some instances OCR has enticed schools to secretly agree to reinvestigate a student who was previously acquitted of wrongdoing. Recently, and in seeming disregard of the fact that “OCR does not serve as an appellate authority that reviews the merits of individual decisions by universities under their grievance procedures,” OCR and colleges have started to sign contracts in which OCR drops Title IX charges against the institution on the condition that the school secretly agree to reinvestigate a sexual harassment allegation, with no notice to the accused until the second investigation begins. The school, in essence, signs away the student’s rights to protect itself; because a Title IX administrative complaint is strictly between the government and the college, an accused student is usually not made a party to it or even given notice that it is happening. In these cases, a conviction upon subsequent investigation is all but assured. No risk-averse institution would dare defy OCR’s unstated command to convict on the second try. OCR’s practice contradicts both intrinsic notions of fundamental fairness

99. Id. (“OCR found that specific factual assertions from [the complainant’s statements] were read to the accused, Student 1, at the initial meeting concerning the complaints. In other words, prior to being questioned regarding the allegations, Student 1 was permitted to rebut specifics from the complainants’ allegations. The complainants were never afforded a similar opportunity for rebuttal. SSU thereby precluded the possibility of conducting an impartial inquiry designed to determine the veracity of the allegations and credibility of witnesses . . . OCR found that from that point when Student 1 was permitted access to the complainants’ specific factual allegations the investigation into the complaints was tainted because SSU could not complete a thorough and objective investigation without asking independent and objective questions. Student 1’s answers were preordained by SSU’s questions. Any possibility of making a determination of the credibility of the witnesses and veracity of their testimony was irreparably harmed at the outset.”) (emphasis added). For a case in which OCR contradicted its own rule, see Bethany Lutheran College, OCR Complaint No. 05-08-2043 (June 23, 2008).

100. University of New England, OCR Complaint No. 01-04-2038 (Sept. 30, 2005).

101. Alderson-Broaddus College, OCR Complaint No. 03-11-2015 (May 6, 2011); Rider University, OCR Complaint No. 02-09-2101 (Apr. 8, 2010); Southern Illinois University-Carbondale, OCR Complaint No. 05-09-2133 (Nov. 18, 2009); University of Maryland-Baltimore, OCR Complaint No. 03-07-2121 (July 16, 2008); Temple University, OCR Complaint No. 03-06-2060 (June 4, 2007); Illinois College, OCR Complaint No. 05-06-2154 (Dec. 18, 2006).

102. In Southern Illinois University-Carbondale, for example, OCR’s letter specifically states that “OCR conducted interviews with the Complainant and eight university employees” but not the accused despite the fact that OCR’s disposition of the case required that the accused be reinvestigated. OCR Complaint No. 05-09-2133 (Nov. 18, 2009).
to the accused and even prior OCR opinions about the scope of both a college’s and the agency’s own authority, but no one has yet been able to mount a legal challenge (perhaps because the agency’s covert method of operation has eluded detection).

In summary, OCR’s administrative enforcement scheme is increasingly skewed toward complainants at the expense of accused student rights. In this regard, individual enforcement letters may go even further than formal policy guidances.

III. PRIVATE RIGHTS OF ACTION

The administrative enforcement scheme outlined in Part II would be more than enough on its own to put all accused students at risk of conviction regardless of guilt or innocence. Campus sexual assault trials are additionally stacked against the defendant, however, because complainants have vastly superior private rights of action in court against their educational institutions.

A. Different Rights Under Title IX for Complainants and Accused Students

Title IX, which prohibits colleges from engaging in sex discrimination, is enforceable through a private right of action in federal court. In 1992, the Supreme Court interpreted the statute as allowing suits for money damages in response to a school employee’s sexual harassment of a student. Questions then arose about student-to-student harassment.

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103. In University of California-Santa Cruz, OCR Complaint No. 09-93-2141 (June 15, 1994), OCR sought increased sanctions against two students who were found to have committed rape. However, the college and the students had signed settlement contracts. OCR concluded that the college could not breach its contract with its students, stating “[a]fter extensive discussions, OCR and UCSC did not find sound legal authority which would allow UCSC to breach the agreements, which were contracts between UCSC and the students. While OCR finds deplorable the terms and results of the agreements reached between UCSC and Students A and D, no further action is available to OCR.” (emphasis added). Because a student and a college have a contractual relationship as explained infra Part III(B), OCR’s practice violates Santa Cruz’s principle that a school cannot breach an agreement with its students: the outcome of a disciplinary process, when the school’s procedures are followed, must necessarily become part of that same contractual relationship such that a school cannot retry an accused student for the same offense.

104. Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979). It is not clear that the creation of a judicial right of action would be the result if Cannon were retried today, however. See Michael A. Mazzuchi, Note, Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism, 90 Mich. L. Rev. 1062, 1076 (1992) (“Justice Powell’s reluctance to enforce congressional purposes became more influential, and the Court further restricted implied rights of action in subsequent cases.”). It is also important to remember that Title IX’s private right of action only authorizes suits against institutional recipients of federal funds, not individual students. See Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 257 (2009).

Could Title IX make a school liable for failing to respond to sexual violence between its students, as Title VII makes employers liable for failing to prevent or remedy hostile environment sexual harassment between coworkers?

Until 1999, the answer to that question in one federal circuit was no. In Rowinsky v. Bryan Independent School District, the Fifth Circuit held that complainants do not have any such private right of action because “[t]he mere existence of sexual harassment does not necessarily constitute sexual discrimination” by the institution. Instead, Rowinsky held that “a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate title IX [sic] if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys.”

Rowinsky’s standard forces complainants to analyze every disciplinary case a school has ever adjudicated in order to prove that their result was symptomatic of a broader pattern of gender bias. Because a school that is equally indifferent to the rights of male and female complainants cannot be said to be violating Title IX under Rowinsky’s reasoning, the case provides no meaningful theory of relief for complainants in the face of university indifference to sexual assault.

In 1999, however, the Supreme Court issued its opinion in Davis v. Monroe County Board of Education. Davis established that complainants have a private right of action for money damages under Title IX when a school “acts with deliberate indifference to known acts of harassment in its programs or activities.” The Court also specified that student-to-student sexual harassment is actionable under Title IX “only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.” While Davis dealt with harassment of elementary school students, the dissent noted that “the majority’s holding would appear to apply with equal force to universities, which do not exercise custodial and tutelary power over their adult students.”

107. Id. Rowinsky was one of several conflicting appellate interpretations of Title IX’s private right of action that existed before Davis v. Monroe County Board of Education, 526 U.S. 629 (1999). See Davis v. Monroe Cnty. Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997); Doe v. Univ. of Ill., 138 F.3d 653, 660-68 (7th Cir. 1998); Brzonkala v. Va. Polytechnic Inst. and State Univ., 132 F.3d 949, 960-61 (4th Cir. 1997) vacated and District Court decision aff’d en banc, 169 F.3d 820 (4th Cir. 1999); Oona, R.S. v. McCaffrey, 143 F.3d 473, 476-78 (9th Cir. 1998).
109. Id. at 633.
110. Id. at 652.
111. Id. at 667 (Kennedy, J., dissenting).
One conclusion of law that all nine justices in *Davis* agreed upon was that a single incident of alleged student-to-student sexual harassment, including rape or sexual assault, generally cannot support a Title IX claim for money damages.\footnote{See id. at 652-53 (“[T]he [Title IX] provision that the discrimination occur ‘under any education program or activity’ suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.”) (emphasis added); see also id. at 677 (Kennedy, J., dissenting) (“The majority’s reference to a ‘systemic effect’ does nothing to clarify the content of its standard. The majority appears to intend that requirement to do no more than exclude the possibility that a single act of harassment perpetrated by one student on one other student can form the basis for an actionable claim. That is a small concession indeed.”) (emphasis added). In revising its 1997 Guidance, OCR refused to comply with this aspect of *Davis*’s holding even while claiming that the 2001 Guidance is consistent with *Davis*. See 2001 GUIDANCE, supra note 14, at v-vi, 6.} While several courts have been faithful to *Davis* in holding that a single allegation of sexual assault on a college campus is not actionable,\footnote{See Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325, 1358 (M.D. Ga. 2007); Allen v. Univ. of Vt., 973 A.2d 1183, 1188 (Vt. 2009) (interpreting the Vermont state equivalent of Title IX, which is identical in wording to the *Davis* standard).} many others have disregarded the Supreme Court’s caveat in cases of university students and sexual violence.\footnote{See Jennings v. Univ. of N.C., 444 F.3d 255, 274 n.12; Albiez v. Kaminski, No. 09-CV-1127, 2010 WL 2465502, at *16 (E.D. Wis. June 14, 2010); Kelly v. Yale Univ., No. Civ.A. 3:01-CV-1591, 2003 WL 1563424, at *9 (D. Conn. Mar. 26, 2003); S.S. v. Alexander, 177 P.3d 724, 741 (Wash. Ct. App. 2008). A similar split exists in cases involving students under the age of 18, with decidedly more authority on the side that one incident is sufficiently severe. Compare April 4, 2011 Letter, supra note 3, at 3 n.10 (collecting cases holding one incident sufficient), with Hawkins v. Sarasota Cnty. Sch. Bd., 322 F.3d 1279, 1289 (11th Cir. 2003) (one incident insufficient).} In so holding, the latter group has essentially turned Title IX into the law held unconstitutional by *United States v. Morrison*.\footnote{529 U.S. 598 (2000).} *Morrison* struck down the portions of the Violence Against Women Act that provided a direct civil remedy for complainants to sue accused perpetrators in federal court for crimes motivated by gender. Because giving complainants a direct federal remedy against accused students for sexual assault is unconstitutional, Title IX instead now provides an indirect remedy by giving complainants recourse against their institutions (and by extension, giving complainants a method of incentivizing their schools to punish those accused of sexual violence as a means of preventing costly law suits).

In recent years, Title IX claims have led to high-profile monetary settlements for complainants. To give just three examples, *Simpson v. University of Colorado* settled for $2.85 million, *J.K. v. Arizona Board of Regents* settled for $850,000, and *Williams v. University of Georgia*...
settled for an undisclosed six-figure sum. 116 Although one commentator has expressed caution that these cases may be limited to the extremity of their facts, 117 they stand for the general proposition that the failure to conform to Title IX can lead to financially disastrous consequences for an educational institution. That knowledge hangs like a Sword of Damocles over risk-averse administrators as they adjudicate campus sexual assault allegations.

It might sound intuitive that any aspect of a sexual assault proceeding implicates concerns of gender parity and that sexual violence is so intertwined with the prospect of discrimination based on sex that Davis’s holding should extend to accused students as well. It could be argued that a school’s reacting to an accused student’s innocence with deliberate indifference, much like a school’s reacting with indifference to a complainant’s suffering, should implicate Title IX’s concerns given the sexualized context. Were Title IX so interpreted, both complainants and accused students would have equivalent rights under the statute. If seriously mistreated, each would have a claim against their school and the law would recognize that both wrongful acquittals and wrongful convictions are per se indicative of sex discrimination. Universities, in turn, would have equivalent liability concerns from both the accused and the complainant, and would thus be motivated to treat them equally.

Sadly, the law does not work that way. While a school’s deliberate indifference to a sexual harassment grievance is now automatically sex discrimination, and thus actionable under Title IX, a school’s deliberate indifference to an accused student’s innocence is not. As a paradoxical consequence, accused student “rights” under Title IX resemble Rowinsky’s impossible-to-meet threshold: a plaintiff must prove that the school made its wrongful accusation as part of a broader pattern of systematic bias. 118 As first established in Yusuf v. Vassar College, an accused student bringing a Title IX claim must allege two elements to survive a motion to dismiss: (1) his or her discipline was erroneous, and (2) “particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding.” 119

116. Walker, supra note 28, at 124 n.185, 126, and 101, respectively.
117. See id. at 128-30.
119. Yusuf v. Vassar Coll., 35 F.3d 709, 715 (2d Cir. 1994). Vassar College’s Assistant Dean of Student Life once declared of the falsely accused, “They have a lot of pain, but it is not a pain that I would necessarily have spared them. I think it ideally initiates a process of self-exploration. ‘How do I see women?’ ‘If I didn’t violate her, could I have?’ ‘Do I have the potential to do to her what they say I did?’ Those are good questions.” Nancy Gibbs, When Is It Rape?, TIME MAG. (June 24, 2001), http://www.time.com/time/magazine/article/0,9171,157165,00.html #ixzz1QyYlxAoD.
Several courts have granted motions to dismiss in accused-student Title IX suits because the plaintiff failed to meet the *Yusuf* standard.\(^{120}\) Even if the student’s case survives long enough to obtain discovery access to old university disciplinary files, a school that treats male and female accused students equally poorly will get off scot-free. The only reported case since *Yusuf* to not automatically dismiss an accused’s Title IX claim is *Vaughan v. Vermont Law School*, in which the court granted an accused student’s motion to amend his complaint to bring one.\(^{121}\) The plaintiff in *Vaughan* alleged that his school barred him from attending the same classes as the complainant, prevented him from accessing his transcript for possible transfer, and demonstrated “disparate treatment . . . based on gender” when it accepted the complaint against him “without any investigation” but refused to investigate a complaint he made alleging assault against him by a female student.\(^{122}\)

In summary, Title IX’s courtroom playing field is imbalanced. Accused students do not have a meaningful private right of action, while complainants have secured at least three six-figure settlements in the last five years.

### B. Private Rights of Action for the Accused Outside of Title IX

It has been argued that accused students have guarantees outside of Title IX that ensure sexual assault hearings are fair.\(^{123}\) Simply put,


122. *See id.*

123. *See* Hogan, *supra* note 95. Hogan’s article does not support its own thesis. While note 2 claims that her analysis applies to private colleges “as a practical matter” “because private higher education institutions often model their disciplinary proceedings on due process requirements,” she freely concedes that “private colleges generally are not state actors for purposes of due process” and thus have no obligation to do so (whereas almost every college nationwide must comply with Title IX). She also alleges that Title IX, but not due process, requires impartiality in investigating a sexual assault grievance, rendering her contention that the two doctrines provide equivalent guarantees of fairness patently untrue. *See id.* at 286-88.
however, accused students do not have rights that could serve as a counterweight to Title IX’s incentives. This section explores the three most common theories upon which a student could sue his or her college for erroneous discipline, explaining why none of them provide adequate protection.124

First, public universities must respect the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution in disciplining students.125 The Clause, however, only confers two rights: the right to “some kind of notice” of the charges and the right to be “afforded some kind of hearing,” as the Supreme Court said in *Goss v. Lopez*.126 Judges usually uphold policies “consistent with the bare-minimum requirements of due process,” sometimes while even labeling them “less-than-desirable for an institution of higher learning.”127 For universities, “the direction almost entirely is, ‘How can we whittle down our due process procedures? What is the bare minimum that we have to do?’”128 In essence, “[t]he procedural game too many universities in this country play is to give students enough process to fulfill the vague dictates of *Goss*, but not enough for the student to have a fair opportunity to defend himself - not enough to keep the university, and its officials, from having their way with him.”129

Second, students at private colleges have a judicially created right to “fundamentally fair” discipline.130 However, during his research the author was unable to find a single case of an accused student successfully pursuing a “fundamental fairness” claim. Judges have even upheld a student’s sentence while at the same time calling the procedures that led to it “fundamentally unfair.”131

Finally, students at both public and private universities usually have some kind of implied state law contractual right to receive any procedural

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124. As explained *infra* Part IV, some states such as New York and Arizona provide other protections. Even their safeguards, however, do not carry severe enough consequences for violation of an accused student’s rights to be on par with those that attach from the violation of a complainant’s rights.

125. *See*, e.g., Gorman v. Univ. of R.I., 837 F.2d 7, 12 (1st Cir. 1988) (citing *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975)).


protections that a college voluntarily promises to provide in its student manual or otherwise. One of the clearest problems with the contract theory is that if an institution follows its own rules the accused student has no recourse no matter how unjustified his or her sentence. Another problem is that artful drafting can prevent the manual from providing any substantive protection: courts in some jurisdictions have given effect to broad reservation clauses that vitiate any rights the manual might have provided. Even if a college’s procedures do create a contractual entitlement, courts typically construe the policies against the student in determining whether the university complied.

Accused student suits under the Due Process Clause, fundamental fairness, contractual theories, or even simple common law negligence usually end in dismissal. To the extent that a claim succeeds, the remedy typically consists of a court ordering the college to rehear the charges with any deviations from the university’s own policies remedied. Damages, if awarded, are minimal: in September 2011, for example, a student walked away with just $26,500 after a jury held that Sewanee: the University of the South had been negligent in unjustly convicting him of rape. His case may be the only instance of a court awarding damages to a student convicted of sexual violence.

133. See Millien v. Colby Coll., 874 A.2d 397, 400-02 (Me. 2005). See also Paul Smith, Due Process, Fundamental Fairness, and Judicial Deference: The Illusory Difference Between State and Private Educational Institution Disciplinary Legal Requirements, 9 U. N.H. L. REV. 443, 468 (2011). But see Tedeschi v. Wagner Coll., 404 N.E.2d 1302, 1307 (N.Y. 1980) (“As Mr. Justice Felix Frankfurter wrote almost 40 years ago in McNabb v United States (318 U.S. 332, 347), ‘The history of liberty has largely been the history of observance of procedural safeguards.’ If that be true in the dealings of the State with citizens enmeshed with its criminal justice system it is no less true in the dealings of a college with the members of its student body. To suggest, as does the dissent, that the college can avoid its own rules whenever its administrative officials in their wisdom see fit to offer what they consider as a suitable substitute is to reduce the guidelines to a meaningless mouthing of words. We do not countenance that in other relationships nor should we between student and college.”) (emphasis added).
135. See Anderson, supra note 70, at 1013-14 (“There are about thirty-five written decisions in state and federal courts involving students who have sued their colleges or universities as a result of being disciplined for sexual assault. Ordinarily, disciplined students are only successful when colleges or universities are found to have deviated from the procedures outlined in their own disciplinary policies. When a student wins such a lawsuit, a court then orders that the college or university grant the student a new disciplinary hearing untainted by the procedural anomaly.”).
136. Collin Eaton, Jury Verdict in Sex-Assault Case at Sewanee Sends Warning to Private Colleges, CHRONICLE OF HIGHER EDUC. (Sept. 2, 2011), http://chronicle.com/article/Jury-Verdict-in-Sex-Assault/128884/. The jury awarded $50,000 but reduced the sum because it deemed the student partially responsible for the university’s negligence. It bears mentioning here that although players on the Duke University lacrosse team obtained substantial settlements from the college as a result of the rush to judgment they suffered, theirs is not a case of erroneous discipline because the
To summarize, as one commentator aptly noted several years before Title IX’s far-reaching implications were fully understood, “[i]f colleges and universities scrupulously follow their own procedures, they have little to worry about in terms of suits from disciplined students. They should perhaps be more concerned with federal civil suits when they receive and ignore complaints from [complainants] who were sexually assaulted.”

IV. PROPOSED REFORM

There have been a variety of approaches to dealing with student misconduct in higher education settings. From the in loco parentis era of the early twentieth century, through the student rights revolution of the 1960s and 1970s, to Title IX’s influence today, courts and the federal government have sought to find a way to balance institutional autonomy with protection for the rights of the accused. As the previous sections have illustrated, however, Title IX’s current framework creates disproportionate incentives to punish innocent students in cases of sexual violence. It is time to throw in the towel on university adjudication of those claims. As the United Kingdom recognized more than fifteen years ago, as other commentators have noted, and as even OCR opinion

137. As of 2010, one author noted that “[s]ignificant research on this point has discovered no cases where a court has overturned a school’s decision to sanction a student for peer sexual violence and awarded the student monetary compensation.” Nancy Chi Cantalupo, How Should Colleges and Universities Respond to Peer Sexual Violence on Campus? What the Current Legal Environment Tells Us, NASPA JOURNAL ABOUT WOMEN IN HIGHER EDUCATION Vol. 3 no. 1 at 69 (2010), available at http://journals.naspa.org/njawhe/vol3/iss1/4/.

138. Anderson, supra note 70, at 1014. See also Cantalupo, supra note 137, at 71 (noting that institutions “are in a much less favorable position vis-à-vis survivors suing for mishandling of their campus peer sexual violence cases” than vis-à-vis “students accused of peer sexual violence who have been disciplined and feel they have been mistreated by the institution.”); Wendy Murphy, Using Title IX’s “Prompt and Equitable” Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to Redress Sexual Assault on Campus, 40 NEW ENG. L. REV. 1007, 1010 (2006) (“The simple truth is, there is no redress for the accused student because schools are free to punish the student as they see fit without governmental regulations or interference.”). Ms. Murphy is most notoriously known for her anti-due-process quotes as a commentator during the Duke lacrosse false rape case of 2006-2007, such as “Stop with the presumption of innocence. It doesn’t apply to Duke.” K.C. Johnson, The Wendy Murphy File, DURHAM-IN-WONDERLAND (Dec. 31, 2006, 12:01 AM), http://durhamwonderland.blogspot.com/2006/12/wendy-murphy-file.html.

139. Graham Zellick, Letter to the Editor – Why Campus Justice is No Substitute for Criminal Prosecution, CHRONICLE OF HIGHER EDUC. (Feb. 14, 1997), http://chronicle.com/article/Why-Campus-Justice-Is-No/77157/ (noting that the U.K. Committee of Vice-Chancellors and Principals concluded that “it was neither safe nor prudent for universities to abrogate to themselves a role which was properly the domain of the criminal courts” in light of “principles of due process and natural justice for people who are also members of our academic communities, and a proper recognition of the limits of the powers which we have available to us”).
letters have implied, society should leave cases of rape and sexual assault to the civil and criminal justice systems.

Given the weakness of our current system, this proposal makes perfect sense. Consider that Tennessee has already enacted legislation which recognizes a university’s limited institutional competence to handle criminal matters. Under “Robbie’s Law,” a university must call in local police whenever a homicide or rape has been reported. It is only a short step to go from Robbie’s Law, which still allows campus police to take the lead on rape investigations, to a fairer, more objective policy under which universities must simply refrain from conducting a judicial process that should be handled by the civil and criminal courts. Under the new proposal, students accused of rape or sexual assault would be investigated by local police and/or be subject to civil suit by complainants directly. The university would be relieved of its current Title IX obligation to conduct its own trial.

Critics might object and suggest that college disciplinary systems can be reformed to protect the innocent. For example, states could follow the lead of jurisdictions like New York (which gives students a judicial right to challenge disciplinary convictions at both public and private universities) or Arizona (which by statute provides for a right of appeal from hearings at public colleges and provides for attorney’s fees if the student is successful). While expanding appeal rights or due process protections would certainly help improve the status quo, fundamental reform of the campus sexual assault adjudication system is impossible in light of the irreparable conflicts of interest inherent in university discipline outlined below. The only way to make sexual assault trials truly equitable for both parties is to take them out of university hands.

A. Why Universities Should Not Handle Sexual Assault Claims

Assuming that university administrators had the necessary training and experience to competently adjudicate sexual assault claims – which most
do not\textsuperscript{146} – four interests would still seriously impede their objectivity. The most obvious is financial. As detailed \textit{supra}, acquitting an accused student carries the threat that OCR could exercise its enforcement authority and thereby cost a college over half a billion dollars in federal funding. There could also be civil litigation from the complainant, which to date has had more high-profile impact on college campuses than comparable suits from accused students. Furthermore, in light of the NCAA’s unprecedented $60 million fine against Penn State in July 2012, there is now reason to fear that any misconduct by university athletes or athletic personnel (including a perceived failure to take strong enough action against perpetrators of sexual violence, the offense for which Penn State was fined) could expose the institution to further sanctions.\textsuperscript{147} As a pure matter of risk aversion, therefore, colleges have a very strong incentive to convict accused students in all circumstances.

The second interest concerns a university official’s professional career. “The primary goal of modern academic administrators is to buy peace during their tenure and to preserve the appearance of competence \textit{on their watch} – an appearance essential to their careers.”\textsuperscript{148} Accordingly, “faced with a student disturbance, a university administrator may not be thinking as a teacher or even an adjudicator; [s/]he is more likely thinking in utilitarian terms about what is best for the institution at the expense of individual justice, or just as a bureaucrat protecting his[/her] job.”\textsuperscript{149} As with a university’s financial incentives, only mistreating complainants carries consequences: while Duke’s president kept his job after the campus rushed to judge its innocent lacrosse team during an infamous false rape case in 2006-2007,\textsuperscript{150} and while two different presidents of Brown University have each survived high-profile law suits from accused

\textsuperscript{146} For arguments to that effect from a former Dean of Harvard College, see \textsc{Harry Lewis}, \textsc{Excellence Without A Soul: Does Liberal Education Have A Future?} 193 (2006) (noting “the folly of academics operating in realms beyond their expertise” and further opining, “confident of the superiority of its wisdom on matters of both justice and sex, the Harvard Faculty refused to acknowledge its incompetence to be fair, wise, or even logical in coping with rape”).

\textsuperscript{147} Pete Thamel, Sanctions Decimate the Nittany Lions Now and for Years to Come, \textsc{N.Y. Times} (July 23, 2012), http://www.nytimes.com/2012/07/24/sports/ncaafootball/penn-state-penalties-include-60-million-fine-and-bowl-ban.html.

\textsuperscript{148} \textsc{Alan Charles Kors and Harvey Silverglate}, \textsc{The Shadow University: The Betrayal of Liberty on America’s Campuses} 313 (1998) (emphasis in original).

\textsuperscript{149} \textit{See Picozzi, supra} note 59, at 2144. \textit{Cf. In re Oracle}, 824 A.2d 917, 938 (Del. Ch. 2003) (“[O]ur law also cannot assume – absent some proof of the point – that corporate directors are, as a general matter, persons of unusual social bravery, who operate heedless to the inhibitions that social norms generate for ordinary folk.”).

\textsuperscript{150} For more details, see \textsc{generally Taylor Jr. and Johnson, supra} note 136. \textit{See also} Stuart Taylor Jr. and K.C. Johnson, Op-Ed., Johnson and Taylor: Penn State, Duke and Integrity: Two universities, two scandals, two leadership crises. That’s where the comparison ends, \textsc{Wall St. J.} (July 19, 2012), http://online.wsj.com/article/SB10001424052702303933704577532891512167490.html.
students in sexual misconduct cases over the past fifteen years,151 “the president, chancellor, athletic director and football coach” of the University of Colorado were all fired after the Title IX case of Simpson v. University of Colorado came to light.152

A third interest concerns the university’s reputation. Because universities appeal to popular sentiment to attract students and receive alumni donations, they shun negative publicity. Their aversion to bad press has caused shameful indifference to sexual assault in the past,153 most recently in Penn State’s cover-up of Jerry Sandusky’s serial child molestation. In coming years, however, as colleges find themselves increasingly accountable to “the grievances of those who might occupy buildings, disrupt the campus, and attract the media [such as] [t]he self-appointed militants who claim to speak on behalf of all . . . feminist women”154 (many of whom disfavor any due process for the accused),155 the interest in preventing the institution from “being branded ‘soft’ on sexual assault by victims’ rights groups and by the media” will come to dominate a university’s thinking.156 As one administrator said, “my fear – yes, it’s fear – of seeing my institution’s name in Inside Higher Ed or The Chronicle of Higher Education as the subject of an investigation, or, even

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154. See KORS AND SILVERGLATE, supra note 148, at 313-14.

155. See Bale, supra note 151 (“The university is to be applauded for . . . [its] message to all males: ‘You need to check your behavior carefully before you enter into a relationship with a woman. There will be no due process if you are accused of rape. The woman’s version of what happened will always be accepted over the man’s account. If a male student knew that was the policy hopefully this would serve as a check on sexually aggressive behavior.’”) (emphasis added). In the McCormick case, Brown is alleged to have forced out an innocent accused student to placate a prominent alumni donor. See K.C. Johnson, A Black Eye for Brown In a Controversial Rape Case, MINDINGTHECAMPUS.COM (Dec. 23, 2011), http://www.mindingthecampus.com/forum/2011/12/a_black_eye_for_brown_in_a_con.html; McCormick v. Dresdale, CA. No. 09-474 S, 2010 U.S. Dist. LEXIS 53049 (D.R.I. May 28, 2010).

worse, having the ‘letter of agreement’ OCR makes public displayed for all to read — makes me tow the line in a way I sometimes have trouble justifying to myself.” Schools responding to sexual assault will remember how Dickinson College garnered adverse media attention in March 2011 when students stormed and occupied the president’s office to demand harsher sentences for sexual misconduct.\(^{158}\) Cases involving wrongfully accused students do not carry the same media or reputational concerns for institutions, as even the Duke lacrosse case did not have lasting consequences for anyone involved.\(^{159}\) In fact, Duke amended its sexual assault procedures just two years later to erode due process rights for the accused.\(^{160}\)

Fourth, ideology plays a role in sexual assault trials to the increasing detriment of the accused as some universities institutionalize the anti-due-process biases of their administrators.\(^{161}\) At Stanford, for example, the school training manuals instruct would-be jurors in sexual misconduct cases that “act[ing] persuasive and logical” is a sign of guilt and that “[e]veryone should be very, very cautious in accepting a man’s claim that he has been wrongly accused of abuse or violence.”\(^{162}\) For some schools, a desire to change societal and cultural attitudes toward sexual violence (or perhaps a simple desire to see what they want to see) can even lead to illegal conduct: the University of California-Davis, for example, was

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161. \textit{See Greve, \textit{supra} note 10, at 537 (“[A] fair hearing on sexual harassment charges is out of the question. At best, the case will be heard by faculty members or administrators whose incentives — in the form of federal regulations and pressure from campus agitators — uniformly cut in the direction of convicting . . . ; the less fortunate . . . will be asked to appear before a panel of ideologues and equal opportunity officers with an institutional interest in maximizing the number of convictions. Either way, a conviction is a foregone conclusion.”.”).}
recently caught violating federal law by over reporting the number of rapes on campus to the federal government.163

The civil and criminal courts do not suffer comparable financial incentives to convict innocent people because there is no statute or enforcement mechanism by which a court could forfeit its funding or pay astronomical sanctions based on the outcome of a trial. Furthermore, protections such as 42 U.S.C. § 1983 (which allows suits for prosecutorial and police misconduct) and the rules of professional ethics give criminal and civil defendants meaningful ways to respond to unfair treatment at the hands of those in power.

Nor do courts suffer from the university’s problem of disciplinarian job security. While prosecutors are undoubtedly sensitive to the political impact of high-profile litigation, election cycles or appointment regimes protect them and the judges who try their cases from instant accountability to unpopular sentiment. Jurors, who are not repeat players in the justice system, are also always free to do what is right instead of what is popular. Even if the political environment in which universities operate could be reformed, it is unclear how to ameliorate the impact of a student affairs officer’s career concerns while letting colleges adjudicate sexual violence. Who would an official be accountable to if not the institution directly? In the informal world of academia, how could insulation of the ultimate decision maker be credibly assured?

Similarly, as to reputational or ideological interests, the justice systems already mitigate the impact of individual and institutional biases by diffusing power and responsibility among a number of different people, including legislators, trial judges, appellate judges, jurors, advocates and police officers. The division helps curb the biases of any one actor or the reputational interests of those who are accountable to the public, such as a prosecutor up for reelection.

By contrast, “[a] university administrator may – and frequently does – fill all the roles of police (enforcing rules and identifying those who break them), prosecutor (deciding who should be charged for breaking the rules), judge (agreeing who should be charged for breaking the rules and deciding on fact-finding procedures), and jury (deciding if the individual is guilty as charged). By melding all of these roles in one person, these functions no longer check one another.”164 Hiring additional personnel to fulfill all of


164. Picozzi, supra note 59, at 2141-42 and n.50. See also Smith v. Denton, 895 S.W.2d 550, 555 (Ark. 1995) (“Throughout the proceedings, Dr. Smith acted in a variety of often-conflicting capacities. He was at once investigator, prosecutor, witness, and judge.”). Such a system is not fair, cf. Int’l Union, United Mine Workers v. Bagwell, 512 U.S. 821 (1994) (Scalia, J., concurring) (citations omitted) (“That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation
these roles would be prohibitively expensive, and there is no guarantee
that it would adequately solve the problem.

Furthermore, while any procedural reforms on campus would have to
start largely from scratch, the justice systems already mitigate the risk of
undeserved punishment through effective safeguards. Here, too, there is
an important separation of powers protection: no individual courtroom
is allowed to establish its own Rules of Evidence or Civil/Criminal
Procedure in the midst of a given case, but rather all must conform their
practices to rules set out by a different organization long before a
controversy arises. Colleges, by contrast, currently are not required to
have rules of evidence at all.165 Because a college can tailor its procedures
to the facts of a given case, colleges have the power to make outcome-
determinative evidentiary rulings and have done so to the detriment of
accused students.166 Universities also have no obligation to disclose
relevant or exculpatory evidence to the accused, and there are no rights to
discovery.167 The procedures governing college adjudications do not even
meet the minimal standards for administrative due process, for there is no
ban on secret ex parte communications between a complainant and the
ultimate decision maker.168 Rather than try to reinvent the wheel on

165. E.g., Nash v. Auburn Univ., 812 F.2d 655, 665 (11th Cir. 1987); Henson v. Honor Comm.
of Univ. of Va., 719 F.2d 69, 73 (4th Cir. 1983). As discussed in Part II(C)
supra, however, the federal government has recently begun establishing a pro-complainant “Rules of Evidence” for
campus sexual assault trials that could be unconstitutional.

166. University tribunals have considered such credible evidence as a one-month-after-the-fact
determination that a complainant “looked like a rape victim,” Schaer v. Brandeis Univ., 735 N.E.2d
373, 384 (Mass. 2000) (Ireland, J., dissenting), or the unverified hearsay testimony of anonymous
evidence that the accused was medically incapacitated on the day he allegedly committed sexual

approved the school’s giving evidence to the complainant but not the accused, id. at 19-22, while in
criminal court the prosecution has to disclose all exculpatory evidence to the defense, see Brady v.
Maryland, 373 U.S. 83 (1963). Civil courts, similarly, have mechanisms for compelling the
disclosure of evidence and for punishing the failure to do so. See, e.g., Fed. R. Civ. P. 37.

168. See Indiana University, OCR Complaint No. 05-06-2138 (Mar. 6, 2007) (finding
insufficient evidence of a Title IX violation, and thus finding that the grievance procedures were
“equitable,” despite the fact that the Dean of Students unilaterally lengthened the accused’s
suspension from one summer to a full year after the Dean “talked to [the complainant’s] father” and
received an ex parte letter from the complainant). Even in administrative hearings under the
Administrative Procedure Act, ex parte contacts of this type are strictly forbidden. 5 U.S.C. §
557(d) (2006). There is at least anecdotal evidence that this practice is quite common in the
informal world of academia. See LEWIS, supra note 146, at 169 (“Far more than in any other area
of student life, students and parents resorted to manipulation and anger to influence the course of
[acquaintance rape] procedures.”). Without discovery or voir dire procedures, accused students
cannot uncover these contacts.
campus, colleges should leave sexual assault adjudication to institutions with procedures that are already in place.

In summary, colleges currently suffer from four interests that negatively impact treatment of the accused (financial, job security, reputational, and ideological), each of which would be difficult if not impossible to remedy and all of which are at least mitigated to a greater extent by the U.S. court systems. Accordingly, courts should be the venue for handling cases of sexual misconduct on campus.

B. The Prevalence of Sexual Assault on Campus and the Nature of College Discipline Do Not Change the Analysis

Six arguments sometimes arise from complainant advocates, university officials, and judges as to why college discipline for rape or sexual assault should continue as is or with minimal modification even in light of the risk of unfair punishments. All six are unpersuasive. Each will be addressed in turn below.

1. Colleges must adjudicate sexual assault claims as part of their obligation to provide a learning environment that is free from sex discrimination.

While schools unquestionably have both a moral and legal obligation to provide a non-discriminatory educational environment, it does not logically follow that they must be empowered to investigate and prosecute rape and sexual assault themselves. As OCR recognized in its opinion letter in the Buffalo State College case, a school that immediately informs criminal authorities of alleged criminal conduct and cooperates in the subsequent investigation has met its obligation.\(^{169}\) If a jury finds the accused guilty after a fully impartial trial with attendant procedural safeguards, the school can then take disciplinary action of its own.\(^{170}\) For closer cases in which prosecutors refuse to indict, a school that informs both the complainant and the accused of their rights in civil court could also be said to have acted appropriately. Separating the obligation to avoid discrimination based on sex with the actual adjudication of a sexual assault claim simply conforms policy to a college’s limited institutional competence. Much as with murder, arson, or any other felony equivalent

\(^{169}\)See Buffalo State College, OCR Complaint No. 02-05-2008 (Aug. 30, 2005).

\(^{170}\)Of course, a university must have some authority to take emergency measures to protect its campus in certain cases such as when a student’s presence poses an imminent risk to his or her classmates. As with temporary restraining orders and preliminary injunctive relief in civil litigation, however, there must also be some mechanism for timely and impartial review of the university’s exercise of its emergency authority and some method by which the university’s administrators can be penalized if they abuse it.
crime, colleges cannot and should not be allowed to play the roles of amateur police department and District Attorney’s office with their student body. An accused should only be subject to supplemental discipline for these offenses after a full criminal or civil adjudication with procedural safeguards.

In discussing a school’s obligations under Title IX, supporters of the statute often reference Title VII, which prohibits sexual harassment as a form of sex discrimination in the workplace. If colleges have to adjudicate claims of sexual violence between their employees, the thinking goes, they should also have to do so for claims between their students. There are at least three reasons why that argument is incorrect. First, Title VII deals with norms in an adult professional setting; Title IX, by contrast, applies in dormitories and other non-work settings, making any analogy between the two statutes or comparison of their precedents “inapposite.” 171 Second, while Congressional statutes cap damages in Title VII suits, Title IX allows for unlimited recovery and thus significantly increases the statute’s ability to incentivize a university adjudicator. 172 Finally, while most states allow tort claims for wrongful discharge for accused employees as a de facto counterweight to Title VII, there are few counterweights for accused college students to sue for wrongful sanction, forced leave of absence, or expulsion as explained supra Part III(B). Accordingly, Title IX should not authorize colleges to adjudicate allegations of sexual violence even if Title VII would.

2. Sexual assault is a highly underreported and serious problem on campus.

One utilitarian theory argues that colleges must handle sexual assault because doing so will bring more justice in the aggregate; it posits that many victims will not come forward otherwise, and the problem is massive in scale. The theory concedes that colleges will occasionally convict innocent people, but argues that such is the price to be paid for empowering survivors.

There is a difficult tension in sexual assault adjudication between avoiding the injustice of a wrongful conviction and avoiding the injustice of a wrongful acquittal, and no system is likely to ever get all cases right. Nevertheless, any process designed to resolve such claims can only be legitimate if determining guilt or innocence is the first priority. Justifying institutionalized unfairness to a given defendant in the exercise of power because of a perceived need to reform a broader social problem is contrary to the very idea of civilized justice. Adjudications “are supposed to be

172. Id. at 668.
about individuals, not symbols; over facts and evidence, not social theories; [and] over guilt or innocence, not social transformation.”

Even if sexual assault is as underreported as complainant advocates claim, and while recognizing that sexual violence is reprehensible, convicting the innocent to atone for society’s sins or to bring about change remains an unjustifiable use of authority and a dangerous judicial precedent.

3. Complainants do not lie or make mistakes when reporting sexual assault.

Critics of changing the present system often argue that instances of false or mistaken accusations are not frequent enough to require colleges to burden meritorious complaints with excessive due process hurdles to overcome. Upon closer examination, such an argument made alongside the claim that sexual violence on campus is grossly underreported contradictorily posits that complainants are very often wrong in claiming they have not been raped, while rarely incorrect in claiming that they have been raped.

Although it is true that society should strive to make justice readily available for rape victims, the argument that alleged victims are rarely incorrect cannot support the current college adjudication system. The most obvious problem is that because the precise rate of false or mistaken reporting is unknowable, the argument has no empirical support. In addition, it is indisputable that false complaints do happen: using OCR’s

173. Greve, supra note 10, at 541.
174. For arguments that there is no evidence of underreporting, and for critical analysis of social science research purporting to prove otherwise, see Heather MacDonald, The Campus Rape Myth, CITY J. VOl. 18 No. 1, 22-33 (2008), available at http://www.city-journal.org/2008/18_1_campus_rape.html; Young, supra note 50; Chad Herman, One-in-One-Thousand-Eight-Hundred-Seventy-Seven, PITTSBURGH POST-GAZETTE (Feb. 28, 2011), http://communityvoices.sites.post-gazette.com/index.php/opinion/the-radical-middle/27667--one-in-one-thousand-eight-hundred-seventy-seven.
175. Surveys estimating the statistical prevalence of rape on college campuses almost always reclassify a number of responses as rape even though the actual respondents claim to have not been raped. See Macdonald, supra note 174; FISHER ET. AL., supra note 40, at 15 (noting that half of those it counted as victims of actual or attempted sexual violence to arrive at its famous “one in four” statistic did not classify themselves as such, while also acknowledging that the study plays such definitional games as defining “attempted rape” to include receiving a verbal rape threat). Fisher et al. freely acknowledge that there has never been a longitudinal study tracking a class of students from start to finish, as opposed to a statistical sampling employing questionable methodology, proving that one in four college women will be sexually assaulted during their time in school. Id. at 37 n.18.
176. There is no evidence that only two percent of rape claims are false. Edward Greer, The Truth Behind Legal Dominance Feminism’s “Two Percent False Rape Claim” Figure, 33 LOY. L.A. L. REV. 947, 971 (2000). See also Anderson, supra note 70, at 984-86 (discussing the debate over the number of false reports).
“preponderance of the evidence” standard in determining whether probable cause exists, police concluded in 2010 and 2011 alone that a university complainant makes a false rape allegation more than once per calendar month. Relying on the good faith or accuracy of complaints does not protect the innocent in these situations, regardless of how often they happen.

4. Because discipline is an educational experience without criminal consequences, it does not require procedural protections.

Some university administrators claim that because a college judicial proceeding does not involve a loss of liberty, as could a criminal trial, it should not be subject to due process. They also say that procedural restrictions impede adjudication’s effectiveness as a tool for educational development because discipline is supposed to be cooperative, not adversarial.

177. There were twenty-five cases (and possibly more) in 2010 and 2011 in which police determined that university students had filed false complaints. In roughly half, complainants recanted their stories or admitted their allegations were untrue. Also in roughly half, police filed criminal charges against the complainant. Articles concerning false accusations at the following universities are on file with the author and are also searchable via Google: Dartmouth, Texas A&M, McNeese State University, George Fox University, Oregon State University, Messiah College, Seton Hall, Goshen College, Otterbein University, Arkansas Tech, Marshall University, The University of Georgia, The University of Northern Iowa, Plattsburgh State, The University of South Dakota, The University of Delaware, South Dakota State University, Indiana University at Bloomington, The University of Cincinnati, The University of North Dakota (“UND”), Penn State, Elon University, Oakland University, Purdue, and Spring Arbor University. The case at Penn State occurred in March 2010 and does not involve the child sexual abuse scandal from November 2011. University Police: Alleged Rape on Campus Did Not Happen, PENN STATE LIVE (Mar. 2, 2010), http://live.psu.edu/story/44931. For over a year, UND refused to reconsider its conviction of an accused student even when informed that the police had charged the complainant with filing a false rape report. Victory for Due Process: Student Punished for Alleged Sexual Assault Cleared by University of North Dakota: Accuser Still Wanted for Lying to Police, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., http://thefire.org/article/13758.html; University of North Dakota: Accuser is Criminally Charged with Lying to Police, But School Refuses to Reopen Misconduct Case, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., http://thefire.org/case/868.html (last visited Nov. 22, 2012) (linking to all of FIRE’s materials on the case).

178. See Donald D. Gehring, The Objectives of Student Discipline and the Process that’s Due: Are They Compatible?, NASPA JOURNAL Vol. 38 no. 4 at 477 (2001), available at http://journals.naspa.org/jsarp/vol38/iss4/art6/ (“[P]rocedures [which] incorporate the right to counsel, confrontation and cross-examination of witnesses and multiple appeals . . . are confusing to students [and] preclude the ‘opportunity for developmental efforts’ . . . and even ‘. . . create an adversarial atmosphere likely to produce harsher, not more lenient results.’”) (citations omitted). Disciplined students do not tend to share the university’s perspective. See Picozzi, supra note 59, at 2150 (“There’s nothing magically collegial about a university; once a student is charged, a full-fledged adversarial relationship exists, and university officials are like everyone else. They play to win.”); Sarah Lipka, Most Students Report Satisfaction with Campus Judicial Systems, CHRONICLE OF HIGHER EDUC. (Mar. 29, 2011), http://chronicle.com/article/Most-Students-Report/126925 (noting that half of disciplined students did not learn anything from the experience).
As to claims about possible sentences, civil trials have procedural rules that a college does not replicate even though civil courts resolve purely private disputes. Furthermore, given the substantial economic impact of being denied a college degree and the stigma that comes with being branded a convicted rapist, a university’s disciplinary sanctions such as suspension, expulsion, and a negative notation on a transcript that could preclude admission to other programs or future jobs are serious enough to warrant procedural protections. Finally, the fact that a campus disciplinary proceeding does not carry a jail sentence does not excuse the need for it only to punish the guilty. There is no legitimacy in a system that does not fairly resolve claims, regardless of what the punishment is.

As to the argument about discipline as a teaching tool, educational objectives do not excuse the need for procedural safeguards because students cannot learn anything from being punished for offenses they did not commit. More importantly, even if the university is correct about discipline in other contexts, “a case involving student-on-student sexual misconduct is per se adversarial” and never cooperative. As such, it should be left to an adversarial system.

5. Due process interferes with academic freedom.

Judges typically use a variation of this reasoning when refusing to closely scrutinize university discipline. The federal executive branch, however, does not have similar reservations about reviewing a college’s proceedings. Today, OCR is permitted to second-guess the grades a school gives to a complainant if he or she suffered sexual harassment in a context totally unrelated to the class. In light of the change that Title IX


180. See Addington v. Texas, 441 U.S. 418, 424-25 (1979) (insisting on higher burdens of proof “in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing”).


182. See, e.g., Osteen v. Henley, 13 F.3d 221, 225-26 (7th Cir. 1993); Schaefer v. Brandeis Univ., 735 N.E.2d 373, 381 (Mass. 2000).

183. See 2001 GUIDANCE, supra note 14, at 16-17 (requiring schools to consider a number of remedies for a harassed student, including recalculating grades without certain quizzes or tests factored in); Indiana University, OCR Complaint No. 05-06-2138 (Mar. 6, 2007) (noting that a complainant in a student-to-student sexual assault case was granted “quite extraordinary” academic relief, including the changing of a C+ grade to a B- and changing three grades of “D” and one “Incomplete” to “W” for withdrawn, despite the fact “that students are generally not permitted to ‘withdraw’ from courses they have completed.”); Vermont Law School, OCR Complaint No. 01-06-2045 (Dec. 1, 2006) (allowing the complainant to complete half of her law school education at another institution as a result of an alleged student-to-student sexual assault). By contrast, judicial deference in matters of academics is well established. See, e.g., Regents of the Univ. of Mi. v.
has wrought, the judiciary’s quixotic unwillingness to get more involved in university discipline only fosters an imbalance of power that leads to false convictions.

More fundamentally, however, nothing about academic freedom requires giving a university the power to adjudicate claims of felony crime between its students. If anything, removing sexual assault adjudications from colleges will increase academic freedom by limiting the government’s reach into how the university is doing its job.

6. The criminal and civil justice systems are too slow or otherwise inadequate in their response to sexual assault on campus.

The criminal and civil justice systems have a long and deplorable history of insensitivity toward crimes of sexual violence. Fortunately, they have experienced significant overhaul since the 1970s. While critics will undoubtedly argue that much work remains to be done, courts are in a much better position to resolve these allegations than they once were. If the judiciary is still not up to the task, efforts should be focused on reforming its processes to make them effective for all assault survivors. Proposals such as creating a “fast track” system for the adjudication of claims of sexual violence on campus could make the courts an even more effective method of resolving these claims, as such changes would prevent survivors from having to sacrifice their college careers waiting for justice to be served.

V. CONCLUSION

Because of Title IX, educational institutions face numerous incentives to wrongfully convict in cases of alleged sexual violence on campus. OCR, with the power to terminate all federal funding to a university behind its words, has issued guidance documents and publications that increasingly press for complainant rights while ignoring the plight of innocent accused students. Courts, similarly, have expanded a university’s exposure to suits from dissatisfied complainants while taking little if any interest in the pleas of those who claim to have been wrongfully disciplined. In the coming years, as the April 2011 Letter makes its impact felt on campuses nationwide, false rape convictions will increase substantially due to the desire of colleges and universities to placate OCR and avoid potential liability from dissatisfied complainants at the expense of just and fair adjudication of student cases. As best expressed by one

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federal judge in a 2012 lawsuit, “from a normative perspective, the process applied to [the alleged attacker] and the behavior of University officials in investigating and prosecuting [a claim of sexual assault] offends the court’s sense of fundamental fairness and appears to fall short of the minimal moral obligation of any tribunal to respect the rights and dignity of the accused.”

Thus, America stands at a crossroads: will the reality of disparate justice on campuses that Title IX has wrought continue without correction? Can colleges adjudicate sensitive claims of interpersonal violence and counterclaims of innocence in light of the inherent financial and self-preservation conflicts of interests looming over the outcome?

Quite simply, the law must recognize that a university (like any institution) has limits. Society must assign the adjudication of sexual assault to civil and criminal court systems to ensure justice for all concerned.

As a further component of the continuing effort to insure that Kentucky has the most up-to-date business entity statutes, the 2012 General Assembly approved an enactment of the Uniform Statutory Trust Entity Act (USTA), a product of the National Conference of Commissioners of Uniform State Laws (NCCUSL) approved by that body in 2009.

With this enactment, Kentucky moves to the forefront of states having modern statutory trust laws, it being the first state to enact the USTA. Still, even as the overall structure of USTA has been adopted in Kentucky, significant departures from the Uniform Act have been incorporated into the Kentucky law (KyUSTA). These departures have been dictated by either the desire for greater specificity in the wording employed, by the need to conform to the Kentucky Business Entity Filing Act (KyBEFA) or, in several instances, substantive policy determinations at odds with those made by NCCUSL.

I. LEGISLATIVE HISTORY AND CODIFICATION


Representatives Tom Kerr, Jesse Crenshaw, and John Tilley. The bill was called before the House Judiciary Committee by Chairman John Tilley on February 22, 2012, from which it passed on a unanimous vote. The bill was passed by the House on February 24 on the consent calendar. After delivery to the Senate, it was assigned to the Judiciary Committee on February 29th. The bill was called before the Senate Judiciary Committee on March 22, from which it was approved by a unanimous vote. It passed out of the Senate, again by a unanimous vote via the consent calendar, on March 26. The bill was signed by Governor Beshear on April 11, 2012. Labeled 2012 Acts chapter 81, KyUSTA is codified in KRS Chapter 386A.

II. EFFECTIVE DATE AND RETROACTIVITY

KyUSTA has an initial effective date of July 12, 2012, that being the generally applicable date for legislation passed by the 2012 General Assembly that does not otherwise contain an accelerated or a delayed effective date. From that date, all statutory trusts organized in Kentucky are subject to the terms of KyUSTA. Business trusts organized under predecessor law are not automatically subject to the new act. Even while those pre-existing business
trusts are not required to become subject to KyUSTA, they may elect to do so through the adoption of an amended and restated certificate of trust that recites, in addition to the otherwise required provisions, the date upon which the original certificate of trust was filed with the Secretary of State and affirmatively stating an election to be governed by KyUSTA. In addition, foreign business trusts may elect to be governed by KyUSTA. After July 12, 2012, it is no longer possible to organize a business trust under KRS chapter 386.

III. “STATUTORY” OR “BUSINESS” TRUST

The designation of the business organizations created under KyUSTA as a “statutory trust,” in contrast with the traditional “business trust,” was the result of a desire to conform to the practices currently employed in Connecticut and Delaware (they being considered the leading states for the organization of the organizations that have traditionally been referred to as the business trust, wherein the entity is designated as a statutory trust). KyUSTA also created a convenient differentiation of the modern statutory trust from the traditional business trust for purposes of referencing the controlling statute.

This explanation, however, begs the question of why the term “statutory trust” is used in place of “business trust.” The change to “statutory trust” in 1988, it made that statute applicable to all pre-existing corporations. See Ky. Rev. Stat. Ann. § 271B.17-050(1). See also id. § 271A.675 (repealed by 1988 Ky. Acts. ch. 23, § 248) (applying that business corporation act to pre-existing corporations).

16. See Ky. Rev. Stat. Ann. § 386A.10-040(5). This mechanism is similar to that employed with respect to limited partnerships pre-existing the adoption of the Kentucky Uniform Limited Partnership Act (2006) that determine to be bound by the new law. See id. § 362.2-1205(1)(b); see also Vestal and Rutledge on KyULPA, supra note 15, at 415; Rutledge & Vestal on Ky. PARTNERSHIPS AND LPS, supra note 15, at 8.


18. See id. § 386A.10-040(4)(a).

19. Delaware adopted a Business Trust Act in 1988, referring to an organization created thereunder as a “business trust.” In 2001 the name of the act was changed to the Delaware Statutory Trust Act and the name of an organization created thereunder was changed to a “statutory trust.” See Del. Code Ann. tit. 12, § 3801(g) (2007). The amendment was not intended as a substantive change in Delaware law. Rather, it was made to address the concern of those who used these trusts in structured finance transactions that a “business trust” might be deemed a “person” and therefore a “debtor” under the Federal Bankruptcy Code. If so, the entity could be the subject of an involuntary bankruptcy, which would defeat the expectations of the parties in asset securitization transactions who rely upon a bankruptcy remote entity. See The Drafting Committee of the Uniform Statutory Trust Act, Preliminary Report-Uniform Statutory Trust Act (July 2005), available at http://www.uniformlaws.org/shared/docs/statutory%20trust%20entity/usta_am05_binder.pdf; see also Elissa O. Habbart and Thomas E. Rutledge, Sneak Preview: Will the Uniform Statutory Trust Act Be Next Summer’s Blockbuster Hit?, Del. Banker 11 (Summer 2008). The Connecticut act, enacted in 1997, used the term “statutory trust” from the outset. See Conn. Gen. Stat. § 34-500. The label “statutory trust” is utilized as well in Wyoming. See Wyo. Stat. § 17-23-202(g).
followed the decision rendered in *In re Secured Equipment Trust of The Eastern Airlines, Inc.*,\(^\text{20}\) which held that certain trusts utilized for securitizations were not “business trusts” as contemplated by the Bankruptcy Code.\(^\text{21}\) Given that business/statutory trusts are often utilized for financing structures where bankruptcy remoteness is desired,\(^\text{22}\) this relabeling, it may be argued, further removes a “statutory trust” from the ambit of organizations that may file for protection under the bankruptcy code. At the same time, this “a rose by any other name”\(^\text{23}\) issue has not been to date addressed in a published opinion.

### IV. SERIES

In order to properly consider the series provisions of both USTA and KyUSTA, it is important to understand the history of the series concept.\(^\text{24}\) The series arose in the context of statutory trusts utilized for asset securitization\(^\text{25}\) and the organization of investment companies.\(^\text{26}\) In addition to Delaware, the series

20. *In re Secured Equipment Trust of the Eastern Airlines*, 38 F.3d 86 (2d Cir. 1994).


concept appears in the statutory/business trust acts of Connecticut, Virginia, Wyoming, and the District of Columbia. In the context of mutual funds, a series is an administrative subunit of an investment company. Assuming that the investment company is organized as a statutory trust, only it, on behalf of the “fund family,” will register with the SEC on, for example, Form N-1. Thereafter, the trust organizes a series for each of the various sponsored funds. The business trust has a single trustee, which is typically embodied in a board, overseeing all of the series even as, on behalf of each series-organized fund, distinct fund managers are retained. Further, typically all of the series organized by a single investment company operate under a single set of service documents executed with service providers such as transfer agents, custodians, principal underwriter(s), numerous broker-dealer firms, and so on. In the context of securitization, distinct series are organized for classes of securitized assets and securities are issued with respect to each series.

composed of separate portfolios of investments organized under the umbrella of a single corporate or trust entity. Each portfolio of a series company has distinct objectives and policies, and interests in each portfolio are represented by a separate class or series of shares. Shareholders of each series participate solely in the investment results of that series. In effect, each series operates as a separate investment company.”); THOMAS A. HUMPHREYS, LIMITED LIABILITY COMPANIES § 1.04 (2006) (“The series fund concept is useful because it permits the formation of only one legal entity. For example, a series mutual fund formed as a corporation under state law has only one board of directors, one set of officers, etc. It files a single registration under the Investment Company Act of 1940. The use of the series is thus designed to save expenses for the fund’s shareholders.”) (citation omitted). See also Investment Company Act § 18(f)(2), 15 U.S.C. § 80a-18(f)(2) (2012); SEC Rule 18F-2(a) (1972), 17 C.F.R. § 270.18f-2(a) (2013) (“For purposes of [this rule] a series company is a registered open-end investment company which, in accordance with the provisions of section 18(f)(2) of the Act, issues two or more classes or series of preferred or special stock each of which is preferred over all other classes or series in respect of assets specifically allocated to that class or series.”).


29. Id.
30. Id. (citing HUMPHREYS, supra note 26, at § 1.04).
31. Id.
32. Id.
33. Id.
As of Kentucky’s enactment of the KyUSTA, “the series concept continues to be used for mutual funds and asset securitizations.”34 However, series concept has been used for other applications as well.35 For example, it has been suggested that it might be used as a mechanism by which an integrated oil company could organize liability shields between different oil fields and other assets,36 in real estate,37 and there is at least one instance where a series of an LLC was utilized to own a personal speedboat.38

A series itself is somewhat difficult to explain in that there is an absence of analogues in business entity law. A series is an internal division of a statutory trust that, while not being a distinct business organization, holds certain assets and is responsible for certain obligations. A series enjoys limited liability; its assets are not subject to claims against either the statutory trust or another series. A series may be dissolved without causing the dissolution of the statutory trust or of any other series, but the dissolution of the statutory trust will compel the dissolution of each series thereof. As such, the series is in certain respects dependent upon the statutory trust while as to other aspects it is independent. Obviously the drafting of an agreement incorporating such an involved concept should not be taken lightly. Furthermore, the series gives rise to significant questions outside of organizational law that remain, at least as of this writing, unsettled. For example, there are questions as to how the series will be classified for purposes of federal39 and state40 income taxation, whether a series - as

34. Rutledge & Habbard, supra note 3, at 1071.
35. Id.
36. See, e.g., Terence F. Cuff, Series LLCs and the Abolition of the Tax System, 2 BUS. ENTITIES 26, 42 (Jan.-Feb. 2000). It has been suggested as well that an organic farm that raises livestock, grows the grain fed to the livestock, and owns the real property on which the operations are conducted, might distribute its various business segments among separate series. See Dominic T. Gattuso, Series LLCs—Let’s Give the Frog a Little Love, 17 BUS. L. TODAY 33, 36 (July/Aug., 2008). See also James D. Blake, From the Offshore World of International Finance to Your Backyard: Structuring Series LLCs for Diverse Business Purposes, 9 DEPAUL BUS. & COMM. L.J. 1, 20-27 (Fall 2010).
38. See GxG Management LLC v. Young Brothers and Co., Inc., 2007 WL 551761 at *1, 5-6 (D. Me. 2007).
39. In late 2010 the IRS proposed regulations addressing the federal tax classification of series. See Series LLCs and Cell Companies, 75 FR 55699-01, 2010-45 I.R.B. 626; 26 CFR Part 301. As of the date of this writing those regulations have not been finalized.
contrasted with the statutory trust as a whole - has the ability to file for bankruptcy, how a series may be identified as a debtor on a UCC-1 financing statement, and questions as to whether the series’ liability shield will be respected in a non-series jurisdiction. Counsel who do not consider these issues and advise their clients of the uncertainties do so at their own risks; a fact that may and should reduce the immediate widespread adoption of the series format.


41. See, e.g., Norman M. Powell, Series LLCs, the UCC, and the Bankruptcy Code—A Series of Unfortunate Events?, 41 U.C.C. L.J. 103, 106 (2008). A petition for bankruptcy may be filed by or with respect to a “person” (11 U.S.C. § 109(a)), which is defined as including an individual, a partnership or a corporation (11 U.S.C. § 101(41)), but does not include an estate or a trust (other than a business trust). See 11 U.S.C. § 101(15) (“‘Entity’ includes person, estate, trust, governmental unit, and United States Trustee.”). Organizations other than those expressly enumerated may as well fall within the definition of a “person.” See, e.g., In re ICLNDS Notes Acquisition, LLC, 259 B.R. 289, 292 (Bankr. N.D. Ohio 2001) (holding that an LLC is eligible to file petition in bankruptcy as it shares characteristics of the corporation and the partnership and therefore “is similar enough to those entities to be eligible”). Further, the definition of a “Corporation” may include an unincorporated organization organized under a law that makes only the capital subscribed to responsible for the debts and obligations of the association. 11 U.S.C. § 101(9) (A)(ii) (2012). See also S. REP. No. 95-989. Conversely, a limited partnership is expressly excluded from the definition of a corporation (11 U.S.C. § 101(9)(B) (2012)), thereby precluding even a limited liability limited partnership from being classified as a corporation, rather than as a partnership, under the Bankruptcy Code. Still, it is not clear that a series may fall within the definition of a “person,” presumably as being akin to a “corporation,” able to file a petition in bankruptcy. As observed by a noted commentator in the law of unincorporated business organizations:

Unless and until bankruptcy law recognizes series as separate legal entities, bankruptcy of a single series might well jeopardize assets of the LLC and other series as well. If a bankruptcy court consolidates the assets and liabilities of the series, the anticipated benefits of limited liability between the series would disappear.


42. Powell, Series LLCs, the UCC, supra note 41, at 106. A series is not itself a “registered organization” as contemplated by UCC § 9-102(c)(70) and Ky. REV. STAT. ANN. § 355.9-102(1)(br) in that it comes into existence by private ordering and the Commonwealth does not “maintain a public record showing the organization to have been organized.”

V. The Place of the Statutory Trust in the Choice of Entity Analysis

The trust has long been utilized as a vehicle for the organization of business ventures.44 Traditionally, the statutory or business trust has been utilized as a means of avoiding substantive limitations upon the business corporation. In eras that imposed limitations upon maximum capitalization or that precluded corporate ownership of real estate,45 the trust format was utilized to avoid those limitations. In the modern milieu, these concerns are now behind us and today the statutory trust may be used for any of a variety of applications, although they are best known for use in the structuring of mutual funds,46 for real estate investment trusts, and in asset securitization.47

A table is perhaps a helpful vehicle through which to identify where the statutory trust fits in the menu of organizational forms:48

44. See, e.g., SYDNEY R. WRIGHTINGTON, THE LAW OF UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS § 37 (2d ed. 1927) (“Trusts for large numbers of beneficiaries whose interests may or may not be represented by transferable certificates are but a natural outgrowth of simple express trusts . . . .”).

45. See, e.g., 16A WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 8232; Dodge v. Ford Motor Co., 170 N.W. 668, 680 (Mich. 1919) (discussing statutory limits on minimum and maximum capital); State Street Trust Co. v. Hall, 41 N.E.2d 30, 34 (Mass. 1942) (discussing limits on ownership of real property by corporations); 4A WILLIAM B. BARDENWERPER AND JAMES T. LOBB, KENTUCKY PRACTICE – METHODS OF PRACTICE § 51.21 (3d ed. 1991) (“The business trust was developed in Massachusetts from 1910 to 1925 to achieve limited liability and to avoid restrictions then existing there on a corporation’s acquiring and developing real estate . . . .”); Robert H. Sitkoff, Trust as “Uncorporation”: A Research Agenda, 2005 U. ILL. L. REV. 31, 44 (noting the importance of escaping arbitrary limits placed by corporate codes); and Linn v. Houston, 255 Pac. 1105, 1107 (Kan. 1927) (“A common-law trust is or may be a very convenient device for the accumulation of sufficient assets to give commercial prestige in the conduct of business, and may be more elastic and adaptable to the business undertakings and projects of its creators than a limited partnership or ordinary corporation would be. So, too, it is less handicapped with ultra vires problems and the necessity of conforming to discordant state laws governing corporations and the payment of burdensome corporation taxes. But a common-law trust certainly has none of the attributes of limited liability or freedom from personal liability which attach to limited partnerships and ordinary corporate organizations. Freedom from personal responsibility for breach of their business contracts is not a matter which a group of men can confer upon themselves by the creation of a trust, without the sanction of a statute to that effect, or without the intelligent contractual consent of the parties with whom they deal.”).

46. A “mutual fund” may be any of an open-end management investment company, a closed-end investment company, or a unit investment trust. See Investment Company Act of 1940 §§ 4-5, 15 U.S.C. §§ 80a-4 to -5 (2012). As a concession to the brevity of life this article will not address the numerous issues that arise in structuring a statutory trust that satisfies the requirements of the Investment Company Act.

47. With respect to the use of the business trust in the organization of investment companies, see generally Sheldon A. Jones, Laura M. Moret and James M. Storey, The Massachusetts Business Trust and Registered Investment Companies, 13 DEL. J. CORP. L. 421, 446-58 (1988).

48. See also Vinson v. Koerner, No. 2000-CA-001217-MR, slip op. at 6-7 (Ky. App. Nov. 9, 2001) (“The selection of the form of business (i.e., sole proprietorship, partnership or corporation) is a decision of utmost importance in establishing a business. That decision requires weighing numerous factors including tax laws and the consequences thereof, limitation of personal liability,
<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Statutory Trust</th>
<th>Shared With</th>
<th>Not Shared With</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maximum Enforcement of Contract</td>
<td>Yes</td>
<td>Partnership, Limited Partnership, LLC</td>
<td>Corporation</td>
</tr>
<tr>
<td>Centralization of Control</td>
<td>Yes</td>
<td>Corporation, LP, some LLCs</td>
<td>Partnership, some LLCs</td>
</tr>
<tr>
<td>Free Transferability of Interest</td>
<td>Yes</td>
<td>Corporation</td>
<td>Partnership, Limited Partnership, LLC</td>
</tr>
<tr>
<td>Limited Liability</td>
<td>Yes</td>
<td>Corporation, LLC, LLP, LLLP</td>
<td>General Partnership, LPs that are not LLLPs</td>
</tr>
<tr>
<td>Continuity of Life</td>
<td>Yes</td>
<td>Corporation, LLC</td>
<td>UPA General Partnership</td>
</tr>
<tr>
<td>Capital Lock In</td>
<td>Yes</td>
<td>Corporation, LLC</td>
<td>General Partnership, RULPA LP</td>
</tr>
<tr>
<td>Modifiable Fiduciary Duties</td>
<td>No</td>
<td>Corporation</td>
<td>General Partnership, LLC, LP</td>
</tr>
</tbody>
</table>

Each statutory trust and foreign statutory trust will be subject to the Kentucky limited liability entity tax. Likewise, each series of a statutory trust or foreign statutory trust will be subject to the limited liability entity tax.

VI. THE KENTUCKY UNIFORM STATUTORY TRUST ACT: A REVIEW

This review of KyUSTA will proceed on a sequential section by section basis following the order of the provisions in the Act, as necessary drawing comparisons and contrasts both with the uniform act upon which KyUSTA is adopted and with other Kentucky business entity statutes. KyUSTA is itself divided into ten subtitles, and a discussion of each begins as follows:

Article 1 - General Provisions ................................................................. 102
Article 2- Formation; Certificate of Trust and Other Filings; Process .................. 108
Article 3 - Governing Law; Authorization; Duration; Powers .............................. 112
Article 4 - Series Trusts ........................................................................... 120

and spreading the amount of potential risk and profit among one or more principals to determine which form is best for a given individual, group or company. This language was apparently copied by the Vinson court, but without attribution from, Dahlenburg v. Young, No. 96-CA-00443-MR and No. 96-CA-0550-MR, 199 Ky. App. Unpub. LEXIS 1 slip op. at 3 (Ky. Ct. App. Mar. 20, 1998).


50. See infra notes 202-92 and accompanying text.

Article 1 - General Provisions

The name of this act as adopted in Kentucky, the “Kentucky Uniform Statutory Trust Act,” departs from the official name of the uniform act, that being the “Uniform Statutory Trust Entity Act.” The word “Entity” was included in the uniform act in order to provide differentiation between the act and the Uniform Trust Code, and to augment the identification of business organizations created thereunder as being a legal “entity” with, it is asserted, certain characteristics such as the capacity to sue and be sued and to hold and convey property in its own name. For reasons considered elsewhere, “entity” has been deleted from the name of KyUSTA. The structure organized is a “statutory trust,” and so the name of the act is the statutory trust act.

There are set forth a series of defined terms that are utilized throughout the Act. Generally speaking the defined terms conform to those utilized in USTA,
except that, in conformity with the Kentucky Business Entity Filing Act, the
term “authorized foreign statutory trust” is used in place of “qualified foreign
statutory trust,” and “principal office” is utilized in place of a “designated
office.” A defined term “appropriate court” has been added. Certain defined
terms used only in connection with organic transactions are in USTA set forth
exclusively in subtitle 7 thereof; they have in KyUSTA been moved to the
primary table of defined terms. In addition, there has been added to the table of
defined terms a definition for “professional services;” that definition having been
adopted from the Kentucky Uniform Limited Partnership Act (KyULPA).

The definition of a “series trust” and “foreign series trust” as utilized in
KyUSTA are intentionally different from that of a “series entity” utilized in the
Business Entity Filing Act. The terms “series trust” and “foreign series trust”
are utilized for the purposes of applying the limited liability entity tax to each
series and applying those rules that are particular to statutory trusts with series.
These terms focus upon the availability of negative asset partitioning by means
of a series. The “series entity” definition utilized in KyBEFA is focused upon
the ability of the series to claim certain property as its own. This definition is in
turn utilized to exempt an individual series from the ability to receive a
certificate of existence or certificate of authority and in the provision permitting
(on behalf of a series entity) a certificate of assumed name for that utilized by a
series.

The document governing a statutory trust is the “governing instrument,” which is comprised of the “certificate of trust” and the “trust instrument.” The

the table of defined terms. See, e.g., KY. REV. STAT. ANN. § 386A.1-020(12) (definition of
“covered party”).

59. In the process of Harmonization, “designated office” was dropped from USTA with
“principal office” substituted. Certain definitions utilized in subsection 7 dealing with conversions
and mergers have been incorporated in the table of defined terms even through, in USTA, they are
set forth in article 7 thereof. The definitions utilized in subchapter 7 of KyUSTA are non-uniform
from those utilized in USTA.

60. See KY. REV. STAT. ANN. § 386A.1-020(1). The “appropriate court” is that in which
certain actions by or against the statutory trust may be brought.

61. See UNIF. STAT. TRUST ENTITY ACT § 701, 6B U.L.A. 131 (2012 supp.).

62. See, e.g., KY. REV. STAT. ANN. §§ 386A.1-020(6) (definition of “constituent
organization”), 386A.1-020(9) (definition of “converted statutory trust”).

63. Id. § 386A.1-020(22); see also § 362.2-102(20).

64. Id. § 386A.1-020(29).

65. Id. § 386A.1-020(15).

66. See id. § 14A.1-070(34).

67. See id. §§ 386A.1-050(7) (referencing KY. REV. STAT. ANN. § 141.0401 (limited liability
entity tax)), 386A.8-060(1) (requirement that series trust, upon dissolution, give notice to
creditors).

68. KY. REV. STAT. ANN. § 365.015(12).

69. Id. § 386A.1-020(15) (definition of “governing instrument”).
act defines the effect of the governing instrument, its permissible scope, the limitations beyond which the governing instrument may not modify the default rules of the act, and the default rules with respect to its amendment. Where the governing instrument is silent as to a particular matter, the applicable provisions of KyUSTA will govern. While KRS section 386A.1-030 catalogs issues that the governing instrument may address, it does not provide any substantive provisions with respect to the governing instrument. Perhaps the most beneficial aspect of this provision is that it provides a roadmap of issues that need to be considered in drafting a governing instrument. To the extent that the governing instrument does not address a subject matter referenced in this section and absent a provision in KyUSTA providing an applicable default rule, reference will need to be made to other law in order to fill the gap. The governing instrument need not be set forth in a single integrated document.

In addition to the recitation of items that may be addressed in the governing instrument, certain rules are recited that are not subject to modification by

70. Certificate of trust and trust instrument are themselves defined terms. See id. §§ 386A.1-020(4) (definition of “certificate of trust”), 386A.1-020(32) (definition of “trust instrument”).
71. Id. §§ 386A.1-030(2), 386A.1-040(1). Accord § 275.003(8); Racing Investment Fund 2000, LLC v. Clay Ward Agency, 320 S.W.3d 654, 657 (Ky. 2010) (to the extent the operating agreement does not address a point, the LLC Act will provide the applicable rule); Spires v. Casterline, 778 N.Y.S.2d 259, 265-66 (N.Y. Sup. Ct. 2004) (“The statute clearly allows the members to enter into an Operating Agreement wherein the members can agree to certain terms, conduct, and provisions for operating the business. However, when there is no Operating Agreement, or such agreement does not address certain subjects, then the entity is bound by the minimum requirements set forth in the Limited Liability Company Law. In this situation, the entity is required to operate according to the statutory provisions. These statutory default provisions of the Limited Liability Company Law become the ‘Operating Agreement’ of the limited liability company.”).
72. USTA departs in one particular aspect from the non-substantive nature of section 103, providing at subsection (d) the default rule for the amendment of the governing instrument. See Unif. Stat. Trust Entity Act § 103(d), 6B U.L.A. 86 (2012 supp.). This provision was not incorporated in KyUSTA, it utilizing a non-uniform provision that centralizes the default rules for votes of the beneficial owners. See Ky. Rev. Stat. Ann. §§ 386A.6-020(1), (2); infra notes 378-82 and accompanying text.
74. Id. § 386A.1-030(3). See also Unif. Stat. Trust Entity Act § 103(c), 6B U.L.A. 86 (2012 supp.). The governing instrument may “refer to or incorporate any record.” As such, the ability of a USTA governing instrument to incorporate by reference is substantially broader than the ability of articles of incorporation to incorporate by reference. Compare Ky. Rev. Stat. Ann. § 271B.1-200(2).
75. See Ky. Rev. Stat. Ann. § 386A.1-030(4). See also Unif. Stat. Trust Entity Act § 103(e), 6B U.L.A. 86 (2012 supp.). Note that USTA § 103(e) is not an all encompassing list of the matters that may be addressed in a governing instrument. For example, USTA § 510 addresses provisions for directed trustees that may appear in the governing instrument even as USTA § 103(e) is silent as to directed trustees. In KyUSTA, an effort has been made to move these provisions to the provision equivalent to USTA § 103. See, e.g., Ky. Rev. Stat. Ann. § 386A.1-040(r) (setting forth the rule of Unif. Stat. Trust Entity Act § 510(a), 6B U.L.A. 120 (2012 supp.).
private ordering. Those particular limitations on modifiability of the rules set forth in KyUSTA will be addressed in concert with the discussion of the substantive rules. A recurring problem with these limitations should, however, now be considered. While in numerous instances the statutory provision may not be varied, in other instances limited modification or qualification is permitted so long as they are not “unreasonable” or “manifestly unreasonable”. A failure of USTA (a failure that continues the tradition of RUPA, ULPA, ULLCA and RULLCA) is that neither the text nor the official comments define what is either “unreasonable” or “manifestly unreasonable” as those terms are utilized.

In *Southcentral Bell Telephone Co. v. Public Service Commission*, it was held that the decision of an administrative agency would be unreasonable “when it is determined that the evidence presented leaves no room for difference of opinion among reasonable minds.” That same formulation was employed in *Thurman v. Meridian Mutual Insurance, Co.* The courts do not appear to have rendered a decision yet on what constitutes a provision that is “manifestly unreasonable” as employed in RUPA section 103(b) and other uniform acts adopting its formula.

In *Morgan Buildings and Spas, Inc. v. Turn-Key Leasing, Ltd.*, the court looked to Black’s Law Dictionary with respect to the definition of “manifest” as utilized in “manifestly unreasonable” as defined in the UCC, determining that manifest constitutes that which is: “Evident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident, and self-evident.” However, the Morgan court did not proceed to give a comprehensive definition of “manifestly unreasonable.”

The decision rendered in *Newsome v. Billips*, in which the court held that it was “manifestly unreasonable” to repair a structure where the costs of repair far exceeded the value of the structure after the repairs would be completed, is of little assistance in this context. It is worth noting that “unreasonable,” understood here to refer to an agreement where either one or both of the parties

78. Id. at 451.
81. Id. at 880.
acted irrationally, is distinct from an agreement that is “unconscionable,” that being one that is one-sided or oppressive. 83 Ultimately the courts are going to need to address these ambiguities, and also address whether they will be assessed objectively or subjectively, i.e., whether the standard be absolute or more relaxed in the context of sophisticated parties? In the meantime, counsel should be cautious in drafting so as to avoid breaching the as of yet undetermined limits.

As a default rule, the law of common law trusts will supplement KyUSTA. 84 This reference to trust law for guidance can be, at best, frustrating. For example, both the Restatements (Third) and (Second) of the Law of Trusts and leading trust law treatises exclude business trusts from their respective scopes. 85 Further, many hallmarks of the trust form as it exists at common law are substantially altered in the statutory trust. For example, under USTA, and in opposition to the traditional rule, title to trust assets may be held by the trust as an entity, 86 trustees enjoy limited liability from the debts and obligations of the trust, 87 and the trust may sue or be sued in its own name. 88 Consequently, reliance on both cases and

84. KY. REV. STAT. ANN. § 386A.1-050(1). See also UNIF. STAT. TRUST ENTITY ACT § 105, 6B U.L.A. 91 (2012 supp.). The statutory trust acts of Delaware and Connecticut refer to the law of common law trusts when the act is silent. See DEL. CODE ANN. tit. 12, § 3809; CONN. CODE § 34.519. See also WRIGHTINGTON, BUSINESS TRUSTS, supra note 44, at § 37 (“[T]he rules of law applicable to [business trusts] are those which have been established with reference to all other trusts.”).
85. See 1 RESTATEMENT (THIRD) OF TRUSTS at 4 (“The Restatement of Trusts does not deal with such devices as business trusts . . . .”), § 1, cmt. B; RESTATEMENT (SECOND) OF TRUSTS § 1, cmt. b; 1 AUSTIN W. SCOTT, WILLIAM F. FRATCHER & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 2.1.2 (5th ed. 2006) (“B]ecause the use of the trust as a substitute for incorporation, as in the case of the so-called business trust or Massachusetts trust, necessarily differs in important ways from the use of the trust as a gratuitous transfer, each of the Restatements [of Trusts] leaves these trusts for discussion along with other business organizations. So does this treatise.”) (citations omitted); 1 AUSTIN WAKEFORD SCOTT, THE LAW OF TRUSTS § 2.2 (Little, Brown, and Company 1939). See also Sitkoff, Trust as “Uncorporation,” supra note 45, at 33:

Readers familiar with the domestic law school curriculum might assume that, because trusts and estates is a separate course from business organizations, the business trust has become the purview of trusts and estates scholars. It has not.

Trusts and estates is organized as a coherent field around gratuitous wealth transfer. Trusts and estate scholars have therefore focused on the trust as an instrument of gratuitous transfer, not as a mode of business organization.

86. See infra notes 148-51 and accompanying text.
87. See infra notes 157-62 and accompanying text.
88. See infra notes 172-75 and accompanying text. See also Sitkoff, Trust as “Uncorporation,” supra note 45, at 36-37:

This raises the broader question of mismatch between traditional trust law, which evolved in the context of donative transfers, and the exigencies of enterprise organization. In addition to differences in fiduciary standards, under traditional trust law principles managerial action requires unanimity among the trustees; the trustee is to act impartially with respect to different classes of beneficiaries; and the Rule Against Perpetuities sets a limit (albeit indirect) on trust duration. Each of those principles is contrary to the analogous rule in
commentary addressing common law trusts in the interpretation of KyUSTA should, at minimum, be guarded.

The applicable common law may be modified or even superseded in the governing instrument; for example, the governing instrument could provide that corporate or partnership law will govern.\textsuperscript{89} Further, law and equity supplement the Act.\textsuperscript{90} KyUSTA expressly disclaims the common law rule that statutes in derogation of the common law are to be strictly construed.\textsuperscript{91} Every statutory trust, domestic or foreign, is subject to the Kentucky Business Entity Filing Act.\textsuperscript{92}

A series of non-uniform provisions set forth rules of construction applicable to governing instruments,\textsuperscript{93} each of which (with one exception) has an antecedent in prior Kentucky business organization law. This exception is subsection (3), which provides that each trustee is bound by the governing instrument.\textsuperscript{94} These rules of construction recite a public policy in favor of the maximum enforcement of governing instruments;\textsuperscript{95} provide that the statutory trust is itself bound by the governing instrument;\textsuperscript{96} adopt the rule of independent legal significance,\textsuperscript{97} the absence of vested rights in a governing instrument;\textsuperscript{98} the obligation of good faith and fair dealing under each governing instrument,\textsuperscript{99} and

\textsuperscript{89} Ky. Rev. Stat. Ann. § 386A.1-050(2). Other states incorporate other law as the first-order gap filler. See, e.g., Ariz. Code § 10-1879 (“Any business trust shall be subject to such applicable provisions of law from time to time in effect with respect to domestic and foreign corporations, respectively.”).


\textsuperscript{91} Id. § 386A.1-050(4). This provision is admittedly redundant of the generally applicable rule. See id. § 446.080(1) (“All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state.”).

\textsuperscript{92} Id. § 386A.1-050(5).

\textsuperscript{93} Id. § 386A.1-060.

\textsuperscript{94} Id. § 386A.1-060(3). The prior law did not recite, for example, that a director is bound by the corporation’s articles and bylaws or that a non-member manager of an LLC is bound by the operating agreement. Language to this effect was in 2012 added to the LLC Act. See id. § 275.003(8).

\textsuperscript{95} Id. § 386A.1-060(1). Accord §§ 275.003(1), 362.1-104(3), 362.2-107(3).


\textsuperscript{97} Id. § 386A.1-060(4). Accord §§ 275.003(5), 362.1-104(5), 362.2-107(4).

\textsuperscript{98} Id. § 386A.1-060(5). Accord §§ 275.003(6), 362.1-103(6), 362.2-110(6).

\textsuperscript{99} Id. § 386A.1-060(6). Accord §§ 275.003(7), 362.1-404, 362.2-305(2), 386.2-408(4).
specific enforcement of limitations upon governing instrument amendment;\textsuperscript{100} and a Dartmouth College provision.\textsuperscript{101}

**Article 2- Formation; Certificate of Trust and Other Filings; Process**

A statutory trust is formed by the filing of a certificate of trust by the Secretary of State.\textsuperscript{102} The certificate of trust must set forth:

- the name of the statutory trust;\textsuperscript{103}
- the name and business address of each person who upon the trust’s formation will be a trustee;\textsuperscript{104}
- the mailing address of the trust’s principal office address;\textsuperscript{105}
- the name and address of the initial registered office and registered agent;\textsuperscript{106} and
- the name and business address of the organizer.\textsuperscript{107}

\textsuperscript{100.} Id. § 386A.1-060(7). \textit{Accord} §§ 275.177, 362.2-110(3).
\textsuperscript{101.} Id. § 386A.1-060(8). \textit{Accord} §§ 362.1-107, 362.2-106(2). An express Dartmouth College provision is likely redundant of the Kentucky Constitution. \textit{See} \textit{KY.\ CONST.} § 3. This provision has its analogue in USTA § 1004. \textit{See UNIF. STAT. TRUST ENTITY ACT} § 1004, 6B U.L.A. 153 (2012 supp.).
\textsuperscript{102.} \textit{KY. REV. STAT. ANN.} § 386A.2-010(1). \textit{Accord} \textit{UNIF. STAT. TRUST ENTITY ACT} § 201(d), 6B U.L.A. 93 (2012 supp.). This provision is consistent with the approach employed in other Kentucky business entity statutes. \textit{See}, e.g., \textit{KY. REV. STAT. ANN.} § 271B.2-030(1) (incorporation accomplished by Secretary of State filing articles of incorporation); \textit{id.} § 275.020(2) (organization of LLC accomplished by Secretary of State filing articles of organization). Under Kentucky’s law governing business trusts, filing the declaration of trust with the Secretary of State was required (\textit{KY. REV. STAT. ANN.} § 386.420(1)), but the statute did not address whether that filing was a precondition to the trust’s existence or otherwise address the impact of an absence of a filing. Since the statutory trust is formed by a filing with the state, it will constitute a “registered organization” within the scope of UCC § 9-102(a)(70) and \textit{KY. REV. STAT. ANN.} § 355.9-102(1)(bs) (“Registered organization” means an organization organized solely under the law of a single state or the United States and as to which the state or the United States must maintain a public record showing the organization to have been organized.”).
\textsuperscript{103.} Id. § 386A.2-010(2)(a). The provisions of KyUSTA governing names are non-uniform. \textit{See infra} notes 129-34 and accompanying text. \textit{But see UNIF. STAT. TRUST ENTITY ACT} § 207, 6B U.L.A. 97 (2012 supp.) (provision of USTA addressing name of statutory trust).
\textsuperscript{104.} \textit{KY. REV. STAT. ANN.} § 386A.2-010(2)(b). This provision is non-uniform against USTA; it does not require that the certificate of trust name the initial trustees. \textit{See also infra} notes 119-20 and accompanying text.
\textsuperscript{105.} Id. § 386A.2-010(2)(c). Where KyUSTA utilizes the “principal office” address (defined in \textit{KY. REV. STAT. ANN.} § 386A.1-070(24)), USTA utilized a “designated office,” defined at \textit{UNIF. STAT. TRUST ENTITY ACT} § 102(4), 6B U.L.A. 84 (2012 supp.). It is to this address that the Secretary of State will send notices and other communications. \textit{See KY. REV. STAT. ANN.} § 14A.2-010(12). In the course of USTA’s “Harmonization” the “designated office” was dropped with the “principal office” substituted.
\textsuperscript{106.} \textit{KY. REV. STAT. ANN.} § 386A.2-010(2)(d). \textit{See also UNIF. STAT. TRUST ENTITY ACT} § 201(a)(3), 6B U.L.A. 93 (2012 supp.).
\textsuperscript{107.} \textit{See KY. REV. STAT. ANN.} § 386A.2-020(2)(e).
In addition, if the statutory trust is to have the capacity to be a series trust,\(^\text{108}\) and a statement to that effect is required in the certificate of trust.\(^\text{109}\) The certificate of trust and all amendments to it must also be filed with the county clerk for the county in which the statutory trust has its registered office.\(^\text{110}\)

The certificate of trust may contain such additional information as is desired.\(^\text{111}\) A filed certificate of trust, as amended by a statement of change or qualification or by articles of merger or conversion, will control over an inconsistent term in a trust instrument.\(^\text{112}\) Amendment of the certificate of trust is required if there is a change in any information required to be set forth in the certificate.\(^\text{113}\) The requirements of the contents of the certificate of trust or any amendment or restatement are not subject to modification by private ordering.\(^\text{114}\)

A certificate of trust may be amended\(^\text{115}\) and/or restated.\(^\text{116}\)

A change in the trustees necessitates an amendment to the certificate of trust,\(^\text{117}\) but the fact that one is not listed on the certificate of trust does not preclude that the person from being a trustee.\(^\text{118}\)

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108. See also id. § 386A.1-020(26) (defining “series trust”).

109. Id. § 386A.2-010(3). This statement in the certificate of trust, standing alone, is not sufficient to effectively create a series that affords the (presumably) desired limited liability. Rather, the series must be structured in the governing instrument and maintained in the manner dictated by the statute. See infra notes 194-97, 212-15 and accompanying text.

110. See KY. REV. STAT. ANN. § 14A.2-040(1)(d); see also id. § 14A.2-070(3).

111. Id. § 386A.2-010(4). See also UNIF. STAT. TRUST ENTITY ACT § 201(c), 6B U.L.A. 93 (2012 supp.). The same rule is employed in other Kentucky business entity statutes. See, e.g., KY. REV. STAT. ANN. §§ 271B.2-020(2)(c), 275.025(4), 362.415(1)(f), 362.2-201(1)(e).

112. KY. REV. STAT. ANN. § 386A.2-010(5). See also UNIF. STAT. TRUST ENTITY ACT § 201(e), 6B U.L.A. 93 (2012 supp.). This provision sets forth a different rule than that in the Uniform Limited Partnership and the Revised Uniform LLC acts, which provide that as to third parties relying thereupon the publically filed record will control, but as between the equity owners and their transferees the private ordering documents will control over the filed documents. See UNIF. LTD. PARTN. ACT § 201(d), 6A U.L.A. 39 (2008); KY. REV. STAT. ANN. § 362.2-201(4); and REV. UNIF. LTD. LIAB. CO. ACT § 112(d), 6B U.L.A. 450 (2008). The rule embodied in KyUSTA is consistent with that employed in the Kentucky Business Corporation Act, it providing that the bylaws may not be inconsistent with the articles of incorporation. See KY. REV. STAT. ANN. § 271B.2-060(2).

113. See KY. REV. STAT. ANN. § 386A.2-020(1). This provision is not uniform to USTA.

114. See id. § 386A.1-040(2)(c). See also UNIF. STAT. TRUST ENTITY ACT § 104(1), 6B U.L.A. 88 (2012 supp.).

115. See KY. REV. STAT. ANN. §§ 386A.2-020(1), (7). See also KY. REV. STAT. ANN. § 386A.6-020(1)(a); UNIF. STAT. TRUST ENTITY ACT § 103(d), 6B U.L.A. 86 (2012 supp.) (default rule of unanimous consent of the beneficial owners in order to amend the governing instrument, which by definition includes the certificate of trust).


117. See KY. REV. STAT. ANN. §§ 386A.2-020(1), (4).

118. See id. § 386A.1-020(36). A similar rule applies in limited partnerships wherein not being named as a general partner in the certificate of limited partnership is not conclusive that the person is not a general partner. See Vestal and Rutledge on KyULPA, supra note 15, at 438-39; RUTLEDGE & VESTAL ON KY. PARTNERSHIPS AND LPS, supra note 15, at 199-200.
The USTA contains something of a “chicken and egg” problem with respect to the execution of the original certificate of trust. A document delivered for filing on behalf of a statutory trust must be signed by or on behalf of one of the trustees.\textsuperscript{119} Given that the USTA applies this directive to the initial certificate of trust, a problem arises from the fact that the statutory trust and the authority of any trustee will come into existence only upon the filing of the certificate of trust. At the same time, until the trust comes into existence pursuant to the filing of the certificate of trust by the Secretary of State, there is not a “trustee” who may sign the document.\textsuperscript{120}

This point was not resolved within the mechanism provided by USTA. In order to address this problem, KyUSTA utilizes an “organizer” similar to those utilized in many business corporation and limited liability company acts.\textsuperscript{121} Following this model, the “organizer” is authorized to execute and deliver the certificate of trust to the Secretary of State, and upon the filing the trust comes into existence and the persons intended to be the trustees become its trustees.\textsuperscript{122} The person executing the initial certificate of trust as the organizer does not have to become a trustee upon the trust’s formation.\textsuperscript{123}

Documents filed with the Secretary of State may have a delayed effective time and date, provided that the delayed effective date cannot be more than ninety days after the document is filed.\textsuperscript{124} Absent a document setting forth a delayed effective time and/or date, the document is effective upon filing by the Secretary of State.\textsuperscript{125} A filed record may be corrected.\textsuperscript{126} The Secretary of State, provided that the necessary conditions are satisfied, may issue a certificate of existence to a statutory trust.\textsuperscript{127} While a statutory trust may be organized with one or more series, a certificate of good standing cannot be issued with respect to an individual series.\textsuperscript{128}

\begin{itemize}
\item \textsuperscript{119} See \textsc{Unif. Stat. Trust Entity Act} § 203, 6B U.L.A. 94 (2012 supp.).
\item \textsuperscript{120} See also Rutledge and Habbart, \textit{supra} note 3, at 1063-64 (noting this inherent inconsistency in the USTA).
\item \textsuperscript{121} See \textsc{Ky. Rev. Stat. Ann.} §§ 271B.2-010, 275.020(1); see also \textsc{Model Bus. Corp. Act} § 2.01.
\item \textsuperscript{122} \textsc{Ky. Rev. Stat. Ann.} §§ 386A.2-010(1), 386A.2-010(2)(b), 14A.2-070.
\item \textsuperscript{123} \textsc{Id.} § 386A.2-030(2). This provision is based upon \textsc{Ky. Rev. Stat. Ann.} § 275.020(1).
\item \textsuperscript{124} \textsc{Id.} § 14A.2-070(2).
\item \textsuperscript{125} See \textsc{id.} § 14A.2-070(1).
\item \textsuperscript{126} \textsc{Id.} § 14A.2-090. See also \textsc{Unif. Stat. Trust Entity Act} § 205, 6B U.L.A. 96 (2012 supp.).
\item \textsuperscript{128} See \textsc{Ky. Rev. Stat. Ann.} § 14A.2-130(4)(d). As is reviewed below, while the capacity of a statutory trust to organize series is initially a matter of public record, thereafter whether any particular series is organized is a matter of private ordering for which no public filing is required.
\end{itemize}
There are no required identifiers for the name of a statutory trust, but its name may not include “incorporated,” “corporation,” “Inc.,” “corp.,” “partnership” or “cooperative.” However, the name may include “Limited” or “Ltd.” The name of a statutory trust must be distinguishable on the records of the Secretary of State. A statutory trust, if doing business under a name other than the name set forth in the certificate of trust, is obligated to file a certificate of assumed name. The fact that the name of a statutory trust is on record does not prevent the use of that name by others.

Every statutory trust is required to designate and maintain an agent for service of process, and the Business Entity Filing Act addresses matters such as the change of the agent for service of process and the resignation of the office or agent. The registered agent is the agent of the statutory trust for the receipt of any process, notice or demand, and is charged to forward same to the statutory trust. Additionally, a statutory trust must change its principal office address by filing a statement of change.

Hence, there is no filing of record upon which the Secretary of State could certify existence. An exception to this approach is Illinois, which requires a public filing (a “certificate of designation”) for each individual series. See 805 ILL. COMP. STAT. 180/37-40(d)(2007). Consequent thereto the Illinois Secretary of State will issue a certificate of existence for an individual series.

129. See KY. REV. STAT. ANN. § 14A.3-010(15). This treatment is consistent with the law in Delaware, which likewise has no required identifiers for a statutory trust. In contrast, Connecticut requires certain identifiers for a statutory trust. See CONN. STAT. § 34-506(c) (the name of a Connecticut statutory trust must include “Statutory Trust,” “Limited Liability Trust,” “Limited,” “LLT,” “L.L.T.,” or “Ltd.”). See also VA. CODE § 13.1-1214.

130. KY. REV. STAT. ANN. § 14A.3-010(15).

131. See id. § 14A.3-010(1).

132. See id. §§ 365.015(1)(b)(5) (defining the “real name” of a statutory trust), 365.015(2)(c) (requirement to have a certificate of assumed name if doing business under other than the real name); see also id. § 14A.3-050.

133. See id. § 365.015(2)(a).

134. See id. § 14A.3-010(17).

135. See id. §§ 386A.2-010(2)(d), 386A.2-080; see also id. § 14A.4-010(1). Under the Delaware Statutory Trust Act there is no registered agent or office provided for or permitted unless the statutory trust is a registered investment company. See DEL. CODE ANN. tit. 12, § 3807(b).

136. See KY. REV. STAT. ANN. §§ 14A.4-020, 14A.4-030. See also id. § 386A.2-020(6).

137. Id. § 14A.4-040(1). See also FED. R. CIV. P. Rule 4(d)(1)(B); KY. RULE CIV. PROC. 4.04(3).

138. KY. REV. STAT. ANN. § 14A.4-050(1).

139. See id. §§ 14A.4-010(3), 14A.4-050(2); see also id. § 14A.1-040.

140. See id. §§ 386A.2-020(5), 14A.5-010.
Each statutory trust is obligated to file an annual report with the Secretary of State that sets forth the name and business address of each of the trustees. There exists no requirement to identify in the public record the beneficial owners. The annual report may not be used to update the trustees (adding to or deleting from those recited in the certificate of trust), the principal office or the registered office or agent. A statutory trust that fails to file its annual report is subject to administrative dissolution.

Article 3 - Governing Law; Authorization; Duration; Powers

The laws of Kentucky, that being the jurisdiction in which the certificate of trust is filed, will govern the internal affairs of the statutory trust and the liability of its beneficial owners and of its trustees for any debt or other obligation of either the statutory trust or a series, as well as the enforceability of a debt or similar liability of the trust or one of its series (if any) against the property of the trust or the property of any series (if any). While there is certainly ample authority for the proposition that the scope of “internal affairs” includes the responsibility of constituents of a business organization for its debts and obligations, the application is made express to avoid any confusion and to

141. See id. §§ 386A.2-090, 14A.6-010; see also Rutledge & Tzanetos, supra note 2, at 442-43. It was not until 2007 that domestic and foreign business trusts became subject to the requirement to file an annual report with the Secretary of State. See Ky. Rev. Stat. Ann. § 386.392; see also Thomas E. Rutledge, The 2007 Amendments to the Kentucky Business Entity Statutes, 97 Ky. L.J. 229, 237 (2008-09) [hereinafter Rutledge, The 2007 Amendments].

142. See Ky. Rev. Stat. Ann. §14A.7-010(1)(a); see also Rutledge & Tzanetos, supra note 2, at 444-45.


144. See, e.g., Whity v. Moravec, 635 F.3d 308, 310 (7th Cir. 2011) (“The internal affairs doctrine designates a firm’s state of incorporation as the source of the rule about whether investors are liable for its debts.”) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 307); Fusion Capital Fund II, LLC v. Ham, 614 F.3d 698, 700 (7th Cir. 2010) (“Because Millenium is incorporated in Nevada, that state’s law determines whether its investors are liable for its debts. (This is an aspect of the internal-affairs doctrine, a choice-of-law rule to which Illinois adheres. . . .)”) (citation omitted). As observed in BAYLESS MANNING, A CONCISE TEXTBOOK ON LEGAL CAPITAL 6 (1981):

History aside, it is important to understand that modern corporation law does not “provide for” limited liability; what it does is provide that in the case of creditor claims against an enterprise in corporate form, the corporation is the debtor rather than those who hold claim to the proprietorship capital in the enterprise. Once that step is taken, the creditor law of the corporation exactly parallels the law of individual indebtedness and of creditors of individuals. (emphasis in original).

See also 1 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 14 (2006) (“The fact that a statutory, constitutional or charter provision may impose liability on shareholders for the corporation’s acts or debts does not alter the basic rule of non-liability.”). It needs to be recognized as well that, in addition to protecting the owners from exposure in excess of the amounts invested in the venture, the corollary of limited liability, namely
clearly differentiate the rule in KyUSTA from that under the predecessor law. The inclusion of the inspection of books and records in the internal affairs is consistent with the prior law and responds to a prior judicial decision to the effect that inspection of books and records is not an issue of internal affairs.

A statutory trust is an entity separate from its trustees and beneficial owners. The requirement that the statutory trust be treated as an entity is not listed as a mandatory provision; it is therefore conceivable that it could be subject to waiver. A statutory trust may hold and take title to property in its own name; alternatively, property may be held in the name of a trustee in an active, passive or custodial capacity. Permitting the trust to contract in its own name is a material alteration of the common law rule. At common law, a trust, including a business trust, was not a legal entity capable of contracting in its own name. Although it is anticipated that, consistent with the treatment of a
A statutory trust may have any lawful purpose, which may include a nonprofit purpose, provided it does not have a “predominantly” donative purpose. The restriction against a statutory trust with a primarily donative purpose exists to insure that the statutory trust is not used to avoid the application of policy-based mandatory limitations imposed upon traditional business, even though another is to receive the benefit or profits therefrom.”). Dolben v. Gleason, 198 N.E. 762, 763 (Mass. 1935):

[A] corporation is a legal personality which may act through agents. A contract made by the authorized agent of a corporation is the corporation’s contract. A trust … can itself do no act. It cannot make a contract. It cannot even act to choose an agent. The trustee alone can do act which affects the rights or property of the trust. He does not act as the agent of the trust or as its embodiment in dealing with its property and making contracts which affect its property. Such contracts when made are his contracts and he is personally liable upon them unless they include an agreement that he shall not be personally liable.


153. Ky. Rev. Stat. Ann. § 386A.3-020(2). See also id. § 386A.6-010(2). The second sentence of this provision is non-uniform and is based on the LLC Act. See id. § 275.240(1). The same rule is utilized in KyRUPA. See id. § 362.1-203. This provision adopts for the statutory trust the rule that has long existed for corporations. See, e.g., James Grant, A Practical Treatise on the Law of Corporations in General as Well Aggregate as Sole 14 (T & J.W. Johnson 1854) (“By the civil law, from which much of our law of corporations has been derived, the goods and rights of a corporation belong in such manner to the corporate body, that particular persons who are members of it have no manner of right or property in them, or can dispose of them.”).


trusts such as those recited in section 105 of the Uniform Trust Code. In a non-uniform addition, a statutory trust organized under KyUSTA may not be utilized to render professional services.\textsuperscript{156} Limits on the use of the statutory trust form that exist in other states need to be considered. On a state-by-state basis, limitations on “business trusts” may be held applicable to KyUSTA statutory trusts desiring to do business in that jurisdiction. For example, the Oklahoma Constitution forbids the issuance of an alcoholic beverage package store or distributor license to a “business trust,”\textsuperscript{157} and under Indiana law, a business trust may not be utilized for the organization of a railroad.\textsuperscript{158}

The limited liability of the trust’s constituents with respect to any debt or obligation of the trust or a series of it is stated both affirmatively (debt is that of the trust or the series) and negatively (no beneficial owner, trustee or any agent thereof is personally liable for a debtor obligation of the trust or of a series).\textsuperscript{159} This rule of limited liability is applicable, by statutory formula, to both the trustee and the beneficial owners. This treatment is consistent with the prior law in providing that the beneficial owners enjoyed limited liability.\textsuperscript{160} As to the trustee, affording limited liability is a departure from the prior common law.\textsuperscript{161}

The application of the limited liability rule with respect to agents assumes that,


\textsuperscript{157} \textit{See Okla. Const.} art. XXVIII, § 10.


\textsuperscript{159} \textit{Ky. Rev. Stat. Ann.} § 386A.3-040. \textit{See also Unif. Stat. Trust Entity Act} § 304, 6B U.L.A. 106 (2012 supp.). Under traditional trust law, the trustee is liable for the debts and obligations of the trust with a corresponding right of contribution out of trust assets. \textit{See Restatement (Second) of Trusts} §§ 244, 261 (1959); \textit{see also William C. Dunn, Trusts for Business Purposes} § 115 (p. 197) (Callaghan and Co. 1922); \textit{Harry G. Henn, Handbook of the Law of Corporations and Other Business Enterprises} 89 (2d ed. 1970); \textit{Edward H. Warren, Corporate Advantages Without Incorporation} 858-60 (1929) (discussing rule that the trustee is liable, as the principal, for obligations undertaken). This rule was revised and indeed reversed in the Uniform Trust Code, it providing that a trustee is not personally liable for the debts, obligations and liabilities arising in the trustee’s fiduciary capacity. \textit{See Uniform Trust Code} § 1010 (2000), 7C U.L.A. 657 (2006). As of this writing, Kentucky has not adopted the Uniform Trust Code. Under the prior law governing Kentucky business trusts, the trustee did enjoy limited liability so long as his conduct did not involve fraud or bad faith. \textit{Ky. Rev. Stat. Ann.} § 386.400. This provision is confusing in a number of ways. For example, must the fraud or bad faith be against the trust or against the third party? If the trustee’s conduct does involve fraud or bad faith, is the trustee alone liable to the third party, or does the trustee stand liable along with the trust estate?

\textsuperscript{160} \textit{See Ky. Rev. Stat. Ann.} § 386.400. \textit{See also Wrightington, Business Trusts, supra} note 44, at § 43 (“It is equally well settled that one who contracts with a trustee has no right of action against the beneficiaries personally.”) (citation omitted).

\textsuperscript{161} \textit{See, e.g., Wrightington, Business Trusts, supra} note 44, at § 43 (“In the absence of some stipulation in the contract to the contrary, it is well settled that one who contracts with a trustee has a contract right at law against the trustee personally, since courts at law purport to ignore the existence of trusts and the trustee does not act as agent for his beneficiaries but is himself the principal.”) (citation omitted).
in the discharge of the agent’s functions, there has been an appropriate identification of the principal on whose behalf they are acting. Additionally, no creditor of a trustee or of a beneficial owner may seek to collect a debt against any specific property of the statutory trust. Whether a foreign jurisdiction will look to and apply Kentucky law as to the limited liability of the trustees and beneficial owners of a KyUSTA statutory trust is open to debate, but the bulk of the decisional law to date indicates that they should.

As a default rule, modifiable in the governing instrument, a statutory trust has perpetual existence. This rule is directly opposite to the rule of limited


Sixth, appellants would urge that the summary judgment was improperly granted because Diversified, being a Massachusetts Trust, has no standing to sue in Texas courts. While Massachusetts Business Trusts are not recognized in this state it has been held that they are to be treated as a partnership or an unincorporated joint stock company. Thompson v. Schnitt, 115 Tex. 5, 274 S.W. 554 (1925); Means v. Limpia Royalties, 88 S.W.2d 1080 (Tex. Civ. App. El Paso 1935, writ dism’d).

See also Thomas E. Rutledge, To Boldly Go Where You Have Not Been Told You May Go: LLCs, LLPs, and LLLPs in Interstate Transactions, 58 Baylor L. Rev. 209-11 (2006).


duration applied to common law trusts as mandated by the rule against perpetuities. By private ordering in the governing instrument, it may be agreed that the duration of the statutory trust is less than perpetual. Although a statutory trust or a series thereof may be terminated or revoked, it is further proved that such a termination or revocation may be accomplished only in accordance with the terms of the KyUSTA or governing instrument. This reference to the governing instrument eliminates the application of existing common law which seeks to balance, over time, between the desires of the settlor and the desires and expectations of the beneficiaries. Neither a statutory trust nor any series thereof shall be terminated consequent to the death, incapacity, expression may be allowed, individuality; property, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.

167. The common law rule against perpetuities, which continues to be followed by a number of states, requires that all interests must vest no later than 21 years after the end of a life (or lives) in being at the creation of the trust. See, for example, Iowa (Iowa Code § 558.68); New York (NY Est. Powers & Trust § 9-1.1 (2002)); and Texas (Tex. Prop. § 112.036). Thus, in those states that follow the common law rule, a trust has a limited life span. However, many states have repealed the common law rule entirely, at least as to personal property (see, e.g., Delaware (25 Del. Code Ann. tit. 25, § 503 (2009))); New Jersey (N.J. Stat. Ann. § 46:2F-9 (2003)); and South Dakota (S.D. Codified Laws § 43-5-8 (1997))); or have extended the allowed life of a trust by adopting, for example the Uniform Statutory Rule Against Perpetuities (“USRAP”) (see, e.g., Connecticut (Conn. Gen. Stat. § 45a-491 (2004)) and Florida (Fla. Stat. § 689.225)), which adopts both the common law rule as well as an alternative rule that all interests will be valid if they actually vest within ninety years. USRAP § 1.(a), 8B U.L.A. 236 (2001). But for a limited exemption, Kentucky repealed the rule against perpetuities in 2010. See 2010 Ky. Acts, ch. 14 (repealing Ky. Rev. Stat. Ann. §§ 381.215 and 381.216); see also James E. Hargrove, 2010 Changes to the Kentucky Trust & Estate Practice, BENCH & BAR 12 (Sept. 2010).

168. See Ky. Rev. Stat. Ann. § 386A.8-010(2)(a); see also infra notes 469-70 and accompanying text.


dissolution, termination or bankruptcy of either a beneficial owner or of a trustee.\textsuperscript{171} Overriding the “merger doctrine” that exists under the common law of trusts whereby legal and equitable title would otherwise merge and thereby bring about the trust’s termination,\textsuperscript{172} the Act provides that neither a trust nor a series thereof will terminate merely because the same person is both the only trustee and the only beneficial owner thereof.\textsuperscript{173}

In an alternation of the common law of trusts,\textsuperscript{174} a statutory trust may sue and be sued in its own name.\textsuperscript{175} This provision may be problematic should the statutory trust sue or be sued in federal court in a jurisdiction that does not, by local state law, afford a trust the right to sue or be sued in its own name.\textsuperscript{176} In such a foreign jurisdiction, absent the court applying to a statutory trust the internal affairs doctrine that is applied to corporations, the trust may not be

\begin{footnotes}
\item[172] See RESTATEMENT (THIRD) OF TRUSTS § 69 (2003); RESTATEMENT (SECOND) OF TRUSTS §§ 99(5) (1959), cmt. c, 341 cmt. b; UNIFORM TRUST CODE § 402(a)(5), 7C U.L.A. 481 (2006); 2 SCOTT ON TRUSTS, supra note 85, at § 99.3. See also RESTATEMENT (THIRD) OF TRUSTS § 2 (2003); WRIGHTINGTON, BUSINESS TRUSTS, supra note 44, at § 37.
\item[173] KY. REV. STAT. ANN. §§ 386A.3-050(3), (4). See also UNIF. STAT. TRUST ENTITY ACT § 306(d), 6B U.L.A. 108 (2012 supp.). Note, however, that where the same person is the sole trustee and the sole beneficial owner, the assets of the statutory trust are available to satisfy the claims of that person’s creditors. See KY. REV. STAT. ANN. § 381.180(7)(a); see also In re Langley, 30 B.R. 595 (Bankr. N.D. Ind. 1983); Cunningham v. Bright, 117 N.E. 909, 910 (Mass. 1917); In re Medallion Realty Trust, 103 B.R. 8, 11-12 (Bankr. D. Mass. 1989), aff’d, 120 B.R. 245 (D. Mass. 1990).
\item[174] See, e.g., Duvall v. Craig, 15 U.S. (2 Wheat.) 45, 56-57 (1817); Taylor v. Davis Adm’x, 110 U.S. 330, 335 (1884) (“When a trustee contracts as such, unless his is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee.”). See also SYDNEY R. WRIGHTINGTON, THE LAW OF UNINCORPORATED ASSOCIATIONS AND SIMILAR RELATIONS § 43 (Little, Brown and Company 1916).
\item[175] KY. REV. STAT. ANN. § 386A.3-060(1). See also UNIF. STAT. TRUST ENTITY ACT § 308, 6B U.L.A. 109 (2012 supp.). An express listing of the power to sue and be sued in the name of the venture is now a standard provision of business organization law. See, e.g., REV. UNIF. PART. ACT § 307(a), 6 U.L.A. 124 (2001); KY. REV. STAT. ANN. § 362.1-307(1); UNIF. LTD. PART. ACT 2001 § 105, 6A U.L.A. 367 (2008); KY. REV. STAT. ANN. § 362.2-105; UNIF. LTD. LIAB. CO. ACT § 106, 6A U.L.A. 169 (2008); REV. UNIF. LTD. LIAB. CO. ACT (2006) § 105, 6B U.L.A. 438 (2008); KY. REV. STAT. ANN. § 275.330; MODEL BUS. CORP. ACT § 3.02(1) (2006); KY. REV. STAT. ANN. § 271B.3-020(1)(a). Blackstone described one of the characteristics of a corporation, it being of that age the prototypical entity, as being the power to sue or be sued in the corporate name. WILLIAM BLACKSTONE, 1 COMMENTARIES *475. See also WILLIAM SHEPHERD, OF CORPORATIONS, FRATERNITIES, AND GUILDS 53 (1659, Law Book Exchange 2009) (“For this power to sue and be sued, [sic] is incident to every good Corporation, and yet it is not amisse to expresse it [in the charter].”); id. at 109 (“A Corporation is a Body only in consideration of Law . . . yet may it . . . sue, and be sued.”). See Fed. R. Civ. Proc. 17(b)(3) (stating that the capacity of a trust to sue or be sued is determined by the law of the state in which the court is located).
\end{footnotes}
permitted to act in its own name. 177 Presumably, this would require the trust to bring suit or defend the action in the name of the trustee(s).

For purposes of federal diversity jurisdiction 178 and the citizenship of a statutory trust, it being an unincorporated organization, presumably it will be deemed to have the citizenship of the various beneficial owners. 179 At the same time neither the jurisdiction of organization 180 or jurisdiction of the principal place of business 181 will be at issue. This rule is consistent with that adopted in Riley v. Merrill Lynch Pierce Fenner & Smith, Inc. 182 It must be acknowledged, however, that it is in contrast with that set forth in Navarro Savings Ass’n v. Lee, 183 where the Supreme Court held that, in a suit brought by the trustees of a Massachusetts business trust in their individual capacities as trustees, only the citizenship of the trustees (and not the citizenship of the beneficial owners) would be relevant to the diversity analysis. 184 The Navarro decision is distinguishable on the basis that the suit was brought by the trustees qua trustees (rather than by or against the trust itself) and the fact that a KyUSTA statutory trust does not afford its trustees the characteristics that permitted them to individually pursue the suit at issue in Navarro. 185 Although it appears the question has never been squarely addressed, the citizenship of a trustee who is not as well a beneficial owner should not be attributed to the statutory trust.

Where a beneficial owner is a corporation, there will be attributed to the trust the corporation’s citizenship in each of its jurisdictions of incorporation and the jurisdiction of its principal place of business as determined by utilizing the “nerve center” test. 186 In contrast, where the beneficial owner is an unincorporated business organization, citizenship will be determined based upon

177. But see Restatement (Second) of Conflicts § 298, cmt. b. (capacity of a “corporation” to sue or be sued in its own name may in a foreign jurisdiction be conditioned upon compliance with that law).
180. See, e.g., JMTR Enterprise, L.L.C. v. Duchin, 42 F. Supp.2d 87 (D. Mass. 1999); TPS Utilicom Serv., Inc. v. AT&T Corp., 223 F. Supp.2d 1089, 1102 (N.D. Ca. 2002) (“[t]he place of organization of an L.L.C. is not relevant to its citizenship for diversity purposes.”).
181. See, e.g., Citizens Bank v. Plasticware, LLC, 830 F. Supp. 2d 321, 325 (E.D. Ky. 2011) (“Plasticware’s principal place of business, however, is not relevant to its citizenship determination.”).
184. See id. at 465 (The focus is upon the citizenship of the trustee and the court “need not consider the citizenship of the beneficiaries of the trust . . . .”)
185. For example, pursuant to the trust at issue in Navarro, title to trust assets was in the names of the trustees. Further, the agreement at issue was entered into between the third party and the trustees in their capacities as such. In contrast, a KyUSTA statutory trust holds property in its own name and as well contracts in its own name.
the citizenship of its ultimate constituent owners.\footnote{187} The citizenship of an individual is that of the state in which they are domiciled.\footnote{188}

Except to the extent property has been “associated” with a particular series,\footnote{189} the property of a statutory trust, whether held in the name of the trust or in the name of a trustee, is subject to attachment and execution to satisfy a debt or other obligation of the trust.\footnote{190} Property of or associated with a series\footnote{191} is subject to attachment and execution to satisfy a debt or obligation of that series,\footnote{192} but is not available to satisfy a debt or obligation of another series or of the statutory trust.\footnote{193}

Article 4 - Series Trusts

The series, as employed in KyUSTA, differs from the USTA series in both language but more importantly in concept.\footnote{194} The KyUSTA series is a more robust structure, being able to hold title to property, to grant a security interest and to sue and be sued in its own name.\footnote{195} A series, under USTA, has none of these capabilities.

The authority for series is subject to a combination of public notice and private ordering. The certificate of trust, in addition to containing the information otherwise required,\footnote{196} must provide notice that the statutory trust has the capacity to have one or more series.\footnote{197} From there the governing instrument

\footnote{188. See Vlandis v. Kline, 412 U.S. 441, 454 (1973); see also Smoot v. Mazda Motors of Am., Inc., 469 F.3d 675, 677-78 (7th Cir. 2006); Am.’s Best Inns, Inc. v. Best Inns of Abilene, L.P., 980 F.2d 1072, 1074 (7th Cir. 1992).}
\footnote{189. See infra notes 211-14 and accompanying text.}
\footnote{190. KY. REV. STAT. ANN. § 386A.3-040(5).}
\footnote{191. See infra notes 2and accompanying text.}
\footnote{192. See KY. REV. STAT. ANN. § 386A.3-040(5).}
\footnote{193. Id. § 386A.4-020(1)(a).}
\footnote{194. The deficiencies in the formula employed in USTA have been otherwise reviewed and will not be here repeated. See Rutledge and Habbart, supra note 3, at 1076-77.}
\footnote{195. See KY. REV. STAT. ANN. § 386A.4-010(4).}
\footnote{196. See id. §§ 386.2-010(2)(a)-(e). See also UNIF. STAT. TRUST ENTITY ACT § 201(b), 6B U.L.A. 93 (2012 supp.).}
\footnote{197. KY. REV. STAT. ANN. § 386A.2-010(3). Accord UNIF. STAT. TRUST ENTITY ACT § 201(b)(4), 6B U.L.A. 93 (2012 supp.); KY. REV. STAT. ANN. § 386A.4-020(2)(c); UNIF. STAT. TRUST ENTITY ACT § 201(b)(4), 6B U.L.A. 93 (2012 supp.). The requirement of public notice of the existence of the capacity to organize series is universal across the various statutes providing for their formation. See, e.g., Nev. Rev. Stat. § 86.161(1)(e) (2011) (requiring that the articles of organization of a series LLC set forth that it is a series LLC and either the “relative rights, powers and duties of the series” or that such are set forth in or established by the operating agreement); Del. Code Ann. tit. 6, § 18-215 (2012) (stating that certificate of formation must set forth that the LLC is a series LLC as a precondition to series limited liability); Utah Code § 48-2c-606(3)(d) (2012) (stating that articles of organization must set forth notice of series limited liability as a precondition thereto); Del. Code Ann. tit. 6, § 17-218(b) (2012) (stating that certificate of limited liability must set forth notice of series limited liability as a precondition thereto).}
may authorize one or more series. Assuming the requirements are satisfied, a series may have separate rights as to certain properties, responsibility for certain debts, and a separate purpose or objective from that of the statutory trust. The separate purpose of a series must be within the scope of the purpose of the statutory trust.

While USTA expressly provided that a series is not an entity separate from the statutory trust, even while it failed to explain the consequences of being or not being classified as an entity, KyUSTA provides that a series is a separate entity to the degree of the entity characteristics it is afforded. Unless the governing instrument sets forth a contrary rule, a series may in its own name:

- contract;
- hold title to assets;
- grant liens and security interests; and
- sue and be sued.

partnership must set forth that limited partnership is a series limited partnership as a precondition to series limited liability); DEL. CODE ANN. tit. 12, § 3804(a) (2012) (requiring that in order for series to enjoy limited liability, notice of the limited liability of the series must be set forth in the certificate of trust); VA. CODE ANN. § 13.1-1231.D (2012) (requiring that in order for series to enjoy limited liability, notice of limited liability of the series must be set forth in the articles of trust); CONN. GEN. STAT. § 34-502(b) (2012) (providing that, in order for series to enjoy limited liability, “notice of the limitation on liabilities of series as referenced in this sentence is set forth in the certificate of trust of the statutory trust.”); IOWA CODE ANN. § 489.1201(2)(d) (requiring as a condition to inter-series limited liability that “[n]otice of establishment of the series and the limitation on liabilities of the series is set forth in the certificate of organization . . . .”); KAN. STAT. ANN. § 17-76, 143(b) (2012) (requiring that as a precondition to limited liability that “notice of the limitation on liabilities of a series as referenced in this subsection is set forth in the certificate of organization”); and WYO. STAT. ANN. § 17-23-106(b)(iii) (2012) (requiring as a condition to series limited liability that “notice of the limitation on liabilities of a series as referenced in this subsection is set forth in the certificate of trust of the statutory trust.”).

198. KY. REV. STAT. ANN. § 386A.4-010(1). See also UNIF. STAT. TRUST ENTITY ACT § 401(a), 6B U.L.A. 110 (2012 supp.).
199. KY. REV. STAT. ANN. §§ 386A.4-010(1)(a)-(b).
200. Id. § 386A.4-010(3)(b). Ergo, by way of example, a series may not have as its purpose the management of commercial real property when the purpose of the statutory trust is restricted to management of a portfolio of marketable securities.

201. UNIF. STAT. TRUST ENTITY ACT § 401(b), 6B U.L.A. 110 (2012 supp.).
202. See also supra note 55.
203. See KY. REV. STAT. ANN. §§ 386A.4-010(2), (4). Compare 805 ILCS § 180/37-40(b) (“A series is treated as a separate entity to the extent set forth in the articles of organization; each series with limited liability, may, in its own name, contract, hold title to assets, grant security interests, sue and be sued and otherwise conduct business and exercise the powers of an LLC.”); IOWA CODE § 489.1201(3) (2012) (“A series meeting all of the conditions of Subsection II shall be treated as a separate entity to the extent set forth in the certificate of organization.”); see also Rutledge, External Entities and Internal Aggregates, supra note 55, at 680-82.

204. KY. REV. STAT. ANN. § 386A.4-010(4).
205. See also id. § 386A.4-030.
206. Id. § 386A.4-010(4).
As noted above, the intent of affording an individual series these characteristics is to create a structure that, while not a distinct legal entity, is sufficiently robust to unilaterally act in the business environment. A series, as contrasted with a statutory trust on behalf of a series, will be able to engage with a third party. This more robust model for the series is seen in other states.208

While a series may in its own name sue and be sued, neither a trustee nor a beneficial owner associated with the series is a proper party to the suit unless the claim is for a right against or liability to the series to that trustee or beneficial owner.209 The registered agent for the statutory trust is the registered agent for each series thereof, and suit is initiated by making service on the registered agent without the need to make service on the trustee associated with the series.210

Each series will be under the control of one or more trustees. As a default rule, each trustee of the statutory trust is also a trustee “associated” with each series, but the governing instrument may provide that only certain trustees are associated with a particular series.211 It is not possible to be a trustee associated with a series without also being a trustee of the statutory trust. If the governing instrument provides that there is at least one trustee obligated to consider the interests of the statutory trust itself and all of the series, the governing instrument may provide that other trustees of that series who may consider the needs of only the trusts or of one or more of the series.212 While the phraseology employed may be less than clear, the capacity of a series to have, for example, a trustee


208. See, e.g., 805 ILCS § 180/37-40(b) (“each series with limited liability may, in its own name, contract, hold title to assets, grant security interests, sue and be sued and otherwise conduct business and conduct the powers of a limited liability company under this Act.”); Utah Code Ann. § 48-2c-606(5) (“a series may contract on its own behalf and in its own name, including through a manager.”); DEL. CODE ANN. tit. 6, § 17-218(c) (“unless otherwise provided in a partnership agreement, a series established in accordance with subsection (b) of this section shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued.”); and Iowa Code Ann. § 489.1201(7), incorporating id. § 489.105(1) (power to sue and be sued in own name).


211. Id. § 386A.4-010(6).

212. Id. § 386A.5-010(2). See also Unif. Stat. Trust Entity Act § 403, 6B U.L.A. 112 (2012 supp.).
whose duties and obligations run exclusively to the assets and beneficial owners associated with that series is contingent upon there being at least one trustee of the statutory trust as a whole whose duties and obligations are not so limited.213

In order for the series to provide and enjoy limited liability, the statutory trust must maintain records accounting for the assets of or associated with the series.214 An asset will be “of” the series when titled in its name or, when that is not possible under local law, is held by a trustee or other nominee on its behalf.215 In contrast, an asset will be “associated with” a series if on the records of the statutory trust that asset has been associated with the series and can be “reasonably” and “objectively” determined.216 For example, a schedule listing all assets of the statutory trust, whether real, personal or intangible, indexed to

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215. See also id. § 386A.3-020(2).

216. Id. § 386A.4-030(4). Accord Unif. Stat. Trust Entity Act § 401(a)(1), 6B U.L.A. 110 (2012 supp.); Del. Code Ann. tit. 6, § 17-218(b) (requiring, as a precondition of series limited liability, the maintenance of accounting records for the assets associated with each series as distinct from those held otherwise by the limited partnership or any other series thereof); Va. Code Ann. § 13.1-1231(D) (requiring, as a precondition of series limited liability, that there be maintained records accounting for the assets associated with each series as distinct from those held otherwise by the trust or any other series thereof); Tenn. Code Ann. § 48-249-309(b)(1)(B) (requiring, in order for series limited liability to be available, that separate and distinct records be maintained for each series reflecting the assets associated with each series, accounting for in separate and distinct records the other assets of the LLC and the assets of any other series of the LLC); Utah Code Ann. §§ 48-2c-606(3)(b), (c) (limited liability being conditioned upon the maintenance on behalf of the series of separate and distinct records and that the assets associated with each series be held and accounted for separately from the other assets of the LLC or of any other series thereof); 18 Okla. Stat. Ann. § 2054-4(B) (requiring, as a precondition to series limited liability, that “separate and distinct records are maintained for any such series and that the assets associated with any such series are held, directly or indirectly, including through a nominee or otherwise, and accounted for separately from the other assets of the [LLC], or any other series thereof”); 805 ILCS 180/37-40(b) (providing as a precondition to series limited liability that “separate and distinct records are maintained for any such series and that the assets associated with any such series are held, directly or indirectly, including through a nominee or otherwise, and accounted for separately from the other assets of the [LLC], or any other series thereof”); Kansas (Kan. Stat. Ann. § 17-76, 143(b) (2012)); Nev. Rev. Stat. § 86.296(3)(a) (providing as a precondition to series limited liability that “separate and distinct records are maintained for any such series and that the assets associated with any such series are held, directly or indirectly, including through a nominee or otherwise, and accounted for separately from the other assets of the [LLC], or any other series thereof”); Del. Code Ann. tit. 6, § 18-215(b) (providing as a precondition to series limited liability that “separate and distinct records are maintained for any such series and that the assets associated with any such series are held, directly or indirectly, including through a nominee or otherwise, and accounted for separately from the other assets of the [LLC], or any other series thereof”); Iowa Code Ann. § 489.1201(2)(b) (“Separate and distinct records are maintained for the series and separate and distinct records account for the assets associated with that series. The assets associated with a series must be accounted for separately from the other assets of the limited liability company, including another series.”); Texas Bus. Org. Code §§ 101.602(b)(1), 101.603(b); and Wyo. Stat. Ann. §§ 17-23-106(b)(i), (ii).
the series to which each is associated and providing as well that all proceeds of each shall also be associated with the series, should satisfy the statutory requirements. 217 Property of a series trust that is not associated with a series is solely the property of the statutory trust.

The association of property of the statutory trust with a particular series thereof, the “disassociation”218 or the reassociation of property within a statutory trust and between itself and any series thereof will be subject to state fraudulent conveyance laws.219 By way of example, if an asset is disassociated from a series, it becomes an asset of the statutory trust (unless and until it is reassociated with another series) and is not available as an asset of the series to satisfy a claim against its assets. To the extent the dissociation poses a detriment to a creditor of the series, the dissociation would need to pass scrutiny under fraudulent conveyance laws.

Assuming the various requirements are satisfied, a series provides both affirmative and negative asset partitioning. Claims against the assets of or associated with a series are enforceable against only those assets; the creditor has no claim on assets of or associated with another series or of the statutory trust.220 At the same time the trustees and beneficial owners enjoy limited liability from claims against the assets of or associated with the series.221 Debts, obligations and liabilities of the statutory trust generally are not enforceable against the property of or associated with a particular series.222

A person who ceases to be a beneficial owner, and a trustee who ceases to be a trustee of the statutory trust, shall cease to be associated with any series thereof.223 A beneficial owner has the right to resign from being associated with a series, and a trustee associated with a series has the right to resign from that position, only if resignation is provided for in the governing instrument;224 there

217. This record showing the association of property to a series is a private, and not a public, document.
218. The meaning of “disassociation” as utilized in KyUSTA is different from that of the term as utilized in RUPA section 601 et seq. See KY. REV. STAT. ANN. § 362.1-601 et seq.
221. KY. REV. STAT. ANN. § 386A.3-040(4).
222. Id. §§ 386A.3-040(5), 386A.4-020(1)(a). See also UNIF. STAT. TRUST ENTITY ACT § 402(a), 6B U.L.A. 111 (2012 supp.).
223. KY. REV. STAT. ANN. §§ 386A.4-040(1), (2).
224. Id. § 386A.4-040(3). The case can well be made that this provision should have been incorporated in KY. REV. STAT. ANN. § 386A.1-030, it reciting the matters that may be addressed in the governing instrument but without, as to these matters, providing a substantive rule. See also
exists no default right to cease to be associated with the series. Upon being
dissociated from a series a beneficial owner has no further right to participate in
its management and no claim upon its assets save for distributions declared but
unpaid as of the termination of the association with the series.\footnote{225} A beneficial
owner’s liability to a series, to the statutory trust or to another beneficial owner
is not discharged by being dissociated from a series.\footnote{226} Dissociation of a
beneficial owner from a particular series does not compel dissociation from any
other series, and unless the dissociation was of the last beneficial owner
associated with the series, dissolution of a beneficial owner does not compel the
winding up of the series.\footnote{227} Where, however, consequent to a beneficial owner’s
dissociation, the series is left with no members associated with it, the series must
proceed to wind up.\footnote{228}

A series of a statutory trust will dissolve upon the first to occur of:
- the dissolution of the statutory trust;\footnote{229}
- as provided in the governing instrument;\footnote{230}
- the consent of all beneficial owners associated with the series;\footnote{231}
- upon the passage of ninety days from the dissociation of the last
  beneficial owner associated with the series;\footnote{232} or
- by judicial order upon a determination that it is not reasonably
  practicable to carry on the activities of the series in accordance with
  the governing instrument.\footnote{233}

The statute goes on to specify, for each circumstance affecting a series’
dissolution, what the date of dissolution is.\footnote{234} An individual series is not subject
to administrative dissolution.\footnote{235}

The governing instrument may specify an event or events upon which the
series is to dissolve. Examples of such provisions include those requiring the
dissolution on a particular date or upon the meeting (or not) of defined financial

\textit{supra} note 72 and accompanying text. The decision was made for this placement in order to
highlight the need, in the governing instrument of a series trust, to address this issue.
\footnote{225} KY. REV. STAT. ANN. § 386A.4-040(4).
\footnote{226} \textit{Id.} § 386A.4-040(5).
\footnote{227} \textit{Id.} § 386A.4-040(6).
\footnote{228} See \textit{id.} § 386A.4-060(1)(d). The statute is silent as to who, in that circumstance, would be
the residual beneficiary of the series’ assets.
\footnote{229} \textit{Id.} § 386A.4-060(1)(a).
\footnote{230} \textit{Id.} § 386A.4-060(1)(b).
\footnote{231} KY. REV. STAT. ANN. § 386A.4-060(1)(c). See also \textit{id.} § 386A.6-020(1)(f). This
unanimous threshold may be altered in the governing instrument. See \textit{id.} §§ 386A.1-040(2)(f)
(“Except as provided therein, vary the provisions . . . .”); 386A.4-060(1)(c) (“Except as otherwise
provided in the governing instrument . . . .”).
\footnote{232} \textit{Id.} § 386A.4-060(1)(d).
\footnote{233} \textit{Id.} § 386A.4-060(1)(e).
\footnote{234} \textit{Id.} § 386A.4-060(2). See also \textit{id.} §§ 386A.4-090(4), 386A.4-100(3)(c).
\footnote{235} See \textit{id.} § 386A.4-060. But see \textit{§} 386A.8-010(1).
thresholds. A series may also be dissolved with the approval of the beneficial owners associated with the series. As a default rule that vote of the beneficial owners will need to be unanimous.\textsuperscript{236} There exists no filing with the Secretary of State necessary to effect a series’ dissolution.\textsuperscript{237}

In a departure from the uniform act, KyUSTA provides for the judicial dissolution of a series.\textsuperscript{238} The provision for judicial dissolution contemplates the use of the series in situations in which a business corporation or an LLC might otherwise have been utilized for objectives including asset segregation, alternative management or an alternative economic treatment. As any of those structures may be judicially dissolved, it seemed appropriate that that same remedy should be available in those circumstances where judicial dissolution might otherwise be available. To that end, a series may be dissolved upon a demonstration that it is not reasonably practical to operate the series in accordance with the governing instrument.\textsuperscript{239}

The “not reasonably practicable” standard has antecedents in other business organization laws.\textsuperscript{240} At some point, breach of fiduciary duty by the trustees associated with the series, either a single or multiple event, will justify judicial dissolution; the court will need to determine if the threshold has ever been met. Frustration of economic purpose, violations of the governing instrument not involving a breach of fiduciary duty, or any number of other circumstances may likewise justify dissolution. The decree judicially dissolving the series is not filed with the Secretary of State.

The dissolution of a series of a statutory trust does not precipitate the dissolution of the statutory trust.\textsuperscript{241} Dissolution of a series does not abate or suspend the rules of limited liability and asset segregation.\textsuperscript{242} After dissolution, the series survives and continues to exist as a series of a statutory trust regardless

\textsuperscript{236} See id. § 386A.6-020(1)(f).
\textsuperscript{237} But see KY. REV. STAT. ANN. §§ 14A.7-020(2) (certificate of dissolution filed by Secretary of State upon administrative dissolution), 386A.8-020(1) (articles of dissolution filed upon voluntary dissolution of statutory trust), and 386A.8-030(1) (court’s decree of judicial dissolution of statutory trust filed with the Secretary of State).
\textsuperscript{238} USTA did not provide for the judicial dissolution of a series or of a statutory trust as a whole.
\textsuperscript{239} KY. REV. STAT. ANN. § 386A.4-060(1)(c). See also id. § 386A.8-030(1)(a) (applying the same “not reasonably practicable” standard for the dissolution of the statutory trust as a whole).
\textsuperscript{240} See, e.g., id. §§ 275.290(1), 362.1-801(5)(c), 362.2-802. This standard is intentionally different from and imposes a more relaxed threshold than does the deadlock standard of the Business Corporation Act. See id. §§ 271B.14-300(2)(a), (c) (allowing judicial dissolution upon director or shareholder deadlock).
\textsuperscript{241} Id. § 386A.4-050(1).
\textsuperscript{242} Id. § 386A.4-050(2), (3). See also Rutledge, The 2007 Amendments, supra note 141, at 248-49.
of whether the dissolution was administrative, voluntary or judicial. A dissolved series is restricted to activities “appropriate to wind up and liquidate its business and affairs,” with certain activities, listed on a non-exclusive basis, identified as being appropriate. It is expressly provided that a dissolved series may enter into agreements with creditors for the resolution of its liabilities. Dissolution of a series does not transfer the property of or associated with the series or “abate or suspend” the rules of limited liability and asset segregation.

Upon judicial dissolution, the dissolving court is charged to direct the series’ winding up and liquidation. In a non-judicial dissolution the winding up and liquidation are undertaken by the trustees associated with the series. However, on a showing of good cause by a beneficial owner associated with the series, the court may take control of the process.

The provision by which a dissolving series gives known creditors notice of its dissolution is based upon prior law, but has been modified in KyUSTA. Where most organizations are simply permitted to utilize the statutory mechanism for notifying known creditors, it not being mandatory, the statutory notice procedure is mandatory for a series.

The notice of a series’ dissolution must set forth the name(s) under which the series has transacted business and also the name of the statutory trust. The notice must otherwise contain:

- the information to be set forth in a claim;
- the mailing address to which the claim should be sent.

244. Id. § 386A.4-070(1). Accord §§ 271B.14-050(1), 275.300(2).
248. Id. § 386A.4-080(2)(b). See also § 386A.8-050(2).
249. Id. § 386A.4-080(1).
250. This provision will have no application where the series dissolution is consequent to the series having no beneficial owners associated with it. See id. § 386A.4-060(1)(e). A creditor does not, by means of this provision, have standing to apply for court supervision.
251. Id. § 386A.4-080(2)(a).
252. See id. §§ 271B.14-060, 275.320.
254. KY. REV. STAT. ANN. § 386A.4-090(1) (“Upon dissolution . . . a series . . . shall dispose of known claims . . . by following the procedures described in this section.”) (emphasis added), id. § 386A.4-090(2) (“The series shall notify . . . .”) (emphasis added).
255. Id. § 386A.4-090(2)(a).
the deadline of not less than 120 days after the date of the notice by which claims must be received;258 and
provide notice that the claim will be barred if not received by the deadline.259

A claim will be barred if, having received notice, the claimant does not submit the claim within the required period.260 A claim will likewise be barred if the claimant whose claim has been submitted and rejected does not commence an action to enforce it within ninety days after the rejection.261 Assuming no newspaper publication, the statute is silent as to the treatment of a claim timely submitted upon which the series neither gives a rejection nor an acceptance. Claims that may be barred do not include those that are contingent or based upon events occurring after the date of dissolution.262

As was the case on the procedures utilized to afford known creditors notice of dissolution, those for notice to unknown creditors are based upon predecessor law.263 Again, while generally giving notice through these procedures is optional, doing so is mandatory in the dissolution of a series.264 Notice is given by publication in a general circulation paper for the county in which the principal office in Kentucky, or if none the registered office, of the statutory trust is or was last located.265 The published notice must:

- recite the name(s) under which the series has conducted business and the name of the statutory trust;266
- describe the information to be provided in a claim and the address to which it should be mailed;267 and
- state that the claim will be barred if a proceeding to enforce it is not brought within two years after publication of the notice.268

The running of the two-year period will bar the claims of:

263. See generally id. §§ 271B.14-070, 275.325, 362.2-807.
264. Id. § 386A.4-100(1) (“A dissolved series shall publish . . . .”) (emphasis added). Further, while most business forms may publish a notice of dissolution without having first given particular notice to known creditors, that option is not available to a series.
265. Id. § 386A.4-100(2). Accord §§ 271B.14-070(2)(a), 275.325(2)(a), 362.2-807(2)(a). Note that the appropriate jurisdiction is determined by reference to the statutory trust, not the individual series undergoing dissolution. A series has neither a principal office nor registered office/agent distinct from those of the statutory trust.
266. KY. REV. STAT. ANN. § 386A.4-100(2)(a).
claimants who should but did not receive notice as known claimants;\textsuperscript{269}
claimants who submitted a claim that was not acted upon;\textsuperscript{270} and
claimants whose claim is contingent or based on an event occurring after the effective date of dissolution.\textsuperscript{271}

Creditor claims may be enforced against assets in the following order:

- first, the assets still held by, whether of or associated with, the series;\textsuperscript{272} and
- second, against the assets distributed in liquidation to the beneficial owners associated with the series and pro-rata among them.\textsuperscript{273}

An innovation in Kentucky’s business entity laws permits a series, having given notice to known and unknown claimants, to apply to a court to determine the amount to be set aside to address creditor claims.\textsuperscript{274} The statutory trust must give notice of the proceeding to its known claimants within ten days of filing the application,\textsuperscript{275} and a guardian ad litem may be appointed to represent the interests of the unknown claimants.\textsuperscript{276} To the extent the court determines that assets be set aside to satisfy unknown or contingent claims or those based on events arising after the effective date of dissolution, they will be available for the statutory period for satisfaction of those obligations, and any further assets distributed in liquidation to the beneficial owners will not be subject to recovery.\textsuperscript{277} After the two-year period has run, any assets not distributed in satisfaction of creditor claims will be distributed among the beneficial owners.\textsuperscript{278}

In the course of winding up, the assets of a statutory trust must be distributed first to its creditors, a class that may include beneficial owners who are creditors.\textsuperscript{279} This first priority is not subject to alteration in the governing instrument. Second, assuming no contrary private ordering, assets may be

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{269} Id. § 386A.4-100(3)(a).
  \item \textsuperscript{270} Id. § 386A.4-100(3)(b).
  \item \textsuperscript{271} Id. § 386A.4-100(3)(c). The degree to which a provision of this nature is subject to characterization as an impermissible statute of repose has not been addressed by the Kentucky courts. See, e.g., Perkins v. Ne. Log Homes, 808 S.W.2d 809 (Ky. 1991).
  \item \textsuperscript{272} KY. REV. STAT. ANN. § 386A.4-100(4)(a).
  \item \textsuperscript{273} Id. § 386A.4-100(4)(b).
  \item \textsuperscript{274} Id. § 386A.4-100(5).
  \item \textsuperscript{275} Id. § 386A.4-100(6).
  \item \textsuperscript{276} Id. § 386A.4-100(7).
  \item \textsuperscript{277} Id. § 386A.4-100(8). See also § 386A.8-070(4)(b).
  \item \textsuperscript{278} Similar provisions exist in Delaware corporate law and section 710(e) of the Revised Prototype Limited Liability Company Act. See DEL. CODE ANN. tit. 8, § 280(c); Revised Prototype Ltd. Liab. Co. Act Editorial Bd., LLCs, P’ships & Unincorporated Entities Comm., ABA Section of Bus. Law, Revised Prototype Limited Liability Company Act, 67 BUS. LAW. 117, 179-89 (Nov. 2011).
  \item \textsuperscript{279} KY. REV. STAT. ANN. § 386A.4-110(1). For example, a beneficial owner who sold an asset to the statutory trust in a seller financed transaction would be paid under this provision.
\end{itemize}
\end{footnotesize}
distributed in satisfaction of declared but unpaid distributions.280 The next level of distributions, and again assuming no contrary private ordering, is to the beneficial owners in proportion to their right to receive distributions prior to dissolution.281 There exists no statutory requirement that the name under which a particular series does business be distinguishable from the name of either the statutory trust or the name of any other business entity.282

The absence of a statutory requirement does not mean, however, that such is permissible. A series that, utilizing the name of the statutory trust, enters into a contract with a third party may have (perhaps without authority) bound the statutory trust, violated the warranty of authority,283 and bound the series’ agent to personal liability on the agreement.284 Consequently, the better practice is for each series to adopt its own unique name, for a certificate of assumed name to be filed,285 and for all those acting on behalf of a series to be scrupulous in both expressing and confirming that agreements are being made with a series and not the statutory trust itself.

Article 5 - Trustees and Trust Management

The business and affairs of a statutory trust are managed by its trustee(s).286 There is no requirement that a trustee be a beneficial owner287 or a natural person.288 A statutory trust that is without a trustee, absent compliance with a provision in the governing instrument for the designation of a new trustee, is subject to judicial dissolution.289 Given that KyUSTA does not restrict the modification of the provision vesting control in the trustees, the trust instrument could provide for governance of a statutory trust other than by a “trustee.” Doing so would, however, necessitate a complete reconceptualization of the statutory trust and its organizational structure.

280. Id. § 386A.4-110(2). See also § 275.310(2).
281. Id. § 386A.4-110(3). Unlike under the LLC Act, there is not, unless the governing instrument should so provide, a penultimate stage at which a return in satisfaction of contributions is made. Compare id. § 275.310(3).
282. But see § 14A.3-010(1).
284. See id. § 6.04.
285. The assumed name statute was amended to address series entities, permitting them to on behalf of a series adopt an assumed name. See KY. REV. STAT. ANN. § 365.015(12).
286. Id. § 386A.5-010(1). Accord UNIF. STAT. TRUST ENTITY ACT § 501, 6B U.L.A. 114 (2012 supp.). See also KY. REV. STAT. ANN. § 386.390 (stating that the trustees “shall have . . . the control and management of the business and affairs of the business trust.”).
287. Accord KY. REV. STAT. ANN. §§ 271B.8-020 (unless required by the articles of organization or bylaws, a director need not be a shareholder in the corporation), 275.165(2)(b) (stating that a manager need not be a member of the LLC).
288. But see § 271B.8-030(1) (stating that a director must be a natural person).
289. Id. § 386A.8-030(1)(b). Curiously, USTA did not by its express terms mandate dissolution of a statutory trust lacking a trustee.
Each trustee, by agreeing to serve or actually performing in that role, is
deemed to have consented to the jurisdiction of Kentucky’s courts for action
arising out of or in connection with that service.290 A non-uniform addition to
the list of items that may not be modified in the governing instrument provides
that this consequence is not subject to modification or waiver.291

The trustees, in managing the business and affairs of the statutory trust, have
such powers as are conferred by the governing instrument,292 such other powers
(save as restricted by the governing instrument) as are necessary or convenient
with respect to the management of the statutory trust and all other powers
conferred by the Act.293 These powers may be restricted or limited in the
governing instrument.

The initial trustee(s) will be named in the original certificate of trust.294
Changes in the trustee(s) will require that the certificate of trust be amended.295
It is crucial that the governing instrument address the mechanism by which
additional or replacement trustees will be appointed, elected or otherwise
designated;296 KyUSTA provides no default rule for doing so. Unless limited by
the governing instrument, a trustee has the capacity to unilaterally resign.297

290. Id. § 386A.5-020(2). While USTA provided that an agent of a trustee, in accepting the
agency, consented to the jurisdiction of the courts of the statutory trust’s jurisdiction of
similar rule upon the trustees. This non-uniform provision of KyUSTA should be interpreted as
supplementing, and not supplanting, existing law on jurisdiction over trustees located out of
Kentucky. See also Cummings v. Pitman, 239 S.W.3d 77, 86-90 (Ky. 2007) (noting that primary
beneficiaries of trusts have personally availed themselves of the trust jurisdiction’s laws).
Equivalent provisions were added in 2012 to certain of Kentucky’s corporation and the LLC acts.
273.227(7), 275.335(2); see also Rutledge, The 2012 Amendments, supra note 6, at 7.


292. The term “governing instrument” is defined as being the “certificate of trust” and the “trust
in a record form, does not itself encompass the certificate of trust, and otherwise addresses the
governance of the affairs of the statutory trust. The trust instrument may embody the trust
agreement, a declaration of trust, and by-laws. See id. § 386A.1-020(35).

293. Id. §§ 386A.5-020(1)(a), (b). See also Unif. Stat. Trust Entity Act § 502, 6B U.L.A.
114 (2012 supp.). This provision is consistent with the rule for common law trusts. See
Restatement (Third) of Trusts § 85 (2003); Restatement (Second) of Trusts § 186 (1959).

294. See Ky. Rev. Stat. Ann. § 386A.2-010(2)(b); see also supra notes 119-23 and
accompanying text.

295. See Ky. Rev. Stat. Ann. § 386A.2-020(1); see also supra notes 117-18 and
accompanying text.

103(e)(6)(C), 6B U.L.A. 86 (2012 supp.).

297. But see Restatement (Third) of Trusts § 36 (2003); Restatement (Second) of Trusts
§ 106 (1959).
There is no requirement that any trustee be resident in the Commonwealth of Kentucky. 298

Absent contrary private ordering in the governing instrument, the trustees act on a per capita basis with the majority controlling either at a meeting or when acting by written consent. 299 It is not required that trustees act by unanimous written consent when acting outside a meeting. 300 To the extent that any trustee does not vote in favor of the matter under consideration, they are entitled to notice of the action taken. 301 In a reversal of the policy decision made in USTA permitting proxy voting by trustees, 302 KyUSTA expressly precludes trustees voting by proxy. 303 In not permitting trustees to vote by proxy, KyUSTA preserves the traditional role employed in business trusts. 304

KyUSTA details certain protections available to third parties who deal with a statutory trust through one or more of its trustees. Initially, a person who in good faith assists a trustee as to an action to which they are unaware that the trustee is exceeding or improperly exercising their authority has no liability to the statutory trust for having done so; they are treated as having transacted with a trustee who is properly exercising their power. 305 The same rule applies with respect to a person who in good faith and for value deals with the trustee; 306 they are not obligated to inquire as to the extent of the trustee’s power or the propriety of the exercise thereof. 307 A person who in good faith delivers property to the trustee is not charged with an obligation to ensure to its proper

299. Ky. Rev. Stat. Ann. § 386A.5-030. See also Unif. Stat. Trust Entity Act § 503(1), 6B U.L.A. 114 (2012 supp.). Per capita voting applies as well to the directors of business and nonprofit corporations and as the default rule for managers of an LLC. See Ky. Rev. Stat. Ann. §§ 271B.8-240(3), 273.217, 275.175(1). But see Restatement (Second) of Trusts § 194 (1959) (“If there are two or more trustees, the powers conferred upon them can properly be exercised only by all the trustees, unless it is otherwise provided by the terms of the trust.”). The more modern rule is that two trustees, except in an emergency, must act together, but three or more may act by the majority. See Restatement (Third) of Trusts § 39 (2003).
304. See, e.g., Wrightington, Business Trusts, supra note 44, at § 46 (“The trustee cannot delegate his authority, but, of course, may appoint agents to perform purely ministerial functions.”) (citations omitted).
application thereafter. Finally, a person who is without knowledge that a purported trustee no longer serves in that capacity (i.e., is now a former trustee) and in good faith assists them, or in good faith and for value deals with them, is afforded the same protections from liability as if the former trustee were still a trustee. As the comment to USTA section 504 notes, this provision overrides the common law that a third party is charged with constructive notice of the trust instrument and its contents and thereby any limitations upon the trustee’s power. There is, however, a non-uniform provision of KyUSTA that in part limits this override.

A trustee is required to act in good faith, on an informed basis, and in a manner the trustee reasonably believes to be in the best interests of the statutory trust. A trustee must discharge the duties imposed “with the care that a person in a similar position would reasonably believe appropriate under similar circumstances.” There is also a non-uniform recitation of the duty of loyalty on the trustee’s agent. These standards warrant careful parsing.

The standards applied to trustees are not subject to substantive modification in the governing instrument. KyUSTA only permits a governing instrument to define the standards by which good faith, the best interests of the statutory trust,
and the care of a person in a similar position are to be determined, subject to a requirement that such standards they are not manifestly unreasonable. To provide but one example, an effort to substitute in a governing instrument a subjective “honestly” for the objective “reasonably” would be invalid ab initio. It should be recognized that this admittedly paternalistic limitation on the degree to which the statutory standards may be modified is in contrast to the freedom available under Delaware’s statutory trust act and Kentucky’s LLC Act.316

The recitation of “good faith” as a standard of conduct is interesting and constitutes a departure from other recent uniform acts. In each of RUPA, ULPA and RULLCA, good faith is set forth as a free standing obligation, distinct from the recitations of the duty of care and the duty of loyalty.317 In contrast, good faith is recited as a substantive component of a corporate director’s duties.318 In those instances, the obligation of good faith, recited in the formula of “good faith and fair dealing,” is modifier to the manner in which the duties and obligations under the act and the controlling agreement are exercised and/or discharged.319

316. See Del. Code Ann. tit. 12, § 3806(e) (permitting the governing instrument of a Delaware statutory trust to eliminate all liability for breaches of duty, including a fiduciary duty, but not breach of the contractual covenant of good faith and fair dealing); Ky. Rev. Stat. Ann. §§ 275.170 (“Unless otherwise provided in a written operating agreement”; thereby enabling the modification or elimination of the fiduciary obligations.), 275.180(1) (providing that a written operating agreement may eliminate liability for breach of a duty owed under Ky. Rev. Stat. Ann. § 275.170); see also Del. Code Ann. tit. 6, §§ 18-1101(c), (e) (allowing a limited liability company agreement to modify or entirely eliminate the fiduciary duties otherwise existing in limited liability companies).


[U]nder Kentucky law, parties have a duty in carrying out a contract to act in good faith, sincerely and without deceit or fraud. Pearman v. W. Point Nat’l Bank, 887 S.W.2d 366, 368 n. 3 (Ky. Ct. App. 1994). This is generally observed as the covenant of good faith and fair dealing implied in every contract. Ranier v. Mount Sterling Nat’l Bank, 812 S.W.2d 154, 156 (Ky. 1991). A breach of the implied duty of good faith and fair dealing is an impossibility where a contract has not yet been formed. Quadrille Bus. Sys. v. Ky. Cattlemen’s Assoc., Inc., 242 S.W.3d 359, 364 (Ky. Ct. App. 2007). “A contracting party impliedly obligates himself to cooperate in the performance
It is not clear whether, by departing from the formula employed in other recent uniform business entity acts, it was intended that there should exist an independent obligation of good faith under USTA that goes beyond the contractual concepts employed in RUPA and other acts of its form. As employed in KyUSTA, the “good faith” component of the trustee’s obligations is intended to be applied, as in Stone v. Ritter, as a component of the duty of loyalty.

The obligation of loyalty, as in part set forth as a requirement that the trustee act in what he or she “reasonably” believes to be in the best interest of the statutory trust, manifests an objective standard that is in accord with the Revised Model Business Corporation Act (RMBCA). This objective standard of reasonableness differs from the subjective “honestly” standard adopted under the corporate laws of Delaware and Kentucky. The obligation of the trustee to act “[w]ith the care that a person in a similar position would reasonably believe appropriate under similar circumstances,” is akin to the formula employed in other recent uniform acts and in the KyRUPA (2006). The phrase “in the best interests of the statutory trust” identifies the beneficiary of the trustee’s fiduciary duties.

of this contract and the law will not permit him to take advantage of an obstacle to performance which he has created or which lies within his power to remove.” Ligon v. Parr, 471 S.W.2d 1, 3 (Ky. 1971) (quoting Gulf, Mobile & Ohio R.R. Co. v Ill. Cent. R.R. Co., 128 F. Supp. 311, 324 (N.D. Ala. 1954)).

320. 911 A.2d 362, 370 (Del. 2006).

321. The Revised Model Business Corporation Act section 8.30 is cited in the official comment to USTA section 505 as being the source for this provision. See UNIF. STAT. TRUST ENTITY ACT § 505, cmt., 6B U.L.A. 116 (2012 supp.).


323. KY. REV. STAT. ANN. § 386A.5-050(2). See also UNIF. STAT. TRUST ENTITY ACT § 505, 6B U.L.A. 116 (2012 supp.).

324. See, e.g., REV. UNIF. LTD. LIAB. CO. ACT § 409(c), 6B U.L.A. 489 (2008) (“[A]ct with the care that a person in a like position would reasonably exercise under similar circumstances. . . .”).

325. See KY. REV. STAT. ANN. § 362.1-404(3). See also Rutledge & Vestal on Ky. Partnership and LPS, supra note 15, at 97.

326. KY. REV. STAT. ANN. § 386A.5-050(1).


The phrase “best interests of the corporation” is key to an explication of a director’s duties. The term “corporation” is a surrogate for the business enterprise as well as a frame of reference encompassing the shareholder body. In determining the corporation’s “best interests,” the director has wide discretion in deciding how to weigh near-term opportunities versus long-term benefits as well as in making judgments where the interests of various groups
Trustees and other representatives of a statutory trust are not liable to either it or its beneficial owners for the breach of any duty to the extent such resulted from reasonable reliance on the governing instrument, a record of the statutory trust, or a professional expert, opinion, report or statement.328

USTA section 507, setting forth the terms and conditions upon which a “covered party” may do business with a statutory trust, has been significantly modified in KyUSTA. Under the formula employed in USTA, a “covered party” may engage in business transactions with the statutory trust, but such transactions are voidable by the statutory trust unless the interested party is able to demonstrate that the terms of the transaction are fair to the statutory trust.329 This formula was rejected on the basis that after-the-fact assessments of transactions with a fiduciary are not cost effective.330 Further, the opportunity is left open for a trustee to profit from the relationship with the statutory trust.331

In its place, a formula describing certain conduct forbidden to a “covered party” has been adopted from KyRUPA (2006).332 Initially, the concept of a “covered party” is retained, that being a “trustee, officer, employee, or manager of a statutory trust or a related person of a trustee, officer, employee or manager.”333 However, rather than defining that term in section 507, as does USTA, in KyUSTA the definition is moved to the primary table of defined

within the shareholder body or having other cognizable interests in the enterprise may differ.


331. For example, if a trustee were to be presented with a business opportunity in the line of activities of the statutory trust, but the trust be unable to utilize it due to a lack of financial capacity, the trustee could, arguably, personally utilize the opportunity and claim it as fair to do so as the trust could not. Under a traditional fiduciary analysis, this is not the correct outcome. See Thomas E. Rutledge and Thomas Earl Geu, The Analytic Protocol for the Duty of Loyalty Under the Prototype LLC Act, 63 ARK. L. REV. 473 (2010).

332. See KY. REV. STAT. ANN. § 362.1-404(2).

333. See id. § 368A.1-020(12).
While KyUSTA does not define the criteria that will be used in determining whether one is a “related person,” who is thereby a “covered party,” certain suppositions are possible. For example, we would assume that the single-member LLC wholly owned by a trustee would constitute a related person while, conversely, we would assume that a publicly traded corporation in which a trustee is a three percent owner, but is neither a director nor an officer, would not be a related person. Such conclusions, however, are simply conjecture and will need to be developed through the courts.

Under the statutory formula employed in KyUSTA, a “covered party” is precluded from engaging in any of a variety of transactions that would generally fall within the scope of self-dealing or personnel appropriation. Where, for example, a trustee utilizes property of the statutory trust for a personnel transaction, the trustee will be obligated to remit any and all gains realized from it to the statutory trust. The fairness of the terms upon which the property was utilized will not be an aspect of the analysis.

This formula, as a default, preserves the traditional rule that a trustee may not utilize trust property for their own benefit, irrespective of the terms on which they act. The governing instrument may not alter the limitations of this section. It may, however, provide a mechanism by which, with disclosure, prior consent of either a committee of disinterested trustees or the beneficial owners may approve a proposed transaction between the statutory trust and a covered party to the effect that the transaction will be valid and binding upon all parties thereto. If the approval is to be made by the disinterested trustees, there must be at least two of them; a single disinterested trustee cannot approve what would otherwise be an impermissible transaction with a “covered party.” Approval of the proposed transaction by the beneficial owners, absent private ordering to the contrary, requires the vote of the majority. Crucially, approval

334. _Id_. _But see_ UNIF. STAT. TRUST ENTITY ACT § 507(a), 6B U.L.A. 118 (2012 supp.).
335. _See also_ Rutledge and Geu, _The Analytic Protocol_, supra note 331, at 494. In 2012 the Kentucky General Assembly amended the LLC and partnership acts to expressly preclude a “fairness” defense for conflict transactions. _See_ KY. REV. STAT. ANN. § 275.170(3); _id_. § 362.1-404(5); _id_. § 362.2-408(5); _id_. § 362.250(3).
336. _See also_ RESTATEMENT (SECOND) OF TRUSTS § 203 (1959) (“The trustee is accountable for any profit made by him through or arising out of the administration of the trust, although the profit does not result from a breach of trust.”); _id_. § 205(b) (“If the trustee commits a breach of trust, he is chargeable with . . . (b) any profit made by him through the breach of trust . . .”).
339. _Ky. Rev. Stat. Ann_. § 386A.1-040(2)(k). This requirement of at least two trustees is consistent with the rule under the Business Corporation Act wherein a single director does not have the authority to sanction a conflict transaction between another director and the corporation. _See_ KY. REV. STAT. ANN. § 271B.8-310(3). _Accord_ MOD. BUS. CORP. ACT §§ 8.62(a), (c).
of a transaction between a statutory trust and a “covered party” must take place prior to its consummation; there is, under KyUSTA, no concept of retroactive validation. This requirement is intended to be an in terrorem provision pursuant to which, in the instance of any question as to whether a transaction between a “covered party” and a statutory trust is legitimate, the covered party will insist upon prior approval as they should not be willing to accept the risk that all gain on the transaction will have to be surrendered. A burden of full disclosure of the terms of the proposed transaction will rest on the covered person seeking the opportunity to do business with the statutory trust. The requirement that any approval of what would otherwise be a conflict transaction be a priori rather than ex post facto is an intended limitation on the otherwise applicable rule permitting retroactive approval.\footnote{341 See Restatement (Third) of Agency § 8.06, cmt. b (2006).}

A trustee’s duty of loyalty will be to the statutory trust.\footnote{342 See Ky. Rev. Stat. Ann. § 386A.5-050(1) (“best interests of the statutory trust”); Mod. Bus. Corp. Act. § 8.30, cmt., supra note 327.} Where the statutory trust is a series trust, and there is at least one trustee obligated to discharge the duty of loyalty to the trust as a whole (including all of the series), the governing instrument may provide that another trustee’s duty of loyalty may be to consider the interest of the trust alone (absent certain or all series) or to the interests of only one or more of the series.\footnote{343 See Ky. Rev. Stat. Ann. § 386A.5-010(2).}


A statutory trust may provide indemnification to its trustees, although indemnification is not mandatory.\footnote{347 Ky. Rev. Stat. Ann. § 386A.5-090(1); § 275.180 (stating that an LLC “may . . . provide for indemnification”); id. § 271B.8-510(1) (stating that “a corporation may indemnify”). But see
the absence of a provision in the governing instrument providing indemnification, common law rights of indemnification will be applicable.\textsuperscript{348} Irrespective of any private ordering making indemnification mandatory in favor of the trustee, indemnification may not be provided for actions described in KRS section 386A.1-040(2)(q).\textsuperscript{349} A statutory trust may advance expenses to a trustee subject to an undertaking to repay those amounts if it is determined that they would not be entitled to indemnification or advancement.\textsuperscript{350} Although there is no statutory requirement that the undertaking be secured, such a requirement may be set forth in the governing instrument or be imposed by the disinterested trustees. Under USTA there is no requirement that the undertaking be in writing;\textsuperscript{351} a non-uniform provision in KyUSTA requires that the undertaking be in a record.\textsuperscript{352}

Addressing a lacuna in USTA, KyUSTA addresses who makes the determination that indemnification or advancement will be made. Unless otherwise directed by the governing instrument, the determination will be made by a committee of at least two trustees not parties to the underlying action or a majority of the beneficial owners\textsuperscript{353} not including the votes of beneficial interests held or voted under the control of the trustees seeking indemnification.\textsuperscript{354}

The governing instrument of a statutory trust may authorize a person to provide binding instructions to a trustee or other person otherwise charged with management of the statutory trust.\textsuperscript{355} Such a directed trustee or other representative of the statutory trust is bound to follow those directions unless they are “manifestly contrary” to the terms of the governing instrument or where the trustee or other person\textsuperscript{356} knows or has reason to know that following those

\textsuperscript{348} See, e.g., Restatement (Second) of Trusts §§ 244-48 (1959); Scott & Aschier on Trusts, supra note 85, at chapter 22. See also Ky. Rev. Stat. Ann. § 386A.1-050(1).
\textsuperscript{350} See id. § 386A.5-090(1)(b).
\textsuperscript{351} But see Model Bus. Corp. Act § 8.53(a)(2) (requiring that the undertaking be in writing); Ky. Rev. Stat. Ann. § 271B.8-530(1)(b) (same).
\textsuperscript{352} See Ky. Rev. Stat. Ann. § 386A.5-090(1)(b) (stating that it “shall be in a record.”). See also Rutledge & Habbert, supra note 3, at 1083 (noting that no writing or security is required).
\textsuperscript{353} See also Ky. Rev. Stat. Ann. § 386A.6-020(2).
\textsuperscript{354} Id. § 386A.5-090(2). This provision is based upon the prior law reflected in the Kentucky Business Corporation Act. See id. §§ 271B.8-550(2)(b), (d).
\textsuperscript{355} Id. § 386A.5-100(1). See also Unif. Stat. Trust Entity Act § 510(a), 6B U.L.A. 120 (2012 supp.).
\textsuperscript{356} While USTA § 510 typically refers to a “trustee or other person,” certain instances do not address an “other person” with respect to certain carve-outs from the requirement to follow the directions given. To provide consistency, the addition of “other person” has been made in parallel with all KyUSTA provisions based upon USTA § 510 references to “trustee.” See also Rutledge & Habbert, supra note 3, at 1083.
directions would constitute a “breach” of fiduciary duty. In KyUSTA this provision is non-uniform. Under the uniform act, a trustee is not required to follow a direction if doing so would involve a “serious breach” of the trustee’s fiduciary obligations.

What constitutes a “serious breach” of fiduciary duty, necessarily implying that there exists a category of actions that while constituting a breach of fiduciary duty are not in and of themselves “serious,” is not addressed. It is questionable whether it will be practicable to follow the advice of USTA’s comment to the effect that direction be sought from a court.

Further, the comment to the effect that a “serious breach” of fiduciary duty is intended to exclude breaches that are themselves inconsequential, immaterial, or technical confuses the actuality of the breach with the determination of what damages might be owing consequent thereto. In effect, the uniform act would apply the rule de minimis non curat lex with respect to a fiduciary in order to determine whether or not a breach has taken place. Under the non-uniform formula of KyUSTA, these issues are avoided, and the trustee is answerable for a breach of fiduciary duty, irrespective of its magnitude. The “manifestly contrary” standard of USTA has not in KyUSTA been modified. Note that the trustee, in assessing whether the instructions given are “manifestly contrary” to the governing instrument, is bound by not only fiduciary duties but also the

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357. KY. REV. STAT. ANN. § 386A.5-100(2). But see UNIF. STAT. TRUST ENTITY ACT § 510(c), 6B U.L.A. 120 (2012 supp.). The ability to modify this provision is limited. See KY. REV. STAT. ANN. § 386A.1-040(2)(m). Accord UNIF. STAT. TRUST ENTITY ACT § 104(9), 6B U.L.A. 89 (2012 supp.).

358. This comment provides:

In determining whether a direction is “manifestly contrary to the terms of the governing instrument: or “would constitute a serious breach of fiduciary duty by the trustee,” the trustee must comply with the standards of conduct stated in Section 505. The drafting committee contemplated that, in accord with conventional trust practice, a trustee could apply to the appropriate court for a determination of whether an instruction falls within the exclusion of subsection (c). See Restatement (Third) of Trusts § 71 (2007).

UNIF. STAT. TRUST ENTITY ACT § 510(c), cmt., 6B U.L.A. 120 (2012 supp.). While certainly consistent with prior law (see, e.g., GEORGE GLEASON BOGERT AND GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES (Rev. 2d ed. 1993) § 543(V) at note 89; WILLIAM C. DUNN, TRUSTS FOR BUSINESS PURPOSES § 174 (p. 305) (Callaghan and Co. 1922)), the likelihood of a timely ruling is questionable and whether the assets of the statutory trust should be expended in such an action is an additional question. Furthermore, the fact that the trustee is not comfortable proceeding with the course of action absent judicial sanction may well be probative evidence that the action is not permissible. As the adage provides, “It’s not the answer that is indiscreet but the question.”


360. The deletion of “serious” in KyUSTA brings the provision more in line with the prior law. See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 185 (1959).
The governing instrument may provide that the person directing a trustee or other representative of the statutory trust is to be or is not to be treated as a trustee or one owing duties, including fiduciary duties, to the statutory trust or the beneficial owners thereof. The wording of this provision is important. It does not provide that the person giving direction to, for example, a directed trustee, is not to be treated as a trustee and automatically relieved of, for example, fiduciary obligations; at the same time it does not provide the contrary rule. Rather, KyUSTA provides that the governing instrument may address the situation. The statute does not provide a default, one way or the other, as to the proper characterization of the person or party providing the instructions to the directed trustee. This is a point of significant flexibility for which even a default rule may not be appropriate in light of the cost of recalling its existence and the necessary private ordering to modify its application. A comprehensive review of the point having been elsewhere set forth, it is incumbent upon a governing instrument’s drafter to consider that guidance and apply it to the nature of the directive power at issue.

Trustees may delegate duties provided the delegation is effected in accordance with the applicable standard of care. In KyUSTA the uniform language on the capacity to delegate, including to a co-trustee, has been simplified but without an intention to set forth a different rule. The trustee must determine the scope and terms of the delegation and periodically review the agent’s performance and compliance with the terms of the delegation. The

361. See KY. REV. STAT. ANN. § 386A.1-060(6).
362. See id. § 386A.5-060.
363. Id. § 386A.1-030(4)(q). See also UNIF. STAT. TRUST ENTITY ACT § 510(b), 6B U.L.A. 120 (2012 supp.).
364. The laws of certain states do define (something of) a default rule. See, e.g., CONN. CODE § 34-517(a) (2005) (“Except to the extent otherwise provided in the governing instrument of a statutory trust, neither the power to give direction to a trustee or other persons or the exercise thereof by any person, including a beneficial owner, shall cause such person to be a trustee.”).
365. See RESTATEMENT (SECOND) OF TRUSTS § 185, cmt. c - e, h (1959).
366. Permitting delegation by trustees is a departure from the common law, wherein delegation is not permitted. See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 171 (1959); WRIGHTINGTON, BUSINESS TRUSTS, supra note 44, at 247. The capacity of an individual trustee to delegate duties and powers to a co-trustee is separately referenced in USTA at section 511(b). See UNIF. STAT. TRUST ENTITY ACT § 511(b), 6B U.L.A. 121 (2012 supp.). Without intending to alter the applicable rule, KyUSTA simplifies the provision, combining in a single subsection the right of delegation, including to a co-trustee.
368. See also Rutledge & Habbert, supra note 3, at 1085, n.200.
369. KY. REV. STAT. ANN. §§ 386A.5-110(1)(b), (c). See also UNIF. STAT. TRUST ENTITY ACT § 511(a), 6B U.L.A. 121 (2012 supp.).
agent to whom a trustee has delegated authority owes a duty to comply with the terms of the delegation and otherwise of ordinary care and diligence. ³⁷⁰ The language in KyUSTA as to the delegating trustee’s responsibility for the agent’s discharge of the function is non-uniform. Even where a trustee satisfies their obligations in making a delegation, they are liable to either the statutory trust or to beneficial owners for an agent’s failure with respect to a delegated function. ³⁷¹ This provision evidences a reversal of the policy election set forth in USTA to the effect that the delegating trustee is not responsible for the agent’s discharge of a delegated function. ³⁷² KyUSTA, in accordance with generally applicable law on agency, will hold the delegating trustee liable for the sub-agent’s performance. ³⁷³ By accepting a delegation from a trustee, the agent submits to the jurisdiction of the Kentucky courts. ³⁷⁴

KyUSTA addresses who constitutes a disinterested trustee when the trust is registered as an investment company. ³⁷⁵ This provision precludes an argument to the effect that, although a particular trustee was disinterested in accordance with the terms of the Investment Company Act, such trustee may still be interested under the KyUSTA.

While the Act is itself silent as to the standards to be employed in an action to remove a trustee, it is inconceivable that a court does not have the power to do so. ³⁷⁶

Article 6 – Beneficial Owners

A “beneficial owner” is one who owns a beneficial interest in a statutory trust. ³⁷⁷ Absent contrary private ordering in the governing instrument, a

³⁷⁰ KY. REV. STAT. ANN. § 386A.5-110(2). See also UNIF. STAT. TRUST ENTITY ACT § 511(a), 6B U.L.A. 122 (2012 supp.). Any failure could be enforced, in addition to the trustees, by the beneficial owners through a derivative action. USTA imposes a duty of “reasonable care” on the trustee’s agent. UNIF. STAT. TRUST ENTITY ACT § 511(3), 6B U.L.A. 121 (2012 supp.). Drawing from agency law, KyUSTA requires that the agent “act with the care, competence, and diligence normally exercised by agent in similar circumstances.” See RESTATEMENT (THIRD) OF AGENCY § 8.08 (2006).

³⁷¹ KY. REV. STAT. ANN. § 386A.5-110(3). But see UNIF. STAT. TRUST ENTITY ACT § 511(d), 6B U.L.A. 122 (2012 supp.). See also Rutledge & Habbert, supra note 3, at 1085, n.204.

³⁷² See UNIF. STAT. TRUST ENTITY ACT § 511(d), 6B U.L.A. 122 (2012 supp.).

³⁷³ See, e.g., RESTATEMENT (THIRD) OF AGENCY § 3.15, cmt. d (“An appointing agent is responsible to the principal for the subagent’s conduct.”), RESTATEMENT (SECOND) OF TRUSTS § 225(2) (1957) (discussing liability of trustee for certain actions undertaken by the trustee’s agent).


³⁷⁵ KY. REV. STAT. ANN. § 386A.5-120. See also UNIF. STAT. TRUST ENTITY ACT § 512, 6B U.L.A. 123 (2012 supp.).

³⁷⁶ See, e.g., WRIGHTINGTON, BUSINESS TRUSTS, supra note 44, at § 47 (“A court of equity can always remove a trustee for cause.”) (citation omitted). See also KY. REV. STAT. ANN. §§ 386A.1-050(1), (3).
beneficial interest in a statutory trust is freely transferable. If the same person is both the sole trustee and sole beneficial owner, all transfer limitations in the governing instrument are void. This provision intentionally limits the ability to use the statutory trust for certain abusive asset protection structures. A beneficial interest is personal property, irrespective of the nature of the properties in turn held by the statutory trust, and the beneficial interest in the statutory trust itself does not create an interest in any of the properties owned by the statutory trust. A beneficial owner is not afforded a pre-emptive right with respect to any beneficial or other interests subsequently issued by the statutory trust.

In a departure from the uniform act, KyUSTA utilizes a provision that centralizes all of the rules with respect to voting thresholds required for action by the beneficial owners. Section 602 of USTA purported to recite a generally applicable rule that the beneficial owners act by a majority vote; this provision failed to address numerous other provisions of USTA that required a unanimous vote for action. As set forth in KyUSTA, a division is made between those

377. KY. REV. STAT. ANN. § 386A.1-020(3). Accord UNIF. STAT. TRUST ENTITY ACT § 102(1), 6B U.L.A. 83 (2012 supp.). This treatment is consistent with that seen in corporate law wherein, in order to be a stockholder, one must own shares. Conversely, under the Kentucky LLC Act, it is possible to hold a limited liability company interest without being a member just as it is possible to be a member without holding a limited liability company interest. See KY. REV. STAT. ANN. §§ 275.195(2), (3); see also Rutledge, The 2007 Amendments, supra note 141, at 259.


379. KY. REV. STAT. ANN. § 386A.6-060(1).

380. Id. § 386A.6-010(4).

381. See also Thomas E. Rutledge, Kentucky Responds Not to Olmstead, But to the Problem of Asset Protection SMLLCs, XXVII PUBOGRAM 17 (April 2011), available at SSRN: http://ssrn.com/abstract=1829385.


384. Id. § 386A.6-010(5). This rule is consistent with that employed in Kentucky business corporations organized under the current Kentucky Business Corporation Act (see KY. REV. STAT. ANN. § 271B.6-300(1)(a)), but is the contrary of the rule employed with respect to business corporations formed under the predecessor statute. See id. §§ 271B.6-300(1)(b), 271B.6-300(4), 271A.130 (repealed 1988 Ky. Acts, ch. 23, § 248 effective Jan. 1, 1989).

385. KY. REV. STAT. ANN. § 386A.6-020.

386. UNIF. STAT. TRUST ENTITY ACT § 602, 6B U.L.A. 124 (2012 supp.).

actions that require, as a default rule, the unanimous vote of the beneficial owners, being those for amendments to the governing instrument, compromise of a beneficial owner’s contribution obligation, extension of the term of the statutory trust beyond a term set forth in the governing instrument, or the conversion, merger or dissolution of the statutory trust, 388 while setting forth a default rule of a majority consent for other actions. 389 These rules may be modified in the governing instrument. Beneficial owners are afforded the capacity to vote by proxy, but the proxy must be set forth in a record. 390 There has not been incorporated into KyUSTA the uniform language that appears at USTA section 602(2) governing action by written consent. 391 Rather, the procedures that should apply with respect to an action by written consent of the beneficial owners should be specified in the governing instrument pursuant to the authorization to do so. 392

In consideration for the receipt of a beneficial interest, a beneficial owner may contribute cash, property, or services rendered for a promissory note or other obligation to make a contribution of cash or property in the future, or to perform services in the future. 393 The obligation to make a contribution, whether in the form of cash, property, or services, is not enforceable unless set forth in a writing signed by that beneficial owner; this statute of frauds requirement in non-uniform and is based upon language in the Kentucky LLC Act. 394 Beneficial owners may by unanimous consent waive a beneficial owner’s obligation to make a contribution to the statutory trust. 395

Unless a contrary rule is set forth in the governing instrument, a beneficial owner will not be relieved of the obligation to make a contribution by reason of death or disability; in the event of any failure to perform on an obligation to contribute either property or services, the statutory trust has the option of demanding cash in lieu of the contribution. 396 While an obligation to contribute may be waived by the other beneficial owners, 397 to the extent a creditor has relied upon the contribution obligation the creditor may enforce it irrespective of

388. KY. REV. STAT. ANN. § 386A.6-020(1).
389. Id. § 386A.6-020(2).
390. Id. § 386A.6-020(3).
392. KY. REV. STAT. ANN. § 386A.1-030(4)(d).
393. Id. § 386A.6-030(2). Accord §§ 271B.6-210(2), 275.195(1).
394. See id. §§ 386A.6-030(3). See also § 275.200(1). By way of contrast, neither Kentucky RUPA nor Kentucky ULPA requires that a capital contribution obligation, even a capital contribution obligation of a limited partner, be set forth in writing in order to be enforceable.
395. Id. §§ 386A.6-020(1)(b), 386A.6-030(5). See also § 275.200(4).
397. Id. §§ 386A.6-030(5), 386A.6-020(1)(b). While these provisions carry forward the default rule of USTA to the effect that the waiver of a contribution obligation requires the unanimous consent of the other beneficial owners, the placement of the rule in KyUSTA is non-uniform.
its waiver.\textsuperscript{398} The governing instrument, either in substitution of or in addition to other statutory rules with respect to a default of a contribution obligation, may detail various consequences that follow therefrom, including forfeiture of the beneficial interest.\textsuperscript{399}

Upon the declaration of a distribution, whether interim or liquidating, a beneficial owner has with respect thereto the rights of a creditor of the statutory trust.\textsuperscript{400} A beneficial owner has no right to demand or receive a distribution other than in cash, but likewise may not be required to accept a distribution in kind that is disproportionate in value to the underlying property.\textsuperscript{401}

A beneficial interest in a statutory trust is subject to redemption on the terms detailed in the governing instrument.\textsuperscript{402} Absent the governing instrument providing for redemption, there is no statutory right to redemption.

The governing instrument may provide the means by which a beneficial ownership will be determined and evidenced,\textsuperscript{403} presumably including mechanisms such as the issuance of certificates\textsuperscript{404} and book entry.\textsuperscript{405}

The charging order provision of KyUSTA is applicable if and only if the governing instrument has modified the rule of free transferability of a beneficial interest to the effect that the transfer thereof is restricted such that a transferee would not succeed to all rights of a transferor.\textsuperscript{406} In those instances, the exclusive remedy of a beneficial owner’s creditor will be a charging order pursuant to which any distributions that might otherwise be made to the beneficial owner who is the judgment debtor will be transmitted by the statutory

\textsuperscript{398} KY. REV. STAT. ANN. § 386A.6-030(4). See also § 275.200(5), 362.2-502(3).

\textsuperscript{399} Id. § 386A.6-030(4). Accord §§ 275.003(2), 362.1-103(4), 362.2-110(4). See also Rutledge, \textit{The 2010 Amendments}, supra note 154, at 395-96.

\textsuperscript{400} KY. REV. STAT. ANN. § 386A.6-040(1). While the import of this provision is in line with that of USTA § 604(a), the language in KyUSTA is non-uniform. Compare Unif. STAT. TRUST ENTITY ACT § 604(a), 6B U.L.A. 126 (2012 supp.). Accord KY. REV. STAT. ANN. §§ 271B.6-400(6), 275.235, 362.471, 362.2-507. The governing instrument may set a mechanism for determining the record date for a distribution. KY. REV. STAT. ANN. § 386A.1-030(4)(o). Accord Unif. STAT. TRUST ENTITY ACT § 103(e)(14), 6B U.L.A. 87 (2012 supp.).

\textsuperscript{401} KY. REV. STAT. ANN. § 386A.6-040(3). The language in KyUSTA, as to these points, sets forth the same rule as does USTA, but in non-uniform language adopted from prior Kentucky law. Compare id. § 275.220(2).

\textsuperscript{402} Id. § 386A.6-050. The language “On the terms set forth in the governing instrument” is non-uniform.

\textsuperscript{403} Id. § 386A.1-030(4)(a). See also Unif. STAT. TRUST ENTITY ACT § 103(e)(1), 6B U.L.A. 86 (2012 supp.).

\textsuperscript{404} Under Kentucky’s business trust act, a beneficial owner’s interest was required to be evidenced by a certificate. See KY. REV. STAT. ANN. §§ 286.370(1), 386.400.

\textsuperscript{405} The drafter of the governing instrument needs to consider as well the requirement for the statutory trust having notice of the transfer of a beneficial interest. See Baar v. Fidelity & Columbia Trust Co., 193 S.W.2d 1011 (Ky. 1946).

\textsuperscript{406} KY. REV. STAT. ANN. § 386A.6-060(1).
trust to the judgment creditor. The charging order provision of KyUSTA is significantly non-uniform, but is conformed to the charging order provisions that already exist in the Kentucky LLC Act and also the Kentucky Partnership and Limited Partnership Acts. The charging order constitutes a lien on the beneficial interest holder’s right to distributions from the statutory trust, entitling the holder thereof to receive the distributions when and as made.

A receiver may be appointed to receive the distributions and enforce the beneficial owner’s right to any distribution declared, and the court issuing the charging order may “make all other orders necessary to give effect to the charging order.” It bears noting that the capacity of the court to issue orders in connection with the enforcement of a charging order is limited to insuring that the judgment debtor receives distributions as declared by the statutory trust; it does not extend to the right to interfere in the internal management of the statutory trust such as by compelling a distribution or a redemption. A beneficial owner or a transferee of a beneficial interest is entitled to the benefit of any exemption laws applicable to the beneficial interests. The right of a judgment creditor to seek a charging order against a non-transferable beneficial interest is not subject to contrary private ordering, but presumably the governing instrument could provide additional provisions not impacting upon the rights of a third party, an example being a waiver of any right of the statutory trust for its beneficial owners to redeem the beneficial interests held by the judgment debtor.

407. See id. § 386A.6-060.
408. The lack of uniformity is two-fold. Initially, the charging order formula departs from that in USTA. Compare UNIF. STAT. TRUST ENTITY ACT § 606, 6B U.L.A. 127 (2012 supp.). Further, as part of the Entity Harmonization project (see supra note 1), the charging order was entirely deleted from USTA.
410. KY. REV. STAT. ANN. § 386A.6-060(3).
411. Id. § 386A.6-060(2).
412. Id.
413. See id.
414. Id. § 386A.6-060(5).
415. Id. § 386A.1-040(2)(p).
A beneficial owner may transact business with the statutory trust on the same terms as may any third party provided that the beneficial owner in question is not themselves a “covered person.” 416

A pair of non-uniform provisions in KyUSTA provide limitations upon distributions that may be made and the consequences of an improperly made distribution. 417 Initially, a distribution may be authorized by the trustees provided it is not either in violation of a restriction in the governing instrument or the statutory limitations. 418 There is provided a default rule that, absent the determination of a different record date, it shall be the date the distribution is authorized. 419 No distribution may be made if after taking its effect into account the statutory trust will not be able to pay its debts and obligations as they come due in the ordinary course, if its total assets would be less than its total liabilities, or if otherwise prohibited by the governing instrument. 420 There are set forth a series of rules that address the mechanisms by which it may be determined that a distribution is or is not improper and how and when the effect of a distribution is to be measured. 421 With respect to a distribution by a series of property of or associated with the series to the beneficial owners associated with the series, the limitations on distributions are applied at the series level. 422

A trustee who votes for or assents to a distribution that violates any of the limitations is personally liable to the statutory trust for the difference between the amount that could properly have been distributed and the amount actually declared if it can be shown that the trustee violated his duty of care. 423 A trustee liable to the statutory trust for the amount of an improper distribution is entitled to contribution from each other trustee who would be liable therefrom and from each beneficial owner for the amount the beneficial owner received knowing it to have been improper. 424 It bears noting that the potential exposure of a beneficial owner for the return of a distribution received is conditioned upon that beneficial owner knowing the distribution to have been improper. This is the same

418. Id. §§ 386A.6-080(1), (3).
419. Id. § 386A.6-080(2).
420. Id. §§ 386A.6-080(3). These limitations are not subject to contrary private ordering. See id. § 386A.1-040(2)(c).
421. Id. § 386A.6-080(6).
422. Id. § 386A.6-080(4).
424. Id. § 386A.6-090(2).
standard employed to the Kentucky Business Corporation Act\(^{425}\) and departs from the standard employed in both the Kentucky LLC Act\(^ {426}\) and the Revised Uniform Partnership Act (2006),\(^ {427}\) which do not have a “knowing” defense to the return of an improper distribution. A proceeding to seek recovery of an improper distribution must be commenced within two years from the date the effect of the distribution is measured,\(^ {428}\) although the “doctrine of adverse domination” may apply to toll this period of limitation.\(^ {429}\)

A beneficial owner has the right to receive information from the statutory trust or a trustee, as it relates to such affairs of the statutory trust as are reasonably related to the beneficial owner’s interest therein.\(^ {430}\) While the rules with respect to the availability of information are not subject to restriction the governing instrument, it may include standards as to how “reasonably related to the beneficial owner’s ability to enforce its rights as a beneficial owner” will be determined, provided that those standards are not themselves “manifestly unreasonable.”\(^ {431}\) Tracking language from the LLC Act,\(^ {432}\) the governing instrument may impose reasonable limitations upon the use of (as contrasted with access to) statutory trust records.\(^ {433}\)

A beneficial owner may bring suit on their own behalf or on behalf of the statutory trust. In the case of a direct action, the beneficial owner may bring an action against the statutory trust or a trustee thereof to address injury sustained by or to enforce an obligation owed to that beneficial owner.\(^ {434}\) The availability of such a direct action is contingent upon the beneficial owner being able to prevail without showing an injury or a breach of any obligation owed to the statutory trust itself.\(^ {435}\) Alternatively, the beneficial owner may bring a derivative action on behalf of the statutory trust, in which instance any proceeds


\(^{426}\) Id. § 275.230(2)(b).

\(^{427}\) Id. § 362.1-1003(2).

\(^{428}\) Id. § 386A.6-090(3).


\(^{430}\) KY. REV. STAT. ANN. § 386A.6-100(1).

\(^{431}\) Id. § 386A.1-040(2)(u).

\(^{432}\) See id. § 275.185(5).

\(^{433}\) Id. § 386A.6-100(2). The shift in the burden of demonstrating reasonableness will apply when the governing instrument may be amended by less than all the beneficial owners (*contra* KY. REV. STAT. ANN. § 386A.6-020(1)(a) and a limitation has been adopted by less than a unanimous vote, the beneficial owner seeking the information not having voted in favor of the amendment.

\(^{434}\) Id. § 386A.6-110(1).

\(^{435}\) Id. A similar rule appears in Kentucky’s limited partnership law. See id. §§ 362.2-1001(1), (2).
or other benefits of the action belong to the trust and not to the beneficial owner bringing the action on its behalf.\textsuperscript{436} Provided the derivative action is successful, the plaintiff beneficial owner’s reasonable expenses and attorneys’ fees may be recovered from the trust.\textsuperscript{437}

In order to initiate a derivative action the beneficial owner must have been a beneficial owner when the conduct giving rise to the cause of action occurred and also be an owner at the time the action has commenced.\textsuperscript{438} Further, the beneficial owner must have made demand upon the trustees for an investigation and redress, or demand must have been futile.\textsuperscript{439} The date and content of the demand for action made or the reason for which the demand should be excused as futile must be detailed in the complaint.\textsuperscript{440} The governing instrument may not restrict the right of a beneficial owner to bring either a direct or a derivative action.\textsuperscript{441} A beneficial owner associated with a series, assuming the series has the capacity to sue and be sued in its own name, may bring on its behalf a derivative action.\textsuperscript{442} By design, the special litigation committee was utilized in Harmonized USTA,\textsuperscript{443} and the Business Corporation Act\textsuperscript{444} is not incorporated in KyUSTA.

**Article 7 - Mergers and Conversions**

Article 7, addressing mergers and conversions involving a statutory trust, is entirely non-uniform and, but for one exception, is based upon predecessor law set forth in Kentucky’s business corporation and LLC acts.

A statutory trust is permitted to merge with any other domestic entity if permitted by the law of that domestic entity,\textsuperscript{445} and likewise may merge with any foreign entity provided that the transaction is not prohibited by the foreign law.\textsuperscript{446} There exist, however, exclusions for mergers with nonprofit corporations and LLCs. The standards are intentionally different for a domestic versus a foreign merger. With respect to a foreign merger, KyUSTA affords additional

\textsuperscript{436} KY. REV. STAT. ANN. § 386A.6-110(2), (5).
\textsuperscript{437} Id. § 386A.6-110(9)(b). A similar rule appears in Kentucky’s limited partnership law. See id. § 362.2-1005(2).
\textsuperscript{438} Id. §§ 386A.6-110(3). Accord §§ 271B.7-400(1), 362.513, 362.2-1003.
\textsuperscript{439} Id. § 386A.6-110(2).
\textsuperscript{440} Id. § 386A.6-110(4).
\textsuperscript{441} Id. § 386A.1-040(2)(v).
\textsuperscript{442} KY. REV. STAT. ANN. § 386A.6-110(8). This subsection has no counterpart in USTA.
\textsuperscript{444} See MOD. BUS. CORP. ACT § 7.44(b)(2); KY. REV. STAT. ANN. § 271B.7-400(2).
\textsuperscript{445} KY. REV. STAT. ANN. § 386A.7-010(1).
\textsuperscript{446} Id. § 386A.7-010(2).
flexibility by which, in particular, a foreign business trust may merge into a Kentucky statutory trust for the purpose of thereafter being bound by KyUSTA.

In order to proceed with a merger, each constituent organization must adopt and approve a plan of merger setting forth: the name of each constituent organization and identifying the constituent organization that will survive the transaction; the terms and conditions of the merger, including a statement as to whether limited liability is retained by the surviving constituent organization; the manner and basis of converting the interest of the various constituent organizations into interest in the surviving entity or other property; any desired amendments to the organizational documents of the surviving constituent entity that will be affected by the merger; and such other terms as may be desired. With respect to each constituent organization that is a constituent statutory trust, the plan of merger must be approved by the beneficial owners, and absent contrary private ordering in the governing instrument, a merger must have the unanimous approval of the beneficial owners. Each constituent organization that is not a statutory trust must approve the transaction in accordance with its governing law.

Unless provided in the governing instrument, a beneficial owner of a statutory trust does not have a right to dissent with respect to a merger, and each organization has such rights to abandon the merger as are provided in either the plan of merger or the law otherwise governing that constituent organization. After approval of the plan of merger, the surviving constituent organization is to deliver to the Secretary of State articles of merger executed by each constituent organization setting forth the name and jurisdiction of organization of each constituent organization, the plan of merger, the name of the surviving constituent organization, a statement that the plan of merger was duly authorized by each constituent organization and, if the surviving constituent organization is not organized in Kentucky, a statement that it accepts liability for obligations of each Kentucky organized constituent organization accrued through the merger and appoints the Secretary of State as the agent for service of process.

447. See id. § 386A.1-020(6).
448. Id. § 386A.7-060.
449. “Constituent statutory trust” is a defined term. See id. § 286A.1-020(7).
450. Id. § 386A.7-020(1).
451. KY. REV. STAT. ANN. §§ 386A.7-020(1), (2).
452. Id. § 386A.7-020(3). Accord §§ 275.350(4), 362.1-906(6), 362.2-1107(4). In contrast, shareholders in a Kentucky business corporation or a Kentucky cooperative have the right to dissent upon a merger. See id. §§ 271B.13-020(1)(a)(1), 272.321. See also Rutledge, The 2007 Amendments, supra note 141, at 248.
453. KY. REV. STAT. ANN. § 386A.7-020(4)
The merger is effective upon the effective time and date of the articles of merger as determined under KRS section 14A.2-070.\textsuperscript{455} Upon the effective time and date of the merger, the constituent organizations\textsuperscript{456} to the merger become a single entity, that being the surviving constituent organization, and each constituent organization except the surviving constituent organization ceases to exist;\textsuperscript{457} the surviving organization comes into possession of all the rights, privileges, immunities and also all restrictions and liabilities of each of the constituent organizations. All property of the constituent organization, whether real, personal, or mixed, become those of the surviving entity, and it also succeeds to its various contract rights.\textsuperscript{458} At the same time, the surviving constituent organization is liable for all debts and obligations of each constituent organization.\textsuperscript{459} Liens on the property of any constituent organization are not impacted by and survive the merger.\textsuperscript{460} The interest of each constituent organization are automatically converted as provided in the plan of merger, and all amendments to the governing instrument of the surviving constituent organization come into force and effect.\textsuperscript{461} If a non-surviving constituent organization is either a partnership or a limited partnership in which a partner has personal liability, their liability for pre-merger obligations will be determined under the applicable partnership or limited partnership law.\textsuperscript{462}

Domestic business entities, other than not-for-profit corporations or LLCs, may convert into the form of a statutory trust.\textsuperscript{463} Irrespective of any lower threshold defined in an organic document, the conversion to a statutory trust must be approved by all of the partners if the converting organization is a general or a limited partnership, by all of the members if the converting organization\textsuperscript{464} if a limited liability company, and by both the board of directors and all of the shareholders is the converting organization is a corporation.\textsuperscript{465} After approval of the conversion, the converting organization files a certificate of trust with the Secretary of State that, in addition to the requirements otherwise generally applicable, recites: that the statutory trust was created by means of a conversion;

\textsuperscript{454} Id. § 386A.7-040(1).
\textsuperscript{455} Id. § 386A.7-040(2).
\textsuperscript{456} “Constituent organization” is a defined term. See id. § 386A.1-020(6).
\textsuperscript{457} Id. § 386A.7-050(2).
\textsuperscript{458} Id. § 386A.7-050(3).
\textsuperscript{459} K Y. REV. STAT. ANN. §§ 386A.7-050(4), (6).
\textsuperscript{460} Id. § 386A.7-050(7).
\textsuperscript{461} Id. § 386A.7-050(8).
\textsuperscript{462} Id. § 386A.7-050(9).
\textsuperscript{463} Id. § 386A.7-060(1). The equivalent transaction for a foreign entity is an election, pursuant to KY. REV. STAT. ANN. § 386A.10-040(6), to be governed by KyUSTA.
\textsuperscript{464} “Converting organization” is a defined term. See id. § 386A.1-020(10).
\textsuperscript{465} KY. REV. STAT. ANN. § 386A.7-060(2). Shareholders not approving the conversion may exercise dissenting rights. See KY. REV. STAT. ANN. § 271B.13-020(1)(d).
the name and form of organization of the converting organization; and a statement that the conversion was duly approved. A series of rules then addresses the consequences of the conversion to certain organic documents of the converting organization.

The converted statutory trust is for all purposes the same entity that existed before the transaction, having all of the property and contract rights as well as the liabilities of the converting organization. An action against the converting organization may be continued against the converted statutory trust. Upon the conversion becoming effective, the governing instrument of the converted statutory trust becomes binding upon each beneficial owner and trustee of that converted statutory trust.

Article 8 - Dissolution and Winding Up

The provisions of KyUSTA addressing the dissolution of a statutory trust, also encompassing the dissolution of a series, are substantially non-uniform as to USTA, embodying policies and procedures already extant in other Kentucky business organization statutes. The provisions of KyUSTA governing dissolution are mandatory; they are not subject to modification in the governing instrument. The dissolution of a statutory trust that is a series trust necessarily results in the dissolution of each of its series.

Dissolution of a statutory trust may come about consequent to its administrative dissolution, voluntarily upon such events as are specified in the governing instrument, voluntarily with the approval of the beneficial members, consequential to having no beneficial members or judicially.

Administrative dissolution of a statutory trust is governed by the applicable provisions of the Kentucky Business Entity Filing Act. Administrative dissolution will take place consequent to the statutory trust not having a registered office or agent for more than ninety days or for failure to make a timely filing of its annual report. In addition, a statutory trust may be administratively dissolved for failure to respond to interrogatories from the Kentucky Secretary of State. A statutory trust, having been administratively

466. Id. § 386A.7-060(3).
467. Id. §§ 386A.7-060(4)-(7).
469. Id. § 386A.7-070(2)(c).
470. Id. § 386A.7-080(2)(d).
471. KyUSTA subtitle 8.
472. See KY. REV. STAT. ANN. § 386A.1-040(x). Compare UNIF. STAT. TRUST ENTITY ACT §
104(14), 6B U.L.A. 89 (2012 supp.).
473. KY. REV. STAT. ANN. § 386A.4-060(1)(a).
474. Id. § 386A.8-010.
475. Id. §§ 14A.7-010(1)(a)-1(c).
476. See id. § 14A.1-050(1).
dissolved, may be reinstated with that reinstatement relating back to the date of the earlier dissolution.477

The governing instrument may specify an event or events upon which the statutory trust is to dissolve.478 Examples of such provisions would include those requiring the dissolution on a particular date or upon the meeting (or not) of defined financial thresholds.479 A statutory trust may also be dissolved with the approval of the beneficial owners.480 As a default rule that vote of the beneficial owners will need to be unanimous.481 A statutory trust will be dissolved if, for a period of ninety days or more, there are no beneficial owners.482

In a departure from the uniform act, KyUSTA provides for the judicial dissolution of a statutory trust. The provision for judicial dissolution contemplates the use of the statutory trust in situations in which a business corporation, a partnership, or an LLC might otherwise have been utilized. As any of those structures may be judicially dissolved, it seemed appropriate that that same remedy should be available in those circumstances where judicial dissolution might otherwise be available. To that end, a statutory trust may be dissolved upon a demonstration that it is not reasonably practical to operate the statutory trust in accordance with the governing instrument.483 The “not reasonably practicable” standard has antecedents in other business organization laws.484 Breach of fiduciary duty by the trustees, either a single event or a repeated pattern, will justify judicial dissolution; the court will need to determine if the threshold has ever been met. Frustration of economic purpose, violations of the governing instrument not involving a breach of fiduciary duty or any number of other circumstances may likewise justify dissolution. Having determined that judicial dissolution is appropriate, the court must enter a decree to that effect and deliver the decree to the Secretary of State for filing; the dissolution is effective as of the latter of the Secretary of State’s filing of the

477. Id. §§ 14A.7-030(1), (3)(a).
478. USTA, in the process of harmonization, removed the provision permitting the governing instrument to provide for a time or event at which a statutory trust would dissolve (USTA § 801), added an express statement that limits on duration could be set forth in the certificate of trust (USTA § 801(2)(B)) and provided that these provisions could not be varied in the governing instrument. See USTA § 104(17). This policy change was in KyUSTA rejected in that it runs afoul of the modern trend in favor of private ordering in business ventures and limits a statutory trust is a manner foreign to the rules applied in corporations, LLCs and partnership, any of which may, by private ordering, define for themselves a term that is less than perpetual.
479. See KY. REV. STAT. ANN. § 386A.8-010(2)(a).
480. Id. § 386A.8-010(2)(b).
481. See id. § 386A.6-020(2).
482. Id. § 386A.8-010(3).
483. Id. § 386A.8-030(1)(a).
484. See, e.g., id. §§ 275.290(1), 362.1-801(5)(c), 362.2-802(1). This standard is intentionally different from and imposes a more relaxed threshold than does the deadlock standard of the Business Corporation Act. See id. § 271B.14-300.
decree of dissolution or such later date as is specified therein.\textsuperscript{485} There exists no mechanism by which a decree of judicial dissolution, once filed with the Secretary of State and effective, may be withdrawn.

Regardless of whether the dissolution was administrative, voluntary, or judicial, the statutory trust survives and continues to exist as a statutory trust.\textsuperscript{486} A dissolved statutory trust is restricted to activities “appropriate to wind up and liquidate its business and affairs,”\textsuperscript{487} with certain activities, listed on a non-exclusive basis, identified as being appropriate. It is expressly provided that a dissolved statutory trust may enter into agreements with creditors for the resolution of its liabilities.\textsuperscript{488} Dissolution of a statutory trust does not transfer its property\textsuperscript{489} or “abate or suspend” the rules of limited liability.\textsuperscript{490}

Upon judicial dissolution the dissolving court is charged to direct the winding up and liquidation.\textsuperscript{491} In a non-judicial dissolution the winding up and liquidation are undertaken by the trustees,\textsuperscript{492} but on a showing of good cause by a beneficial owner the court may take control of the process.\textsuperscript{493}

The provision by which a dissolving statutory trust gives known creditors notice of its dissolution is based upon prior law,\textsuperscript{494} but has been modified. Where most organizations, including a statutory trust that is not a series trust, are simply permitted to utilize the statutory mechanism for notifying known creditors, it not being mandatory,\textsuperscript{495} the statutory notice procedure is mandatory for a series trust.\textsuperscript{496} This requirement of notice will protect creditors who have dealt only with a particular series and in consequence may be unaware of the identity of the series trust.

The notice of dissolution must list the name of the statutory trust and if it is a series trust the name(s) under which each series has transacted business.\textsuperscript{497} The notice must also contain:

- the information to be set forth in a claim;\textsuperscript{498}

\textsuperscript{486} Id. § 386A.8-040(1).
\textsuperscript{487} Id § 386A.8-040(1).  Accord §§ 271B.14-050(1), 275.300(2).
\textsuperscript{488} Id. § 386A.8-040(1)(c); see also Rutledge, The 2012 Amendments, supra note 6, at 9-11.
\textsuperscript{490} Id. §§ 386A.8-040(3)(e), (f).  Accord §§ 271B.14-050(2)(i), 275.300(4)(e).
\textsuperscript{491} Id. § 386A.8-030(3).  See also id. § 386A.8-050(1).
\textsuperscript{492} Id. § 386A.8-050(1).
\textsuperscript{493} Id. § 386A.8-050(2).  A creditor does not, by means of this provision, have standing to apply for court supervision of the winding up and liquidation.
\textsuperscript{494} See, e.g., §§ 271B.14-060, 275.320.
\textsuperscript{495} See, e.g., KY. REV. STAT. ANN. § 275.320(1) (stating that “upon dissolution . . . a [LLC] may dispose . . . ”) (emphasis added); see also Bear Inc. v. Smith, 303 S.W.3d 137, 145-46 (Ky. Ct. App. 2010).
\textsuperscript{496} KY. REV. STAT. ANN. § 386A.8-060(1).
\textsuperscript{497} Id. § 386A.8-060(2)(e).
the mailing address to which the claim should be sent;\textsuperscript{499}
the deadline of not less than 120 days after the date of the notice by which claims must be received;\textsuperscript{500} and
provide notice that the claim will be barred if not received by the deadline.\textsuperscript{501}

A claim will be barred if having received notice the claimant does not submit the claim within the required period.\textsuperscript{502} A claim will likewise be barred if the claimant whose claim has been submitted and rejected does not within ninety days after the rejection commence an action to enforce it.\textsuperscript{503} Assuming no newspaper publication, the statute is silent as to the treatment of a claim timely submitted upon which the statutory trust neither gives a rejection nor an acceptance. Claims that may be barred do not include those that are contingent or based upon events occurring after the date of dissolution.\textsuperscript{504}

As was the case on the procedures utilized to afford known creditors notice of dissolution, those for notice to unknown creditors are based upon predecessor law. Again, while generally giving notice through these procedures is optional, doing so is mandatory in the dissolution of a series trust.\textsuperscript{505} Notice is given by publication in a general circulation paper for the county in which the principal office in Kentucky, or if none, the registered office where the statutory trust is or was last located.\textsuperscript{506} The published notice must recite:

- the name of the statutory trust and the names under which any series has conducted business;\textsuperscript{507}
- describe the information to be provided in a claim and the address to which it should be mailed;\textsuperscript{508} and
- state that the claim will be barred if a proceeding to enforce it is not brought within two years after publication of the notice.\textsuperscript{509}

The running of the two-year period will bar the claims of:

\begin{itemize}
  \item \textsuperscript{498} Id. § 386A.8-060(2)(b). Accord §§ 271B.14-060(2)(a), 275.320(2)(a), 362.2-806(2)(a).
  \item \textsuperscript{499} Id. § 386A.8-060(2)(c). Accord §§ 271B.14-060(2)(b), 275.320(2)(b), 362.2-806(2)(b).
  \item \textsuperscript{500} Id. §386A.8-060(2)(d). Accord §§ 271B.14-060(2)(c), 275.320(2)(c), 362.2-806(2)(c).
  \item \textsuperscript{501} Id. § 386A.8-060(2)(e). Accord §§ 271B.14-060(2)(d), 275.320(2)(d), 362.2-806(2)(d).
  \item \textsuperscript{502} KY. REV. STAT. ANN. § 386A.8-060(3)(a). Accord §§ 271B.14-060(3)(a), 275.320(3)(a), 362.2-806(3)(a).
  \item \textsuperscript{503} Id. § 386A.8-060(3)(b). Accord §§ 271B.14-060(3)(b), 275.320(4), 362.2-806(3)(b).
  \item \textsuperscript{504} Id. § 386A.8-060(4). Accord §§ 271B.14-060(4), 275.320(4), 362.2-806(4).
  \item \textsuperscript{505} Id. § 386A.8-070(1). See also § 386A.1-020(29) (definition of a "series trust").
  \item \textsuperscript{506} Id. § 386A.8-070(2)(a). Accord §§ 271B.14-070(2)(a), 275.325(2)(a), 362.2-807(2)(a).
  \item \textsuperscript{507} Id. § 386A.8-070(2)(a). Curiously, the equivalent provisions of the corporate, LLC and limited partnership acts do not contain an express requirement to name the entity of whose dissolution notice is being given. Still, the necessity of doing so is obvious.
  \item \textsuperscript{508} KY. REV. STAT. ANN. § 386A.8-070(2)(c). Accord §§ 271B.14-070(2)(b), 275.325(2)(b), 362.2-807(2)(b).
  \item \textsuperscript{509} Id. § 386A.8-070(2)(d). Accord §§ 271B.14-070(2)(c), 275.325(2)(c), 362.2-807(2)(c).
claimants who submitted a claim that was not acted upon;\textsuperscript{511} and
claimants whose claim is contingent or based on an event occurring
after the effective date of dissolution.\textsuperscript{512}

Creditor claims are enforced against assets in the following order:
first, the assets still held by the statutory trust;\textsuperscript{513} and
second, against the assets distributed in liquidation to the beneficial
owners and pro-rata among them.\textsuperscript{514}

An innovation in Kentucky’s business entity laws permits a statutory trust,
having given notice to known and unknown claimants, to apply to a court to
determine the amount to be set aside to address creditor claims.\textsuperscript{515} The statutory
trust must give notice of the proceeding to its known claimants\textsuperscript{516} and a guardian
ad litem may be appointed to represent the interests of the unknown claimants.\textsuperscript{517}
To the extent the court determines that assets are set aside to satisfy unknown or
contingent claims or those based on events arising after the effective date of
dissolution, they will be available for the statutory period for satisfaction of
those obligations, and any further assets distributed in liquidation to the
beneficial owners will not be subject to recovery.\textsuperscript{518} After the two-year period
has run, any assets not distributed in satisfaction of creditor claims will be
distributed among the beneficial owners.\textsuperscript{519}

In the course of winding up, the assets of a statutory trust must be distributed
first to its creditors, a class that may include beneficial owners who are
creditors.\textsuperscript{520} This first priority is not subject to alteration in the governing
instrument.\textsuperscript{521} Second, assuming no contrary private ordering, assets may be

\textsuperscript{510} Id. § 386A.8-070(3)(a). \textit{Accord} §§ 271B.14-070(3)(a), 275.325(3)(a), 362.2-807(3)(a).
\textsuperscript{511} Id. § 386A.8-070(3)(b). \textit{Accord} §§ 271B.14-070(3)(b), 275.325(3)(b), 362.2-807(3)(b).
\textsuperscript{512} Id. § 386A.8-070(3)(c). \textit{Accord} §§ 271B.14-070(3)(c), 275.325(3)(b), 362.2-807(3)(c).

The degree to which a provision of this nature has the effect of an impermissible statute of repose
has not been addressed by the Kentucky courts. \textit{See}, e.g., \textit{Perkins v. Northeastern Log Homes}, 808
S.W.2d 809 (Ky. 1991).

\textsuperscript{513} Id. § 386A.8-070(4)(a).
\textsuperscript{514} KY. REV. STAT. ANN. § 386A.8-070(4)(b).
\textsuperscript{515} Id. § 386A.8-070(5).
\textsuperscript{516} Id. § 386A.8-070(6).
\textsuperscript{517} Id. § 386A.8-070(7).
\textsuperscript{518} Id. § 386A.8-070(8). \textit{But see} § 386A.8-070(4)(b).

\textsuperscript{519} Similar provisions exist in Delaware corporate law and section 710(e) of the Revised
Prototype Limited Liability Company Act. \textit{See} DEL. CODE ANN. tit. 8, § 280(c); \textit{Revised Prototype
Limited Liability Company Act, supra} note 278, at 64-65.

\textsuperscript{520} KY. REV. STAT. ANN. § 386A.8-080(1)(a). For example, a beneficial owner who sold an
asset to the statutory trust in a seller financed transaction would be a creditor under this provision.

\textsuperscript{521} Id. § 386A.1-040(2)(x).
distributed in satisfaction of declared but unpaid distributions. The next level of distributions, and again assuming no contrary private ordering, is to the beneficial owners in proportion to their right to receive distributions prior to dissolution.

Article 9 - Qualification of Foreign Statutory Trust to Transact Business

With one exception, the entirety of Article 9 of USTA has been deleted from KyUSTA, these matters being now governed by the Kentucky Business Entity Filing Act (KyBEFA). It is stated expressly that each foreign statutory trust is subject to the Business Entity Filing Act. What activities will necessitate a certificate of authority, the requirements for and effect of a certificate of authority, and the consequences of the failure to have a required certificate of authority, the revocation of a certificate of authority, and the voluntary relinquishment of a certificate of authority will all be governed exclusively by its terms. The qualification of a foreign statutory trust to transact business does not require any certified record from its jurisdiction of organization, but rather only a representation from its representative that it exists in that foreign jurisdiction. Still, there has been retained from USTA the rules as to the internal affairs of a foreign statutory trust and the rules of liability applicable to beneficial owners, trustees and, among the series of a statutory trust, it being provided that those issues will be governed by the law of the jurisdiction of organization. The specific inclusion of the books and records of the foreign statutory trust within the matters addressed by the law of the jurisdiction of organization is consistent with other Kentucky law. The express statement that the law governing the liability of a particular series of a foreign statutory trust will be governed by the law of its jurisdiction of organization is an

522. Id. § 386A.8-080(1)(b).
523. Id. § 386A.8-080(1)(c). Unlike under the LLC Act, there is not, unless the governing instrument should so provide, a penultimate stage at which a return in satisfaction of contributions is made. See id. § 275.310(3).
524. See generally Rutledge & Tzanetos, supra note 2.
525. KY. REV. STAT. ANN. § 386A.9-010(2).
526. See id. § 14A.9-010.
527. See id. §§ 14A.9-030, 14A.9-050.
528. See id. § 14A.9-020.
529. See id. §§ 14A.9-070, 14A.9-080, 14A.9-090.
530. Id. § 14A.9-060.
531. KY. REV. STAT. ANN. § 14A.9-030(2). See also Rutledge & Tzanetos, supra note 2, at 447.
532. See KY. REV. STAT. ANN. § 386A.9-010(1). See also UNIF. STAT. TRUST ENTITY ACT § 901(a), 6B U.L.A. 146 (2012 supp.).
533. See, e.g., KY. REV. STAT. ANN. § 14A.9-050(3). As to the rationale for the inclusion of this non-uniform language, see Rutledge, The 2007 Amendments, supra note 141, at 238-39.
expansion of the otherwise applicable rules that follow from the internal affairs doctrine.534

A foreign statutory trust may not be denied a certificate of authority on the basis that the law governing statutory trusts in that foreign jurisdiction is substantially different from that employed in Kentucky, 535 but at the same time a foreign statutory trust holding a certificate of authority may not engage in any business or exercise a power that is not permitted to a domestic statutory trust.536 For example, in that KyUSTA precludes the formation of a professional statutory trust, a foreign statutory trust may not be utilized in Kentucky to render professional services.

If the name of a foreign statutory trust is not available either because it includes a non-permitted identifier537 or because it is not distinguishable on the records of the Secretary of State,538 the foreign statutory trust may adopt a fictitious name.539 A foreign statutory trust may register its name,540 thereby making it of record with the Secretary of State. A foreign statutory trust, even if not qualified to transact business, may apply for a certificate of assumed name.541

Having qualified to transact business a foreign statutory trust is obligated to update information of record with the Secretary of State542 and to file an annual report.543 A foreign statutory trust that violates these obligations is subject to having its certificate of authority revoked.544

Article 10 - Miscellaneous Provisions

While the act directs that in its interpretation consideration is to be given to the promotion of uniformity among the states,545 this provision should not apply when KyUSTA embodies a policy determination different from that in the

534. See Rutledge, Again, For the Want of a Theory, supra note 22, at 328-38; BISHOP AND KLEINBERGER, LIMITED LIABILITY COMPANIES, supra note 43, at ¶14.06, 14-109 (“Many (perhaps most) LLC statues make foreign law controlling where the question is the liability of a member of the obligations of a foreign LLC. However, Delaware’s internal shields do not implicate that question. Instead, they raise an entirely different question – namely, whether a forum state should defer to a foreign state’s rules on an entity’s ability to segregate its assets and its creditors’ access to those assets.”) (footnote omitted).
535. KY. REV. STAT. ANN. § 386A.9-010(3).
536. Id. § 386A.9-010(4). See also id. § 14A.9-050(2).
537. See id. § 14A.3-010(15).
538. See id. § 14A.3-010(1).
539. See id. § 14A.3-040.
540. See KY. REV. STAT. ANN. § 14A.3-030.
541. See id. § 365.015.
542. See id. § 14A.9-040.
543. See id. § 14A.6-010.
544. See id. § 14A.9-070.
545. Id. § 386A.10-010.
The relationship of the statute to the federal Electronic Signatures in Global and National Commerce Act is detailed. It is provided that KyUSTA does not impact upon actions pending or rights accrued as of its effective date. The previously reviewed rules as to application of KyUSTA to existing business trusts are detailed as are the rules as to KyUSTA’s effective date.

VII. CONCLUSION

The Kentucky Uniform Statutory Trust Act (2006) adds an innovative option to the menu of available organizational forms. While a variety of factors have historically limited the utility of the business trust, notably the absence of a comprehensive statute, KyUSTA, it is anticipated, will initiate at minimum greater consideration and as appropriate greater utilization of the form. At the same time it must be recognized that there are particular issues in the use of the statutory trust. The drafting of a governing instrument is an involved process. “Corporate” law attorneys often lack a substantive background in the trust law against which the governing instrument is drafted, giving rise to a variety of problems including the failure to appreciate rules to either be incorporated or avoided. The complexity of the rules governing series and the necessity of carefully tracking both the associated beneficial owners and the assets of and associated with each series cautions against the use of this new option absent circumstances where this functionality is needed and there is a commitment of sufficient assets to address both the known requirements and the significant unknown complexities of the structure. Still, the function is there and should be utilized in appropriate circumstances.

546. See, e.g., supra notes 299-300 and accompanying text (trustees may not vote by proxy); supra notes 360-67 and accompanying text (trustee answerable for performance of trustee’s agent).
547. KY. REV. STAT. ANN. § 386A.10-020.
548. Id. § 386A.10-030.
549. See supra notes 14-18 and accompanying text.
TRAGIC REPRESENTATIONS: THE CURIOUS CONTRADICTION BETWEEN CASES SEEKING ACCESS TO AUTOPSY AND DEATH SCENE PHOTOGRAPHS AND CASES REGARDING THE CONSEQUENCES OF SUCH PHOTOGRAPHS BEING PUBLISHED

Megan Bittakis*

I. INTRODUCTION

Imagine you are a newspaper reporter, and you are investigating the death of someone killed under unusual circumstances. You want to look at the photographs from the death scene and the autopsy, as these photographs could provide clues regarding how the person died or perhaps contradict official reports.1 Despite the laudable goal of discovering how and why a person perished, which could prevent future tragedies or bring the culpable party to justice, recent court decisions indicate that your request for these photographs will likely be denied.

Now imagine that you have come into possession of such photographs and you decide to publish them on the Internet. The photographs might depict the deceased in a grotesque condition and the deceased’s family members might come across the published photographs. Despite the fact that the family could suffer serious emotional harm from the publication of the photographs, this alone likely will not provide them recourse against you for publishing the photographs. As noted above, the courts usually prevent public access to such images. If someone publishes these types of photographs, however, the law rarely provides a remedy for this disclosure that violates the family’s privacy rights.

This article explores the contradiction between the line of cases regarding public access to autopsy and death representations and cases where families seek recovery for harm from the actual publication of those representations. Part II explores cases where individuals sought access to autopsy and death scene representations, including audio recordings. Part III discusses cases where family members brought tort claims against individuals that published representations and the varying degrees of success that family members had. Part IV discusses the contradiction between courts preventing access to representations and the families’ difficulty in obtaining any remuneration when representations are

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photographs. Finally, Part V provides a recommendation ensuring public access to autopsy and death representations when necessary, but also providing punishment and remedies when publication of those representations is unwarranted.

II. PUBLIC ACCESS

Photographs of autopsies and crime scenes are usually classified as government documents. Because they are government documents, they can be subject to state and federal open access laws that allow the public to inspect and, in some circumstances, copy the photographs. Courts considering the release or publication of such photos must weigh the interest of public access against the deceased’s family’s right to privacy in those images. In recent years, corresponding with the advent of the Internet’s pervasiveness, courts are increasingly restricting access to such photographs, but it was not always this way.

A. Cases Granting Public Access

Some courts have granted public access to autopsy and crime scene photographs. The Arkansas Supreme Court in McCambridge v. City of Little Rock held that photographs from a crime scene should be open to the public because the public’s right to evaluate the government’s job performance outweighed the family’s right to privacy. In this 1989 case, the son of an Oscar award-winning actress shot and murdered his wife and two young daughters and then committed suicide. The actress sued to prevent the public dissemination of the crime scene photographs. The court found that the actress did not have a privacy interest in the personal matters depicted in the crime scene photographs that prevented their disclosure.

First, the court noted that the United States Supreme Court in Whalen v. Roe recognized a right preventing the government from disclosing

2. See id. at 239-41 (exploring the history of autopsy and crime scene records and noting that they were and are completed by government agents and usually contain photographs).
3. See id. at 241-45 (describing the law regarding access to autopsy photographs before 2001).
7. Id. at 911.
8. Id.
9. Id. at 915.
personal matters. 10 Then, the court engaged in an analysis of whether the photographs constituted a personal matter. 11 The court used the following three-part test to determine whether the information constituted a personal matter: (1) whether the person wants the information kept private and has kept it private; (2) whether the information can be kept private, except for the governmental action; and (3) whether a reasonable person would find disclosure of the information harmful or embarrassing. 12

The court held that the photographs easily met all three components of this test. 13 First, the actress clearly wanted the photographs kept private because she brought suit to do so, and she did not disclose the photographs. 14 The second part of the test relates to matters that were previously a part of the public record, which the court determined that the photographs were not. 15 Finally, the court concluded that a reasonable person would find the release of the photographs harmful or embarrassing. 16 Thus, the court held that the photographs constituted a personal matter, and the actress had a right to prevent the government from disclosing them. 17 Despite finding that the actress had a privacy right in the photographs, the court ultimately ruled against her and found in favor of disclosure, holding that her privacy right did not outweigh the governmental interest in disclosure. 18

In doing so, the court balanced the actress’s interest in nondisclosure against “the government’s strong interests in depicting how the multiple murders occurred, why the police consider the case closed as a triple murder-suicide matter, and why no further action should be taken.” 19 The court described this interest as “highly valued,” and “held that the photographs should be released under the Freedom of Information Act.” 20 The court downplayed the actress’s emotional harm that could result from the public release of the photographs of the murdered bodies of her son, daughter-in-law, and granddaughters. 21 The court attempted to minimize the fact that the photographs were “horrible and sickening,” by including

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10. Id. at 913 (citing Whalen v. Roe, 429 U.S. 589, 598–600 (1977)).
11. Id. at 914.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id. at 914-15.
18. McCambridge, 766 S.W.2d at 915.
19. Id.
20. Id.
21. Id. at 915.
the phrase, “as are all such multiple murder photographs.” In addition, the court described the actress’s potential reaction to the photographs as “naturally sensitive,” which seems to be an understatement when describing a grandmother’s reaction to photographs of her murdered granddaughters.

The year that the court decided McCambridge —1989—might explain its decision. First, the decision was prior to the United States Supreme Court’s decision in National Archives & Record Administration v. Favish, where the Court discussed the common law privacy right that family members have in photographs depicting their deceased relatives and acknowledged the strength of that privacy right. Second, the court decided McCambridge before Internet usage became widespread, thus predating atrocities such as websites publicizing autopsy and death-scene photographs.

Even when courts permit disclosure like in McCambridge, they find that the family has a privacy interest in autopsy photographs or death scene photographs. The source of that right, however, is not always clear. At least one court has stated that the family could acquire the privacy right derivatively from the deceased. If the victim survived, then that victim would have a privacy interest in the photos and video because the autopsy pictures depict the victim nude and injured. Additionally, even if the photographs are public records, one can have a privacy interest preventing their disclosure if they contain information that is intimate or potentially embarrassing. A majority of courts, however, have held that the family itself has the right to privacy and the right is not derivative from the deceased.

The public’s right of access to information kept or created by the government tends to be statutory under public records law. For example, in State v. Rolling, the photos and video of a serial killer’s victims were

22. Id.
23. Id.
25. McCambridge, 766 S.W.2d at 909. It may also have been a case of bad lawyering on behalf of the actress. The opinion states that a plethora of reasons for ruling in her favor were included in the brief, and that “[m]any of the subpoints are so wholly without merit that we treat them summarily.” Id. at 912. The actress probably would have been better served if her attorney had concentrated on quality, rather than quantity. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 22-23 (2008) (avoiding a “scattershot argument” in favor of choosing no more than three arguments and fully developing those three reasons for winning).
27. Id. at *4.
28. Id. at *3.
29. Id.
public records because state officers took them while conducting their investigation and possessed the photographs and video in their official capacity. The documents were part of a criminal investigation and were subject to pretrial discovery under a Florida Rule of Criminal Procedure. Because the documents were public records, the photographs had to be disclosed and available for inspection and copying unless an exception existed prohibiting or restricting access.

The Rolling court, like the McCambridge court, balanced the families’ privacy rights against the public’s right to know. In performing this balancing test, the court considered four factors: (1) whether the photographs are relevant to evaluating government accountability; (2) the gravity of the intrusion into the families’ privacy by disclosure; (3) the existence of other material that would not invade the families’ privacy interests but is equally relevant to evaluating government accountability; and (4) whether alternatives other than full disclosure would protect the interests of both the families and the public.

Applying this test, the court first determined that the photographs would aid the public in evaluating not just law enforcement’s actions, but also the actions of the judge and jury in the criminal case against the murderer. Second, the court found that “[b]ecause the photographs depict the nude, mutilated bodies of their children or siblings, public disclosure would be a serious infringement of the right to privacy of the children[‘]s parents and siblings.” Third, the court noted that other documents could provide similar information to that contained in the photographs, such as the detailed descriptions of the crime scenes and the autopsy reports. Finally, the court determined that there was an alternative to either full disclosure or no disclosure whatsoever.

After weighing the factors, the court reached a compromise that has been praised for its balancing of the families’ and the public’s interests. The public (including the media) could view the photographs, but the photographs were to remain in the possession of the records custodian. Those viewing the photographs could not copy them, but if they wanted to

32. *Id.* (citing FLA. R. CRIM. P. 3.220).
33. *Id.*
34. *Id.* at *5.
35. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
make copies, they could apply to the court for permission to do so. Thus, the court’s restrictions should prevent dissemination of the photographs, and the public was still able to view the photos and draw their own conclusions:

This remedy permits the public and media to independently evaluate what the jurors saw, close-up as they saw it, and to reach whatever independent conclusion they deem proper. It permits interested members of the public and the media access to the material sufficient to enable them to carry out the oversight function envisioned by Florida’s Public Records law.

The McCambridge and Rolling cases are two of the few cases that do grant all or some access to the public regarding murder scene photographs. Public access was probably granted because the cases were decided before the Internet and all its vices became commonplace.

B. Cases Denying Public Access

The McCambridge and Rolling cases are unique, in that access to death scene photographs and videos were available to members of the public, albeit not complete, unfettered access. Most courts will not grant any access to autopsy or death scene photographs.

1. Public Access Under the Freedom of Information Act

In New York Times Company v. NASA, the court denied access to the audio recording of the astronauts’ final moments aboard the Challenger spacecraft. A newspaper reporter sought the recording under the Freedom of Information Act (FOIA). The district court found that Exemption 6 of FOIA, which can prevent disclosure, did not apply; but eventually an en banc panel of the District of Columbia Circuit Court of Appeals found that the exemption did apply and remanded the case to the district court to determine if Exemption 6 prevented disclosure.

On remand, the district court had to determine whether the astronauts’ families had a substantial privacy interest that could prevent disclosure under Exemption 6. NASA argued that the astronauts’ families had

42. Id.
43. Id.
45. Id. at 630.
46. Id. (“Exemption 6 of FOIA provides that an agency shall not disclose ‘personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.’”) (quoting 5 U.S.C. § 552(b)(6) (1988)).
47. Id.
48. Id. at 630-31, 633.
privacy interests in the recording, and it wanted to protect the families against suffering additional anguish that could result from disclosure.\textsuperscript{49} The court found that the decedents’ families do have privacy interests, even though the families are not on or mentioned in the recording.\textsuperscript{50}

The court rejected the plaintiff’s arguments that no privacy interest exists because the recording is about “official government business and relates entirely to a public event,” and the transcript of the recording was already public.\textsuperscript{51} The purpose of Exemption 6 is to guard against unnecessary disclosure of intimate details highly personal in nature, and the plaintiff additionally argued that the recording did not contain any such details.\textsuperscript{52} The court rejected the plaintiff’s argument, instead looking to not what was said in the recording, but how it was said.\textsuperscript{53} The court found that the intimate details were the astronauts’ voices.\textsuperscript{54} Explaining its reasoning, the court held that “[e]xposure to the voice of a beloved family member immediately prior to that family member’s death is what would cause the Challenger families pain.”\textsuperscript{55} The voices, not the words, were the intimate details underlying the families’ privacy rights.\textsuperscript{56}

The court also determined that the families’ privacy interests were substantial.\textsuperscript{57} Exemption 6’s privacy interest includes a reasonable expectation of not being disturbed in one’s home.\textsuperscript{58} The court noted that the families’ reasonable expectation of privacy in their homes would be disturbed because release of the audio recording would subject the families to solicitations, inquiries from the media, and emotional disruption.\textsuperscript{59} The court’s reasoning appears to equate the extent that the family will be bothered or disturbed to how substantial the privacy interest is, as the court discusses how outsiders will invade the families’ solitude if the recording is released.

After finding that family members of deceased astronauts do have a substantial privacy interest in the voices of the astronauts immediately preceding their deaths, the court had to evaluate the strength of the public interest in releasing the audio recording.\textsuperscript{60} “[T]he public has an undeniable interest in learning about NASA’s conduct before, during, and

\textsuperscript{49} \textit{Id.} at 631.
\textsuperscript{50} \textit{NASA}, 782 F. Supp. at 631.
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.} at 631.
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{NASA}, 782 F. Supp. at 631.
\textsuperscript{57} \textit{Id.} at 632.
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.}
The purpose of FOIA is in line with this interest, as that purpose is to contribute significantly to understanding the government’s operations. Background noises and voice inflections, which is what the audio recording consists of, would not fulfill this purpose. Because the transcript of the recording was previously released, the noises and voice inflections would be the only new information the audio recording would provide. The plaintiff argued that the public could learn whether the astronauts knew they were going to die. Even if this were true, this information would not contribute anything to what the public knows regarding how NASA functions.

Based on all of the above, the court found the public’s interest in disclosure of the audio recording “very minimal, if it can even be said to exist at all.” The court weighed the families’ substantial privacy interest against the public’s de minimis interest to determine whether Exemption 6 should prevent disclosure. Taking into account that a transcript of the audio recording was already public, the court found that the privacy interest clearly outweighed the public interest and denied the request for disclosure of the audio recording.

The United States Supreme Court considered the issue of whether the family had a privacy interest in death scene photographs when a private citizen, and not a reporter, sought the photographs in National Archives and Records Administration v. Favish. The death scene photographs at issue were of a public official, Vincent Foster Jr., who was deputy counsel to President Clinton. The private citizen requested the death scene photographs under FOIA. One commentator referred to this case as “the key decision in the area of familial privacy rights over death-scene images . . .”

Exemption 7(C) of FOIA exempts documents compiled for law enforcement purposes from disclosure if the disclosure “could reasonably
be expected to constitute an unwarranted invasion of personal privacy.” 74
Accordingly, because the photographs were “compiled for law
enforcement purposes,” the Court had to consider whether Exemption
7(C) provided a possible prohibition on disclosure. 75

First, the Court had to determine whether the family members
opposing the disclosure had a personal privacy interest protected by FOIA
or if the privacy interest belonged only to the deceased because the
photographs contained information only about him, rather than his
family. 76 The Court stated outright that the right to personal privacy is not
limited to information about the person asserting the right and focused on
the family’s privacy interest. 77 The family was asserting their own rights
to personal privacy in the photographs and sought “to be shielded by the
exemption to secure their own refuge from a sensation-seeking culture for
their own peace of mind and tranquility, not for the sake of the
deceased.” 78 They were not asserting the exemption on behalf of the
deceased public official, but on behalf of themselves. 79

To illustrate how the photographs’ disclosure could violate the
family’s privacy rights in both the present and in the future, the Court
quoted the sworn declaration of the decedent’s sister. 80 The sister stated
that opportunists had harassed her family and that she personally had been
horrified and devastated by a previously-published photo. 81 She recounted
how she suffered from insomnia and nightmares every time she saw that
particular photograph. 82 Furthermore, the sister feared that a release of
undisclosed pictures would undoubtedly end up on the Internet and result
in further violation of the family’s privacy, including more media
scrutiny. 83 Taking into account this evidence, the Court stated, “We have
little difficulty . . . in finding in our case law and traditions the right of
family members to direct and control disposition of the body of the
deceased and to limit attempts to exploit pictures of the deceased family
member’s remains for public purposes.” 84 Thus, the Court recognized the
family members’ right to control the publication of pictures of their
deceased relative independent of FOIA, at least in part. 85

74. Favish, 541 U.S. at 161.
75. Id. at 164.
76. Id. at 165.
77. Id.
78. Id. at 166.
79. Id.
80. See Favish, 541 U.S. at 167.
81. Id.
82. Id.
83. Id.
84. Id.
85. See id. at 168.
The Court recognized the respect civilizations have given to burial rights, a sign that civilizations respect the deceased and his remaining family.86 “Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.”87 Furthermore, the Court stated that the common law has long recognized the tradition of the family’s control over the body and images of the deceased.88

Additionally, the Court assumed that Congress drafted FOIA and Exemption 7(C) with this background in mind.89 The legislative history indicates that Congress observed that the United States Attorney General considered the relatives’ privacy interests and possible harmful effects of disclosure, and consistently interpreted the exemption as protecting the decedent’s family members.90

Finally, the Court found that “the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution.”91 Consequently, it would be contradictory to find that the statute provides less protection than the common law.92 Additionally, because murderers, child molesters, and rapists file FOIA requests seeking photographs and autopsy reports of their victims, the Court stated that it would be “inconceivable that Congress could have intended a definition of ‘personal privacy’ so narrow that it would allow convicted felons to obtain these materials without limitations at the expense of surviving family members’ personal privacy.”93

The Court explicitly held that FOIA recognizes the family’s “right to personal privacy with respect to their close relative’s death-scene images.”94 Because the Court stated that FOIA recognizes the right, FOIA itself does not establish the right; instead, this right is an independent one that courts can take notice of without a FOIA claim.

Interestingly, the Court stated, “Neither the deceased’s former status as a public official, nor the fact that other pictures had been made public,

86. Favish, 541 U.S. at 167-68.
87. Id. at 168.
88. Id. The Court only cites three cases and the Restatement (Second) of Torts to support this idea, which somewhat contradicts the statement that the common law has “long recognized” this “tradition.” See id. at 168-69 (citing Schuyler v. Curtis, 42 N.E. 22, 25 (N.Y. 1895); Reid v. Pierce Cnty., 961 P.2d 333, 342 (Wash. 1998); Bazemore v. Savannah Hosp., 155 S.E. 194 (Ga. 1930); and Restatement (Second) of Torts § 652D, p. 387 (1977)).
89. Favish, 541 U.S. at 169.
90. Id.
91. Id. at 170.
92. Id.
93. Id.
94. Id.
detracts from the weighty privacy interests involved." 95 Perhaps this is because the family’s privacy rights are implicated, and the family members are not public officials. Also, the Court might have considered that the family could not control the earlier release of the pictures.

Even though the Supreme Court held that the family has personal privacy rights regarding death representations, those representations can still be disclosed through FOIA.96 Under FOIA, documents are only exempt from disclosure if they would constitute an unwarranted invasion of personal privacy.97 This determination requires a balancing test weighing the “family’s privacy interest against the public interest in disclosure.”98

Generally, when documents are disclosable under FOIA, who requested the documents or what the individual wants to do with them is not significant because the documents belong to the public and the public can use the documents as it sees fit.99 However, because Exemption 7(C) prohibits disclosure if the intrusion would be unwarranted, courts must look at the reason for the intrusion.100 The reason for the intrusion must be sufficient for disclosure.101

The Court established a two-part test to determine whether a person’s reason for disclosure is sufficient when Exemption 7(C) applies: “First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest.”102 If both parts are not met, then “the invasion of privacy is unwarranted[,]” and the documents will not be disclosed.103 The Court then laid out additional criteria:

In the case of photographic images and other data pertaining to an individual who died under mysterious circumstances, the justification most likely to satisfy Exemption 7(C)’s public interest requirement is that the information is necessary to show the investigative agency or other responsible officials acted negligently or otherwise improperly in the performance of their duties.104

Applying the first prong of this test, the Court accepted the Court of Appeal’s conclusion that the citizen’s stated public interest in obtaining

95. Favish, 541 U.S. at 171.
96. Id.
97. Id.
98. Id.
99. Id. at 172.
100. Id.
101. Favish, 541 U.S. at 172.
102. Id.
103. Id.
104. Id. at 173.
the photographs – to uncover government negligence or wrongdoing in conducting the investigations – was significant.105 However, if the public interest advanced is to uncover government negligence or wrongdoing, the requester must show clear evidence “that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.”106 From the outset, there is a presumption that the government’s conduct was legitimate.107 The Court did not explain what type of evidence would constitute clear evidence that would cause a reasonable person to believe that the government acted improperly.108 Rather, the Court placed the burden on the requester to provide sufficient evidence to satisfy the standard.109 The Court determined that the private citizen did not meet this standard because five separate investigations came to the same conclusion: that the public official committed suicide.110 As such, the plaintiff did not satisfy the first prong of the test, and the Court did not need to consider whether the information was likely to advance the asserted interest.111 Therefore, Exemption 7(C) prevented disclosure of the photographs.112

2. Public Access Under State Law

The New York Court of Appeals also addressed the issue when it considered families’ privacy interests in recordings and transcripts of conversations that occurred on September 11, 2001.113 The family members of eight people that died at the World Trade Center intervened to join a reporter and the New York Times’ request under New York’s Freedom of Information Law (FOIL) for tapes and transcripts of 911 calls made that day.114 Under FOIL, records are disclosable unless they would constitute an unwarranted invasion of personal privacy.115 The court immediately rejected the argument that no privacy interest exists in the

105. Id.
106. Id. at 174.
108. See id.
109. Id. at 174-75 (“Only when the FOIA requester has produced evidence sufficient to satisfy this standard will there exist a counterweight on the FOIA scale for the court to balance against the cognizable privacy interests in the requested records.”).
110. Id. at 161, 175.
111. See id. at 175.
112. Id. at 174-75. The Court may have also denied access because, as it noted, once the documents are disclosed, they are out and belong to the public, and there is no method under FOIA to “undisclose” them.
114. Id. at 268.
115. Id. at 269.
feelings and experiences of people now dead. 116 “[R]elatives have an
interest protected by FOIL in keeping private the affairs of the dead.” 117

The court reasoned that everyone wants to keep private some aspects
of their deceased family members’ lives. 118 It is normal to be outraged if
private aspects of the deceased’s lives are publicly revealed and become
“an object of idle curiosity or a source of titillation.” 119 “The desire to
preserve the dignity of human existence even when life has passed is the
sort of interest to which legal protection is given under the name of
privacy.” 120 Interestingly, the court did not cite to any sources to support
its statements about the protection of private aspects of the lives of those
that died. One reason why the court did not cite any support for this could
be because the living generally cannot sue for invasion of privacy
regarding stories about their dead relatives. 121

The court then held that the privacy interests involved in the case were
compelling. 122 The calls contained communications of people who were
facing imminent death and likely included terror, agony, and feelings of
what the callers’ lives and families meant to them. 123 The callers
themselves or their families (if the callers did not live) could be “deeply
offended” if these words ended up in the popular press. 124

The court determined that the 9-11 calls are different from other 911
calls. 125 Most 911 calls are not from people facing death. 126 Furthermore,
9-11 received unprecedented, intense attention and has continued to do
so. 127 Because of this interest, the tapes will likely be played often and “in
some cases they will be exploited by media seeking to deliver sensational
fare to their audience.” 128 The court found that protecting the families
from exploitation is the reason why the exemption from disclosure
exists. 129 This is similar to the Challenger case, where the court protected
the families from disclosure because it found that the recordings would
generate a lot of attention. 130

116. Id.
117. Id. (citation omitted).
118. Id.
119. N.Y. Fire Dep’t, 829 N.E.2d at 269.
120. Id. (internal citation omitted).
2010) (citing numerous cases holding that families did not have standing to sue publications for
representations of the decedents’ lives, as the decedents’ right to privacy dies with the decedents).
122. N.Y. Fire Dep’t, 829 N.E.2d at 270.
123. Id.
124. Id.
125. Id.
126. Id.
127. Id.
128. N.Y. Fire Dep’t, 829 N.E.2d at 270.
129. Id.
The New York court recognized that not every relative of the deceased wants his or her loved one’s last words to remain private.\textsuperscript{131} “They may feel . . . that to make their loved ones’ last words public is a fitting way to allow the world to share the callers’ sufferings, to admire their courage, and to be justly enraged by the crime that killed them.”\textsuperscript{132} Although the court respected this, it stated that the privacy rights of other family members that do not want disclosure must be respected as well.\textsuperscript{133}

The court also held that the public’s interest in the tapes was legitimate.\textsuperscript{134} The 9-11 Commission, which had access to the tapes, pointed out several flaws in the 911 system, and that public access to this information could help to better understand the problems.\textsuperscript{135} The court noted, however, that the plaintiffs wanted all calls released, not just those relevant to the performance of the 911 system.\textsuperscript{136} The public already had access to the 911 operators’ words during the calls, and the plaintiffs failed to show how this was “insufficient to meet the public’s need to be informed.”\textsuperscript{137} Thus, the court held that the privacy interest of the families outweighed the public’s interest in disclosure of the 911 calls.\textsuperscript{138}

Judge Rosenblatt, joined by Chief Judge Kaye and Judge Ciparick, dissented from this part of the opinion.\textsuperscript{139} Judge Rosenblatt first stated that there ordinarily is no expectation of privacy in 911 calls and that they are disclosable under FOIL.\textsuperscript{140} Then, Judge Rosenblatt made several arguments in favor of the public’s interest in disclosure, including that the public should have a “complete and coherent account of what happened on September 11, 2001.”\textsuperscript{141} Having half of the conversation is not adequate because it is difficult to assess whether the response was sufficient without hearing the caller’s request.\textsuperscript{142} Sometimes the caller’s half of the conversation can be discerned from the responses, but sometimes it cannot.\textsuperscript{143} The nation’s security was incredibly compromised on 9-11, and

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\textsuperscript{131} \textit{N.Y. Fire Dep’t}, 829 N.E.2d at 270.
\textsuperscript{132} \textit{Id}.
\textsuperscript{133} \textit{Id}.
\textsuperscript{134} \textit{Id}.
\textsuperscript{135} \textit{Id} at 271.
\textsuperscript{136} \textit{Id}.
\textsuperscript{137} \textit{N.Y. Fire Dep’t}, 829 N.E.2d at 271.
\textsuperscript{138} \textit{Id} (“We conclude that the public interest in the words of the 911 callers is outweighed by the interest in privacy of those family members and callers who prefer that those words remain private.”).
\textsuperscript{139} \textit{Id} at 274-76.
\textsuperscript{140} \textit{Id} at 274.
\textsuperscript{141} \textit{Id} at 274-75.
\textsuperscript{142} \textit{Id} at 275.
\textsuperscript{143} \textit{N.Y. Fire Dep’t}, 829 N.E.2d at 275.
\end{flushright}
because of the enormity of the event, the public deserves to have as full an
account of it as possible.\footnote{144}

Additionally, the calls provide information regarding the effectiveness
of the government’s response to the crises, which in turn would lead to
improving the government’s response to such events, which then would
result in saved lives.\footnote{145} Finally, not every call would be dramatic or
contain identifying information regarding the victim.\footnote{146} “But for their
connection with September 11th, many of the calls in question are
ordinary 911 calls: people reporting factual information and seeking
help.”\footnote{147}

Judge Rosenblatt did not advocate for full disclosure.\footnote{148} Instead, the
callers’ words would be disclosed, but anything that would identify the
callers could be redacted, including things such as dying wishes.\footnote{149}
Finally, Judge Rosenblatt acknowledged that the information on the tapes
may be uncomfortable to hear because the information might expose
mistakes made by the first responders.\footnote{150}

Exposing mistakes may prove discomforting, but this will pale in the
face of the unforgettable heroics that we will always associate with
September 11th. For every person critical of an error or omission, ten
thousand voices will rise up in praise of the firefighters, police officers
and others who risked life and limb in the line of duty.\footnote{151}

We should not be afraid of the information, but embrace it, and show the
world that the United States is strong enough to let others see our
mistakes, learn from those mistakes, and praise the good things that were
done.

\textit{Campus Communications, Inc. v. Earnhardt} was decided less than one
year after 9-11 and also involved a very public death--the death of Dale
Earnhardt Sr.\footnote{152} Dale Earnhardt Sr. died when he crashed at the Daytona
500 NASCAR race.\footnote{153} To prevent the autopsy photographs from
becoming public, the Florida Legislature passed the Earnhardt Family
Protection Act, which provided that autopsy photographs, videos, or audio

\footnotesize
\begin{itemize}
\item 144. \textit{Id.}
\item 145. \textit{Id.}
\item 146. \textit{Id.}
\item 147. \textit{Id.} (footnote omitted).
\item 148. \textit{N.Y. Fire Dep’t}, 829 N.E.2d at 275.
\item 149. \textit{Id.}
\item 150. \textit{Id.} at 276.
\item 151. \textit{Id.}
\item 152. Campus Commc’ns, Inc. v. Earnhardt, 821 So. 2d 388 (Fla. Dist. Ct. App. 2002).
\item 153. \textit{Id.} at 391.
\end{itemize}
recordings are exempt from disclosure under the state’s Public Records Act, except for good cause as determined by a judge.154

The court first ruled on the constitutionality of the Earnhardt Family Protection Act.155 The Florida Constitution permits the state legislature to create exemptions to the Public Records Act as long as the exemption meets two requirements.156 First, the exemption must serve “an identifiable public purpose, and second, the exemption must be “no broader than necessary to meet that public purpose.”157 The court held that the Earnhardt Family Protection Act exemption met both of these requirements.158

To comply with Florida’s constitutional requirement that the disclosure exemption benefit the public, the legislature made several findings in enacting the Earnhardt Family Protection Act.159 The first finding was that it is a public necessity that autopsy photographs and recordings be exempt from disclosure.160 These recordings and photographs depict the deceased in an explicit, gruesome, and troubling nature, including being nude and bearing the signs of the physical trauma that may have accompanied the death.161 Therefore, seeing, hearing or copying these recordings and photographs could emotionally injure the deceased’s immediate family and the deceased’s memory.162 Second, the photographs or recordings could be posted on the Internet, and with its constant presence, the deceased’s family would suffer continuous injury.163 Third, other types of information, such as the autopsy report, are available and do not hurt the family as much as the photographs and recordings do.164 The court stated that these findings satisfy the requirement that the Legislature specifically state “the public necessity justifying the exemption.”165

The court then held that the exemption is not broader than necessary to meet the public purpose advanced by the legislature, as it applied “only to autopsy photographs and audio and video recordings of the autopsy.”166

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155. Campus Commc’ns, Inc., 821 So. 2d at 392.
156. Id.
157. Id.
158. Id. at 395.
159. Id. at 392-93 (citing Ch. 2001-1, § 2, at 2, Laws of Fla.).
160. Id. (citing Ch. 2001-1, § 2, at 2, Laws of Fla.).
161. Campus Commc’ns, Inc., 821 So. 2d at 392-93 (citing Ch. 2001-1, § 2, at 2, Laws of Fla.).
162. Id. (citing Ch. 2001-1, § 2, at 2, Laws of Fla.).
163. Id. (citing Ch. 2001-1, § 2, at 2, Laws of Fla.).
164. Id. (citing Ch. 2001-1, § 2, at 2, Laws of Fla.).
165. Id. at 393 (citing Fla. Const. art. I, § 24(c)).
166. Id. at 394.
Other documents regarding the autopsy are not exempt from disclosure.\textsuperscript{167} In addition, there can be disclosure if good cause is shown.\textsuperscript{168}

After deciding that the Act met the two requirements of serving an identifiable public purpose and that the exemption was not broader than necessary, the court then had to determine whether to apply the Act prohibiting unrestricted disclosure of autopsy photographs retroactively to Dale Earnhardt Sr.’s autopsy photographs.\textsuperscript{169} To make this determination, the court considered whether the public’s right to disclosure of autopsy photographs is a vested right.\textsuperscript{170} If the right is a vested right, the Act could not be given retroactive effect.\textsuperscript{171} A vested right is “more than a mere expectation” of the law continuing as it exists in the present and is one that cannot be taken away without due process.\textsuperscript{172}

The court held that the right to public disclosure in this case is not a vested right for two reasons.\textsuperscript{173} First, the right is not “fixed” because it is “subject to divestment by legislative enactment.” Second, the right to disclosure of the autopsy photographs is a public right, not a private right, and only private rights can be vested rights. Only abrogation of private rights prohibits retroactive application of statutes.\textsuperscript{174} Thus, because the right to view the autopsy recordings was not fixed and was a public right, the court could apply the statute retroactively to prevent disclosure of Dale Earnhardt Sr.’s autopsy photographs.\textsuperscript{175}

Under the Act, a court may disclose otherwise protected autopsy photographs if it finds good cause.\textsuperscript{176} The appellant argued that it had shown good cause for disclosure of the autopsy photographs because disclosure is necessary to evaluate the medical examiner’s job performance.\textsuperscript{177} The court gave this argument little weight because the pictures were not of diagnostic quality, so they would not provide evidence that the medical examiner was not adequately doing his job, and there was no additional information in the photographs that was not

\textsuperscript{167}. \textit{Campus Commc’ns, Inc.}, 821 So. 2d at 394.
\textsuperscript{168}. \textit{Id.}
\textsuperscript{169}. \textit{Id.} at 395.
\textsuperscript{170}. \textit{Id.} at 398.
\textsuperscript{171}. \textit{Id.}
\textsuperscript{172}. \textit{Id.}
\textsuperscript{173}. \textit{Campus Commc’ns, Inc.}, 821 So. 2d at 398.
\textsuperscript{174}. \textit{Id.} at 399 (citing Hodges v. Snyder, 261 U.S. 600 (1923)).
\textsuperscript{175}. \textit{Id.} at 401.
\textsuperscript{176}. \textit{See} \textit{FLA. STAT.} § 406.135(4)(a) (2006). The statute instructs courts to consider the following in determining good cause: “whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form.” \textit{FLA. STAT. ANN.} § 406.135(4)(b) (2006).
\textsuperscript{177}. \textit{Campus Commc’ns, Inc.}, 821 So. 2d at 401.
contained in documents already released to the public. Furthermore, the court noted that the disclosure would be a serious intrusion on the family’s privacy because the autopsy photographs were “gruesome, grisly and highly disturbing,” and publication of the photographs would cause the family emotional suffering. Finally, there were no less intrusive means that would prevent the suffering. Accordingly, the court held that there was not good cause compelling disclosure.

The court ruled against disclosure and inspection, however, it did recognize the public right to see and copy public records so that the public could know how the government functions. It determined that it was the role of the legislature to decide whether this right was trumped by the deceased’s family’s right to privacy regarding autopsy photographs. Once the legislature made the determination that the public’s right should yield to the family’s privacy right, the court’s role was limited to deciding whether this decision was constitutionally permissible, which the court decided that it was.

Even though the court found a public necessity justifying nondisclosure, the exemption still had to be narrow to survive under Florida law. The court found that the Earnhardt Family Protection Act met this requirement also, because it applied “only to autopsy photographs and audio and video recordings of the autopsy.” Other documents regarding the autopsy are not exempt from disclosure. In addition, there can be disclosure if good cause is shown. Thus, the Act was sufficiently narrow to survive, and prevented public disclosure of Dale Earnhardt Sr.’s autopsy photographs.

Although exemptions to disclosure are supposed to serve the public, the Florida Legislature created this exemption for autopsy records at the request of the Earnhardts (a private family), and the legislative findings did not specify how the exemption serves the public, as opposed to serving the families of the deceased or the deceased’s memory. Instead, it states, without explanation, that exemption from disclosure is a public necessity.

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178. Id. at 401-02.
179. Id. at 402.
180. Id.
181. Id.
182. Id. at 402.
183. Campus Commc’ns, Inc., 821 So. 2d at 402.
184. Id. at 403.
185. Id. at 392 (citing FLA. CONST. art. I, § 24(c); FLA. STAT. § 119.15(4)(b) (2001)).
186. Id. at 394.
187. Id.
188. Id.
Colorado is another state where the exemption from disclosure must benefit the public, and not only the family. The Colorado Open Records Act ("CORA") does not provide a mechanism for private persons to prohibit disclosure. Instead, it permits only the custodian of the document to petition the court to deny access. The only way to prevent disclosure is for the document’s custodian to petition the court to allow the custodian to have the record protected. The burden is on the custodian to prove that disclosure would substantially harm the public. Thus, Colorado’s policy is not only that the public has access to public records, but the State also makes it difficult to stop the public from having access. Colorado does this by putting the onus of nondisclosure on the custodian, and not allowing any other person to prevent disclosure, but instead requiring the custodian go to court to prevent disclosure.

In a Colorado case regarding disclosure of autopsy documents from the Columbine school shooting, the court affirmed the trial court’s ruling that disclosure of the documents would substantially injure the public. The trial court based its conclusion on several findings: (1) the autopsy reports contain “detailed and gruesome” descriptions of the bodies, such as damage done to the body and specimens obtained from it; (2) family members of the victims testified that disclosure would contribute to the ongoing suffering caused by the tragedy; and (3) the graphic details regarding the deaths would hurt the public as well as the families. The appellate court also affirmed the trial court’s decision because the trial court ruled soon after the tragedy occurred (five weeks) and the trial court did not completely ban disclosure. Instead, the trial court restricted inspection and disclosure until further order.

The appellate court rejected respondent’s argument that the reports were only being kept secret because they were graphic. The appellate court noted how the trial court focused its attention on the community’s reaction to the event, which included memorial services attended by tens of thousands of people, including the President and Vice President of the United States. It was the extraordinary circumstances of the homicides,
and not the graphic nature of the autopsy reports that supported the court’s finding that disclosure would result in substantial injury to the public. As noted supra in discussing the Challenger space shuttle case, the more attention the event receives, the more protection the families receive to prevent disclosure.

Even in states where the family itself cannot statutorily assert privacy rights, like in Colorado, courts may still find a way to prevent disclosure. In Galvin v. Freedom of Information Commissioner, a reporter sought an autopsy report, and the issue before the court was whether the autopsy report was a public record under Connecticut’s statutes and administrative regulations. In concluding that autopsy reports were not public records, and therefore not subject to public access, the court noted that under Connecticut’s Freedom of Information Act, family members of the deceased do not have standing to receive notice of or be heard at the administrative hearing on disclosure of the autopsy report. Instead, the family members’ interest must be represented by the government body opposing disclosure, “whose standing to invoke [the family’s] claims of privacy is questionable.” The court concluded that its construction of the relevant statute that autopsy reports are not public records, and thus not disclosable, “permits the vindication of privacy rights that cannot effectively be asserted under the Freedom of Information Act.”

It seems that if the legislature recognized a right of privacy for family members of the deceased, it would have provided a mechanism for those family members to protect their privacy right. The fact that the legislature did not provide such a mechanism indicates that it did not recognize such a privacy right. Construing a statute to protect a right when the legislative and executive branches did not protect that same right seems beyond the court’s purview. This is especially true considering the numerous administrative regulations regarding disclosure of autopsy reports in Connecticut.

The body of case law indicates that most courts will not grant access to autopsy or death scene photographs, no matter how noble the stated reason

201. Bodelson, 5 P.3d at 379.
202. Two years later, the Colorado appellate court found that the release of the crime scene report containing graphic information and the passage of time provided a sufficient change in circumstances permitting the respondent to ask the trial court to modify its order regarding the autopsy report of one of the perpetrators of the homicide. Blesch v. Denver Publ’g Co., 62 P.3d 1060, 1065 (Colo. App. 2002).
204. Id. at 71.
205. Id.
206. Id.
207. Id.
208. See Galvin, 518 A.2d at 66 n.3, 4 (setting forth regulations that include rules regarding the form, retention, and requests for access to autopsy records, among other things).
for disclosure. Instead, the families’ privacy right in preventing disclosure almost always prevails over the right to public access. Despite the reluctance of courts to allow access to such representations, the public still somehow obtains these types of photographs. Part III discusses the families’ tort claims against those that not only access the photographs, but also publish them.

III. TORT AND STATUTORY CLAIMS AGAINST PUBLISHERS

In cases where the press or the public has gained access and then publishes death photographs, the plaintiffs often rely on their right to privacy as the foundation of their tort claims.209 The plaintiffs in these cases are usually family members of the deceased because the deceased’s privacy rights die with the deceased.210 Thus, the deceased or the administrator of the deceased’s estate does not have a claim for invasion of privacy regarding the death scene or autopsy photographs.211 This section discusses cases brought against the mainstream media and other entities when those photographs are published.

A. Cases Against the Media

In most cases, the media seeks access to these death representations. Members of the media are also usually the defendants in the tort cases against the publishers of the photographs. One case brought against a media defendant is Kelley v. Post Publishing Co.212 In Kelley, the court found that the parents of a fifteen-year-old girl did not have any claims against the newspaper that published a photograph of the girl taken immediately after she died in a car accident.213 The court stated that even though the parents did have a right to privacy, the newspaper did not invade that right by publishing the picture and information.214 The only reference to the parents in the newspaper was that the girl was their daughter.215 The court concluded that revealing that information was not an invasion of privacy.216 The court was concerned about the implications

209. See Terilli & Splichal, supra note 40, at 343 (recognizing a “growing momentum” of cases finding a privacy interest in people that are not depicted in the photographs).
211. Calvert, supra note 210, at 148-49; Catsouras, 104 Cal. Rptr. 3d at 358.
212. 98 N.E.2d 286 (Mass. 1951).
213. Id. at 287-88.
214. Id. at 287.
215. Id.
216. Id. at 288.
regarding future cases if it held that the publication of the photograph was an invasion of the privacy right.217

It appears that the court did not see a distinction between writing about the incident and publishing a photograph depicting the parents’ dead child. The court stated, “A newspaper account or a radio broadcast setting forth in detail the harrowing circumstances of the accident might well be as distressing to the members of the victim’s family as a photograph of the sort described in the declaration.”218 The court was concerned that such a ruling would prohibit newspapers from publishing other crash scene photographs if the victims were recognizable.219 The court also did not know how it could limit the claims to only the parents and hypothesized that the victim’s other family members might also have claims.220

The court in Bremmer v. Journal-Tribune Publishing Co. had the same concerns.221 In this case, the local newspaper published a photograph of the mutilated and decomposed body of an eight-year-old boy that had been missing for one month.222 The boy’s parents sued the paper for invasion of privacy.223 In upholding the trial court’s decision dismissing the parents’ claim, the Iowa Supreme Court held that although the parents did have a right to privacy, they could not enforce the right when the published information was “newsworthy.”224 The court framed the question as whether the plaintiffs had alleged facts demonstrating “an unwarranted invasion of their right of privacy.”225 The Iowa court followed the principle that if the information is newsworthy, then there is no invasion of privacy.226 Instead, the plaintiffs’ privacy rights must yield to the public’s interest to be informed.227 In support, the court quoted no less a figure than Thomas Jefferson, who observed that any discomfort produced by the publication of troubling information is necessary to keep a check on the government.228

217. Id. at 287.
218. Kelley, 98 N.E.2d at 287.
219. See id.
220. Id. at 287-88.
222. Id. at 763.
223. Id.
224. Id. at 768.
225. Id. at 765 (emphasis added).
226. Id. at 766.
227. Bremmer, 76 N.W.2d at 766.
228. Id. at 767 (quoting Jacova v. S. Radio & Television Co., 83 So. 2d 34, 36, 40 (Fla. 1955) (“The public has an interest in the free dissemination of news. This interest was well stated by that great American, Thomas Jefferson, in the following words: ‘The only security of all is in a free press. The force of public opinion cannot be resisted, when permitted freely to be expressed. The agitation it produces must be submitted to. It is necessary to keep the waters pure. No government ought to be without censors: and where the press is free no one ever will.’ It is vital that no
In defending its decision that the photograph was newsworthy, the court noted that society is interested in the misfortunes that befall its members.229 Interestingly, the court agreed with the idea that if society wants to see such things, then the court should not ban society from seeing them.230 The court specifically stated, “From a news standpoint the public is interested in the appearance of the body of such a local victim. Such appearance may be pictured by words or by photographs or both.”231 The court did not put much, if any, weight on the fact that the picture might be grotesque.232 Instead, it based its decision on the idea that because the photograph was newsworthy, there was no invasion of privacy.233

The court in *Abernathy v. Thornton* also dealt with a death-scene photograph published in a newspaper.234 In that case, the court held that the mother did not have a right to privacy when the newspaper published a photograph of her murdered son that showed a bullet protruding from his head.235 The court’s conclusion was based on the fact that the son was a public character because he had been on parole for committing a federal offense and had served time in prison.236 One charged with a crime becomes a person of legitimate public interest.237 Because the son had become a public figure due to his actions, he would not have had a privacy right in the publication of the photograph, and the mother’s relational privacy right could not rise higher than that of her son.238 This case was decided almost fifty years before *Favish* and might have had a different result, or at least a different reasoning, after *Favish* because of the Court’s admonition that the status of the deceased as a public official does not affect a family’s privacy right.239

In contrast to the cases discussed above, *Showler v. Harper’s Magazine Foundation* involved a published photograph that was not gory, but was of the deceased in his open casket.240 In *Showler*, the biological father of the deceased tried to assert claims against the magazine and photographer that took the picture and then published it.241 His son, who

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unreasonable restraints be placed upon the working news reporter or the editorial writer.”

( emphasis in original)).

229. *Id.*
230. *Id.*
231. *Id.* at 768.
232. *Id.*
233. *Bremmer*, 76 N.W.2d at 768.
234. 83 So. 2d 235, 236 (Ala. 1955).
235. *Id.* at 237.
236. *Id.*
237. *Id.*
238. *Id.* at 237.
240. 222 F. App’x 755, 759 (10th Cir. 2007).
241. *Id.* at 757-59.
died while serving in Iraq, was the first member of the Oklahoma National Guard killed in action since the Korean War, and his funeral received substantial media attention.242 The funeral was open to the public, and 1200 people attended.243 At the end of the funeral, the attendees filed past the deceased’s open casket.244

Before the funeral, the photographer contacted the funeral home multiple times and was told that the press would be permitted to attend the funeral.245 The family told the funeral director that they did not want any pictures taken of the deceased in the open casket, although photographers were permitted to take pictures during the service.246 Although there were many members of the media in attendance and several of them did take pictures, the defendant was the only photographer that photographed the deceased in his open casket.247

The father sued the magazine and the photographer, alleging various torts.248 The district court granted summary judgment for the defendants on all claims and the Tenth Circuit affirmed.249 Although the defendants raised a First Amendment defense, the Tenth Circuit did not reach that question because it held that the tort claims were without merit.250

The father claimed that the publication resulted in intentional infliction of emotional distress.251 Oklahoma follows the Restatement (Second) of Torts definition of intentional infliction of emotional distress.252 The court agreed with the district court’s finding that the photograph itself was not outrageous because “the photo accurately depict[ed] the exact image that Plaintiffs chose to expose to approximately 1200 people who attended [the] funeral.”253 The court also noted that the family chose to have an open casket because, in the family’s own words, “the body looked fine.”254 “[T]he mere fact that the photograph was of a deceased person was not enough to constitute outrageous conduct.”255 The court then rejected the

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242. Id. at 758.
243. Id.
244. Id. at 759.
245. Id. at 758.
246. Showler, 222 F. App’x at 758.
247. Id. at 759.
248. Id.
249. Id. at 766.
250. Id. at 760. Although stating at the beginning of the opinion that First Amendment issues would not be reached, the echoes of such an argument are heard in the court’s statement that “fair and accurate media coverage of official public occasions is in the highest and best interest of the public, [and] ... cannot be treated as actionable under this rubric.” Id. at 761 (quoting Wright v. Grove Sun Newspaper Co., 873 P.2d 983, 990 (Okla. 1994)).
251. Id. at 760.
252. Showler, 222 F. App’x at 760.
253. Id.
254. Id.
255. Id.
plaintiffs’ argument that the photographer’s disobedience of the specific instruction not to photograph the deceased constituted the outrageous conduct. 256 Instead, the court held that the photograph being “unauthorized” did not transform the photographer’s conduct into something outrageous.257

In addition to infliction of emotional distress, the plaintiff asserted three different types of the invasion of privacy tort, all of which also failed.258 In asserting the right to privacy, the plaintiff relied on Favish.259 The court found Favish inapplicable, stating that it involved a statutory privacy right under FOIA.260 Instead, the plaintiff in Showler was trying to assert a common law cause of action based on an invasion of a privacy right.261 The court further distinguished Favish on the basis that it involved gruesome photographs.262 The photograph in Showler was an accurate depiction of the deceased in his military uniform during an event that was witnessed by 1200 people.263 Because the photograph did not contain ghastly imagery, the court held that Favish and the other cases finding an invasion of privacy were inapposite.264

The first invasion-of-privacy tort that the court discussed was appropriation, which is a statutory cause of action under Oklahoma law.265 In eliminating this claim, the court looked to a comment to the Restatement (Second) of Torts, section 652C, regarding the appropriation of one’s name or likeness.266 The comment on this section creates a “newspaper defense,” in which the use must be commercial to impose liability; the fact that newspapers and magazines try to make a profit is not enough to make their publication of the picture a commercial use.267 Because the magazine used the photograph to illustrate a matter of public interest, the court held there was no liability for appropriation.268

Second, the court discussed the privacy tort of publication of private facts.269 The plaintiff lost on this cause of action as well, based on the elements of the tort: “the publication must: (1) be highly offensive to a reasonable person; (2) contain private facts; (3) be a public disclosure of

256. Id. at 761.
257. Id.
258. Showler, 222 F. App’x at 761.
259. Id.
260. Id.
261. Id.
262. Id. at 762.
263. Id.
264. Showler, 222 F. App’x at 762.
265. Id.
266. Id. at 763.
267. Id.
268. Id. at 763-64.
269. Id. at 764.
private facts; and (4) not be of legitimate concern to others.\textsuperscript{270} The court found that the photograph of the deceased soldier did not contain private facts and was not a disclosure of private facts.\textsuperscript{271} The photograph was of legitimate concern to others because the funeral of Oklahoma’s first National Guard member killed in action since the Korean War was a newsworthy event.\textsuperscript{272} The court rejected the plaintiff’s argument that the family’s mourning is a private event, noting that the family invited the public to the funeral.\textsuperscript{273} Because the funeral was public and attended by so many, a photograph depicting something at that funeral did not reveal private facts.\textsuperscript{274}

Third, the court discussed the privacy tort of intrusion upon seclusion, which does not require publication.\textsuperscript{275} Instead of publication being the determinative factor, “the intrusion itself creates liability.”\textsuperscript{276} First, the court found that there was not an intrusion into the plaintiff’s private affairs.\textsuperscript{277} Second, even if there was an intrusion, “the intrusion was [not] highly offensive to a reasonable person.”\textsuperscript{278} Once again, the court found the public nature of the funeral was fatal to the plaintiff’s claim.\textsuperscript{279} The court repeated the facts regarding the public nature of the funeral, including that the photographer stayed in the area designated for the press when he took the photograph.\textsuperscript{280}

In addition to the privacy torts, the plaintiff alleged the unlikely tort of unjust enrichment, which the court described as a circumstance caused by failing to make restitution when it would be fair to do so.\textsuperscript{281} The court rejected this claim as well, holding that there was no evidence that the magazine or its photographer profited at the expense of the plaintiff.\textsuperscript{282} And, because the plaintiff’s privacy rights were not invaded, there was no injustice to the plaintiff.\textsuperscript{283}

\textsuperscript{270} Showler, 222 F. App’x at 764.
\textsuperscript{271} Id.
\textsuperscript{272} Id.; see also Clay Calvert, Revisiting the Voyeurism Value in the First Amendment: From the Sexually Sordid to the Details of Death, 27 Seattle U. L. Rev. 721, 744 (2004) (“The concept of newsworthiness is relevant in any consideration of privacy because it is a defense to invasion of privacy actions under the tort of public disclosure of private facts.”).
\textsuperscript{273} Showler, 222 F. App’x at 764.
\textsuperscript{274} Id.
\textsuperscript{275} Id.
\textsuperscript{276} Id.; see also Neil M. Richards, The Limits of Tort Privacy, 9 J. Telecomm. & High Tech. L. 357, 382 (2011) (noting that “no act of expression is necessary to satisfy the intrusion tort”).
\textsuperscript{277} Showler, 222 F. App’x at 764.
\textsuperscript{278} Id.
\textsuperscript{279} Id. at 764-65.
\textsuperscript{280} Id. at 765.
\textsuperscript{281} Id. at 766.
\textsuperscript{282} Id.
\textsuperscript{283} Showler, 222 F. App’x at 766.
*Showler* indicates that if the deceased is in a public setting and the photograph is not grotesque, then all tort claims fail.\textsuperscript{284} This does not seem to comport with part of the reasoning in *Favish* where the court rejected the plaintiff’s argument that because some of the photographs were already public, the remaining ones should also be disclosed.\textsuperscript{285} In fact, the *Favish* court held that the prior public disclosure of some of the photographs did not detract from the privacy interests involved.\textsuperscript{286} Conversely, the *Showler* court based its reasoning on the fact that the photograph depicts a public event, which necessarily involves disclosure to the public. The difference could be that the family in *Showler* chose to make the event public, whereas the family in *Favish* did not. The *Showler* court did not draw a distinction between things that are seen at a public event and photographing those things. The difference, however, is that a public event happens in the present and then is over. A photograph, on the other hand, can last almost indefinitely.\textsuperscript{287} It can be reproduced, it can be altered, and it can be sent and resent, including being sent to the family of the deceased.\textsuperscript{288}

### B. Defendants Other Than the Mainstream Media

This section discusses cases involving non-media defendants, including the *Catsouras* case, which deals with the many evils that can be done with photographs due to their permanent and easily accessible nature.

The *Catsouras* case involved the death of the plaintiffs’ teenage daughter, who died in a car accident on Halloween.\textsuperscript{289} California Highway Patrol dispatchers sent nine pictures of the daughter’s dead body, including those showing her nearly decapitated head, by email to their

\textsuperscript{284} Compare *Armstrong v. H & C Comme’ns* Inc., 575 So. 2d 280 (Fla. Dist. Ct. App. 1991). In *Armstrong*, a local television station televised, during its six p.m. newscast, the police chief holding up the skull of a local girl that had been missing for over two years. *Id.* at 280-81. The footage aired during a story about the memorial service for the girl, which had occurred that day, and without any warning to the family, which saw the footage when it aired during the newscast. *Id.* at 281. Discussing only whether the conduct was outrageous, the court found that the family could state a claim for intentional infliction of emotional distress. *Id.* at 281-82. The family’s invasion of privacy claims failed, however, because “the discovery of the remains of [the girl], and their possession by the police, were legitimate matters of public interest.” *Id.* at 283.


\textsuperscript{286} *Id.*

\textsuperscript{287} See generally Calvert, *supra* note 74, at 25 (discussing how the Internet has made death photographs both permanent and accessible, and thus changed the debate regarding access to such photographs).


\textsuperscript{289} *Catsouras v. Dep’t of the Cal. Highway Patrol*, 104 Cal. Rptr. 3d 352, 361 (Ct. App. 2010).
family and friends; eventually, those pictures were posted on approximately 2500 websites.\footnote{Id. at 359.} Worse, the pictures were surreptitiously emailed to the girl’s father with messages such as “Hey Daddy I’m still alive.”\footnote{Id.} The girl’s parents and sisters sued the California Highway Patrol (CHP) and the individual dispatchers, alleging various torts and a violation of 42 U.S.C. § 1983.\footnote{Id. at 359-60.}

The court first discussed the tort of invasion of privacy based on public disclosure of private facts.\footnote{Id. at 361.} The court relied on Favish to find that the family did have a privacy interest in the death images, pointing out that the United States Supreme Court recognized such a common law privacy right and not just a statutory right encased in the Freedom of Information Act.\footnote{Id. at 365.} As discussed supra in Part II.A, the Showler court came to the opposite conclusion. Clay Calvert, Salvaging Privacy & Tranquility From the Wreckage: Images of Death, Emotions of Distress & Remedies of Tort in the Age of the Internet, 2010 MICH. ST. L. REV. 311, 319 (2010) (describing how the Catsouras court came to a different conclusion regarding the extent of the right to privacy under Favish than the Showler court).

The court dispensed with the idea that there was some public interest or freedom of the press implication that prevented imposing liability on the CHP for violating the family’s privacy rights.\footnote{Id. at 366.} The dispatchers “allegedly disseminated [the photographs] out of sheer morbidity or gossip, as opposed to any official law enforcement purpose or genuine public interest.”\footnote{Id.} Morbid gossip does not serve a legitimate public interest.\footnote{Id.} The case is also different from Showler, where there was a legitimate public interest in the soldier’s death.\footnote{Showler v. Harper’s Magazine Found., 222 F. App’x 755, 764 (10th Cir. 2007).} Thus, the Catsouras family did state a cause of action for invasion of privacy.\footnote{Catsouras, 104 Cal. Rptr. 3d at 365. See also Reid v. Pierce Cnty., 961 P.2d 333, 339-42 (Wash. 1998) (en banc) (holding that family members of decedents could maintain action for public disclosure of private facts when county employees took unauthorized photographs of decedents in county morgue, displayed the photographs to third persons, and used the photographs in personal scrapbooks).}

The family faced a hurdle in asserting their claim for intentional infliction of emotional distress; specifically, the element that the conduct must either take place in their presence or be directed at them.\footnote{Catsouras, 104 Cal. Rptr. 3d at 366.} Because the family asserted that the dispatchers acted intentionally (for example,
“the e-mails were sent ‘with the intention of causing’ emotional distress to
decedent’s close family members”) and that those emails must have
contained identifying information regarding the father, as evidenced by the
horrific emails he subsequently received, the court found the element that
the conduct be directed toward the family was met.302

Interestingly, the thorniest legal issue in the case arose under the
negligence cause of action: whether the dispatchers owed a duty to the
family.303  The court defined duty as “simply a shorthand expression for
the sum total of policy considerations favoring a conclusion that the
plaintiff is entitled to legal protection.”304  The court could find a duty on
the part of the dispatchers in one of two ways: (1) a special relationship
between them and the family, or (2) by using a multifactor analysis set
forth in Rowland v. Christian.305  The court found no special duty to the
family because the dispatchers did not make representations to the family
that the family relied on to their detriment, the dispatchers did not put
the family in harm’s way, and the dispatchers did not lull the family into a
sense of security and then remove those security protections.306

After reviewing the Rowland factors, however, the court did find that
the law imposed a duty upon the dispatchers to the family.307  The
Rowland factors are as follows:

[T]he foreseeability of harm to the plaintiff, the degree of certainty that
the plaintiff suffered injury, the closeness of the connection between
the defendant’s conduct and the injury suffered, the moral blame
attached to the defendant’s conduct, the policy of preventing future
harm, the extent of the burden to the defendant and consequences to the
community of imposing a duty to exercise care with resulting liability
for breach, and the availability, cost, and prevalence of insurance for
the risk involved.308

In addition, courts consider three other factors if the case involves whether
a public agency owes a duty.309  Those three factors are (1) the extent of
the agency’s powers; (2) the agency’s role, as imposed by the law; and (3)
the limitations imposed on the agency due to its budget.310

In applying these factors, the court found that it was foreseeable that
the family would suffer emotionally from the posting to the Internet of the

302. Id.
303. Id. at 368.
304. Id. (quoting Adams v. City of Fremont, 80 Cal. Rptr. 2d 196 (Ct. App. 1998)).
305. Id. (citing Rowland v. Christian, 443 P.2d 561 (Cal. 1968)).
306. Catsouras, 104 Cal. Rptr. 3d at 369-72.
307. Id. at 376.
309. Catsouras, 104 Cal. Rptr. 3d at 372.
310. Id. (citing Thompson v. Cnty. of Alameda, 614 P.2d 728 (Cal. 1980)).
pictures of their daughter’s remains.311 The “defendants give us no reason at this juncture to question the certainty that emotional trauma was indeed suffered.”312 The court also stated simply that, “in these days of Internet sensationalism,” it disagreed with the defendants’ contention that “it was not foreseeable that the gruesome photographs allegedly disseminated for shock value on Halloween would be forwarded to thousands of Internet users . . . .”313

Next, the court turned its attention to the moral blame factor.314 Even though the parties did not cite any statutes regarding the treatment of photographs of the deceased, the court still found that the dispatchers’ actions violated the public policy favoring protection of the deceased’s family’s feelings.315 “[C]oncepts of morals and justice clearly dictate that those upon whom we rely to protect and serve ought not be permitted to make our deceased loved ones the subjects of Internet spectacle and then to claim the defense of lack of duty.”316

In considering the other Rowland factors, the court stated that it did not appear that imposing this particular duty upon the CHP would be an onerous one.317 The defendants could control the behavior that brought about this litigation because it involved intentional conduct and conduct that could be cured by enforcement of a policy forbidding such behavior.318 The simplicity of the court’s holding points to its ease in application: “CHP and its officers must refrain from exploiting gruesome death images by disseminating them to friends and family members or others with no involvement in official CHP activities.”319 Surely, law enforcement officers can understand and follow this directive.

The court similarly rejected the defendants’ argument against imposing a duty upon them because insurance will not cover the damage caused by their acts, specifically stating that “[i]f every defendant were excused from liability whenever his or her egregious behavior was uninsured, then no defendant would ever be held liable for intolerable acts.”320 Another argument the court rejected was that the harm was not sufficiently close to the dispatchers’ behavior because the injury was caused by the photographs being posted on the Internet and horrendous

311. Id. at 373.
312. Id.
313. Id.
314. Id.
315. Catsouras, 104 Cal. Rptr. 3d at 374.
316. Id.
317. Id.
318. Id.
319. Id. at 375.
320. Id.
emails containing the photographs being sent to the family.\footnote{321} However, the family alleged that dispatchers emailed the photographs “to family members and friends on Halloween for the purposes of grotesque sensationalism.”\footnote{322} Thus, “[i]t is perfectly foreseeable that those e-mails would be forwarded to others, for exactly the same purpose.”\footnote{323} As the court noted, “In any event, the photographs could not have spread across the Internet like wildfire, ending up in the hands of malefactors, had [the dispatchers] not e-mailed them in the first place.”\footnote{324}

The court’s reasoning on the factor of the prevention of future harm is particularly compelling:

It is a sad day, to be sure, when those upon whom we rely to protect and serve do the opposite, and make the decapitated corpse of a teenage girl the subject of international gossip and disrespect, and inflict devastating emotional harm on the parents and siblings of that girl. Every CHP officer should know better. The CHP is in a position to ensure that this does not happen again.\footnote{325}

Thus, the court placed the burden on the entity that can prevent the harm, as opposed to placing the burden on the potential victims.

The court also found that the last three factors, pertaining to state agencies, did not preclude imposing a duty upon the defendants.\footnote{326} First, the court stated that there was no indication that it was beyond the CHP’s powers to prevent its employees from disseminating death images to their friends and families “for ghoulish thrill purposes.”\footnote{327} Second, if such photographic evidence is collected, the CHP should not put the decedent’s family at risk of seeing those photographs “made the subject of Internet spectacle.”\footnote{328} Third, the adoption of a policy prohibiting these types of actions or the enforcement of such an existing policy would not seem to have any appreciable effect on the CHP’s budget.\footnote{329}

Finally, the court “conclude[d] that the defendants in the case before us owed a duty of care to plaintiffs not to place decedent’s death images on the Internet for the lurid titillation of persons unrelated to official CHP business.”\footnote{330} Thus, because the court found a duty, the family’s negligence claim survived.\footnote{331}
The Catsouras family also attempted to state a claim under 42 U.S.C. § 1983, but the court found that this claim was precluded by the doctrine of sovereign immunity. The court first examined whether the officers violated a property right that the family had in the photographs of their daughter. The court found that if such a property right existed, it was not a clearly established constitutional right.

The court considered the family’s argument that their constitutionally-protected privacy right in the photographs was violated. Because only two cases had discussed this right at the time the officers emailed the photographs to their families and friends, the court concluded that this right was not clearly established. Since the right had not been clearly established, the officers were not on notice that their behavior would violate a constitutionally-protected right, and thus sovereign immunity applied to prevent the family from succeeding on the section 1983 claim.

It was this last prong, that the right be clearly established, which defeated a mother’s similar section 1983 claim against a former prosecutor for the prosecutor’s publication of an autopsy photograph of the mother’s two-year-old son. In Marsh v. County of San Diego, a former prosecutor took an autopsy photograph with him after he retired. After a court set aside the murder conviction of the mother’s boyfriend, the former prosecutor delivered the photograph, along with a memorandum about the case, to the newspaper and a television station. When the mother discovered this, she sued the former prosecutor and the county

332. Id. at 380, 385.
333. Catsouras, 104 Cal. Rptr. 3d at 383-84.
334. Id. at 384. Compare Melton v. Board of County Commissioners, where the siblings of the deceased sued the county, which ran the county morgue, as well as a photographer, because the photographer allegedly took photographs of their brother’s body and then used those photographs for commercial purposes. Melton v. Bd. of Cnty. Comm’rs, 267 F. Supp. 2d 859, 861 (S.D. Ohio 2003). In addition, the siblings alleged that the photographer manipulated, touched or abused their brother’s corpse. Id. The court determined whether those actions could constitute a claim under 42 U.S.C. § 1983 in deciding whether to grant the photographer’s motion for judgment on the pleadings. Id. at 862. One of the bases for the siblings’ section 1983 claim was a deprivation of property. Id. Relying on the theory that property rights are a bundle of sticks, the court stated that the photographer did not have to physically take the deceased’s body part for the siblings to have a deprivation of property. Id. at 863. Instead, it was enough to assert that the photographer “photographed, posed, touched, manipulated, came into possession of photographs, and/or otherwise abused and/or violated the corpse of the decedent . . . for purposes of commercial exploitation” to show an interference with the siblings’ property interests. Id.
335. Catsouras, 104 Cal. Rptr. 3d at 385.
336. Id.
337. Id.
338. Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1159 (9th Cir. 2012).
339. Id. at 1152 (the prosecutor said that he kept the photograph as a memento).
under 42 U.S.C. § 1983 for violating her right to due process under the Fourteenth Amendment.\(^{341}\)

The Ninth Circuit became the first federal court to determine that a mother has a substantive due process right in controlling autopsy photographs of her child.\(^{342}\) Specifically, the Ninth Circuit found “that the Constitution protects a parent’s right to control the physical remains, memory and images of a deceased child against unwarranted public exploitation by the government.”\(^{343}\)

In coming to its conclusion, the court started with the right to privacy and the two interests that it protects: “One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.”\(^{344}\) After setting forth some parameters of the privacy right, the Ninth Circuit noted that, from *Favish to Catsouras*, many courts had recognized a personal privacy right in controlling the death images of relatives.\(^{345}\) Previously, the courts found the right emanated from the common law, but the Ninth Circuit went further and found that “the common law right to non-interference with a family’s remembrance of a decedent is so ingrained in our traditions that it is constitutionally protected.”\(^{346}\)

For a right to be constitutionally-protected, it must be “deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty.”\(^{347}\) The right to privacy in death images of one’s relatives invokes both aspects of the right to privacy.\(^{348}\) It invokes the interest in preventing disclosure of personal matters because “[f]ew things are more personal than the graphic details of a close family member’s tragic death. Images of the body usually reveal a great deal about the manner of death and the decedent’s suffering during his final moments—all matters of private grief not generally shared with the world at large.”\(^{349}\)

The second aspect of the privacy right, the interest in making important decisions independently, is also invoked because this interest involves making decisions regarding one’s children.\(^{350}\) “A parent’s right to choose how to care for a child in life reasonably extends to decisions dealing with death, such as whether to have an autopsy, how to dispose of

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\(^{341}\) Id.

\(^{342}\) Id. at 1154.

\(^{343}\) Id.

\(^{344}\) *Marsh*, 680 F.3d at 1153 (quoting *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)).

\(^{345}\) Id. at 1153-54.

\(^{346}\) Id. at 1154.

\(^{347}\) Id. (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

\(^{348}\) Id.

\(^{349}\) Id.

\(^{350}\) *Marsh*, 680 F.3d at 1154.
the remains, whether to have a memorial service and whether to publish an obituary.\textsuperscript{351}

First, the Ninth Circuit found a constitutional due process right to control the death images of one’s child from “unwarranted public exploitation by the government.”\textsuperscript{352} The Ninth Circuit discussed how disclosure of such photographs shocks the conscience, which is a prerequisite to finding a violation of substantive due process.\textsuperscript{353} One reason why the disclosure shocks the conscience is because, due to the Internet, such pictures could go viral and the mother “might easily stumble upon photographs of her dead son on news websites, blogs or social media websites. This intrusion into the grief of a mother over her dead son, without any legitimate governmental purpose, ‘shocks the conscience’ and therefore violates [the mother’s] substantive due process right.”\textsuperscript{354}

In addition to finding a violation of the mother’s substantive due process right, the Ninth Circuit also found a violation of her procedural due process right.\textsuperscript{355} The court first concluded that the mother had a liberty interest under California law in her son’s autopsy photograph.\textsuperscript{356} The United States Constitution protects this interest because the state law establishing the interest contains both substantive limits on official discretion and mandatory and explicit language limiting that official discretion.\textsuperscript{357} The former prosecutor violated that interest by submitting the autopsy photograph to the media because he did not do this for any legitimate law enforcement, criminal investigation, or educational purposes (which are exemptions to the prohibition on disclosing autopsy photographs under the California law).\textsuperscript{358}

In reading the \textit{Marsh} case, one starts to believe that the mother will prevail in her action when the Ninth Circuit determined that the mother had a substantive due process right to control the autopsy photographs of her son and not have those photographs become the subject of exploitation by government workers.\textsuperscript{359} That feeling continues when the court determines that the mother also had a procedural due process right created by California law, and the former prosecutor violated that procedural due

\textsuperscript{351} Id.
\textsuperscript{352} Id.
\textsuperscript{353} Id. at 1154-55.
\textsuperscript{354} Id.
\textsuperscript{355} Id. at 1157.
\textsuperscript{356} Id.
\textsuperscript{357} Marsh, 680 F.3d at 1156 (discussing state law prohibiting copying or disclosure of autopsy photographs except in limited circumstances).
\textsuperscript{358} Id. at 1157.
\textsuperscript{359} Id. at 1154.
process right by sending the photograph to the newspaper and television station.\textsuperscript{360} That is not, however, how the court ruled.\textsuperscript{361}

Even though the former prosecutor violated the mother’s rights, he did so after he was retired.\textsuperscript{362} Therefore, he could not have been acting under color of state law when he sent the photographs to the media.\textsuperscript{363} Because the individual must be acting under color of law to sustain a section 1983 claim, and the former prosecutor could not have been acting under the color of law after he retired, the mother’s claim failed.\textsuperscript{364}

The Ninth Circuit also rejected any claim that the mother might have had based on the former prosecutor photocopying the picture and taking it with him when he retired.\textsuperscript{365} The basis for this rejection was the principle that a government official is entitled to qualified immunity from a section 1983 claim if the right the official violated was not clearly established at the time of the violation.\textsuperscript{366} When the former prosecutor made the copy and took the photograph, \textit{Favish} and \textit{Catsouras} had not yet been decided.\textsuperscript{367} The Ninth Circuit stated that its opinion “is the first case to address the federal privacy interest in death images.”\textsuperscript{368} The right that the former prosecutor violated, therefore, was not clearly established when he violated it, and the former prosecutor was entitled to qualified immunity on the claim.\textsuperscript{369}

It must have been quite a disappointment to the mother when she learned of the Ninth Circuit’s holding in \textit{Marsh}. The court found that she had a right and that the right was violated, but, despite this, she could not recover for the violation.\textsuperscript{370} The mother can take some comfort in the idea that now, after \textit{Marsh}, perhaps the right will be considered clearly established and those that have suffered as she has suffered will be able to bring a successful section 1983 claim against the violator.

In another case involving government actors, the Supreme Court of Washington, sitting en banc, also rejected the plaintiffs’ claims against the government employees for taking pictures of the plaintiffs’ dead relatives.\textsuperscript{371} Unlike \textit{Catsouras}, the court did not find a way around the presence requirement of intentional and negligent infliction of emotional

\begin{itemize}
\item \textsuperscript{360} Id. at 1157-58.
\item \textsuperscript{361} Id. at 1160.
\item \textsuperscript{362} Id. at 1158.
\item \textsuperscript{363} \textit{Marsh}, 680 F.3d at 1158.
\item \textsuperscript{364} Id. (noting that the mother did not present any evidence that the former prosecutor worked with current government employees in sending the photograph to the media).
\item \textsuperscript{365} Id.
\item \textsuperscript{366} Id.
\item \textsuperscript{367} Id. at 1158.
\item \textsuperscript{368} Id. at 1159.
\item \textsuperscript{369} \textit{Marsh}, 680 F.3d at 1159.
\item \textsuperscript{370} Id. at 1160.
\item \textsuperscript{371} Reid v. Pierce Cnty., 961 P.2d 333, 338 (Wash. 1998) (en banc).
\end{itemize}
distress. In this case, county employees took pictures of persons post-autopsy, including some politicians. One employee took these pictures with him after he no longer worked at the county morgue. Other employees took personal photographs of the dead, displayed them to others, and put them in personal scrapbooks.

Despite this egregious behavior, the Washington court held fast to the requirement for infliction of emotional distress that the plaintiff must be present during the act. Because the plaintiffs were not present when the photographs of their deceased loved ones were taken or displayed, their tort claims failed. The court did not find any support for elimination of the presence requirement either in the Restatement (Second) of Torts, upon which Washington’s infliction of emotional distress causes of action are based, or in its prior cases regarding those torts. The court specifically rejected the plaintiffs’ invitation to change the law to encompass behavior “directed at” the plaintiffs, in the absence of the plaintiffs’ presence. The court did hold, however, that the plaintiffs could maintain their common law invasion of privacy claims.

The *Catsouras* and *Reid* cases are two of the few cases where plaintiffs had a chance at a civil recovery for disclosure of pictures of their deceased relatives. Instead, plaintiffs rarely prevail in such cases, especially when a member of the mainstream media publishes pictures of their deceased loved ones. Although courts have grown increasingly reluctant to grant access to such photographs, the family will have a difficult time recovering anything for that invasion of their privacy if those photographs are obtained and eventually published.

**IV. THE CURIOUS CONTRADICTION**

The line of cases regarding public access to autopsy and death representations contradicts cases where the family seeks recovery for harm from the actual publication of those representations. The contradiction is that the family’s privacy right is strong enough to prevent access, but if that privacy right is violated, then the family will probably not be able to recover for suffering caused by the violation. The difference between public access and publication is at the heart of this contradiction. Courts

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372. *Id.*
373. *Id.* at 335-36.
374. *Id.*
375. *Id.*
376. *Id.* at 337-38.
378. *Id.* at 338.
379. *Id.* at 337-38.
380. *Id.* at 342.
are reluctant to grant access to death images and representations. But, if
the public has already obtained the photographs, then it is exceedingly
unlikely that the courts will provide a remedy for the violation of the
families’ privacy rights.

Publishing autopsy or death-scene photographs without the family’s
permission should be considered a violation of their privacy rights. As
discussed in Part II, all of the courts that have considered the issue have
determined that the family has a privacy right in these types of
representations of their dead relatives. In almost all of these cases, this
privacy right is so substantial that it outweighs all the other competing
interests in access to the information, even when those interests are to
determine what went wrong, and thus could lead to preventing future
tragedies.

Accordingly, the privacy right, pre-disclosure, is so substantial that it
trumps any other right. But, if disclosure does occur, then the violation of
that privacy right will most likely not be punished. If a member of the
traditional media violates the privacy right, then courts usually find that
the matter was newsworthy, and thus the media does not have any liability
to the family. If a government official violated the privacy right, then,
at least at this time, the right is not so clearly established as to impose
liability and defeat the qualified immunity enjoyed by that government
actor, as the courts in *Catsouras* and *Marsh* determined. Finally, if the
person that violates the privacy right is a private citizen, and the family’s
claim is premised upon the tort of intentional infliction of emotional
distress, then the family has to somehow demonstrate that the conduct
occurred in the family’s presence or was directed at the family.

This contradiction is nonsensical, as apparently a right exists that is so
valuable that it trumps other rights to the point that people are barred from
obtaining access to government documents, yet one cannot recover
anything for a violation of this same right. Worse than being nonsensical,
however, it encourages people to act outside of the law. If one tries to
obtain access to such photographs or representations by following the
appropriate legal channels, then he will almost surely be denied access.
But, if he somehow gets his hands on the pictures, then he is basically
immune from punishment for subsequently releasing those photographs
into the public sphere. Accordingly, if someone wants autopsy
photographs badly enough, the best course of action is to avoid asking for
permission and instead to obtain the photographs in an extra-legal way.

381. See supra Part II.A.
382. See supra Part II.B.
Then, the person can publish the photographs almost with impunity.384 A solution is clearly needed.

V. RECOMMENDATION

The public should have access to government documents, even if those documents are grisly autopsy or death scene photographs. Also, we should encourage people to go through the appropriate channels to obtain access as a way to control the use of the photographs and thus prevent violations of others’ privacy rights. In addition, the families of the deceased should be protected from having their privacy rights invaded by those that would publish such photographs for nothing more than sensationalism. These goals are not contradictory, and there are ways to accomplish both.385

First, there should be strict access to these types of representations. In most circumstances, only designated people should be permitted to see them, such as accident investigators and coroners.386 Strict access, however, does not mean that the access is difficult to obtain. Instead, it means that it is monitored and conditions are imposed upon it. Second, those gaining unauthorized access to the documents should be severely punished, including losing one’s job (if that is how the access was gained) and criminal sanctions. Third, if a member of the public does want to view the documents, that person should be required to complete several steps to do so, including filing forms and agreeing not to do certain things with the photographs, such as publishing them, copying them, or using them to harass, intimidate, or threaten others.387 Finally, if the person does

384. But see Richards, supra note 277, at 377-78 (noting that if the press does not obtain information lawfully, the reporter can be subject to civil and criminal sanctions without offending First Amendment principles). Of course, then the actor is punished only for unlawfully obtaining the representations, id. at 378, not for disclosing the photographs, and it is the disclosure that causes the most harm to the family.

385. “Striking an appropriate balance between an individual’s need for privacy and society’s need for information is necessary to preserve the accountability principle of democracy.” Martin E. Halstuk, Shielding Private Lives from Prying Eyes: The Escalating Conflict Between Constitutional Privacy and the Accountability Principle of Democracy, 11 COMM&LAW CONSPECTUS 71, 73 (2003). See also Calvert, supra note 74, at 28 (“[T]here is a line that must be maintained between the public interest and a prurient interest.”) (citing LOUIS ALVIN DAY, ETHICS IN MEDIA COMMUNICATIONS: CASES AND CONTROVERSIES 151 (5th ed. 2006)).

386. Washington has a statute that only permits certain people to have access to autopsy records and reports, thus demonstrating its public policy that these matters are private and should not be treated carelessly. Reid v. Pierce Cnty., 961 P.2d at 341-42 (quoting Washington’s statute regarding access to autopsy records and reports). Florida and “[o]ther states also limit by statute the public disclosure of autopsy photographs, while giving special rights of access and control to family members and the decedent's relatives.” Calvert, supra note 211, at 140.

387. Arguably, such a restriction would not raise First Amendment concerns. See Quin S. Landon, Note, The First Amendment and Speech-Based Torts: Recalibrating the Balance, 66 U.
do such things with the documents, then that person should be subjected to criminal prosecution and civil sanctions.388

States should also create a cause of action that allows families to recover from those that publish death representations for purely sensational reasons. This cause of action should jettison any requirement that the conduct occur in the presence of the family or be directed toward the family. These recommendations resolve the contradiction between the two lines of cases—public access and privacy torts—by making the documents accessible to the public, but also providing sanctions for the unwarranted publication of such documents that violate a family’s privacy rights.

VI. CONCLUSION

It is odd that access to autopsy and death scene photographs is rarely granted, but publication of those same photographs without the family’s permission is rarely punished. Hopefully, by implementing all of the recommendations listed above, this contradiction can be eliminated, and surviving relatives can mourn their loved ones in peace.

Miami L. Rev. 157, 168 (2011) (noting that some types of speech are not constitutionally protected, including threatening words).

388. See Fla. Stat. § 406.135(6)(b) (2012) (making it a third degree felony for a person to willfully and knowingly violate a court order regarding viewing the autopsy photographs or recordings).
KENTUCKY SHOULD MANDATE ATTORNEY CONSULTATION BEFORE JUVENILES CAN EFFECTIVELY WAIVE THEIR MIRANDA RIGHTS

Sandra Eismann-Harpen*

I. INTRODUCTION

Childhood is a stage of life that human beings experience before adulthood; it is not a condition or mental defect. Legally, it is equated with diminished capacity. Childhood marks a period of transition from full dependency on parents and guardians at infancy to greater independence during adolescence. Throughout childhood and adolescence, young people develop physically, emotionally, and cognitively. It is easy to recognize that a toddler does not have the same mental acuity as an adult, but it is more difficult to assess an adolescent’s decision-making capabilities. Adolescents often oscillate from making sound decisions in some contexts to making irrational decisions in other contexts. The Supreme Court of the United States has noted that “[e]ven the normal 16-year-old customarily lacks the maturity of an adult.”¹ The Court recognized that juveniles have an underdeveloped sense of responsibility that often results in impetuous and poor decision-making.² Because of juveniles’ inherent immaturity, states often require parental consent and involvement for important decisions.³

Miranda warnings are a familiar concept in popular culture. Today’s television programming is full of crime shows. These shows are readily accessible to juveniles and adults. The shows frequently portray authorities providing Miranda warnings to suspects upon arrest or during questioning. Then, the shows often depict suspects waiving their Miranda rights and making statements to authorities during interrogation. Because of the prevalence of references to Miranda rights in modern culture, juveniles may be more apt to claim that they understand these rights. However, familiarity with a concept does not necessarily equate to a

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3. Bellotti v. Baird, 443 U.S. 622, 649 (1979) (discussing the constitutionality of requiring parental consent before a minor could obtain an abortion, the Court noted that “[c]onsent and involvement by parents in important decisions by minors long have been recognized as protective of their immaturity”).
juvenile’s cognitive understanding of the related risks and consequences that accompany waiver.

Kentucky courts apply the totality-of-the-circumstances test to ascertain the voluntariness of waiver of the right against self-incrimination for juveniles and adults.\(^4\) Kentucky’s application of *Miranda* has minimal modifications for juveniles. Consequently, juveniles may waive their *Miranda* rights without fully understanding the consequences of doing so. Police interrogations are inherently coercive.\(^5\) While in police custody, suspects lack the freedom to leave.\(^6\) Interrogating officers receive training in persuasion and usually have interests that are antagonistic to those of the suspect.\(^7\) Authorities generally question suspects in a location that is familiar to officers and unfamiliar to suspects.\(^8\) Juveniles are not equipped to handle these circumstances, as they lack the cognitive capability necessary for knowing and intelligent waiver. The Supreme Court has recognized that “the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings.”\(^9\) Waiver of the *Miranda* rights is an important, life-altering decision that could lead to a loss of liberty. This raises the issue of whether Kentucky adequately protects juveniles’ *Miranda* rights.

This article proposes a modification to Kentucky law to better safeguard juveniles’ constitutional rights by creating a bright-line rule mandating attorney consultation before juveniles can effectively waive their *Miranda* rights. Part II provides background information related to the *Miranda* rights of juveniles. Part III demonstrates that Kentucky’s current law inadequately protects juveniles’ *Miranda* rights. Part IV provides the rationale and analysis to support modifying Kentucky’s law to mandate attorney consultation before effective waiver of *Miranda* rights.

**II. BACKGROUND**

The Fifth Amendment to the United States Constitution protects an individual’s right against self-incrimination: “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”\(^10\) In

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6. *Id.* at 444.
7. *Id.* at 461.
8. *Id.* at 449. The Court cited to police interrogation manuals that instructed, “[i]f at all practicable, the interrogation should take place in the investigator’s office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant.”
10. U.S. CONST. amend. V.
Miranda v. Arizona, the Supreme Court of the United States applied the Fifth Amendment to state action through the Due Process Clause of the Fourteenth Amendment and determined the meaning of the right against self-incrimination for both state and federal action. First, this section provides an overview of United States jurisprudence related to Miranda rights. Second, it discusses the extension of Miranda rights to juveniles. Third, it reviews the Supreme Court’s recent decision in J.D.B. v. North Carolina. Finally, this section analyzes Kentucky’s law regarding juveniles’ right against self-incrimination.

A. An Overview of Miranda Jurisprudence

In Miranda, the Supreme Court of the United States held that authorities did not sufficiently safeguard the constitutional right against self-incrimination for the suspects in four cases: Miranda, Vignera, Westover, and Stewart. First, the Court held that Miranda’s written confession was inadmissible despite his signature below a pre-printed clause indicating that he had full knowledge of his legal rights. The Court based its decision on the failure of authorities to advise the suspect of his right to have an attorney present. Second, the Court held that Vignera’s verbal confession was inadmissible because authorities questioned the suspect without warning him of his constitutional rights. The third suspect, Westover, confessed after being in police custody for fourteen hours, followed by interrogations by federal authorities for approximately two hours. Although federal authorities warned the suspect of his constitutional rights, there was no evidence of an earlier warning or of an articulated waiver of his rights. Because the federal interrogation occurred without removal in time or in place from the police interrogation, the Court held that the federal authorities benefitted from the pressure applied by police; thus, the warnings by federal authorities were insufficient to protect the suspect’s constitutional rights. The final

14. Id. at 492.
15. Id.
16. Id. at 493-94.
17. Id. at 495-96 (“The FBI interrogation began immediately upon the conclusion of the interrogation by Kansas City police and was conducted in local police headquarters. Although the two law enforcement authorities are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning.”). Id. at 496.
18. Id. at 496.
19. Miranda, 384 U.S. at 496-97 (“A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original
suspect, Stewart, confessed after nine interrogations that occurred over a period of five days. The Court held that the suspect’s confession was inadmissible due to the lack of evidence in the record of any warning. In addition, the Court held that courts cannot assume knowing and intelligent waiver on a silent record.

The Court in *Miranda* interpreted the Fifth Amendment of the United States Constitution to include an individual’s right against self-incrimination in any manner. The right against self-incrimination is also known as the right to remain silent. Specifically, the Court held that authorities must inform suspects of their constitutional rights before commencing interrogations. These constitutional rights are often referred to as *Miranda* rights and include: 1) the right to remain silent; 2) a warning that any statement may be used as evidence against the individual; 3) the right to an attorney; and 4) the right to an appointed attorney if the individual is indigent. The Court requires *Miranda* warnings in order to ensure that suspects are aware of their constitutional rights, as well as the potential consequences that might result from waiver of these rights.

Custody determination is critical when evaluating whether a *Miranda* warning is required because *Miranda* warnings protect suspects in custodial interrogations from the coercive aspects inherent in restrictions of individuals’ freedom. Adequate protective devices are necessary to reduce the compulsion inherent in custodial surroundings and to ensure the voluntariness of statements. Courts must exclude any confession that results from compulsion. Moreover, when authorities take suspects into custody or otherwise deprive them of their freedom, authorities must communicate *Miranda* warnings to them. *Miranda* warnings are not required outside of the custodial context and do not apply to voluntary statements. For example, the Court does not require that authorities provide *Miranda* warnings to suspects who come to the police station of

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surroundings, and then adequately advised of his rights and given an opportunity to exercise them.”). *Id.* at 496.
20. *Id.* at 497.
21. *Id.*
22. *Id.* at 498-99.
23. *Id.* at 476.
24. *Id.* at 444.
26. *Id.* at 469 (“It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege.”).
29. *Id.* at 462.
30. *Id.* at 478-79.
31. *Id.* at 478.
their own volition or who answer questions at any location from where they are free to leave.\textsuperscript{32}

Courts apply an objective test, known as the totality-of-the-circumstances test, to determine whether a suspect was in custody at the time of the interrogation.\textsuperscript{33} Under the totality-of-the-circumstances test, courts review: 1) the circumstances surrounding the interrogation; and 2) whether, under the circumstances, a reasonable person would have felt free to terminate the interrogation and leave.\textsuperscript{34} Specifically, the test focuses on whether authorities formally arrested the suspect or similarly restrained the suspect’s freedom.\textsuperscript{35}

Authorities must cease questioning when a suspect demonstrates his or her desire either to consult with an attorney or to avoid interrogation.\textsuperscript{36} Suspects have the right to waive their \textit{Miranda} rights as long as their waiver is voluntary, knowing, and intelligent.\textsuperscript{37} Prior acquiescence to interrogation\textsuperscript{38} or failure to ask for an attorney before interrogation begins\textsuperscript{39} does not result in a waiver of \textit{Miranda} rights. Suspects may reassert their right to remain silent or to consult with an attorney at any time during the interrogation.\textsuperscript{40}

\section*{B. \textit{In re Gault} Extended the Right Against Self-Incrimination to Juveniles}

The juvenile court system has historically applied different procedural rights to juveniles than those guaranteed to adults.\textsuperscript{41} In \textit{In re Gault}, the lower court sentenced a fifteen-year-old boy to state custody for making lewd comments to a neighbor over the telephone.\textsuperscript{42} Although the maximum penalty for an adult found guilty of the same offense was a fine for up to fifty dollars or imprisonment for up to two months, the juvenile court determined that he was habitually involved in immoral matters and

\begin{thebibliography}{10}
\bibitem{32} \textit{Id.}
\bibitem{34} \textit{Id.}
\bibitem{35} \textit{Id.}
\bibitem{36} \textit{Miranda}, 384 U.S. at 444-45. Police may not question an individual if “he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking,” or “if the individual is alone and indicates in any manner that he does not wish to be interrogated.”\textsuperscript{37} \textit{Id. at 444.}
\bibitem{37} \textit{Id. at 445.} “The mere fact that [an individual] may have answered some questions or volunteered some statements on his own” does not preclude the individual from later invoking the right to silence.\textsuperscript{38} \textit{Id.}
\bibitem{38} \textit{Id. at 470.} “No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given.”\textsuperscript{39} \textit{Id.}
\bibitem{39} \textit{Id. at 444-45.}
\bibitem{40} \textit{In re Gault}, 387 U.S. 1, 14 (1967).
\bibitem{41} \textit{Id. at 4-8.} (“It will suffice for purposes of this opinion to say that the remarks or questions put to her were of the irritatingly offensive, adolescent, sex variety.”).\textsuperscript{42} \textit{Id. at 4.}
\end{thebibliography}
The United States Supreme Court held that the juvenile court proceedings were invalid due to the court’s failure to advise the juvenile of his right to counsel. The Court extended the Fifth Amendment right against self-incrimination to juveniles. In \textit{In re Gault}, the Court noted that the language of the Fifth Amendment was unequivocal with no exceptions to its application. According to the Court, courts should broadly apply the right against self-incrimination, and “no person shall be ‘compelled’ to be a witness against himself when he is threatened with deprivation of his liberty. . . .” If a proceeding may result in the curtailment of a juvenile’s freedom, then the juvenile must receive notification of the juvenile’s right to counsel, retained or appointed. The Court recognized that juvenile waiver of \textit{Miranda} rights might create unique challenges and require different techniques based on the juvenile’s age and parental competence. However, until recently, the Court did not provide additional guidelines for warning juveniles of their \textit{Miranda} rights.

\textbf{C. J.D.B. Created the Reasonable Child Standard}

In general, \textit{Miranda} custody analysis focuses on whether a reasonable person in the position of the suspect would feel free to leave. The Court previously interpreted and applied a custody test to determine whether \textit{Miranda} warnings were required without considering the suspect’s age. This resulted in the application of a reasonable adult standard to juvenile interrogations. Courts differentiated \textit{Miranda} custody analysis from other legal contexts and applied the same standard to juveniles and adults. Meanwhile, there is a general rule that courts may prevent juveniles from independently exercising their legal rights until they reach

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43. \textit{Id.} at 8-9, 56. The boy was fifteen years old when committed to the State Industrial School “for the period of his minority (that is, until 21) unless sooner discharged by due process of law.” \textit{Id.} at 7.
44. \textit{Id.} at 41.
45. \textit{Id.} at 55.
46. \textit{Id.} at 47.
47. \textit{In re Gault}, 387 U.S. at 50.
48. \textit{Id.} at 41.
49. \textit{Id.} at 50.
52. \textit{Id.} at 662 ("[T]he only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.") (citing \textit{Berkemer v. McCarty}, 468 U.S. 420, 442 (1984)).
\end{flushright}
Courts differentiate juveniles from adults in other legal contexts, e.g., contract law, property law, and marriage. In *J.D.B.*, police and school authority figures removed a thirteen-year-old child from the classroom and questioned him about two burglaries. This interrogation occurred in a school conference room with the door closed. The police did not give the child his *Miranda* warnings or tell him that he could leave the room. Not only was the child’s legal guardian not present, but police and school authorities also did not notify his guardian of the interrogation. Authority figures told the child to “do the right thing,” and police threatened him with juvenile detention. No one informed the child of his right to remain silent or his freedom to leave until after he confessed to the burglaries.

The Supreme Court recognized that the compulsory nature of school creates a special circumstance for juveniles without a functional adult equivalent. Because school is compulsory and courts may find juveniles guilty of status offenses, such as truancy for leaving school campuses without permission while school is in session, juveniles do not have the same freedom to leave as an adult under similar circumstances. Additionally, juveniles may receive disciplinary action for their disobedience in school. Although the Court limits *Miranda* application to situations when a suspect is in custody, an unlevel playing field exists for in-school interrogations as the circumstance of being at school may impact juveniles’ perception of custody. The holding in *J.D.B.* recognizes that age and development might impact a reasonable child’s perception of the child’s freedom to leave.

In *J.D.B.*, the Court expanded juveniles’ *Miranda* rights by requiring consideration of a child’s age as a factor in *Miranda* custody analysis, as

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55. *J.D.B.*, 131 S. Ct. at 2403 (identifying “limitations on [juveniles’] ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent”).
56. *Id.* at 2399.
57. *Id.*
58. *Id.*
59. *Id.* This was the second time in a week that police had questioned J.D.B. On the day of the first questioning, police spoke to J.D.B.’s aunt and his legal guardian, his grandmother.
60. *Id.* at 2399-2400.
62. *Id.* at 2405.
63. *Id.* The Court contrasted a student’s presence at school with that of “a parent volunteer on school grounds to chaperone an event, or an adult from the community on school grounds to attend a basketball game.”
64. *Id.*
65. *Id.* at 2402.
66. *J.D.B.*, 131 S. Ct. at 2406 (“In some circumstances, a child’s age ‘would have affected how a reasonable person’ in the suspect’s position ‘would perceive his or her freedom to leave.’”). *Id.* at 2403 (citing Stansbury v. California, 511 U.S. 318, 325 (1994)).
long as the child’s age was known or would have been objectively apparent to a reasonable officer at the time of questioning. The Court noted that the coercive aspects of police interrogations often undermine adults’ will to resist, and juveniles might feel pressured to submit to police questioning under circumstances where adults would feel free to leave. Consequently, the Court stated “[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.” Using the totality-of-the-circumstances test, courts historically applied a reasonable adult standard when determining whether a suspect felt free to terminate the interrogation and leave. However, the J.D.B. Court modified Miranda custody analysis for juveniles by requiring that courts apply a reasonable child standard when assessing a juvenile suspect’s perception of custody.

D. Juveniles’ Miranda Rights in Kentucky

Unlike the punitive focus of adult procedures, juvenile procedures tend to focus on the treatment and rehabilitation of delinquent juveniles. The Kentucky Unified Juvenile Code’s (“Kentucky Juvenile Code”) express legislative purpose is to promote the protection and care of juveniles. In Kentucky, juveniles have an express right to rehabilitative treatment as a means of reducing recidivism and creating productive citizens. Because of the Kentucky Juvenile Code’s rehabilitative focus, juvenile courts make no distinction between violations, misdemeanors, and felonies. The Kentucky Juvenile Code categorizes any non-motor vehicle offense

67. Id.
68. Id. at 2401. The Court reiterated that “the physical and psychological isolation of custodial interrogation” are “inherently compelling pressures.” (citing Miranda v. Arizona 348 U.S. 436, 467 (1966)).
69. Id. at 2403.
70. Id. at 2398-99.
73. In re Gault, 387 U.S. 1, 16 (1967). In discussing the applicability of traditional criminal procedures to juveniles, the Court noted that early reformers “were profoundly convinced that society’s duty to the child could not be confined by the concept of justice alone. They believed that society’s role was not to ascertain whether the child was ‘guilty’ or ‘innocent,’ but ‘What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.’” Id. at 15 (citing Julian Mack, The Juvenile Court, 23 HARV. L. REV. 104, 119-20 (1909)).
74. KY. REV. STAT. ANN. § 600.010(2)(a) (West 2011).
75. § 600.010(2)(d)-e.
committed by a juvenile as a public offense when the action would be a crime if committed by an adult, regardless of whether the crime would be a violation, misdemeanor, or felony. Legislators designed Kentucky’s juvenile system to protect one-time juvenile offenders from the long-term, negative effects that result from a criminal record.

Specifically, section 610.200 of the Kentucky Revised Statutes (“KRS”) requires that officers notify juveniles’ parents or legal guardians when their child is in custody and specifically charged with violation of a particular statute. According to the statute, arresting officers should notify juveniles’ parents or guardians of the reasons for taking them into custody. When juveniles receive notification of their Miranda rights, demonstrate adequate understanding of these rights, and voluntarily waive the right to counsel, juveniles can only raise an action to suppress their statements on the basis of a lack of voluntariness. If juveniles do not raise a voluntariness issue, then technical violations of section 610.200 do not warrant suppression of statements made by juveniles. According to Justice Keller’s concurring opinion in Murphy v. Commonwealth, a violation of section 610.200 is an important variable in determining the voluntariness of a juvenile’s confession.

Section 610.220(2) of KRS allows authorities to hold juveniles in custody for up to two hours for initial investigation and processing. However, juveniles may remain in custody for an additional ten hours upon consent granted by the court, trial commission, or court-designated worker. Technical violations of section 610.220(2) do not warrant suppression of statements made by juveniles. However, a violation of section 610.220(2) is a factor in determining the voluntariness of statements made by juveniles. For instance, in Shepherd v. Commonwealth, the court found that a confession from a sixteen-year-old

78. Phelps, 125 S.W.3d at 241. The system’s design contemplates that otherwise, “isolated instances of reckless adolescent behavior” would cause children to spend the rest of their lives “saddled with a criminal record;” however, juvenile courts retain discretion to transfer some juvenile offenders to the adult criminal court system for treatment as adults.
80. Id.
81. Murphy v. Commonwealth, 50 S.W.3d 173, 185 (Ky. 2001) (holding that juvenile’s challenge to the introduction of his inculpatory statement at trial failed because juvenile was read his rights and only moved to suppress his statement on the grounds of a statutory violation).
82. Id.
83. Id. at 187 (Keller, J., concurring).
85. Id. For the additional ten hours, the child may be held only at a police station, secure juvenile detention facility, juvenile holding facility, youth alternative center, a nonsecure facility or, if necessary, a hospital or clinic. Id. § 610.220(1).
87. Id. at 320.
juvenile was voluntary despite a technical violation of section 610.220(2) related to the police interrogation exceeding the statutorily permitted length. The court’s holding was due to the juvenile’s adequate understanding of his *Miranda* rights, his lack of influence of drugs or alcohol, and the lack of abuse or coercion by police.

In addition to *Miranda* rights, Kentucky’s legislature created sections 610.200 and 610.220 of KRS to provide additional safeguards for juveniles while in custody. Kentucky courts apply the totality-of-the-circumstances test to ascertain the voluntariness of statements made by juveniles while in custody. Most states apply the totality-of-the-circumstances approach to determine the voluntariness of statements made by juveniles. Moreover, courts consider the violation of statutes, such as section 610.220, as a factor when assessing the totality-of-the-circumstances surrounding a juvenile’s confession.

III. KENTUCKY’S PROTECTION OF JUVENILES’ *MIRANDA* RIGHTS IS INADEQUATE

Kentucky is one of only two states that can state its juvenile justice agencies are fully accredited by the American Correctional Association (“ACA”). In 2012, the ACA recognized Kentucky’s commitment to excellence in juvenile justice by awarding Kentucky the ACA’s highest honor, the Golden Eagle Award. Although Kentucky recently received national recognition for its commitment to juvenile justice, it continues to lag behind other states in its protection of juveniles’ *Miranda* rights. Kentucky’s inadequate protection of juveniles’ *Miranda* rights creates a gaping hole in its juvenile justice system that needs to be closed in order for Kentucky to retain its status as a leader in juvenile justice.

The Supreme Court indicated in *J.D.B.* that juveniles need additional protection during police interrogations; however, its *Miranda* custody

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88. *Id.*
89. *Id.*
90. Ky. Rev. Stat. Ann. § 610.200(1) (West 2011) and § 610.220(2) apply only to juveniles in custody and both statutes are subject to interpretation under the express legislative purposes of the Kentucky Juvenile Code, which include “promoting protection of children.” *Id.* §600.010(2).
91. *Shepherd*, 251 S.W.3d at 319.
95. *Id.* The Kentucky Department of Juvenile Justice received the Golden Eagle Award for achieving accreditation “in all of its facilities, the training academy, central office and community and mental health division.”
analysis modifications do not provide juveniles with enough protection. As the facts in *J.D.B.* demonstrate, juvenile interrogations often occur at school, in the presence of adult authority figures, where juveniles are likely unaware of the implications of their situation. However, school is not the only setting where juveniles’ perception of custody may differ from that of reasonable adults, and custody analysis is critical for determining whether *Miranda* warnings are required.

Kentucky can achieve *J.D.B.*’s reasonable child standard by requiring that authorities provide *Miranda* warnings before all interrogations of juveniles. While this would eliminate the subjectivity that stems from the application of the reasonable child standard in custody analysis, providing juveniles with *Miranda* warnings without additional safeguards is not enough.

Although the Court’s holding in *J.D.B.* requires that authorities provide juveniles with *Miranda* warnings more frequently than adults, the Court did not address juvenile-specific issues related to inadequate understanding and inappropriate waiver. Additionally, the Court did not alter the totality-of-the-circumstances test. The “totality-of-the-circumstances test is not sufficient to protect children’s rights, especially when children do not understand their *Miranda* rights, and are more vulnerable than adults during interrogations . . . .” Thus, even though the Court raised the floor in *J.D.B.* by adding the reasonable child standard to *Miranda* custody analysis for juveniles, the revised standard in *J.D.B.* does not prevent Kentucky from further protecting the *Miranda* rights of juveniles.

Sections 610.200 and 610.220 of KRS also provide illusory safeguards related to the admissibility of statements made by juveniles while in custody. Because courts interpret violations of these statutes as merely factors for consideration when assessing the voluntariness of statements made by juveniles under the totality-of-the-circumstances test, the statutes have little to no teeth and provide minimal additional protections for juveniles. In practice, Kentucky does not safeguard any more rights for juveniles than those required by the Constitution and *Miranda*. The legislative intent of the Kentucky Juvenile Code is to promote the protection of juveniles, yet Kentucky does not adequately protect

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98. *J.D.B.*, 131 S. Ct. at 2403 (“Addressing the specific context of police interrogation, we have observed that events that ‘would leave a man cold and unimpressed can overcome and overwhelm a lad in his early teens.’”) (citing *Haley* v. Ohio 332 U.S. 596, 599 (1948)).


101. *KY. REV. STAT. ANN.* § 600.010(1)-(2)(a) (West 2011).
juveniles’ *Miranda* rights. Because the United States Supreme Court’s interpretation of the constitutional rights of juveniles provides merely a floor, Kentucky retains the ability to provide additional safeguards, which would further protect juveniles and their constitutional rights.

IV. PROPOSED SOLUTION AND SUPPORTING ANALYSIS

Kentucky should expand its juvenile protections to mandate consultation with an attorney before juveniles can waive their *Miranda* rights. At least seventeen states provide juveniles increased protection of their constitutional rights during interrogations. Some states require consultation with an adult before effective waiver. Other states require consultation with an attorney before waiver.

The Supreme Court has long recognized that juvenile admissions in the absence of counsel require special care to ensure that admissions are voluntary, not coerced, and “not the product of ignorance of rights or of adolescent fantasy, fright or despair.” The elicitation and use of juvenile confessions or admissions requires special caution. Furthermore, the Court has expressed doubts regarding the reliability and trustworthiness of juvenile confessions.

Without attorney consultation, many juveniles are unable to understand the risks and consequences of waiving their *Miranda* rights. Attorney presence not only provides support, but it also helps to ensure that authorities stop interrogations short of coercion by reducing the

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102. *J.D.B.*, 131 S. Ct. at 2417 (Alito, J., dissenting) (“States are free to enact additional restrictions on the police over and above those demanded by the Constitution or *Miranda*.”).


107. *Id.* at 45.

108. *Id.* at 52.


likelihood of the use of coercion and providing a witness that can testify to any coercion used.\footnote{Miranda v. Arizona, 384 U.S. 436, 470 (1966) (“The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.”) (citing Crooker v. California, 357 U.S. 433, 443-448 (1958) (Douglas, J., dissenting)).} Juveniles need support and guidance to prevent them from falling victim to fear or being crushed by the presence of authorities.\footnote{Haley, 332 U.S. at 600.} An intelligent exercise of Miranda rights can only occur when an individual has both awareness and understanding of the consequences.\footnote{Miranda, 384 U.S. at 469.} Adolescents typically lack the experience, perspective, and judgment necessary for evaluating the consequences of legal decisions.\footnote{Bellotti v. Baird, 443 U.S. 622, 635 (1979).} Therefore, Kentucky should require juvenile consultation with an attorney before authorities commence an interrogation.

This section provides analysis in support of a proposed change to the Kentucky Juvenile Code to require juveniles to consult with an attorney before waiving their Miranda rights. First, the section explains why a bright-line rule is preferable to the more subjective standard created in J.D.B. Second, it demonstrates that requiring parental consultation for valid Miranda waiver does not resolve the issue. Third, the section discusses the lack of accountability for juveniles’ immature brain development under the present Miranda standard. Fourth, it explores additional difficulties experienced by juveniles in comprehending Miranda warnings. Fifth, it examines the increased rate of false confessions by juveniles. Sixth, the section touches on some of the lifelong effects of juvenile Miranda waiver. Seventh, it mentions other areas of law where juveniles receive special treatment. Eighth, it determines that waiver of Miranda rights is analogous to waiver of the right to counsel. Finally, the analysis concludes with a reference to similar arguments made in other states.

A. A Bright-Line Rule Is Preferable to J.D.B.’s Test

Before J.D.B., courts and authorities often cited the Miranda test’s objectivity as a benefit.\footnote{J.D.B. v. N. Carolina, 131 S. Ct. 2394, 2402 (2011).} The objective nature of the Miranda test provides clear guidance to authorities\footnote{Id.} and is less burdensome for authorities to administer due to the test’s exclusion of individuals’ idiosyncrasies.\footnote{Yarborough v. Alvarado, 541 U.S. 652, 666 (2004).} While an objective test for Miranda benefits authorities,
the application of a similar standard to juveniles and adults results in unfair judicial proceedings against juveniles.

In *J.D.B.*, the Supreme Court attempted to mitigate the *Miranda* test’s unfair results on juveniles by adding a reasonable child standard to the determination of custody. Authorities lead interrogations and provide *Miranda* warnings. Authorities are not juveniles, yet the standard in *J.D.B.* requires that they consider how a reasonable child would perceive a specific situation. By requiring authorities to think like a reasonable child, juveniles’ constitutional rights under the *J.D.B.* standard are more subjective than adults’ constitutional rights. According to the Court, “a child’s age, when known or apparent, is hardly an obscure factor to assess.” However, there is no need for a subjective determination of custody-perception based on age if Kentucky implements a bright-line rule mandating that juveniles consult with an attorney before effectively waiving their *Miranda* rights.

The dissent in *J.D.B.* argued that the *Miranda* test should continue to consider only external circumstances, such as the location of the interrogation, the duration of interrogation, the usage of physical restraints, and the suspect’s freedom to leave. According to the dissent, courts should ignore the suspect’s age in *Miranda* analysis because age is a personal characteristic that is similar to a suspect’s intoxication, education, cultural background, and intelligence. The dissent argued that *Miranda*’s reasonable person standard provides authorities with clarity and administrative benefits that do not exist under the reasonable child standard. In addition, the dissent expressed concern that the reasonable child standard does not provide clear guidance for judges and may result in litigation over a reasonable officer’s perception. The creation of a bright-line rule that better protects juveniles’ *Miranda* rights would also alleviate these issues.

By implementing a bright-line rule that requires attorney consultation before interrogating juveniles under the age of eighteen, Kentucky can increase the objectivity of its *Miranda* test through the provision of clear guidance to authorities. A bright-line rule eliminates the controversial

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118. *J.D.B.*, 131 S. Ct. at 2406.
119. *J.D.B.*, 131 S. at 2407 (“Just as police officers are competent to account for other objective circumstances that are a matter of degree such as the length of questioning or the number of officers present, so too are they competent to evaluate the effect of relative age.”).
120. *Id.*
121. *Id.* at 2411 (Alito, J., dissenting) (asserting that consideration of a juvenile suspect’s age is “not needed to protect the constitutional rights of minors who are questioned by the police”). *Id.* at 2408.
122. *Id.* at 2414.
123. *Id.* at 2411.
requirement for authorities to interpret a reasonable child’s perception of custody. Kentucky should enact legislation to require attorney consultation before interrogation when the authority knew or reasonably should have known that the suspect was under the age of eighteen. When determining whether an authority should have known whether a suspect was below the age of the majority, courts should consider the Supreme Court’s guidance in *J.D.B.*, where the Court noted that “officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child’s age. Rather, officers and judges simply need the common sense to know that a seven-year-old is not a thirteen-year-old, and that neither of the children are adults.”

**B. Consultation with a Parent or Guardian Is Not Enough**

Parents and guardians may have interests that conflict with the juvenile’s legal interests. For example, a parent or other family member might be a victim or suspect of the alleged misconduct. Juvenile, civil, or criminal courts may hold parents legally accountable for the misconduct of their children. Tension might result in a conflict of interest between a parent and child due to the financial burden of attorney representation. A parent may encourage a child to confess in order to avoid missing work during the interrogation. The parent and child might have differing opinions on what is in the child’s best interests. The child may be a victim of abuse inflicted by the parent. Parental focus on the child’s moral development or on a desire to learn the truth might result in the parent assisting authorities in the coercion of a confession from the child. A child might be more apt to commit perjury when a parent is present. When conflicting interests exist, parents may elect to protect their own interests rather than the best legal interests of the child. Unfortunately, there is no clear standard to determine whether a conflict of

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125. *Id.* at 2407.
129. *Id.* at 615 (“Experienced attorneys who represent children in delinquency cases confront many variations of child-parent disagreements that may or may not be relevant to the legal issues pending in court.”).
130. *Id.* at 614.
interest exists between a parent and child. Attorney presence mitigates familial conflicts and ensures adequate representation.

Moreover, parents might provide poor guidance and advice even though they believe their actions are in the child’s best interests. Parents may struggle emotionally and psychologically with the circumstances, such that they are unable to effectively evaluate the child’s best interests. Parents typically lack the legal expertise and advocacy skills required to adequately advise their child and to accurately evaluate their child’s options. Parents often fail to appreciate the potential consequences that stem from waiver of constitutional rights. For example, parents often coerce their child to confess to the police, probation officers, or the judge due to a belief that a confession will result in reduced or dismissed charges, a desire to punish the child for the alleged misconduct, or a belief that a confession is in the family’s best interests.

Some parents attempt to use the justice system as a tool to aid in their parenting. Parents may bring a petition against their child for acting uncontrollably. They might mistakenly believe that the authorities are there to help their child and have their child’s best legal interests in mind. These parents may utilize the police or court to obtain treatment for their child’s mental health or drug abuse problems. They might feel safer if the juvenile remains in custody. Parents may believe that their moral interests are best suited by convincing their child to confess, but a “parent should not be forced to decide between teaching a child a moral lesson and protecting them from grave legal consequences.” By segregating the legal advisor role from the parental role and requiring legal consultation before waiver, Kentucky can clearly distinguish the parental and legal consultative roles for juveniles while better safeguarding their constitutional rights.

132. Farber, supra note 126, at 1291-92.
133. Id. at 1296 (“[T]he adult may be overwhelmed by feelings of confusion and concern.”).
135. Henning, supra note 127, at 851. See also Katner, supra note 128, at 616.
137. Marrus, supra note 134, at 531.
138. Id.
139. Id. at 530.
140. Henning, supra note 127, at 851.
141. Farber, supra note 126, at 1296.
142. Henning, supra note 127, at 852.
143. Farber, supra note 126, at 1307.
Some states require juveniles to consult with a parent or guardian before they can effectively waive their Miranda rights. However, the same jurisdictions often find that parents coerce their child to confess to authorities. Juveniles often defer to parental guidance when making decisions regarding the justice system. Because most adults lack legal training and some may have adverse interests, modifying Kentucky’s juvenile law to require consultation with a parent or guardian would not sufficiently protect juveniles’ right against self-incrimination. Thus, by requiring attorney consultation for valid waiver of the right against self-incrimination, Kentucky can ensure that juveniles have an impartial third party to focus on their best legal interests.

C. Juvenile Brains Are Different from Adult Brains

The United States Supreme Court has consistently recognized that adolescence “is more than a chronological fact.” Juvenile brains are still developing. The brain experiences substantial structural and functional maturation during adolescence. Although the brain’s ability to perform basic cognitive functions typically matures by mid-adolescence, the brain’s ability to self-regulate may not reach maturation until early adulthood. The final stage of human brain development involves changes to the frontal lobes and extends into one’s early twenties. In fact, “developmental and neuro scientific research demonstrate differences between children and adults that make children uniquely vulnerable during police interrogations, underscoring their need for greater procedural protections than adults.”

The brain’s prefrontal lobe or cortex manages an individual’s higher cognitive skills, such as problem-solving, thinking, planning, and organizing. This region of the brain develops last and controls

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145. Marrus, supra note 134, at 531.
146. Henning, supra note 127, at 837.
149. Id.
150. Id. at 70.
151. SOCIETY FOR NEUROSCIENCE, BRAIN FACTS: A PRIMER ON THE BRAIN AND NERVOUS SYSTEM 17 (2012) [hereinafter BRAIN FACTS].
152. Brief for Juvenile Law Center et al. as Amici Curiae Supporting Appellant, supra note 109, at 1.
153. BRAIN FACTS, supra note 151, at 6.
judgment, insight, and impulse control.\textsuperscript{154} Its development is critical for goal-oriented, rational decision-making.\textsuperscript{155} The prefrontal cortex experiences synaptic pruning in adolescence and myelination until early adulthood.\textsuperscript{156} Synapses provoke or prevent the generation of signals to neurons to aid in the brain’s processing capacity.\textsuperscript{157} Synaptic pruning improves cognitive function by eliminating excess and unused synapses,\textsuperscript{158} thus resulting in the increased strength, precision, and reliability of remaining synapses.\textsuperscript{159} The coating of nerve fibers with myelin creates more efficient neural connections, thus improving the speed and coherence of an individual’s decision-making ability.\textsuperscript{160} From a neurological standpoint, the average juvenile brain has less cognitive capability than the average adult brain due to its unfinished state of development.\textsuperscript{161} Diminished cognitive capability may cause juveniles to lack full comprehension of the consequences of their decisions.\textsuperscript{162} It is unreasonable to expect or to require adult reasoning and judgment from a juvenile when immature brain functionality is a natural part of adolescent development.

Behavioral differences between adults and adolescents may stem from neurological differences. Behavioral research indicates that adolescents are less likely than adults to think ahead and foresee the consequences of their actions.\textsuperscript{163} Because adolescent brains are not fully developed, adolescents are more vulnerable than adults to poor decision-making and risky behavior.\textsuperscript{164} As the brain develops, an individual’s behavioral changes demonstrate improvement in “judgments, impulses, memory, problem-solving capabilities, emotions, [and] consideration of alternatives and consequences.”\textsuperscript{165} The difference in brain development may account for behavioral discrepancies between adults and juveniles.\textsuperscript{166} This lack of

\begin{itemize}
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Neelum Arya, Campaign for Youth Justice, State Trends: Legislative Victories from 2005 to 2010 Removing Youth from the Adult Criminal Justice System 9 (2011).
\item \textsuperscript{156} Steinburg, supra note 148, at 67-68.
\item \textsuperscript{157} Brain Facts, supra note 151, at 15.
\item \textsuperscript{158} Id. at 16 (“[T]he circuits of the adult brain are formed, at least in part, by sculpting away incorrect connections to leave only the correct ones.”).
\item \textsuperscript{159} Id. at 17.
\item \textsuperscript{160} Steinburg, supra note 148, at 68.
\item \textsuperscript{161} See Graham v. Florida, 130 S. Ct. 2011, 2026 (2010).
\item \textsuperscript{162} See id. at 2028; see also Miller v. Alabama, 132 S. Ct. 2455, 2468 (2012).
\item \textsuperscript{163} Steinburg, supra note 148, at 75.
\item \textsuperscript{164} Id. at 70-71.
\item \textsuperscript{165} Alison S. Burke, Under Construction: Brain Formation, Culpability, and the Criminal Justice System, 34 Int’l J.L. & Psychiatry 381 (2011).
\item \textsuperscript{166} Id.
\end{itemize}
development leads to juveniles being incompetent defendants as shown through risk-taking, bad judgment, and misunderstanding of law.167

Moreover, the adolescent brain has increased sensitivity to dopamine.168 This impacts adolescents’ response to risks, rewards, pleasure, and sensation-seeking.169 A recent study published by B.J. Casey and others “suggests that the combination of heightened responsiveness to motivational cues and immaturity in behavioral control may bias adolescents to seek immediate rather than long-term gains.”170 This finding aligns with other studies that have found adolescents tend to emphasize short-term rather than long-term consequences.171 Adolescents attach different values to the rewards from risk-taking than adults in comparable situations.172 The preference for immediate gains over long-term gains is thought to stem from the tendency for adolescents, faced with emotionally charged circumstances, to rely on their striatum and amygdala more than their still developing prefrontal cortex.173 The amygdala is responsible for managing an individual’s emotional responses.174

From a neuro-scientific standpoint, it appears that adolescents in emotional situations use a different portion of their brains for reasoning than adults under similar circumstances.175 Psychologists have confirmed the apparent existence of a relationship in adolescents between extreme emotional arousal and difficulty or inability to self-control.176 In emotionally stressful situations, adolescents are more apt to self-incriminate in order to receive short-term rewards, such as release from custody or discontinuation of confrontation, than similarly situated adults.177

Additionally, immature decision-making by adolescents might stem from their underlying brain structure and function.178 When compared to average adults, the psychological traits of adolescents include reduced

169. Steinburg, supra note 148, at 68.
171. Burke, supra note 165, at 381.
173. Casey, supra note 170, at 22, 26-27.
174. BRAIN FACTS, supra note 151, at 6 (“Neuroscientists also believe that the temporal lobe has a role to play . . . in learned emotional responses through its amygdala.”).
175. Casey, supra note 170, at 26.
176. Scott, supra note 172, at 22-23.
177. See Casey, supra note 170, at 21, 26; Stealing Innocence, supra note 167, at 582.
178. Casey, supra note 170, at 23.
decision-making capability and vulnerability to coercion. From a scientific standpoint, the adolescent brain is notably different than the adult brain, yet \textit{Miranda} law has minimal cognizance of differences widely recognized in the scientific community and society at large. As early as 1967, the Supreme Court recognized that courts should take great care when law enforcement officials obtain an admission from a juvenile without counsel presence in order to ensure that it was voluntary, not coerced, and not the product of ignorance, adolescent fantasy, or fear. Nevertheless, Kentucky continues to provide minimal protections to juveniles.

D. Juveniles Do Not Adequately Understand Their Miranda Rights

Thomas Grisso published a study in 1980 on juveniles’ comprehension of their \textit{Miranda} rights. This study focused on whether suspects understand the words and phrases used in \textit{Miranda} warnings and the function and significance of suspects’ \textit{Miranda} rights. Researchers applied three different measures to assess participants’ comprehension: researchers asked participants to paraphrase each of the \textit{Miranda} warnings, to define key words from the \textit{Miranda} warnings, and to identify whether paraphrased responses contained the same meaning as the \textit{Miranda} warnings. The research sample considered age, sex, race, offense history, intelligence, and socioeconomic level. The sample included 260 adults and 431 juveniles.

The results of Grisso’s study illustrate that juveniles fail to adequately comprehend their \textit{Miranda} rights. When researchers asked participants to paraphrase the \textit{Miranda} warnings, only 20.9% of juveniles and 42.3% of adults demonstrated adequate understanding of all four warnings. In addition, 55.3% of juveniles demonstrated inadequate understanding of at least one warning. When researchers assessed participants’ understanding of \textit{Miranda} vocabulary, they found that only 33.2% of

\begin{thebibliography}{99}
\bibitem{179} Stealing Innocence, supra note 167, at 579-80.
\bibitem{180} \textit{In re Gault}, 387 U.S. 1, 55 (1967).
\bibitem{182} \textit{Id.} at 1143.
\bibitem{183} \textit{Id.} at 1144. The tests measured not only whether the participants understood the meanings of each word in the warning individually, but also “the meanings conveyed by the specific semantic context.”
\bibitem{184} \textit{Id.}
\bibitem{185} \textit{Id.} at 1146.
\bibitem{186} \textit{Id.} at 1147.
\bibitem{187} Grisso, supra note 181, at 1149.
\bibitem{188} \textit{Id.} at 1152.
\bibitem{189} \textit{Id.} at 1153.
\bibitem{190} \textit{Id.} at 1153-54.
\end{thebibliography}
juveniles and 60.1% of adults adequately understood the key words used in Miranda warnings.\footnote{191} Similarly, only 27.6% of juveniles and 62.7% of adults were able to correctly categorize all eleven or twelve paraphrases of the Miranda warnings as either true or false.\footnote{192} In addition, 44.8% of juveniles and 14.6% of adults misunderstood the right to consult with an attorney before interrogation and the right to have an attorney present during interrogation.\footnote{193} This study “indicate[s] that younger juveniles as a class do not understand the nature and significance of their Miranda rights to remain silent and to counsel. Consequently, their waivers of these rights cannot be considered intelligently, knowingly, and voluntarily made.”\footnote{194}

In 2011, a study was conducted regarding interrogative suggestibility and Miranda rights comprehension in adolescents.\footnote{195} This study used a sample of ninety-four adolescents ranging from twelve to nineteen years of age.\footnote{196} The adolescents attended youth recreation centers in two medium-sized Canadian cities.\footnote{197} The results of the study did not show any correlation between Miranda comprehension and gender, ethnicity, first-language, or self-reported police experience.\footnote{198}

On the other hand, this study demonstrated that many adolescents lack full comprehension of their Miranda rights.\footnote{199} Of the participants, 42.5% failed to comprehend at least one of the four Miranda warnings.\footnote{200} In addition, 44.7% of participants failed to understand some of the vocabulary used in the Miranda warnings.\footnote{201} Comprehension and reasoning related to Miranda rights requires cognitive ability regarding verbal vocabulary.\footnote{202} This study found that both age and intelligence independently predict Miranda comprehension.\footnote{203} Younger participants with lower intelligence were least likely to understand their Miranda rights and were most likely to succumb to negative feedback and pressure.

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191. Id. at 1154.
192. Id.
193. Grisso, supra note 181, at 1154. This was the most frequently misunderstood Miranda warning for both juveniles and adults.
194. Id. at 1166.
196. Id. at 167-68.
197. Id. at 168.
198. Id. at 173. The results strongly suggested that age and IQ are the strongest predictors of a juvenile’s comprehension of his or her rights.
199. Id.
200. Id. at 170.
202. Id. at 174.
203. Id. at 173.
\end{flushleft}
from police. This study recommends that police and courts consider a juvenile’s age and intellectual capability when determining the validity of *Miranda* waiver. Instead of adding increased subjectivity to the *Miranda* test for juveniles, Kentucky can better safeguard juveniles’ *Miranda* rights by requiring attorney consultation before valid waiver. Indeed, attorneys who specialize in representing juveniles are accustomed to communicating with juveniles in a developmentally-appropriate way and are more able than other participants in an interrogation to assess juveniles’ ability to understand the ramifications of waiver.

E. Because of Juveniles’ Unique Characteristics, Juvenile Confessions Require Special Scrutiny

In *In re Gault*, the Supreme Court recognized that courts should carefully scrutinize the elicitation and use of confessions, as a person might falsely acknowledge guilt. Furthermore, special scrutiny should apply to juvenile admissions and confessions. False confessions can occur any time that acknowledging guilt appears to be a favorable choice over denial of guilt. False confessions typically stem from police officers usage of psychological tactics that prey on the suspect’s vulnerabilities. A recent study demonstrated a strong correlation between a suspect’s age and the likelihood of eliciting a false confession. In fact, juveniles were statistically over-represented in the number of false confessions.

False confessions contribute to wrongful convictions and “lead to increased risk of forensic errors, misled witnesses, governmental misconduct, ineffective counsel, and other mistakes.” The justice

205. Id. at 175.
206. See Model Rules of Prof’l Conduct R. 1.14 (2011). A juvenile’s attorney has an ethical obligation to communicate with the juvenile in a developmentally-appropriate manner. This obligation stems from the normal attorney-client relationship. A similar duty does not exist for other individuals.
207. *In re Gault*, 387 U.S. 1, 44 (1967).
208. Id. at 45.
209. Id. at 44.
211. Id. at 584.
213. Id. at 944. Juveniles comprised approximately one-third of the samples of false confessions.
214. *Stealing Innocence*, supra note 167, at 583. According to the Innocence Projects around the world, eyewitness misidentification, informants, forensic science errors, ineffective assistance of counsel, and governmental misconduct also contribute to wrongful convictions.
215. Id. at 586.
system generally treats suspects who confess harsher than non-confessing suspects throughout every stage of the process. After a suspect confesses, police officers typically treat the case as solved and stop pursuing alternative leads. In addition, prosecutors tend to charge the suspect with the highest number and type of offenses. Prosecutors also are less willing to negotiate a plea bargain. Similarly, the suspect might have a greater difficulty making bail. “Confession evidence (regardless of how it was obtained) is so biasing that juries will convict on the basis of confession alone, even when no significant or credible evidence confirms the disputed confession and considerable significant and credible evidence disconfirms it.”

The reliability of juvenile confessions is questionable. When police officers perceive that a suspect is guilty, their interrogations tend to be more coercive. Normal adolescent behavioral cues, such as slouching, are often viewed as deceptive behavior, thus increasing the police officer’s perception that a juvenile is guilty. Juveniles may alter their testimony in an effort to please police. Juveniles are more vulnerable than adults to police pressure and tactics. Interrogation methods validly used on adults often result in unreliable confessions from juveniles. According to Professor Steven Drizin, juveniles falsely confess at two to three times the rate of adults, and their false confessions are often driven by a mistaken belief that authorities will allow them to go home after they confess. This aligns with neuro-scientific research that suggests that adolescents are biased to seek short-term benefits rather than long-term gains.

Juveniles are naturally susceptible to suggestion and might agree with an officer’s statement even though they do not understand the implications

216. Drizin & Leo, supra note 212, at 922.
217. Id.
218. Id.
219. Id.
220. Id. Not making bail can also significantly diminish the juvenile defendant’s likelihood of obtaining an acquittal.
221. Drizin & Leo, supra note 212, at 923.
223. Stealing Innocence, supra note 167, at 580.
224. Id. This is called the misclassification error.
225. Id. at 595.
226. Id. at 578-79. See also Drizin & Leo, supra note 212, at 919.
227. Stealing Innocence, supra note 167, at 578-79.
228. Id. at 580, 582. Steven Drizin is the Director of Northwestern University’s Center on Wrongful Convictions. See also Brief for Juvenile Law Center et al. as Amici Curiae Supporting Appellant, supra note 108, at 28.
of the language used.\(^{230}\) Juveniles might ignore words that lack specific meaning to them even though the words represent legal terms of art.\(^{231}\) In criminal law, minor deviations in language can result in different charges and sentences due to the required intent for the underlying crime.

The dissent in \textit{J.D.B.} mentioned that the suppression of confessions under \textit{Miranda} creates a high cost for society as guilty defendants might go free.\(^{232}\) However, the likelihood of conviction increases even when a suspect wrongfully confesses to a crime.\(^{233}\) In addition, the incarceration of innocent juveniles creates a large cost to society. In 2008, the average annual cost to incarcerate a juvenile in a United States’ juvenile correctional facility was $88,000.\(^{234}\) When society incarcerates an innocent juvenile, not only does the guilty party go free, but the juvenile also irreplaceably loses his or her childhood and experiences lifelong negative impacts from incarceration, as “[y]outh in confinement typically face long odds in their hopes to succeed in school and the labor market.”\(^{235}\)

\textbf{F. Miranda Waiver Can Have Lifelong Impact}

A juvenile’s waiver of his or her \textit{Miranda} rights can have a lifelong impact. An incarcerated juvenile has different educational, family, and social opportunities, which could impact the juvenile’s prospects for college, long-term career opportunities, and cognitive development.\(^{236}\) Incarcerated adolescents are more likely to become victims of assault, suicide, and sexual abuse\(^{237}\) during a period of life when they are more susceptible than adults to psychological damage.\(^{238}\) Incarcerated juveniles can be more likely to commit additional crimes upon release.\(^{239}\) Although Kentucky deems juvenile records to be confidential, some individuals retain access to these records and the court can, for good cause, admit the

\begin{itemize}
\item \(^{230}\) Krzewinski, \textit{supra} note 222, at 359-60.
\item \(^{231}\) \textit{Id}.
\item \(^{233}\) \textit{Stealing Innocence, supra} note 167, at 579 (“[C]onfession evidence is the most powerful piece of evidence in a court of law.”).
\item \(^{235}\) \textit{Id.} at 12.
\item \(^{236}\) \textit{See Mendel, supra} note 234, at 12.
\item \(^{237}\) \textit{ACLU, The Children’s Law Center, Inc & The Office of the Ohio State Public Defender, A Call To Amend the Ohio Rules of Juvenile Procedure to Protect the Right to Counsel} 2 (Jan. 2006) [hereinafter \textit{Call to Amend}]. \textit{See also Mendel, supra} note 234, at 6-9.
\item \(^{239}\) \textit{Call to Amend, supra} note 237, at 2. \textit{See also Mendel, supra} note 234, at 9-12.
\end{itemize}
records. In some instances, courts can transfer juveniles to the adult justice system where convictions are a matter of public record. Although prosecutors cannot use juvenile felonies to charge an adult with being a persistent felony offender in Kentucky, the jury may consider such felonies when sentencing an adult.

Meanwhile, the majority of states allow employers to discriminate on the basis of criminal record and arrests. Due to the accessibility of records, discrimination might extend to housing opportunities and beyond. Most states restrict voting rights based on criminal conviction. Because of the long-reaching consequences of juvenile confessions and the increased likelihood of false confessions due to youth, it is imperative that Kentucky take steps to better safeguard juveniles’ constitutional rights.

G. Treating Miranda Analysis Differently Based on Age Is Consistent with Other Areas of Law

The legal system has historically treated juveniles differently from adults. The mere existence of a juvenile justice system in the United States demonstrates society’s cognizance of these differences. Under American common law, the culpability of children differed from adults, as courts traditionally viewed children less than seven years of age as incapable of possessing criminal intent. More recently, in Roper v. Simmons, the Supreme Court recognized the instability and emotional imbalance of juveniles and interpreted the Eighth and Fourteenth Amendments as prohibiting the imposition of the death penalty for

240. Ky. Rev. Stat. Ann. § 610.340 (West 2011). This statute authorizes the disclosure of juvenile records to the following individuals: child, parent, victim, or other persons authorized to attend juvenile court hearings; public officers, peace officers, or employees engaged in the investigation or prosecution of cases; employees of the Department of Juvenile Justice; attorneys for parties involved in actions related to §§ 600-645; and elementary and secondary school administrative, transportation, counseling, teaching, and school personnel. See also § 610.320. A judge recently found good cause to allow access to juveniles’ records in a sexual assault case. The case received public scrutiny after defendants filed a contempt motion against a victim of sexual assault for posting comments about the crime on the internet. Because of the strong public interest in the case, the victim’s request for disclosure, and the prosecution’s lack of objection, the judge found good cause to provide access to the records. Order In re: Dietrich, No. 10-j-701053, 2012 (Jefferson D. Ct. Ky. entered Aug. 28, 2012).
244. Id.
245. Id.
246. In re Gault, 387 U.S. 1, 16 (1967).
offenses committed by a juvenile under the age of eighteen.\textsuperscript{247} The Supreme Court followed similar reasoning in \textit{Graham v. Florida} to prohibit sentencing juvenile offenders who did not commit homicide to life without parole.\textsuperscript{248} Further, in \textit{Miller v. Alabama}, the Supreme Court extended this concept to prohibit mandatory sentencing schemes of life without parole for juveniles convicted of homicide.\textsuperscript{249}

In the United States, it is generally accepted that eighteen is the dividing line between childhood and adulthood.\textsuperscript{250} States typically treat those under eighteen differently from adults in property law, contract law, voting rights, gun purchase, military service, and marriage.\textsuperscript{251} Young adults receive most of the rights and responsibilities of adulthood on their eighteenth birthday.

Accordingly, the Supreme Court justifies sensitive and flexible application of the constitutional rights of juveniles due to their increased vulnerability and reduced decision-making capability when compared to adults.\textsuperscript{252} The application of different \textit{Miranda} analysis based on the age of the suspect aligns with other areas of American jurisprudence that apply different rules to juveniles under the age of eighteen. By modifying Kentucky’s \textit{Miranda} rules to require attorney consent before waiver, Kentucky would more consistently align the distribution of rights and responsibilities for juveniles. If Kentucky implemented a bright-line rule that requires juveniles under the age of eighteen to consult with an attorney before validly waiving their \textit{Miranda} rights, then juveniles’ ability to waive their \textit{Miranda} rights would align with other legal rights, responsibilities, and restrictions that apply to juveniles based solely on account of age.

\textbf{H. Waiver of Miranda Rights Is Similar to Waiver of the Right to Counsel}

The right against self-incrimination is analogous to the right to counsel in that both rights ensure fair treatment of suspects in the criminal or juvenile justice systems. Kentucky vigilantly protects the right to counsel for juveniles. Kentucky codified juveniles’ right to counsel by not allowing any court to “accept a plea or admission or conduct an adjudication hearing involving a child accused of committing . . . any

\begin{itemize}
\item \textsuperscript{247} Roper v. Simmons, 543 U.S. 551, 578 (2005). The Court acknowledged that the “instability and emotional imbalance of young people may often be a factor in the crime.”
\item \textsuperscript{248} Graham v. Florida, 130 S. Ct. 2011, 2026 (2010). The Court noted specifically the “fundamental differences between juvenile and adult minds” supported by recent psychology and brain science.
\item \textsuperscript{249} Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).
\item \textsuperscript{250} \textit{Roper}, 543 U.S. at 574.
\item \textsuperscript{251} See \textit{J.D.B. v. N. Carolina}, 131 S. Ct. 2394, 2403 (2011); \textit{Roper}, 543 U.S. at 569.
\item \textsuperscript{252} Bellotti v. Baird, 443 U.S. 622, 634 (1979).
\end{itemize}
offense . . . for which the court intends to impose detention or commitment as a disposition unless that child is represented by counsel.” For any other offense, valid waiver of the right to counsel requires a hearing with findings of fact to determine whether the juvenile knowingly, intelligently, and voluntarily waived the right. The right to counsel belongs to the juvenile, and a parent or legal guardian cannot waive this right on behalf of the juvenile. Under Kentucky law, a juvenile can validly waive the right to counsel only after the court appoints counsel and the juvenile consults with counsel regarding the waiver. If a juvenile attempts to waive his or her right to counsel without consulting with an attorney, then the waiver is ineffectual.

It is illogical for Kentucky to fervently protect the right to counsel for juveniles in court hearings and other formal settings without offering similar protections for juveniles’ rights at the onset of the legal process. The Supreme Court has long recognized that “the compulsion to speak in the isolated setting of a police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.”

Police interrogations often use psychological pressure to compel an individual to speak. Juveniles are in a disadvantaged position when compared to interrogating authorities due to the juveniles’ lack of experience, the authorities’ training in interrogation and psychological techniques, the custodial atmosphere, and the inherent police authority.

Kentucky’s current approach allows juveniles to waive their right during interrogations without attorney or adult consultation, but it does not allow juveniles to waive their right to counsel in the courtroom without attorney consultation. By requiring juveniles to consult with an attorney before the juvenile can effectively waive their right to counsel, Kentucky’s legislature implied that juveniles need additional procedural safeguards to ensure that they do not waive their right to counsel without understanding the consequences. If the legislature believes that juveniles, as a class, lack sufficient understanding of the consequences of waiving their right to an attorney during a court proceeding, then it would only seem logical for the same class of juveniles to lack sufficient understanding of the consequences of waiving their right to an attorney or their right to remain silent during an interrogation.

253. KY. REV. STAT. ANN. § 610.060(2)(a) (West 2011).
254. § 610.060(2)(b).
255. § 610.060(1)(e).
257. Id. at 297.
I. By Requiring Consultation, Kentucky Will Align Itself with Other States that Already Provide Juveniles with Additional Safeguards of Their Constitutional Rights

Kentucky currently lags behind other states that better protect juveniles’ constitutional rights. Many states require either the consultation with or presence of an interested adult, parent, guardian, or attorney for effective waiver of a juvenile’s constitutional rights.\(^{259}\) Several state supreme courts in jurisdictions that continue to apply the totality-of-the-circumstances test have commented on the importance of a parental or guardian presence when assessing the validity of a juvenile’s waiver.\(^{260}\) For example, Maryland applies the totality-of-the-circumstances test, yet its courts recognize that denial of parental access to a juvenile charged as an adult is a very important factor in assessing voluntariness.\(^{261}\)

New York and Mississippi also provide additional procedural safeguards for juveniles.\(^{262}\) New York requires that a juvenile and his or her parent or guardian receive *Miranda* warnings before commencing any interrogation.\(^{263}\) Under Mississippi law, authorities must make continuing, reasonable efforts to notify the juvenile’s parent or guardian that the juvenile is in custody and invite them to be present during any interrogation.\(^{264}\)

Several states require that juveniles of any age consult with a parent or guardian before effective waiver of their *Miranda* rights.\(^{265}\) North Dakota and Colorado require that a parent, guardian, or attorney is present during


\(^{260}\) Farber, *supra* note 126, at 1286 n.56.


\(^{263}\) *N.Y. Fam. Ct. Act* § 305.2(7) (McKinney 2012).


custodial interrogations of juveniles under the age of eighteen.\footnote{266}{N.D. Cent. Code Ann. § 27-20-26(1) (West 2011); Colo. Rev. Stat. Ann. § 19-2-511(1) (West 2012).} In Indiana, valid waiver of a juvenile’s constitutional rights requires waiver by the juvenile’s parent, guardian, or attorney on behalf of the juvenile in addition to the juvenile’s knowing and voluntary consent for waiver.\footnote{267}{Ind. Code Ann. § 31-32-5-1 (West 2012).} New Jersey requires the presence of a juvenile’s parent or guardian during interrogation, unless “the juvenile has withheld their names and addresses, a good faith effort to locate them is unsuccessful, or they simply refuse to attend the interrogation.”\footnote{268}{In re J.F., 688 A.2d at 430.}

Other states have special rules that apply to juveniles below sixteen years of age.\footnote{269}{Conn. Gen. Stat. Ann. § 46b-137(a) (West 2012); Okla. Stat. tit. 10A, § 2-2-301(A) (West 2012); Mont. Code Ann. § 41-5-331(2)(b)-(c) (2011).} Under Connecticut and Oklahoma law, statements made by a juvenile under the age of sixteen are inadmissible unless they are made in the presence of the juvenile’s parent or guardian.\footnote{270}{Conn. Gen. Stat. Ann. § 46b-137(b) (West 2012).} When authorities interrogate juveniles sixteen or seventeen years of age in Connecticut, authorities must make reasonable efforts to contact juveniles’ parents or guardian and notify juveniles of their right to contact their parents or guardians and their right to have their parents or guardians present during any interrogation.\footnote{271}{Conn. Gen. Stat. Ann. § 46b-137(b) (West 2012).} Conversely, Oklahoma treats juveniles over sixteen years of age as adults.\footnote{272}{Okla. Stat. tit. 10A, § 2-2-301(B) (West 2012).} In Montana, juveniles under sixteen years of age can validly waive their constitutional rights only if the juvenile and the juvenile’s parent or guardian agrees to waiver or the juvenile elects to waive these rights with advice of counsel.\footnote{273}{Mont. Code Ann. § 41-5-331(2)(b)-(c) (2011).}

Some states have special rules for juveniles younger than fourteen years of age.\footnote{274}{N.C. Gen. Stat. Ann. § 7B-2101(b) (West 2012); A Juvenile, 449 N.E.2d 654, 657 (Mass. 1983).} Massachusetts and North Carolina require the presence of a juvenile’s parent, guardian, or attorney for valid waiver of the juvenile’s \textit{Miranda} rights when the juvenile is below fourteen years of age.\footnote{275}{N.C. Gen. Stat. Ann. § 7B-2101(b) (West 2012); A Juvenile, 449 N.E.2d at 657.} In North Carolina, a parent or guardian cannot waive the rights of a juvenile who is less than fourteen-years-old unless an attorney is present.\footnote{276}{§ 7B-2101(b); (Kan. 1998); Commonwealth v. A Juvenile, 449 N.E.2d 654, 657 (Mass. 1983).}

\begin{footnotesize}
268. In re J.F., 688 A.2d at 430.
276. § 7B-2101(b);}

In Massachusetts, a juvenile under the age of fourteen cannot waive the juvenile’s \textit{Miranda} rights unless “a parent or an interested adult was present, understood the warnings, and had the opportunity to explain his
[or her] rights to the juvenile so that the juvenile understands the significance of waiver of these rights. 277 Similarly, Kansas requires that juveniles under fourteen years of age have an opportunity to consult with the juvenile’s parent, guardian, or attorney before effective waiver of the juvenile’s right against self-incrimination. 278

Other states require that juveniles consult with an interested adult. 279 The Supreme Court of Vermont further safeguarded juveniles’ Miranda rights in In re E.T.C. 280 In this case, a fourteen-year-old group home resident appealed his adjudication as a delinquent juvenile despite the presence of his legal custodian during the interrogation. 281 The Supreme Court of Vermont held that the juvenile’s custodian did not qualify as an interested adult due to his lack of participation in the juvenile’s decision to waive his rights, his inattention during the interrogation, his inability to remember the juvenile’s waiver, his failure to meaningfully consult with the juvenile, and his coercion of the juvenile to confess. 282 According to Vermont law, there are three criteria that must be met for effective waiver of a juvenile’s Miranda rights: (1) the juvenile “must be given the opportunity to consult with an adult; (2) that adult must be one who is not only generally interested in the welfare of the juvenile but completely independent from and disassociated with the prosecution . . . ; and (3) the independent interested adult must be informed and be aware of the rights guaranteed to the juvenile.” 283 Interested adults may include the juvenile’s parent, legal guardian, or attorney. 284

Other states require attorney representation for valid waiver of a juvenile’s constitutional rights. 285 In Texas, valid waiver of a juvenile’s constitutional rights require that “(1) the waiver is made by the child and the attorney for the child; (2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it; (3) the waiver is voluntary; and (4) the waiver is made in writing or in court proceedings that are recorded.” 286 Illinois and West

280. Id.
281. Id. at 938. The custodian present during the interview was the director of the group home where the juvenile lived.
282. Id. at 940.
283. Id. These criteria are required under Chapter I, Article 10 of the Vermont Constitution.
284. Id.
285. 705 ILL. COMP. STAT. ANN. 405/5-170(a) (West 2011); TEX. FAM. CODE ANN. § 51.09 (West 2011); W.VA CODE § 49-5-2(l) (West 2012).
286. TEX. FAM. CODE ANN. § 51.09 (West 2011).
Virginia require attorney representation during custodial interrogations for juveniles under the age of thirteen and fourteen, respectively. 287

A few states demonstrate a strong preference for attorney presence during interrogation, but maintain exceptions to required attorney presence. 288 In West Virginia, statements made by juveniles of fourteen or fifteen years of age are only admissible when made in the presence of counsel or when made with parental or guardian presence and consent. 289 In Iowa, juveniles under sixteen years of age must have an attorney present during interrogation unless the juvenile’s parent or guardian provides written waiver of the juvenile’s right to counsel. 290 Although Iowa allows a juvenile over sixteen to validly waive his or her right to counsel during interrogations, waiver is only valid after authorities make a good faith effort to provide the juvenile’s parent or guardian with the specific offense for which the juvenile is charged, the location of his or her confinement, and acknowledge the right of the parent or guardian to visit or confer with the juvenile. 291

In 2011, the Juvenile Law Center filed a brief of Amici Curiae with the Supreme Court of Ohio in support of the appellant in In re M.W. 292 This brief urges the Supreme Court of Ohio to modify Ohio law by creating a bright-line rule that requires juveniles to consult with an attorney before waiving their Miranda rights. 293 The brief bases its argument on juveniles’ decreased capacity for knowing and intelligent waiver of their Miranda rights due to: (1) ongoing brain development; (2) weak future orientation; (3) tendency to comply with authority figures; (4) inexperience; and (5) false confession rates. 294 Although the case is currently on the Supreme Court of Ohio’s pending docket, the arguments should be persuasive to nearby sister jurisdictions such as Kentucky.

287. 705 ILL. COMP. STAT. ANN. 405/5-170(a) (West 2011); W.VA CODE § 49-5-2(l) (West 2012).
290. IOWA CODE ANN. § 232.11(2) (West 2012).
291. Id.
292. Brief for Juvenile Law Center et al. as Amici Curiae Supporting Appellant, supra note 109, at 1. Appellant appealed a juvenile court decision holding him delinquent for aggravated robbery. Appellant was fifteen years of age at the time of the police interrogation. The interrogating officers did not determine the appellant’s education-level or his ability to read before having the appellant sign a Miranda waiver form. Officers did not provide the appellant with an opportunity to consult with his parents or an attorney before the interrogation. Neither appellant’s parents nor an attorney were present during the interrogation. Appellant had a history of attention deficit hyperactivity disorder. Additionally, appellant received special education services. Brief of Appellant, supra note 99, at 1-2.
293. Brief for Juvenile Law Center et al. as Amici Curiae Supporting Appellant, supra note 99, at 1. The bright-line rule proposed would require “meaningful access to counsel during police interrogations and prior to waiver of their rights under Miranda v. Arizona.”
294. Id. at 17-19, 28.
In 2012, the Supreme Court of Ohio amended Ohio law to better safeguard juveniles’ constitutional right to counsel. The arguments that supported this change in Ohio law also support changing Kentucky law to better protect juveniles’ *Miranda* rights. Juveniles need more than the standard discussion of rights to fully understand the consequences of waiving constitutional rights. There is diminished likelihood that juvenile waiver is knowing or voluntary because juveniles are less likely to understand the consequences and risks inherent in the legal decisions that they make. In addition, juveniles are more vulnerable to misinformation and intimidation in legal proceedings. Thus, Kentucky should consider the proactive measures taken by Ohio in an effort to better safeguard juveniles and their constitutional right to counsel.

V. CONCLUSION

In *In re Gault*, the Supreme Court of the United States recognized that juveniles require the “guiding hand of counsel.” However, the Court does not require that juveniles consult with counsel before waiving their *Miranda* rights. Juveniles have immature brain development and often lack sufficient comprehension of their *Miranda* rights. They often say and do things without fully appreciating the potential long-term consequences. Juveniles are susceptible to influence and prone to false confessions. Thus, Kentucky should require that juveniles consult with an attorney before validly waiving their *Miranda* rights. Additionally, the Kentucky Juvenile Code should be modified to provide a strong presumption against *Miranda* waiver for suspects under the age of eighteen. By creating a bright-line rule, Kentucky will increase its protection of juveniles, provide clear guidelines for courts and authorities, and eliminate the challenges that stem from the subjective nature of the *J.D.B.* test.

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297. *Id.*
300. *In re Gault*, 387 U.S. 1, 36 (1967).
TWO STEPS FORWARD, ONE STEP BACK: CONGRESS HAS CODIFIED THE TEDFORD EXCEPTION, BUT WILL INCONSISTENT APPLICATIONS OF “BAD FAITH” SWALLOW THE RULE?

Nathan A. Lennon*

I. INTRODUCTION

On December 7, 2011, Congress enacted the Federal Courts Jurisdiction and Venue Clarification Act of 2011,1 which amended 28 U.S.C. § 1446, the statute governing diversity removal procedure, in order to codify the Fifth Circuit’s equitable removal tolling principle announced in Tedford v. Warner-Lambert Co.2 Section 1446 had previously provided that defendants seeking to remove cases to federal court on diversity jurisdiction grounds must do so within one year of the commencement of a suit.3 Before the 2011 amendment, most courts had held that § 1446’s one-year limitation on removal was an absolute bar to removal, even in cases where plaintiffs had apparently manipulated pleadings to defeat federal diversity jurisdiction.4 The Fifth Circuit’s decision in Tedford, followed by a minority of courts, had permitted some defendants to defeat these manipulations by allowing for equitable tolling of the one-year removal period.5 Defendants employing the “Tedford Exception” could remove to federal court, even after the one-year limitation had lapsed, when they could show that the plaintiff had attempted to defeat diversity jurisdiction through bad faith pleading of amounts-in-controversy or fraudulent joinder of non-diverse defendants.6

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2. Tedford v. Warner-Lambert Co., 327 F.3d 423 (5th Cir. 2003). “Where a plaintiff has attempted to manipulate the statutory rules for determining federal removal jurisdiction, thereby preventing the defendant from exercise its rights, equity may require that the one-year limit in § 1446(b) be extended.” Id. at 428-29.


4. See, e.g., Ariel Land Owners, Inc. v. Dring, 351 F.3d 611, 615 n.2 (3d Cir. 2003) (“There is no question that the statute prohibits removal outside of certain time limits . . . . [T]he Supreme Court’s statement in Caterpillar that ‘no case, however, may be removed from state to federal court based on diversity of citizenship more than 1 year after commencement of the action.’”) (citation omitted).

5. See Tedford, 327 F.3d at 426 (“Time requirements in lawsuits between private litigants are customarily subject to ‘equitable tolling.’”) (citing Irwin v. Dept’ of Veterans Affairs, 498 U.S. 89, 95 (1990)).

6. See id.
The revised § 1446 now allows district courts to obtain equitable tolling of the removal window in cases where the court is convinced that plaintiffs have manipulated pleadings in “bad faith.” Given that courts in the past have reached widely varying results on what constitutes “bad faith,” both pre- and post-Tedford, the question remains whether § 1446’s changes will have any real effect.

Part II of this article surveys the recent history of diversity jurisdiction as well as the legislative history behind former § 1446, which most courts formerly held barred equitable removal tolling. Part III discusses the rationale behind the Tedford court’s equitable tolling doctrine, as well as the changes that Congress finally codified in the current version of § 1446. Finally, Part IV examines the disparate results courts have reached when attempting to apply the “bad faith” standard under the new § 1446, and argues for more bright line guidance from Congress to ensure that its changes to diversity removal have a lasting effect.

II. BACKGROUND

Federal “Diversity” Jurisdiction and Removal

Although federal courts are only courts of general jurisdiction in matters of federal question and constitutional interpretation, the Constitution extends federal jurisdiction to encompass one category of cases involving issues of purely state law: “diversity” cases between citizens of different states. Since the time of the Judiciary Act of 1789, two limitations on diversity jurisdiction have remained constant. The first is the “amount in controversy” requirement, which ensures that federal jurisdiction extends only to significant state-law cases by excluding cases involving low or nominal value damages. The second is the “complete diversity” requirement, a rule that federal jurisdiction applies only when all plaintiffs are diverse as to all defendants.

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8. Compare Ariel Land Owners, Inc., 351 F.3d at 616 (“Because failure to remove within the one-year time limit established by § 1446(b) is not a jurisdictional defect, a district court has no authority to order remand on that basis without a timely filed motion.”).
10. 1 Stat. 73 (1789) (“That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature of common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.”).
11. See 28 U.S.C. § 1332(a). Currently, the amount-in-controversy must exceed $75,000, exclusive of fees and costs.
12. See Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (stating that “[i]t be court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest
The practice of removing cases from state courts to federal courts is based on the same idea as diversity jurisdiction, namely that “an out-of-state defendant in a state court proceeding should have access to an even-handed federal forum.” Consistent with this principle, the general removal statute provides that a suit brought in a state court may be removed by the defendant to federal court, so long as the claim could have been brought in federal court in the first instance. Put another way, if a state court case could have been initially filed in federal court based on diversity jurisdiction, then it is “removable” to federal court.

Removal of a case from state court has been, and continues to be, a hotbed for litigation because common belief, as well as empirical research, suggests that defendants have better outcomes in federal court. Unsurprisingly then, defendants argue fiercely for a liberal interpretation of removal, while plaintiffs complain that an artificial reading of the removal statutes impinges on state courts’ sovereignty.

That is not to say, however, that there are not limitations on removal. For approximately twenty-five years, 28 U.S.C. § 1446 prevented defendants from removing actions if the actions did not become removable within one year of the action’s commencement. Until 2011, § 1446(b) provided, in relevant part:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that

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14. 28 U.S.C. § 1441(a) (2012) states: “Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending . . .”

15. See, e.g., Yosef Rothstein, Ask Not for Whom the Bell Tolls: How Federal Courts have Ignored the Knock on the Forum Selection Door Since Congress Amended Section 1446(b), 33 COLUM. J.L. & SOC. PROBS. 181, 184-85 (2000) (“Removal may counterbalance the inherent advantages that a plaintiff may gain in choosing to file in a particular state court . . . the plaintiff may seek a home-court advantage by ‘shopping’ for a favorable forum in which to bring suit”); Kevin M. Clermont & Theodore Eisenberg, Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction, 83 CORNELL L. REV. 581, 598-99 (1998) (“[R]emoval effect is significant and sizable in the ordinary cases in which jurisdiction is based on diversity of citizenship or a nonprisoner federal question. . . . Compared to an original diversity or nonprisoner federal question case with a 50% chance of a plaintiff victory, an apparently identical but removed diversity case has only a 33% chance, while a removed nonprisoner federal question case has a 30% chance.”).

16. See infra notes 24-28 and accompanying text.

the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after the commencement of the action. 18

Put simply, a case could ultimately become removable based on diversity jurisdiction, even if it was not removable at the time the plaintiff filed it. 19 Yet, under the pre-2011 version of § 1446, a defendant’s ability to remove the action was still strictly bound by the one year statute of limitations, measuring from the action’s inception. 20

The one-year limitation period on removal is a relatively recent constraint on removal practice. Before Congress enacted former § 1446(b) in 1988, a diverse defendant could remove a case to federal court at any point in the case. 21 For instance, when the plaintiff dismissed all the non-diverse defendants, even if this occurred near or in the midst of trial, the diverse defendant could remove. 22 The ability to remove a case at essentially any time could, and often did, lead to serious disruptions. For instance, if a plaintiff brought suit against multiple parties in state court and subsequently settled with the only non-diverse defendant during the jury’s deliberation, but prior to the rendering of a verdict, the remaining diverse defendant or defendants would be immediately free to remove the case to federal court, requiring a completely new trial. 23

Delays from these types of disruptions drove Congress to enact former § 1446(b) in 1988 as part of an effort to reduce the federal docket and to prevent removal to federal court after “substantial progress has been made in state court.” 24 Congress reasoned that the one-year bar to removal would have a two-fold benefit to the removal docket. 25 First, Congress anticipated that it would save time in the federal district courts by eliminating the otherwise time-consuming process that district judges would have to spend familiarizing themselves with cases that had already substantially progressed. 26 Second, Congress hoped that it would

18. Id.
19. See id.
20. See id.
22. See id.
23. E. Farish Percy, The Tedford Equitable Exception Permitting Removal of Diversity Cases After One Year: A Welcome Development or the Opening of Pandora’s Box?, 63 BAYLOR L. REV. 146, 156 (2011) (including this scenario as one of several hypothetical examples of delay tactics employed prior to former § 1446(b)’s enactment).
25. See id. at 71.
26. See id.
eliminate further delays to plaintiffs whose cases were nearing trial.\footnote{27} However, the former § 1446 made no provision for an equitable exception to the one-year removal period for diversity cases, even though equitable exceptions to statutes of limitations for other types of cases were available under the removal statutes.\footnote{28} This lack of an equitable exception set the stage for plaintiffs to manipulate diversity and amounts-in-controversy to keep cases in state courts until the expiration of the one-year time limitation.

III. ABUSE OF FEDERAL JURISDICTION AND THE ORIGIN OF THE “TEDFORD EXCEPTION”

A. The landscape before Tedford v. Warner-Lambert

A widely-accepted maxim states that plaintiffs generally prefer to sue in state court while defendants generally prefer to defend in federal court.\footnote{29} Thus, plaintiffs often file their cases in state court in order to frustrate removal to federal court, which frequently involves precise or unusual pleading.\footnote{30} Plaintiffs have searched for creative pleading techniques across a wide variety of different litigation settings to avoid federal jurisdiction in diversity cases, even when Congress has attempted to broaden the classes of cases that would qualify for diversity jurisdiction. In the class action context, for example, plaintiffs have historically manipulated the amounts-in-controversy of the putative classes, or alternatively named both diverse class defendants and nominally non-diverse codefendants to defeat diversity jurisdiction.\footnote{31} In response to these forum manipulation tactics, Congress attempted to circumscribe forum manipulation of class action cases by enacting the Class Action Fairness Act of 2005.\footnote{32} Undeterred, class action plaintiffs promptly responded with new and creative tactics to avoid the reforms.\footnote{33}

For example, in Palisades Collections v. Shorts, the class action plaintiff was originally the defendant in a routine collection case on a

\footnote{27} See id.
\footnote{28} Percy, supra note 23, at 156-57 (citing as an example § 1441(d), which allows a foreign state to remove at any time for good cause).
\footnote{29} Percy, supra note 23, at 147 n.1 (discussing the many perceived reasons why plaintiffs prefer state court, chiefly that federal pleading, procedure, and evidence standards tend to favor defendants).
\footnote{30} Id. at 147 n.2 (identifying litigation manuals that plaintiffs’ attorneys promulgate purely for the purpose of keeping cases in state court).
\footnote{31} See, e.g., Sen. Rep. No. 109-14, at 10 (explaining that “current law enables plaintiffs’ lawyers who prefer to litigate in state courts to easily ‘game the system’ and avoid removal of large interstate class actions to federal court”).
\footnote{33} Infra notes 34-38 and accompanying text.
defaulted wireless telephone account. In response to the collection action, the consumer defendant filed a class action counterclaim against the collection agency plaintiff and joined the diverse wireless company that held the original defaulted account as an additional counterclaim defendant. The “counterclaim class action” was a tactic to keep the case in state court; traditionally, courts have held that counterclaim defendants are not able to remove under § 1441, because counterclaim defendants are really plaintiffs, and as such are not the original “defendants” entitled to remove. In spite of broadly-worded language in the Class Action Fairness Act that entitles “any defendant” (regardless of complete diversity or unanimity) to remove, the Fourth Circuit held that the tactic was a valid way to defeat diversity jurisdiction and did not conflict with Congressional intent.

In the same way that plaintiffs have circumvented Congress’s attempt to expand diversity jurisdiction in class action cases, plaintiffs have manipulated the one-year bar to removal in former § 1446. This history of the removal period’s manipulation ultimately led to the Fifth Circuit’s recognition of an equitable tolling exception in Tedford v. Warner-Lambert Co.

In Tedford, two otherwise unrelated plaintiffs, Tedford and Castro, filed suit in Johnson County, Texas for side effects allegedly sustained from a popular drug used to treat diabetes. To keep the action against the diverse drug maker defendant Warner-Lambert in state court, the plaintiffs named a non-diverse physician who had treated only Castro.

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35. Id.
36. Id. at 333 (“Of course, additional counter-defendants, like third-party defendants, are certainly not defendants against whom the original plaintiff asserts claims. Thus, we easily conclude that an additional counter-defendant is not a ‘defendant’ for purposes of § 1441(a).”)
37. 28 U.S.C. § 1453(b), for example, allows “any defendant” to remove certain types of class actions which would not have originally been eligible for federal jurisdiction prior to 2005.
38. See Palisades Collections, 552 F.3d at 336 (“If Congress intended to make the sweeping change in removal practice that ATTM suggests by altering the near-canonical rule that only a "defendant" may remove and that ‘defendant’ in the context of removal means only the original defendant, it should have plainly indicated that intent."). Even on the Palisades panel, however, there was disagreement concerning whether the majority interpretation of the Class Action Fairness Act was correct. See id. at 337-44 (Niemeyer, J., dissenting).
39. See H.R. REP. No. 112-10, at 15 (“The change [to § 1446 providing for a one-year time limit on removal], however, led some plaintiffs to adopt removal-defeating strategies designed to keep the case in state court until after the 1-year deadline passed.”).
40. Tedford v. Warner-Lambert Co., 327 F.3d 423, 428-29 (5th Cir. 2003) (“Where a plaintiff has attempted to manipulate the statutory rules for determining federal removal jurisdiction, thereby preventing the defendant from exercising its rights, equity may require that the one-year limit in § 1446(b) be extended.”).
41. Id. at 424-25.
42. Id. The lack of a present injury proved to be important later in the case, as this meant that the one plaintiff with a non-diverse treating physician actually had no cognizable claim as a matter
Warner-Lambert’s motion, the trial court severed Tedford’s claims from Castro’s and transferred Tedford’s case to Eastland County, Texas, where Tedford lived. After Warner-Lambert notified Tedford of its intent to remove the case to U.S. District Court, Tedford filed an amended complaint naming as a defendant a non-diverse physician who had treated Tedford and prescribed the drug. Warner-Lambert proceeded with removal, arguing that Tedford had fraudulently joined the non-diverse treating physician in an effort to manipulate the forum; however, the district court disagreed and remanded the case. Upon remand to Texas state court, Tedford dismissed his claims against the non-diverse physician after the one-year removal period’s expiration, but Warner-Lambert once again removed to federal court over Tedford’s protest.

On review, the Fifth Circuit took particular interest in the fact that evidence showed Tedford had intentionally waited until after the one-year period expired before he voluntarily dismissed the non-diverse defendant. Specifically, Tedford prepared and signed the notice of dismissal in advance of the one-year anniversary of the case, but did not notify Warner-Lambert of the physician’s release from suit until the one-year period had expired. Additionally, Tedford never presented any discovery requests to the non-diverse physician after naming the physician as a defendant, which suggested that the non-diverse physician was never a proper party to begin with.

After the case’s second removal from state court, Warner-Lambert had argued before the district court that Tedford had manipulated the pleadings to avoid diversity jurisdiction. In opposition, Tedford filed a motion to remand, raising essentially three arguments in opposition to the allegations of forum manipulation. First, Tedford claimed that she had decided to dismiss her claims against the non-diverse physician to preserve a preferential trial date agreed to by Warner-Lambert. Second, Tedford claimed that after a brief investigation, her counsel had determined that the

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of law. See id. at 427, n.11 (citing Lauterbach v. Shiley, Inc., Civ. No. H-87-3208, 1991 WL 148137, at *9 (S.D. Tex. 1991) (stating that there is no cause of action under Texas law for products liability where a product is functioning without actually injuring a plaintiff)).
43. Id. at 426. As the Fifth Circuit noted, under Texas law, venue is proper in the county where substantially all of the events of the case occurred.
44. Id. at 425.
45. Tedford, 327 F.3d at 425.
46. Id. at 427-28.
47. Id. at 425.
48. Id.
49. Id.
50. Id.
51. Tedford, 327 F.3d at 425.
52. Percy, supra note 23, at 162 n.111 (citing the Appellant’s brief in Tedford).
non-diverse defendant was not morally culpable. Finally, Tedford claimed that, although she had signed the notice of dismissal before the expiration of the one-year period, she did not immediately file it because negotiations with the non-diverse physician were ongoing until after the close of the one-year period. Unconvinced by Tedford’s arguments, the district court denied the motion to remand on equitable grounds and certified the order for interlocutory review.

On appeal, the Fifth Circuit affirmed the equitable tolling principle applied by the district court. Although the plain language of § 1446 does not appear to allow for equitable tolling in response to forum manipulation, the court concluded that equitable tolling was possible because the statute was procedural in nature, rather than substantive. As proof, the court noted that it was possible for a plaintiff to waive the right to object to removal under the one-year time bar. Thus, the court reasoned that “if [a plaintiff’s] sleeping on his rights justifies application of an equitable exception in the form of waiver, Tedford’s forum manipulation justifies application of an equitable exception in the form of estoppel.” In the court’s view, the equitable exception made sense because strictly applying the one-year limit would encourage plaintiffs to temporarily join non-diverse parties for one year, simply for the purpose of avoiding federal court. Such an absurd result was contrary to the purpose of diversity jurisdiction and would lead to its undoing. Thus, the “Tedford Exception” was born, despite being roundly criticized and rejected by many courts in subsequent cases, including the Fourth Circuit and the Sixth Circuit.

53. Id. at 162 n.112.
54. Id. at 162 n.112.
55. Tedford, 327 F.3d at 424.
56. Id. at 426-27 (citing Leininger v. Leininger, 705 F.2d 727, 729 (5th Cir. 1983) (stating that “the time limit for removal is not jurisdiction; it is merely modal and formal and may be waived”) (footnote omitted)).
57. Id. at 426 (discussing Barnes v. Westinghouse Electric Corp., 962 F.2d 513 (5th Cir. 1992)).
58. Id. at 426 (discussing Barnes v. Westinghouse Electric Corp., 962 F.2d 513 (5th Cir. 1992)).
59. Id. at 427.
60. Id.
61. See Brock v. Syntex Laboratories, Inc., Nos. 92-5740, 92-5766, 1993 WL 389946 (6th Cir. Oct. 1, 1993). The Sixth Circuit decided Brock long before Tedford, but the language of Brock suggests that the Sixth Circuit would have declined to follow Tedford in any event. See id. at *1 ("While it seems likely that Defendants may have engaged in a manipulation of the rules of
B. Congress Codifies the “Tedford Exception”

In response to the varying substantive versus procedural interpretation of § 1446’s one-year limitation to diversity removal, Congress enacted the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (“the Act”).64 The Act made several important changes to § 1441.65 First, it separated § 1441’s procedures into two new sections, a civil and criminal section.66 Second, the new § 1446(b)(2)(A) codified the well-established “Martin Rule,” which required that all removing defendants in an action “join in or consent to removal.”67 Subparagraph (b)(2)(B) codified the “last served defendant rule,” which settled a split among the courts concerning situations where multiple defendants are served over a lengthy period of time.68

Third, Congress responded to problems with the former § 1446, which required defendants to file a notice of removal within 30 days after receipt of a notice or other paper indicating that an action was removable.69 There had been considerable confusion concerning whether the statute permitted earlier-served defendants to join in a notice of removal when a later-served defendant chose to remove beyond the 30-day period of the earlier served defendant.70 The new rule allows each defendant thirty days...
following her service to seek removal;\textsuperscript{71} but when a later-served defendant chooses to remove, earlier-served defendants may join in or consent to the later-served defendant’s removal.\textsuperscript{72}

Finally, addressing the issue confronted in\textit{Tedford}, Congress amended § 1446 to include a new subsection (c)(1), which provides: “A case may not be removed under subsection (b)(3) on the basis of [diversity jurisdiction] more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.”\textsuperscript{73}

As Congress explained, the intent behind § 1446(c)(1) was to codify the “\textit{Tedford} Exception” and clarify ambiguity in the case law concerning whether the one-year limitation in § 1446 was jurisdictional or procedural.\textsuperscript{74} However, Congress’s lack of any overt guidance as to what constitutes “bad faith” within § 1446(c)(1) is apparently a delegation of “discretion” to district courts to determine whether a plaintiff has procedurally manipulated the forum of the case.\textsuperscript{75} The only clue provided by Congress regarding a standard for “bad faith” is the explanation that “[t]he inclusion in the new standard of the phrase ‘in order to prevent a defendant from removing the action’ makes clear that the exception to the bar of removal after one year is limited in scope.”\textsuperscript{76}

As the cases illustrate, however, courts have reached widely varied results on similar facts, post-\textit{Tedford} and pre-amendment, with respect to whether a defendant is entitled to equitable removal tolling in a given case.\textsuperscript{77} Additionally, courts will continue, for now, to apply pre-amendment law to cases currently working their way through the courts.

\begin{itemize}
\item \textsuperscript{71} 28 U.S.C. § 1446(b)(2)(B) (2012) (“Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.”).
\item \textsuperscript{72} § 1446(b)(2)(C) (“If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.”).
\item \textsuperscript{73} § 1446(c)(1) (emphasis added).
\item \textsuperscript{74} H.R. Rep. No. 112-10 at 15 (“New paragraph 1446(c)(1) adds to the current one-year limitation on removal of diversity actions a limited exception, authorizing district courts to permit removal after the 1-year period if the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.”).
\item \textsuperscript{75} See id. “Proposed paragraph 1446(c)(1) grants district court judges discretion to allow removal after the 1-year limit if they find that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.”
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Compare LaFazia v. Ecolab, No. 06-491ML, 2006 WL 3613771, at *3 (D.R.I. Dec. 11, 2006) (finding that a “fraudulently joined” defendant was evidence of forum manipulation, whether intentional or not), with Hill v. Delta Int’l Mach. Corp., 386 F. Supp. 2d 427, 432-33 (S.D.N.Y. 2005) (concluding based on similar facts to \textit{La Fazia} that the defendant should have removed the action immediately and argued fraudulent joinder, rather than wait for the non-diverse defendant to be dismissed).  
\end{itemize}
because the § 1446 amendments do not apply to cases filed before January 6, 2012.78

IV. VARYING RESULTS UNDER THE “BAD FAITH” INQUIRY AND ANALYSIS

In the period between the advent of the Tedford exception and the amendments to § 1446, courts applying equitable removal tolling reached widely varied results on similar sets of facts. For example, some courts have been willing to find equitable tolling when a plaintiff sues a non-diverse defendant against whom the plaintiff could never have recovered as a matter of law.79 In contrast, other courts have denied equitable tolling in the exact same circumstances, concluding that a defendant in such a situation should remove the case immediately, and argue that the plaintiff fraudulently joined the non-diverse defendant.80

These contradictory results reached by courts on similar facts show that Congress should further amend § 1446 to provide guidance to the courts with respect to when equitable removal tolling is appropriate.81 Interestingly, the varying results reached by district courts during this time led some commentators to suggest that codifying the Tedford exception would actually be bad policy because it would lead to needless litigation.82 While this observation is not patently incorrect, the proposal for further action by Congress, discussed later in Part IV, addresses this possibility.

A. Finding “bad faith” manipulation

One common scenario for equitable tolling involves a plaintiff’s fraudulent joinder of a non-diverse defendant against whom the plaintiff could never recover as a matter of law.83

For example, LaFazia v. Ecolab began as a case in Rhode Island state court, arising from a workplace accident.84 The plaintiff worked in a nursing home and allegedly suffered an injury at work while operating a

78. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 105(a), 125 Stat. 758, 762 (2011) (“[T]he amendments made by this title shall take effect upon the expiration of the 30–day period beginning on the date of the enactment of this Act, and shall apply to any action or prosecution commenced on or after such effective date.”).
81. See infra Part IV.
82. See Percy, 63 BAYLOR L. REV. 146, 188 (arguing that the high remand rate of cases involving equitable removal tolling shows that the doctrine encourages defendants to remove cases, regardless of the strength of the facts favoring removal in any given case).
84. Id.
garbage disposal and dishwasher.\textsuperscript{85} Although the exclusive remedy under Rhode Island law for such a claim is the workers’ compensation system,\textsuperscript{86} the plaintiff nevertheless sued the employer, the employer’s workers’ compensation insurer, and the vendor of the kitchen appliances.\textsuperscript{87} While the vendor was a diverse defendant, the employer and insurer were not, so the case was not removable on its face at the time of its commencement.\textsuperscript{88}

Thereafter, the plaintiff settled with the employer and the insurer, and then filed a First Amended Complaint adding yet another non-diverse defendant, Ecolab, Inc.\textsuperscript{89} Importantly though, the plaintiff did not remove the employer from the caption of the amended complaint.\textsuperscript{90} After the state court granted summary judgment to the first vendor, it appeared that Ecolab was the only true defendant remaining in the action, because all of the other defendants had either settled or won summary judgment.\textsuperscript{91} Ecolab removed the case to federal court, but the plaintiff moved to remand, arguing that the one-year period in § 1446 had lapsed, and removal was not proper.\textsuperscript{92}

Citing \textit{Tedford}, the district court concluded that equitable removal beyond the one-year period was warranted, based on the appearance that the non-diverse employer and insurer were fraudulently joined from the beginning of the case.\textsuperscript{93} In light of the lack of any legal basis for joining these parties, the court concluded that “[t]he bottom line is that this case would have been removable from its commencement but for the presence of two fraudulently joined parties.”\textsuperscript{94} Interestingly though, it does not appear that the court was entirely convinced that the removal was based on intentional manipulation:

\begin{quote}
It is unclear whether this is a case of procedural gamesmanship to prevent removal or if Plaintiff has received an unintended benefit from sloppy pleading. Either way, this Court concludes that it would be
\end{quote}

\textsuperscript{85} Id.
\textsuperscript{86} Id. (citing R.I. GEN. LAWS §§ 28-29-20 (West 2012)).
\textsuperscript{87} Id. (“Plaintiff filed suit in Superior Court on February 16, 2005 against his employer, Cedar Crest; Cedar Crest’s workers’ compensation insurer, Beacon Mutual Insurance Co. (“Beacon”); and Johnson Diversey, Inc., apparently a vendor of kitchen cleaning equipment and/or systems to Cedar Crest.”).
\textsuperscript{88} Id.
\textsuperscript{89} LaFazia, 2006 WL 3613771, at *1.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id. at *1-2.
\textsuperscript{93} LaFazia, 2006 WL 3613771, at *3. (“It appears to a legal certainty that no cause of action in Superior Court ever existed against Cedar Crews or Beacon.”).
\textsuperscript{94} Id.
Thus, the court concluded that the equitable removal doctrine applied, regardless of whether the “fraudulent” joinder was intentional.96

Another common sign of forum manipulation is a plaintiff’s lack of vigorous prosecution against the non-diverse defendant.97 For example, Rauch v. Rauch began as a divorce case in South Carolina state court.98 Near the end of the divorce suit, and after settling some of the claims with his wife, the husband filed suit against two other diverse defendants, alleging theories of fraud, fraudulent conspiracy, and negligence.99 The defendants removed within the one-year window, arguing fraudulent joinder of the ex-wife, but the district court granted the ex-husband’s motion to remand on the grounds that the divorce settlement agreement was not clear whether it extinguished all claims against her.100 The defendants removed the case again, introducing affidavits from the marital defendant and a third party, which purportedly showed that joinder was fraudulent and that removal was proper.101 The district court remanded the case to state court again, concluding that: (1) the second removal was a prohibited attempt to “appeal” the first remand order; and (2) the affidavits were not “other papers” within the meaning of § 1446.102

Nearly two and one-half years after the case began, the plaintiff voluntarily dismissed his non-diverse wife from the action, apparently after having sought no discovery from her.103 The defendants then

95. Id. (footnote omitted); see also Linnin v. Michielsens, 372 F. Supp. 2d 811, 825 (E.D. Va. 2005) (warning against “procedural gamesmanship” between opposing parties in determining whether removal is proper and noting “many plaintiffs’ attorneys include in diversity cases a non-diverse defendant only to non-suit that very defendant after one year has passed in order avoid the federal forum”).
96. Id.
98. Id.
99. Id. at 432-33 (“At the conclusion of the divorce proceedings, Rauch filed suit against Defendants Davis, Deutsche Bank Securities, Inc. and Richard Deboe in the Court of Common Pleas.”).
100. Id. at 433 (“Rauch’s remand motion was heard . . . [and the district court] issued an order finding that Davis had not been fraudulently joined because the Settlement Agreement was ambiguous regarding whether Rauch could pursue a claim against Davis. Accordingly, Judge Bertelsman remanded the action to Hampton County.”).
101. Id.
102. Id. The significance of the defendants’ reference to “other paper” at the second district court proceeding pertained to the particular language’s usage in the former version of § 1446(b), which the defendants argued could reset the statute of limitations for removal actions “after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may be ascertained that the case is one which is or has become removable.” See id. at 433-34 (emphasis added).
103. Rauch, 446 F. Supp. 2d at 433 (“Two years and five months after the commencement of this action, on January 28, 2005, Plaintiff voluntarily dismissed Davis.”).
promptly removed the action a third time, based upon diversity jurisdiction.\textsuperscript{104} The plaintiff moved to remand yet again, this time arguing that the defendants’ removal was untimely because it occurred well beyond the one-year window in § 1446.\textsuperscript{105}

Considering the \textit{Tedford} court’s application of equitable principles, and noting that no Fourth Circuit decision barred equitable removal beyond the one-year window, the district court found that equitable principles should estop the plaintiff from arguing that removal was untimely.\textsuperscript{106} The court noted the diligence of the defendants in their desire to remove, observing that they had attempted to remove the case on fraudulent joinder grounds twice within the one-year time limit.\textsuperscript{107} Moreover, the court noted that, once the one-year time period had expired, the plaintiff had dismissed the non-diverse party, after having pursued no discovery against her.\textsuperscript{108} The court described the plaintiff’s actions as “a shameless and egregious manipulation of [the] court’s jurisdiction.”\textsuperscript{109} Additionally, the court noted the legislative history of § 1446, including Congress’s intent that the purpose of the one-year limitation was to prevent removal after “significant action” in state court.\textsuperscript{110} As the court concluded, however, due to the plaintiff’s failure to pursue discovery against the non-diverse defendant, there had been no significant action in state court.\textsuperscript{111} Thus, the court concluded: “If ever an equitable exception should be recognized to relieve the inequities caused by a strict interpretation of the one-year limit on removal, it is in this very case.”\textsuperscript{112}

Courts have also found “bad faith” manipulation where defendants purposely conceal the true amount-in-controversy to prevent the removability of a case.\textsuperscript{113} In \textit{Jones v. Chavez}, the plaintiff sued a diverse defendant and the defendant’s diverse insurer in Louisiana state court on

\begin{footnotesize}
\begin{enumerate}
\item[104.] \textit{Id}.
\item[105.] \textit{Id}.
\item[106.] \textit{Id}. at 435-36.
\item[107.] \textit{Id}. at 435.
\item[108.] \textit{Id}. (“Now, more than one year after the commencement of the action, Plaintiff dismissed the non-diverse party and Defendants finally have the evidence that proves Plaintiff intended to make this dismissal all along.”).
\item[109.] \textit{Rauch}, 446 F. Supp. 2d at 435.
\item[110.] \textit{Id}. at 435-36 (citing Price v. Messer, 872 F. Supp. 317 (S.D. W.Va. 1995)); \textit{see also} US Airways, Inc. v. PMA Capital Ins. Co., 340 F. Supp.2d 699, 706, n.8 (E.D. Va. 2004) (“The legislative history of § 1446(b) provides that ‘[s]ection (b)2 amends 28 U.S.C. § 1446(b) to establish a one year limit on removal based on diversity jurisdiction as a means of reducing the opportunity for removal after substantial progress has been made in state court.’”) (emphasis added) (citation omitted).
\item[111.] \textit{Rauch} at 446 F. Supp. 2d at 436.
\item[112.] \textit{Id}.
\end{enumerate}
\end{footnotesize}
June 17, 2010, for personal injuries from a car accident.\textsuperscript{114} Initially, the defendants did not remove the case, because the face of the complaint did not suggest that the amount-in-controversy was in excess of $75,000.\textsuperscript{115} In January, 2011, the plaintiff underwent an MRI, which revealed that the plaintiff’s injuries were more serious than initially thought, yet he did not make the MRI results immediately available to the defendants.\textsuperscript{116} Instead, the plaintiff waited until July 21, 2011, about one month beyond the expiration of the one-year removal period, to inform the defendants via an updated demand letter that the plaintiff was seeking in excess of $75,000 in damages.\textsuperscript{117} After learning of the updated demand, the defendants removed the case on August 17, 2011.\textsuperscript{118}

The plaintiffs moved to remand, arguing that the removal was untimely under § 1446.\textsuperscript{119} The defendants countered that the plaintiff purposely concealed the results of the MRI until after the one-year limitations period had expired.\textsuperscript{120} In the plaintiff’s view, however, the defendants could have discovered the alleged amount in damages because the plaintiff’s responses to the defendants’ interrogatories had revealed that the plaintiff was temporarily disabled as early as December 2010, which was well within the one-year limitations period.\textsuperscript{121}

The court denied the motion to remand, relying on the equitable tolling exception from \textit{Tedford}.\textsuperscript{122} The court carefully noted that the mere tendering of an updated demand letter following the expiration of the one-year limitations period is not enough by itself to demonstrate forum manipulation.\textsuperscript{123} On the other hand, the evidence in \textit{Jones} tipped beyond mere suspicion, because the plaintiff kept the MRI results in his possession for approximately seven months before sending an updated demand letter.\textsuperscript{124} In light of this fact, and the fact that the plaintiffs promptly sent the updated demand once the removal period had expired,

\begin{itemize}
\item \textsuperscript{114} Id. at *1.
\item \textsuperscript{115} Id. at *2.
\item \textsuperscript{116} Id. at *3.
\item \textsuperscript{117} Id. at *2-3.
\item \textsuperscript{118} Id. at *1.
\item \textsuperscript{119} Jones, 2012 U.S. Dist. LEXIS 16850 at *1-2 (“In her motion, Plaintiff argues that under 28 U.S.C. § 1447(b), this case is properly remanded to state court because Defendants removed more than one year after the suit was filed.”).
\item \textsuperscript{120} Id. at *2.
\item \textsuperscript{121} Id. at *2-3.
\item \textsuperscript{122} Id. at *1, 5-6 (“In Tedford, the Fifth Circuit held that an exception to the one-year limitation under Section 1446(b) may be granted when ‘forum manipulation justifies application of an equitable exception in the form of estoppel.”
\item \textsuperscript{123} Id. at *8-9; see also Ho v. Colony Ins. Co., 2010 U.S. Dist. LEXIS 110079 at *1 (E.D. La. Oct. 14, 2010) (noting even suspicious behavior does not “offer any evidence to support . . . allegation[s] of bad faith”).
\item \textsuperscript{124} Jones, 2012 U.S. Dist. LEXIS 16850 at *9.
\end{itemize}
the court was convinced that the plaintiff had engaged in a “transparent attempt” to avoid federal jurisdiction. Thus, removal was appropriate.

B. Courts refusing to find “bad faith” manipulation

In sharp contrast to courts finding that fraudulent joinder is a sign of forum manipulation, which entitles the defendant to equitable removal tolling, other courts have suggested that fraudulent joinder actually militates against equitable tolling. For example, Hill v. Delta International Machinery Corporation, which began in New York state court, involved an employer of a trophy manufacturing company who injured himself at work while operating a saw manufactured by Delta and sold by Home Depot. Even though the employee’s exclusive remedy for work-related injuries was usually a claim under the state workers’ compensation system, the employee sued the non-diverse employer, as well as the diverse saw manufacturer and hardware store. Over a year after the suit began, the employee dismissed the employer from the suit, thereby creating complete diversity between the parties. Within a week, the diverse defendants removed the case to federal court; in opposition, the plaintiff moved to remand arguing that removal was untimely because the one-year window had expired. The defendants opposed the motion, and alleged that the plaintiff had fraudulently joined the non-diverse employer solely to defeat removal, only to dismiss the employer once the one-year removal window had lapsed.

Although the court acknowledged that other courts had applied an equitable tolling exception to § 1446’s one-year limit to remove actions, it nevertheless concluded that the defendants were not similarly entitled for two reasons. First, the court noted that, because the employer was a named defendant on the original complaint and it was apparent that the plaintiff had failed to state a claim against the employer, the defendants should have raised the issue of fraudulent joinder immediately, instead of waiting until the plaintiff dismissed the employer. The court acknowledged that the complaint alleged the employer maliciously failed to maintain the saw, which could trigger the intentional acts exception to

125. Id.
126. Id. ("Accordingly, the Court finds the doctrine of equitable tolling should apply, and the suit should not be remanded to state court for further proceedings.").
128. Id. at 428-29.
129. Id. at 428.
130. Id. at 429.
131. Id.
132. Id. at 427, 428-29.
133. Hill, 386 F. Supp. 2d at 431.
134. Id. at 432.
the state’s workers’ compensation scheme, but subsequently concluded that a mere conclusory allegation was insufficient to trigger a tort action and mask the fraudulent joinder of the employer. 135

Second, the court concluded that even though the tort claim against the non-diverse employer was insufficient as a matter of law, there was no evidence that the plaintiff “behaved strategically to defeat [the defendants’] right of removal.” 136 Specifically, the court determined that the plaintiff’s failure to dismiss the non-diverse employer until after the one-year removal window had expired was not in and of itself evidence of manipulative pleading on the part of the plaintiff. 137 Distinguishing a number of cases from other jurisdictions involving manipulative pleading, the court concluded that this was not an example of clearly manipulative forum tactics. 138

Some courts have arguably permitted plaintiffs to conceal the true amount-in-controversy in order to avoid removal, at least where independent evidence is available to the defendant to ascertain the actual value. 139 For example, Foster v. Landon involved a rear-end automobile collision on a Louisiana highway. 140 The plaintiff sued the driver of the vehicle that hit his car, as well as the vehicle’s owner, a diverse rental car company. 141 After filing suit, the plaintiff settled with and dismissed the non-diverse car driver within the one-year removal window. 142 However, the case was not removable on its face because the complaint did not specify more than $75,000 in damages. 143 Several months beyond the expiration of the one-year window, however, the plaintiff sent the defendant an updated demand letter, seeking over $75,000 in damages; in response, the defendant filed a notice of removal. 144 The plaintiff moved

135. Id. An exception to the workers’ compensation system exists where an employer engages in intentional misconduct that injures an employee, allowing for a tort suit against the employer as an alternative remedy. See also id. at 431, n.25 (citing Burlew v. American Mut. Ins. Co., 472 N.E.2d 682 (1984) (“Intentional injuries are not covered by the Workers’ Compensation Law and an employee may bring a tort action for such wrongs against the offending employer or insurer.”)).


137. Id.

138. Id. The court’s conclusion appeared to be grounded more on the issue of timing as evidence of forum manipulation, rather than pleading by itself. For instance, to distinguish the instant case from cases where forum manipulation was present, the court noted that the plaintiff did not add the non-diverse party in response to a notice of removal. Of course, the court’s distinction implicitly assumes that fraudulent joinder is not in and of itself a type of forum manipulation, or at least not one that will toll the one-year removal period.


140. Id. at *1.

141. Id.

142. Id. at *1-2.

143. Id. at *2.

144. Id. at *1-2.
to remand, arguing that the one-year window had elapsed, and was not subject to equitable tolling.\footnote{145}

Addressing the motion to remand, the court noted that although some courts, including the \textit{Tedford} court, had recognized that equitable principles sometimes allow for tolling of the one-year period, it could not conclude that the case sub judice was an example of such an “egregious, clear pattern of forum manipulation.”\footnote{146} The court did note that “[i]t is troubling that the Plaintiff would expressly state that the case was not worth $75,000 in the initial pleading, when stating an amount in controversy is not necessary to satisfy the pleading requirements of state court . . . ”\footnote{147} Additionally, in light of evidence that the plaintiff possessed medical records indicating his injury was serious, the delay in giving the defendants an updated demand certainly gave “rise to an aroma of manipulation.”\footnote{148} Nevertheless, although the court acknowledged that the plaintiff’s pleading practice was suspicious, it concluded that the defendants were not entitled to equitable removal.\footnote{149} The court conceded that the purportedly high standard for equitable tolling “lends itself to abuses,” but stated that “it is for the Congress and not this Court to rewrite the provisions of section 1446(b) to curb such abuses.”\footnote{150}

In addition to fraudulent joinder, some plaintiffs have postponed removal by delaying dispositive motions, yet this practice is generally insufficient to constitute improper forum manipulation.\footnote{151} For example, \textit{D’Alessandro v. Cumberland Farms, Inc.} began as a slip-and-fall, premises liability suit in Connecticut state court on February 25, 2011.\footnote{152} Following an alleged injury in a retail store, the plaintiff sued the diverse store, as well as the non-diverse store manager on duty at the time of the plaintiff’s injury.\footnote{153} Just over a year later, the state court granted the non-diverse manager defendant’s motion for summary judgment, leaving only diverse parties in the suit.\footnote{154} Within thirty days, the store owner defendant removed the action to federal court, claiming that equitable tolling made the removal proper, even though the one-year limitations period had
When the plaintiff moved to remand, the defendant argued that the plaintiff had manipulated the choice of forum by (1) naming the store manager defendant, who was never a proper party based on Connecticut premises liability law, and (2) seeking two 60-day extensions of time to file responses to the manager’s motion for summary judgment.

The court acknowledged that Tedford and its progeny allowed for equitable tolling in certain circumstances, but nevertheless granted the motion to remand. In the court’s view, the defendant’s argument that a cause of action was never proper against the non-diverse store manager was not a sufficient basis to allow for equitable removal tolling. According to the court, if the defendant had suspected the deficient cause of action signaled fraudulent joinder on the face of the complaint, it should have filed a notice of removal immediately, rather than wait until after the non-diverse defendant’s dismissal. Addressing the defendant’s argument that the plaintiff also stalled the state court proceedings by requesting additional time to file response briefs, the court noted that the defendant did not oppose those requests. Consequently, the court found that equitable removal tolling was not appropriate.

C. Analysis and Proposed Solution

These cases show the inexplicably contradictory results that federal district courts have reached when confronted with the question whether a defendant is entitled to equitable removal tolling. Where a diverse defendant suspects that a plaintiff has fraudulently joined a non-diverse party, the cases involving fraudulently joined employers are particularly troubling because courts have created what amounts to a “catch-22” situation. For instance, the plaintiff in LaFazia allegedly joined a non-diverse employer defendant in order to prevent the case’s removal by the diverse vendor of the appliance that caused the injury. The court saw

155. See id. at *4-5 (“Cumberland does not dispute that it removed this action more than one year after commencement . . . Cumberland contends, however, that its failure to meet the statutory deadline was the result of D’Alessandro’s strategic efforts to prevent removal.”).

156. Id. at 5. To be a proper party in a premises liability action, the manager would have had to own, possess, or control the store at the time that the plaintiff fell. According to the defendant, the plaintiff never had any factual basis to assert these essential elements of the claim against the store manager. See id.


158. Id. at *3-4, 7.

159. Id. at *5-6.

160. Id.

161. Id. at *6 (“The court is also doubtful that D’Alessandro’s two requests for extensions of time in state court—requests that Cumberland did not oppose—represent the sort of clearly strategic behavior that the equitable exception was designed to address.”).

162. Id. at *7.

the gist of the action as a products liability case against the diverse vendor of the allegedly defective equipment that caused the plaintiff’s injury, and determined that the improper joinder of the employer effectively triggered equitable tolling of § 1446.164

However, the court in Hill came to the opposite conclusion based on indistinguishable facts.165 Just like the employee in LaFazia, the worker in Hill was injured in the course and scope of employment by an allegedly defective product; thus, the gist of both actions was clearly products liability, rather than employer liability.166 Nevertheless, the court in Hill concluded that, because the fraudulent joinder of the employer should have been obvious on the face of the complaint, the diverse defendants actually erred by waiting to remove the action until after the plaintiff dismissed the employer, as if to suggest that fraudulent joinder was somehow not the plaintiff’s own choice and responsibility.167 Perhaps even more egregiously, the Hill court also faulted the defendants for accepting at face value the complaint’s allegation that the employer acted maliciously toward the plaintiff, which would have meant that, taken as true, the employer was not shielded by the workers’ compensation “exclusive remedy” immunity.168

Likewise, the Rauch and Foster cases reach opposite conclusions based on similar factors.169 The court in Rauch noted that the plaintiff sought no discovery from the non-diverse defendant, but dismissed her once the one-year window had closed.170 While this was sufficiently “egregious” forum manipulation for the Rauch court, the court in Foster could not conclude that the plaintiff had manipulated the forum merely because it failed to timely disclose the amount-in-controversy of the claim to the defendants.171 While acknowledging that there was evidence that the plaintiff knew about the true value of the amount-in-controversy before the expiration of the one-year window, the court concluded that it was for Congress to act by amending the statute, in light of the fact that the statute lends itself to abuse by plaintiffs.172

164. Id.
166. Compare LaFazia, 2006 WL 3613771 at *1, with Hill, 386 F. Supp. 2d at 431.
168. Id.
171. Foster, 2004 WL 2496216 at *3 (“In this case, Plaintiff may have delayed by a few months in sending a demand letter and medical records indicating that the federal jurisdictional amount is satisfied. However, such conduct hardly rises to the transparent attempt to circumvent federal jurisdiction presented in Tedford.”).
172. Id.
Now that Congress has amended the statute, however, it is not clear that the amendment will have any practical effect for a defendant where the plaintiff is clearly trying to evade federal jurisdiction by manipulating the one-year bar. Cases like Foster and Hill demonstrate how a court can ignore the facts of the case, and at the court’s discretion, find that a defendant is not entitled to equitable tolling. If Congress has left the issue of equitable tolling to the courts’ discretion, the cases suggest that more bright line rules are needed to give any lasting effect to the equitable tolling exception.

One possibility for a further amendment to § 1446 would be the creation of a rebuttable presumption of forum manipulation, which would attach to equitably toll the one-year period when a plaintiff engages in any of a number of questionable litigation tactics. These tactics could include: naming non-diverse defendants in a complaint when the complaint clearly fails to state a claim against them; dismissing non-diverse defendants within a short time after the one-year period has passed; and suing non-diverse defendants but failing to seek discovery from them. Because the presumption would be rebuttable, it would not prevent plaintiffs from staying in state court when the reasons for these tactics are perfectly legitimate. The interest that a plaintiff has in legitimate pleading tactics would be balanced against the defendant’s right under § 1446 to a federal forum. At the very least, it is clear from these cases that courts need further guidance on what factors should be given weight in the equitable tolling inquiry, contradictory results have been produced from nearly identical facts.

V. Conclusion

Congress has acted to codify the Tedford equitable removal tolling exception, but the effectiveness of the removal procedure amendments is in doubt given the varied results reached by the district courts applying the Tedford rationale. While codifying the Tedford Exception is a step in the right direction, Congress should act to provide more concrete guidance to the courts in order to give the amendments lasting effect.