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MEDIATION PRACTICE IN KENTUCKY: ADOPTION OF THE UNIFORM MEDIATION ACT WOULD HELP

Henry L. Stephens Jr.*

I. INTRODUCTION

Over the last twenty years, Kentucky lawyers have been introduced to the concept and practice of mediation. Since 1993, the Kentucky Bar Association and the courts of the Commonwealth have sought to bring order to a process that utilizes traditional procedures such as interrogatories, requests for admission, and discovery depositions, to achieve a negotiated resolution as opposed to an outcome at trial.1 Thus, in 2000, the Kentucky Supreme Court promulgated Model Mediation Rules [hereinafter “Model Rules”].2 Following the supreme court’s adoption of the Model Rules, a number of local courts throughout the Commonwealth also adopted the Model Rules.3 However, a large number of other local courts elected to use the Model Rules as a springboard, thereby creating local mediation rules out of whole cloth.4

While Kentucky was considering the need to standardize mediation in the 1990s, the National Conference of Commissioners on Uniform State Laws was considering drafts of the Uniform Mediation Act [hereinafter “the UMA” or “the Act”].5 The Act was completed by the Uniform Law Commissioners in collaboration with the American Bar Association’s Section on Dispute Resolution in 2001; later amended in 2003.6 To date, eleven states and the District of Columbia have adopted the UMA, and bills to consider adoption have

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1. See generally Hal Daniel Friedman, Court Ordered Mediation in Kentucky: A Boon or Bane for Kentucky Trial Lawyers?, KY. BENCH & B., 1993, at 10, 11-14. The Kentucky Bar Association’s Alternative Dispute Resolution Committee drafted proposed rules for mandatory arbitration that were presented for comment during a public hearing at the 1993 KBA annual convention. In recent years, mediation has gained notoriety for its ability to alleviate crowded court dockets and obtain resolution of disputes, often in a faster and more cost effective manner than traditional litigation. After the case has been filed, pleadings exchanged, and sufficient time for preliminary discovery has passed, the judge will issue an order referring the case to mediation. Id.


3. See infra notes 59-91 and accompanying text.

4. See infra text accompanying notes 92-104.

5. Author was a member of The Uniform Law Commission when the National Conference of Commissioners on Uniform State Laws was considering drafts of the Uniform Mediation Act.

been introduced in the 2014 sessions of the New York and Massachusetts legislatures.\textsuperscript{7}

This article urges the adoption of the UMA in Kentucky to fill gaps in the Model Rules concerning the areas of confidentiality and privilege, to resolve conflicts between local rules and the Model Rules, and to ensure that all mediators in the Commonwealth operate under a standard set of rules concerning all facets of mediation, irrespective of whether those mediations are conducted under the auspices of a trial court.\textsuperscript{8} This article begins with a brief discussion of the UMA’s provisions and how such provisions differ from current laws throughout Kentucky. The privilege against disclosure and the confidentiality of oral communications made within the mediation context provided for under Kentucky law, specifically Kentucky Rule of Evidence 408 [hereinafter “K.R.E. 408”], will be examined and contrasted with the privilege and confidentiality provisions of the UMA. This article concludes by urging the Kentucky General Assembly to consider adopting the UMA to bring clarity, consistency, and uniformity to all mediations conducted in the Commonwealth, irrespective of whether such mediations are subject to the Model Rules.\textsuperscript{9}

II. THE NUTS AND BOLTS OF THE UMA

As conceived by the Uniform Law Commission, a uniform mediation statute was necessary to combat the problems created by as many as 2,500 separate mediation statutes throughout the United States, and the uncertainty that mediating parties might face in choice of law disputes.\textsuperscript{10} “This complexity is especially troublesome when it undermines one of the most important factors promoting mediation as a means of dispute resolution, namely the parties’ ability to depend on the confidentiality of the proceeding, and their power to walk away without prejudice if an agreement cannot be voluntarily reached.”\textsuperscript{11} Accordingly,

\textsuperscript{7} Id.

\textsuperscript{8} See, e.g., Model Mediation Rules, KY. CT. OF JUST. (Nov. 1, 2001), http://courts.ky.gov/courtprograms/mediation/Pages/modelmediation.aspx. Rules 3-10 specifically contemplate the Model Rules’ applicability only when a case is presently in litigation. Thus, the rules only address cases presently under the jurisdiction of the trial court. Id.

\textsuperscript{9} See Rebecca Callahan, Mediation Confidentiality: For California Litigants, Why Should Mediation Confidentiality be a Function of the Court in Which the Litigation is Pending?, 12 PEPP. DISP. RESOL. L.J. 63, 64 (2012) (“Why should mediation confidentiality depend upon (a) whether the dispute has escalated to the point of litigation, and (b) whether that litigation is pending in state or federal court?”).


\textsuperscript{11} Mediation Act Summary, UNIF. LAW COMM’N: THE NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, http://uniformlaws.org/ActSummary.aspx?title=Mediation%20Act (last visited July 28, 2014). In federal court, some courts have found the existence of a “common law” mediation privilege, while other courts have treated mediation confidentiality in diversity cases as a matter governed by state law pursuant to \textit{Erie v. Tompkins}, 304 U.S. 64 (1933). See Michael P.
the need for parties to feel secure concerning the confidentiality of the mediation process and mediation-related communications was a central concern of the UMA drafters.\footnote{12}

A. “Mediation Communications”

The drafters determined that any uniform statute addressing mediation must protect the confidentiality of “mediation communications.”\footnote{13} To accomplish this objective, the UMA defines the term “mediation communication” as follows: “‘Mediation communication’ means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.”\footnote{14}

The scope of this definition defines the core protection that the drafters of the UMA sought to implement. Section 4 ensures privilege against disclosure of such mediation communications:

(a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.

(b) In a proceeding,\footnote{15} the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

\footnotesize{Dickey, ADR Gone Wild: Is it Time for a Federal Mediation Exclusionary Rule?, 25 OHIO ST. J. ON DISP. RESOL. 713, 731 nn.86-87 (2010).}

\footnotesize{12. Mediation Act Summary, UNIF. LAW COMM’N: THE NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, http://uniformlaws.org/ActSummary.aspx?title=Mediation%20Act (last visited July 28, 2014) (“Promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2001, the Uniform Mediation Act (UMA) is intended to address this core concern about the confidentiality of mediation proceedings. The result of a unique joint drafting effort between NCCUSL and the American Bar Association through its Dispute Resolution Section, the UMA is intended as a statute of general applicability that will apply to almost all mediations, except those involving collective bargaining, minors in a primary or secondary school peer review context, prison inmate mediation, and proceedings conducted by judicial officers who might rule in a dispute or who are not prohibited by court rule from disclosing mediation communications with a court, agency, or other authority.”).}

\footnotesize{13. See supra notes 10-13 and accompanying text; infra text accompanying note 14.}

\footnotesize{14. UNIF. MEDIATION ACT § 2(2), U.L.A. (2003). Most importantly, the UMA’s definition of “mediation communication” encompasses statements made prior to the start of the formal mediation session, including any such communications made for the purpose of setting up the mediation. Id.}

\footnotesize{15. Id.§ 2(7) (defining “proceeding” as: “(A) a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or (B) a legislative hearing or similar process”).}
(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.16

Therefore, the “UMA’s focus on privilege simplifies and strengthens the confidentiality of mediation by creating a privilege for mediators and participants that allows them to refuse to disclose a ‘mediation communication’ in any discovery or evidentiary proceedings covered by the act.”17

Prefatory to a discussion of whether the UMA would broaden the scope of any existing privilege embodied in the Model Rules, it is critical to understand the scope of the UMA’s privilege. While the creation of privilege was not the only mechanism available to secure the confidentiality of mediation,18 the drafters recognized that the privilege construct was already familiar to the legislatures and courts. For many years, both have used the privilege concept to provide protection for other forms of professional communications including attorney-client, doctor-patient, and priest-penitent relationships.19

Since the use of privilege is the primary mechanism by which communications are protected under the law,20 the drafters ultimately opted for a

16. Id. § 4.
17. See John R. Van Winkle, Van Winkle: Should Indiana Adopt the Uniform Mediation Act?, Ind. Law., (Oct. 26, 2011), http://www.theindianalawyer.com/van-winkle-should-indiana-adopt-uniform-mediation-act/PARAMS/article/27414 (looking at the existing privilege provided by Indiana Rule of Evidence 408 and concluding that the privilege provided by the rule does not provide the same scope of protection as the UMA’s confidentiality provisions); infra notes 32-41 and accompanying text.
18. Unif. Mediation Act § 4 cmt. 2(a), U.L.A. (2003) (“The Drafters considered several other approaches to mediation confidentiality including a categorical exclusion for mediation communications, the extension of evidentiary settlement discussion rules to mediation, and mediator incompetency. Upon exhaustive study and consideration, however, each of these mechanisms proved either overbroad in that they failed to fairly account for interests of justice that might occasionally outweigh the importance of mediation confidentiality (categorical exclusion and mediator incompetency), underbroad in that they failed to meet the reasonable needs of the mediation process or the reasonable expectations of the parties in the mediation process (settlement discussions), or under-inclusive in that they failed to provide protection for all of those involved in the mediation process (mediator incompetency).”).
19. Id. (citing Unif. R. Evid. 510 (1986); 26 U.S.C. § 7525 (1998)).
narrowly crafted privilege, explaining that, “[t]he privilege structure also provides greater certainty in judicial interpretation because of the courts’ familiarity with other privileges, and is consistent with the approach taken by the overwhelming majority of legislatures that have acted to provide broad legal protections for mediation confidentiality.” Finally, it is worth noting that support for such a privilege can be found among scholars and practitioners alike.

B. The Scope of the UMA’s Privilege

Through the UMA’s utilization of the term “mediation communication” and its expansive definition, the mediation communication privilege broadly attaches to communications made outside of formal mediation sessions, such as those made for purposes of convening or continuing a mediation. The privilege “is not subject to discovery or admissible in evidence.” Section 4(a) provides that a court or other tribunal must exclude privileged communications that are protected, and may not compel discovery of the communications. Moreover, as with other privileges, a mediation privilege operates to allow a person to refuse to disclose and to prevent another from disclosing particular communications. As explained by the drafters of the UMA, “[t]his blocking function is critical to the operation of the privilege.”

The blocking function potentially applies to all persons participating in mediation. First, mediating parties have the ability to block testimony about, or other evidence of, mediation communications made by anyone in the mediation – the attorneys, mediator, parties, or nonparties. On the other hand, if all parties agree that a party should testify about mediation communications, no one else – the mediator, counsel, or nonparties – may prevent the party from doing so.


25. See Id. § 4a.

26. Id. § 4 cmt. 2(a).

27. Id. § 4 cmt. 4(b).

28. See id.

29. Id.
Second, the mediator herself may refuse to provide evidence, including her own statements or anyone else’s, even if the parties consent. This allows the mediator to protect the integrity of the mediation process despite the parties’ wishes. However, with the parties’ consent, a non-mediator may testify to statements made during the mediation process, including statements made by the mediator, and the mediator may not prevent such disclosure. By crafting the ability to disclose evidence of statements made during the mediation process in this fashion, the drafters struck a balance between protecting the expectations of the parties and others during the mediation process and the tribunal’s presumed need for relevant information.

Finally, consistent with the protection provided to the mediator and parties, a nonparty participant, such as an expert witness who attends a mediation session, may block evidence of that individual’s mediation communication regardless of who provides the evidence and whether the parties or mediator consent. Here again, assuming the willingness of a nonparty to testify, the parties themselves may block such testimony, unless all agree.

In order to thwart parties who may wish to first disclose discoverable evidence in mediation sessions from later seeking to protect such evidence from discovery under the guise of privilege, Section 4(c) provides that “relevant evidence may not be shielded from discovery in such fashion.” For purposes of the mediation privilege, it is the communication made in a mediation that is protected by the privilege, not the underlying evidence that gives rise to the communication. Evidence that is disclosed and therefore “communicated” in a mediation is subject to discovery and does not itself become a “mediation communication” privileged from disclosure. As such, relevant evidence that is “communicated” during mediation is just as discoverable as it would be if the mediation had not taken place.

Furthermore, as in the case of any privilege, mediation privilege may be waived. In the case of communications made by parties, all parties must waive the privilege. Nonparties and the mediator may assert privilege where their own

31. Id.
32. See id.
33. Id. (“This is consistent with fixing the limits of the privilege to protect the expectations of those persons whose candor is most important to the success of the mediation process.”). To guard against the possibility that a person may wish to assert the mediation communication privilege but is unaware of his need to do so, the drafters suggest that the mediation resolution agreement include provisions requiring notification in the event that mediation communications are sought to be admitted in any ongoing or subsequent proceeding. Id. § 4 cmt. 4(a)(5).
34. Id. § 4(c); see also supra text accompanying note 15.
36. See id. § 4(c).
37. See id. § 5(a); see also Haas, supra note 20 (comparing mediation privilege to attorney-client privilege in ability to be waived).
Communications are sought to be introduced. In addition, any person who discloses the mediation communications of another and prejudices such person loses his mediation communication privilege, at least to the extent of allowing the person prejudiced to respond to the representation or disclosure.

Lastly, Section 6 contains exceptions to the privileges conferred in Section 4. Pursuant to Section 6, there is no privilege for a mediation communication that is, inter alia, (1) in an agreement evidenced by a record signed by all parties to the agreement; (2) available to the public because of applicable open records or open meetings statutes; (3) involves a threat, a planned crime, or a complaint of professional malpractice filed against the mediator or any mediation participant; or (4) involves abuse, abandonment, or neglect.

III. Comparing the UMA’s Privilege with K.R.E. 408

The Model Rules addressed the concept of confidentiality in mediation sessions by simply providing, in Rule 12, that “mediation shall be regarded as compromise negotiations for purposes of K.R.E. 408.” Accordingly, one must be fully cognizant of the scope and limitations of K.R.E. 408 to assess whether such provisions adequately protect that which is discussed and disclosed in mediation sessions.

A. Confidentiality Protection

At the outset, it is critical to recognize that K.R.E. 408 differs materially from its counterpart in the Federal Rules of Evidence, F.R.E. 408. K.R.E. 408 provides as follows:

Evidence of:

1. Furnishing or offering or promising to furnish; or
2. Accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise

39. Id. § 4 cmt. 4(a)(1).
40. Id. § 5.
41. Id. § 6.
42. See Model Mediation Rules, supra note 8. The guidelines also provide some confidentiality for communications made in the mediations process. See Paula Young & Karen Walker, Building the Ethical Infrastructure to Support Court-Connected Mediation: Kentucky Supreme Court Takes Important Steps, KY. BENCH & BAR, Mar. 2006, at 12, 13. The section essentially provides only the level of confidentiality that attaches to settlement negotiations under Kentucky Rule of Evidence 408. Id.
discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.  

By contrast, F.R.E. 408 reads:

(a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

F.R.E. 408 makes clear that prohibited uses of compromise statements or conduct include impeachment with a prior inconsistent statement made during compromise negotiations. K.R.E. 408 contains no such restriction. Accordingly, in Kentucky courts, conduct and statements made during the course of mediation compromise negotiations may be utilized to impeach a witness who subsequently changes his story at trial.

In addition, K.R.E. 801(a)(1) incorporates the long-standing rule of Jett v. Commonwealth, which permits prior inconsistent statements to be received in evidence for substantive purposes. Such prior inconsistent statements are therefore admissible for both substantive and credibility purposes, and no limiting admonition need be given to the jury as such statements are, by

43. KY. R. EVID. 408 (emphasis added).
44. FED. R. EVID. 408 (emphasis added).
45. Compare FED. R. EVID. 408(a), with KY. R. EVID. 408(2); see also supra notes 28-29 and accompanying text (discussing a parties right to block testimony about mediation communications under the Uniform Mediation Act).
46. 436 S.W.2d 788, 790 (Ky.1969).
definition, excluded from the definition of hearsay.\textsuperscript{47} In Kentucky, inconsistent statements between mediation and trial may be utilized at trial for impeachment and substantive evidence of guilt (or innocence) and liability (or no liability).\textsuperscript{48}

Moreover, K.R.E. 408(2) makes clear that statements made in the course of compromise negotiations are clearly admissible when such evidence is offered for purposes other than establishing the validity or invalidity of the claim itself. Examples provided in K.R.E. 408(2) include, but are not limited to, “proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”\textsuperscript{49} In this regard, K.R.E. 408(2) and F.R.E. 408(b) provide for the same exclusions. However, F.R.E. 408(a), unlike its Kentucky counterpart, makes clear that prior inconsistent statements made during compromise negotiations are exclusions to the compromise negotiations ban, and therefore are not admissible in proceedings governed by the federal rules.\textsuperscript{50}

Additionally, neither K.R.E. 408 nor F.R.E. 408 provide any protection for mediation participants against the discovery of matters pertaining to settlement negotiations.\textsuperscript{51} However, because a party (as opposed to a nonparty participant) is aware of the statements made by the opponent during the negotiations, “the availability of discovery is not as significant as it is when the party is unaware of the evidence.”\textsuperscript{52} While K.R.E. 408 and F.R.E. 408 do not “prohibit discovery of an opponent’s communications regarding negotiation strategies, Rule 26(c) of the Federal Rules of Civil Procedure, as well as the attorney-client privilege and the work product doctrine, may be applicable to protect these discussions.”\textsuperscript{53} Thus, both K.R.E. 408 and F.R.E. 408 do not bar the discovery of evidence “otherwise discoverable,” and make clear that any party’s attempt to shield otherwise discoverable evidence under the cloak of compromise negotiations will be thwarted.\textsuperscript{54}

\textsuperscript{47} See id. at 791.
\textsuperscript{48} See Ky. R. Evid. 801A(a)(1) (“A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is: (1) Inconsistent with the declarant’s testimony . . . ”); see also ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 8.10, at 373 (3d ed. 1993) (“The legislative history of KRE 801A(a)(1) leaves no doubt that the intent of the General Assembly and Supreme Court was to codify the Jett Rule as it had developed in the case law.”).
\textsuperscript{49} KY. R. EVID. 408(2).
\textsuperscript{50} Compare Fed. R. Evid. 408(a), with Ky. R. Evid. 408(2); see supra text accompanying note 48.
\textsuperscript{51} Compare Ky. R. Evid. 408(2), with Fed. R. Evid. 408(b); see also Charles W. Ehrhardt, Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court, 60 LA. L. REV. 91, 104 n.49 (1999).
\textsuperscript{52} Ehrhardt, supra note 51, at 104-05.
\textsuperscript{53} Ehrhardt, supra note 51, at 105; accord, Ky. R. CIV. P. 26.03.
\textsuperscript{54} See supra notes 49-50 and accompanying text.
B. The Kentucky Conundrum

Because the Supreme Court of Kentucky incorporated K.R.E. 408 by reference when it promulgated Model Mediation Rule 12 in 2000,55 thereby cloaking mediation with the protections of compromise negotiations under the rule, one would assume that discoverable matters, not otherwise excluded by K.R.E. 408, would constitute admissible evidence in all courts in the Commonwealth. Unfortunately, lawyers in the local courts face a plethora of local court rules that amend, modify, or in some cases even nullify the discovery provisions of K.R.E. 408.56

Some local courts have mediation rules that either parrot the precise language of Model Rule 12,57 or substantively incorporate K.R.E. 408 with slight variations in the language.58 The following local courts have confidentiality rules regarding mediation that are consistent with K.R.E. 408, and the rules have been approved by the Kentucky Supreme Court: Christian Circuit Court59 and Family Division,60 Warren Circuit Court61 and Family Division;62 Hardin Circuit63 and Family Division;64 Laure, Hart and Nelson Circuit and District65 and Family Division;66 Green, Marion, Taylor and Washington Circuit;67 Henry, Oldham,

55. See supra note 2 and accompanying text.
56. See infra notes 59-104; see also KY. R. EVID. 408.
58. See infra notes 92, 102-104 and accompanying text.
and Trimble Circuit;\textsuperscript{58} Garrard Circuit;\textsuperscript{69} Bourbon, Scott and Woodford Circuit\textsuperscript{70}
and Family Division;\textsuperscript{71} Carroll, Grant and Owen Circuit;\textsuperscript{72} Harrison, Nicholas, Pendleton, and Robertson Circuit;\textsuperscript{73} Greenup and Lewis Circuit;\textsuperscript{74} Fayette Circuit;\textsuperscript{75} Johnson, Lawrence and Martin Family Division;\textsuperscript{76} Jefferson Circuit;\textsuperscript{77} District\textsuperscript{78} and Family Division;\textsuperscript{79} Floyd, Knott and Magoffin Family Division;\textsuperscript{80} Boyd Circuit;\textsuperscript{81} Pike Family Division;\textsuperscript{82} Carter, Elliott, and Morgan Family

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Division, Breathitt, Powell, and Wolfe Family Division, Marshall and Calloway Circuit; Barren and Metcalfe Circuit; Bell Circuit; Breckinridge, Grayson and Meade Circuit and Domestic Relations; Kenton and Campbell Circuits, Boone and Gallatin Circuit; and Bullitt Family Division.

Notwithstanding that K.R.E. 408 contains no restrictions on the discovery of information disclosed in mediation sessions, to the extent that the civil or criminal rules permit discovery of such matters, many local court rules effectively amend K.R.E. 408 and thereby the incorporation of Model Rule 12, by limiting discovery of the documents and communications that would be fully discoverable under a direct application of K.R.E. 408 and Model Rule 12. These local courts, whose rules have also been approved by order of the Kentucky Supreme Court (after adoption of the Model Rules) include: McCracken Family Division, which provides, “[m]ediation documents and communications are not subject to disclosure through discovery or any other process, and are not

90. Order Approving Amended Local Rules, 16th, 17th & 54th Judicial Circuit, Kenton, Campbell, Boone & Gallatin Counties, KY. CT. JUSTICE 58-60 (Nov. 20, 1997), http://courts.ky.gov/Local_Rules_of_Practice/C16LOCALRULES.pdf (mediation provisions in these Circuit rules apply only to the district courts)
admissible into evidence in any judicial proceeding".\(^93\) Henry, Oldham, and Trimble Circuit;\(^94\) Fayette Circuit;\(^95\) Johnson, Lawrence and Martin Circuit;\(^96\) Clark and Madison Family Division;\(^97\) Knox and Laurel Circuit\(^98\) and Family Division;\(^99\) Calloway and Marshall Family Division;\(^100\) Franklin Circuit\(^101\) and Family Division;\(^102\) Anderson, Shelby and Spencer Circuit, which provide, “[t]hey are not subject to disclosure through discovery or any other process, and are not admissible into evidence in any judicial or administrative proceeding.”\(^103\) In Campbell District, “[r]ecords of the hearing procedures and statements made during the hearing shall be privileged and shall not be admissible or discoverable for any purpose.”\(^104\) And in Estill, Lee, and Owsley Circuit, the language provides that “[n]o party shall introduce, for any purpose, a statement made during mediation at any civil trial or hearing.”\(^105\)


The following courts have local mediation rules that do not contain any specific provision regarding K.R.E. 408 or admissibility: Hopkins Family Division; Garrard and Jessamine Family Division; Perry Domestic Relations; Allen and Simpson Family Division; Boyle and Mercer Family Division; Caldwell, Livingston, Lyon and Trigg Circuit.

The resulting cornucopia of local court rules creates a patchwork quilt of seemingly conflicting provisions which, if not addressed by the local courts themselves, will require decisions of the highest courts of the Commonwealth to ultimately resolve the conflicts. In those circuits that bar the discovery of matters and materials that would be “otherwise discoverable” under K.R.E. 408 and Model Rule 12:

[A] party presents one set of facts during the mediation, and a different set of facts as the case proceeds through discovery trial, faces no consequences. . . . [T]he party’s falsehood may well go on exposed to the prior fact. In the name of ensuring “free and frank discussion,” . . . [such rules] effectively confer a license to lie.

106. See Order Approving the Rules of Court Practice and Procedure for the 4th Judicial Circuit, Family Court Division, Hopkins County, Ky. Ct. Justice 10-11 (Apr. 2012), http://courts.ky.gov/Local_Rules_of_Practice/C4FAMILYRULES.pdf. Rule 9.05 merely states that “nothing in these Rules shall be construed to discourage or to prohibit voluntary mediation.” Additionally, the Court may, in its discretion, refer the parties to mediation services for resolution of some of all the issues pending before the Court. Id.

107. See Order Approving the Local Rules of Court Practice and Procedure for the 13th Judicial Circuit Courts, Counties of Garrard and Jessamine, Family Division, Ky. Ct. Justice 10 (Apr. 2012), http://courts.ky.gov/Local_Rules_of_Practice/ C13FAMILYRULES.pdf. Rule 7.03 only states that the Court may order mediation, but that the parties are not required to use it. Id.


111. See Order Approving the Local Rules of Practice and Procedure, Domestic Relations Rules, for the 56th Judicial Circuit and Family Law Rules for the 56th District Courts, Caldwell, Livingston, Lyon, and Trigg Counties, Ky. Ct. Justice 12 (Jan. 2014), http://courts.ky.gov/Local_Rules_of_Practice/C56D56LOCALRULES.pdf. Rule 707 in its entirety states only, “[c]onsistent with FCRPP2(6)(a,b,c), mediation of contested issues is not mandated, but strongly encouraged, and will routinely be ordered by the Court prior to trial.” Id.

While one can conceive of a seemingly endless array of scenarios where conflicts between local rules can create havoc in subsequent litigation, Professor Dennis Sharp illustrates the shoals of these uncharted waters with this simple hypothetical:

A two party mediation ends in a fully executed written settlement, but in a subsequent court proceeding one party claims to have discovered evidence clearly establishing fraud by the opposing party during the mediation process. When a court must determine whether a settlement agreement should be enforced, do rules concerning mediation confidentiality permit the court to admit evidence showing a party’s misrepresentations during the mediation?113

Such a situation might arise, for example, where mediation is ordered in a case pending in the 12th Judicial Circuit, Henry, Trimble and Oldham counties. In such mediation, the plaintiff (not his counsel), knowing that local rules prevent the discovery or utilization of any documents or communications made during the mediation, presents a document to urge settlement, knowing the document is false. The case is resolved at mediation. The defendant subsequently discovers that the document, upon which the mediated settlement was urged and based, was fraudulent. The defendant, who resides in Jefferson County, files suit in Jefferson Circuit Court to set aside the mediated settlement agreement and seeks to introduce the allegedly fraudulent document. The plaintiff answers the complaint and seeks to dismiss the fraud claim on the grounds that it is based upon a document that, pursuant to Rule 5.4(A) of the Local Court Rules of the 12th Judicial Circuit, is privileged, confidential, inadmissible, and therefore cannot support the claim of fraud. If the applicability of the local court rules where the mediation was conducted control, the 12th Judicial Circuit, plaintiff’s motion to dismiss will be sustained and the case will be dismissed. On the other hand, if the local rules of the forum hearing the fraud case control, Jefferson Circuit Court, the defendant would not only be able to introduce the fraudulent document as the basis for his case, but he would also be able to utilize the document to impeach plaintiff’s prior inconsistent statements concerning the validity of the document made during the mediation. Pursuant to Jett, the fraudulent document could be considered by the finder of fact as substantive evidence, in addition to the salutary effect of having impeached the plaintiff.114

Irrespective of the outcome in Jefferson Circuit Court, such a case will no doubt be appealed. The outcome on appeal is preordained, given the Kentucky

114. Jett v. Commonwealth, 436 S.W.2d 788, 792 (Ky. 1969); see also note 46 and accompanying text.
Supreme Court’s pronouncements in *Abernathy v. Nicholson*,¹¹⁵ wherein the Court explained:

Under Section 116 of the Constitution, the power to promulgate local rules of practice and procedure for the Court of Justice is vested exclusively in the Supreme Court and should not be undertaken by other courts. The authorization to enact local rules pursuant to RULE 1.040(3)(a) is subject to two conditions: *first, that no local rule shall contradict any substantive rule of law or any rule of practice and procedure promulgated by this Court, and second, that it shall be effective only upon Supreme Court approval.*¹¹⁶

Thus, the local court rules on mediation in at least 16 judicial districts are in direct conflict with Model Rule 12, in that they preclude all discovery and all admissibility of mediation communications and documents.¹¹⁷ Prophetically predicting this outcome, the Court in *Abernathy* eschewed the promulgation of local rules, stating:

For generations it has been widely believed that local rules were a trap for the unwary and disadvantageous for practitioners unfamiliar with a particular venue. It is this Court’s intention to standardize practice and procedure in the Court of Justice to the greatest extent possible and permit local rules only to the extent necessary to satisfy a peculiar circumstance of the locality. In general, the rules of court adopted pursuant to Section 116 of the Constitution are sufficient and need no adornment in the form of local rules. Kentucky attorneys are licensed to practice law in all courts of this Commonwealth and should be able to practice wherever they choose, east and west, rural and urban, without the burden of superfluous local rules, whatever the form in which they may appear.¹¹⁸

In summary, practitioners face dilemmas concerning mediation in the Commonwealth of Kentucky. A subsequent trial of a case mediated in the Kentucky courts will allow a party to impeach a witness who was present at the mediation with statements made at trial that are inconsistent with statements made at mediation. Moreover, such prior inconsistent statements will be substantive evidence in such a trial pursuant to *Jett*.¹¹⁹ In the event the case is removed to federal court, however, F.R.E. 408 will preclude the use of the prior inconsistent mediation statement, even for the purposes of impeaching the witness, and no substantive use of the statement may be made, unless

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¹¹⁶. *Id.* at 87 (emphasis added).
¹¹⁷. *See supra* notes 93-105 and accompanying text.
¹¹⁸. *Abernathy*, 899 S.W.2d at 87-88.
¹¹⁹. *See supra* note 46 and accompanying text.
admissibility is premised on some other rule of evidence.\textsuperscript{120} Also, with respect to discovery in state and federal court, while both K.R.E. 408(2) and F.R.E. 408(b) provide for exclusions to the offers of compromise ban for purposes such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution,\textsuperscript{121} the local court rules of at least 16 judicial districts directly conflict with K.R.E. 408 and Model Rule 12 by prohibiting any discovery of mediation documents and mediation communications, notwithstanding that such materials might be “otherwise discoverable” under applicable civil or criminal rules.\textsuperscript{122}

While adoption of the UMA in Kentucky will not resolve the conflict between the current versions of K.R.E. 408 and F.R.E. 408, its adoption would represent a major success in efforts to standardize mediation procedures throughout the Commonwealth; irrespective of whether the mediation is conducted under the auspices of the trial court, and irrespective of whether the mediator is an attorney.

IV. UMA’S SOLUTIONS

A. Mediation Confidentiality

While Model Mediation Rule 12 incorporates by reference whatever confidentiality protections are afforded by K.R.E. 408,\textsuperscript{123} the protections afforded by K.R.E. 408 and F.R.E 408 have important limitations. Speaking to the confidentiality protection in F.R.E. 408, David Assey noted the deficiencies in the confidentiality protection of the rule as follows:

First it applies only when the validity or amount of a civil claim is at issue. Second, it affords no protection when evidence from a mediation is used for some collateral purposes such as demonstrating witness bias or proof of agency. Third, this cloak of confidentiality only covers evidence in court proceedings and offers no protection in administrative or legislative hearings or against disclosure of information to the general public. Finally, the rule applies only to parties in the litigation; thus mediation participants who are not parties to the suit cannot object to the introduction of confidential communications. As a result of these limitations, commentators generally agree that \textit{Rule 408} does not

\begin{footnotesize}
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\item \textsuperscript{120} See supra notes 43-46 and 48-50 and accompanying text.
\item \textsuperscript{121} See supra notes 46-50 and accompanying text.
\item \textsuperscript{122} See supra notes 55, 59-62 and accompanying text.
\item \textsuperscript{123} See Model Mediation Rules, supra note 8. Model Rule 12 on confidentiality provides that “[m]ediation shall be regarded as settlement negotiations for purposes of K.R.E. 408.” \textit{Id}.
\end{itemize}
\end{footnotesize}
provide adequate protection against the use of statements made in mediation in subsequent litigation.\textsuperscript{124}

Moreover, while Model Rule 2 defines the term “mediation,”\textsuperscript{125} this definition speaks only to a “process,” without any temporal limitations. In other words, when does “mediation” begin? When does it end? Are preparatory discussions with opposing counsel surrounding the scheduling of future mediations protected? In the event that the formal mediation session concludes without resolution, are post–session discussions with opposing counsel considered part of the “process,” such that confidentiality protections preclude the introduction of such statements into evidence?

The UMA’s confidentiality provisions have answers to all of these questions. By limiting the confidentiality protections to “mediation communications,”\textsuperscript{126} there is no confusion concerning whether something disclosed in mediation is, or is not, subject to confidentiality protections. First, the “mediation communication” must consist of a “statement” that is made orally or in writing, verbal or nonverbal.\textsuperscript{127} Second, the UMA’s definition of “mediation communications” solves the temporal problem created by Model Rule 12’s scanty definition of “mediation.” Under the UMA, a “mediation communication” can take place before, during, and after the formal mediation session is convened.\textsuperscript{128} As such, virtually any “statement” made “about” the mediation from the first phone call until and unless the case is resolved in mediation, is privileged, inadmissible, and non-discoverable.\textsuperscript{129}

While adoption of the UMA and its confidentiality protections would solve the problem of defining what is and is not protected from admissibility and discovery in Kentucky mediations, it would change Kentucky law unless conforming amendments are proposed and passed by the Kentucky General Assembly. The most glaring change would bar a party or witness from utilizing a mediation communication that is inconsistent with a person’s testimony at trial to impeach the person at trial.\textsuperscript{130} Moreover, as to any mediation communications, adoption of the UMA in Kentucky would permit persons currently subject to subpoena power of the Kentucky courts to refuse to disclose such


\textsuperscript{125} See Model Mediation Rules, supra note 8.

\textsuperscript{126} See UNIF. MEDIATION ACT § 2(2), U.L.A. (2003); see also supra note 2 and accompanying text.

\textsuperscript{127} While the UMA contains no definition of the term “statement,” both the Kentucky Rules of Evidence and the Federal Rules of Evidence define the term as “a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.” See FED. R. EVID. 801(a); KY. R. EVID. 801(a)(1)-(2).

\textsuperscript{128} See supra text accompanying note 14.

\textsuperscript{129} Id.

\textsuperscript{130} See supra notes 43-46 and accompanying text.
Pursuant to the UMA, a party may refuse to disclose, and may bar any other person, from disclosing a mediation communication. Furthermore, a mediator may refuse to disclose any mediation communication and may bar any other person from testifying concerning the mediator’s communications. Finally, a nonparty may bar any other person from disclosing a communication made by such nonparty.

In addition, as to mediators, except where failure to report would be a violation of public policy for the specific grounds stated, UMA Section 7 expressly limits the ability of the mediator to report to the court to the extent of disclosing whether the mediation occurred or has terminated, whether a settlement was reached, and attendance. In this regard, the UMA comports with Model Rule 10. However, Model Rule 12 differs from its UMA counterpart in that, in Kentucky, mediators are given an absolute right to refuse to testify about any mediation communication irrespective of whether the parties may consent to and desire such testimony. Pursuant to the UMA, with all parties consent, the mediator may testify about any mediation communication made by the parties. However, without the consent of the mediator and any nonparties, the mediator may refuse to testify about any of his mediation communications and, absent consent, may refuse to testify concerning mediation communications of nonparties.

In summary, while Kentucky’s Model Rule may arguably provide adequate confidentiality protection for mediators themselves, the rule confers no privilege whatsoever on parties and nonparties. Absent such protection, parties and nonparties alike may be required to testify concerning mediation communications, thus thwarting the Commonwealth’s public policy objective of

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133. Id. § 4(b)(1), U.L.A. (2003); see also supra note 30 and accompanying text.
134. See supra notes 23-40 and accompanying text.
136. Model Mediation Rules, supra note 8. Model Rule 10 provides that “[t]he mediator shall report to the court that the mediation has not occurred, has not been completed, or that the mediation has been completed with or without an agreement on any or all issues. With the consent of the parties, the mediator may also identify those matters which, if resolved or completed, would facilitate the possibility of a settlement.” Id.
137. Id. Model Rule 12(c) provides that “[m]ediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matters shall be considered confidential and privileged in nature except on order of the Court for good cause shown. This privilege and immunity reside in the mediator and may not be waived by the parties.” Id.
139. Id. § 5(a)(1)-(2).
140. See Model Mediation Rules, supra note 8. Model Rule 12 governs confidentiality in mediation. Id.
creating an environment where the parties may be free to express their views in aid of settlement.\textsuperscript{141}

If the Kentucky General Assembly considers adoption of the UMA, as to the issue of confidentiality of mediation communications, the legislature will have to wrestle with two competing policy objectives: encouraging free, frank and open discussion in mediation, versus the tribunal’s need for relevant evidence.

\textit{B. Eliminating Discovery Confusion}

While K.R.E. 408 does not bar the discovery of evidence “otherwise discoverable,” and makes clear that any party’s attempt to shield otherwise discoverable evidence under the cloak of compromise negotiations will be thwarted,\textsuperscript{142} at least 16 local courts have rules which bar admissibility as well as discovery of “mediation documents” and “mediation communications” (notwithstanding that such terms are undefined in the local rules).\textsuperscript{143} Although \textit{Abernathy} portends that such local rules will ultimately perish and be ruled invalid,\textsuperscript{144} in the meantime, adoption of the UMA and its discovery provisions would perhaps strike an appropriate balance between K.R.E. 408, which seeks to protect against the evidentiary use of compromise statements affecting liability without addressing whether such statements are discoverable, and those local court rules which, presumably in the interest of protecting the integrity of the mediation process, bar all evidentiary uses and all discovery of that which could reasonably be construed as a “mediation statement” or a “mediation document” (given that no definition of such terms exist).

If adopted in Kentucky, the UMA would provide a privilege against disclosure or discovery and introduction of “mediation communications.” All the UMA seeks to protect is the confidentiality of that which was “said” either orally, in writing, or by nonverbal conduct during the mediation.\textsuperscript{145} Thus, any subject matter opened during a mediation may be explored in later discovery or trial, provided the speaker is not asked what was \textit{said}.

Importantly, neither the UMA nor any other jurisdictions with mediation privilege statutes have extended the privilege beyond communication, to the

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\item \textsuperscript{141} KY. REV. STAT. § 454.011 (2006) (“It is the policy of this Commonwealth to encourage the peaceable resolution of disputes and the early, voluntary settlement of litigation through negotiation and mediation. To the extent it is consistent with other laws, the courts and state governmental agencies are authorized and encouraged to refer disputing parties to mediation before trial or hearing.”).
\item \textsuperscript{142} See supra notes 50-67 and accompanying text.
\item \textsuperscript{143} See supra notes 55-61 and accompanying text.
\item \textsuperscript{144} Abernathy v. Nicholson, 899 S.W.2d 85 (Ky. 1995); see also supra notes 65-68 and accompanying text.
\item \textsuperscript{145} See UNIF. MEDIATION ACT § 2(2), U.L.A. (2003); see also supra note 14 and accompanying text.
\item \textsuperscript{146} See Rambo, supra note 112, at 1062.
\end{itemize}
information contained within the communication.\textsuperscript{147} In this respect, the UMA comports with the last sentence of K.R.E. 408 which provides that otherwise discoverable evidence does not become undiscoverable simply because it is presented in a compromise negotiation.\textsuperscript{148}

If adopted, the UMA would leave the discovery rules applicable in Kentucky civil and criminal proceedings untouched and intact. However, with respect to issues of admissibility at trial, the UMA would bar the admissibility of any “mediation communications,” but would not bar the admissibility of any document that has been or would be discovered without mediation. Additionally, consistent with K.R.E. 408, “otherwise discoverable” evidence is not subject to exclusion merely because it is first presented in the mediation context.\textsuperscript{149} Adoption of the UMA would severely restrict the ability of a party to make evidentiary use of “mediation communications” for “other purposes” contemplated by K.R.E. 408, “such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”\textsuperscript{150}

The UMA attempts to strike a balance between the tribunal’s need for relevant evidence and the need for confidentiality in the mediation process, by providing that any documents or statements that are not “mediation communications” or are “otherwise discoverable” and therefore excluded from the definition of “mediation communications,”\textsuperscript{151} can clearly be utilized as evidence for the “other purposes” embodied in K.R.E. 408.\textsuperscript{152} Further, the UMA’s adoption in Kentucky would thwart any party who seeks to use a mediation communication as a prior inconsistent statement for substantive and impeachment purposes at trial, pursuant to Jett.\textsuperscript{153}

1. Reports to the Court

In 2005, responding to the increased utilization of mediation, the Supreme Court of Kentucky amended its Administrative Procedures by adding Part XII, “Mediation Guidelines for Court of Justice Mediators,” [hereinafter “the Guidelines”] to “promote public confidence in the mediation process.”\textsuperscript{154} The Guidelines also standardized education and training requirements for mediators who wish to be listed on the Roster of Mediators Serving the Courts of Justice within the Commonwealth of Kentucky. Those requesting placement on the roster must agree to voluntarily comply with the ethical and training

\textsuperscript{147} See Unif. Mediation Act § 4(c), U.L.A. (2003); see generally Kirtley, supra note 22.
\textsuperscript{148} Compare Unif. Mediation Act § 4(c), U.L.A., with Ky. R. Evid. 408(2).
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Ky. R. Evid. 408(2).
\textsuperscript{153} See supra note 89 and accompanying text.
\textsuperscript{154} See supra notes 44-48 and accompanying text.
requirements set out in the Guidelines. However, one need not comply with the Guidelines in order to perform mediation services in the Commonwealth. The Guidelines are only “suggested minimum criteria … for mediators practicing in the courts of the Commonwealth.” As such, the Guidelines have no applicability to non-lawyers, except to the extent that they wish to be included on the roster of mediators maintained by Kentucky’s Administrative Office of the Courts. Moreover, there is no mechanism for removal of a mediator from the Roster of Mediators, only a mechanism for a mediator to be “reinstated” if his or her name has been removed from the Roster for unspecified reasons. Accordingly, neither the Guidelines nor the Model Rules operate to control the many mediations that take place throughout the Commonwealth pre-suit, with no litigation presently contemplated, or where the mediation is conducted by a non-lawyer.

By contrast, the UMA seeks to instill confidence in the mediation process through the adoption of mandatory requirements applicable to all persons, lawyers and non-lawyers alike, who seek to perform mediation services in the Commonwealth. It is this author’s experience that many non-lawyer parties or participants in mediation have concerns that, while the process itself may be confidential, the relationship between the mediator and the court remains unclear and produces fear that subsequent conversations between the mediator and the judge may take place. The Guidelines attempt to address this issue in Section 9, as follows:

The mediator reports to the court that the mediation has not occurred, has not been completed, or that the mediation has been completed with or without an agreement on any or all issues. With the consent of the parties, the mediator may also identify those matters, which, if resolved or completed, would facilitate the possibility of a settlement.

The tenor of this provision requires the mediator to report to the court concerning the success of the mediation, and with the consent of the parties, allows the mediator to converse with the judge concerning those unresolved matters that would facilitate settlement.

157. See supra note 96 and accompanying text.
159. Guidelines, supra note 155, § 3(9).
Requiring the mediator to report to the court concerning the status of settlement negotiations serves the aims of the judicial system by promoting the expeditious administration of justice; however, allowing the mediator to have discussions with the judge concerning unresolved issues is fraught with difficulty and danger, notwithstanding consent of the parties. Can the mediator ever be sure that precisely what he is disclosing to the judge was the subject of full disclosure and consent by all parties? If the mediator and the judge discuss unresolved issues, is this done in anticipation of further mediation session? Or, rather, is it to inform the judge where he may apply pressure to achieve a resolution in advance of trial?

Unlike the Guidelines, the UMA resolves concerns about contact with the court by very clearly delineating that the mediator may disclose that the mediation occurred or is terminated, and whether a settlement was reached and who attended. Beyond these precise facts, the mediator is only permitted to report abuse and neglect, and any mediation communications to the extent expressly authorized by the parties.

In summary, while the Guidelines encourage proper conduct, they provide no remedy whatsoever for improper conduct. Lawyers are bound by ethical rules, but those do not apply to non-lawyers conducting mediations. Adoption of the UMA in Kentucky would ensure that both lawyers and non-lawyers alike risk violating state law if their conduct deviates from the required standard.

2. Conflict of Interests Disclosure

With regard to the mediator’s need to disclose conflicts of interest, the principal difference between the UMA and the Guidelines concerns the level of diligence that the mediator is required to undertake to learn the existence of potential conflicts. While the Guidelines potentially address all issues regarding conflicts of interest, they only require the disclosure of known relationships with the parties that may affect, or give the appearance of affecting, the mediator’s neutrality.

By contrast, the UMA places an affirmative duty on all mediators to undertake an investigation to determine whether conflicts exist or may exist. UMA Section 9(a)(1) provides:

161. See Guidelines, supra note 155. The Guidelines also permit abuse and neglect reports. Id. § 3(8)(d).
163. See supra note 158.
164. See generally Guidelines, supra note 155, § 3.
165. Id. § 3(4) (“Prior to commencing the mediation, the mediator should make full disclosure of any known relationships with the parties or their counsel that may affect, or give the appearance of affecting, the mediator’s neutrality.”).
Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation.

While the concept of undertaking a conflict investigation will not be new to practicing lawyers,167 if the UMA is adopted in Kentucky, non-lawyer mediators will be required to adhere to these binding statutory standards. However salutary it may be for both lawyers and non-lawyers to be held to the same set of standards when conducting mediations, it is submitted that adoption of the UMA will be only a partial remedy for the consumers of mediation practices.

Lawyers serving as mediators may be subject to discipline under the Kentucky Rules of Professional Conduct,168 but non-lawyers failing to adhere to the UMA’s statutory provisions may escape liability for violations of the Act unless and until the Kentucky General Assembly adopts companion legislation conferring a private right of action upon those who are injured by a mediator’s violation of the statutory standards. As such, remedial statutes are commonplace and the Kentucky General Assembly is urged to consider the adoption of such a statute applicable to the UMA so that all persons performing mediations in the Commonwealth have personal liability in the event they fail to adhere to the provisions governing all mediators.169 This way, citizens of the Commonwealth can be assured of their right to redress injuries they incur from mediator misconduct, irrespective of whether such persons hold professional licenses under the auspices of the Commonwealth.

V. CONCLUSION

The inconsistencies in current Kentucky law governing mediation procedures, mediation communications, and potential discovery issues and abuses, cry out for the adoption of the UMA. While the Supreme Court of Kentucky attempted to bring clarity to the notion of mediation confidentiality, the

167. See Model Rules of Prof’l Conduct R. 1.7 cmt. [2] (2011) (“Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing.”).
168. See, e.g., Ky. Sup. Ct. R. 3.130 ¶ XX.
loosely drawn language of Model Rule 12 and its failure to address the concept of mediation communications and a myriad of discovery issues, served to create needless confusion.\textsuperscript{170} There is no doubt that many local rules were promulgated to address the obvious gaps in the Model Rules.

To bring local rules into harmony and resolve discovery and privilege issues with mediation, an obvious resolution would require the supreme court to undertake a comprehensive revision of the Model Rules. It is submitted that action of the General Assembly is necessary to fully and completely address the subject of mediation in the Commonwealth. A statute, rather than an obscure supreme court rule, would more fully serve to notify the public of the rights and obligations of all participants in mediation.

Moreover, while a supreme court rule is applicable to attorneys serving as mediators, the authority to bind non-lawyers serving as mediators, or out-of-state lawyers performing mediations in the Commonwealth, is questionable. A comprehensive legislative fix is needed to allow the supreme court to step back from the precipice of attempting to regulate the practice of mediation as its authority arguably extends only to the regulation of the courts of the Commonwealth and the practice of law.\textsuperscript{171} In short, a new supreme court rule would only affect a partial fix, and if history is any model, the fix may be incomplete. The Kentucky General assembly should act to adopt the UMA.

\textsuperscript{170} See supra note 76.
\textsuperscript{171} See supra notes 103-05.
PRIOR RESTRAINT AND THE UNION POLITICAL SPEECH OPT-OUT REQUIREMENT

Andrew J. Hull*

I. INTRODUCTION

Many states require compulsory union fees as a condition of state employment. Under existing law, a full-fledged public employee must pay all fees designated for the basic operations of the union, including collective bargaining, even if the employee objects and refuses to join the union. Concerned that nonmember employees may benefit by “free-riding” on the union’s work, the Supreme Court of the United States has historically excused the compelled speech of nonmember employees by allowing public-sector unions to exact such fees from all public employees served (with or without the endorsement of the employee) by the union.

Many public-sector unions, however, also use the fees collected from public employees to fund the union’s political and ideological activities. Recognizing such practices to constitute an even greater infringement of an employee’s free speech rights, the Supreme Court has mandated that a union must not require an employee to pay the percentage of the fees that the union plans to designate toward its political and ideological activities. The process for non-payment,

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1. After the writing of this article, the Supreme Court of the United States issued the landmark decision of Harris v. Quinn, 134 S. Ct. 2618 (2014). In Harris, the Court ruled that the First Amendment prohibits the exacting of compulsory union dues from personal homecare assistants, who were merely paid by the state rather than controlled, when the assistants do not want to join the union. Id. at 2623–26, 2639–44. The Court, however, declined to extend its ruling to “full-fledged public employees.” Id. at 2638.


3. Davenport v. Wash. Educ. Ass’n, 551 U.S. 177, 181 (2007) (“The primary purpose of such arrangements is to prevent nonmembers from free-riding on the union’s efforts, sharing the employment benefits obtained by the union’s collective bargaining without sharing the costs incurred.”).

4. Abood, 431 U.S. at 235–36 (“We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of government employment.” (footnote omitted)); Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 301 (1986) (affirming that is constitutional “for a public employer to designate a union as the exclusive
however, is not quite that easy. Instead of simply not paying the percentage of the fee designated for furthering the union’s political and ideological activities, Supreme Court precedent requires an employee to notify the union and opt out of the fee.\(^5\) Rather than being required to opt into the fees, the employee is presumed to be paying the fees. In order for an employee to refrain from such speech by funding the union’s political and ideological activities (and, in so doing, expressing the employee’s own speech), the employee must overcome a state-enforced hurdle by expressly opting out of the fee.\(^6\)

In the recent 2012 decision of *Knox v. Service Employees International Union, Local 1000*, the Supreme Court questioned the constitutionality of the opt-out requirement.\(^7\) The questions left open by the majority in *Knox* create the opportunity to examine the lawfulness of the opt-out requirement in light of the First Amendment’s protection of free speech.

An analysis of the history of the doctrine of prior restraint demonstrates that the union-imposed opt-out requirement constitutes a violation of the free speech rights of public-sector employees who object to the union’s political and ideological activities. It does so by placing a hurdle in front of the employees that they must overcome before they can express their own speech.

This Article consists of five parts. Part I introduces the doctrine of prior restraint and discusses the history of its beginning and growth within the English common law. Part II discusses how the doctrine of prior restraint was incorporated in the First Amendment, and also traces the development of the doctrine within the Supreme Court’s jurisprudence. Part III provides a summary of the current law as it relates to the constitutionality of compelled public employee speech through union dues. Part IV analyzes the door left open by the Supreme Court in *Knox* to reevaluate the constitutionality of the opt-out

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5. *Knox* v. *Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277, 2291 (2012) (recognizing a burden on the employee to opt out of the fees); *Abood*, 431 U.S. at 235–36 (recognizing that an employee must “object” to participating in the union’s political and ideological speech in order to be exempt from the requirement of paying the specified fees).

6. *See Int’l Ass’n of Machinist v. Street*, 367 U.S. 740, 774 (1961) (“[R]emedies, however, would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object.”).

requirement. Finally, Part V demonstrates how the opt-out requirement constitutes an unconstitutional prior restraint.

II. PRIOR RESTRAINT IN THE COMMON LAW

A. A History of Abuses

The doctrine of prior restraint traces its roots back to the early sixteenth century.\(^8\) The printing press was introduced to England in 1476, and subsequent regulations from the Crown began to arise in response to this new technology that enabled the promulgation of ideas through the written word at a much faster rate than before.\(^9\) In 1530, King Henry VIII issued a proclamation setting up the first licensing system of published materials.\(^10\) Restricted only to the regulation of printed materials, the proclamation prohibited any person from publishing any religious material in English without the examination and approval of the ecclesiastic leaders in the publisher’s diocese.\(^11\) The proclamation stated:

Moreover his highness commandeth that no manner of person or persons take upon him or them to print any book or books in English tongue concerning Holy Scripture, not before this time printed within this realm, until such time as the same book or books be examined and approved by the ordinary of the diocese where the said books shall be printed; and that the printer thereof, upon every of the said books being so examined, do set the name of the examiner or examiners, with also his own name upon the said books, as he will answer to the King’s highness at his uttermost peril.\(^12\)

In 1538, Henry VIII issued another proclamation that expanded the censorship and licensing system over the public of all printed material in English.\(^13\) The proclamation ensured that no material was to be printed that the king found to be heretical or seditious. The proclamation stated:

[N]o person or persons in his realm shall from henceforth print any book in the English tongue, unless upon examination made by some of his grace’s Privy Council, or other such as his highness shall appoint, they shall have license so to do . . . no person or persons using the occupation of printing of books in this realm shall print, utter, sell, or cause to be published any books of Scripture in the English tongue until


\(^9\) Id.


\(^11\) Id.

\(^12\) Proclamation 129: Prohibiting Erroneous Books and Bible Translations, in 1 Tudor Royal Proclamations 193, 195 (Paul L. Hughes & James F. Larkin eds., 1964).

\(^13\) Iid., supra note 10, at 48.
such time as the same books be first viewed, examined, and admitted by the King’s highness, or one of his Privy Council, or one bishop of this realm, whose name also his grace willeth shall be therein expressed, upon pain not only to incur and run into the King’s most high displeasure and indignation but also to lose and forfeit all their goods and chattels and suffer imprisonment at his grace’s will and pleasure.\textsuperscript{14}

Thus, by printing a book without a license, individuals could be stripped of their property, fined, and imprisoned.\textsuperscript{15} This system of licensing and censorship existed into the reigns of King Edward VI and Queen Mary.\textsuperscript{16}

During the reign of Queen Elizabeth I (1558-1603), however, the system of licensing and the means of enforcement became even stricter. The Injunctions of 1559 reinforced the practice of licensing by establishing new regulations on printing.\textsuperscript{17} Most importantly, in 1586, the notorious Court of the Star Chamber entered a decree that severely curtailed the freedom of the press.\textsuperscript{18} The decree (1) limited the number of printers; (2) provided the Stationers Company (a royal agency tasked with the responsibility of licensing the publication of works and enforcing the licensing laws) with the power to search printing shops and warehouses and to seize unlicensed material; (3) required that all books (with the exception of law books and books printed by the royal publisher\textsuperscript{19}) be licensed by the Archbishop of Canterbury and the Bishop of London; and (4) authorized the punishment of fines and destruction of printing equipment for violators who were caught printing without a license.\textsuperscript{20} Under the reign of the Court of the Star Chamber, political and religious dissenters faced a variety of punishment, including fines, imprisonment, torture, mutilation, and execution.\textsuperscript{21}

The Court of the Star Chamber was eventually abolished in 1641,\textsuperscript{22} but, in 1643, Parliament, anxious to squelch the spread of dissent during the English Civil War, passed licensing laws and created its own committees of licensors and members charged with the responsibility of investigating and punishing violators of the licensing laws.\textsuperscript{23} Parliament continued to exert its control over the freedom of the press for the next fifty years until 1695 when the existing licensing act died

\textsuperscript{15} Id.
\textsuperscript{16} SIEBERT, supra note 10, at 51.
\textsuperscript{17} Id. at 56–57.
\textsuperscript{18} Id. at 61.
\textsuperscript{19} Id. at 62 (Law books were licensed by their profession. Books printed by the royal publisher, presumably, were not considered heretical or dissentious and, thus, did not require licensing).
\textsuperscript{20} Id. at 61–62; Meyerson, supra note 8, at 299–300.
\textsuperscript{21} Meyerson, supra note 8, at 300–03.
\textsuperscript{22} SIEBERT, supra note 10, at 166.
\textsuperscript{23} Id. at 179–91.
and the House of Commons refused to renew it. The lapse of the licensing act was seen as a major victory for advocates of freedom of the press. Prior restraint, or previous restraint as it was called in the day, of speech no longer existed through the work of a licensing body.

The common practice of prior restraint also dwindled as common law courts took on the jurisdiction of the abolished Court of the Star Chamber over defamation suits. After the death of the licensing laws, common law courts experienced a growth in the number of defamation cases brought by the government against its critics. While this system still was oppressive to free speech, the importance of the common law courts taking jurisdiction over defamation claims is that the courts of equity lacked such jurisdiction. Accordingly, the government could only seek to punish speech subsequent to its being made; it could not enjoin the speech from being made in the first place.

Thus, the journey of freedom from prior restraint was gradual, and it developed almost by accident. Proponents of free speech, however, recognized its evolution and advocated its continued growth.

B. The Establishment of a Doctrine

The doctrine of prior restraint—that the government must not prevent publication or expression prior to making the speech—became firmly established in the English common law in the eighteenth century. The licensing laws of the previous centuries were but an unpleasant, yet recent, memory, and English courts lacked the power to enjoin the printing of material prior to its being published. The freedom of speech began to flourish, and common law theorists attached great importance and reverence to the doctrine of prior restraint. Understanding how these theorists understood the doctrine of prior restraint is critical to obtaining a proper realization of how the doctrine should be applied today.

The most notable common law theorist of this time to discuss the doctrine of prior restraint was Sir William Blackstone. In Book IV of his Commentaries on

24. Meyerson, supra note 8, at 304–05 (noting that the decision not to revive the licensing act was made more out of practical reasons than philosophical reasons: “The two main complaints about the licensing system were that it was ineffective in stopping scurrilous books and that poorly paid licensors were frequently bribed by aspiring publishers”).
25. Id.
26. Id. at 309–10.
27. Id. at 310.
28. Id.
29. Id.
30. Id. at 304–06.
31. 4 WILLIAM BLACKSTONE, COMMENTARIES *151–52.
33. BLACKSTONE, supra note 31, at *152.
the Laws of England, Blackstone recognized that the English common law forbade prior restraint by government against freedom of the press.\(^{34}\) He wrote:

In this, and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less degree of severity; the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. . . . To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.\(^{35}\)

The lesser-known, but influential,\(^{36}\) Jean-Louis de Lolme also recognized the settled existence of the doctrine of prior restraint. In his work, The Constitution of England, de Lolme wrote,

The liberty of the press, as established in England, consists therefore (to define it more precisely) in this, that neither the courts of justice, nor any other judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are actually printed, and must, in these cases, proceed by the trial by jury.\(^{37}\)

Thus, to the theorists of the English common law, the former system of prior restraint was unlawful, and the freedom of speech, particularly freedom of the press, was a prerequisite of a free state.

More than a superficial reading of these passages, however, is necessary to understand the nature of the doctrine of prior restraint. The key to understanding the doctrine lies in viewing the issue not as one of substance, but rather as an issue of procedure. Blackstone and de Lolme recognized that the substance of some speech could and should, at times, be punished, but this was an inquiry completely separate from the issue of prior restraint.

Blackstone wrote:

But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of

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\(^{34}\) Id.
\(^{35}\) Id. at *151–52.
\(^{36}\) See Meyerson, supra note 8, at 312–13 (describing the influence of de Lolme on John Adams, revolutionary American pamphleteers, St. George Tucker, Justice Joseph Story, and the Supreme Court).
peace and good order, of government and religion, the only solid foundation of civil liberty.38

In other words, the government should still punish those who produce injurious or dangerous speech. Similarly, de Lolme wrote:

[T]he same laws that protect the person and the property of the individual, do also protect his reputation; and they decree against libels, when really so, punishments of much the same kind as are established in other countries. But, on the other hand, they do not allow, as in other states, that a man should be deemed guilty of a crime for merely publishing something in print; and they appoint a punishment only against him who has printed things that are in their nature criminal, and who is declared guilty of so doing by twelve of his equals, appointed to determine upon his case, with the precautions we have before described.39

Thus, for both Blackstone and de Lolme, the potential of punishment for speech did not constitute a prior restraint, though many today conflate these two sanctions as one.

According to an original understanding of the doctrine of prior restraint, the problem with prior restraint was that it created a hurdle (e.g., licensing, injunctions, etc.) that an individual must overcome before speaking.40 The doctrine of prior restraint allows a speaker to say not only what is good, true, and lawful, but also that which is harmful, false, and unlawful.41 The procedural nature of the doctrine of prior restraint requires that the speech be made unhindered by any government restraint or hurdle before the government can even begin to take action against the speaker.42

Thus, a careful logical analysis of the original understanding of the doctrine of prior restraint demonstrates that its chief concern was in preventing the government from creating some form of hurdle in front of the potential speaker that the speaker must overcome in order to speak. Such hurdles are exemplified by the licensing requirements and injunctions against publication that existed prior to the eighteenth century. The common law came to understand, however,

38. Blackstone, supra note 31, at *152.
39. De Lolme, supra note 37, at 213.
40. See Siebert, supra note 10, at 7 (“[A]lthough the press was free from previous restraints such as licensing, it was subject to penalties for the abuse of its freedom, the abuse to be determined by the common law and by Parliament.”); see also Thomas I. Emerson, The Doctrine of Prior Restraint, 20 L. & Contemp. Probs. 648, 655 (1955) (“The clearest form of prior restraint arises in those situations where the government limitation, expressed in statute, regulation, or otherwise, undertakes to prevent future publication or other communication without advance approval of an executive official. Such limitations are normally enforced by criminal prosecution for having published without the required approval, the prosecution being based upon mere failure to obtain approval and not on any issue concerning the content or manner of the publication.”).
42. Id. at 713–23.
that such a hindrance on speech is inconsistent with a free society. This understanding is the basis of the doctrine of prior restraint in the English common law, and, established shortly before the American Revolution, it made its way into the American legal system.

III. PRIOR RESTRAINT IN THE AMERICAN LEGAL SYSTEM

A. Prior Restraint and the First Amendment

Despite the development of the doctrine of prior restraint in Britain, the doctrine had a slow start in colonial America.\footnote{43. COOLEY, supra note 32, at 885.} Often, critics of the establishment were driven from their colonies, and their works were destroyed.\footnote{44. Id. at 882.} In some instances, printing was prohibited and colonial legislatures forbade the publishing of newspapers without a license.\footnote{45. Id. at 881 n.8; Meyerson, supra note 8, at 314–17.} Eventually, however, the American colonists came to accept the English common law doctrine of prior restraint articulated by Blackstone.\footnote{46. See Near, 283 U.S. at 713–14 (discussing the influence of Blackstone’s Commentaries on the development of the doctrine of prior restraint and the guarantees provided by the First Amendment).}

By the time of the ratification of the U.S. Constitution, the First Amendment’s freedoms of speech and press were premised on the English common law doctrine of prior restraint.\footnote{47. Compare Meyerson, supra note 8, at 313 (explaining English common law understanding of prior restraint during the drafting of the First Amendment), with U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”).} Discussing the background and theoretical basis of the First Amendment, Justice Joseph Story wrote:

> It is plain, then, that the language of this amendment imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property, or reputation; and so always, that he does not thereby disturb the public peace, or attempt to subvert the government.\footnote{48. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1874 (photo. reprint 1991) (1833).}

Similarly, Justice Oliver Wendell Holmes stated that the “main purpose” of the First Amendment’s freedom of speech and freedom of press provisions were “to prevent all such previous restraints upon publications as had been practised by other governments.”\footnote{49. Patterson v. Colorado, 205 U.S. 454, 462 (1907) (quoting Commonwealth v. Blanding, 3 Pick. 304, 313–14 (Mass. 1825)).} Initially, the American legal system recognized the difference articulated by Blackstone and de Lolme between prior restraint and subsequent punishment for
improper speech. Thus, the emphasis on the unlawfulness of a government-created hurdle to speech remained the main rationale behind the doctrine of prior restraint. In time, though, American legal theorists sought to expand the basis of the doctrine by also forbidding the subsequent punishment of speech (subject to certain exceptions) because, in its effect, such punishment acted as a prior restraint on speech.

In 1799, St. George Tucker, the authoritative American editor of Blackstone’s Commentaries, criticized Blackstone’s interpretation of the doctrine of prior restraint as not being expansive enough. He wrote,

Under [the British government], an exemption of the press from previous restraints, by licensers from the king, is all the freedom that can be secured to it, there: but, that in the United States the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroachments are regarded as possible from the one, as well as from the other. Hence in the United States, the great and essential rights of the people, are secured against legislative, as well as against executive ambition. They are secured, not by laws paramount to prerogative; but by constitutions paramount to laws. This security of the freedom of the press requires, that it should be exempt, not only from previous restraint by the executive, as in Great-Britain; but also from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licencers, but from the subsequent penalty of laws.

Likewise, in 1868, Thomas Cooley, author of the influential treatise Constitutional Limitations, wrote that

[It is nevertheless believed that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.

These theorists argued for a more expansive interpretation of the doctrine of prior restraint through the First Amendment—one that prohibited subsequent

50. Story, supra note 48, §§ 1878–79; see Mardee Sherman, Note, Chaos in the Marketplace: When Subsequent Punishment Leads to Prior Restraint: Will Cincinnati Ever Get It Right?, 32 N. Ky. L. Rev. 397, 401 (2005) (“[T]he concept behind the First Amendment’s freedom of speech clause at the time of its ratification was limited to the notion of prior restraint, and did not face the disputes about subsequent punishment that abound today.”).


52. Cooley, supra note 32, at 885.
measures by government that might restrain an individual from speaking. This expanded view of the doctrine of prior restraint was eventually recognized by the Supreme Court in the early twentieth century.

B. Prior Restraint and the Supreme Court

The 1931 case of Near v. Minnesota was the first in which the Supreme Court fully analyzed and applied the doctrine of prior restraint. In Near, the Court struck down a Minnesota statute allowing the government to seek a court injunction against anyone found to be publishing or distributing an “obscene, lewd and lascivious” or “malicious, scandalous and defamatory” newspaper or periodical. The statute labeled such actions as “nuisance,” and violators of the injunction were guilty of contempt of court and subject to a potential fine or term of incarceration.

Embracing the spirit of Tucker and Cooley, the Supreme Court held that the subsequent punishment dictated by the statute constituted an unlawful prior restraint in violation of the First Amendment. While the Court did not adopt a view that all subsequent punishment was unlawful, the Court did look at the “operation and effect” of the Minnesota law and recognized that the effect of the law would be to restrain publishers from printing their newspapers and periodicals. Thus, rather than merely applying the doctrine of prior restraint to executive licensing or censoring actions, the Court expanded the scope of the doctrine to include hurdles to free speech created by the legislature that would actually take effect after the original speech was made. Though the speaker was not technically restrained from speaking, the injunction and the subsequent potential punishment for contempt of court did, in practice, serve as a restraint on the speaker.

The Near decision resulted in a wide variety of claims against the government based on the doctrine of prior restraint. The Supreme Court has struck down as unconstitutional numerous laws and practices that create a prior restraint on free speech. These include prohibiting the publication of information

53. Story, supra note 48, §§ 1880–1883 ("[T]he security of the freedom of press requires that it should be exempt, not only from previous restraint by the executive . . . but, from legislative restraint also.").
54. 283 U.S. 697 (1931).
55. Id. at 701–02.
56. Id. at 702–03.
57. Id. at 713–23.
58. Id. at 715 ("In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment.").
59. Id. at 723.
60. Emerson, supra note 40, at 654 ("Theoretically, therefore, the statute could hardly be said to set up prior restraint. On paper, it was a system for subsequent punishment by contempt procedure. But in practice, the system was bound to operate as a serious prior restraint.").
and stories in newspapers, \textsuperscript{61} ordinances and injunctions against distributing written materials without government permission, \textsuperscript{62} a restrictive order on media coverage of a defendant’s confession and admissions prior to a murder trial, \textsuperscript{63} and ordinances requiring a permit for public assemblies. \textsuperscript{64} Most pertinent for the focus of this Article is the Court’s striking down of laws imposing a special tax on potential speakers, such as newspapers and religious pamphleteers, because the tax created a prior restraint designed to curtail their speech. \textsuperscript{65} Specifically, the Court in \textit{Grosjean v. American Press Co.} held that the tax involved was unconstitutional “because, in the light of its history and of its present setting, it is seen to be \textit{a deliberate and calculated device} in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees.” \textsuperscript{66}

Thus, while the Supreme Court has expanded the applicability of the doctrine of prior restraint, its fundamental tenet remains the same: \textit{the government may not place a hurdle before an individual’s speech}. \textsuperscript{57} While, as the Court has recognized, there are limitations to one’s free speech rights, \textsuperscript{68} it is unconstitutional for the government to create a deliberate and calculated device to curtail speech from happening. \textsuperscript{69} Such a device is evident not just from the mere existence of a government-required license, but also from viewing the effect of and possible motivation behind the government’s requirements in each set of circumstances.

IV. UNION-COMPELLED EMPLOYEE SPEECH

Over half of the states in America have laws that allow unions to force employees to pay mandatory union dues. \textsuperscript{70} In those states, public-sector employees are required by law to pay union dues as a condition of their employment. \textsuperscript{71} Originally, the Supreme Court upheld a law that required public-

\textsuperscript{64} See, e.g., Thomas v. Collins, 323 U.S. 516, 541–43 (1945).
\textsuperscript{66} Grosjean, 297 U.S. at 250 (emphasis added).
\textsuperscript{67} Id.
\textsuperscript{69} Grosjean, 297 U.S. at 250; see also Erik W. Stanley, \textit{LBJ, the IRS, and Churches: The Unconstitutionality of the Johnson Amendment in Light of Recent Supreme Court Precedent}, 24 Regent U. L. Rev. 237, 265 (2012).
\textsuperscript{71} Id.
sector employees to join as members of the union. Gradually, however, the Court, concerned with the problem of compelling employee speech through union dues at the expense of employee free speech rights, began to loosen the union requirements on public-sector employees. Today, the Court recognizes that such “arrangements in the public sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment.” While the protection of employee speech has evolved, its growth has been slow due to a desire to establish “[i]ndustrial peace.”

In 1954, the Supreme Court held that, while employees must still pay union dues, unions may not force union employees to join the union as a condition of employment. Seven years later, in International Association of Machinists v. Street, the Court analyzed the Railway Labor Act, and it affirmed that the Act required employees to pay union dues but denied unions the right to spend an employee’s exacted dues on political or ideological activities if the employee objected to such use. In dicta, the Court mused over the alternatives open to an employee who objected to the union’s spending of money for political purposes. The Court stated:

Any remedies, however, would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object. . . . Dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee. The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities.

Thus, the obligation is on the employee to object to how the union is spending the employee’s money. In making this argument, the Court created a strong presumption for the unions’ lawful collection of employee funds that required an affirmative act by the employee to overcome.

In the 1977 case of Abood v. Detroit Board of Education, the Court upheld state law compelling public-sector employees to pay union dues as a condition of employment in order to support the union’s collective-bargaining activities, but it struck down a provision of the law that required employees to support the

74. Id.
78. Id. at 774.
79. Id. (emphasis added).
80. See id.
union’s political and ideological activities. Compelling employee speech to fund such activities violated the free speech rights and free association rights of the employees. The Court stated:

\[ \text{We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.} \]

Relying on the dicta from Street, however, the Court still required employees to actively object in order to exercise their free speech rights.

About a decade after the Abood decision, the Court decided the case of Chicago Teachers Union, Local No. 1 v. Hudson in which the Court established several procedures that a union must follow in order to protect an employee’s right not to be compelled to provide the union with funds to support the union’s political and ideological activities. Nonetheless, the obligation still remained on employees to object to the use of their funds for union political and ideological activities. The presumption is always in favor of the union because, as the Court stated in Street, “dissent is not to be presumed.”

Street, Abood, and Hudson remained standing precedent for the next twenty-seven years. However, the Court’s most recent opinion on union-compelled employee dues showed a crack in the current precedent’s foundation and a possible change of direction toward protecting employee free speech rights.

V. Knox v. Service Employees International Union, Local 1000: A Crack in the Precedent

In 2012, the Supreme Court decided the case of Knox v. Service Employees International Union, Local 1000, which dealt with the constitutionality of compelled employee-funding of a special political activities fee instituted by the union, affecting all employees, and announced after the opportunity to opt out of...
the regular fees for political and ideological activities had expired.\textsuperscript{88} In \textit{Knox}, the union announced an increase in union dues from all of its public-sector employees in order to fund a political “Fight Back Fund” to defeat two controversial ballot propositions in a California special election and to save up to fund the elections of a new governor and legislature.\textsuperscript{89} All employees were affected, including those who had opted out of paying toward the union’s political and ideological activities by objecting to the union’s \textit{Hudson} notice.\textsuperscript{90} Recognizing that the current obligation on employees to pay union dues and to opt out of dues not related to a union’s collective bargaining activities already imposed on the free speech rights of employees,\textsuperscript{91} the majority opinion of the Court, written by Justice Alito, held that the increase in special dues to fund the union’s political activity likewise violated the First Amendment rights of the employees.\textsuperscript{92}

In dicta of the majority opinion, however, Justice Alito pointed out some fundamental flaws in the existing precedent as he levied some major attacks against what he saw as an injustice against the free speech rights of public-sector employees. Recognizing the major denial of free speech rights to employees by compelling them to pay union dues as a condition of employment, Justice Alito wrote, “Our cases to date have tolerated this ‘impingement,’ and we do not revisit today whether the Court’s former cases have given adequate recognition to the critical First Amendment rights at stake.”\textsuperscript{93} Such an impingement constituted an “anomaly” in the Court’s usual role as a defender of the free speech rights of every individual.\textsuperscript{94}

The Court then turned its attention to the opt-out requirement called for in \textit{Abood} and \textit{Hudson}. Justice Alito specifically probed the constitutionality of this requirement. He wrote:

Similarly, requiring objecting nonmembers to opt out of paying the nonchargeable portion of union dues—as opposed to exempting them from making such payments unless they opt in—represents a

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\textsuperscript{88} 132 S. Ct. 2277, 2284–87 (2012).

\textsuperscript{89} \textit{Id.} at 2284–86.

\textsuperscript{90} \textit{Id.} at 2286. For a discussion of what constitutes a “\textit{Hudson} notice,” see \textit{Lajeunesse}, supra note 70.

\textsuperscript{91} The Court pointed out the two-part test for determining when the government may compel the funding of another’s speech. \textit{Knox}, 132 S. Ct. at 2288–89. First, there must be a “comprehensive regulatory scheme involving a ‘mandated association,’” which requires a compelling state interest and actualization by the least restrictive means. \textit{Id.} at 2289. Second, fees may only be imposed to the extent they are “a ‘necessary incident’ of the ‘larger regulatory purpose which justified the required association.’” \textit{Id.} (quoting United States v. United Foods, Inc., 533 U.S. 405, 414 (2001)). The Court noted that it had traditionally allowed the compelling of nonmembers to pay union dues to pass the two-part test because the Court desired to prevent nonmembers from free-riding on the unions’ work and to foster “‘labor peace.”’ \textit{Id.} at 2289–90 (quoting \textit{Chi. Teachers Union, Local No. 1 v. Hudson}, 475 U.S. 292, 303 (1986)).

\textsuperscript{92} \textit{Knox}, 132 S. Ct. at 2293–96.

\textsuperscript{93} \textit{Id.} at 2289.

\textsuperscript{94} \textit{Id.} at 2290 (citing \textit{Hudson}, 475 U.S. at 303).
remarkable boon for unions. . . Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union’s political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment? Shouldn’t the default rule comport with the probable preferences of most nonmembers? . . . An opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree.95

In other words, the Court questioned why employees should be required to go to such lengths in order to express their views of either opposition or ambivalence to the union’s political and ideological speech.

The Court then noted that the opt-out requirement was conceived in the dicta of the Street decision in which the Court did not take the time to analyze the First Amendment implications of such a system.96 In the subsequent cases of Abood and Hudson, this requirement was adopted from the Street dicta as constitutionally permissive, and it was used to create the current precedent.97 Recognizing this shaky basis, the Court stated, “Although the difference between opt-out and opt-in schemes is important, our prior cases have given surprisingly little attention to this distinction. Indeed, acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles.”98 Perturbed, first, by the practice of forcing employees to speak against their wills by permitting the compulsory payment of union dues by nonmember employees and, second, by the seeming injustice and the shaky basis of the opt-out requirement, the Court concluded its analysis: “By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate.”99

While the Court did nothing to change the existing precedent, the decision in Knox seriously questioned the constitutionality and viability of forcing public-sector employees to pay union dues and of requiring them to affirmatively opt out of funding a union’s political and ideological activities. Building off of the majority’s decision and the questions raised in Knox, the doctrine of prior restraint, one of the most basic free speech principles in First Amendment jurisprudence, levies a significant challenge to the constitutionality of this practice.

95. Id.
96. Id.
97. Id.
98. Id.
99. Id. at 2291.
VI. Opt-Out Requirements as an Unconstitutional Prior Restraint

The Knox decision left wide-open the opportunity to invalidate both the compelled payment of union dues by nonmember public employees and the opt-out requirement for nonmember employees who do not wish to support the union’s political and ideological activities.100 This Article addresses the lawfulness of the opt-out requirement. Specifically, this Part explains that, based upon a proper and historic understanding of the doctrine of prior restraint, it is evident that this practice violates the First Amendment rights of public employees.

The argument proceeds as follows: The doctrine of prior restraint, as enshrined in the protections of the First Amendment, prohibits the government from creating a hurdle that an individual must overcome in order to speak. By requiring public-sector employees to go through the process of opting out in order to prevent the union from charging them to fund the union’s political and ideological activities, the government creates a hurdle that employees must overcome in order to refrain from expressing the union’s speech and to express their own views. The opt-out requirement, thus, constitutes a prior restraint on employee speech. As such, the opt-out requirement violates the First Amendment rights of public-sector employees who are forced to pay union dues to a union that uses some of its funds to support its political and ideological activities.

The first premise, regarding the doctrine of prior restraint, was discussed earlier.101 This Part, thus, focuses on the above argument’s second premise and overall conclusion. First, the opt-out requirement is a government hurdle to public employee speech. Second, this form of prior restraint is unconstitutional.

A. The Opt-Out Requirement Constitutes a Hurdle to Employee Speech

When dealing with the issue of mandatory union dues, the First Amendment analysis is generally focused on the compelled speech of the employees in paying the dues.102 The opt-out requirement, however, necessitates another instance of employee speech that, up until the Supreme Court’s decision in Knox, has gone generally unnoticed.103 Within the setting created by the union, the act of not paying union fees designated for political or ideological purposes constitutes employee speech either in opposition to the union’s political or ideological viewpoint or in ambivalence to the union’s viewpoint.104

100. Id. at 2295–96.
101. See supra Parts I–II.
103. See id. at 2295.
104. Compare id. at 2295–96 (holding that nonmembers, forced to participate in a public-sector union, must be given a fresh Hudson notice and then must affirmatively consent to special assessments and increases in dues before their funds are taken), with W. Va. State Bd. of Educ. v.
provisions of the First Amendment protect not only the right of an individual to speak, free of government oppression, but also the right of an individual not to engage in speech.\textsuperscript{105}

The Supreme Court has held that “all speech inherently involves choices of what to say and what to leave unsaid.”\textsuperscript{106} The ability to choose not to speak is protected to the same extent as the ability to speak.\textsuperscript{107} Thus, when an employee chooses not to pay union fees designated for furthering the union’s political and ideological viewpoints, the employee is engaging in speech by communicating a particular viewpoint.

The trouble occurs, however, when the union imposes an opt-out requirement in order for the employee to express opposition or ambivalence to the union’s viewpoint. The employee must fulfill this requirement, or hurdle, in order to express the employee’s speech. The employee is restrained from making such speech without following the union’s requirements. Otherwise, the employee is forced to fund the union’s speech. Rather than requiring an employee to opt in to support the union’s political and ideological activities, unions are allowed to follow the dicta in Street that dissent is not to be presumed.\textsuperscript{108} Oddly, it is the dissenters who must opt out of this “voluntary” payment of union dues. Such a practice creates a prior restraint on the employee’s speech. While the law does not ban opposing employee speech, the “operation and effect”\textsuperscript{109} of the opt-out requirement—to borrow language from Near—does serve to hinder such speech from even being made.

An example is beneficial to illustrate this point: Abe, Bill, and Cindy are public school teachers who are required to pay union dues as a condition of their employment by the state. Neither Abe, Bill, nor Cindy is a member of the union. At the beginning of the year, the union sent an appropriate Hudson notice to all of the school employees, informing them of their union dues and notifying them that twenty-five percent of the dues will go toward funding the union’s political activities. The union will use these funds to support Senator Sam’s reelection campaign. In the notice, the union informs employees that they may opt out of the requirement to pay the percentage of dues designated for funding political activity if they notify the union within thirty days.

\begin{itemize}
\item \textsuperscript{105} Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) (holding that the freedom of speech includes not only the affirmative action of speaking, but also the freedom not to speak).
\item \textsuperscript{107} See Harper & Rox, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) (“There is necessarily, and within suitably defined areas, a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.” (quoting Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250, 255 (N.Y. 1968))); W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) (“The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all . . . .”)).
\item \textsuperscript{108} Int’l Ass’n of Machinists v. Street, 367 U.S. 740, 774 (1961).
\item \textsuperscript{109} Near v. Minnesota, 283 U.S. 697, 723 (1931).
\end{itemize}
Abe agrees with the union’s use of the money to fund Senator Sam’s reelection campaign, so he does nothing and is charged the full amount. Bill is ambivalent about the union’s viewpoint, but he does not agree that his money should be spent to fund the union’s political activities. Cindy opposes Senator Sam and the union’s viewpoint, and she does not agree that her money should be taken from her to fund the union’s political activities. Under current law, Abe must do nothing in order to express his viewpoint (i.e. support of Senator Sam). The union simply continues to charge him for the full amount of his union dues. Bill and Cindy, however, must notify the union within a set amount of time in a certain manner in order to express their viewpoints (i.e. ambivalence and opposition to Senator Sam). Otherwise, they will, de facto, be supporting Senator Sam through their union dues. Forced into this context, Bill and Cindy are compelled to overcome the opt-out requirement hurdle in order to express their views. Bill and Cindy, thus, are hindered (even though the hurdle may be small) from speaking prior to their opportunity to express their own views.

The opt-out requirement clearly constitutes a hurdle to the ability of employees to express their own viewpoints regarding a certain political or ideological issue. In essence, the union informs an employee that if the employee does not want to be compelled to fund the union’s speech, the employee must straddle this hurdle in order to be able to express the employee’s own viewpoint. This requirement is similar in many ways to the tax in Grosjean, which the Supreme Court held was really a “deliberate and calculated device” to refrain speech. Motivated by desire to support their political and ideological viewpoints, unions use the opt-out requirement as a device to discourage employees from expressing their opposing viewpoints regarding the union’s political and ideological views, thus increasing the union’s funding. Such a device clearly constitutes a prior restraint on employee speech.

**B. The Prior Restraint on Employee Speech Is Unconstitutional**

Any instance of prior restraint comes with a strong presumption of unconstitutionality. While the Supreme Court has recognized several exceptions, such as during time of war or dealing with the printing of obscenity, the opt-out requirement does not fall within one of these exceptions. Thus, in order to override the employee’s fundamental free speech rights, the government must have some compelling interest.

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112. Near, 283 U.S. at 716.
It is hard to imagine, however, that there is any compelling governmental interest in using the opt-out requirement. As Justice Alito pointed out in Knox, it would seem to make more sense to require employees that embrace the union’s political and ideological viewpoint to opt into paying the dues than to presume that all employees support that viewpoint and require those that do not to opt out. Indeed, the only interest that it appears the government would have would be to create a system that is more likely to generate funds for the union’s political and ideological activities than would otherwise be the case if all employees were required to opt into the fee system in order to fund those activities. Such a self-serving interest in order to fund certain political and ideological views can hardly be considered a compelling interest.

It is possible that someone could object and argue that, under this logic, an opt-in requirement would also constitute a prior restraint on employee speech. If an employee has to actively opt into the fee system to support the union’s political and ideological views, would that not be a prior restraint? The answer is no, because, under the opt-out requirement, an employee must overcome a government hurdle in order not to be compelled to speak a certain way. Under an opt-in requirement, an employee need only make an affirmative action in order to speak—the employee is not being compelled to speak in any way.

The opt-in requirement is similar to the election voting system. In order to advance a particular viewpoint in favor of a candidate, an individual need only go to the polling place and vote for the candidate. The opt-out requirement, however, is quite similar to an imaginary system where the local election board fills out the ballot ahead of time and votes on behalf of all of the individuals in its precinct in favor of one candidate. Under this imaginary system, the only way that an individual could change the ballot or not vote at all would be to go through a procedure of objecting to the election board’s choice. Of course, such an imaginary system is clearly ridiculous and would certainly be held unconstitutional. However, the current law allows an identical system to exist within the world of public-sector union dues where the government sacrifices employee speech and money (instead of votes) for the sake of allowing the union to more easily advance its own political and ideological views.

VII. CONCLUSION

The Supreme Court already recognizes that compelled union fees impinge on the free speech rights of employees. Up until now, they have attempted to find justifications, such as fostering labor peace or preventing nonmember free-riding, for allowing this system to continue. It seems that the Court has only begrudgingly allowed dissenting employees to opt out of paying dues to support the union’s political and ideological activities. The majority opinion in Knox,
however, has opened wide the opportunity to address the constitutionality of both of these practices. Focusing on the opt-out requirement, this Article has provided an argument for why the Supreme Court should strike down the opt-out requirement as an unconstitutional prior restraint on employee speech.

A careful and detailed analysis of the history and doctrine of prior restraint demonstrates that one of the doctrine’s main tenets is that the government may not place a hurdle in front of an individual that creates an effect of discouraging, limiting, or prohibiting the individual from speaking. The opt-out requirement creates such a hurdle because it forces an employee to go through certain procedures in order not to be forced to express a certain viewpoint. Such a practice infringes on an employee’s free speech rights by discouraging and frustrating the employee’s ability to express an opposing viewpoint. There is no compelling interest for allowing such a system to exist. Instead, this system is one-sided and benefits only the union and its viewpoint. The opt-out requirement, thus, is an unconstitutional limitation on employee speech, and the Supreme Court should take the advice of the majority in *Knox* and revisit this subject.
ENCOURAGING COOPERATIVE LEARNING WITH A NON-TRADITIONAL EXAMINATION PROCESS

Carol Goforth*

Despite criticism that law schools are slow to change and are not as responsive to the needs of students and legal practitioners as they need to be, the subject of legal education reform is a perennial topic of discussion in American law schools.¹

In the early 1990’s, the American Bar Association’s section on Legal Education and Admissions to the Bar sponsored and produced a report under the leadership of Robert MacCrate.² The “MacCrate Report,” as it is generally called, includes a keynote address by Talbot “Sandy” D’Alemberte, a former president of the American Bar Association, which traces the origins of the modern reform movement back to the 1980’s, to a conference held at McGeorge Law School, and a speech given by Robert MacCrate himself, in which he opined that legal educators of that era had at least in part failed the profession.³

Following on the heels of the MacCrate Report, there have been other influential documents urging reform in legal education.⁴ One such document

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¹. The attention paid to law schools and the educational programs that they offer is not surprising, since regular consideration of how law schools are evaluated and accredited requires review of the programs of legal education that are offered. Since 1952, the U.S. Department of Education has recognized the Section of Legal Education and Admission to the Bar of the American Bar Association, as the national accrediting agency for American law schools. See James Podgers, Ongoing Re-Evaluation May Bring Change to Law School Accreditation Standards, A.B.A. J. 61, 62 (2009), available at http://www.abajournal.com/magazine/article/self-study_program/. The Education Department requires accrediting agencies to review their standards and procedures annually, which the ABA adheres to through its standing Standards Review Committee. That committee is regularly and actively involved in a discussion of what the standards should be in light of the changing needs of students and the profession. See generally Donald J. Polden, Statement of Principles of Accreditation and Fundamental Goals of a Sound Program of Legal Education, (May 6, 2009) http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/principles_and_goalsaccreditation_5_6_09.authcheckdam.pdf.


³. See generally, id. at 4-5.

grew out of a larger project on the education of professionals commissioned by the Carnegie Foundation for the Advancement of Teaching and is simply referred to in most legal literature as the “Carnegie Report.” The Clinical Legal Education Association sponsored another project, and the byproduct of those efforts is generally called “Best Practices.” The Carnegie Report and Best Practices have both been credited with having a profound and lasting impact on the direction of reform and innovation in legal education.

All three of these documents and the bulk of scholarship addressing the information and suggestions contained therein focus on making law schools more responsive to the needs of the profession and of practicing attorneys. One of the prevalent suggestions for reform that appears in the original reports as well as being discussed repeatedly in the scholarly commentary addressing the MacCrate Report, the Carnegie Report, and Best Practices urges law schools to make a much more sustained effort to train students to work cooperatively and collaboratively.

There are certainly a number of reasons why collaborative work seems desirable. Social science research supports that collaborative work is a very powerful learning technique for many people, and no one would dispute that we


Best Practices is similarly lauded for having a positive impact on legal education. See generally CATHERINE CARPENTER ET AL., REPORT OF THE OUTCOME MEASURES COMMITTEE, AMERICAN BAR ASSOCIATION: SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR 1, 5 (2008), available at http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf (relying upon the Carnegie Report and Best Practices to determine “the current state of thought about law school pedagogy” and describing those two documents as the most influential).

8. See, e.g., Best Practices, supra note 6, at 119-20 (reporting on the “extensive body of research” documenting the benefits of cooperative learning).

need our lawyers to be well grounded in legal doctrine. Helping them learn well would have to be a positive outcome. Collaborative work can also enhance a number of potentially critical skills beyond simply knowing doctrinal rules – skills that are also important to the practice of law.\textsuperscript{10} Law practice itself functions best when attorneys are willing and able to work cooperatively and collaboratively,\textsuperscript{11} and therefore it is critical that legal education should train students in these skills.

In addition to the specific needs of law practice, there are other reasons to support collaborative learning in law schools. Intuitively, it should be important to teach cooperation to offset the inclination towards competition that has often been associated with legal education.\textsuperscript{12} This would help bring law schools into line with other areas of academia, which have already embraced the benefits of cooperative learning.\textsuperscript{13} A student body with improved morale can only be beneficial for academia and the profession.\textsuperscript{14}

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ROGER T. JOHNSON, LEARNING TOGETHER AND ALONE: COOPERATIVE, COMPETITIVE AND INDIVIDUALISTIC LEARNING 56 (Needham Heights, 4th ed. 1994)) ("[W]orking together to achieve a common goal produces higher achievement and greater productivity than does working alone is so well confirmed by so much research that it stands as one of the strongest principles of social and organizational psychology.").

10. Sheila Blackford, Can We Collaborate?: What Today’s Collaboration Tools Can do for You and Your Clients, 71 OR. ST. B. BULL. 34, 34 (2010). See also Linda Morton et al., Teaching Interdisciplinary Collaboration: Theory, Practice, and Assessment, 13 QUINNIPIAC HEALTH L.J. 175, 189-93 (2010) (discussing the various skills taught at collaboration training sessions and noting that “communication skills, . . . teamwork skills, awareness of self and others, and leadership skills” are essential collaboration skills).


12. Jennifer Jolly-Ryan, Promoting Mental Health in Law School: What Law Schools Can Do for Law Students to Help Them Become Happy, Mentally Healthy Lawyers, 48 U. LOUISVILLE L. REV. 95, 108 (2009) (quoting Roger E. Schechter, Changing Law Schools to Make Less Nasty Lawyers, 10 GEO. J. LEGAL ETHICS 367, 391 (1997) (complaining that law students learn that they need to focus on “unadulterated self-interest” and “hard-ball competition” in law school); see also Clifford S. Zimmerman, Thinking Beyond My Own Interpretation: Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum, 31 ARIZ. ST. L.J. 957, 987 (1999) (explaining that “collaborative learning aims to remove most of the competition and places group success ahead of individual achievement”). Obviously, law schools make choices that impede the goal of a cooperative learning environment, such as establishing curves or median grading requirements. It is especially challenging to set up incentives for cooperative and collaborative learning when students are aware that they are, in fact, competing for grades.


14. See Tom Cobb, Public Interest Research, Collaboration, and the Promise of Wikis, 16 PERSP.: TEACHING LEGAL RES. & WRITING 1, 9 (2007) (discussing students’ pride in their
The increasing attention on collaborative work and its merits has generated a sizable and growing body of scholarship dealing with the topic. Recent articles have included both general consideration of the merits of, and options for, collaborative teaching in law schools, as well as narrower suggestions on how collaborative exercises can be added to law schools’ legal writing programs or clinical offerings.

This essay assumes that the benefits of collaborative learning are accepted and that the goal of adding opportunities for cooperative learning by groups of law students is agreed to be a viable and valuable direction for discussion. Instead of rehashing what appears to be well documented, this short article presents what seems to be a new and different option for encouraging collaborative work by students. Ideally it is an option that is suitable for consideration in any course in which a traditional examination might have been offered. In addition, this idea does not require substantially increased or redirected resources, and does not materially increase faculty time.

To start with some background, I teach corporate and business law courses. During my twenty plus years of full-time law teaching, I have taught almost all of the non-tax classes relating to businesses that have been offered at the


18. It would be ideal if there were empirical studies supporting the anecdotal and inferential conclusion that cooperative learning improves outcomes in legal education, but the difficulty of developing sound methodologies and the probable expense that would be associated with any such effort probably explains why such data is lacking.
University of Arkansas. In recent years, my typical course load has involved Business Organizations (which really could be called Closely Held Businesses), Advanced Corporations (Public Corporations), Business Drafting, and Business Lawyering Skills.

One of these courses, Advanced Corporations, is one of the most difficult courses in the school's curriculum. It introduces students to the process by which securities are registered, the ongoing reporting obligations of public companies, proxy regulation, insider trading, tender offer regulation, and mergers and acquisitions. These are all difficult topics, and providing an overview in a survey class that is sufficiently detailed without being completely overwhelming is a challenge. Students in past years have frequently reported feeling very stressed at exam time, and that certainly has never been one of my course objectives.

My examinations in this course have always been open-book, as I see little purpose in asking students to memorize and remember the myriad rules that we cover in overview format over the course of the semester. I have also, at various times, tried alternatives to the single end-of-course examination; such as giving

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19. This includes Corporations, Agency and Partnership, Business Organizations, Advanced Corporations, Corporate Finance, Mergers and Acquisitions, Securities Regulation, Business Planning, Business Lawyering Skills, and Business Drafting (obviously not all in the same year). In line with most law schools, our curriculum has undergone considerable reform in the past twenty years. The addition of a panoply of new for-profit business entities available for entrepreneurs necessitated expansion of the traditional business curriculum because Agency and Partnership no longer covered all non-corporate options. In addition, the changes in the hiring market over the past decade increased the pressure on my law school to offer a curriculum that met the needs of students expecting to go into small law firms or to become general practitioners upon graduation. It therefore made sense to abandon Corporations as the basic foundational course, and instead, move to a Business Organizations option focusing on closely held businesses with an upper-level elective filling in information applicable to publicly owned enterprises. The push for increased practical training led the school to focus more on business drafting and skills instruction, which also changed my regular teaching package.

20. This is a four-credit class focusing on agency issues, the whole panoply of closely held businesses and issues applicable to such enterprises. When I offer this class, there have been as many as ninety students, but more often than not, the class enrollment is generally around sixty students. Evaluation has been through a single final examination.

21. This is a survey class that has covered a variety of topics most applicable to public corporations such as an introduction to the public offering and registration of securities, an overview of shareholder communications and proxy regulation, insider trading, and state and federal regulation of corporate reorganizations, mergers, and acquisitions. It has been offered for two or three credits, depending on whether the school has been able to offer a focused mergers and acquisitions class. Few students take this elective, which usually has a class size of less than fifteen student. Evaluation has traditionally been through means of one or more examinations.

22. This is an upper level writing class focusing on transactional drafting. Because it involves a substantial amount of individual feedback on regular student work product, enrollment is limited to no more than fifteen students. It does not include an examination.

23. This started out as Business Planning and over the years gradually morphed into a simulated skills-based class providing students with a very broad overview of topics that every business lawyer should know, and an introduction to essential business lawyering skills such as interviewing, counseling, negotiation, arbitration and business mediation. Because of the number of simulation exercises that are individually evaluated, this class is also limited to 15 students. It does not include an examination.
three separate non-cumulative exams over the course of the semester, giving take
home projects (particularly in regards to potential responses to shareholder
proposals), and requiring partial take home exams (such as the likely result in the
event of litigation arising out of various takeover defense strategies). When I sat
down with my students after the semester to ask for informal feedback, none of
these alternatives seemed to significantly alleviate student stress or improve
student learning.

Two years ago, I decided to try something different. I wrote out two
relatively long and involved fact patterns; both included corporations facing
potential reorganizations. The first fact pattern focused on a leveraged buy-out
offer and ensuing bidding war. The second fact pattern involved a tender offer
and concomitant defensive responses. Additionally, one included a public
offering of securities that had taken place prior to the main events in the fact
pattern, and the other included an annual meeting in the middle of the process
with a variety of proxy-related issues. Both fact patterns involved requests from
various parties for production of documents and involved some sort of insider
trading during the attempted change in control. One fact pattern also included
some short swing profit issues. I also included a wide variety of problems with
the proposed acquisition/restructuring process and potential tender offer
defenses.

I gave the class the fact patterns before spring break, which occurred about a
month before the scheduled final exam. I told the students that at least seventy-
five percent of their final exam grade would be based on questions using at least
one of these fact patterns. I did not give the students the questions that I intended
to ask; however, I did tell them it would not be a “discuss all the issues
presented” kind of exam. I also told them that the exam would still be open-
book, and they could bring in any written materials they desired, including
materials that they had prepared in groups. I also told the students that they
could, and should, consider studying together.

In the weeks following this, I second-guessed myself several times. What if
all my students worked so hard that they all turned in perfect exams? What if the
entire class got together, accurately predicted my questions, and turned in
answers so similar that I could not differentiate between high and lower

24. I avoid those kinds of questions because I think the ability to organize a response that
addresses a dozen discrete issues under the time-pressure of an exam situation is not likely to
replicate real world legal practice skills. Instead, I focus on whether my students can pull out
particular issues and general rules based on much narrower questions. For example, if the fact
pattern in question included three different potential shareholder proposals, one from Lotta Bucks,
received on a certain date, I might ask the student to list or identify plausible reasons that the
corporation might rely on to exclude that particular proposal. There might be procedural or timing
issues, or more substantive issues raised, depending on what my fact pattern indicated. I might not
ask any question at all about the other proposals.
performers?\textsuperscript{25} What if I had made the fact patterns too complicated in my desire to make my students consider a wide range of possible questions in their studying?\textsuperscript{26}

With regard to the first of these concerns, I should not have worried. I did have a group of four students who performed phenomenally well on the exam, and in fact produced answers that were of a higher caliber than I was used to seeing even from my best students. I also had another group who did quite well, which represented a higher proportion of the class doing extremely well, or better than average, than in past classes. I had a couple students who probably turned in what I would consider average exams (based on responses to similar questions from prior years) and one who did not do well at all (which I have also had in prior years, from time to time). That gave me a nice set of grades, and a set of responses with which I was generally very pleased. Based on this limited sample size, my initial conclusion was that the top papers were better, and there was a higher percentage of exams showing superior learning outcomes compared to previous years.

After considering the increased levels of student stress caused by the unusual exam format, I modified the last week and a half of the class to adjust to student anxiety. I usually reserve the last hour of class time to review topics, address the exam, and handle any residual student questions (of which I rarely have many). Instead of this, I cut out a portion of the materials that I would have otherwise assigned and devoted the last three classes to course and exam recap and review. I came up with another, albeit shorter, fact pattern, and distributed it to my students. I then went over the facts to make sure the students all understood what was happening in the fact pattern, and why, and then discussed with them the various legal problems presented. I talked about what kinds of questions I could ask based on the facts as presented, and what I would expect in an exam answer. I teach the course as a survey class, so I was interested in students’ abilities to spot issues and problems, and to identify possible or probable violations or theories relating to the specific actions on which I focused with my questions. My questions and expected answers focused on this kind of detail. In the real

\textsuperscript{25} While my law school does not have a strict curve, we do have a median grade that we expect in upper level classes. At the time I initiated this experiment, however, it was not applied to classes of 15 or fewer, and I had fewer than 15 students in Advanced Corporations. We do, however, allow faculty members to explain to the administration why they should deviate from the median, and I decided that if this technique resulted in perfect exams from the entire class, that would be a good reason to deviate. In my opinion, if all of my students turned in perfect exams, that would have been evidence that either I had stumbled onto a perfect teaching technique or my examination would have failed, and in either event, I would have felt justified in requesting a departure from our usual grading. On the other hand, even without the pressure of a required median grade, I was concerned that I would not be able to differential between students who learned and those who were free-riding on the work of others.

\textsuperscript{26} Certainly, based on the number of e-mails and office visits, my students seemed to feel this way, especially immediately following the distribution of the fact patterns and after the students returned from spring break.
world, that would be the starting point for research, and thus, I did not generally ask for any detailed analysis or projections from the students. Based on the questions asked, I would expect answers suitable for clients or for attorneys with differing levels of sophistication. I specifically encouraged my students to be forthcoming and tell me if they needed more information, provided that they could identify what was missing and why it was relevant. After the first of these sessions, the students’ stress levels appeared to diminish rapidly.

I tracked down most of my students after grades were posted and asked them to chat with me about their experience. A group of students, who had all studied together, wrote the four top exams in the class. These students were also high achievers outside of the class, so the grades did not surprise them and were consistent with what they usually earned. They reported surprise at how well they learned from each other, because they all thought they knew and understood the material until they started talking about it in the group, where they each found things that others had missed or misunderstood. Most of the rest of the class also reported, anecdotally, positive experiences.27

The student with the unsatisfactory grade said he did not like studying with others and was not pleased that I had made it a requirement in the course. No students reported studying less, and most of the students indicated that the fact patterns had made them study more, and that they thought the studying was more effective than their usual methods of outlining and review, whether or not they generally studied alone or in a group. Students were concerned with the length of the fact patterns and suggested that the facts were too long. Additionally, the students thought that giving the facts out before spring break had created additional stress. Some students, especially for those who could not be around their peers, because they were traveling, felt that they were at a disadvantage because they could not work cooperatively during that time period.

The next year, in the spring of 2013, I repeated this experiment; welcoming my Advanced Corporations students back from spring break with a single fact pattern, and the news that it would account for at least two-thirds of the final exam questions. I devoted the last week of the class to course and exam review (using two instead of three class periods for this purpose). Again, I received mostly good or excellent exam papers, but there was a fair grade distribution. I had a slightly harder time tracking down these students after grades were posted, but again, I received overwhelmingly positive feedback from the students. Most students reported that they liked my approach to the exam, they felt like they had in fact worked much more cooperatively, they believed that they understood the

27. I regret that my notes from this semester are not complete. At the time, I was not thinking of turning this experiment into an article, but instead, was only checking to see whether it was worth repeating in my own classes. I do know I was not able to talk to all of the students.
material better, they thought they would retain the material more effectively, and they recommended that I continue to offer that kind of exam in the future.  

In the fall of 2013, I used this same approach to the final examination in my Business Organizations class. At the University of Arkansas, this is a basic class that covers a range of topics applicable to closely held businesses. It is identified as a bar exam class, and most of the students at this law school take the course before they graduate. I teach the class as a survey course, and I have always used open book exams. I do not like multiple choice questions because I find it hard to avoid potential ambiguities, and I do not think those kinds of questions are likely to be faced by practitioners. I tend to use shorter answer and issue spotting questions. Because I have never had fewer than fifty students in the class, I have not experimented with multiple exams, but I have tried different exam formats. I never found an exam style that I liked more than the traditional, open book, short-essay format. Never, that is, until the fall of 2013.

Thanksgiving was late in the semester, with only one week of classes left after that three-day break. Consequently, I did not feel that I could give out lengthy fact patterns after Thanksgiving and still allow students time to meet and review the material collaboratively. Therefore, I wrote a very long involved fact pattern (a copy of which I am including at the end of this essay) and distributed it to students two weeks before Thanksgiving, or about a month before the start of the examination period. As I had done with Advanced Corporations, I told them that a significant portion of their final exam grade would be based on questions using the fact pattern that I had distributed in advance. I did not give them the questions that I intended to ask. I did, however, tell my students that the questions would be the shorter, issue spotting and problem-identification kinds of questions that I traditionally favored for survey courses. I also told them that the exam would be open-book (as I had promised at the start of class), and that they could bring in any written materials they desired, including materials they prepared in groups. I also told them they could, and should, consider studying together for the final exam.

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28. All of these meetings were either face-to-face or via e-mail for the few who had not graduated and who still had access to their student e-mail accounts. There was obviously no confidentiality, but at the time of these evaluations, none of the students were enrolled in any of my classes and most had already graduated from law school.

29. So that readers can really understand what my exam approach, I am including the fact pattern that I used in this class at the end of this article. See infra Appendix. To put that in perspective, it may therefore be useful to understand the scope of Business Organizations. As I teach the course, it covers agency relationships in a business context, the various forms of partnerships that are now available, limited liability companies, and corporations. It addresses in very basic terms the tax options and consequences of various business structures and elections, and at least introduces students to the concept that investments in these enterprises may be regulated as securities, but the focus is on state laws governing how such entities are established, owned, and operated; how management rights and responsibilities are allocated among the various participants; sharing of profits and losses; transfer of ownership; and how the business may be terminated.

30. For this class, I promised that at least half of the points would be based on questions from the fact pattern that I distributed.
I had fifty-six students in the class. One student audited the class and therefore did not take the final exam or study for it. The class ended up with twelve A’s (those papers were extremely well written), twenty-eight grades in the B range (in accordance with our median grade), nine C’s, and (surprisingly to me) six unsatisfactory grades (C- or lower). This grade distribution resulted in more A’s and more unsatisfactory grades than students traditionally earn. In addition, the A papers were not merely good they were superb. My preliminary observations about this particular set of exams was that the grades were more polarized: there were more exams at the very top and they were better than I usually see, but there were also more at the bottom, and they were worse than I usually see. The median group also seemed to do better on the exam than my “average” group does.

I also gave this group a written question about the exam format and asked whether they had found the experience to be positive or negative. Of the fifty-six students, fifty-four responded. All of the students used an examination number when submitting responses, however, I was able to match up the exam number to the students name only when reviewing the feedback. The students were aware of this, and perhaps they were worried that a failure to reply positively might adversely affect their grades or how I (or other faculty members) perceive them in the future. The responses were overwhelmingly, although not unanimously, positive (again, perhaps because they were not anonymous). In fact, I would characterize fifty of the fifty-four responses as being positive, while two were negative, and two were mixed.

Among the positive opinions expressed, twenty-seven of my students said that having the facts in advance encouraged them to study more collaboratively or cooperatively than they would have otherwise studied. None of the students said this made them study less cooperatively. Eighteen reported that they studied more as a result of this format, although the reasons differed with some saying they enjoyed it more, some saying this gave them something different to study, and some saying this made them feel more pressure to study. Thirteen students reported that they thought this way of studying resulted in them learning more or being more likely to retain and understand the material. Eleven said that the process was more efficient or effective. Seven said that this reduced their exam

31. Absent special justification presented to our Dean, upper-level classes with this many students are required to have a median grade of B or B-. I had a dozen papers that addressed approximately ninety-five percent of the issues that I included in the questions I asked. I usually have one exam (if any) in that range. I then had a gap in grades, with a series of papers in the eighty-five percent range. Those I wound up with a grade of B+, so that the median group (which included grades ranging from eighty to eighty-three percent) could logically earn a B. In typical years, a score of eighty-five percent would be more likely to be an A-, and B’s could drop into the seventies.

32. I rarely have more than one or two unsatisfactory grades in this class. To have six, including two that were in the lower D range, was highly unusual.

33. I counted studying more as a positive. I am aware that not all of my students would agree with that characterization.
stress or anxiety levels. Six students reported liking the format because they thought it better mirrored what they knew of real practice. Four commented that it enabled them to focus less on memorization, and two said they simply enjoyed the exam process. Two were pleased because they said it would directly reward diligence.

On the other hand, two students said they studied less because they already had the fact pattern for half the exam. One said it was not helpful, another complained that it made studying less efficient, and one was unhappy because it caused students to over-prepare.³⁴

Obviously, this information is limited and anecdotal. In addition, there is the possibility that some students’ answers were biased and tailored to what the students thought that I wanted to hear. But generally, my personal intuition is that my students did study more cooperatively, and I did see better than expected exams from most of the students. The students who got the lowest grades were not necessarily those who disliked the alternative approach; however, the lowest grades did correlate disproportionately to those students who did not report studying cooperatively, and spent either the same or less time studying than they otherwise would have.³⁵

This is not a social science piece. It does not involve a rigorous, controlled experiment. There was a limited subject size and no control group. The evaluations of the process from the students were anecdotal and not anonymous. Even with these limitations, however, I think there are some positive and interesting, albeit preliminary, observations worth making. First, as far as experiments go, this one is not terribly expensive. This alternative approach to the traditional law school examination only involves a little additional effort in creating a fact pattern that includes a substantial number of issues that will not be tested. Other than that, there is no real cost to the faculty member or the institution. Second, this approach logically and anecdotally suggests that students are more involved with cooperative and collaborative studying and learning when this format is followed. Third, the results suggest that student learning can improve; only if insofar as is demonstrated through their completed exams and through the initial assessments of their learning.

³⁴. Personally, the last criticism does not cause me to worry. One student expressed concern about fairness because we had unseasonably bad weather for some of the days, and she claimed that it had prevented her from studying in a group because she lived too far away from other students. The snow days, however, accounted for only three or four days of the four weeks that the students could have used for studying.

³⁵. All but one of my students with an unsatisfactory grade came to talk to me about the exam after grades were available. My information about whether they studied cooperatively and whether they studied more or less than they might otherwise have done, comes from those sessions as well as what they wrote in response to my question about how they felt about the unorthodox exam process I was using in the class. Because there were only six unsatisfactory grades, and only four students who reported negative or mixed reactions to the process, it is hard to derive any statistically significant information about these groups.
It is possible that I am completely overlooking some major issue or problem with utilizing this approach. On the other hand, one of the joys of legal scholarship is that I am confident, if I am missing the boat, or have failed to consider one or more problems, one of my peers is sure to point it out to me. I look forward to reading any such response.
APPENDIX--SAMPLE BUSINESS ORGANIZATIONS FACT PATTERN

FALL 2013

Heidi Klump and Tim Gunner decide to go into business together. They start their business in September of 2012, under the name: “Project Right Way.” The nature of the business involves updating maps for electronic and online navigation guides (e.g., MapQuest, Navistar). They start the business very informally, without reducing anything to writing or filing anything. They start work operating and programming out of Heidi’s basement in Fayetteville, which they convert to office space. By early 2013 they have completed some initial programming, and have prototype maps ready to use as demos.

On February 1, 2013, Heidi Klump signs a contract in her personal name (not even mentioning the company), calling for the delivery of a customized map to the City of Fayetteville for use in planning and coordinating highway and roadway maintenance and improvement projects. The map and software is delivered March 15, 2013, and the City begins using it immediately.

In April, Heidi and Tim begin to get worried about their personal assets when they hear about someone relying on an inaccurate online map and then demolishing the wrong house. They research the law without the assistance of a lawyer and decide they need a limited partnership that is registered as an LLP because they want Heidi to be the only one with management power, but they want limited liability for both of them to protect their personal assets. On June 1, 2013, they mail this document to the County Clerk for Washington County, with $40 cash enclosed:

* * *

STATEMENT OF QUALIFICATION FOR “RIGHT WAY LLP”

The undersigned hereby files this statement of qualification pursuant to the requirements of the Arkansas Limited Partnership Act:

1. Heidi Klump and Tim Gunner register their business as an LLP to do business with the name of “Project Right Way.”
2. Heidi Klump is the sole general partner and Tim Gunner is the sole limited partner.
3. Heidi Klump is the registered agent for the business and can accept service of process at the company’s registered office, which is 1000 Infinity Circle, Fayetteville, AR 72701.
4. It is expressly agreed that the general partners of this LLP may not quit except on 90 days’ advance written notice.

Date: June 1, 2013.
Heidi Klump (**assume this is Heidi’s real signature)

Signed in capacity as director

* * *

It turns out that the customized software with the interactive map delivered to the City of Fayetteville on March 15 pursuant to the February 1, 2013 contract has an embedded virus, which results in the City having $20,000 in costs associated with removing the virus and cleaning infected computers. On June 5, the City communicates all of this to Heidi, also telling her that aside from the virus, the map works great.

On June 15, 2013, Heidi and Tim decide the business has outgrown the home office in Heidi’s basement and they need to find new office space. They find a perfect location, but Heidi is out of town when the terms of the lease are agreed to. Tim therefore agrees to sign the lease. The landlord, Lindseed Leasing, Inc., at Tim’s request, calls Heidi to confirm that Tim is authorized to sign the document, and she says something along the lines of “Yes, he is authorized to sign the document on behalf of the limited partnership even though he is a limited partner.” Tim signs the lease “Tim Gunner, for Project Right Way LLP.” The lease has a 12-month term, calling for $2000 per month rental, payable in advance each month.

On June 15, Heidi and Tim receive their entire packet and an un-cashed check back from the County Clerk with a handwritten note saying, “You guys probably need an attorney....”

On July 1, Tim and Heidi meet with Carol Goooff, a local attorney. She advises them to form a corporation rather than an LLC. They consider her advice, and on July 12, 2013 mail in the following document, in duplicate, to the Secretary of State along with the required fee:

* * *

ARTICLES OF INCORPORATION

“PROJECT RIGHT WAY, INC.”

1. The name of the corporation shall be Project Right Way.
2. The corporation may issue up to 100,000 shares of common stock and as many shares of preferred stock as the directors may from time to time authorize.
3. The corporation’s registered agent for service of process is the corporation’s CEO who may be served at P.O. Box 1111, Fayetteville AR 72701-1111.
4. It is agreed that directors of this corporation will not be personally liable to the corporation or its shareholders for monetary damages.

5. The corporation shall indemnify its directors for any other liabilities to the maximum extent permitted by law.

6. It is expressly agreed that the corporation shall be deemed to have come into existence on January 1, 2013.

Heidi Klump (**assume this is Heidi’s real signature)**

Signed in Heidi Klump’s capacity as director

* * *

On July 15, after the above form is mailed to the Secretary of State, Heidi enters into a contract with Web Designs, LLC, which calls for Web Designs to design a web page for Project Right Way in exchange for a lump sum payment of $1000. She signs the contract as “Heidi Klump, on behalf of Project Right Way, Inc.” Heidi tells the president of Web Designs, LLC (a gentleman named Web Webster) that Project Right Way is a corporation that she and her friend, Tim Gunner, are in the process of forming. She admits she has not checked to see if the articles have been filed. Webster says, “No worries, I am happy to do business with you guys.”

On July 20, Heidi and Tim agree that they will each get 5,000 shares of stock in exchange for the following items from each of them: $20,000 in cash; their total right, title and interest in the maps, software and programs developed to date; and a promise to work for the company for at least 40 hours per week for 3 months for no compensation. The total value of this package is agreed to be $50,000 for each of them. They also have a verbal understanding that they will each be a director, shareholder and employee of the company, and that they will start earning salaries after the first 3 months. They also ask Carol Goofoff to be the third director and she agrees. All three of them sign the following document, which as of July 20 is the only document kept in their minute book other than a copy of the Articles previously sent to the Secretary of State:

* * *

Resolution adopted by unanimous agreement:

We the undersigned, being all the directors of Project Right Way Inc., hereby agree that the company should issue 5,000 shares to each of Heidi Klump and Tim Gunner in exchange for the following to be received from each of them:
$20,000 cash

- map programs and software, documentation and manuals (with each of their interests agreed to be valued at $15,000)
- 40 hours per week for 3 months (agreed to be valued at $15,000)

[signed and dated July 20 by Heidi, Tim and Carol, each signing as director]

* * *

Not surprisingly, on July 25, the Secretary of State returns the Articles that were mailed in on July 1 as legally insufficient. The document is corrected, mailed back, and is filed by the Secretary of State on August 1, 2013.

By September 1, it becomes clear that Project Right Way is in financial difficulty. The company cannot pay the City of Fayetteville the amounts the City is demanding, and it is behind in the rent on the lease with Lindseed. At this point, Heidi’s friend Michael Corz agrees to invest $50,000 in exchange for 5,000 shares of stock from the Company if Heidi agrees to certain terms. Heidi is reluctant to agree until Michael convinces her to go along by threatening to release some very embarrassing and unprofessional photographs from Heidi’s college days. Michael insists that Heidi agree to the following on an audio tape that he will keep in his possession:

1. Heidi promises to vote to elect Michael to the board of directors.
2. Heidi promises to always vote in accordance with Michael’s direction on any and all business items.
3. Heidi grants Michael an irrevocable, undated proxy, so that Michael could vote the shares herself if there was ever a dispute.
4. Heidi agrees to a non-disclosure commitment preventing Heidi from revealing the terms of the agreement to anyone without Michael’s permission.
5. The agreement will last as long as Michael owns his shares.

After verbally agreeing to this, Heidi presses Michael for details about why he is doing this, and Michael admits to a personal animosity towards Tim, and indicates that he intends to make sure Tim is kicked off the board of directors and never gets a dime from the company unless Tim agrees to sell back his shares at a fraction of their worth.

On September 10, the Company issues 5000 shares of common stock to Michael in exchange for $50,000 cash, and Michael is elected as the third director after Carol voluntarily resigns. No minutes or record of this action exists but all involved individuals would acknowledge that this is what they agreed to.

On September 15, Michael and Heidi vote to remove Tim as director and employee effective immediately. They replace him on the board with Carol Goofoff. After the meeting at which Carol is re-elected as director, Michael also
asks Carol to investigate whether there are any causes of action available because the stock that was issued to Tim was in part for services that were never performed.

Heidi comes to hate going in to the office and takes to working from her home. On October 1, she is speeding home to do work from her home office, in tears after an angry meeting with both Tim and Michael, and runs a red light, seriously damaging her car and the car of Ima Innocent, who was just in the wrong place at the wrong time.

After filing the police report and getting a massive ticket, Heidi gets a cab to the local car rental and asks for a car with a navigation system. She is told that the entire fleet of cars has been stripped of the portable navigation systems because the maps were too expensive to update. She talks with the manager, talking about her involvement with Project Right Way to demonstrate her expertise in the area. Over the next few days, Heidi is passed up the chain of command in the company, discussing the possibility of designing cheaper up to date maps for cars.

On October 15, Heidi forms Heidi’s Second Chances, Inc., a single-shareholder Arkansas corporation by filing the appropriate papers and fees with the Arkansas Secretary of State.

On November 1, on behalf of Heidi’s Second Chance, Inc., Heidi signs a contract with Car Trek, Enterprising Rentals, Ltd., agreeing to provide cheap and up to date computerized maps for Car Trek. All of their cars are local rentals and they operate only in Arkansas, Oklahoma and Missouri, and the contract calls for up to date computerized maps for car navigation systems in those three states. The same day, Heidi resigns from Project Right Way, meaning that company would completely lack the technical ability to prepare the computerized maps for Car Trek.

On November 15, Tim brings a derivative suit against Heidi and Michael for forcing him out of the Company. He does not make demand before instituting the lawsuit. Michael immediately suggests that Carol be appointed to decide whether any such suit should be allowed to continue.

On November 20, Michael demands that the corporation provide him with an advance of litigation expenses pursuant to the article provision saying he is to be indemnified to the fullest extent of the law. Carol thinks the Company cannot advance Michael funds because of a belief that Michael did not act in good faith.
CAGING UNCERTAINTY: RESPONSIBLE REFORM OF FEDERAL CHILD PORNORAGHY SENTENCING GUIDELINES

Kaleb Noblett

“Certainty is the mother of quiet and repose, and uncertainty the cause of variance and contentions.” --Sir Edward Coke

I. INTRODUCTION

Of all criminal endeavors, those that rightly offend us most deeply are crimes against children. Sexual crimes against children tear down the fleeting innocence of society’s future by wreaking the most frightening havoc on the bodies, minds, and souls of those we want most dearly to protect. Those who enjoy and perpetuate such obscenities attract little empathy from anyone.

Child pornographers and those found to possess such material deserve serious punishment. But the nature of these crimes is no excuse for society to ignore the goals of the criminal justice system.

The Federal Sentencing Guidelines relating to child pornography offenses are outdated. Technological advances have completely altered the nature of these offenses, and Congress has understandably hesitated to reform the applicable provisions. This two-fold problem results in sentences that many judges and the United States Sentencing Commission (”USSC”) agree are excessive. Judges, therefore, use their discretion to vary downward in many cases, producing unnecessarily capricious sentences.

The USSC reports that, based on a review of 1,654 cases in fiscal year 2010, only 40.4% of defendants in child pornography possession, receipt, or trafficking cases were sentenced within the range provided by the guidelines. Of those cases, 44.3% resulted in a non-government-sponsored departure or variance. Meanwhile, as recently as 2004, 83.2% of non-production based offenders were sentenced within the guideline range.

* J.D. Candidate, University of Louisville Louis D. Brandeis School of Law; B.A. Union University, History and Political Science.
3. Id. at 239.
4. Id. at 224.
5. Id. In 2011, this number had grown to 48.1%. Id.
6. Id. at ii.
The USSC published a report to Congress in December 2012 detailing the flaws in the guidelines for defendants in child pornography cases. The report included the recommendation that three primary factors should be considered in these cases: the content and nature of an offender’s collection, the degree of interaction with other offenders, and whether an offender has a prior record of abuse or predatory behavior. According to the USSC, all three factors deal primarily with retributive goals of punishment, though they may address concerns of incapacitation, deterrence, and rehabilitation as well. The USSC was hesitant to propose any amendments to the guidelines for production of child pornography, citing a wide variety of production behavior ranging from actual contact with the victims to remote contact via webcams or other technological means.

Congress should generally adopt the USSC’s recommendations; but it must also provide opportunities for the rehabilitation of offenders guilty of possession, and it should increase penalties in all non-possession cases to deter the production and distribution of child pornography and ensure the incapacitation of the most dangerous offenders.

II. HISTORY

The USSC receives its overall directive from the Sentencing Reform Act of 1984 (“SRA”). It is charged with the task of establishing “sentencing policies and practices for the Federal criminal justice system.” As new data is discovered and federal criminal practitioners relay problems to the USSC, it is charged with reviewing the United States Sentencing Guidelines and recommending appropriate changes to Congress. The power of the Guidelines has changed dramatically since the SRA created the USSC, and sentencing for child pornography offenses has similarly evolved over the past few decades.

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7. See generally id.
8. REPORT, supra note 2, at 320.
9. Id. at 321.
10. Id. at 330–31.
13. Id.
15. HISTORY, supra note 11, at 2.
A. Brief History of the Guidelines

The Guidelines were put in place to resolve a lack of uniformity in federal sentencing resulting from the broad discretion left to district court judges.\(^\text{16}\) The SRA also noted a concern that serious criminals were not always receiving due punishment.\(^\text{17}\) The USSC was charged with following the basic standards promulgated in 18 USC § 3553(a); namely, the Guidelines were to consider certain characteristics of the offense, including:

[T]he nature and degree of harm caused by the offense, the community view of the gravity of the offense, the public concern generated by the offense, the deterrent effect a particular sentence may have on the commission of the offense by others, and the current incidence of the offense in the community and in the Nation as a whole.\(^\text{18}\)

The USSC must also provide for consideration of the particular offender’s criminal history and personal background, while maintaining the assurance of equal application of the law.\(^\text{19}\) Congress retained control of the final text of the Guidelines, but the USSC was given broad discretion—its findings were quite persuasive.\(^\text{20}\)

Under the SRA, federal judges were originally bound to the range configured for the offense by application of the Guidelines.\(^\text{21}\) However, a series of Supreme Court decisions, capped by the Court’s 2005 opinion in United States v. Booker, rendered the Guidelines merely advisory.\(^\text{22}\) While Booker may have emasculated the Guidelines, it was not a death blow.\(^\text{23}\) The Guidelines are still a part of everyday federal practice and a major player in sentencing hearings.\(^\text{24}\) In fact, in many federal offenses—especially drug crimes and firearms offenses—the Guidelines are followed closely.\(^\text{25}\) But, in fraud offenses and child pornography crimes, judges are relying less and less on the Guidelines.\(^\text{26}\)

Since Booker, regional disparities in sentencing have increased.\(^\text{27}\) Likewise, the USSC reports that sentences for similar offenders vary depending on the individual judge in a case.\(^\text{28}\) In a more disturbing trend, there is an increasing correlation between demographic identity and the severity of sentences; and, though the USSC does not go so far as to suggest that federal judges are using

\(^{16}\) See id.
\(^{17}\) See id.
\(^{18}\) Id. at 2–3 (quoting 28 U.S.C. § 994(c)) (internal quotation marks omitted).
\(^{19}\) Id. at 4.
\(^{20}\) Id. at 5–6.
\(^{21}\) See Booker Report, supra note 14, at 10.
\(^{22}\) Id.
\(^{23}\) Id. at 10–11.
\(^{24}\) Id.
\(^{25}\) Id. at 60–61.
\(^{26}\) Id.
\(^{27}\) Booker Report, supra note 14, at 3.
\(^{28}\) Id. at 8.
race as a factor in sentencing, the trend raises serious questions about the effect of Booker on minorities.29

Despite the increased use of judicial discretion, the USSC’s overall goals and purpose are not diminished. And, while the certainty of reliance on the Guidelines continues to waiver, they can still serve as a tool to help protect defendants from unequal application of the law by insuring a degree of uniformity across all ninety-four federal districts.

B. The Guidelines and Child Pornography Offenses

The sentencing range for the trafficking, receipt, or possession of child pornography is determined by §2G2.2 of the Guidelines.30 Production of child pornography is covered by §2G2.1.31

Congress has indicated quite clearly that it believes child pornography offenders deserve severe punishment.32 In 1977, Congress enacted the Protection of Children Against Sexual Exploitation Act, which created two-year mandatory minimum sentences and fifteen-year maximum sentences for producers of pornography involving children.33 Later, the Child Protection Act of 1984 extended this protection by including producers and traffickers regardless of pecuniary gain.34 1986 was a landmark year for the prosecution of child pornography, as both the Child Sexual Abuse and Pornography Act and the Child Abuse Victim’s Rights Act were passed, officially recognizing the psychological harm of such criminal acts and ensuring the rights of victims to pursue civil suits.35

The USSC included child pornography in the Guidelines for the first time in 1987.36 However, because simple possession was not at federal crime at the time, there was no such provision in the Guidelines.37 Since 1987, there have been nine major changes to these provisions.38 The contour of those changes has led to increased sentences, effectively portraying Congress’ desire to further deter and punish these offenders.39

A knowledge of the basic layout and use of the Guidelines is essential to understanding those changes and the current nature of §2G2.1 and §2G2.2. The U.S. Sentencing Guidelines Manual contains chapters and sections, each one

29. Id. at 3.
30. History, supra note 11, at 8.
31. Id.
32. Id. at 6.
33. Id. at 8–9.
34. Id. at 9.
35. Id.
36. History, supra note 11, at 10.
37. Id.
38. Id. at 54.
39. Id.
relating to specific violations of U.S. Code provisions. The offense is assigned a “base offense level,” which serves as the numerical starting point for the offense. The practitioners—typically a probation officer, the prosecution, and defense—then apply the facts of the case to any number of “specific offense characteristics.” Each specific offense characteristic includes a number that, if applicable, is added to the base offense level. Mitigating factors may also be included in a specific guideline, in which case a set number is subtracted from the total. An offender’s criminal history is figured, and he is assigned a category (I-VI) that generally corresponds to the depth of the offender’s prior record. Finally, the total number derived from combining the base level, specific offense characteristics, and any mitigating factors is found on a chart that includes columns for each category of criminal history.

The defendant thus lands in a range of months that corresponds to his number. There are also separate considerations that may result in an upward or downward variance or “departure.” This description is certainly not comprehensive, but it provides a fundamental, requisite understanding of the Guidelines in practice.

At the outset of the Guidelines’ governance of child pornography sentencing, the base offense level in §2G2.2 for “transporting, receiving, or trafficking in material involving the sexual exploitation of a minor” was thirteen. And if all specific offense characteristics applied, an offender would max out at a sentence of thirty-three to forty-one months. One year after this initial implementation, the USSC altered the language of one of those specific offense characteristics to increase the offense by two levels if “the material involved a prepubescent minor or a minor under the age of twelve years.” That change did not affect the total possible offense level.

In 1990, however, the USSC released findings showing that child pornography had developed into a multi-million dollar industry. The report noted a “troublesome” failure to account for physical abuse of children and the likelihood that victims often grow up “in an adult life of drugs and prostitution

41. See id. § 1B1.1.
42. See id. § 1B1.2 cmt. n.2.
43. Id. ch. 2, introductory cmt.
44. See, e.g., id. § 3B1.2.
45. See id. § 4A1.1.
47. See id.
48. See, e.g., id. ch. 5, pt. K.
49. See HISTORY, supra note 11, at 11.
51. See HISTORY, supra note 11, at 11–12.
52. Id.
53. Id. at 13.
and become child molesters themselves, thus continuing the vicious cycle.”

In light of these findings, the USSC proposed an increase of the base offense level from thirteen to fifteen as well as the addition of more specific offense characteristics. However, after receiving negative feedback from the Judicial Conference of the United States, the ABA, and the Federal Defenders, the USSC and Congress added only one specific offense characteristic—a four level enhancement when images included violent, sadistic or masochistic conduct.

In 1990, Congress passed both the Crime Control Act of 1990 and the Child Protection Restoration and Penalties Enhancement Act of 1990, which criminalized the simple possession of child pornography. In an attempt to sever possession and receipt from trafficking-based offenses, the USSC responded in 1991 by setting a base offense level of ten for simple receipt or possession. Within one month of those effective changes, however, Congress responded vigorously with the Helms-Thurmond Amendment. Senator Jesse Helms testified before the Senate that “the Sentencing Commission has undermined Congress’ attempt to assure severe punishment for dealing in child pornography.” That amendment passed 99-0 and was followed by a similar amendment in the House that passed 414-0. These amendments were signed into law, and the USSC responded by making substantial changes to the Guidelines. Under these amendments, §2G2.2 still specifically governed trafficking offenses, but the base offense level was raised to fifteen and a specific offense characteristic increased by five levels any offender’s sentence when that offender exhibited a pattern of sexual abuse or exploitation. While simple receipt was done away with unless it constituted trafficking, §2G2.4 governed simple possession, setting a base offense level of thirteen and adding the specific offense characteristic that an offender who possessed over ten items (magazines, books, photographs, etc.) was given a two-level enhancement.

Those Guidelines were in effect until 1996, when the USSC responded to the Sex Crimes Against Children Prevention Act of 1995. In response to increased pressure to fight the proliferation of child pornography—especially given the increasing availability of the use of computer images—the USSC changed the base offense level for trafficking-related offenses under §2G2.2 to seventeen and

54. Id. (quoting U.S. SENTENCING COMM’N, REVISED REPORT OF THE WORKING GROUP ON CHILD PORNOGRAPHY AND OBSCENITY OFFENSES AND HATE CRIME 8 (1990)).
55. Id. at 14–15.
56. Id. at 15–17.
57. Id. at 17.
58. See HISTORY, supra note 11, at 18.
59. Id. at 19–20.
60. Id. at 20.
61. Id. at 20–22.
62. Id. at 23.
63. Id.
64. HISTORY, supra note 11, at 25.
65. Id. at 26.
added a two-level enhancement for the use of a computer. The base level for possession under §2G2.4 was increased to fifteen and a similar two-level use-of-computer enhancement was added.

The Sexual Predators Act of 1999 gave specific directions to the USSC, which resulted in a more complex enhancement structure for distribution offenses under §2G2.2. Those changes added the layers of specific offense characteristics regarding an offender’s pecuniary gain that remain, at least in substantial part, effective today. In 2003, following congressional directives from the PROTECT Act, the USSC added specific offense characteristics to both §2G2.2 and §2G2.4, assigning set enhancements that correspond to the number of images the offender trafficked or possessed.

Following other directives from the PROTECT Act, the USSC made substantial changes to the trafficking provision in 2004. The base offense level in convictions pursuant to 18 U.S.C. § 1466A(b), § 2252(a)(4), or § 2252A(a)(5) was raised to eighteen, while any other convictions falling within the section started out at twenty-two. If offenders falling within that catch-all provision were only guilty of receipt or solicitation of material and lacked the requisite intent, a specific offense characteristic allowed a two point decrease. A specific offense characteristic was added providing an enhancement of six levels for distribution to a minor intended to entice the minor into other criminal behavior.

In all, the mean sentence for child pornography offenders increased 443% between 1997 and 2007.

III. ANALYSIS

Since the last major update of the provisions for child pornography offenses, technological advancement has altered the nature of the crime’s commission. As of 2011, the use-of-computer specific offense characteristic was applied in 97% of cases. Because of the ease and availability of almost instant file transfer, an additional 63.1% of offenders receive a five-level increase for

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66. Id. at 32.
67. Id.
68. Id. at 32–34.
69. See id. at 36.
70. History, supra note 11, at 39–41.
71. Id. at 45–48.
72. Id. at 49.
73. Id.
74. Id.
77. Id. at 33.
possessing over six hundred images. That number may also be inflated due to the current method of converting a video to seventy-five images and the presumably greater ease of transferring and possessing digital video recordings as opposed to tape recordings. Furthermore, the enhancement for images depicting children under twelve years of age applies in 94.8% of cases, and the specific offense characteristic covering images of violence is applied in 73.4% of cases.

The idea that these “specific” offense characteristics have become nearly automatic certainly calls the efficiency of the Guidelines into question. But the real problem with this evolution is that the rigidity and steadily increasing antiquity of those enhancements has directly led to higher sentences across the board. Marcia G. Shein aptly explains:

It is not uncommon for the run-of-the-mill child pornography defendant charged with possession to end up with an offense level of 40, simply by applying the enhancements for involvement of a minor under 12, use of computer, material depicting violence, 600 images or more, and expectation of value. This results in a recommended sentence range of 292-365 months, assuming a Criminal History Category of I. Such a recommendation is drastically higher than the 41-51 months that would be recommended if the base offense level of 22 was applied. In addition, even the low end of this range is above the statutory mandatory maximum of 20 years that Congress enacted for convicted child pornographers.

Not surprisingly, therefore, a survey of 639 federal district court judges revealed that 70% of those judges believe the guideline ranges for possession offenses are generally too high.

Although the psychosexual proclivities of offenders vary greatly and the link between child pornography possession and actual abuse is not entirely clear, child pornography offenders are sentenced like child predators. In addition, convicted possessors of child pornography often receive significantly disproportionate sentences compared to more serious offenders. As one federal judge wrote, “In an instance of troubling irony, an individual who, sitting alone, obtained images of sexually exploited children on his computer, could receive a higher sentence than the Guidelines would recommend for an offender who actually rapes a child.” The USSC suggests that structural barriers have

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78. Id.
79. See REPORT, supra note 2, at 322–23 n.57.
80. Shein, supra note 75, at 33.
81. Id. at 32.
82. Id. at 33.
83. REPORT, supra note 2, at 11 n.64.
84. See id. at 16 n.85; see also id. at 13.
85. Id. at 13.
prevented the development of informative research regarding any real or perceived links between viewers of child pornography and a propensity for dangerous sexual behavior. Specifically, almost all relevant information regarding the details of an offender’s collection of pornography and any of his communications with minors are contained on one hard drive seized and stored by law enforcement. And, while presentence reports contain detailed, personal information about a defendant’s past, those reports are not available to researchers. Thus, without access to those computers, researchers are often limited to the word of the offender.

Two sets of objectives drive this discussion. First, the fundamental purposes of criminal punishment—retribution, rehabilitation, deterrence, and incapacitation—provide a tempered avenue by which to consider the best options for reforming and restructuring the Guidelines. While these methods of punishment are by their virtue competing, more than one category may be at least partly satisfied when scrutinizing modern sentencing. The four commonly-cited purposes of punishment have a long-standing basis in theory and have become increasingly prevalent as pronounced intentions of legislatures. Furthermore, prior to the establishment of guideline-based sentencing in the federal system, district judges attempted to balance these principles when exercising their discretion.

Second, the original goals set for the Sentencing Guidelines, as articulated in the SRA, remain legitimate despite the limiting effect of Booker. The Guidelines were designed to prevent disparities resulting from excess judicial discretion; now that those disparities have returned in full force, retaining respect for the intentions behind the Guidelines is essential to resolving the issues plaguing §2G2.2.

Considering both of those categories increase the likelihood that the issue is resolved in the interests of justice and with deference to the Guidelines.

88. Id. at 16–17 n.86.
89. Id.
90. Id.
92. Id. at 1313.
94. History, supra note 11, at 2.
95. Report, supra note 2, at 317.
96. See id. at 316–18. A marked rise in disparate sentencing among similarly-situated defendants resulted after Booker made the Guidelines discretionary in 2004. See id. However, the changes in the nature of the crime during the same period have undoubtedly contributed to that disparity. See id. at 316. Just as the classical goals of punishment long-revered by many on the bench provide an independent analytical route, the original goals of the SRA serve as a grounded means of assuring reform that does not stray from Congressional intent.
97. See Booker Report, supra note 14, at 3. Because judges tend to follow many other portions of the Guidelines, it is safe to say that, when well-written, judges maintain a degree of respect for the role they play in the process of punishing offenders. See Id.
This Note will proceed by analyzing the problems outlined using the traditional purposes of punishment and resolving the issue by applying that analysis to the stated goals of the Guidelines.

A. Retribution

Often at philosophical odds with the more utilitarian purposes of criminal punishment (rehabilitation, deterrence, and incapacitation), retribution has its base in social standards of morality. The theory of retribution essentially holds that certain offenses, by their very nature, warrant punishment. Implicit within that definition is the fact that, under a regime valuing retribution, social ideas about the varying seriousness of crimes must guide the degree of punishment due a particular offender.

While a number of state constitutions and the Model Penal Code have long urged jurists to consider only the utilitarian goals, retribution has always been a key player in the justification of sentencing policies. However, retribution’s role as a highly valued purpose of punishment in criminal justice has long been questioned. As John Stuart Mill wrote:

If anyone thinks that there is justice in the infliction of purposeless suffering; that there is a natural affinity between the two ideas of guilt and punishment, which makes it intrinsically fitting that whenever there has been guilt, pain should be inflicted by way of retribution; I acknowledge that I can find no argument to justify punishment inflicted on that principle.

When considering, as some have suggested, that the child pornography guidelines fail to account for varying degrees of culpable mental states in possession cases, the shaky rationale upon which solely retributive punishment is based crumbles even further.

Still, the USSC, in its December 2012 Report, emphasized that its proposed reforms were based primarily on retributive concepts of punishment. At the same time, the Report acknowledges that the other goals are satisfied by the changes, albeit without elaboration. The USSC’s ambiguous analysis of the changes’ purposes reflects the difficulty of placing practical policies into neat, philosophical categories. Ultimately, the Report’s hazy attempt to categorize its

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98. Cotton, supra note 90, at 1315–16.
99. Id.
100. Id. at 1318.
101. See id. at 1319–20.
102. See id. at 1316.
103. JOHN STUART MILL, AN EXAMINATION OF SIR WILLIAM HAMILTON’S PHILOSOPHY 597 (1889).
105. REPORT, supra note 2, at 321.
106. Id.
extensive proposal shows that retribution can scarcely be rationally separate from the utilitarian models of punishment.

For example, the USSC argues that the reformed Guidelines should consider the nature of an offender’s collecting behavior—specifically, the “extent to which an offender has organized, maintained, and protected his collection over time.” The Report then characterizes this consideration as relating to retributive goals of punishment. That characterization seems misplaced. Is a more organized offender inherently deserving of more punishment simply because of his efforts in organization? On the other hand, it could be quite easily argued that an offender who went to great lengths to conceal his long-held collection is a greater danger to society than one whose newfound collection was not categorized or encrypted. And, as a result of that increased danger to society, incapacitating the offender longer does greater good. Under that line of analysis, therefore, incapacitation would be the primary justification.

While it seems that the most localized goals of punishment tend to be utilitarian, retribution may still play a broad, guiding role in sentencing. Specifically, if modern sentencing insists upon honoring retribution as a primary goal of punishment, Congress must consider the potential for such great disparity between child pornography possession sentences and contact offenses. The seemingly universal incredulity regarding those disparities evidences their incompatibility with a retributive model of punishment. In other words, if society believes that a child rapist deserves 151 months in prison, it does not likely simultaneously believe that a child pornographer deserves 210 months in prison.

Thus, while retribution on its own provides little guidance in terms of restructuring sentencing in child pornography cases, it seems to have some value in establishing broad bounds of proportionality. Not only should punishment be proportional to an offender’s culpability, but the punishments handed down for those convicted of one crime should bear some semblance of proportional relation to typical sentences of different crimes. Judges should not be forced to

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107. Id. at 320.
108. Id. at 323.
110. See Cruikshank, 667 F. Supp. 2d at 701.
113. See Tison, 481 U.S. at 156 (“Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.”).
114. See Ewing v. California, 538 U.S. 11, 35 (Stevens, J., dissenting) (discussing how the broad, basic principle of proportionality precludes “a life sentence for overtime parking”).
ignore, and thereby delegitimize, the Guidelines when they choose to honor the principles of proportionality stemming from the value of retributive justice.\textsuperscript{115}

\textbf{B. Rehabilitation}

Rehabilitation, like deterrence and incapacitation, is typically classified as a utilitarian model of punishment due to its positive effect on society when successful.\textsuperscript{116} In general, rehabilitative punishment attempts to better those convicted for their own sake and in the hope that they will not be compelled to offend after their release from confinement.\textsuperscript{117}

The USSC’s December 2012 Report includes detailed findings on the ongoing efforts to better understand and, when applicable, to improve the treatment of offenders convicted for crimes related to the sexual exploitation of minors.\textsuperscript{118} While many offenders suffer from some degree of pedophilia, others maintain collections with what the USSC calls “non-sexual motivation.”\textsuperscript{119} Offenders with non-sexual motivations are plagued with a clinical pathological condition that many psychiatric and behavioral social scientists identify as compulsive Internet use (“CIU”).\textsuperscript{120}

CIU is defined quite generally as the “inability to stop using Internet technologies without experiencing distress and where such use has resulted in a significant negative impact.”\textsuperscript{121} Many who suffer from CIU fit an already troublesome behavioral profile—“poor impulse control, emotional problems, and lack of social and emotional outlets.”\textsuperscript{122} They often have unstable careers, live in social isolation, and suffer from depression.\textsuperscript{123} People with CIU take refuge in and fulfill their version of a social life in online communities, many of which are geared toward the proliferation of obscene material, including child pornography.\textsuperscript{124}

The most prominent structured method of treating the psychosexual disorders of convicted child sex offenders is the Containment Model (“Containment”). The USSC is not the only entity that has expressed faith in this collaborative system of treatment.\textsuperscript{125} In the summer of 2012, California began mandating Containment for all sex offenders.\textsuperscript{126} Under the California model of Containment, treatment is combined with ongoing monitoring facilitated by

\begin{itemize}
\item\textsuperscript{115} See, e.g., D.M., 942 F. Supp. 2d at 350–52.
\item\textsuperscript{116} Cotton, supra note 90, at 1316–17.
\item\textsuperscript{117} Id.
\item\textsuperscript{118} See REPORT, supra note 2, at 77–79.
\item\textsuperscript{119} Id.
\item\textsuperscript{120} Id. at 78–79.
\item\textsuperscript{121} Id. at 79 n.40.
\item\textsuperscript{122} Id. at 79.
\item\textsuperscript{123} Id. at 80.
\item\textsuperscript{124} REPORT, supra note 2, at 79.
\item\textsuperscript{125} Id. at 318.
\item\textsuperscript{126} See Cal. Penal Code § 290.09 (West 2010).
\end{itemize}
regular polygraph examinations and check-ins with probation or parole officers.\textsuperscript{127} Only state-certified treatment providers and polygraph examiners can satisfy the model’s requirements.\textsuperscript{128}

Integral to most treatment programs is cognitive behavioral treatment.\textsuperscript{129} Through either individual or group sessions, cognitive behavioral treatment looks to identify and address the root causes of the offender’s conduct.\textsuperscript{130} Because the offender’s collection itself is unavailable to treatment providers, the process relies heavily on the patient’s word.\textsuperscript{131} The patient may often understate the extent of his collection, the depravity of his thoughts, and the severity of his addiction.\textsuperscript{132} Thus, professionals rely heavily on the use of polygraph examinations to ensure that treatment is focusing on the real problems.\textsuperscript{133} While the USSC’s Report seems to suggest that allowing treatment professionals to access an offender’s forensic report or actual computer files could improve efficacy,\textsuperscript{134} it does not make an official recommendation to that effect.

Although it is neither required by California’s model of Containment nor specifically recommended by the USSC,\textsuperscript{135} some professionals use “Abel testing” in the treatment of sex offenders.\textsuperscript{136} While somewhat similar to Penile Phallometric Tests, Abel testing is less invasive, more like a polygraph examination, and involves “showing subjects a series of slides and monitoring the amount of time they attend to each slide.”\textsuperscript{137} The Ninth Circuit has explicitly upheld a district court opinion holding that mandatory Abel testing in post-conviction treatment is constitutional when it is “reasonably related to the goal of deterrence, protection of the public, or rehabilitation of the offender, and involve[s] no greater deprivation of liberty than is reasonably necessary.”\textsuperscript{138}

When considering rehabilitative strategies, it is essential to recognize that not all offenders are the same; therefore, not all offenders will respond to punishment in the same way.\textsuperscript{139} Nonetheless, through a combination of behavioral therapy

\textsuperscript{127} Id.
\textsuperscript{128} Id. § 290.09(b)(1); see also id. § 290.09(c).
\textsuperscript{129} REPORT, supra note 2, at 280–81.
\textsuperscript{130} See id.
\textsuperscript{131} See id.
\textsuperscript{132} See id. at 282. The Report refers to the use of polygraphs as “truth facilitators,” which gauge progress for the rehabilitation program much like urine tests gauge the progress for those addicted to drugs. Id.
\textsuperscript{133} See id.
\textsuperscript{134} Id. at 281.
\textsuperscript{135} REPORT, supra note 2, at 280. The Report discusses both “penile phallometric tests” and “visual response time tests” before citing the testimony of Dr. Abel. Id. at 280-281. So, while certainly present in the discussion, no specific recommendation is made in Chapter 12 of the Report. See id.
\textsuperscript{137} See United States v. Stoterau, 524 F.3d 988, 1006 (9th Cir. 2008) (citing United States v. Weber, 451 F.3d 552, 567 (9th Cir. 2003)).
\textsuperscript{138} Id. at 1007 (quoting United States v. Rearden, 349 F.3d 608, 618 (9th Cir. 2003)).
\textsuperscript{139} See REPORT, supra note 2, at 279–82.
and maintenance efforts (and, in some cases, medication\textsuperscript{140}), even if an offender is not “cured,” relapse may be prevented.\textsuperscript{141} In fact, in his testimony before the Commission, Dr. Abel reported success rates between 93-95\% when an offender was subject to ongoing official supervision, cognitive behavioral treatment, and polygraph examinations every six months.\textsuperscript{142}

\section*{C. Deterrence}

Deterrence is most often broken down into two concepts: specific and general deterrence.\textsuperscript{143} And though a philosophical distinction can be drawn between specific deterrence and rehabilitation,\textsuperscript{144} for the purposes of this discussion the two ideas represent the same goal—preventing an offender from returning to his criminal lifestyle. The most basic element of deterrence as a utilitarian mode of punishment is general deterrence—\textsuperscript{145}the theory that harsher sentences will deter other potential criminals from committing the same crime.\textsuperscript{146} By consistently increasing the possible penalties for child pornography offenses over the past few decades, the USSC and Congress have certainly acted with deterrence as an objective.\textsuperscript{147} However, as the availability of child pornography has increased,\textsuperscript{148} the rate of federal prosecutions for such crimes has subsequently risen,\textsuperscript{149} despite a steady increase of the penalties for being caught.\textsuperscript{150}

It is not entirely clear whether deterring the possession of child pornography is a reasonable goal.\textsuperscript{151} While some experts believe that psychosexual urges overcome the typical criminal mind and negate typical deterrent effects, many others argue that the same disorders do not make offenders “unable” to resist committing the crime.\textsuperscript{152} Additionally, though definitively knowing the size of any black market is difficult, some experts estimate that as much as $20 billion flow through the online child pornography industry.\textsuperscript{153} Thus, efforts to deter child pornography must target both consumers with psychological proclivities and depraved producers who not only take refuge in a life of predatory behavior

\begin{thebibliography}{99}
\bibitem{140} Id. at 281.
\bibitem{141} Id.
\bibitem{142} Id. at 281 n.50.
\bibitem{143} Cotton, \textit{supra} note 90, at 1316.
\bibitem{144} Id. at 1316 n. 8.
\bibitem{145} Id. at 1316.
\bibitem{146} Id.
\bibitem{147} \textit{See} \textit{History, supra} note 11, at 41.
\bibitem{148} Shein, \textit{supra} note 75, at 33.
\bibitem{149} \textit{See} United States v. Cunningham, 680 F. Supp. 2d 844, 847 (N.D. Ohio 2010).
\bibitem{150} Shein, \textit{supra} note 75, at 33.
\bibitem{152} Id. at 1537–38.
\end{thebibliography}
and rape, but who are additionally motivated to maintain investments and continue making money in a lucrative market.

While courts recognize the relationship between consumer and producer, they have been understandably hesitant, partly due to the mandate of 18 U.S.C. § 3553(a), to abandon general deterrence as a goal of punishment. As described by the Seventh Circuit Court of Appeals:

Young children were raped in order to enable the production of the pornography that the defendant both downloaded and uploaded . . . The greater the customer demand for child pornography, the more that will be produced. Sentences influence behavior, or so at least Congress thought when in 18 U.S.C. § 3553(a) it made deterrence a statutory sentencing factor. The logic of deterrence suggests that the lighter the punishment for downloading and uploading child pornography, the greater the customer demand for it and so the more will be produced.

Still, other courts adhere to the belief that child pornography has such a hold on most offenders that they are not susceptible to deterrence.

However, severity of punishment is not the only means of ensuring (or attempting to ensure) general deterrence. Certainty of punishment is equally—if not more—important than the severity of punishment, especially when policies are only changed marginally. Professor Donald A. Dripps explains:

If we look at empirical evidence on deterrence, it seems reasonably clear that punishment, in a general way, deters; that marginal changes in legal doctrine do not translate into marginal changes in criminal behavior; and that marginal policy changes that increase the certainty, rather than the severity, of punishment have the best chance of reducing criminal behavior.

Similarly, the Institute of Criminology at Cambridge University found in 1999 that there is no empirical basis for the long-standing belief that increasing severity of sentences has a deterrent effect. Furthermore, “[p]otential offenders are also unlikely to be aware of modifications to sentencing policies, thus diminishing any deterrent effect.” In all, the steady increases in

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154. See, e.g., United States v. Camiscione, 591 F.3d 823, 834 (6th Cir. 2010).
155. United States v. Goldberg, 491 F.3d 668, 672 (7th Cir. 2007).
156. Kimball, supra note 150, at 1537–38.
158. Id.
160. Id. at 3.
punishment of child pornography offenders have been implemented marginally and have focused almost exclusively on the severity of punishment.\textsuperscript{161}

Meanwhile, despite the steady increase in federal prosecutions, the certainty of punishment in possession cases has faltered, especially over the past decade as disparities in sentencing have notably increased.\textsuperscript{162} These disparities include cases, many highly publicized, in which convicted offenders are sentenced to one day in prison,\textsuperscript{163} and cases in which offenders are sentenced to life imprisonment.\textsuperscript{164} Even more importantly, the general public tends to underestimate the severity of punishment that is imposed for these crimes.\textsuperscript{165} So, regardless of the reality, if a potential offender—possibly a pedophile or compulsive collector—perceives that (1) the likelihood of getting caught online is very low, and (2) even if caught, he could get off with a very short sentence, general deterrence is not likely to be effective.\textsuperscript{166} While structural improvements to law enforcement interdiction techniques are most likely to address that first concern, improving uniformity of sentencing at the federal level, even if only marginally, could help deter commission of these crimes.

\textit{D. Incapacitation}

Incapacitation is the attempt to remove dangerous individuals from society in order to prevent further harm.\textsuperscript{167} In those cases where rehabilitation is not a reasonable goal, incapacitation is an especially important consideration.

Some argue that simple possession of child pornography is a victimless crime;\textsuperscript{168} however, that idea is not only far from the truth, but it is also dangerous in its tacit acceptance of the very serious, devastating crimes associated with the production of the material.\textsuperscript{169} Furthermore, each time an offender views an image, that victim is humiliated again.\textsuperscript{170} In fact, child pornography victims may need to be notified each time their images are found in an offender’s possession in order to receive restitution.\textsuperscript{171}

According to the USSC, at least one-third of non-production child pornography offenders have engaged in criminal sexually dangerous behavior

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\textsuperscript{161} Supra, Part II.
\textsuperscript{162} See REPORT, supra note 2, at 317.
\textsuperscript{163} See, e.g., United States v. Bistline, 665 F.3d 758, 768 (6th Cir. 2012) (overturning a one-day sentence because it was “substantively unreasonable”); but see United States v. Stall, 581 F.3d 276, 286 (6th Cir. 2009) (upholding a one-day sentence for possession of child pornography).
\textsuperscript{165} Wright, supra note 158, at 3.
\textsuperscript{166} Id. at 2.
\textsuperscript{167} Cotton, supra note 90, at 1316.
\textsuperscript{168} Kimball, supra note 150, at 1536–37.
\textsuperscript{169} Id.
\textsuperscript{170} Id. at 1537.
\textsuperscript{171} REPORT, supra note 2, at 118.
\end{flushleft}
Even more are presumed to have engaged in non-dangerous but sexually deviant behavior that may indicate their potential to harm. Of those with known CSDB, 94.7% of prior acts were committed against minors.

According to the limited studies that have been conducted over the past fifteen years, non-production offenders have a general recidivism rate ranging between roughly 25-32%. Among those who committed subsequent crimes, between 5-11% of non-production offenders committed crimes of a sexual nature. And, while the USSC’s study could not reach a definite conclusion as to the relation between CSDB and sexual recidivism due to the small sample size, behavioral experts generally agree that non-production offenders with a history of CSDB pose a greater risk of sexual recidivism than those with no such background.

Meanwhile, over 40% of possession offenders with proven CSDB received sentences of less than ten years. Of those, more than four out of every five did not receive any sentencing enhancement—either through statutory provisions or the Guidelines.

Accurately predicting the likelihood that a child pornography offender will fall into a rut of sexual recidivism is difficult, to say the least. Some researchers have suggested the Screening Scale for Pedophilic Interests (“SSPI”) as a tool to aid in predicting the likelihood of recidivism. The SSPI looks at (1) whether the offender had at least one male victim, (2) whether the offenses were committed against multiple victims, (3) whether the offender had at least one prepubescent victim, and (4) whether there was at least one non-relative victim. Based upon those factors, an offender’s degree of pedophilia is gauged; the “greater” the pedophilic tendencies, the higher the risk of recidivism. In all, the SSPI was found to correlate to the findings of penile phallometric testing, discussed above. And, while the SSPI originally looked specifically to pedophiles engaging in CSDB, its creators acknowledge child pornography as highly correlative with pedophilic tendencies.

172. Id. at 204.
173. Id.
174. Id.
175. Id. at 302, 306.
176. Id. at 306.
177. REPORT, supra note 2, at 170.
178. Id. at 206.
179. Id.
181. Id.
182. Id.
183. Id.
A Canadian study conducted in 2010 looked at 541 offenders in an attempt to identify the most consistent predictors of recidivism in child pornography cases.\(^\text{185}\) According to that study, three primary offender characteristics can help accurately predict recidivism: (1) the age of the offender upon first arrest, (2) prior criminal history (especially violent prior crimes), and (3) failure to comply with conditional release.\(^\text{186}\) Of those factors, only the offender’s prior criminal history is a possible factor for consideration at sentencing.

In all, the conclusion of the USSC that sentencing reform takes into account the nature of an offender’s collection seems to echo professional considerations regarding recidivism, particularly with respect to the SSPI—that is, the offenders with the most vile collections are the most likely to engage in sexual crimes against children upon release.

IV. RESOLUTION

Congress would be hard-pressed to find a more comprehensive analysis of the current state of the US Sentencing Guideline provisions covering child pornography than that contained in the USSC’s December 2012 Report to Congress. However, this Note argues that many of the Report’s recommendations fall short, either because they lack specificity or because they omit an opportunity for appropriate reform.

As previously stated, the USSC was originally charged to account for the nature and degree of harm caused by the offense, the public concern generated by the offense, the deterrent effect a particular sentence may have on the commission of the offense by others, and the current incidence of the offense in the community.\(^\text{187}\) In general, Congress should follow the lead of the USSC and revisit §2G2.1 and §2G2.2, making the most of the recommended changes. But, where the USSC’s Report reached three broad conclusions, this Note offers three supplemental, complementary goals for consideration in reforming the current state of sentencing in federal child pornography cases:

1. Section 2G2.2, which applies to possession, trafficking, and receipt of child pornography, should be amended to encourage opportunities for rehabilitation of offenders with known psychosexual disorders. Specifically, a small negative specific offense characteristic should be offered to those offenders who agree to enter and stay in treatment during incarceration. In addition, a larger negative specific offense characteristic should be offered to those who agree to Containment as a permanent condition of lifetime supervised release. Containment, in addition to the regular interviews required under supervised release, should include behavioral and, if needed, medical treatment by licensed

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185. Id. at 466.
186. Id.
187. HISTORY, supra note 11, at 3 (quoting 28 U.S.C. § 994(c)).
professionals, regular polygraph examinations and Abel testing, and coordinated communication between those professionals and the offender’s designated probationary officer.

2. In an effort to deter the physical and emotional harm of further victims, Congress should authorize an increase in penalties covered by §2G2.1, relating to the production of child pornography.

3. As indicated in the Report, the Guidelines or the appropriate statutory provisions should provide adequate opportunities to ensure proportionate incapacitation of the most dangerous offenders. Specifically, a specific offense characteristic should include a tiered approach to enhancing sentences based on whether the offender has engaged in CSBD once or multiple times.

Due to the advisory nature of the Guidelines in a post-Booker setting, these changes will be ineffective if not supported by those judges currently viewing downward departures as appropriate. The opinions authored by the most lenient district court judges regarding child pornography seem to suggest that they are opposed to enforcing the law as it relates to possession—let alone following the Guidelines. Despite such judicial opinion, Congress has been clear in its handling of child pornography offenses.

In that gridlocked environment, the Guidelines ought to serve as a mediator—respecting the seriousness of the crime as assessed by Congress and understanding that a sentencing judge has to look an offender in the eye before caging him. Restoring respect for the Guidelines by ensuring that they account for their original goals may give them a seat at the table again.

A. The Nature and Degree of Harm Caused by the Offense

The introduction of this Note emphasized the depravity of crimes against children—a reality that must not be ignored when discussing the punishment of such criminals. Those who possess child pornography perpetuate and encourage a market for such refuse; those who produce child pornography to satisfy that market demand directly harm children. That relationship, in many cases, is much more than tenuous. But those found in simple possession of child pornography have not necessarily physically, sexually abused a minor. On the other hand,

188. See Holly H. Krohel, Comment, Dangerous Discretion: Protecting Children by Amending the Federal Child Pornography Statutes to Enforce Sentencing Enhancements and Prevent Noncustodial Sentencing, 48 SAN DIEGO L. REV. 623, 635 (2011) (“Some district court judges believed that the Guidelines are too harsh on child pornography offenders, and armed with the discretionary power provided by Booker, these judges began to make their opinions known.”).
189. See id. at 638–39.
190. HISTORY, supra note 11, at 6.
those who have produced child pornography have, almost necessarily, abused a minor directly.

Looking to the nature and degree of harm caused by the two most prominent actors in this offense, it follows basic proportionality as it stems from a retributive theory of justice that producers are due significantly greater punishment than possessors. Likewise, the fact that child rapists can potentially receive much lower sentences under the Guidelines than possessors of child pornography strains credulity. In all, the status quo fails to account for the nature and degree of harm caused by the offense as it relates to similar crimes against children.

This is not to say that anyone engaging in the sexual exploitation of a child, whether actively or passively, deserves lenient punishment. And an implementation of the USSC’s recommendations—with or without the supplementary considerations in this Note—would not lead to lenient punishment, but rather more rational and proportionate punishment.192

B. Current Incidence of the Offense in the Community and Nation as a Whole

As explained by Professor Carissa Hessick, child sex abuse and child pornography cases are often “entangled” in the public’s perception of both the nature and incidence of such cases.193 Child sex abuse, where contact with a victim occurs, is under-reported and under-prosecuted.194 However, child pornography offenses are generally considered easier to prosecute, and there are significantly fewer incidences of the crime.195 Thus, because the crimes are often grouped together statistically into “child sexual exploitation” crimes, Professor Hessick argues that the public is misinformed about the actual rates of both, as well as the effectiveness of law enforcement in catching physically dangerous child predators.196

While the overall number of people possessing child pornography is estimated to be much lower than the number of people sexually abusing children,197 the increase in internet access and availability to recording equipment—as well as the growth of P2P networks—has certainly increased the number of images and videos circulating among offenders.198 As a result of both that increased supply and the increasing ease of surveillance and interdiction, rates of prosecution have skyrocketed.199 Therefore, although child pornography

192. Admittedly, the implementation of either would likely involve lessening the average Guideline recommendation for a child pornography offender under §2G2.1. But, considering the current ranges, the average would by no means be considered low.
194. Id. at 890.
195. Id. at 890–91.
196. Id.
197. Id.
198. REPORT, supra note 2, at 41–43.
199. Id.
is more prolific than ever before, the government’s efforts to combat it have also risen.

The proposed changes to the Guidelines directly acknowledge the role that technology has played in the evolution of child pornography. This Note also argues that the steadily increasing penalties for possession crimes have done little to lessen the crime’s incidence in the community. Since general deterrence of possession seems to have been ineffective, shifting the model toward rehabilitation and incapacitation of the most dangerous offenders may be one means of lowering the incidence of child pornography offenses. Rehabilitative efforts to address the root cause of offenders’ problems may help prevent recidivism among those with pedophilic tendencies or impulsive collection disorders. Further, ensuring incapacitation of the most dangerous subset of offenders will keep them off the street and out of the child pornography marketplace.

C. The Public Concern Generated by the Offense

In December 2013, Jesse Ryan Loskarn, the chief of staff for a prominent United States Senator, was arrested and charged with possessing child pornography. Shortly after his firing and a “media frenzy,” Loskarn committed suicide. A childhood victim of sexual abuse himself, Loskarn wrote in his suicide note, “The news coverage of my spectacular fall makes it impossible for me to crawl in a hole and disappear . . . I’ve hurt every single human being I’ve ever known and the details of my shame are preserved on the internet for all time.”

Loskarn was not the victim of his possession crime, and he was certainly not innocent—a fact of which he was well aware. Nonetheless, he bore an immense burden, including both his history of sexual abuse and the public disgust generated by his conduct.

At the same time, disgust and public concern, while nearly synonymous, may warrant bifurcation in the context of possession of child pornography. For instance, legal scholars have long addressed the constitutionality of various obscenity laws, but “the law of child pornography has been left alone to occupy its own peculiar and unpleasant realm.” As assessed by one judge:

201. Id.
202. Id.
203. See id.
Possessors of child pornography are modern-day untouchables. We cannot fathom how they can be aroused by images of prepubescent children being brutalized. And, because we cannot imagine that we personally know anyone so perverted, we are not bothered by the idea that these men are cast out to serve long periods in prison . . . The resulting punishment under the Guidelines may be more a reflection of our visceral reaction to these images than a considered judgment of the appropriate sentence for the individual.\textsuperscript{205}

Thus, it is worth considering whether the general inability to empathize with these offenders has overtly distorted the construct of “public concern with the offense.” That is, do people genuinely fear possessors of child pornography or simply react gutturally upon reminders that they cannot really know all of their neighbors?

But, even if disgust and concern are not sufficiently distinct—and, assuming that bursts of outrage at specific incidences of the act and continual ratcheting up of penalties by elected officials constitute a seemingly high degree of public concern—the changes proposed by this Note do not expressly advocate lower sentencing for the most disconcerting child pornography offenders. On the contrary, by arguing for higher penalties for those who cause physical harm to children in the production of this material or in prior acts of CSDB, societal concern about the evils of child pornography is addressed directly.

\textbf{D. The Deterrent Effect of a Particular Sentence}

While it seems that traditional efforts to deter the typical offender’s behavior may not be successful, increasing penalties to the most egregious subset of offenders—those who produce child pornography, directly exploiting society’s most innocent—has no readily perceivable downside. Though general deterrence of the typical offender’s consumption of online child pornography seems a difficult battle, deterrence as a broader principle still has a role in this discussion. And, while those victims whose images have already flooded that market can never be made whole by the criminal justice system alone, deterring people from entering the production business may help prevent the future victimization of innocent children. It may not be possible to deter everyone from what has become a lucrative business, but if one producer of child pornography can be dissuaded from touching a child, the change is worthy of consideration.

At the same time, if those changes are marginal, the deterrence theory discussed in Section III, Part C of this Note suggests that they will have little deterrent effect. Thus, in addition to revisions to §2G2.1 allowing for higher sentencing of production offenders, either federal judges must be on board with

the comprehensive approach to market-based deterrence or Congress must mandate aggressive sentencing—a move likely to entrench some jurists.206

That is, without a firm stance from the bench as a whole, the lack of uniformity of sentencing will persist and continue contributing to uncertainty of sentencing. And, if the perception of low sentences for the production of child pornography is allowed to continue, any effect on deterrence by these marginal changes to the Guidelines will be negligible.

V. CONCLUSION

If the Guidelines are to be retained as a tool in federal sentencing, they must stay relevant. Any changes to them should account for both the traditional goals of punishment and the original considerations mentioned at the formation of the USSC. The USSC’s recommendations to Congress ought to be adopted to achieve much-needed reform of sentencing under §2G2.2. Furthermore, by increasing penalties to production offenders under §2G2.1, by ensuring the incapacitation of the most dangerous subsets of possession offenders, and by incentivizing rehabilitation programs, the Guidelines could more effectively serve as a silent mediator between a skeptical Congress and more sympathetic district court judges. For judges to sentence with some regularity and certainty under the advisory Guidelines, those Guidelines must be up-to-date and give reasonable advice.

206. See generally Krohel, supra note 186 and accompanying text.
RE-EXAMINING JUVENILE SEIZURES IN LIGHT OF ROPER, GRAHAM, AND J.D.B.

Erin M. Heidrich

I. INTRODUCTION

On Halloween night in 1989, fourteen-year-old J.M. was traveling from New York City to Wilmington, North Carolina on a Greyhound bus. At 2:30 in the morning, the bus driver announced a ten-minute rest stop just northeast of Washington, D.C. Immediately after stopping, police officers in civilian attire boarded the bus and took over the loudspeaker system. The officers announced that they were part of a drug interdiction group.

After interviewing other passengers, one of the officers, Detective Zattau, approached J.M. and asked to see his bus ticket. Detective Zattau asked J.M. if he had heard and understood the officers’ message over the loudspeaker. J.M. confirmed that he had. Zattau asked J.M. if he was carrying drugs or weapons, which J.M. denied. Zattau asked J.M. for permission to search his bag. J.M. granted the request, and the search yielded nothing. Zattau then asked J.M. for permission to pat him down. Without answering or standing up, J.M. raised his arms. Zattau patted him down and found a small bag containing crack cocaine taped to J.M.’s body. Zattau then arrested J.M.

At trial, the prosecution acknowledged that the officers had no reason to suspect J.M. of a crime, but argued that because J.M. had “freely consented to the pat-down,” there was no “seizure.” J.M. denied that he had given Zattau permission to search him, stating that Zattau “just started patting [him] down.” When asked why he did not stop the frisk, he stated that “if he had done so, the officers ‘would have got[ten] more suspicious at me.’” J.M. further testified

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2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
14. Id. at 498-99.
15. Id. at 498.
16. Id.
that while he had given Zattau permission to check his bag, he did so because he believed his refusal would have aroused the officers’ suspicion.\footnote{Id.} J.M. argued that any “alone, black, barely . . . teenaged youth, would feel pressure [to consent] when the police came up to him.”\footnote{Id.} The trial court found that no seizure had occurred because “there was no indication that the actions of Detective Zattau had overborne appellant’s will.”\footnote{In re J.M., 619 A.2d at 498.} The District of Columbia Court of Appeals agreed.\footnote{Id. at 501-02.}

In reaching its conclusion on the seizure issue, the appellate court “[did] not on [the] record consider the fact that J.M. was fourteen years old and hence possibly vulnerable to coercion in a way an adult would not have been.”\footnote{Id. at 501.} Instead, the court followed the Supreme Court’s instruction in \textit{Michigan v. Chesternut} that “the test for whether a person has been seized . . . does not vary \textit{with the state of mind of the particular individual being approached}.”\footnote{Id. (emphasis in original) (quoting Michigan v. Chesternut, 486 U.S. 567, 573-74 (1988)).} While this was and remains the standard for assessing whether a seizure occurred under the Fourth Amendment, this test is ripe for reconsideration in the context of juvenile arrests. In the last decade, the Supreme Court has “carved out a distinct jurisprudential approach to youth.”\footnote{Hillary B. Farber, \textit{J.D.B. v. North Carolina: Ushering In A New “Age” Of Custody Analysis Under Miranda}, 20 J.L. & Pol’y 117, 118 (2011).} In 2005 the Court eliminated the death penalty for juveniles in \textit{Roper v. Simmons}.\footnote{Roper v. Simmons, 543 U.S. 551 (2005).} Five years later, in \textit{Graham v. Florida}, the Court found it unconstitutional to impose life sentences without the possibility of parole on juveniles who committed crimes other than homicide.\footnote{Graham v. Florida, 560 U.S. 48 (2010).} And in 2011, in \textit{J.D.B. v. North Carolina}, the Court held that a juvenile’s age properly informs the \textit{Miranda} custody analysis.\footnote{J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011).} The \textit{Roper/Graham/J.D.B.} trilogy reflects a sea change in juvenile law. The Court’s acknowledgement that “age is far more than a chronological fact . . . it is a fact that generates commonsense conclusions about behavior and perception” opens up room for change in a host of contexts.\footnote{Id. at 2397 (internal citations omitted).} This comment will review current Fourth Amendment seizure jurisprudence, survey the Court’s recent conclusions about juvenile development, and apply those conclusions to show how the law of juvenile seizures can be brought more in line with contemporary understanding of juveniles.
II. THE CURRENT STATE OF JUVENILE SEIZURE JURISPRUDENCE

The Fourth Amendment provides that “the right of the people…to be secure…against unreasonable searches and seizures shall not be violated.” 28 It prohibits all unreasonable seizures of the person, including brief detentions that stop short of a full arrest. 29 However, not all interactions with a police officer constitute a seizure—a person is “seized” only if, “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” 30 As examples of such circumstances, the Supreme Court has offered: “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” 31 The Supreme Court has explicitly declined to require police officers to issue Miranda-style warnings to inform individuals that they have a right not to comply with police questioning. 32 Additionally, the Supreme Court has clarified that this “reasonable person” standard is an objective one:

While the test is flexible . . . it calls for consistent application from one police encounter to the next, regardless of the particular individual’s response to the actions of the police. The test’s objective standard—looking to the reasonable man’s interpretation of the conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment. This ‘reasonable person’ standard also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached. 33

In In re J.M., both the trial and appellate courts recognized that police officers carry an “inherent authority” into their interactions with citizens which may influence “even adults.” 34 The appellate court also acknowledged that the question of whether J.M. consented to the search is a subjective question, one which focuses on the “particular individual” and his “possibly vulnerable subjective state.” 35 When it came to whether J.M. was seized, however, because of the Supreme Court’s explicit guidance that the seizure calculus is objective, the appellate court did not consider J.M.’s age, nor whether his age made him “vulnerable to coercion in a way that an adult would not have been.” 36

28. U.S. CONST. amend. IV.
30. Id. at 554.
31. Id.
35. Id. (internal citations omitted).
36. Id. at 501.
words, the court determined that J.M. must have felt free to leave because a reasonable adult in his position would have felt free to leave. J.M. pointed out that none of the approximately twenty adult passengers aboard the bus actually did attempt to exit the bus.  Still, the court was not persuaded that the adults felt coerced into remaining aboard, reasoning that it did not know “where the last stop had been or where the next scheduled one was...[nor] whether there was a bathroom aboard the ... bus.”

III. CHANGES IN OUR UNDERSTANDING OF JUVENILE DEVELOPMENT SINCE IN RE J.M.

In Re J.M. was decided in 1992. The Roper/Graham/J.D.B. trilogy of cases illustrates not only a great increase in societal understanding of developmental differences between juveniles and adults, but how willing the Supreme Court is to use this knowledge in its determination of “reasonable” behavior.

A. Roper and Graham

In Roper v. Simmons, the Supreme Court held that it was cruel and unusual to execute juveniles for capital crimes committed while the juvenile was under eighteen years of age. In so holding, the Court identified three general differences between juveniles and adults:

1. Underdeveloped maturity and responsibility: Even “normal” juveniles lack the maturity and sense of responsibility that a “normal” adult possesses. Juveniles are “impetuous” and do not fully consider their actions before taking them. Indeed, juveniles are statistically overrepresented in “virtually every category of reckless behavior.” In recognition of this reality, most States prohibit juveniles from voting, marrying without parental consent, or serving on juries.

2. Increased susceptibility to negative influences: Juveniles, who “have less control ... over their own environment”, are more susceptible to peer pressure. This susceptibility renders their irresponsible behavior less morally reprehensible than that of an...
Their lack of control means juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their environment."46

3. Transitory character traits: A juvenile’s personality and character are not fixed, and juveniles experience anxiety as they struggle to form their identity.47 Because their characters are still forming, there is greater possibility for reform and “it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”48

Five years later, in *Graham v. Florida*, the Supreme Court held that juveniles cannot be sentenced to life in prison without parole for offenses other than homicide.49 The Court expressly declined to depart from its findings in *Roper* about the differences between juvenile and adult development, finding that there was no recent data to warrant it.50

**B. J.D.B. v. North Carolina**

In *J.D.B. v. North Carolina*, the Supreme Court held that a juvenile’s age is relevant to a *Miranda* custody analysis, so long as the child’s age was known or should have been known by a reasonable police officer.51 In so holding, the Court referenced its prior holdings in *Roper* and *Graham*, which recognized the developmental differences between juveniles and adults.52 The Court also noted that the law has “historically reflected the . . . assumption that children characteristically lack the capacity to exercise pure judgment.”53 For instance, children are not able to enter contracts.54 Furthermore, in negligence suits involving a child actor, the “reasonable person” standard factors in the defendant’s age.55 Though individual children may exist at differing stages of development, the contemporary understanding that children are more susceptible to police pressure than adults is objective.56

**C. Research Shows that Juveniles Do Not Understand Miranda Warnings**

Of the trilogy of cases discussed above, the police-custody case *J.D.B.* is most relevant to the context of juvenile Fourth Amendment seizures—both

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45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
50. *Id.* at 68.
52. *Id.* at 2404-05.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
involve juvenile contact with police, and both *Miranda* and the Fourth Amendment’s prohibition against unreasonable searches and seizures reflect the reality that police interviews necessarily contain “coercive aspects.”\(^{57}\) However, unlike juveniles brought into custody, who are entitled to a *Miranda* warning, juveniles who are “seized” by a police officer are not entitled to any indication whatsoever that they are free to walk away.\(^ {58}\)

Significantly, a 1980 study shows that even juveniles who *are* Mirandized do not fully understand the implications of the warning.\(^ {59}\) The study reflected that only half as many juveniles as adults understood the vocabulary used in a Miranda-style warning.\(^ {60}\) Additionally, juveniles were three times as likely to misunderstand that the right to silence is an absolute right not to incriminate oneself and that the police and the judge cannot punish someone for remaining silent.\(^ {61}\)

**D. In Re I.R.T.**

In 2007, the North Carolina Court of Appeals broke from long-established precedent and held that a juvenile’s age is relevant in determining whether a Fourth Amendment seizure has occurred.\(^ {62}\) This case provides a template for other states in bringing their own Fourth Amendment jurisprudence in line with the *Roper/Graham/J.D.B.* trilogy.

I.R.T. was standing with a group of other individuals outside of an apartment building in Durham, North Carolina in May 2005.\(^ {63}\) Durham Police Officers approached the group.\(^ {64}\) Although officers had made drug-related arrests in the area previously, on this particular day the police had received no reports of any drug sales in the neighborhood.\(^ {65}\) One of the officers approached I.R.T. and began asking him some questions.\(^ {66}\) I.R.T. kept his head turned away from the officer and spoke without opening his mouth fully.\(^ {67}\) The officer had experience with individuals attempting to hide crack-cocaine in their mouths, and assumed I.R.T. was trying to do the same thing.\(^ {68}\) He requested that I.R.T. spit out what was in his mouth,

\(^ {60}\) Id.
\(^ {61}\) Id.

\(^ {63}\) In re I.R.T., 647 S.E.2d 129, 132 (N.C. Ct. App. 2007).
\(^ {64}\) Id.
\(^ {65}\) Id.
\(^ {66}\) Id.
\(^ {67}\) Id.
\(^ {68}\) Id.
whereupon I.R.T. spit out a crack-cocaine rock.\textsuperscript{69} At trial, I.R.T. filed a motion to suppress the crack-cocaine evidence, which the trial court denied.\textsuperscript{70}

On appeal, the North Carolina Court of Appeals considered whether the age of a defendant is a “relevant inquiry in determining whether a reasonable person would feel free to leave,” and concluded that it was.\textsuperscript{71} Four years before \textit{J.D.B.}, the court looked to state cases which had held that a “defendant’s age has been used to determine whether he was in custody.”\textsuperscript{72} While acknowledging that the test to determine custody and the test to determine whether a seizure has occurred are not identical, the court found “no legal or common sense reason” to make a distinction between the two.\textsuperscript{73}

The court also concluded that a seizure had occurred. The court noted that the officers were driving marked police cruisers, carrying visible guns, and wearing “gang unit emblems” on their shirts. Given this show of authority, a reasonable fifteen-year-old juvenile such as I.R.T. could reasonably have construed the officer’s “request” that he spit out what was in his mouth as an “order, compliance with which was mandatory.”\textsuperscript{74} A reasonable juvenile in these circumstances, said the court, would not have felt free to leave.\textsuperscript{75}

IV. WHAT IS THE STATUS OF \textit{IN RE J.M.} FOLLOWING \textit{ROPER, GRAHAM, AND J.D.B.}?

Given the Court’s repeated affirmation over the last ten years that juveniles must be treated differently from adults in criminal contexts, what is the status of lower court holdings like \textit{In re J.M.} and juvenile seizures in general? The \textit{In re J.M.} court expressed its willingness to factor a juvenile’s age into the “consent” analysis, but did not consider his age in the “seizure” analysis because of the Supreme Court’s long-established objective test.\textsuperscript{76} But a court deciding the same case today would not be bound by the same constraints.

In \textit{J.D.B. v. North Carolina}, the Supreme Court retained the objectivity test as it relates to a determination of whether a juvenile is “in custody,” but it created room within that test for consideration of the juvenile’s age and development. The Court acknowledged that the objective test was important because it “avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person’s subjective state of mind.”\textsuperscript{77} However, the Court also recognized that there is room within the objective test for consideration of age. In the words of the

\textsuperscript{69} In re I.R.T., 647 S.E.2d at 132.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} In re I.R.T., 647 S.E.2d at 132.
\textsuperscript{76} Id.
Court, lower courts can account for the reality of age and development “without doing any damage to the objective nature of the custody analysis.” The key is not to replace the objective reasonable person test with a subjective individual youth test, but with an objective reasonable juvenile test. Such a test is possible because our contemporary understanding of childhood psychology yields the “objective conclusion” that “children are more susceptible to influence.” As Chief Judge Rogers of the D.C. Court of Appeals recognized in his dissent in In re J.M., “to consider whether the ‘reasonable person’ at issue is a child is not the same as considering the subjective state of mind of a particular child.”

When a juvenile is actually in custody, his rights are different, and the stakes are arguably higher, than in a seizure situation like the one in which J.M. found himself. However, like J.M., a juvenile who does not know his rights or understand the implications of a conversation with a police officer may wind up in a very serious situation. If the Supreme Court has found that a juvenile’s age is relevant to an analysis of when a Miranda warning is warranted, it seems equally important to consider a juvenile’s age in a search and seizure situation where he is not entitled to any warning at all. After J.D.B., the just and logical conclusion that lower courts should reach in situations like the one in J.M. is that a Fourth Amendment seizure has occurred when, in view of all of the circumstances surrounding the incident, a reasonable juvenile would have believed that he was not free to leave. This objective test should be applied in cases where the police officer knew or should have known that the juvenile in question was a minor. Such a test is consistent with the Supreme Court’s holdings in Roper, Graham, and J.D.B.

This also simplifies and makes sense of currently strained Fourth Amendment jurisprudence. In In re J.M., the D.C. Court of Appeals confronted what it deemed to be two distinct issues: whether there was a seizure of the defendant’s person (under an objective analysis that does not include age), and whether the juvenile consented to the subsequent search (under a subjective analysis including age). Using the objective test as it existed in 1992, the court concluded that a seizure had not occurred, but that under the subjective test, J.M.’s “consent” was not truly consent because of his age. In his dissent, Senior Judge Mack called attention to the court’s “preoccupation” with these standards of review, which can ultimately lead to erroneous results. Regardless

78. Id. at 2403.
79. Id. at 2404-05.
80. Id. at 2404 (internal citations omitted).
85. Id. at 504.
86. Id. at 509 (Mack, J., dissenting).
of which standard is used, Judge Mack argued, the court is still to consider the “totality of factual circumstances”: J.M. was seized when cornered by police in the early morning hours of October 31, 1989. I cannot find that a reasonable person, even an innocent person, (in the circumstances in which J.M. found himself) would feel free to decline the officers’ request or otherwise terminate the encounter in the physically confining interior of an interstate bus commandeered by armed drug interdiction officers at 2:00 a.m. for the purpose of conducting interviews during a rest stop. In fact, no passengers exited the bus during the stop—not even adults—but still the court concluded that reasonable people probably felt free to leave. According to Judge Mack, the court’s tortured analysis resulted in a finding that does not reflect reality and establishes dangerous precedent. Unraveling this confusion is yet another justification for adopting a “reasonable juvenile” standard in the context of Fourth Amendment seizures.

V. CRITICISMS OF THE REASONABLE JUVENILE APPROACH ARE UNPERSUASIVE

Of course, the “reasonable juvenile” approach is not without its critics. Legal commentators and Supreme Court justices have raised a number of concerns about this approach.

A. The “Clarity” Criticism

In his dissent to J.D.B., Justice Alito argued that Miranda “places a high value on clarity and certainty,” and that clarity and certainty are undermined by taking age into account in determining when a Miranda warning is necessary. While the dissent acknowledges that a rigid standard often “require courts to ignore personal characteristics that may be highly relevant,” such personal details must fall away in favor of “ease and clarity of application.” The Fourth Amendment seizure analysis is, like the Miranda analysis, intended to provide clarity to police officers. The J.D.B. dissenter’s reference clarity sixteen times in their opinion, even valuing it over “highly relevant details,” if those details complicate the calculus. Others have dismissed the “reasonable juvenile” test as nothing more than “political correctness” which renders the seizure analysis meaningless. Mere clarity, however, seems a poor excuse for denying a

87. Id.
88. Id. at 502.
90. Id.
91. Id.
92. Id. at 2408-18.
juvenile his Fourth Amendment rights. Police officers and courts should not exclude highly relevant information from their analysis “simply to make the fault line…brighter.”

Furthermore, a child’s age is generally not difficult to assess. Critics fear that the test requires police officers and judges to engage in tortured considerations of the ways in which a sixteen-and-a-half year old differs from a seventeen year old, or how a reasonable seven year old would interpret a situation differently from a reasonable thirteen year old. But the Roper/Graham/J.D.B. trilogy has made it abundantly clear that it is a miscarriage of justice to treat juveniles as adults in many criminal contexts. The difficulty police officers and courts may find in assessing gradations of children at various ages simply “cannot justify ignoring a child’s age altogether.”

Applying and carrying out the law have never been simple tasks—courts and officers are well qualified to account for nuances and matters of degree. They “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. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.”

B. The “Slippery Slope” Criticism

The J.D.B. dissenters feared that factoring age into a Miranda analysis was a slippery slope that would lead to requiring officers to factor in “other personal characteristics—such as intelligence, education, occupation, or prior experience with law enforcement.” In the dissenters’ view, drawing the line at age is “arbitrary.” But age is anything but arbitrary. Age is recognized as a legal disability in contract law. Juveniles cannot vote or serve on juries. States have adopted separate criminal codes for juveniles, along with criminal procedures which recognize that

95. Id. at 2416 (Alito, J., dissenting) (“[F]urther problems will likely emerge as judges attempt to put themselves in the shoes of the average 16–year–old, or 15–year–old, or 13–year–old, as the case may be. Consider, for example, a 60–year–old judge attempting to make a custody determination through the eyes of a hypothetical, average 15–year–old. Forty–five years of personal experience and societal change separate this judge from the days when he or she was 15 years old. And this judge may or may not have been an average 15–year–old.”).
96. Id. at 2407.
97. Id.
98. Id. at 2409 (Alito, J., dissenting).
99. Id.
100. Restatement (Second) of Contracts § 14 (1981) (“Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person’s eighteenth birthday.”).
101. Restatement (Second) of Torts § 283A (1965) (“If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.”).
juveniles have a unique propensity for rehabilitation. And the Roper/Graham/J.D.B. trilogy of the last decade has been moving towards the same inescapable conclusion that juveniles, because of developmental factors beyond their control, deserve special consideration in the eyes of the law. Factoring youth into a Fourth Amendment seizure analysis does not infuse an objective test with subjectivity—rather, it recognizes yet another objective factor to consider: juveniles, as a matter of biology, respond to situations differently.

Professor Wayne LeFave has cautioned that the use of a “reasonable youth” test in Fourth Amendment seizure cases would “doubtless prompt imaginative defense counsel to seek recognition in other cases of ‘reasonable woman,’ ‘reasonable black’,...and similar variations.” Indeed, many such groups can point to evidence which supports their claim for consideration—for example, some research shows that black males experience considerably more anxiety and tension in encounters with police. But then, perhaps findings that reach the level of empirical objectivity that juvenile brain development has achieved deserves to be considered in an objective analysis. Ignoring the objectively important characteristics of juvenile development would arguably be a greater ill than leaving it out for fear of mythical future considerations.

VI. CONCLUSION

Police officers carry a hefty and intimidating authority by their very presence—one that most people do not feel at liberty to defy. This is especially true for juveniles, who exist in a world run by adults. Following Roper, Graham, and J.D.B., the application of the “reasonable person” test to juveniles in Fourth Amendment seizure cases is no longer justifiable. Though the “reasonable juvenile” test has its critics, none of the proffered criticisms justify the judiciary and police turning a blind eye to the objective fact that, developmentally, juveniles are not adults. “Empirical studies over the last several decades on the social psychology of compliance, conformity, social influence, and politeness have all converged on a single conclusion: the extent to which people feel free to refuse to comply is extremely limited under situationally induced pressures.” Indeed, studies show that neither juveniles nor adults truly feel free to leave; “the courage to walk away from a police encounter simply does not increase with age.” Perhaps this is reason to question the entire judicially-developed “free to leave” calculus in Fourth Amendment seizure cases.

103. See supra Part III.
105. Id. at 1420.
GUAMANIAN VETERANS: UNDERSERVED AFTER YEARS OF SERVICE

Eli Krafte-Jacobs

I. VETERANS OF GUAM ARE DISADVANTAGED COMPARED TO VIETNAM COUNTERPARTS

Prevalent during the Vietnam War, Agent Orange and other herbicides saturated the lands of the Southeast Asia Theater of war.\(^1\) Discontinued after seven years of use, medical conditions associated with exposure to herbicide persisted so significantly that legislation passed specifically to alleviate the burden, but the legislation lacks recognition for Guam because the United States Department of Veterans Affairs (“VA”) refuses to recognize herbicide existence there.\(^2\) Yet, the evidence supports Guamanian claimants at least as much as it supports the VA, which requires the adjudicators to give a benefit of the doubt to the veteran.\(^3\) Rather than a presumption, the process of successfully receiving benefits for exposure to herbicide on Guam is coupled with an insurmountable burden of establishing the existence of herbicide and exposure thereof.\(^4\) The system demands a change to satisfy the needs of these veterans.

II. BACKGROUND

A. History of Agent Orange and its Effects on Soldiers

During the Vietnam War, the United States military sprayed millions of gallons of herbicide in the Southeast Asia Theater.\(^5\) In connection with Operation Ranch Hand, these herbicides defoliated the dense vegetation, which

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3. 38 U.S.C. § 5107(b) (2012) (stating the “evidence in equipoise” standard, also known as the benefit of the doubt standard, wherein the adjudicators must side with the veteran when the evidence is of equal weight on each side of an issue).


5. U.S. Dep’t of Veterans Affairs, supra note 1.
enemy soldiers trained to use as cover. Agent Orange, aptly named in accordance with the orange stripe painted on the fifty-five gallon storage drums, was the most common of the “rainbow” herbicides to be used in the conflict. While the U.S. military sprayed over nineteen million gallons of herbicide, estimates show that Agent Orange comprised eleven to thirteen million of those gallons. Despite concerns from the scientific community as early as 1964 with regard to the unknown consequences of exposure to Agent Orange, the U.S. government continued to spray until 1971.

The two active ingredients in Agent Orange are 2,4–dichlorophenoxyacetic acid ("2,4–D") and 2,4,5-trichlorophenoxyacetic acid ("2,4,5-T"). The second substance contained trace amounts of 2,3,7,8-tetrachlorodibenzo-p-dioxin ("TCDD"), more commonly known as dioxin. According to the World Health Organization, dioxins can be highly toxic and are known to affect a myriad of organs and systems in the human body. Once exposed to dioxin, the compound remains in the body for a very long time because of the seven to eleven year half-life, the time it takes for half of a substance to disintegrate. As a result, despite the fact that four decades passed since the U.S. stopped spraying herbicide, we still have to address a host of issues today.

More than three million members of the U.S. military served in the Southeast Asia Theater throughout the conflict and soon after veterans began to file benefit claims for medical issues believed to be associated with Agent Orange exposure. First filed in 1977, the VA denied these benefit claims because veterans could not show that their conditions became manifest either during service or within one year of discharge. Shown to be misplaced logic over the

7. Id.
8. Id.
11. Id.
15. Waiting for an Army to Die, AGENT ORANGE REC., http://www.agentorangerecord.com/information/the_quest_for_additional_relief/ (last visited July 27, 2014) (discussing the connection between soldiers who served in Southwest Asia and their high frequency of claims).
16. Id.
years. Agent Orange is now recognized to be an etiological cause of many long-term health problems, many of which take longer than one year to manifest.  

Today, the VA recognizes many medical conditions as presumptively connected with Agent Orange exposure: chronic B-cell leukemia, chloracne, type II diabetes mellitus, Hodgkin’s disease, ischemic heart disease, Parkinson’s disease, et cetera. The VA even recognizes Agent Orange’s effects on the veterans’ children born with spina bifida or certain other issues. The conditions covered under the VA regulations mostly fall in-line with research from the Institute of Medicine (IOM); research intended to find correlations between Agent Orange and medical conditions. Despite less resistance of the U.S. government to accept blame for herbicide affects, problems like Guamanian claims still persist today.

B. Development of Regulations for Exposure to Agent Orange and Other Herbicides

The last American soldier left Vietnam on March 29, 1973, but the real fight for many of our veterans began at home when reports of illnesses started to come in at a much higher rate than previous wars. More than a decade later, with the effects of Agent Orange exposure already vigorously studied, the research could not provide sufficient evidence to support these claims. In In re Agent Orange Product Liability Litigation, the court addressed the poor nature of the studies: too small in size, a noticeable selective bias, and other problems. The court discussed a Texas study of eighty-five men as not statistically significant to show any abnormalities in human cells, the immune system, or sperm characteristics. The most significant study compiled at the time covered Air Force personnel actually in the planes that sprayed herbicide, but the conclusion was also

18. Id. § 1116(a)(2); see also 38 C.F.R. § 3.309(e) (2013).
24. Id. at 787.
25. Id.
negative.\textsuperscript{26} Despite studies still in progress, veterans struggled through another seven years of debate before any significant legislation passed.\textsuperscript{27}

When Congress passed the Agent Orange Act of 1991 (the “Act”), veterans of the Republic of Vietnam no longer needed to establish a nexus between their exposure to herbicide and their manifest illness.\textsuperscript{28} Since the implementation, a veteran need only show service in the requisite location and the development of a VA recognized illness or disease.\textsuperscript{29} Although the evidence was not statistically significant to find a linkage between herbicide and illness, the Act was passed to alleviate the pain and suffering of veterans regardless.\textsuperscript{30} However, in the years since its implementation, the VA continued to expand the circumstances through which a veteran may claim presumptive exposure.\textsuperscript{31}

The original Agent Orange legislation only established a presumptive connection for a limited number of medical conditions and only for those veterans who actually served in the Republic of Vietnam.\textsuperscript{32} The original recognized diseases included: Non-Hodgkin’s lymphoma, soft-tissue sarcoma, chloracne and other acneform disease consistent with chloracne.\textsuperscript{33} The Act covered one location and three subsets of medical conditions, whereas current legislation covers the Korean Demilitarized Zone (“DMZ”), locations in Thailand, and an additional thirty-four subsets of conditions.\textsuperscript{34} Yet, with claims from service exposure in many other countries, the legislation needs to expand.\textsuperscript{35} A very significant aid for claim adjudication, those who served on Guam need and deserve inclusion in this legislation.

C. Significance of a Presumptive Service Connection

As outlined in 38 U.S.C. § 101(16), attaining disability compensation requires the establishment of a service connection.\textsuperscript{36} A veteran must be able to show that he or she incurred or aggravated their current affliction by some

\begin{itemize}
\item \textsuperscript{26} Id. at 788.
\item \textsuperscript{27} Fassinger, \textit{supra} note 22, at 193-94 (describing the struggles for veterans prior to the Agent Orange Act of 1991).
\item \textsuperscript{28} Id. at 194.
\item \textsuperscript{29} Id.; see also 38 C.F.R. § 3.307(a)(6) (2013); 38 C.F.R. § 3.309(e) (2013).
\item \textsuperscript{30} Fassinger, \textit{supra} note 22, at 201-02.
\item \textsuperscript{32} Id. (describing the first significant piece of legislation for Vietnam veterans suffering from afflictions related to herbicide exposure).
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id.; see also 38 C.F.R. § 3.307(a)(6); see also 38 C.F.R. § 3.309(e).
\item \textsuperscript{36} 38 U.S.C. § 101(16) (2012).
\end{itemize}
occurrence in the line of duty. \textsuperscript{37} This connection can be very difficult to prove for many veterans who are suffering from certain medical conditions with only a distant relation to their military service. \textsuperscript{38} For nearly a century, under these circumstances the U.S. Congress and the VA implemented presumptive service regulations, which are designed to remove the burden of having to establish a causal relationship between service and illness. \textsuperscript{39}

The history of this legislation dates back to 1921 when an amendment to the War Risk Insurance Act created a presumptive service connection for both tuberculosis and an illness contemporarily known as psychosis. \textsuperscript{40} In the decades to follow, the presumptive list expanded significantly through VA regulations, congressional legislation, and presidential executive orders. \textsuperscript{41} Such additions include: veterans exposed to atomic bomb radiation in Japan, those who served in the Gulf War or Vietnam, and a plethora of specifics, such as prisoners of war. \textsuperscript{42}

In signing the Agent Orange Act on February 6, 1991, President George H.W. Bush issued a statement describing the ultimate goal of the legislation as, “providing the truth to Vietnam veterans about the effects of exposure to Agent Orange.” \textsuperscript{43} The Act revolved around scientific procedures to determine causality between herbicides and afflictions, but the presumptive clause was, and continues to be, one of the most significant changes to the claims process. \textsuperscript{44} Without a presumption, Veterans would be required to establish the connection on their own. \textsuperscript{45} The veteran benefits through the presumptive clause by avoiding the extensive process of establishing a service connection, which the VA must go through to establish recognized illnesses.

Following the submission of the study findings from the IOM, a working group is convened, consisting of representatives from several different parts of the VA. Based on the IOM study findings, review of other relevant academic literature, and possible input from various stakeholders, the working group determines whether there is sufficient scientific evidence to support giving any disease(s) special

\begin{footnotes}
\item[38.] Sidath Viranga Panangala et al., CONG. RESEARCH SERV., VETERANS AFFAIRS: PRESumptive Service Connection and Disability Compensation 2 (2010) (detailing the use of a presumptive service connection for attaining disability compensation).
\item[39.] Id.
\item[40.] Id.
\item[41.] Id.
\item[42.] Id.; see also 38 C.F.R. § 3.309 (2013) (discussing non-herbicide conditions rising to a presumptive claim for benefits).
\item[43.] President George H.W. Bush, Statement by the President of the United States Upon Signing H.R. 556 (Feb. 11, 1991), available at 1991 WL 66548 (discussing the Agent Orange Act upon its signing).
\item[44.] See id.
\item[45.] See generally Panangala, supra note 38.
\end{footnotes}
consideration with respect to disability presumptions. Following deliberations, the working group generates a report, which makes recommendations to an internal VA Task Force based on pre-established legal standards by which the VA Secretary’s final decision is bound.

The VA internal review Task Force typically consists of high-level officials who report directly to the Secretary. The Task Force reviews the findings of the Working Group and may provide a separate, but similar, report to the VA Secretary based on the Working Group’s recommendations. If the Task Force recommends that a new disability presumption be established, and the Secretary concurs, the Veterans Benefits Administration (VBA) will submit a cost estimate and draft regulations for the presumption(s) to the Office of Management and Budget (OMB) for review. If approved by the OMB, the proposed rule is then published in the Federal Register. After the allotted period for public comment, the VBA will then prepare a final rule to be submitted to the Federal Register.46

Without this legislative process, veterans would only be able to receive benefits if they could provide sufficient evidence to establish the nexus.47 Previously, to show a service connection required the Veteran to proffer evidence to show a manifest disability caused by an injury occurring during service.48 This standard evolved over the years to encompass three elements: (1) a present disability; (2) incurred or aggravated during service; and (3) a nexus between the first two elements.49 This shows the small likelihood of a single veteran successfully convincing the VA of the connection if it took the collaboration of Congress, the VA, the IOM, and other groups to find a connection.50

After the Act passed, many veterans no longer had the burden of showing a service connection for their illnesses.51 Once recognized by the VA, a veteran seeking disability benefits for said illness must only show two elements: (1) service in the Republic of Vietnam during the requisite period and (2) a diagnosis of a disease on the presumptive list.52 The presumption mandates the adjudicative body to draw an inference of a service connection.53

46. Id. at 19.
50. PANANGALA, supra note 38, at 23.
51. Fassinger, supra note 22, at 202 (discussing the change in steps for veterans to establish service connection).
52. Id.
connection—rather than requiring a veteran to do what the IOM struggled with—hastens the process of receiving benefits or care of any kind, which also happens to be a big problem with the VA in today’s society.

D. Why Guam is Not Recognized as a Presumptive Location

For twenty years, the VA only officially recognized the Republic of Vietnam as a presumptive location. Prior to any change in the law, the VA Adjudication Procedure Manual began to recognize a presumption for the Korean DMZ as early as 2009. The regulations officially began to recognize Korean in 2011 with the passing of 76 FR 4245-01: Herbicide Exposure and Veterans with Covered Service in Korea. As of 2014, the VA manual added procedures regarding: service on brown waters of Vietnam (inland waterways), circumstances of service in Thailand, as well as a system to adjudicate claims for service in locations not listed. Veterans who served on Guam are erroneously excluded from the presumptive locations.

To understand the lack of recognition of Guam there must be an understanding of the existing recognition for the Korean DMZ. The VA put it rather simply when passing the legislation stating, in part, that the department, “believes it is reasonable . . . to concede exposure for veterans who served in or near the Korean DMZ after herbicide application ceased . . .” The presumptive service connection for Korea stems from the U.S. recognition of herbicide existence in Korea. However, lack of recognition for Guam stems from the U.S. government and the Department of Defense’s ("DOD") steadfast refusal to acknowledge the existence of herbicide there. It follows that if the DOD is unable to show existence, the VA certainly will not concede exposure for the
purpose of claim adjudication. Essentially, the difference between the Korean DMZ and Guam is that the VA rightfully concedes Agent Orange on one, but wrongfully refuses to do so on the other.

III. FAILURE TO PROPERLY WEIGH THE EVIDENCE OF HERBICIDE EXISTENCE ON GUAM

Hundreds of Guamanian veterans have filed claims seeking benefits for Agent Orange related illnesses, yet with only a few exceptions they are regularly denied. In September of 2013, out of 270 claims filed under this premise, fewer than ten received benefits. The DOD’s stance only solidified after conducting an exhaustive analysis of shipping records, which found no documents to indicate that Agent Orange transportation to Guam in any capacity. Thus, it appears convoluted for the DOD to continue its denial while the VA grants a handful of claims. This convolution begs the question what evidence do successful claimants use to counter the stance of the U.S. government and how are the other ninety-three percent of these claims denied?

A. Evidence for Veterans

Overwhelming in volume and substance, a lot of material is available to veterans seeking claims for benefits from Agent Orange on Guam. This evidence runs the gamut from official agency and news reports to editorials and company investor reports for the Dow Chemical Company ("Dow") and the Monsanto Company. This evidence should be sufficient in and of itself, but successful claimants also supplemented it with a significant amount of lay-evidence.

1. Investor Reports for Dow Chemical and Monsanto

Arguably the most effective support for veterans’ claims are investor reports from Dow and Monsanto, which speak volumes to the existence of herbicide.

64. Id. 65. Id.; see also Herbicide Exposure and Veterans with Covered Service in Korea, 76 Fed. Reg. 4245-01 (Jan. 25, 2011) (to be codified at 38 C.F.R. pt. 3, 16, and 21). 66. Dimond, supra note 35 (discussing the miniscule amount of granted claims). 67. Id. 68. Id. 69. Id. 70. See NAT’L CTR. FOR ENVT’L. ASSESSMENT, REVIEW OF STATE SOIL CLEANUP LEVELS FOR DIOXIN 28 (2009) (an EPA report of Guam contamination); see also Dow, supra note 4; MONSANTO, supra note 4; Bd. Vet. App. 0740151, 2007 WL 6225547, at *4 (Nov. 06, 2013) (claimant used personal testimony and an article); and Bd. Vet. App. 1336976, 2013 WL 6992004, at *3 (Nov. 26, 2013) (claimant used letter from congressman). 71. See generally Dow, supra note 4, at 1, 47, and MONSANTO, supra note 4, at 1. 72. Dow, supra note 4, at 1, 47; see also MONSANTO, supra note 4. 73. Dow, supra note 4; see also MONSANTO, supra note 4.
These two companies face liability for producing Agent Orange and in light of their business interests, any internal report acknowledging herbicide use in an additional location could be devastating. However, Dow was anything but forthright prior to releasing the investor reports. A concerned stockholder contacted the SEC on January 29, 2004 regarding Dow’s lack of disclosure in a few different areas and one was a lack of projected costs associated with Agent Orange. This letter notes the potential floodgate of liability in the future after the original Agent Orange settlement reached $180 million.

A letter on behalf of Dow, sent to the Securities and Exchange Commission (“SEC”) on February 13, 2004, addressed the gaps in the public disclosures by Dow and attempted to persuade the SEC to not require additional disclosure. Despite denial by the SEC, two months later, Innovest Strategic Value Advisors (“Innovest”) released an independent report, titled Dow Chemical Risks for Investors. This report addresses many of the gaps in Dow’s initial disclosures. The investor report includes an individual section regarding herbicide existence for U.S. military personnel and civilians stationed on Guam as well as indications of dioxin poisoning in the indigenous population as well. Compared with a safe level of dioxin, 1 part per billion (“ppb”), measurements of the actual dioxin contamination on Andersen Air Force Base (“AAFB”), the most prevalent base on Guam, peaks at 1900 parts per million (“ppm”), far surpassing safe levels.

Monsanto came out with a similar investor report, also from Innovest, which essentially transposed the report created for Dow Chemical investors in 2004. The section on Guam is nearly verbatim, addressing all of the same concerns: veterans’ exposure, U.S. civilian exposure, illnesses for Guamanians, and the same 1900-ppm measurement. Ultimately, both companies engaged in the production of Agent Orange and acknowledge the investor reports of herbicide prevalence on Guam.

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74. See generally Waiting for an Army to Die, supra note 15 (discussing veterans’ lawsuits to date).
76. Id. at *2.
77. Id. at *19 (discussing a new right for thousands of veterans to file compensation claims).
78. Id. at *1-2.
79. Dow, supra note 4.
80. See generally id.
81. Id. at 47.
82. Id.
83. Id.; see also MONSANTO, supra note 4 (reporting from Monsanto investors, almost entirely verbatim to the Dow report, Marc Brammer was an author for both reports and additional authors were listed for the Monsanto report).
84. MONSANTO, supra note 4, at 66.
85. Id.; see also Dow, supra note 70, at 47.
2. Lay Testimony from Successful Claims

Due to a complete lack of VA records regarding the use of herbicides on Guam, claimants rely significantly upon lay testimony in order to show exposure.\(^86\) The evidence includes: statements from veterans, relatives, and fellow soldiers; photographs of barrels and storage facilities; letters from at least one Congressman; as well as news articles.\(^87\)

The most publicized of claimants, Air Force Master Sergeant Leroy Foster finally received disability benefits in January of 2011.\(^88\) During the Vietnam War, Foster deployed to AAFB as a fuels specialist with the 43\(^{rd}\) supply squadron.\(^89\) Foster provided testimony of his day-to-day routine as preparing, mixing, and spraying, “herbicides which were packaged in 55 gallon drum containers . . . and 50 lb. dry chemical bags with Monsanto [printed] on the bags.”\(^90\) Foster’s duties further included the actual spraying of herbicide nearly everywhere on AAFB: pipelines, the fence line, warehouses and storage facilities, refueling locations, and many other places across the island.\(^91\)

In an Airman Performance Report, Foster’s reporting officer, Task Sergeant Francisco R. San Agustin, specifically notes vegetation control as a regular job for Foster.\(^92\) Senior Master Sergeant James O. Burdette and Colonel Jack D. Westfall both signed the report with concurring opinions.\(^93\) Fellow veteran Sergeant Ralph Stanton provided a notarized letter for Foster’s claim as testimony of witnessing the actual spraying on a regular basis.\(^94\) Foster and Stanton both lived in the Marbo Annex Barracks area, which happens to be identified by the United States Environmental Protection Agency (“EPA”) as an area with extremely high dioxin levels.\(^95\) Both veterans developed similar illnesses codified in existing law regarding afflictions connected with Agent Orange.\(^96\) Master Sergeant Foster received benefits for his exposure, while Sergeant Stanton still lacks benefits today.\(^97\)


\(^{88}\) Dimond, supra note 35.

\(^{89}\) Id.


\(^{91}\) Id.

\(^{92}\) Id. at 3.

\(^{93}\) Id.

\(^{94}\) Id. at 3, 6.

\(^{95}\) Id.; see also DIOXIN, supra note 4, at 65, 70 (discussing the high dioxin levels reported throughout the entire publication).

\(^{96}\) Foster Letter, supra note 90.

\(^{97}\) Id.; see also Dimond, supra note 35.
On October 30, 2013, the Board of Veterans Appeals’ (“BVA”) found a connection for Douglas L. Kelley regarding exposure to herbicides, including TCDD. Stationed at AAFB in Guam and Pease AFB in New Hampshire, Kelley claimed exposure at one or the other, yet he primarily offered evidence relating to AAFB. Kelley testified to the following: working with clothing and personnel flying to and from Vietnam; going into the herbicide drum lot; running along the fence line; and actually witnessing spraying in barracks, chow halls, and runways. He further provided pictures showing barrels of herbicides and dead grass from spraying, in addition to statements from fellow veterans testifying to the existence, leakage, and spraying of Agent Orange. The BVA granted a service connection for type II diabetes mellitus and coronary artery disease incurred from exposure to herbicides.

Veteran Ed Jackson developed Hodgkin’s disease after serving at AAFB from December of 1972 to May of 1973. In his claim, Jackson described his exposure to herbicide as stemming from his job of dumping deteriorating barrels of Agent Orange over a small cliff, wherein direct exposure occurred from splashing. Jackson further gave a copy of a letter from a Congressman, an Internet article, and photographs of sprayed vegetation. In 2013, the BVA granted a service connection for Hodgkin’s disease from herbicide exposure.

Other successful claimants remain anonymous, only noted by the citation number of their BVA decision. Decision number 1409977 covers a veteran stationed out of AAFB at different times between 1958 and 1965. He flew a weather aircraft that remained docked near a facility containing Agent Orange. After submitting the usual evidence—Dow report, news articles, statements, etc.—the BVA found exposure to herbicide and granted a service connection for type II diabetes mellitus, peripheral neuropathy of the right upper extremity, and neuropathy in the left upper extremity. Decision number 0527748 covers a

99. Id. at *3.
100. Id. at *4.
101. Id. at *4, 8.
102. Id. at *8.
104. Id. at *2.
105. Id. at *3
106. Id. at *1, 4.
108. Id.
109. Id. at *4, 5.
veteran stationed out of AAFB from December of 1966 to October of 1968.\textsuperscript{110} He served as an aircraft maintenance specialist in a field surrounded with sprayed grass and he testified as to seeing herbicide barrels.\textsuperscript{111} While this claimant was successful,\textsuperscript{112} there are only a handful of others in the same position.\textsuperscript{113}

3. The Guamanian Resolution

Largely overlooked in the mainstream media, the Guamanian legislature must still deal with tragedies of Agent Orange head on. In 2007, dozens of Guamanians gave testimony to their legislative body seeking to back a resolution calling for Agent Orange compensation.\textsuperscript{114} The local president for the America Federation of Government Employees Union believes that herbicide stored and loaded onto AAFB planes should provide sufficient evidence.\textsuperscript{115} Others claim that they recall smelling fumes around the base perimeter after spraying.\textsuperscript{116}

In 2008, the Guamanian Legislature passed a resolution, which petitioned the United States government to recognize the military’s use of herbicide on the island by adding Guam to existing legislation.\textsuperscript{117} According to the document, herbicides with Agent Orange moved across the island, both military and civilian personnel handled the herbicide, and some applicants in Guam are receiving benefits from the VA.\textsuperscript{118} While this evidence is considered lay-evidence, the VA Adjudication Procedure Manual requires the VA to consider such evidence that comes from people with knowledge of relevant events.\textsuperscript{119} Lay evidence may be used to help establish service incurrence of a disability.\textsuperscript{120} When weighing this evidence, the VA must take it at face value, provided that it does not conflict.\textsuperscript{121}

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\textsuperscript{111} Id. at *2.
\textsuperscript{112} Id. at *4, 5.
\textsuperscript{113} See generally APPROVED GUAM HERBICIDE CASES, http://www.guamagentorange.info/people/approved_guam_herbicide_cases (last visited July 27, 2014) (providing a list of many unpublished, successful BVA and review officer decisions).
\textsuperscript{114} Residents Speak out on Agent Orange, PAC. DAILY NEWS, Dec. 18, 2007, at A2, available at 2007 WLNR 28279381 (discussing of lay-testimony provided by the indigenous Guamanians).
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} See generally Guam Res. 172 (EC), I Mina’bente Nuebi Na Liheslaturan Guåhan (2008) (writing of a resolution passed by the Guamanian legislature requesting that the United States provide relief to Guam for the effects of herbicide).
\textsuperscript{118} Id. at 3.
\textsuperscript{120} Id. § 9(a) (May 7, 2012) (stating regulations regarding acceptable lay-evidence).
\textsuperscript{121} Id. § 11(a) (Dec. 13, 2005) (stating regulations regarding the evaluation of conflicting evidence).
\end{flushleft}
4. Reports from the E.P.A. and the Agency for Toxic Substances and Disease Registry

Tasked with the mission of protecting human health and the environment, the EPA continuously compiles a group of locations into the National Priorities List (“NPL”). Only locations in the United States and its territories, contaminated with hazardous substances, qualify for the NPL. Prior to the addition of AAFB to the NPL, the EPA identified the sources of contamination as, “landfills, drum storage and disposal areas, chemical storage areas, fire training areas, waste storage areas, a laundry [area], and industrial flight line operations.”

The EPA placed Guam on the NPL in 1992 with the passage of 57 FR 47180-01. When added to the NPL, the EPA must continue investigation, determine remedial action, notify the public, and give notice to responsible parties. Following Guam’s addition to the NPL, the EPA began to release lengthy records of decision (“RODs”) regarding the status of AAFB. The first ROD to mention dioxin was released in 2002. Thereafter, dioxin contamination sites have been reported countless times on the island. Assessments described the concentration levels of dioxin and other chemicals in the soil as an unacceptable risk to human health. Two years later, the EPA came out with a report detailing dioxins in soil throughout the U.S. and

129. Superfund, supra note 127. (listing reports from 2002 to 2008 showing high levels of dioxin; exception for 2007).
130. Id.
Guam is mentioned throughout as a site that is dangerously contaminated with dioxin and remedial action must be taken. The Agency for Toxic Substances and Disease Registry ("ATSDR"), an agency designed to prevent exposure to toxic substances, published the most prominent study of Andersen Air Force Base. The study uncovered contamination of landfills, waste-piles, and chemical storage areas. The ATSDR subsequently identified five different exposure pathways, the path that a substance takes leading to human exposure. However, the records show very high levels of TCE contamination, a dangerous solvent not recognized as a chemical herbicide for VA adjudication purposes.

B. Evidence for the Department of Veterans Affairs

To support the denials of claims, the VA essentially relies on non-existent evidence, or more specifically a lack of any records regarding Agent Orange on Guam. Veteran Douglas Kelley bounced around the adjudicatory system for a decade prior to receiving benefits in 2013. Among the many appeals that Kelley filed, the VA requested information from the Joint Services Records Research Center ("JSRRC") for anything related to herbicide. Responding on the JSRRC’s behalf, The Center for Unit Records Research ("CURR") said that, with the lack of records, herbicide existence on Guam could not be verified. Upon viewing the veteran’s compensation and pension exams, the CURR information, and the lay evidence, the BVA found that, “the official service department records showing no use or storage of pertinent tactical herbicide where the Veteran served during the time he served” more probative than the appellants lay evidence.

According to the court, the personal testimony did not come from people with professional expertise and the studies only showed toxin contamination on

131. DIOXIN, supra note 4 (showing another official report from the EPA indicating dioxin prevalence on Guam).
132. Id.
136. Public Health Assessment, supra note 134.
140. Id.
141. Id.
Guam rather than actual exposure to veterans. Many of the VA denials followed a similar sequence, but rejections are more prevalent than Kelley’s acceptance. The VA largely utilizes non-existent records to show that Agent Orange never entered Guam, but there is a key distinction between not having records of an event and having records which show that an event did not occur.

C. VA Disregard of the “Evidence in Equipoise” Standard

Like most claimants in an adjudicative system, veterans seeking benefits from the VA must satisfy their “burden of proof.” A veteran makes and supports his claim under the laws of the Secretary of the VA. However, the VA compensation system supports a claimant friendly system. The Secretary uses reasonable efforts to help a veteran’s claim by gathering the evidence needed to support it. The Secretary also considers all information of record when adjudicating a claim. Furthermore, “when there is an approximate balance of positive and negative evidence regarding any issue material to the determination of the matter, the Secretary shall give the benefit of the doubt to the claimant.”

Often prevalent in he-said-she-said circumstances, the evidence in equipoise standard errs toward the veteran when making a decision on equally conflicting evidence. In a 2003 BVA decision adjudicating a claim for trigeminal neuralgia, one medically inconsistent VA examination conflicted with a second VA examination and a thoroughly detailed VA neurologist’s opinion. Likely that the veteran incurred a service connected injury, the BVA found that the evidence in equipoise standard applied and granted benefits.

In a similar case, the record contained medical evidence to both refute and indicate a diagnosis of diabetes—merely impaired glucose measures as opposed to hypoglycemia—and the BVA used the same standard to grant benefits. Likewise, in 2002, the BVA reviewed a PTSD claim with medical evidence of a psychiatric disorder from a VA psychiatrist and a PTSD diagnosis from a private physician. The evidence did not settle the issue on its face and the BVA granted a service connection.

142. Id.
143. Approved Guam Herbicide Cases, supra note 98 (scroll to the bottom of the page to view a list of denied claims).
146. 38 U.S.C. § 5103A (2012); see also 38 C.F.R. § 3.159(c) (2013).
148. Id.
149. See id.
151. Id. at *3, 6.
154. Id.
Most of the claims involve conflicting medical opinions, but they follow the same theory as conflicting evidence of herbicide existence. One decision in particular stands out, a claim for bilateral hearing loss and tinnitus wherein competent medical evidence and lay testimony weighed against a lack of medical treatment for years. With the evidence in equipoise for the hearing claim, the BVA granted benefits. This is eerily similar to the Guamanian Agent Orange claims weighing professional evidence and lay testimony against a lack of records for the VA. However, despite similarities, the VA consistently disregards the standard for Guamanian Agent Orange claims. In light of such a clear balance of the evidence, veterans from Guam have a legal right to receive the benefit of the doubt.

IV. LEGAL HURDLES TO ESTABLISHING A SERVICE CONNECTION AND RECEIVING BENEFITS

In lieu of a presumptive service connection for veterans from AAFB, successful herbicide-claims require the veteran to establish a direct service connection. However, if a veteran is able to establish a showing of exposure to herbicide during service, the regulations allow for a presumptive connection between the service exposure and a subsequently manifest disease. Even with this small presumption, the VA’s continued refusal to acknowledge herbicide on Guam in any capacity leads to extreme difficulties in establishing exposure.

A. The Direct Service Connection

Codified at 38 U.S.C. § 1131, the basic provisions covering entitlement to VA disability requires the doling out of compensation to any veteran suffering from an affliction causally related to injury or disease incurred within the line of duty. Without the availability of a presumptive service connection, the

156. Id. at *4.
158. 38 C.F.R. § 3.309(e) (2013) (stating regulation allowing for a presumption of causation for diseases relating to herbicide exposure, subject to the following regulation); see also 38 C.F.R. § 3.307(a)(6) (2013) (noting TCDD in a definition of what herbicide agent means and further mandates time requirements and the right of presumption for the Republic of Vietnam and the Korean DMZ).
159. Dimond, supra note 35 (discussing the continuous refusal of the DOD to acknowledge the existence of herbicide on Guam; it logically follows that if the U.S. government does not recognize herbicide on Guam it should be impossible to establish exposure, and yet, a handful of claims have been successful).
160. 38 U.S.C. § 1110 (2012) (discussing basic entitlement for wartime disability; in addition to the requirements enumerated above, a successful claimant cannot be dishonorably discharged); see
successful claimant relies upon a direct service connection. The traditional elements to establishing a direct service connection require a current disability that is causally related to a disease or injury during service. After showing exposure—the difficulty for Guamanian veterans—claimants typically use medical records to show a current disability and the presumptive connection after establishing exposure to herbicide.

1. Limited Capacity to Show Specific Location of Herbicide

The difficulty in establishing a direct service connection—via exposure to herbicide—stems from the complete lack of any records regarding herbicide existence on Guam. After providing sufficient evidence to establish the existence of herbicide on Guam, a successful veteran shows how he or she was directly exposed to the chemical, often by proffering evidence of proximity to locations allegedly sprayed. One veteran’s claim identified alleged exposure through the actual handling of barrels of herbicide. Another veteran supported his claim with testimony regarding his proximity to an airfield surrounded with dead foliage.

With many alleged herbicide locations across the island, it remains difficult to establish exposure through location as a result of the lack of records kept. These locations include: pipelines, the fence line, warehouses and storage facilities, refueling locations, etc. If deemed to be equal, the government records and veteran lay testimony create a contradiction that returns the claim back to the evidence in equipoise standard. However, without a proper adjudication of that standard, the claimant has a very limited capacity to establish exposure through the location of herbicide.


162. Karnezis, supra note 37, § 2.


164. Dimond, supra note 35 (discussing a continuous refusal of the DOD to acknowledge herbicide existence on Guam).

165. Id.


168. Foster Letter, supra note 90.

169. Id.

170. See generally 38 U.S.C. § 5107(b) (2012) (stating the codification of the evidence in equipoise standard; with an approximate balance of positive and negative evidence, the veteran receives the benefit of the doubt).
2. Exposure Through Military Occupation

The VA Compensation and Pension Manual recognizes a mini-presumption for veterans who served in Thailand during the Vietnam conflict based upon occupational circumstances.171 A presumption is established if the veteran served as a: security policeman, a security patrol dog handler, a member of the security police squadron or personnel otherwise stationed by the perimeter of the Royal Thai Air Force Base.172 Despite not using tactical herbicides on Thailand, there are indications of a limited use of non-tactical (commercial) herbicides within the fenced perimeters of bases and thus, likelihood of exposure is greater if a veteran’s occupation put him or her in close proximity to the perimeter.173

Similarly, though without the presumption, many Guamanian veterans have utilized testimony regarding exposure through their military occupational duties.174 Under one of three theories, veterans proffer testimony regarding their day-to-day routine and how such activity led to a direct exposure to herbicides.175 Choosing which of the three theories to use—personal testimony of one’s own exposure, exposure through occupation, or exposure through a close proximity—depends upon the type of occupation in service.

Leroy Foster, represents the first theory, proffering testimony claiming one’s own occupation involved the actual mixing and spraying of herbicides.176 Research yielded no other successful claims regarding a veteran with this occupation. Some veterans established that their duties led to exposure through direct skin contact, such as physically dumping barrels of Agent Orange, during which herbicide leaked and splashed.177 Others used their occupation to show that exposure incurred from their duties in close proximity to herbicide locations, such as: counting the barrels of herbicide, or reporting to a location near herbicide storage.178

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172. Id. § C(10)(q) (adjudicatory regulations covering the Thailand presumption).
173. Id. § C(10)(r).
175. See generally id.
176. Foster Letter, supra note 90 (describing Foster’s duties in service); see also Dimond, supra note 35 (providing a general discussion of Foster’s claim).
Unsuccessful claimants generally produce evidence similar to that of Foster and Jackson, but to no avail.\textsuperscript{179} A veteran who cleared vegetation with Agent Orange was denied in 2013.\textsuperscript{180} In 2009, the BVA denied another veteran’s claim although he personally handled the barrels alleged to contain herbicide.\textsuperscript{181} Regardless of the occupation, the hurdle to establish exposure remains connected to the inconsistent interpretation of the evidence in equipoise standard.\textsuperscript{182} Couple the inconsistencies among the veterans law judges (“VLJs”) in finding herbicide existence on Guam, with the lack of ability to use precedent in BVA decisions,\textsuperscript{183} and the result is an uneven adjudication of claims involving essentially the same facts.\textsuperscript{184}

3. Inability to Use Prior Board Decisions as Precedent

According to 38 C.F.R. § 20.1303, regulations do not allow for the precedential use of prior Board decisions unless they are specifically noted as precedential decisions.\textsuperscript{185} A particularly old regulation, the supporting factors for non-precedential use of board decisions is in a 1992 amendment.\textsuperscript{186} The majority of claims moving through the VA hold facts unique to the specific circumstances of the veteran.\textsuperscript{187} Yet, decisions of the BVA are \textit{ex parte} and cannot be appealed


\textsuperscript{180} Bd. Vet. App. 1313507, 2013 WL 2901848, at *4, 6 (Apr. 23, 2013) (denying benefits for veteran who went around the base with Guamanians to clear foliage—the same occupation that MSgt. Foster engaged in—the BVA denied his claim for service connection for type II diabetes mellitus).

\textsuperscript{181} Bd. Vet. App. 0905405, 2009 WL 949884, at *2 (Feb. 13, 2009) (denying benefits for diabetes mellitus were despite claims of actual contact).

\textsuperscript{182} 38 U.S.C. § 5107(b) (2012) (describing the evidence in equipoise standard. It will not matter what the occupation is if the adjudicator feels that the weight of the evidence showing a lack of herbicide does not equal the weight of contradictory evidence, or if the standard is disregarded entirely).

\textsuperscript{183} \textit{See} Dimond, supra note 35 (showing clear inconsistency in adjudication when article reports hundreds of claims denied for lack of herbicide existence, yet a handful were granted; granted claims speak to the existence of herbicide, which directly contradicts the denied claims); \textit{see also} 38 C.F.R. § 20.1303 (2013) (showing the regulation disallowing the precedential use of Board decisions).


\textsuperscript{185} 38 C.F.R. § 20.1303 (2013) (stating the law disallowing precedential use of BVA decisions); \textit{see also} 38 U.S.C. § 7104 (2012) (the authority for the regulation, though the language mandates decisions to be made on the entire record in addition to all evidence and material of record, but apparently not to include prior BVA decisions).


\textsuperscript{187} \textit{Id}.
by the administration. Thus, the VA faces limitations in supporting its side of the claim.

Circumstances of the Guamanian claims do not support these factors. First and foremost, while the particulars of these claims fall to unique facts, showing the existence of herbicide on Guam largely falls to similar facts for two reasons: (1) the Secretary’s requirement to produce evidence supporting a veteran’s claim, and (2) the widespread availability of the evidence used to show herbicide existence. The second reason, when viewed in light of the fact that the VA has had forty years to create adjudicatory procedures to establish their position, going so far as to presumptively connect some veterans, further dismisses the idea that these decisions should not be precedential in nature.

Largely overlooked, the regulation allows for the consideration of non-precedential decisions, essentially in the same manner as a persuasive opinion. However, the ability to use Board decisions persuasively lacks prevalence in VA adjudication, especially for Guamanian claimants. The interpretation of the clause allows for persuasive use of decisions that “reasonably relate” to the case at hand. Often, decisions that disallow the use of another BVA decision sidestep the discussion of reasonable relation, simply to deny precedential use.

In Morgane v. States Marine Lines, Inc., the Supreme Court recognized the interests of precedent and the inherent benefits associated with its use.

188. Id.
189. Id.
191. Compare Appeals Regulations, supra note 186 (discussion of the factor limiting the VA’s ability to hold a position), with Treaster, supra note 22 (discussion of when soldiers left Vietnam to account for the significant amount of time allocated to the VA to recognize their position on Guamanian claims through regulatory procedure).
Precedent establishes predictable adjudication allowing individuals to plan accordingly.\textsuperscript{197} It removes the burden of re-litigating every issue within a case, providing for quick and fair decisions.\textsuperscript{198} Lastly, it helps in, “maintaining the public faith in the judiciary as a source of impersonal and reasoned judgment.”\textsuperscript{199} Through lack of precedent or absentminded dismissal of the persuasive clause, Guamanian claimants are denied the interests associated therein.\textsuperscript{200}

\textbf{B. Connecting Exposure to the Manifest Illness or Disease}

The next element to establish before receiving benefits—a service connection—allows Guamanian claimants a presumed connection for a medical condition after establishing exposure; however, this presumption was not always available.\textsuperscript{201} Part of the difficulty for Agent Orange veterans revolved around the fact that herbicide afflictions often take years or decades to manifest.\textsuperscript{202} Elevated levels of TCDD remain in the body for years, which extends the period of potential development of a medical condition.\textsuperscript{203}

In 1984, as the VA started responding to frequent claims regarding long-term effects of herbicide exposure, Congress began to address the concerns despite an uncertainty in the science.\textsuperscript{204} However, until the Agent Orange Act, only certain diseases incurred within one year of departure from service were recognized.\textsuperscript{205} Legislation not only expanded the time frame during which the VA recognizes manifestation, but the list of diseases as well, which now includes thirty-seven different subsets of medical conditions.\textsuperscript{206}

Contemporarily, if the VA finds that a veteran sufficiently established his or her exposure to an herbicide agent, there is a presumed service connection for

\begin{itemize}
\item \textsuperscript{197} Id.
\item \textsuperscript{198} Id.
\item \textsuperscript{199} Id.
\item \textsuperscript{200} 38 C.F.R. § 20.1303 (2013) (regulation of non-precedential BVA decisions); see also cases cited supra note 193 (dismissing persuasive use of prior decisions without addressing the persuasive clause in 38 C.F.R. § 20.1303).
\item \textsuperscript{201} Veterans’ Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (requiring the Administrator of Veterans’ Affairs to prescribe regulations regarding the determination of service connection of certain disabilities of veterans who were exposed to dioxin in the Republic of Vietnam) (presumption will only be applicable to illnesses incurred within one year of service).
\item \textsuperscript{203} Id. at 52.
\item \textsuperscript{206} 38 C.F.R. § 3.309(e) (2013) (diseases associated with herbicide).
\end{itemize}
any of the recognized diseases. Without the requirement of satisfying a particular service location, this presumptive legislation applies to Guamanian veterans. When the VA adjudicates the claim of a veteran with established exposure, who also presents sufficient evidence to establish the diagnosis of a recognized disease, there is a mandatorily presumed connection between the two.

C. Effective Termination of Appellate Reversals via the Clear and Unmistakable Error Standard

Regulations allow for the reopening of a claim after final adjudication when a veteran offers new and material evidence. Appealing a case to the Court of Appeals for Veterans Claims (“CAVC”) too frequently results in a remand, and with veterans from the 1960’s, remanding a case could be a death sentence of sorts. However, appealing to the BVA rarely ends with reversal. In fact, so limited are veterans’ options, the single truly applicable theory under this regulation allows a veteran to appeal a claim based on clear and unmistakable error (“CUE”) in the adjudication. A successful appeal on the basis of CUE asserts a particular instance of error, which subsequently leads to a change of decision in the case. Claims are dismissed without prejudice where the claimant fails to sufficiently meet pleading requirements.

207. Id.
208. Id. (establishing that exposure during service—not location of service—is the only requisite for the disease presumption).
209. Karnezis, supra note 37, § 2 (discussing the meaning of a presumptive service connection).
210. 38 U.S.C. § 5103A (2012) (statutory mandate to reopen a claim with the presentation of new and material evidence); see also 38 C.F.R. § 3.105 (2013) (reopening a claim with the presentation of new and material evidence by regulatory mandate. New evidence means evidence in existence that was not presented to the adjudicators. Material evidence means evidence in existence that relates to a non-established fact supporting a necessary component of a veteran’s claim).
211. James D. Ridgway, Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims, 1 Veterans L. Rev. 113, 159 (2009) (discussing the high frequency of remands ordered by the C.A.V.C.); see also 38 U.S.C. § 1116 (2012) (discussing the statutory mandate for presumption of exposure as early as 1962. If an eighteen-year-old soldier deployed to the Southeast Asia Theater during the Vietnam War, today that person is fifty-two-years-old and waiting for the adjudication of disability claims for life threatening illnesses; any extended time incurred through the use of a remand potentially means death for an ill veteran).
212. See generally 38 C.F.R. § 3.105 (2013) (enumerating the grounds necessary to mandate revision of a decision).
213. 38 C.F.R. § 3.105 (2013) (requiring that error is the only method that may be established by a veteran because the remaining options include: difference of opinion between adjudicative agencies; a change in the character of discharge, which would preclude entitlement; a severance of a service connection, logically not filed by a veteran seeking benefits; a reduction in the amount of compensation; a reduction in the amount of pension; a reduction in monetary allowance; other reductions or discontinuances).
215. Id. at 113-14.
In creating this legislation, a House Report described the CUE standard as only applicable to very specific or rare errors, which, “when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ that the result would have been manifestly different but for the error."\textsuperscript{216} The mere assertion that a lower adjudicator erroneously balanced the evidence falls short of the strictly interpreted CUE standard.\textsuperscript{217} Lastly, a CUE claim finds no support from general assertions of procedural deficiencies.\textsuperscript{218}

The strict interpretation of this standard essentially removes any possibility for the appellate reversal of Guamanian herbicide claims.\textsuperscript{219} Reaching a conclusion that reasonable minds agree on, the standard on CUE appeal establishes a standard more difficult to prove than the evidence in equipoise standard.\textsuperscript{220} The erroneous adjudication of Guamanian claims revolves around the evidence in equipoise standard and the claims denied without regard to the standard.\textsuperscript{221} Consequently, the assertion of CUE invites denial because the appeal claims a failure to follow VA regulations by improperly balancing the evidence of herbicide existence on Guam.\textsuperscript{222}

In lieu of the claimant friendly system, which gives the benefit of the doubt to the veteran, Guamanian veterans enjoy limited recourse without an efficient appeals process.\textsuperscript{223} Administrative procedures still available to the veteran, albeit less effective, include: filing a motion to reconsider or vacate the decision, or file an entirely new claim.\textsuperscript{224} A Guamanian veteran with claims for exposure to herbicides in the Vietnam War is either one of the few lucky ones to receive benefits, or he is entrenched in an endless campaign.\textsuperscript{225}

\textsuperscript{216} H.R. REP. No. 105-52, at *3 (quoting Russell v. Principi, 3 Vet. App. 310, 313 (Ct. Vet. App. 1992) (en banc)) (describing the very limited circumstances applicable to revising decisions based on CUE).

\textsuperscript{217} Id.

\textsuperscript{218} Id. (discussing examples one of which specifically notes “failure to follow the regulations” as a general assertion that falls short of the CUE standard. For example, claiming that the lower adjudicator failed to follow the regulation implementing the evidence in equipoise standard).

\textsuperscript{219} Id. (discussing the strict definition of CUE).

\textsuperscript{220} Compare id. (discussing of the reasonable minds concuring requirement), with 38 U.S.C. § 5107(b) (2012) (statute of the evidence in equipoise standard).

\textsuperscript{221} See generally Approved Guam Herbicide Cases, supra note 143 (listing a handful of the denials that have been issued).

\textsuperscript{222} Compare 38 U.S.C. § 5107(b) (2012) (establishing that the standard asserted as CUE on appeal is a procedural element entirely based upon the weighing of the evidence), with H.R. REP. No. 105-52, at *3 (1997) (discussing the specific issues which fail to rise to the strict interpretation of the CUE standard).

\textsuperscript{223} See 38 U.S.C. § 5103A (2012); and 38 C.F.R. § 3.159(c) (2013) (supporting the idea of a veteran friendly system); see also 38 U.S.C. § 5107(b) (2012) (benefit of the doubt).

\textsuperscript{224} Craig M. Kabatchnick, Obstacles Faced by the Elderly Veteran in the VA Claims Adjudication Process, 12 MARQ. ELDER’S ADVISOR 185, 188-89 (2010) (discussing the options available to a veteran aside from appealing).

\textsuperscript{225} Dimond, supra note 35.
V. CLEARING THE HURDLES AND CORRECTING THE SYSTEM

A. Option One—A Presumptive Service Connection for Guam

The premier option in easing the burden on Guamanian claimants effectively removes the seemingly insurmountable burden of establishing both herbicide existence on Guam and exposure thereof. Both statutory and regulatory codifications specifically state that a veteran shall be granted a presumed exposure to herbicide if he or she was deployed to the recognized locations within the requisite time period. Effectively admitting the existence of herbicide on these presumed locations and adding Guam directly to the codification removes this legal hurdle entirely.

In lieu of an end-all-be-all presumptive service connection, Guamanian claimants still receive a significant benefit from a more limited presumptive regulation: (1) either limited to just the existence of herbicide or (2) limiting the presumptive circumstances of exposure. A middle ground between the VA and Guamanian claimants would be to add legislation recognizing herbicides on Guam, while still requiring the veteran to establish exposure thereto. This maintains a balance of requiring competent evidence of exposure and easing the burden on the veteran.

Neither regulation nor statute codifies the presumption for Thailand. After serving in Thailand, some claimants receive the presumed connection so long as their military occupation, or other competent evidence, establishes that the veteran spent time near the perimeter of the certain bases. Resulting from the limited recognition of herbicide use in Thailand, the circumstances according a

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226. 38 U.S.C. § 1116 (2012) (the presumed service connection or the Republic of Vietnam and the Korean DMZ, if added to the list, Guamanian claimants would be accorded the same presumption. The legislation indirectly shows the VA’s position that herbicide existed in the presumptive locations because those claimants able to show service therein are presumed to be exposure. Thus, there are two presumptions, herbicide existence and herbicide exposure).

227. Id. § 1116-(f) (including only the Republic of Vietnam); see also 38 C.F.R. § 3.307 (2013) (added regulatory presumption for the Korean DMZ as well).

228. Id. (recognizing the indiscriminate use of Agent Orange throughout the entire country, no other interpretation suffices except to say that the VA/Congress recognizes a presumed exposure to herbicides in the entire country of Vietnam).


230. Kelley v. Shinseki, No. 09-2585, 2011 WL 1479469, at *4 (Ct. Vet. App. Apr. 19, 2011) (discussing entitlement accorded to plaintiff allowing prove of a direct service connection to herbicides, which requires an actual showing of exposure. If the VA presumed recognition of herbicide existence on Guam, a veteran would sidestep the burden of establishing existing, but would still be required to establish exposure to that herbicide).

231. Id.


233. Id.
presumption are limited in nature. While such a presumption limits successful claims to specific occupations, transposing this legislation to recognize Guam would substantially lessen the burden for particular claimants to establish a successful claim for disability benefits.

B. Option Two—Allow Prior Decisions to be Used as Precedent

As noted above, the benefits attributable to using a decision as precedent cannot be understated. First and foremost, allowing the precedential use of a prior decision leads to consistency in claim adjudication. However, Guamanian claimants know nothing but inconsistency with some granted claims finding herbicide exposure, but a vast majority of contradictory denials based on findings that herbicide never existed on Guam.

If the use of precedent is allowed, a Guamanian veteran not only receives consistency in adjudication, but the benefits outlined in Morgane v. States Marine Lines, Inc. as well. The use of precedent expedites the claims process by removing instances of re-litigation; an immeasurable benefit to aging veterans who served in the sixties and seventies.

Moreover, the VA gleans a benefit from, “maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.” The reasonable person should see that the evidence for herbicide on Guam certainly balances the DOD evidence and, in light of the evidence in equipoise standard, a reasoned judgment grants the finding of herbicide. The benefits of respecting precedent on appeal are significant and would not be lost on Guamanian claimants.

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234. Id. § C(10)(r) (discussing why Thailand claims are added, yet limited to certain circumstances).
235. See generally id. § C(10)(q) (adding to the administrative regulations would allow Guam claimants to receive the same benefits in adjudication as Thailand soldiers that worked the perimeter of certain bases during the war).
237. Id.
240. Id.
241. Id.
242. Id. (“[W]eighty considerations underlie the principle that courts should not lightly overrule past decisions.”).
C. Option Three—Softer Standard of Review to Provide More Reversals of Erroneous Adjudications Based on Affirmative Evidence to Rebut

In fiscal year 2012, the average length of time between the filing of an appeal and reaching a final decision lasted more than 1,000 days and the BVA remanded more than 45% of the claims it reviewed.243 Already appealed once through a Notice of Agreement, the real length of time from original claim to final adjudication lasts much longer for veterans making appellate claims.244 Many of the remands issued addressed deficiencies in claim development not dealt with at the lower level.245 One year later, in June of 2013, the amount of appeals pending at the VA amounted to 250,845.246

Aptly known as the “the hamster wheel”, the entire administrative process of remand after remand leads to the not so infrequent death of a veteran while awaiting benefits.247 As a statutory protection, entitlement to the speedy adjudication of remanded case is not always accorded to the veteran’s claim.248 If the delay in adjudication of a remanded claim occurs as a result of an overburdened system, the veteran receives no relief from the court.249

Ultimately, without a simpler method providing for more reversals, there exists no recourse for the veteran service member waiting for his or her remand to be adjudicated.250 Accordingly, the tendencies of the administration to frequently remand cases directly causes more veterans to go without benefits for longer stretches of time.251

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244. Id.
245. Id.
246. Id.

248. 38 U.S.C. § 5109B (2012) (protection accorded to the veteran requiring the expeditious adjudication of remanded claims); see also Benson v. Shinseki, No. 13-2774, 2013 WL 6072864, at *2 (Vet. App. Nov. 19, 2013) (holding a ten-month delay does not sufficiently show that the VA refused to adjudicate nor that it stopped being processed, as opposed to being the result of an overburdened system); see generally Brand v. Shinseki, No. 13-1179, 2013 WL 2302108, at *3 (Ct. Vet. App. May 28, 2013) (holding one-year delay from overburdened system is not sufficient to grant a writ of mandamus compelling the court to adjudicate the remand immediately).

249. See generally Brand, 2013 WL 2302108, at *3; and Benson, 2013 WL 6072864, at *2.
250. Ridgway, supra note 211.
251. Manar, supra note 243 (discussing the extended period of time taken to process veterans’ claims).
these claimants can ill afford to have their claims roll around the hamster wheel. In light of their age, the VA or Congress should implement regulations that give appellate courts more leeway in granting benefits.

VI. CONCLUSION

No presumptive service connection exists for veterans serving on the Island of Guam. Without such a connection, claimants’ only path of success requires a direct connection. A presumed service connection for medical conditions exists if a veteran establishes exposure. Thus, showing exposure is the insurmountable step for a claimant, which directly contradicts the claimant friendly system.

Displayed through a wealth of evidence and inconsistencies in adjudication, Guamanian veterans making claims for herbicide exposure lack the benefit of the doubt accorded to them by law. When the evidence balances equally, the veteran receives the benefit of the doubt. The VA proffers a lack of records as evidence. The Guamanian veterans offer Dow and Monsanto investor reports, EPA records, photographs, and lay testimony—to include some Congressional support—yet, for most of the claimants, the VA holds the evidence as insufficient. These veterans are too often being denied the disability benefits that they have earned.
BOURBON DISTILLATION & ITS COLLISION WITH THE CLEAN AIR ACT & TORT LAW: IS THE ANGEL’S SHARE ACTUALLY A DEVIL TO KENTUCKY RESIDENTS?

Wesley Abrams*

I. INTRODUCTION

Bourbon, America’s self-proclaimed “native spirit,” is a cornerstone of Kentucky’s culture and economy.1 But for some Kentucky residents that live along the Bourbon Trail, a stretch of land in Central Kentucky where an overwhelming majority of the world’s bourbon is produced, the state’s trademark spirit is rapidly losing its appeal.2 In fact, dissatisfied Bourbon Trail residents (“the Plaintiffs”) have filed multiple lawsuits against major bourbon distillers based on Kentucky common law tort theories in Kentucky state and federal court.3 This Note, however, will focus on Merrick v. Diageo Americas Supply, Inc. - a case that is currently before the United States District Court for the Western District of Kentucky.4

What would push these Kentuckians, some of whom have close family ties to the major Kentucky bourbon distilleries, to take the distillers to court? A “mysterious and ever-present . . . sooty-looking black gunk” that covers any exposed surface on their property.5 According to the Plaintiffs, ethanol emissions from the distilleries’ operations cause the “black gunk” that is plaguing their property.6 The black gunk, in scientific terms, is known as Baudoinia Compniacensis (“Baudoinia”), a type of naturally occurring fungus.7

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3. Ryzik, supra note 2.


5. Ryzik, supra note 2.

6. Id.

7. Id.
But there is a barrier to the Plaintiffs’ recovery that extends beyond their claims’ merits – the doctrine of federal preemption.\textsuperscript{8} The provisions of the Clean Air Act (“CAA”), in addition to state and local regulations, control ethanol emission levels.\textsuperscript{9} There is little agreement on whether CAA regulations preempt state common law tort claims – federal circuit courts are currently split on the issue and, strangely, few commentators have weighed in.\textsuperscript{10}

Preemption is a major concern for the Plaintiffs; if the CAA preempts Kentucky common law tort claims, the Plaintiffs’ case will be dismissed.\textsuperscript{11} Moreover, the Plaintiffs cannot seek redress under the CAA because Diageo Americas Supply, Inc. (“Diageo”), as well as all the other major bourbon distilleries in Kentucky, is in compliance with federal and state ethanol emissions regulations.\textsuperscript{12} Therefore, due to the issue’s importance, the Western District recently certified the preemption issue for interlocutory appeal to the Sixth Circuit pursuant to 28 U.S.C. § 1292(b).\textsuperscript{13} The Sixth Circuit’s ruling, “might be the final straw in persuading the Supreme Court to address this issue.”\textsuperscript{14} In turn, the Sixth Circuit’s decision will likely be pivotal in the ultimate resolution of the circuit split.

Overall, this Note will analyze the CAA preemption issue and the merits of the lawsuits filed against the major bourbon distilleries through the lens of Merrick. Section I of this Note provides background information about bourbon production in Kentucky and the properties of Baudoinia. Section II introduces the


\textsuperscript{10} \textit{Compare} Her Majesty the Queen v. City of Detroit, 874 F.2d 332, 342-43 (6th Cir. 1989) (holding that the Clean Air Act does not preempt statutory claims based on source-state law), and Bell v. Cheswick Generating Station, 734 F.3d 188, 198 (3d Cir. 2013), \textit{cert. denied}, 134 S.Ct. 2696 (2014) (holding that the Clean Air Act does not preempt common law tort claims based on source-state law), \textit{with} North Carolina ex rel. Cooper v. TVA, 615 F.3d 291, 309 (4th Cir. 2010) (holding that ambiguous nuisance laws are incompatible with the comprehensive regulatory framework established by the CAA and dismissing source-state claims on preemption-like grounds). \textit{See also}, Gallisdorfer, \textit{supra} note 8 at 132 (stating that few commentators have considered “the extent to which the Clean Air Act preempts state common law . . .”).

\textsuperscript{11} Merrick, 5 F. Supp. 3d at 870 (stating that the issue of preemption is determinative).

\textsuperscript{12} \textit{Id.}; \textit{see also} Brockman v. Barton Brands, LTD., No. 3:06CV-332-H, 2009 WL 4252914, at *4 (W.D. Ky. Nov. 25, 2009) (stating that Barton Brands distillery meets or exceeds all relevant CAA regulations).


\textsuperscript{14} \textit{Id.}
doctrine of federal preemption, the Clean Air Act, and the major federal court cases relevant to the question of whether the CAA preempts state common law tort claims. Section III lays out the background facts and holding of Merrick and the relevant background law for the Plaintiffs’ Kentucky common law tort claims. Section IV analyzes whether the CAA preempts Kentucky common law tort claims related to Baudoinia and argues that the Sixth Circuit should apply the Supreme Court’s approach in International Paper Co. v. Ouellette to the facts of Merrick. Section V analyzes the Plaintiffs’ common law tort claims, suggests how the district court should rule on the merits of the Plaintiffs’ case in Merrick, and forecasts how the Plaintiffs’ Baudoinia problem might be resolved.

SECTION I.

A. What is Bourbon and How is it Made?

Bourbon is a type of barrel-aged distilled whiskey made from fermented mash, a mixture of various grains that consists primarily of corn. According to the United States Code of Federal Regulations, a spirit must meet certain requirements before it can be labeled as bourbon: (1) it must be made in the United States; (2) aged in new, charred white oak barrels; (3) produced from a grain mixture containing at least 51% corn; (4) distilled at or below 160 proof, or 80% alcohol; (5) bottled at or above 80 proof, or 40% alcohol; and (6) it must not be barreled for aging at more than 125 proof, or 62.5% alcohol.

Thus, in order to be considered bourbon, a whiskey must be aged for a period of time in oak barrels. The aging process is arguably the most important step to crafting fine bourbon and it is at the heart of the Baudoinia problem.

15. See Natalie Wolchover, What’s the Difference Between Bourbon and Whiskey, LIVE SCIENCE (May 5, 2011), http://www.livescience.com/33256-difference-between-bourbon-whiskey.html (stating that bourbon must be produced from a grain mixture, called mash, made up of at least 51% corn).


At least 2% of the bourbon in each barrel evaporates for every year that the bourbon is aged. When bourbon evaporates it becomes ethanol vapor - distillers call this lost bourbon the “angel’s share.” Currently, 4.9 million barrels of bourbon, a number larger than Kentucky’s population, are being aged in warehouses throughout Kentucky. As a result, ethanol levels are extremely high in areas surrounding bourbon-aging warehouses.

B. Understanding Baudoinia Compniacensis

Baudoinia, also known as “whiskey fungus,” is a type of naturally occurring fungus that thrives in ethanol-rich environments. In order to understand Baudoinia, one must have a basic knowledge of the scientific properties of fungi.

Fungi are microorganisms that can exist as yeast, mold, or both. Fungi spores “[t]hat become mold are always present in the air and on objects.” However, fungi spores do not become visible to the human eye until “the temperature and moisture in the environment are suitable for germination.” When an ideal environment presents itself, “the fungal spores burst and take the shape of . . . ” a “hyphae,” which is a long strand or fiber that resembles a thread. The hyphae then forms a mass known as a “mycelium.” Through its mycelium, a fungus can absorb nutrients from its environment, “such as dead or living organic matter.”

Baudoinia has been around for millions of years and predates human life. But it was not formally identified until 2007, as a result of a Canadian distillery’s investigation. Hiram Walker Distillery had a problem with some homeowners who lived near one of its whiskey aging warehouses in Lakeshore, Ontario. The homeowners blamed Hiram Walker for a black mold that covered their homes.

20. Id.
21. Id.
23. Byland, supra note 19.
24. Id.
25. Id.
26. See id.; see also, Cooper, supra note 8 (suggesting that fungal spores are invisible until germination).
27. Byland, supra note 19.
28. Id.
29. Id.
30. Rogers, supra note 18; Ryzik, supra note 2 (stating that Dr. Scott estimates Baudoinia developed in the Cretaceous period).
31. Byland, supra note 19; Rogers, supra note 18 (detailing Hiram Walker’s hiring of Dr. James Scott to investigate a black mold growing on homes near its whiskey-aging warehouse).
32. Rogers, supra note 18.
33. Id.
To get to the bottom of the problem, Hiram Walker commissioned Dr. James Scott, who ultimately discovered Baudoinia.  

According to Dr. Scott’s findings, Baudoinia interacts with ethanol in a number of ways. First, ethanol promotes Baudoinia germination because it is one of Baudoinia’s main sources of nutrition. Second, “[B]audoinia is normally slow growing,” but it grows at an “uncharacteristically” rapid pace when it absorbs ethanol. Third, when exposed to ethanol, Baudoinia is able to survive in extreme environments that are subject to total sun exposure, such as metal roofs on cars and homes.

Baudoinia becomes visible when its hyphae form a black mycelium – this gives the fungus its black, “crust-like appearance.” Mature colonies of Baudoinia present in ethanol-rich environments can grow to be 1-2 centimeters thick and are very resilient and adaptable. Additionally, Baudoinia is extremely difficult to remove - the only way to remove it is through “extreme cleaning measures,” like pressure washing or scrubbing with chlorine bleach. Any cleaning, however, is only temporary because the Baudoinia continues to grow back.

C. Is There a Connection Between Baudoinia and Bourbon?

For the Plaintiffs’ Kentucky common law claims against Diageo to have merit, there must be a connection between Diageo’s operations and the accumulation of Baudoinia on the Plaintiffs’ property.

34. Id.
36. James A. Scott et al., Baudoinia, a New Genus to Accommodate Torula Compniacensis, 99 MYCOLOGIA 592, 594 (2007); Byland, supra note 19 (detailing the characteristics of mature Baudoinia colonies).
37. Byland, supra note 19.
38. Id.
39. Baudoinia spores are naturally present in the air, but are invisible to the human eye until the surrounding environment promotes germination. Scott, supra note 35; Byland, supra note 19 (detailing the characteristics of mature Baudoinia colonies).
40. Byland, supra note 19; see also, Ryzik, supra note 2 (“Baudoinia belongs to a class of fungi that is almost prehistorically tenacious.”).
41. Ryzik, supra note 2; Complaint, supra note 4, at 6.
42. Ryzik, supra note 2 (Kentucky resident “[h]and-washed the exterior of her home annually, . . . using industrial-strength solvents, only to see [the Baudoinia] return.”); Alan Fisher, Whisky Fungus Tarnishes Homes in Kentucky, A. JAEZERA (Sept. 16, 2012), http://blogs.aljazeera.com/blog/americas/whisky-fungus-tarnishes-homes-kentucky (stating that even after being scrubbed with the strongest chemicals available to consumers, Baudoinia “appeared again, often darker and nastier than before); Byland, supra note 19 (stating that removal techniques are only temporary).
43. See Merrick v. Diageo Ams. Supply, Inc., 5 F. Supp. 3d 865, 878-80 (W.D. Ky. 2014) (suggesting that the Plaintiffs’ nuisance and trespass claims would be dismissed if there were not
Diageo argues that there is no connection because Baudoinia can occur naturally in “areas unrelated to the production of whiskey.” On its face, Diageo’s argument is true. Baudoinia is not “exclusively associated” with whiskey production. For example, it has been observed in areas near commercial bakeries. That being said, numerous scientific studies suggest that there is a connection between Baudoinia and whiskey aging warehouses. The Louisville Metro Air Pollution Control District (“LMAPCD”) conducted an investigation and determined that the Baudoinia problem in areas surrounding the Bourbon Trail is “the result of [ethanol] emissions from whiskey aging warehouses.”

While commercial bakeries and whiskey distilleries operate differently, both emit ethanol vapor into the atmosphere. And the presence of ethanol vapors in the atmosphere “directly correlates with the rapid growth of Baudoinia.” Therefore, the mere fact that Baudoinia exists in places other than around bourbon aging warehouses does not validate Diageo’s position that their operations do not cause Baudoinia to accumulate on the Plaintiffs’ property.

Overall, it seems likely that the Plaintiffs in Merrick will be able to demonstrate that ethanol emissions from whiskey aging facilities cause excessive Baudoinia growth on their property.

SECTION II.

Preemption will destroy the Plaintiffs’ claims – if the Sixth Circuit overturns the Western District’s ruling on the preemption issue, the Western District will not consider the Plaintiffs’ common law claims and will dismiss the Plaintiffs’ case. Therefore, this section provides background information and law relevant to the ultimate question of whether the CAA should preempt the Plaintiffs’ Kentucky common law tort claims.

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44. Ryzik, supra note 2; Merrick, 5 F. Supp. 3d at 878, 880 (stating Diageo argues that the Plaintiffs’ nuisance and trespass claims “must be disregarded as conclusory and speculative).
45. See Ryzik, supra note 2 (stating that Baudoinia occurs elsewhere).
46. Scott, supra note 37; accord Ryzik, supra note 2.
47. Scott, supra note 37; accord Ryzik, supra note 2.
48. Scott, supra note 37; Rogers, supra note 18 (discussing Dr. James Scott’s discovery of Baudoinia); Byland, supra note 19 (presenting the Louisville Metro Air Control District’s research and findings on Baudoinia); Bernard Dixon, The Mystery of the Warehouse Stains: A Black Fungus, With a Liking for Distilleries and Bakeries, Has a Love-Hate Relationship with Ethanol in the Atmosphere, 4 MICROBE 104 (2009).
49. Byland, supra note 19.
50. Ryzik, supra note 2; Scott, supra note 35.
51. Byland, supra note 19.
52. See infra pp. 22-23.
A. THE BASIC PRINCIPLES OF FEDERAL PREEMPTION

Federal preemption of state law stems from Article VI, Section 2, of the Constitution of the United States, which is known as the “Supremacy Clause.” Federal preemption deems the laws of the United States as “the supreme Law of the Land” and avers that “the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.” Basically, if state law conflicts with federal law, federal law prevails.

Courts are rightfully cautious when determining whether a federal statute has preemptive effect. According to the Supreme Court, a federal statue should not supersede the States’ police powers unless that was Congress’s “clear and manifest purpose.”

There are two main ways a federal statute can preempt state law: express preemption and implied preemption. Express preemption occurs when the terms of the statute explicitly provide the statute’s preemptive effect. Implied preemption comes into play when the federal statute at issue does not explicitly declare that particular state laws are preempted. In these situations, courts determine Congress’s intent through an analysis of the statute’s “structure and purpose.”

Implied preemption is divided into two subcategories: (1) field preemption; and (2) conflict preemption. Field preemption occurs when “federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.” On the other hand, conflict preemption occurs when “state law ‘actually conflicts’” with federal law or where compliance with both federal and state law is impossible.

54. U.S. CONST. art. VI, cl. 2.
56. Gallisdorfer, supra note 8 at 140-41 (citing Altria Grp. v. Good, 555 U.S. 70, 77 (2008)) (“a court will read a statute that is ambiguous as to preemptive intent not to invoke preemption . . .”); Mason A. Barney, Note, Not as Bad as We Thought: The Legacy of Geier v. American Honda Motor Company in Product Liability Preemption, 70 BROOK. L. REV. 949, 959-61 (2005) (stating that presumption against preemption is a tool used by courts to aid statutory interpretation and noting that presumption can be overcome).
58. Gallisdorfer, supra note 8, at 141.
59. Id.
60. Walsh, supra note 56, at 624.
61. Gallisdorfer, supra note 8, at 141.
62. Id.
64. Id. (citing English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990)).
should only be implied when the federal statute is “sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation.” Moreover, “implied preemption should be applied narrowly in the environmental policy context in order to recognize the states’ traditional police powers over public health and safety and regulation of land uses.”

Seemingly, Congress is aware of the dangers of preemptioning state law. Therefore, in many federal statutes that govern public health, welfare, and environmental quality – aspects of the States’ police powers – Congress includes “savings clauses.” Savings clauses expressly limit a statute’s preemptive effect. However, while savings clauses help courts determine Congress’s intent, the Supreme Court has “decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.”

B. The Clean Air Act, International Paper Co. v. Ouellette, & Her Majesty the Queen v. City of Detroit

This section provides the CAA text that is relevant to the analysis of whether the CAA preempts state common law tort claims. This section also introduces International Paper Co. v. Ouellette and Her Majesty the Queen v. City of Detroit, two cases that were pivotal to the Western District when it decided whether the CAA preempted the Plaintiff’s Kentucky common law tort claims in Merrick.

1. The Clean Air Act

The Clean Air Act, 42 U.S.C. § 7401 et seq., is a federal law that regulates air emissions. In 1970, Congress enacted the law to protect public health and welfare from the growing problem of air pollution created by “[u]rbanization [and] industrial development . . . .” The CAA asserts that individual states and

67. See Gallisdrorfer, supra note 8 at 141-42 (stating that Congress uses savings clauses “to avoid the invalidation of state law on the basis of preemption . . . ”).
68. See id.; Learner, supra note 66, at 651 (discussing preemption in the context of state police powers and environmental regulations).
69. Id.
71. Merrick v. Diageo Ams. Supply, Inc., 5 F. Supp. 3d 865, 871-75 (W.D. Ky. 2014) (suggesting that essentially all federal courts that have addressed the preemption issue in relation to the Clean Air Act have interpreted Int’l Paper Co. v. Ouellette).
73. Id. (citing 42 U.S.C. § 7401(a)(2) (2012)).
local governments are primarily responsible for air pollution prevention and control. But the CAA also recognizes that “federal financial assistance and leadership is essential to accomplish these goals.”

In turn, the CAA operates under a “cooperative federalism structure,” which means “[t]he federal government develops baseline standards that the states individually implement and enforce.” Specifically, the Environmental Protection Agency (“EPA”) develops National Ambient Air Quality Standards (“NAAQS”) for “air emissions that cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.” Then, each state develops its own state implementation plan (“SIP”) that works to implement, maintain, and enforce the NAAQS. SIPs establish permit programs, which limit the amount and types of emissions that permit holders are allowed to discharge. Additionally, through SIPs, the CAA expressly allows states to adopt standards that are stricter than what federal law requires. Once the EPA approves a SIP, the EPA, private citizens, and the specific state that adopted the implementation program can enforce the SIP’s provisions and any permits associated with the SIP in federal court.

The CAA contains two major savings clauses that relate to the preemption analysis: the “citizen suit savings clause”; and the “states’ rights savings clause.”

The citizen suit savings clause provides, in relevant part: “nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief . . . .”

The states’ rights savings clause provides, in relevant part: “except as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . . .”

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75. Id. § 7401(a)(4).
76. Bell, 743 F.3d at 190 (citing GenOn REMA, LLC v. EPA, 722 F.3d 513, 516 (3d Cir. 2013)).
77. Gallisdorfer, supra note 8, at 145 (citing 42 U.S.C. 7408(a)(1)(A)).
78. Id.
81. See id. § 7604.
82. See 410 KY. ADMIN. REGS. 50:010(135) (2013) (citing 40 C.F.R. § 51.100 (2014)).
83. Bell, 734 F.3d at 191.
85. Id. § 7416.
The CAA does not contain any provisions that indicate the Act expressly preempts state common law tort claims. Therefore, if the CAA preempts state common law tort claims, it must do so through implied preemption.

2. International Paper Co. v. Ouellette

An analysis of whether the CAA preempts state law tort claims related to Baudouinia that extends beyond the express language of the CAA must take into account the Supreme Court’s ruling in Ouellette. Therefore, this Section will provide insight into Ouellette’s underlying facts and holding.

Ouellette considered whether the Clean Water Act (“CWA”) preempts state common law nuisance claims. Specifically, the Court had to determine whether the CWA preempted a Vermont common law nuisance claim, when the activity that led to the nuisance claim occurred in New York.

The plaintiffs, a group of property owners that lived near Lake Champlain in Vermont, filed a class action lawsuit against International Paper Company (“IPC”). IPC operated a paper mill near Lake Champlain in New York. As a result of its operations, IPC discharged pollutants into Lake Champlain. The plaintiffs alleged that IPC’s actions were a “continuing nuisance” under Vermont common law because the pollutants made the water of Lake Champlain undesirable and reduced their property’s value.

The Court first considered the ultimate purpose of the CWA, and noted that Congress intended the CWA to “establish an all encompassing program of water pollution regulation.” Likewise, the court noted that the “control of interstate pollution is primarily a matter of federal law.” Therefore, the Court held that CWA preempts all claims that the CWA does not specifically preserve.

Next, to determine what claims the CWA preserves, the Court reviewed the CWA’s savings clauses. The Court’s analysis began by noting the distinction between the law of the state where the pollution’s source is located (the “source state”) and the law of the state that the pollution affects (the “affected state”).

86. Gallisdorfer, supra note 8, at 142-43.
87. Id.
88. Id. at 146 (stating that an implied preemption analysis in the context of the CAA and state law tort claims must begin with Ouellette).
90. Ouellette, 479 U.S. at 483.
91. Id. at 484.
92. Id.
93. Id.
94. Id.
95. Id. at 492.
97. Id.
98. Id. at 492-93.
99. Id. at 490-91.
The Court held that the CWA preempts claims that arise under the common law of an affected state. This is because, if affected states were allowed to impose standards different from the source state’s standards, “the inevitable result would be a serious interference with the achievement of the full purposes and objectives of Congress.”

Therefore, the plaintiffs’ Vermont claims were barred—Vermont was the affected state because the pollution’s source was IPC’s paper mill, which was located in New York.

However, the Court held that the CWA does not preempt claims that arise under the common law of the source state. The Court recognized that allowing source-state nuisance claims may create some tension with the operation of CWA based regulations. But the Court gave a number of reasons why allowing source state claims would not frustrate the goals of the CWA: (1) applying the source-state’s law “does not disturb the balance among federal, source-state, and affected-state interests...” because the Act allows source states to adopt more stringent pollution standards through common law or statutory restrictions; and (2) restricting suits to “those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations...” because a source of pollution only needs to worry about complying with the state laws where the source is located. Therefore, the Court held that the CWA would not pre-empt a common law tort claim brought against IPC under the law of New York, the source state.

3. **Her Majesty the Queen v. City of Detroit**

As a matter of precedent, relevant Sixth Circuit decisions must be considered. The Sixth Circuit has not decided a case that directly addresses the preemption issue in Merrick. However, in Merrick, the Western District recognized that *Her Majesty the Queen v. City of Detroit* “foreshadows how the Sixth Circuit would approach the issue of preemption, [even though] the decision...”

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100. *Id.* at 493 (stating that allowing claims brought under affected state law “[w]ould effectively override the EPA’s permit requirements and the policy choices made by source States in adopting their own standards, and would engender confusion by subjecting point sources to a variety of often vague and indeterminate common-law rules established by different States along the interstate waterways”).

101. *Id.* at 497 (“[V]ermont nuisance law is inapplicable to a New York point source...”).

102. See *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 498 (1987) (“An action brought against IPC under New York nuisance law would not frustrate the goals of the CWA as would a suit governed by Vermont law.”).

103. *Id.* at 499.

104. *Id.* at 497-99.


only goes so far with regard to the facts of [Merrick].” 108 In Her Majesty, the Sixth Circuit considered whether the CAA preempts state statutory claims. 109 In that case, several environmental groups brought claims against the City of Detroit because the city planned to build a “municipal trash incinerator.” 110 The plaintiffs alleged that the incinerator would violate the Michigan Environmental Protection Act, a Michigan statute. 111 In response, the city claimed that the CAA preempted the plaintiffs’ Michigan statutory claims because the incinerator was in compliance with CAA regulations. 112

The Sixth Circuit found that the CAA did not preempt the plaintiffs’ statutory claims. 113 In doing so, the court looked to the CAA’s savings clauses and stated that “the plain language of the CAA compels the conclusion” that states are free to adopt emissions limitations more stringent than the CAA. 114 The court based its position on the notion that the CAA “clearly indicates that Congress did not wish to abolish state control.” 115 Thus, while the city’s trash incinerator met the minimum requirements of the CAA, the Michigan statute represented a more stringent emissions requirement that the incinerator did not meet. 116

In addition to applying the CAA’s savings clauses, the court found that the Supreme Court’s rationale in Ouellette clearly indicated that the plaintiffs’ claim should not be preempted. 117 Likewise, the court distinguished source state law from affected state law. 118 And, in this case, the plaintiffs’ claim involved application of source-state law – the proposed trash incinerator was to be built in Michigan and the plaintiffs’ claim was based on a Michigan statute. 119 Therefore, under Ouellette, the plaintiffs’ claim was not preempted. 120

C. Split Decisions in the Circuit Courts

Ouellette and Her Majesty dealt with slightly different issues than Merrick. 121 But the following circuit court cases directly addressed the question of whether

108. Id. at 871.
109. See Her Majesty the Queen v. City of Detroit, 874 F.2d 332 (6th Cir. 1989).
110. Id. at 334.
111. Id.
112. See id. at 335.
113. Id. at 344.
114. Id. at 336, 342-44.
115. Her Majesty the Queen v. City of Detroit, 874 F.2d 332, 342-43 (6th Cir. 1989).
116. Id. at 344.
117. Id. at 343.
118. Id.
119. Id.
120. Id. (citing Int’l Paper Co. v. Ouellette, 479 U.S. 481, 498 (1987)) (stating that Ouellette clearly indicates “[t]hat Congress did not seek to preempt actions such as involved in this appeal”).
121. Ouellette dealt with the CWA and Her Majesty the Queen dealt with CAA preemption of state statutory claims, while Merrick deals with CAA preemption of state common law claims. See supra pp. 2, 14, and 16.
the CAA preempts state common law tort claims and, ultimately, reached different conclusions.

1. Bell v. Cheswick Generating Station

Bell v. Cheswick Generating Station, a Third Circuit opinion, is the most recent case on the issue of whether the CAA preempts state common law tort claims. In Bell, the plaintiffs, a group of Pennsylvania property owners, filed a class action lawsuit against a power company. The plaintiffs sued the power company based on multiple state tort law theories. Basically, the plaintiffs alleged that the power company’s Pennsylvania power plant caused ash and other coal residue to settle on their property.

The power company argued that the CAA preempted the plaintiffs’ common law tort claims and moved to dismiss. The district court agreed with the power company and held that the CAA preempted the plaintiffs’ claims (and dismissed their claims). The district court stated “that because the plant was subject to comprehensive regulation under the [CAA], it owed no extra duty to the [plaintiffs] under state tort law.”

The Third Circuit, however, overturned the district court’s decision and held that the CAA did not preempt the plaintiffs’ state law tort claims. The Third Circuit used the Supreme Court’s analysis in Ouellette to reach its decision because it found Ouellette to be controlling on the issue of whether the CAA preempts state common law tort claims.

The Third Circuit disregarded the fact that Ouellette involved the CWA because it concluded that, in the context of preemption, there is no real difference between the CWA and CAA. Therefore, like the Supreme Court in Ouellette, the Third Circuit distinguished source-state law from affected-state law, and looked to the CAA’s savings clauses to determine which claims the CAA preserves.

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122. See Bell v. Cheswick Generating Station, 734 F.3d 188 (3d Cir. 2013), cert. denied, 134 S. Ct. 2696 (2014).
123. Id. at 189.
124. Id.
125. Id.
126. See id.
127. Id.
129. Id. at 190.
130. Id.
131. Id. at 195 (“[A] textual comparison of the two savings clauses at issue demonstrates there is no meaningful difference between them.”).
132. Id. at 194-95.
The Third Circuit, like many other federal circuits, determined that the CAA’s savings clauses are virtually identical to the CWA’s savings clauses. \(^{133}\) Therefore, the court concluded that the CAA did not preempt the plaintiffs’ source-state common law tort claims — a claim brought under Pennsylvania law “against a source of pollution located in Pennsylvania, is not preempted.” \(^{134}\)

Much like the Supreme Court in *Ouellette*, the Third Circuit recognized that its decision could “create[a] a patchwork of inconsistent standards across the country” and harm the CAA’s delicate “cooperative federalism framework.” \(^{135}\) The Third Circuit employed the same reasoning as the Supreme Court in *Ouellette* and concluded that, like in the context of the CWA, allowing source state claims would not frustrate the goals of the CAA. \(^{136}\) The court stated that “the requirements placed on sources of pollution [by the CWA and the CAA] serve as a regulatory floor, not a ceiling.” \(^{137}\) Ultimately, the court justified its decision by noting that “nothing in the Clean Air Act indicates that Congress intended to preempt source state common law tort claims. . . .” \(^{138}\)

2. **North Carolina, ex rel. Cooper v. Tennessee Valley Authority**

In *North Carolina, ex rel. Cooper v. Tenn. Valley Auth.*, the Fourth Circuit addressed the CAA preemption issue differently than the Third Circuit. \(^{139}\) In *Cooper*, the State of North Carolina sued the Tennessee Valley Authority (“TVA”) for public nuisance. \(^{140}\) North Carolina’s attorney general alleged that TVA power plants, located in Tennessee, Alabama, and Kentucky, created emissions that came into North Carolina. \(^{141}\)

The district court held that the power plant emissions were a public nuisance and granted an injunction that required TVA to install new emissions controls on

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133. Id. at 195-96 (“[T]he only other circuit courts to have examined this issue in depth have also found no meaningful distinction between the Clean Water Act and the Clean Air Act.”).


135. See supra p. 15 (discussing how the CAA operates in Kentucky in order to illustrate the CAA’s cooperative federalism framework); Bell, 734 F.3d at 197-98.

136. Bell, 734 F.3d at 197-98 (quoting Int’l Paper Co. v. Ouellette, 479 U.S. 481, 498 (1987)) (“First, application of the source State’s law does not disturb the balance among federal, source-state, and affected-state interests. Because the Act specifically allows source States to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership established by the permit system. Second, the restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations. Although [source State] nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable. Moreover, States can be expected to take into account their own nuisance laws in setting permit requirements.”).

137. Id. at 198.

138. Id. at 198 (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 491 (1996)).


140. Id. at 296.

141. Id. at 296-97.
some of its power plants. The Fourth Circuit, however, reversed the district court’s decisions and held that the CAA preempted North Carolina’s public nuisance claim.

Instead of directly following Ouellette, like the Third Circuit, the Fourth Circuit’s analysis hinged on a detailed analysis of the CAA’s structure. The court’s reasoning “expressed a strong presumption . . .” that the CAA should preempt all state law nuisance claims. The court essentially disregarded the distinction between source-state law and affected-state law, and suggested “[t]hat nuisance liability may never be imposed where the emissions in question are the subject of a Clean Air Act permit.” Overall, the court’s view was based on its concern that allowing common law nuisance claims would make the regulation of air emissions an almost impossible task. Likewise, the court employed a cautionary approach that focused on the potential dangers of allowing state law nuisance claims to coexist with the CAA.

SECTION III.

A. Merrick v. Diageo Americas Supply, Inc.

This section introduces Merrick’s background facts and explores the Western District’s analysis of whether the CAA preempts Kentucky common law tort claims related to Baudoinia, as well as the court’s analysis of those claims.

1. Background and Procedure

Diageo is a New York corporation that owns and operates a bourbon distillery in Louisville, Kentucky. As a part of its operations, Diageo leases multiple warehouses in and around Louisville for the purpose of aging its bourbon. The Plaintiffs are a “class of individuals who allegedly own, lease, or

142. Id. at 296.
143. Id. at 312.
144. Gallisdorfer, supra note 8, at 155 (citing North Carolina, ex rel. Cooper, v. Tenn. Valley Auth., 615 F.3d 291, 298-301 (2010)).
145. Id. (citing Cooper, 615 F.3d at 303).
146. Id. at 156-57 (quoting Cooper, 615 F.3d at 309) (“It would be odd, to say the least, for specific state laws and regulations to expressly permit a power plant to operate and then have a generic statute countermand those permissions on public nuisance grounds.”).
147. Cooper, 615 F.3d at 298 (“If courts across the nation were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern. Energy policy cannot be set, and the environment cannot prosper, in this way.”).
148. See id.
150. Id.
rent real and/or personal property” located near Diageo’s bourbon aging warehouses.151

On June 15, 2012, the Plaintiffs filed a class action lawsuit against Diageo in the United States District Court for the Western District of Kentucky on the basis of diversity of citizenship.152 The Plaintiffs allege that the ethanol emissions from Diageo’s bourbon aging warehouse cause Baudoinia to cover their real and personal property, which reduces the Plaintiffs’ property value and makes it unsightly.153 The Plaintiffs’ lawsuit is based on the following Kentucky common law tort theories: (1) negligence and gross negligence; (2) temporary nuisance and permanent nuisance; and (3) trespass.154

The Plaintiffs seek compensatory damages for the alleged harm that Baudoinia has done to their property as well as permanent injunctive relief.155 The Plaintiffs base their demand for injunctive relief on the theory that Diageo can implement ethanol control technology in its bourbon aging warehouses that will correct or abate the ethanol emissions that lead to the Baudoinia problem.156

Diageo moved to dismiss the Plaintiffs’ claims pursuant to Fed. R. Civ. P. 12(b)(6).157 Diageo argued that the Plaintiffs’ claims should be dismissed because: (1) the CAA preempts the Plaintiffs’ common law claims; and (2) the Plaintiffs failed to adequately plead their common law claims.158

2. The Preemption Analysis

The Western District engaged in a comprehensive analysis of whether the CAA preempts state common law tort claims because that issue was central to Diageo’s motion to dismiss.159 The court began its analysis by noting that neither the Supreme Court nor the Sixth Circuit has specifically addressed the CAA preemption issue in Merrick.160 However, the court analyzed the Supreme Court’s decision in Ouellette and the Sixth Circuit’s decision in Her Majesty to determine how those courts would decide the preemption issue.161

The court’s CAA preemption analysis hinged on precedent – notably Ouellette and Her Majesty.162 But the court was also aware that other courts had

151. Id.
152. Id. at 868.
153. Anstoetter & McDonough, supra note 4; Complaint, supra note 4, at 5.
154. Ryzik, supra note 2; Complaint, supra note 4, at 11-16.
155. Complaint, supra note 4, at 17; Cooper, supra note 8 (discussing plaintiffs’ desired remedy and details related to the damage Baudoinia has done to plaintiffs’ real and personal property).
157. Id.
158. Id.
159. If the Court found that the CAA preempts state common law tort claims, the Court would have granted Diageo’s motion to dismiss. See supra pp. 2, 8; Merrick, 5 F. Supp. 3d at 871-77.
160. Merrick, 5 F. Supp. 3d at 869.
161. See id. at 871-72 (citing Int’l Paper Co. v. Ouellette, 479 U.S. 481; (1987); Her Majesty the Queen v. City of Detroit, 874 F.2d 332 (6th Cir. 1989)).
162. See id. at 871-77.
addressed the issue and reached conflicting results.\textsuperscript{163} Therefore, in light of \textit{Ouellette} and \textit{Her Majesty}, the court analyzed the conflicting rulings of the Third and Fourth Circuit in \textit{Bell} and \textit{Cooper}, respectively.\textsuperscript{164}

The court recognized that the Fourth Circuit's opinion “enumerates the problems that may arise if the CAA is not deemed to preempt state common law tort claims,” and stated that it was responsive to those concerns.\textsuperscript{165} However, the court noted that \textit{Bell} was more factually similar to the preemption issue in \textit{Merrick} than \textit{Cooper}, because \textit{Cooper} involved a case brought by a governmental entity.\textsuperscript{166} Moreover, the court stated that “\textit{Cooper} involved the application of [affected-state] laws . . .” but \textit{Merrick} involves source-state law because “[K]entucky plaintiffs [are] complaining of alleged pollution in Kentucky, which is allegedly caused by a company located in Kentucky.”\textsuperscript{167} Also, the court found that the Third Circuit “interpret[ed] and incorporat[ed] Supreme Court and Sixth Circuit precedent” while the Fourth Circuit “only briefly considered \textit{Ouellette} in reaching its holding.”\textsuperscript{168}

The court found the Third Circuit’s reasoning in \textit{Bell} to be most persuasive and stated that “the analysis as set forth by the Third Circuit, coupled with the Sixth Circuit’s analysis in \textit{Her Majesty}, captures the prevailing law for CAA preemption.”\textsuperscript{169} Therefore, the court held that the CAA did not preempt the Plaintiffs’ Kentucky common law tort claims.\textsuperscript{170}

3. The State Law Claims

After deciding the preemption issue, the court turned to the Plaintiffs’ Kentucky common law tort claims.\textsuperscript{171} However, because Diageo moved to dismiss the Plaintiffs’ complaint pursuant to Fed. R. Civ. P. 12(b)(6), the court’s analysis of the Plaintiffs’ claims was limited to the allegations in the Plaintiffs’ complaint.\textsuperscript{172} When considering a Rule 12(b)(6) motion to dismiss, courts “take all of the factual allegations in the complaint as true . . .” and “if the well-pleaded

\textsuperscript{163} Id. at 872-73.
\textsuperscript{164} Id. at 872-75 (citing \textit{Bell} v. Cheswick Generating Station, 734 F.3d 188 (3d Cir. 2013), \textit{cert. denied}, 134 S. Ct. 2696 (2014); North Carolina ex rel. \textit{Cooper} v. TVA, 615 F.3d 291 (4th Cir. 2010)).
\textsuperscript{165} Id. at 874.
\textsuperscript{166} \textit{Merrick} v. \textit{Diageo Ams. Supply, Inc.}, 5 F. Supp. 3d 865, 875 (W.D. Ky. 2014).
\textsuperscript{167} Id.
\textsuperscript{168} Id. (citing \textit{Bell}, 734 F.3d. at 188; \textit{Cooper}, 615 F.3d. at 291).
\textsuperscript{169} Id. at 876.
\textsuperscript{170} Id.
\textsuperscript{171} Id. at 877.
\textsuperscript{172} \textit{Merrick} v. \textit{Diageo Ams. Supply, Inc.}, 5 F. Supp. 3d 865, 869-70 (W.D. Ky. 2014) (citing J.P. Silverton Indus. L.P. v. Sohm, 243 Fed. Appx. 82, 86-87 (6th Cir. 2007)) (“As a general rule, a district court may not consider matters outside the pleadings when ruling on a Rule 12(b)(6) motion to dismiss without converting the motion into one for summary judgment.”).
facts do not permit the court to infer the mere possibility of misconduct, [the motion is granted and the complaint is dismissed]."

The Plaintiffs’ negligence claims are based on the notion that Diageo breached its duty to minimize the accumulation of Baudoinia on their property and prevent ethanol emissions from entering their property. Also, the Plaintiffs alleged that Diageo breached its duty by violating LMAPCD regulations related to ethanol emissions. First, the court held that Diageo owed no such duty to the Plaintiffs. The court further noted that the Plaintiffs, as property owners, were not entitled to a private cause of action based on Diageo’s alleged violation of a city ordinance or regulation. Likewise, the court granted Diageo’s motion to dismiss the Plaintiffs’ negligence claims.

Next, the court turned to the Plaintiffs’ temporary and permanent nuisance claims. The court held that the Plaintiffs stated a claim for temporary nuisance because they alleged that: (1) Diageo’s operations cause Baudoinia to accumulate on their property; (2) Baudoinia unreasonably interferes with their private use and enjoyment of their property; and (3) Diageo’s operations reduce the value of their property. In the same vein, the court further held that the Plaintiffs stated a claim for permanent nuisance, but the court noted that the claim could be barred under the applicable statute of limitations.

The court also held that the Plaintiffs stated a claim for both intentional and negligent trespass. The Plaintiffs stated a claim for intentional trespass because they alleged that, as a result of Diageo’s operations, Diageo intentionally emitted ethanol that entered upon and physically invaded their property. The Plaintiffs stated a claim for negligent trespass because they alleged that, as a result of its operations, Diageo breached its duty “[t]o not cause ethanol to physically invade...”

173. Id. at 869 (citing Bell Atl. Corp. v. Twombly 550 U.S. 544, 555 (2007)).
174. Id. at 877.
175. Id.
176. Id. (”Plaintiffs have not identified the source of Diageo’s purported duty to minimize and prevent its ethanol emissions from entering Plaintiffs’ property, nor have they identified the source of Diageo’s alleged duty to prevent whiskey fungus from accumulating on Plaintiffs’ property.”).
177. Id. (quoting Baker v. Warren Cnty. Fiscal Court, No. 1:06-CV-153-R, 2007 WL 486738, at *2 (W.D. Ky. Feb. 12, 2007)); Schilling v. Schoenle, 782 S.W.2d 630, 632-33 (Ky. 1990); Alderman v. Bradley, 957 S.W.2d 264 (Ky. Ct. App. 1997) (“Kentucky courts have held that a property owner has not private cause of action to bring suit against another property owner for violation of an ordinance... because the property owner owes a duty to follow the ordinance to the municipality, not to another party.”).
179. Id.
180. Id. at 878.
181. Id. at 878-79 (“While plaintiffs have technically complied with the pleading requirements and provided sufficient facts to state a claim for permanent nuisance under Twombly, we note that this claim may be time barred under the applicable statute of limitations. The parties have not addressed this issue, so we decline to go further than remark that a claim for permanent nuisance is subject to Kentucky’s five-year statute of limitations.”).
182. Id. at 880.
183. Id.
However, the court concluded by noting that the court “offer[s] no opinion as to the origin of this duty, or its legal basis.”

4. The Outcome

Ultimately, Diageo filed an interlocutory appeal on the preemption issue, which the district court granted. Therefore, before the Western District rules on the case’s merits, the Sixth Circuit must decide whether the CAA preempts the Plaintiffs’ claims.

B. Kentucky Common Law

This section introduces the portions of Kentucky common law that are relevant to the Plaintiffs’ nuisance and trespass claims. The Plaintiffs’ negligence claim is not considered because the Western District disposed of that claim pursuant to Diageo’s Rule 12(b)(6) motion to dismiss.

1. Nuisance

A nuisance claim has two elements: “[(1)] the reasonableness of the defendant’s use of his property, and [(2)] the gravity of harm to the complainant.” A nuisance can be public or private. A private nuisance only affects an individual or a limited number of individuals. A public nuisance affects the public at large. In Merrick, the Plaintiffs allege that Diageo’s ethanol emissions, and the Baudoinia that results from those emissions, are a private nuisance.

Under Kentucky law, a private nuisance can be temporary or permanent, but not both. A temporary nuisance occurs when “a defendant’s use of property causes unreasonable and substantial annoyance to the occupants of the claimant’s property or unreasonably interferes with the use and enjoyment of such property, and thereby causes the value of use or the rental value of the claimant’s property to be reduced.” A permanent nuisance occurs when “a defendant’s use of property causes unreasonable and substantial annoyance to the occupants of the claimant’s property or unreasonably interferes with the use and enjoyment of

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185. Id.
187. See id.
188. See supra pp. 25-26.
191. Id.
192. Id.
195. Merrick, 5 F. Supp. 3d, at 878 (citing KRS § 411.540(4)).
such property, and thereby causes the fair market value of the claimant’s property to be materially reduced.”

To determine whether a nuisance is temporary or permanent, Kentucky courts look to “whether the cause of the nuisance results from some improper installation or method of operation [of the structure] which can be remedied at a reasonable expense.” Therefore, “Kentucky differentiates between temporary and permanent nuisances on the basis of whether the nuisance can be remedied or abated.” Likewise, a nuisance is temporary under Kentucky law “if it is a continuing nuisance that can be remedied at reasonable expense; if not such remedy is possible, then the nuisance will be classified as permanent.”

2. Trespass

Trespass can either be intentional or negligent. In Merrick, the Plaintiffs assert claims for intentional and negligent trespass. In Kentucky, “liability is imposed for intentional trespasses when there is an intrusion, even when it is harmless.” However, liability is only imposed for negligent trespasses when actual harm occurs.

Under Kentucky law, an intentional trespass is “[a]ny intended intrusion or encroachment [on another’s property that] is not privileged,” regardless of the duration of the intrusion or encroachment. Negligent trespass requires the plaintiff to prove that: “(1) the defendant must have breached its duty of due care (negligence); (2) the defendant caused a thing to enter the land of the plaintiff; and (3) the thing’s presence caused harm to the land.”

SECTION IV.

The Sixth Circuit should affirm the Western District’s ruling in Merrick and hold that the CAA does not preempt the Plaintiffs’ Kentucky common law tort claims because the Western District applied Supreme Court and Sixth Circuit precedent correctly. The Supreme Court’s ruling in Ouellette and the Sixth

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196. Id. (citing KRS § 411.530(2)).
197. Lynn Mining Co., 394 S.W.2d at 759.
198. Merrick, 5 F. Supp. 3d at 878.
199. See, e.g., Huffman v. U.S., 82 F.3d 703, 705 (6th Cir. 1996) (citing Lynn Mining Co., 394 S.W.2d at 759).
200. Merrick, 5 F. Supp. 3d at 879.
201. Id.
204. Smith v. Carbide & Chems. Corp., 226 S.W.3d 52, 54 (Ky. 2007) (citing Fletcher v. Howard, 226 Ky. 258, 10 S.W.2d 825 (1928)).
205. Rockwell Int’l Corp., 143 S.W.3d at 620 (citing RESTATEMENT (SECOND) OF TORTS § 165 (1965)).
Circuit’s ruling in *Her Majesty* should control the CAA preemption issue in *Merrick*. 206 *Ouellette* dealt with the CWA’s preemptive effect.207 The circuit courts that have examined the CAA have found “no meaningful distinction between the [CWA] and the [CAA]” in the context of preemption.208 Therefore, the Sixth Circuit should adopt the Third Circuit’s approach in *Bell* because it incorporated *Ouellette* and *Her Majesty* into its analysis of the CAA’s preemptive effect.209

*Ouellette* establishes that the CWA preempts common law actions based on the law of an affected state and that “the only state law applicable to an interstate discharge is the law of the State in which the point source [of the pollution] is located.”210 Therefore, it is “clear” that CWA preemption is “limited to situations involving interstate pollution.”211 Likewise, because the CAA and CWA are virtually identical, CAA preemption operates in the same way – the CAA only preempts common law claims brought under the laws of an affected state.212 Moreover, *Ouellette* strongly suggests that the CWA only preempts state common law claims when it is necessary to resolve potential conflicts of state law.213

*Merrick* does not involve interstate pollution.214 Here, the Plaintiffs’ claims are brought under source-state law – Kentucky plaintiffs are complaining about pollution in Kentucky, allegedly caused by Diageo’s operations in Kentucky.215 There is no potential conflict of state law.216 Thus, under *Ouellette*, the CAA should not preempt the Plaintiffs’ Kentucky common law tort claims in *Merrick*.

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206. See *Bell v. Cheswick Generating Station*, 734 F.3d 188, 196-97 (3d Cir. 2013), cert. denied, 134 S. Ct. 2696 (2014) (“[G]iven that we find no meaningful difference between the Clean Water Act and the Clean Air Act for the purposes of our preemption analysis, we conclude that the Supreme Court’s decision in Ouellette controls this case.”). See also, *Merrick*, at 876 (adopting the Third Circuit’s approach to the CAA preemption issue, which is merely an application of Ouellette to the CAA.); *Her Majesty the Queen*, at 343 (stating that, based on Ouellette, state statutory claims brought under source state law are clearly not preempted by CAA).

207. See supra p. 14.

208. *Bell*, 734 F.3d at 195-96.

209. *Merrick*, 5 F. Supp. 3d at 873 (indicating that the Third Circuit merely applied the Supreme Court’s CWA preemption analysis to a CAA preemption case).


211. *Id.* (emphasis added).

212. *Bell*, 734 F.3d at 195, 197 (stating that there is no meaningful difference between the CWA and the CAA and holding that the CAA does not preempt state common law claims based on the law of the state where the source of the pollution is located).


215. *Id.*

The plain language of the CAA’s savings clauses indicates that the CAA does not preclude the Plaintiffs’ state common law claims. In *Her Majesty*, the Sixth Circuit applied *Ouellette* and held that the plain language of the CAA’s savings clauses indicates that the CAA does not preclude state statutory claims brought under source state law. Likewise, because the CAA’s citizen suit savings clause refers to both statutes and common law, the CAA does not preempt the Plaintiffs’ Kentucky common law tort claims brought under source-state law.

Common law tort claims are mechanisms that allow states to establish more stringent emissions regulations. In *Her Majesty*, the Sixth Circuit recognized that the Michigan Environmental Protection Act was “a mechanism under which more stringent limitations may be imposed than required by federal law.” Furthermore, *Ouellette* supports the idea that “[t]he ‘cooperative federalism’ structure of the Clean Water Act serve[s] as a regulatory floor, not a ceiling.” Moreover, the CAA allows states to “impose higher standards on their own sources of pollution” through common law.

Here, however, Diageo argues the Plaintiffs’ common law claims must be preempted because the CAA already provides an avenue for the Plaintiffs to seek limits on ethanol emissions. This argument is in plain opposition to *Ouellette* and *Her Majesty*. Kentucky’s common law is simply acting as a more stringent emissions regulation and should not be preempted by the CAA.

Thus, it follows that a suit brought by Kentucky plaintiffs, under Kentucky law, against a source of pollution in Kentucky does not raise a potential conflict between state laws.

217. *Her Majesty the Queen v. City of Detroit*, 874 F.2d 332, 342-43 (6th Cir. 1989); *Bell*, 734 F.3d at 196-97 (applying *Ouellette* and holding that CAA’s savings clauses preserve state common law tort claims brought under source state law).

218. *Her Majesty the Queen*, 874 F.2d at 443-44.

219. 42 U.S.C. § 7604(e) (“Nothing in this section shall restrict any right which any person (or class or persons) may have under any statute or common law . . . .”); *Merrick*, 5 F. Supp. 3d at 873 (explaining that the Plaintiffs’ claims are brought under source-state law).


221. *Her Majesty the Queen*, 874 F.2d at 344.


223. *Id.* (citing *Ouellette*, 479 U.S. at 497-98) (applying the Supreme Court’s interpretation of the CWA to the CAA).


The nature of the Plaintiffs’ lawsuit against Diageo presents a unique CAA problem and further supports a finding against preemption.\(^\text{226}\) Essentially all of the circuit court cases that have dealt with the CAA’s preemptive effect involve emissions that harm the plaintiff(s) directly.\(^\text{227}\) Here, Diageo’s ethanol emissions indirectly harm the Plaintiffs by acting as a catalyst to Baudoinia germination.\(^\text{228}\) Diageo argues that the CAA “specifically addresses the alleged economic and property effects from air emissions about which Plaintiffs complain.”\(^\text{229}\)

However, the CAA regulations that deal with ethanol emissions do not take into consideration situations like the Plaintiffs’ Baudoinia problem.\(^\text{230}\) In fact, the alleged harm caused to the Plaintiffs as a result of Baudoinia accumulation on their property “[is not] one the [Clean Air Act] addresses.”\(^\text{231}\) Therefore, it is questionable whether the CAA based ethanol regulations even apply to the facts of *Merrick*.

The CAA may not provide an adequate remedy for the Plaintiffs. The CAA only allows for injunctive relief, not damages for injuries caused by emissions.\(^\text{232}\) Tort law, however, allows for both injunctive relief and damages.\(^\text{233}\) According to Dr. James Scott, it is unclear whether entirely removing Diageo’s distillery or its aging warehouses would stop Baudoinia from accumulating on the Plaintiffs’ property.\(^\text{234}\) Thus, it is uncertain whether issuing an injunction against Diageo would stop, or even abate, the accumulation of Baudoinia on the Plaintiffs’ property.\(^\text{235}\)

The Plaintiffs allege that regenerative thermal oxidizers (RTOs), which are used in brandy warehouses in California to reduce ethanol emissions, are an “available, affordable, and affective” method to eliminate or abate Diageo’s ethanol emissions.\(^\text{236}\) But, as Diageo points out, “the EPA and states . . . have acknowledged that no technology exists for capturing and controlling ethanol

\(^{226}\) Cooper, *supra* note 8 (stating that Merrick does not present a typical CAA problem and suggesting that the Plaintiffs’ could use the case’s unique facts to argue for a limited preemption analysis).

\(^{227}\) See, e.g., *Bell*, 734 F.2d at 188 (plaintiffs’ tort claims were originating due to based ash and contaminants being emitted from power plant); *North Carolina, ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010) (public nuisance case based on power plant emissions).

\(^{228}\) Cooper, *supra* note 8.

\(^{229}\) *Supplemental Memorandum of Diageo*, *supra* note 225, at 5.

\(^{230}\) Cooper, *supra* note 8 (“Congress didn’t include in the Clean Air Act’s provisions governing ethanol emissions consideration of whiskey fungus.”).

\(^{231}\) *Id.*

\(^{232}\) *Id.*

\(^{233}\) *Id.*

\(^{234}\) Ryzik, *supra* note 2 (detailing Dr. James Scott’s uncertainty about the possibility of removing Baudoinia).

\(^{235}\) *Id.*

emissions from whiskey aging without damaging or risking damage to the product.\textsuperscript{237} Likewise, it seems speculative to suggest that RTO technology is an “available, affordable, and effective” method to control Diageo’s ethanol emissions.\textsuperscript{238}

Diageo’s position on the propriety of RTO technology, coupled with Dr. Scott’s position on the likelihood of eliminating Baudoinia, indicates that an injunction may not be an efficient or adequate remedy for the Plaintiffs. Therefore, it seems unlikely that a court would issue an injunction requiring Diageo to install RTO technology. So, even if CAA based ethanol regulations applied to the Plaintiffs’ Baudoinia problem, they likely would not have a remedy under the CAA.\textsuperscript{239}

Public policy supports finding that the CAA does not preempt the Plaintiffs’ Kentucky common law tort claims.\textsuperscript{240} As Diageo points out, and as courts have recognized, “allowing the jury and court to set emissions standards” could harm the CAA’s “comprehensive regulatory framework” and lead to inconsistent emissions regulations.\textsuperscript{241} However, the Supreme Court expressly rejected Diageo’s concerns in \textit{Ouellette}.\textsuperscript{242} According to the Court, protecting common law claims brought under source state law “[d]oes not frustrate the goals of the [Clean Water Act] . . . .”\textsuperscript{243} In turn, given that the CWA and CAA are substantially similar in the context of preemption, protecting the Plaintiffs’ state common law tort claims would not frustrate the goals of the CAA.\textsuperscript{244}

Furthermore, Diageo’s argument that allowing the Plaintiffs’ claims to proceed would “create an incompatible regime of regulation by common law” is without merit.\textsuperscript{245} As stated in \textit{Ouellette} and \textit{Bell}, Diageo would have to observe very little additional authority – Kentucky’s common law regarding nuisance and trespass, and the court’s ultimate ruling in \textit{Merrick}.\textsuperscript{246}

If the Plaintiffs prevail, Diageo’s increased responsibility with regard to its ethanol emissions would be relatively small. Diageo will either have to pay damages to the Plaintiffs or, pursuant to an injunction, install ethanol emission control technology that curtails the accumulation of Baudoinia on the Plaintiffs’

\textsuperscript{237} \textit{Id.} at 6.
\textsuperscript{238} \textit{Id.} at 22.
\textsuperscript{239} \textit{See supra} pp. 29-30 (discussing remedies available under CAA and tort law).
\textsuperscript{240} \textit{See Bell} v. Cheswick Generating Station, 734 F.3d 188, 195, 197 (3d Cir. 2013), \textit{cert. denied}, 134 S. Ct. 2696 (2014) (discussing public policy concerns related to CAA preemption of state common law tort claims brought under source state law).
\textsuperscript{241} \textit{Supplemental Memorandum of Diageo, supra note 225, at 8; Bell, 734 F.3d at 197.}
\textsuperscript{242} \textit{Supplemental Memorandum of Diageo, supra note 225, at 8; Bell, 734 F.3d at 197.}
\textsuperscript{243} \textit{Id. at 498.}
\textsuperscript{244} \textit{Bell, 734 F.3d at 197 (applying Ouellette’s public policy analysis to the CAA and concluding that state common law claims brought under source-state law do not frustrate the operation of the CAA).}
\textsuperscript{245} \textit{Supplemental Memorandum of Diageo, supra note 225, at 8.}
\textsuperscript{246} \textit{Ouellette, 479 U.S. at 499 (stating that “a source is only is required to look to a single additional authority” – source state common law); Bell, 734 F.3d at 196-97 (quoting Ouellette, 479 U.S. at 499).}
property And if the Plaintiffs are awarded damages, neither the jury nor the court would change the ethanol emissions regulations with which Diageo must comply – the Plaintiffs would merely receive money for the damage Baudoinia has done to their property. Moreover, regardless of the remedy awarded to the Plaintiffs, Diageo’s federal and state emissions permits will remain valid. Therefore, the idea that the Plaintiffs’ claims are somehow displacing the CAA’s regulatory structure is unfounded.

Overall, it seems unlikely that Congress intended to preclude state common law tort claims like those in Merrick. However, given the unique facts of this case, the Sixth Circuit does not have to adopt a broad holding that protects all common law claims brought under source state laws from the CAA’s preemptive effect. Instead, the court could narrowly hold that the CAA does not preempt state common law tort claims brought under source state laws when the CAA itself does not address the harm suffered. Other than giving the Plaintiffs a chance to remedy their Baudoinia problem through the federal court system, such a holding would surely reduce the concerns associated with categorically protecting all common law tort claims brought under source state law from CAA preemption.

SECTION V.

A. The Nuisance Claims

If the Sixth Circuit affirms the Western District’s judgment and rules against CAA preemption, the Plaintiffs should pursue their permanent nuisance claim, as opposed to their temporary nuisance claim. Given the uncertainty about eliminating Baudoinia, the Plaintiffs would have difficulty proving that their Baudoinia problem can be remedied at “reasonable expense,” which is pivotal to the distinction between temporary and permanent nuisance claims brought under Kentucky common law. Therefore, because it is more likely that “no such remedy is possible,” the Plaintiffs should choose permanent nuisance.

248. Her Majesty the Queen v. City of Detroit, 874 F.2d 332, 344 (6th Cir. 1989) (stating that even if plaintiffs’ actions in state court are successful, the defendant’s permits will not be altered).
249. Cooper, supra note 8.
250. Merrick, 5 F. Supp. 3d at 874-75 (discussing the Fourth Circuit’s position regarding “the problems that may arise if the CAA is not deemed to preempt state common law tort claims”).
251. See Huffman v. U.S., 82 F.3d 703, 705 (6th Cir. 1996) (citing Lynn Mining Co. v. Kelly, 394 S.W.2d 755, 759 (Ky. 1965) (stating that a nuisance is temporary if it can be “remedied at reasonable expense”) (emphasis original)).
252. Huffman, 82 F.3d at 705 (citing Lynn Mining Co., 394 S.W.2d at 759 (stating that if a nuisance cannot be “remedied at reasonable expense,” it is a permanent nuisance).
The Plaintiffs must show that Diageo’s use of its property is unreasonable “in light of the gravity of harm to the plaintiff.”253 However, this does not mean that the Plaintiffs need to show that Diageo’s use of its property is or was negligent - nuisance does not require proof of negligence.254 In fact, even businesses that are operated with “due care” may still be liable for nuisance.255 Therefore, even though Diageo is in full compliance with all relevant ethanol emissions regulations, it still may be liable for nuisance.256

To succeed on their permanent nuisance claim, the Plaintiffs must prove that the gravity of their harm outweighs the reasonableness of Diageo’s use of its property.257 Under Kentucky law, the judge or jury should consider a number of factors to make that determination.258 In turn, the Plaintiffs will have to show that their harm outweighs the economic benefit of the Diageo’s operations, such as, for example, the increased tourism to Central Kentucky, as a result of the bourbon trail, and the number of jobs Diageo creates in Kentucky.

It is questionable whether the Plaintiffs can establish the necessary elements of permanent nuisance. To illustrate the harm Diageo has caused to their property, the Plaintiffs have alleged that Diageo’s operations cause a black fungus to accumulate on their homes, business and vehicles.259 To succeed on their permanent nuisance claim, however, the Plaintiffs’ damages must be measured by a “material reduction” in the fair market value of their property.260 Likewise, the Plaintiffs will be required to provide expert testimony that establishes a material reduction in their property’s fair market value.261

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253. *Lynn Mining Co.*, 394 S.W.2d at 758 (citing *Louisville Ref. Co. v. Mudd*, 339 S.W.2d 181 (Ky. 1960); *Associated Contr. Stone Co. v. Pewee Val. San. & Hosp.*, 376 S.W.2d 316 (Ky. 1963)).

254. *Id.*


256. See * supra* text accompanying note 12 (stating that Diageo is in compliance with all relevant ethanol emissions regulations).

257. *Louisville Refining Co.*, 339 S.W.2d at 186-87.

258. *KY. REV. STAT. ANN. 411.550 (West 2014)* (“In determining whether a defendant’s use of property constitutes a private nuisance, the judge or jury, whichever is the trier of fact, shall consider all relevant facts and circumstances including the following: (1) the lawful the defendant’s use of the property; (2) the manner in which the defendant has used the property; (3) the importance of the defendant’s use of the property to the community; (d) the influence of the defendant’s use of property to the growth and prosperity of the community; (e) the kind, volume and duration of the annoyance or interference with the use an enjoyment of claimant’s property caused by the defendant’s use of property; (f) the respective situations of the defendant and claimant; and (g) the character of the area in which the defendant’s property is located . . . ”).


260. *KY. REV. STAT. ANN. § 411.560 (West 2014).*

261. *Adams Constr. Co., Inc. v. Bentley*, 335 S.W.2d 912, 914 (Ky. 1960) (stating that a plaintiff must introduce a “tangible figure from which the value of the use can be deduced”).
Otherwise, “without quantifiable proof of harm to their properties,” the Plaintiffs’ permanent nuisance claim is likely to be dismissed at the end of discovery.\textsuperscript{262} Baudoinia’s effect on the Plaintiffs’ property might not be enough to establish a material reduction in their property’s fair market value. First, the Plaintiffs’ complaint establishes that “the fungus can only be removed with extreme cleaning measures, for which Plaintiffs are required to spend an abnormal amount of time, money, [and] energy.”\textsuperscript{263} Additionally, the Plaintiffs allege that their extreme cleaning measures are only temporary – the Baudoinia always comes back, regardless of the cleaning method employed.\textsuperscript{264} Second, the Plaintiffs allege that Baudoinia causes “early weathering” of the paint on buildings and cars.\textsuperscript{265} Third, the Plaintiffs allege that Baudoinia’s black, sooty appearance makes the Plaintiffs’ homes and businesses unsightly.\textsuperscript{266} While Baudoinia’s affect on the Plaintiffs’ property is undesirable, it is questionable whether the resultant damage rises to the level of a material reduction in their property’s fair market value.

Regardless of the merits the Plaintiffs’ permanent nuisance claim, the claim may be barred by Kentucky’s five-year statute of limitations.\textsuperscript{267} According to the Plaintiffs’ complaint, whiskey fungus was identified by scientific discovery in 2007.\textsuperscript{268} But the Plaintiffs’ complaint also states that ethanol emission control technology was made available in 2005.\textsuperscript{269} Dr. Scott’s discovery of Baudoinia was published in July of 2007.\textsuperscript{270} The Plaintiffs’ permanent nuisance claim is based on the accumulation of Baudoinia on their property.\textsuperscript{271} The Plaintiffs could not have stated a claim for nuisance prior to Dr. Scott’s discovery of Baudoinia.\textsuperscript{272} Thus, the Plaintiffs’ permanent nuisance claim should survive Kentucky’s five-year statute of limitations. The Plaintiffs filed their case against Diageo on June 15, 2012.\textsuperscript{273} Moreover, the fact that ethanol emission control technology existed in 2005 should not be relevant because the technology was

\begin{itemize}
\item \textsuperscript{262} Brockman v. Barton Brands, Ltd., No. :06CV-332-H, 2009 WL 4252914, at *4 (W.D. Ky. Nov. 25, 2009) (dismissing the plaintiffs’ nuisance claims because the plaintiffs failed to offer “quantifiable proof of harm to their properties”).
\item \textsuperscript{263} Plaintiffs’ First Amended Complaint, supra note 259, at 6.
\item \textsuperscript{264} See supra p. 7.
\item \textsuperscript{265} Plaintiffs’ First Amended Complaint, supra note 259, at 2.
\item \textsuperscript{266} Id.
\item \textsuperscript{267} Merrick v. Diageo Ams. Supply, Inc., 5 F. Supp. 3d 865, 879 (W.D. Ky. 2014).
\item \textsuperscript{268} Plaintiffs’ First Amended Complaint, supra note 259, at 5.
\item \textsuperscript{269} Id. at 22.
\item \textsuperscript{270} Scott, supra note 38.
\item \textsuperscript{271} Plaintiffs’ First Amended Complaint, supra note 259, at 2.
\item \textsuperscript{272} The Plaintiffs could not have traced the black substance accumulating on their property to Diageo prior to the discovery of Baudoinia. There would be no scientific evidence to show that Diageo’s operations cause the substance to accumulate. Any nuisance claim brought by the Plaintiffs against Diageo prior to Dr. Scott’s discovery of Baudoinia’s would have been speculative at best.
\item \textsuperscript{273} Complaint, supra note 4, at 1; Merrick, 5 F. Supp. 3d at 865.
\end{itemize}
implemented to curb general pollution problems, not as a specific deterrent of ethanol emissions related to Baudoinia.\textsuperscript{274}

\textbf{B. The Trespass Claims}

The Plaintiffs have viable claims for both intentional and negligent trespass. Intentional trespass does not require “actual knowledge of wrongdoing.”\textsuperscript{275} The Plaintiffs have a claim for trespass “if they allege that an object or thing entered on and caused harm to their property.”\textsuperscript{276} The Plaintiffs’ First Amended Complaint states that Diageo’s operations cause ethanol and Baudoinia to enter and physically invade their property.\textsuperscript{277} Therefore, Diageo’s alleged lack of knowledge as to any wrongdoing does not reduce the viability of the Plaintiffs’ trespass claim.\textsuperscript{278} Instead, “Kentucky courts distinguish between willful, or knowing, trespass and innocent trespass as a means of determining the amount of damages for which a trespasser may be liable.”\textsuperscript{279}

The Plaintiffs’ negligent trespass claim is somewhat weaker than their intentional trespass claim, but still remains viable. The Plaintiffs “appear to allege that as a result of its operations, Diageo breached a duty of care to not cause ethanol to physically invade [their] property.”\textsuperscript{280} The Western District questioned the origin and legal basis of this duty.\textsuperscript{281} However, under Kentucky law, “[t]he rule is that every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury.”\textsuperscript{282} Likewise, to succeed on their negligent trespass claim, the Plaintiffs must show that Diageo’s ethanol emissions represent Diageo’s failure to exercise ordinary care to prevent foreseeable injury. Due to Diageo’s awareness of similar lawsuits against bourbon distillers and the LMAPCD’s actions regarding ethanol emissions, the Plaintiffs could make an argument that Diageo breached its duty of ordinary care.\textsuperscript{283} That being said, Diageo’s compliance with relevant ethanol emissions

\textsuperscript{274. Cost Effectiveness Analysis for Rule \textasciitilde 4695, San Joaquin Valley Unified Air Pollution Control District (Sept. 17, 2009), http://www.sbcapcd.org/eng/winery/ AppdxCr4695.pdf.}
\textsuperscript{276. Id. at *13. (citing Dickens v. Oxy Vinyls, LP, 631 F. Supp. 2d 859, 864-65 (W.D. Ky. 2009)).}
\textsuperscript{277. Plaintiffs’ First Amended Complaint, supra note 259, at 19.}
\textsuperscript{278. Merrick, 5 F. Supp. 3d at 879-80.}
\textsuperscript{279. Id. at 880.}
\textsuperscript{280. Id. at 881.}
\textsuperscript{281. Id. at 880.}
regulations makes that argument somewhat of a stretch.\textsuperscript{284} Therefore, the Plaintiffs’ intentional trespass claim is most likely to succeed.

\textit{Merrick} presents an unusual trespass case because, under Kentucky Law, either Diageo’s ethanol emissions, or the Baudoinia caused by those emissions, could be viewed as an intrusion on the Plaintiffs’ property.\textsuperscript{285}

A substance does not have to be visible to be considered an intrusion.\textsuperscript{286} In \textit{Smith}, the Kentucky Supreme Court held that “when the intrusion is through imperceptible particles not visible to the naked eye, there may still be an actual injury.”\textsuperscript{287} However, allowing trespass claims for substances that are not visible or tangible is a recent development in Kentucky courts.\textsuperscript{288} In fact, in \textit{Brockman}, a case similar to \textit{Merrick}, Judge Heyburn of the Western District stated that “visibly undetectable and transient [substances], are not sufficient to state a claim for trespass” under Kentucky law.\textsuperscript{289} However, in light of \textit{Smith}, Judge Heyburn’s position, which applied Kentucky law, seems to be an inaccurate application of Kentucky Supreme Court precedent – the highest authority on Kentucky law.\textsuperscript{290} Therefore, Diageo’s ethanol emissions alone are likely an intrusion on the Plaintiffs’ property and, thus, constitute trespass.

Even if the court refused to recognize that “imperceptible particles” constitute an intrusion, the Baudoinia caused by Diageo’s ethanol emissions are sufficient for a trespass claim.\textsuperscript{291} Thus, the fact that the ethanol itself is not visible does not harm the Plaintiffs trespass claim because Baudoinia has a “visible and tangible presence on the [Plaintiffs’] property.”\textsuperscript{292}

\textbf{C. The Remedy}

While the Plaintiffs have viable claims for both nuisance and trespass, it remains unknown what remedy a court will award pursuant to those claims. The Plaintiffs have yet to provide expert testimony that establishes “quantifiable proof” of the harm that Baudoinia has done to their property.\textsuperscript{293} Likewise, while

\begin{itemize}
 \item \textsuperscript{284} See supra text accompanying note 12 (stating that Diageo is in compliance with all relevant ethanol emissions regulations).
 \item \textsuperscript{285} See \textit{Merrick}, 5 F. Supp. 3d at 878-79 (suggesting that either Diageo’s ethanol emissions or the Baudoinia caused by those emissions could be considered an intrusion for purposes of a trespass claim).
 \item \textsuperscript{286} Smith v. Carbide & Chems. Corp., 226 S.W.3d 52, 57 (Ky. 2007).
 \item \textsuperscript{287} Id. at 56.
 \item \textsuperscript{288} See Brockman v. Barton Brands, Ltd., No. :06CV-332-H, 2009 WL 4252914, at *5 (W.D. Ky. Nov. 25, 2009) (citing Bartman v. Shobe, 353 S.W.2d 550, 555 (Ky. 1962) (stating that trespass is “more visible and tangible than a nuisance”)).
 \item \textsuperscript{289} Id.
 \item \textsuperscript{291} \textit{Brockman}, 2009 WL 4252914, at *5.
 \item \textsuperscript{292} Id.
 \item \textsuperscript{293} See supra pp. 38-39.
\end{itemize}
“a court can award nominal damages in an intentional trespass case for the mere invasion of the plaintiffs’ property,” in order to recover compensatory damages the Plaintiffs’ must prove actual injury.294 Baudoinia has made the Plaintiffs’ homes, businesses, and automobiles unsightly and caused early weathering of these structures.295 Some practical considerations illuminate the extent to which the Plaintiffs’ property has been damaged. For starters, as a blogger notes, “who would want to buy a house with hard-to-remove fungus growing all over it?”296 Undoubtedly, whiskey fungus will make it harder for the Plaintiffs to sell their homes. In fact, pursuant to KRS 324.360, the Plaintiffs are going to have to disclose their whiskey fungus problem to would-be purchasers.297 Likewise, Baudoinia seemingly has reduced the Plaintiffs’ property value. That being said, the actual amount by which Baudoinia has reduced the value of the Plaintiffs’ property remains unknown.298

On the other hand, due to the uncertainty about eliminating Baudoinia, it is questionable whether a court would award an injunction pursuant to the Plaintiffs’ nuisance and trespass claims that would require Diageo to install RTO technology.299 Therefore, while the Plaintiffs are likely to get past CAA preemption and prove that Diageo is liable for nuisance and trespass, the actual outcome of the Plaintiffs’ lawsuit may not yield the result most desired – the abrogation of Baudoinia through a court-ordered injunction. In turn, the courts may not resolve the Baudoinia problem. Leaving the problem to the LMAPCD, perhaps unfortunately, seems likely to be the only way the Plaintiffs will get relief beyond monetary damages.

The LMAPCD has not been silent on the Baudoinia issue.300 The LMAPCD and Diageo reached an agreement in 2013 that required Diageo to move its bourbon barrels, or face steep fines.301 The agreement presents an interesting way to resolve the Baudoinia problem – through step-by-step municipal action, rather than through a one-time court ruling. Unfortunately, the current agreement seems ineffective - it merely moves the problem “around the corner.”302 In a sense,

295. See supra p. 41.
297. See Plaintiffs’ First Amended Complaint, supra note 259, at 24-25 (discussing the requirements of KRS 324.360).
298. Id. at 18, 20 (alleging generally that Baudoinia is an unreasonable and substantial interference with the Plaintiffs’ use and enjoyment of their property and, thus, reduces their property’s value). Some have speculated as to the total amount of damage done to the Plaintiffs’ home. See also Colangelo, supra note 299.
299. See supra p. 34 (discussing the likelihood of eliminating Baudoinia).
301. Id.
however, the agreement is a positive step towards reducing the problem – the LMAPCD is forcing Diageo to come up with a plan to stop the Baudoinia problem.\textsuperscript{303} Hopefully, as research and emissions control technology develops, the LMAPCD will remain proactive and will force Diageo to find an adequate solution to the Baudoinia problem.

Overall, leaving the Baudoinia problem to organizations like the LMAPCD is likely the best option for the state of Kentucky as a whole. Such an approach will allow industry regulation to evolve over time, as emission control technology develops. This is ideal because it will keep bourbon production in Kentucky, which allows the state to retain the economic benefit and tradition that accompanies bourbon being produced in Kentucky.

V. CONCLUSION

The Sixth Circuit should affirm the Western District’s ruling in \textit{Merrick} and hold that the CAA does not preempt the Plaintiffs’ common law tort claims. The CAA and Kentucky regulations that deal with ethanol emissions do not address the Plaintiffs’ harm. Moreover, unique cases like \textit{Merrick} only add to the notion that the CAA should not preempt state common law claims brought under source-state law. Overall, this Note has sought to relieve the concerns of allowing the Plaintiffs’ source-state claims in \textit{Merrick} to proceed.

On the other hand, beyond preemption, the issue of the Plaintiffs’ Kentucky common law claims against Diageo is not clear-cut. Given the current facts before the court concerning the propriety of RTO technology, it is unlikely that the court will award an injunction and, albeit just, monetary relief will not stop Baudoinia from growing on the Plaintiffs’ property. Ultimately, it seems that the Plaintiffs’ Baudoinia problem will be left for the LMAPCD and Diageo to resolve.\textsuperscript{304}

\textsuperscript{303} Thomas Nord, an LMAPCD said “[the LMAPCD’s goal is to get Diageo] to come up with a control plan to stop [the Baudoinia problem].” Dylan Lovan, \textit{Whiskey Fungus Lawsuit: Diageo Faces Steep Fines Unless it Controls Vapors}, HUFFINGTON POST (Sept. 13, 2012), http://www.huffingtonpost.com/2012/09/13/whiskey-fungus-diageo-fine_n_1881647.html.

\textsuperscript{304} Baudoinia is a dynamic issue on many levels. If the Sixth Circuit reverses the Western District and sides with the Fourth Circuit, the circuit split regarding CAA preemption of state common law claims will be solidified and prime for Supreme Court review. If the Sixth Circuit upholds the Western District, the case will be sent back to district court for adjudication of the Plaintiffs' unique common law claims. Only one thing can be said for sure about the Baudoinia problem: it is nowhere near resolved and will likely be debated in living rooms, board rooms, courtrooms, and the state capitol for years to come.